

DECONSTRUCTING AUSTRALIAN GENOCIDE

**Britain's legislative and procedural
agency in the destruction of
Aboriginal society**

Ray Gibbons

The facing photograph shows Mounted Constable Dempsey, two black trackers, and four native prisoners arrested in connection with Brigalow Bill's death in 1910.¹ Brigalow Bill was a cattle duffer who had a small parcel of land on the western part of Victoria River Downs in the Northern Territory. The natives killed him because he misused Aboriginal women. The natives further accused him of shooting at male Aboriginals to get access to their women. He was never charged. The British legal system and settler society accepted such predatory behaviour. His alleged killers received life imprisonment, but they did not serve their full term.

Note the use of neck chains, which police routinely used to rope Aboriginal prisoners together and walk them long distances. The practice was called being 'on the chain'. Unless they were shot, to save the trouble of a chained march; for example, see the Coniston massacre of 1928.²

In Western Australia, many of the Aboriginal detainees – from the late 19th century into the middle of the 20th - came from the Kimberley, and were usually destined for incarceration at Rotnest Island prison where a large number died in captivity.

As recently as 1958, the Western Australian Police Commissioner continued to defend neck chaining, untruthfully claiming that Aboriginal prisoners preferred to be chained rather than handcuffed and that the policy was 'most humane'. The chains could weigh up to 84oz (6lb or nearly 3kg). Some journeys took weeks, with prisoners often dying along the way, suffering from suppurating flyblown sores and other injuries.³

¹ *Report of the Inspector of Police for 1912*, Government Printer, Adelaide. Photograph is by Francis Birtles, courtesy of the National Library of Australia

² Ray Gibbons (2017), *Recollections of a (Homicidal) Pastoral Frontier 1788 - 1928*

³ Also see D.J. Mulvaney, *Encounters in Place: 186-9; The Roth Royal Commission on the Condition of the Natives*, Western Australian Parliamentary Papers, 1905; Ray Gibbons (2017), *Recollections of a (homicidal) pastoral frontier 1788 – 1928*.

Similar pictures to Birtles' are available from, for example, the James McLure Thompson collection of photographs taken at the Wyndham and Ord River Station (the Kimberley) in 1901. The collection is held by the State Library of Western Australia.⁴

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http://encore.slwa.wa.gov.au/iii/encore/record/C__Rb2406616__SJames%20McLure%20Thompson%20collection%20of%20photographs%20of%20Wyndham%20and%20Ord%20River%20Station%20SMCLN%20_Orighresult_X3?lang=eng&suite=def#attachedMediaSection

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Deconstructing Australian genocide: Britain's legislative and procedural agency in the destruction of Aboriginal society[©]

Ray Gibbons (2017)

Abstract: Whenever the subject of Australian genocide arises, so does the question of State intentionality: did Britain, its administrative functionaries (bureaucrats, police, military) and its settlers *intend* to exterminate the Aboriginal population as the necessary price for confiscating the land?

Many argue: there is no set of official policies or instructions that ordered and encouraged the categorial behaviour and indictable actions of genocide; and therefore that Aboriginal extermination may have been an 'unintended consequence'⁵ of forcible land dispossession, if they acknowledge retrospective culpability at all.

We will show that there were key Government documents and policies that placed genocidal intention (*mens rea*) in clear view, along with official orders to act (*actus rea*). These documents shaped and directed Aboriginal dispossession and extermination. We will further show that arguments against Australian genocide are misconceived at best or reflexive at worst.

It raises troubling questions: If Australian history has been manipulated, then why and by whom? And can we change? Can we acknowledge the past? Or are we forever to perpetuate more palatable myths of heroic settler triumphalism in benignly 'taming' the land?

⁵ See, for example, Henry Reynolds (2001), *An Indelible Stain?: 27 The question of intent is never far away in discussions of genocide. Was the killing of indigenous people done with the specific intention of destroying particular groups, or did it happen as a consequence of action that had other motives, such as the taking of land, the imposing of a new order or the pacification of a violent frontier?*

Acknowledgments

For any work of history, none stands alone. In understanding the shape of the present and its provenance, each contributor depends on the efforts of others. To the many people who forensically helped us discover the Tasmanian past anew, thank you. I am especially indebted, in no particular order, to:

Aboriginal society across Australia;

Australian Dictionary of Biography;

AGL Shaw (ed) (1971), *Van Diemen's Land copies of all correspondence between Lieutenant-Governor Arthur and His Majesty's Secretary of State for the Colonies, on the subject of the military operations lately carried on against the Aboriginal inhabitants of Van Diemen's land*;

Historical Records of Australia (HRA), Series 1;

Historical Records of New South Wales (HRNSW), Vol I;

<http://ozcase.library.qut.edu.au/qhlc/lands.jsp>

www.foundingdocs.gov.au;

www.lib.mq.edu.au;

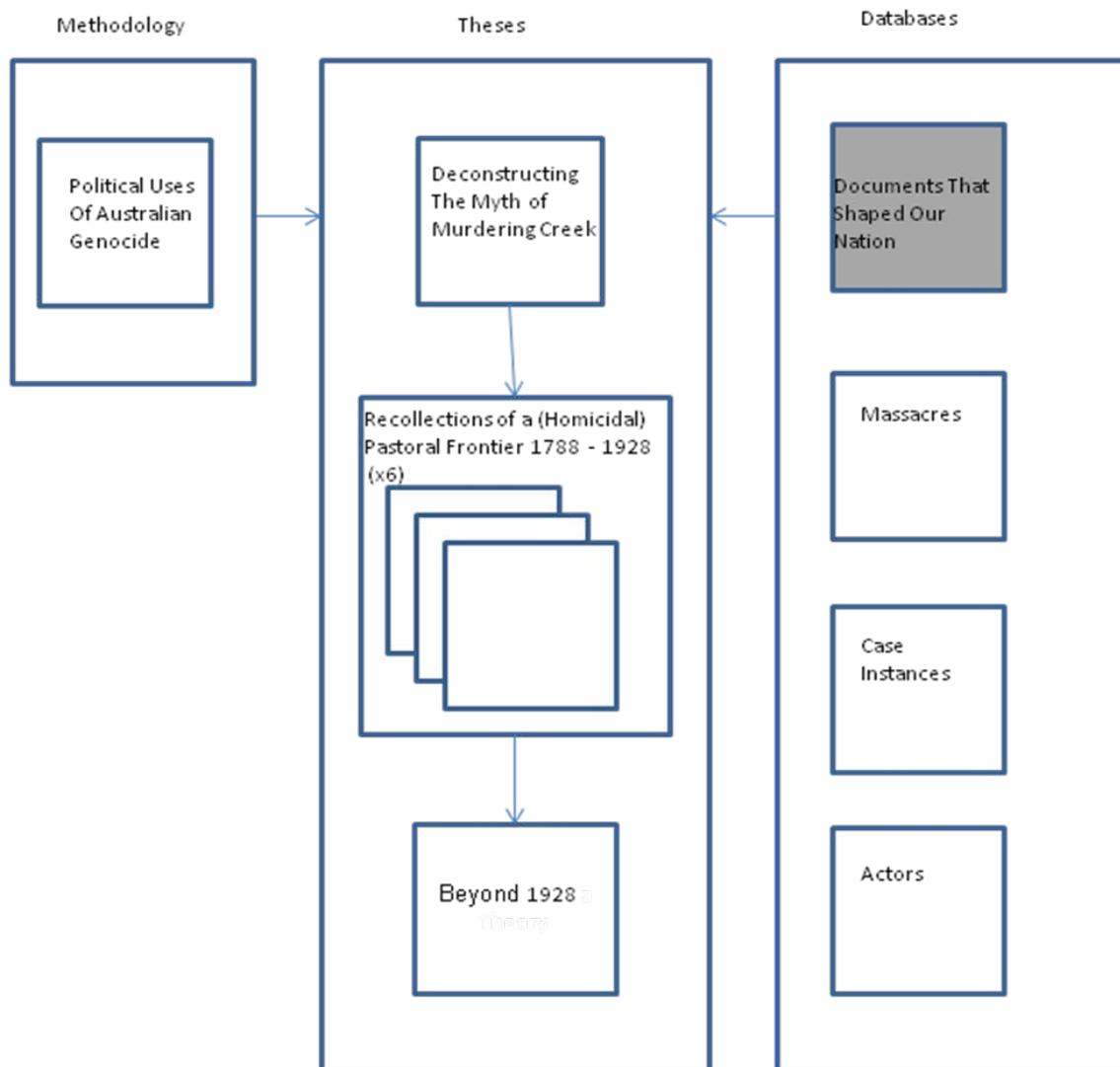
Mitchell Library, Sydney, without which we would all be much poorer in our remembering.

*The song is gone; the dance
is secret with the dancers in the earth,
the ritual useless, and the tribal story
lost in an alien tale.⁶*

⁶ From *Bora Ring*, by Judith Wright. The physicist and historian, John Steele, in his important book *Aboriginal Pathways in South East Queensland and the Richmond River*, was shocked and deeply moved to discover the extent of cultural destruction caused by the wholesale extermination and ethnic cleansing, when many surviving Aboriginals wistfully asked him ‘*Tell us please where we came from, and who we are. Tell us about our sacred sites, our languages, our customs, and our traditional skills.*’ [p. xix] The Aboriginal rights movement, emboldened by the 1992 Mabo decision, is gradually regaining a proud cultural identity for all Aboriginal people. However, there is some way to go: many Aboriginals still live in third world conditions, the result of post-occupation policy and practice for Government at all levels, both State and Federal. And until we acknowledge our murderous past, there remains moral doubt about our future. Yet the Native Title Act (1993) is now being gouged by mining interests intent on financial reward in a new wave of cynical Aboriginal dispossession.[Anna Krien (2017), *The Long Goodbye Coal, Coral and Australia’s Climate Deadlock*, Quarterly Essay]

Document Structure

For We Are Young and Free (FWAYAF) is intended as a series of documents that bind together the story of the destruction of Aboriginal society in Australia and the continuing suffering of the Aboriginal people.



Deconstructing Colonial Myths: the Massacre at Murdering Creek and *Deconstructing Tamanan Genocide: the Extermination of the Palawa* provide detailed case instances of the Occupation Process and Lemkinian genocide, as defined in the methodology (*Political Uses of Australian Genocide*). The methodology includes a semantic typology

for mass killing and the variant terms. It helps us to confirm that the proposed theoretical model for Australian genocide is potentially falsifiable through an elaboration of the abundantly available case instances (or massacre events). This then allows us to develop a theoretically consistent contextual referent (or type instance of the model) for each Recollection in *Recollections of a (Homicidal) Pastoral Frontier 1788 – 1928*.

Some data stores are reused many times by the central theses. They include biographical details of the central players, and an extended repository of massacres (with those involved, where and when). Rather than replicate the data stores in each thesis, they are made available in a persistent (or reference) data base. Among the data stores is a repository that holds transcripts of the key pieces of land legislation and other Government Proclamations, Enquiries and racist Acts of Parliament that were used to dispossess and subjugate Aboriginals in a sustained genocidal process, as set out in the central theses, and this originating source material is provided in *Documents That Shaped Australian Genocide*.

Evolution of self-governing boundaries: 1788 – Present

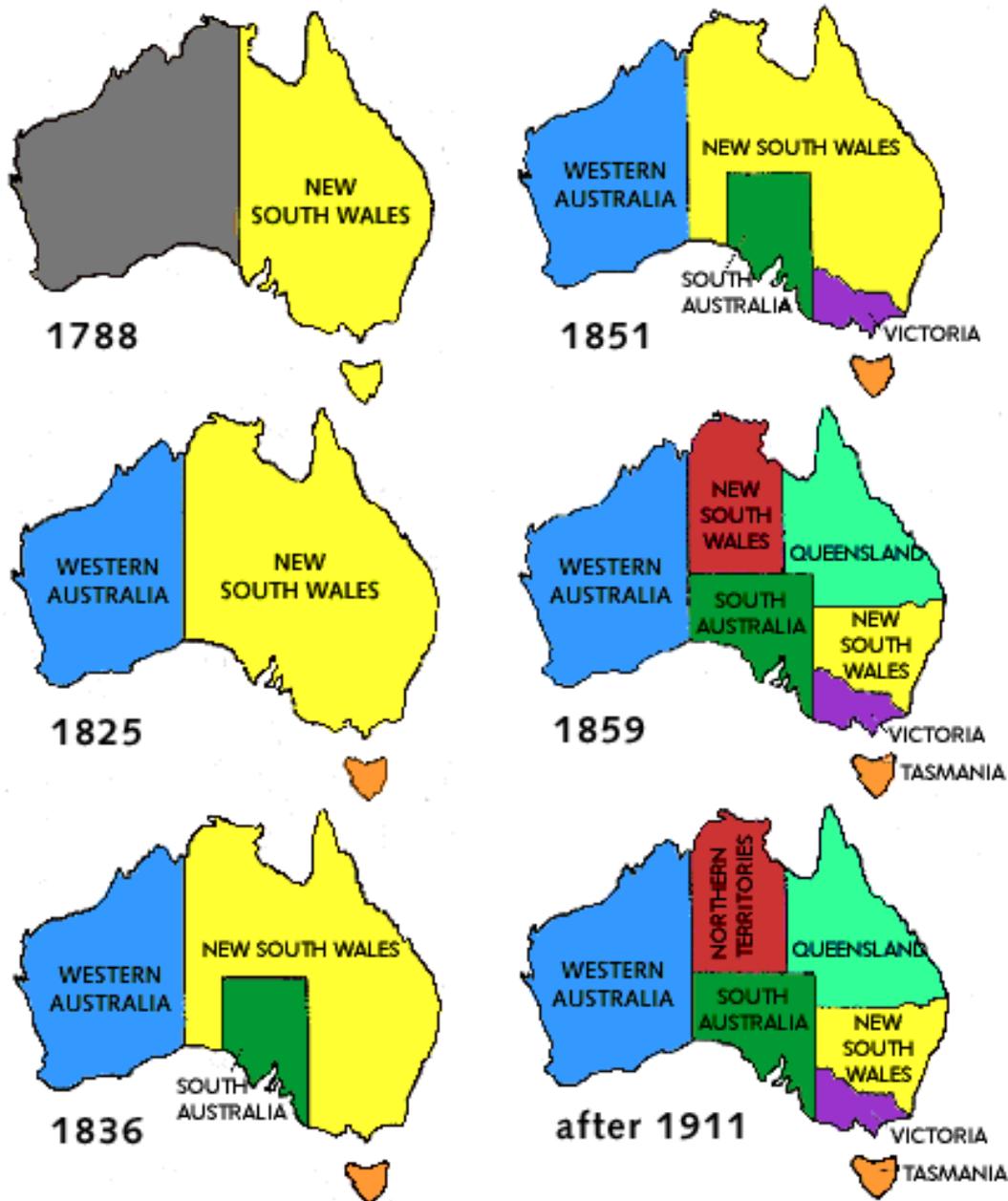


Figure 1 Evolution of colonial borders (1788 - present)

Time lapsed picture of colonisation and self-government across Australia, showing a progressive tightening of settler sovereignty following the process of opportunistic squatting, aggressive Government land grants and sales, and then, closer settlement through accelerated and Government subsidised immigration.⁷

Abbreviations: **NSW** New South Wales; **NT** Northern Territory; **QLD** Queensland; **SA** South Australia; **TAS** Tasmania; **VIC** Victoria; **WA** Western Australia

⁷ For maps see www.teachers.ash.org.au/ozedweb_h_oz._state_colonies.htm ; For the evolution of borders see Gerard Carney (2013), *The Story Behind the Borders of the Australian States*.
http://www.hcourt.gov.au/assets/publications/speeches/lecture-series/Carney_lecture.pdf

Australian Colonies. Dates of Annexation, Settlement. Creation, and of First Censuses ⁸

Colony	Date of Annexation	Date of First Permanent Settlement	Date of creation as Separate Colony	Date of first Census
New South Wales	1770	1788	1786	1828
Tasmania	1788	1803	1825	1841 (<i>Note 1</i>)
South Australia	1788	1836	1834	1844
Victoria	1770	1834	1851	1854 (<i>Note 1</i>)
Queensland	1770	1824	1859	1861 (<i>Note 1</i>)
Western Australia	1829	1829	1829	1848

Figure 2 Colonial Provenance Statistics⁹

⁸ 1301.0 - Year Book Australia, 1911
<http://www.abs.gov.au/ausstats/abs@.nsf/Previousproducts/1301.0Feature%20Article61911?opendocument&tabname=Summary&prodno=1301.0&issue=1911&num=&view=>

⁹ Note 1: Previously included with New South Wales.

Preface

The alternative name of this book (*Documents that shaped Australian genocide*) is an ironic reference to another: John Thompson, *Documents That Shaped Australia Records of a Nation's Heritage*. Thompson's is a well-intentioned compendium that plays to jingoistic nationalism, of how we prefer to see ourselves, but barely mentions *any* of the seminal Government proclamations and legislation that caused the destruction of Aboriginal society in a drawn-out inhumane process that still continues today.

Australia would now be a much different place if Britain had recognised Aboriginal land rights from the beginning; nor would state driven dispossession and 'dispersal' have been so likely. Racist laws and proclamations have racist outcomes. That, after all, is their intent.

These are the questions we will ask in this prefatory introduction: What is the definition of genocide according to the United Nations Convention and why hasn't the Convention been ratified in Australian law? Was British land policy the primary cause of Australian genocide? Can we set out a *type* process for genocide? Has Australian normalized behaviour changed today or are Aboriginals still suffering from late stage genocide? Are we still propagating the same collective behavioural mistakes that caused the destruction of Aboriginal society? Finally, and most importantly, are there official British documents in existence that provide evidence of genocidal intentionality?

*

The term *genocide* (*genos* race *cide* killing) was coined in 1944 by Raphael Lemkin,¹⁰ when he began to generate international support for a United Nations Convention¹¹ that would criminalise certain kinds of targeted mass killing and destruction by one group against another, in almost all cases triggered by some politically, ideologically or ethnically motivated collaborative process. Lemkin's specific concern was to prevent or

¹⁰ Rafael Lemkin (1944), *Axis Rule in Occupied Europe*

¹¹ Adopted by the UN General Assembly in 1948. The full transcript can be found at http://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf

forestall any further occurrences of the type of pogrom practised by the Nazi machine against the Jews and others in the middle of the 20th century.

But Lemkin¹² also had a broader objective in mind when he steered the 1948 acceptance of the Convention on genocide through the United Nations. He recognised that genocide was a malignant societal disorder whose symptoms we must be able to diagnose if we are to prevent further occurrences and reliably assess those in the past.

In thinking about the defining characteristics of targeted group destruction, Lemkin identified that: *genocide has two phases: One, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor.*¹³ Lemkin was careful to point out that he was not referring to an old concept of ‘denationalisation’ (or even, in the simplest sense, the loss of citizenship) but something far more embracing and dysfunctional, which also connoted biological, mental and cultural destruction – in whole or part - of one group by another through a process in which the State and its instruments of power are often involved.¹⁴

The reach of the Convention is both retrospective (although this is sometimes challenged by involved parties¹⁵) and prospective.¹⁶ Any genocide¹⁷ is a function of

¹² Rafael Lemkin (1900 – 1949), a Polish Jew and lawyer, first raised the concept of genocide in his influential 1944 book: *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*. At the time of his death, Lemkin was writing a further comprehensive book that included a section on Tasmanian Genocide. The book was never finished. Only seven people attended his funeral in New York.

¹³ Ibid, Chapter IX, GENOCIDE - A NEW TERM AND NEW CONCEPTION FOR DESTRUCTION OF NATIONS

¹⁴ In the case of Australia, we think of the destruction of Aboriginal society by Britain.

¹⁵ More formally, an *Involved Party* (or the Involved Party concept) represents all the participants that may have contact with the *type reference model* (or subject area conceptual schema) and about which the model wishes to maintain information. The definition and characteristics of the ‘involved party’ are independent of the party’s involvement with the subject area. Types of Involved Party are individuals, organisations, functional areas, and roles. Examples are: British Government, Secretary of State, Governor, Land Commissioner, police, military, settlers, sealers, timber-getters, landowners, pastoralists, judiciary, Executive Council, Legislative Council, Aboriginals. *Agency* is the capacity and manner in which an individual or organisation (Involved Party) may act in a given environment or social structure. Agency corresponds to an ‘object class’, or the manner in which an object such as Involved Party is implemented (instantiated) within a found environment such as the *type* Occupation Process. Therefore, *agency* is bound up with the concept of *Involved Party*. See Ray Gibbons (2017), *Deconstructing Tasmanian Genocide the extermination of the Palawa*.

¹⁶ Shirley Scott, *Why wasn’t genocide a crime in Australia? Accounting for the half century delay in Australia implementing the Genocide Convention*

(usually) *state* sponsored intent, process characteristics (Lemkinian actionable components and how they are instantiated), and the outcome comprising the proportional numbers lost or persecuted in the targeted population.

The Convention reads in part:

... any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, such as: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group. [Article 2]¹⁸

Genocide can exist without the United Nations necessarily agreeing or ratifying any one claimed instance. For example, many lawyers and historians generally accept the evidence for Armenian genocide, but it is disputed by Turkey, who was the responsible entity (involved party).¹⁹

Although the State is often implicated in alleged cases of genocide, it is notionally excluded from prosecution by the articles of the Convention, in particular to protect members of the Security Council from culpability as a condition for ratifying the

<http://www.austlii.edu.au/au/journals/AJHR/2004/22.html> ICTJ Legal Analysis on Applicability of UN Convention on Genocides prior to January 12, 1951 <http://groong.usc.edu/ICTJ-analysis.html>

¹⁷ For an Australian context, see Colin Tatz, *Confronting Australian Genocide*, Aboriginal History 2001 Vol 25, and *Genocide in Australia*, Research Discussion Paper, AIATSIS, Number 9, 1999.

<http://www.kooriweb.org/gst/genocide/tatz.html>

also Benjamin Madley, *Patterns of frontier genocide 1803 – 1910: the Aboriginal Tasmanians, the Yuki of California, and the Herero of Namibia*, Journal of Genocide Research (2004), 6 (2): 168 - 192

http://gsp.yale.edu/sites/default/files/patterns_of_frontier_genocide.pdf

¹⁸ http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

¹⁹ See for example Geoffrey Robertson (2015), *An Inconvenient Genocide: Who Now Remembers the Armenians?* - See more at: <http://www.randomhouse.com.au/books/geoffrey-robertson/an-inconvenient-genocide-who-now-remembers-the-armenians-9780857986337.aspx#sthash.s9vQZB4E.dpuf> Turkey disputes the Armenian genocide, arguing that over a million deaths occurred ‘accidentally’ as a result of mass ethnic relocation in the course of a war.

Convention. The term 'intent' in Article 2 has the legal meaning of '*mens rea*' or awareness of wrongdoing (criminal intent) associated with a criminal act (*actus rea*).

*

Australia has still not ratified and incorporated the United Nations Genocide Convention in its domestic legislation. In 1999, the High Court asserted that, consistent with the doctrine of parliamentary supremacy, there was no constitutional restriction on Section 122 of the Constitution not to authorise acts of genocide.²⁰ Australia refuses to legislate specifically against the crime of genocide, preferring to keep its options open.²¹ However, it has introduced legislation that prohibits crimes against humanity in accordance with International law, not quite the same as genocide, but with a degree of overlap where there is mass killing, yet not other forms of destruction, and not retroactively because of the pernicious (and largely wrong) 'standards of the time' argument which we have reinvented as reflexivity. Nor does the argument hold scrutiny that Governments mistreated Aboriginals with 'the best of intentions, for their common good', when there is clear evidence of mass killing, legislated oppression, eugenics, stolen wages, stolen children, and theft of Aboriginal land. How can it be 'well intended' to dispossess tribe after tribe, break up families, massacre those who resisted, and submit the remnant population to forced detention, subjugation and repression?

In 1999, following the High Court decision on genocide, an Anti-Genocide Bill was proposed by the Australian Parliament, which would amend the genocide Convention Act 1949 to implement Australia's obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, to ensure genocide is unlawful in Australia. The progress was inexcusably tardy and inconclusive, with the Government delaying as much as possible. On 13 October 1999, the amendment was introduced and read the first time. On 13 October 1999, a second reading was moved. On 5 April 2001, there was a second reading debate, but on 13 February 2002, it was restored to the Notice Paper, and on 16 November 2004, it lapsed at the end of Parliament. On 17 November 2004, it was restored to the Notice paper, but on 12 February 2008, it lapsed once more.

²⁰ Chris Cunneen, Julia Grix, *The Limitations of Litigation in Stolen Generations Cases*, AIATSIS Research Discussion Paper, Institute of Criminology, University of Sydney Law School, 2004: 11, 12. (Judge Gaudron)

²¹

http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s230

So Australia *still* does not have any domestic legislation that makes genocide a crime, in accordance with the UN Convention.

There is no reason for Australia not to criminalise the internationally recognised crime of genocide, unless the Commonwealth Government is worried that it may be culpable. They may be right.

As we are reminded (but not by Australia):²²

There are two federal statutes in Australia that refer to proceedings involving crimes against humanity:

- Criminal Code Act 1995 (Cth), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/5423704BFDAC4386CA2576EA00129CE7/\\$file/CriminalCode1995_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/5423704BFDAC4386CA2576EA00129CE7/$file/CriminalCode1995_WD02.pdf).
- The relevant provisions in this legislation were inserted by the International Criminal Court (Consequential Amendments) Act 2002, available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/640800730D340CE5CA256F7100563577/\\$file/0422002.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/640800730D340CE5CA256F7100563577/$file/0422002.pdf).
- International Criminal Court Act 2002 (Cth), available at [http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/FA56268B62FE5347CA256F7100563077/\\$file/0412002.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/FA56268B62FE5347CA256F7100563077/$file/0412002.pdf).

*The Criminal Code Act 1995 provides that Australian courts can have jurisdiction in cases involving crimes against humanity, even if the offenses are also crimes within the jurisdiction of the International Criminal Court.*²³

²² United States Library of Congress, *Crimes Against Humanity Statutes and Criminal Code Provisions in Selected Jurisdictions* <http://www.loc.gov/law/help/crimes-against-humanity/index.php> It is difficult to find an index of such open access documents through Australian sources.

²³ Criminal Code Act 1995 § 268.1; *see also* International Criminal Court Act 2002, § 3(2). The relevant offenses are set out in §§ 268.8 to 268.23 of the Code.

*Jurisdiction is available, whether or not the offense was committed in Australia.*²⁴

*The Attorney-General must give permission for charges to be brought under these provisions.*²⁵

*There can be no double jeopardy, where a person has already been tried for the same offense in the International Criminal Court.*²⁶

*The International Criminal Court Act 2002 sets out the procedural requirements relating to Australia's cooperation with, and provision of assistance to, the International Criminal Court.*²⁷

*

Many of us assume that genocide and ethnic cleansing are solely comprised of massacres, with the state required to be tacitly or explicitly involved in a deliberate culture and official practice of racially targeted killings, and that there must be a burden of legal proof, through official orders and court judgments and death records, that massacres were intentional and directed. This is not correct, as the United Nations Lemkin definition for genocide makes quite clear. Ethnic cleansing – genocide when sufficient numbers and a larger proportion of the unwanted racial group have been removed or destroyed – is not constrained to massacres alone.

Key to the Lemkin definition is *intentionality*, leading among other things to racial and cultural displacement and mass expulsions and miscegenation, and there is nothing more intentional than the deliberate dispossession of Aboriginals from their land, through legislated parliamentary Acts which exist in the historical record for any of us to see, a little like the invisible elephant in the room, so large we may fail to notice it, except in part.

²⁴ *Id.* §§ 268.117(1) & 15.4.

²⁵ *Id.* §§ 16.1 & 268.121.

²⁶ *Id.* § 268.118.

²⁷ *Ibid.*, United States Library of Congress

Did Britain have humanitarian intentions when it dispossessed Aboriginals and, if they resisted, treating them as insurgents who could lawfully be exterminated for the greater good of Empire? Were British policies and proclamations intended to facilitate genocide? Did Britain and its functionaries acknowledge guilt (*mens rea*) – either explicitly or tacitly - for their criminal actions (*actus rea*)?

*

In these documents, we will show there is compelling and direct evidence that Britain knew its genocidal actions were wrong, ‘an indelible stain’,²⁸ but doggedly continued on its dispossessory path, primarily for economic reasons. State sponsored genocide by colonists also went unchecked, but the continent-wide killing became more circumspect after the Myall Creek prosecutions, where circumspection itself is further evidence of *mens rea*. That is, the collective British structural guilt mapped levels of intentionality, both subordinate (directed and hierarchical) and ordinate (collusive and coercive).

British land policy drove Aboriginal genocide through a violent dispossessory process. Genocide was therefore no unintended consequence of racial dispossession (as some have argued) but a calibrated and deliberate process (*mens rea*) that intended to remove – in whole or part - Aboriginals from their homelands with all necessary force and by all available means including legislative actions, official proclamations and the use of lethal force (*actus rea*). This genocidal process went beyond targeted homicidal killing to other forms of physical, mental and social destruction as specified by the Convention, including stolen children and eugenics.

While Britain constantly spoke of Aboriginal ‘conciliation’, its land and emigration policies made conciliation almost impossible. Imperial Britain ranked other races into classes of lower orders, with the expectation that conquered or subordinated ethnic groups would benefit by being civilised and converted to Christianity, to take their place as grateful indentured servants to the master race. As a result of this thinking, Britain and its vassal territories²⁹ were to go further: that Aboriginal society ought to be

²⁸ George Murray, Secretary of State Despatch No. 43, 5th November, 1830; Papers on Van Diemen’s land, 1831, No. 259, p. 56; HRA 3/9: 573-574

²⁹ As Britain progressively relinquished direct administrative responsibilities to its colonies, as self-government was granted into the mid 1800s, these British occupied territories continued with Lemkinian practices whose intent was Aboriginal subjugation through various means including eugenics, stolen wages, stolen children, misuse of the law, cultural destruction, and a system of segregation or apartheid.

destroyed, allowing it to adapt to the superior British way of life, and until that time any surviving Aboriginals would be relocated to ‘reserves’ under the ‘care’ of a ‘protector’. If possible, the ‘recessive’ Aboriginal trait would be bred out through an elongated policy-driven process of segregation and racial discrimination.

That is, Britain’s genocidal process did not stop at cultural and economic dispossession or at extermination. Racial subjugation and oppression followed, even to the extent of dismembering the dead. Soon after the time of the British invasion in 1788, trophy hunters procured Aboriginal body parts, often under questionable circumstances, and shipped them to Britain for display in natural history museums. In 1802, for example, the pickled head of the Aboriginal resistance leader, Pemulwuy, was despatched to Sir Joseph Banks, who gratefully received it into his specimen collection.³⁰ Aboriginals were curiosities, of more interest when dead, mere fauna, ‘sub-human’ exhibits that reassured British civilization of its mistaken racial superiority. Would we allow the head of (say) Lord Nelson to be similarly displayed? Or that of Charles Darwin?

The extraordinary and unchecked rise of invasive pastoralism in Australia, the rapid spread of British occupied territories between 1788 and the early 1900s, the strengthening of racist legislation, the homicidal proclamations and actions by a determined British administrative machine, were all directly proportional to the rate of Aboriginal ethnic cleansing and catastrophic Aboriginal depopulation, greater than 95% by 1911.³¹

Australia’s discriminatory policies continued well into the 20th century. Under the racially repressive post-war Menzies Government,³² Aboriginals were not permitted to own land or any form of property. As an example, in 1949-50, the famous Aboriginal artist, Albert Namatjira,³³ tried to buy a house for his family. He was refused permission. He tried to buy a cattle station lease for his family in 1951. He was refused.

³⁰ <http://adb.anu.edu.au/biography/pemulwuy-13147> <http://www.abc.net.au/news/2015-03-20/commemorating-australias-first-aboriginal-resistance-leader/6332964>
<http://www.indigenous.gov.au/news-and-media/announcements/nma-national-museum-honours-aboriginal-warrior-pemulwuy> <https://en.wikipedia.org/wiki/Pemulwuy>

³¹ Ray Gibbons (2015), *The Great Australian Land War and Aboriginal Depopulation*.

³² Sir Robert Menzies (1894 - 1978) Australian Prime Minister from 1949 to 1966.
<http://adb.anu.edu.au/biography/menzies-sir-robert-gordon-bob-11111>

³³ Albert Namatjira (1902 – 1959) <http://adb.anu.edu.au/biography/namatjira-albert-elea-11217>

The fear was that Aboriginals might compete economically with the whites.³⁴ The Australian Government was on firm legislative ground, based upon Australia's Constitution Act (1900) and the Aborigines Act (1905) and amendments.³⁵ It was not until the 1967 referendum that Aboriginals were formally recognized as Australian citizens.

What of genocidal scope, the range and reach of State sponsored inhumanity. Consider Tasmania. If the extermination of the Tasmanian Palawa was intentionally genocidal,³⁶ the result of official Government policy, there are some who may still deny the evidence of British infamy because only a few thousand Aboriginal lives were impacted, as though the categorial behaviour of genocide is inextricably linked to the numbers killed. This argument is false. It ignores the key principle of Lemkinian genocide that there is an indictable crime when a targeted group is destroyed, culturally, mentally or physically, '*in whole or in part*'.

But the British Government's genocidal behaviour steps to another level on the continent of Australia, where hundreds of thousands of Aboriginals were targeted. Nowhere was this brutal process more determined and the assault on human values more acute than in Queensland, the most populous Aboriginal state, where the Queensland Government conducted an open war of aggression against its original landowners, using the latest British weapons and misuse of the Law in the service of overt racial oppression. The *1897 Queensland Aboriginals Protection and Restriction of Sale of Opium*³⁷ was an odious example of professed concern for Aboriginal welfare when it was a stalking horse for racist Aboriginal discrimination, what Aboriginals fearfully called 'living under the Act'. Queensland continued to issue amendments to

³⁴ <http://adb.anu.edu.au/biography/namatjira-albert-elea-11217>
https://en.wikipedia.org/wiki/Albert_Namatjira

³⁵ For transcripts, see this document.

³⁶ Ray Gibbons (2017), *Deconstructing Tasmanian Genocide the extermination of the Palawa*. This document includes a projected Aboriginal population, if Britain had not invaded in 1788. This projection is the more realistic estimate of Aboriginal depopulation.

³⁷ For a transcript, see this document.

this Act until 1971.³⁸ As recently as this century, we have examples of Aboriginal murder by police, one well-known event eloquently documented by Chloe Hooper.³⁹

We are cajoled by some historians into believing that we cannot judge the past by the standards of the present. But our predecessors knew what they were doing was wrong (*mens rea*), the historical evidence is quite clear; yet they continued their behaviour (*actus rea*), motivated almost solely by self-enrichment, knowing that British Law would never prosecute them, if they were circumspect. They were right. In spite of the tens of thousands of Aboriginals who were massacred by whites and the hundreds of thousands who disappeared, the effect of the British invasion, not one British person was ever convicted for over one hundred and fifty years (apart from the perpetrators of the Myall Creek massacre). The slaughter would not stop until British supremacy was realized and Aboriginal land had become white property. Violence became quotidian, the thread from which a racist fabric was woven.

Australia was built upon the blood of Aboriginals. Legislation was the boot on the neck. In these Government orders, proclamations, and Acts, we see the military and legislative process that shaped our nation and its genocidal incubation. It is not an alternative history. It is our formative history, and bequeathed our national character, if mateship and racism can be called such. It was a determined, intentional, and directed process with a genocidal outcome, as defined by the United Nations Lemkin Convention,⁴⁰ but at the time was simply called ‘extermination’, or ‘dispersal’, or a ‘war of the races’, or ‘martial law’, or ‘land alienation’, or ‘Aboriginal protection’, or ‘black velvet’ (women were scarce in the bush).

*

Government land policy, first established by the British, drove Aboriginal ethnic cleansing in the form of genocide. Land policy was calculated and intentional. Aboriginal land was sold or taken from under the original owners, leaving the

³⁸ Queensland Aboriginal Act, 1971. ‘The Aboriginal Regulations’ of 1972, regulations 10, 11 and 14 (2). Also see Bill Rosser (1987), *Dreamtime Nightmares*.

³⁹ Chloe Hooper (2008), *The Tall Man Death and Life on Palm Island*.

⁴⁰ FWAYAF *Deconstructing the Myth of Murdering Creek* (2014) pp. xxix– lxi presents the summary case for Australian genocide, within the terms of the internationally agreed Convention. The full United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* can be found at www.hrweb.org/legal/genocide

Government and pastoralists to push Aboriginals aside, usually at gunpoint. But pushed aside to where? To barren wildernesses? To detention centres? To tin shanties on the edges of towns? The conclusion is therefore inescapable: that ethnic cleansing was also intentional and sustained for as long as the land was fought over, the intended consequence of land dispossession, an extended home-grown conflict that the Australian War Memorial refuses to recognize as too self-condemnatory. As the Aboriginal Protector G.A. Robinson sadly and presciently observes in one of his journal entries – where were the Aboriginals to go?⁴¹

Where are the natives to go? Question: the settlers or rather squatters do not allow the natives to stop at their home or out stations, then where are they to go? As many of the squatters claim for their runs from 2, 3 and 400 square miles of country, the home station and out station, in many instances in a bad water country, secure all the water and the sheep and cattle graze the intermediate space. Then where are the natives to go? Where are they to procure food? Or are they to live? Are they to throw themselves on the mercy of other tribes because no British humanity exists in the hearts of British Australian squatters towards the original occupants of the soil?

Robinson was almost a lone voice of protest when he observes the genocidal effect of land dispossession: *Where are the natives to go?* Britain never had an answer, beyond ethnic cleansing. When the British Government expropriated Aboriginal homelands, it began a genocidal process. Aboriginals were simply removed from their land, by force if necessary, backed up by British law and openly racist legislation. It led to rolling genocide across the continent, as the pastoral frontier advanced. The message from Britain was very clear. Aboriginals could legally be evicted from their land. And without their land, Aboriginals would simply struggle to survive, both culturally and physically, a process helped along by death squads and deportation.

Our preferred myth is that ‘we are young and free’, the words of Australia’s national anthem speaking to the pastoral triumphalism and accelerated immigration that followed

⁴¹ Journals of G.A. Robinson, May to August 1841 (ed. Presland), Victorian Archaeological Survey, VAS 11, entry for 31 July. [See Ray Gibbons (2017), *Recollections of a (homicidal) pastoral frontier 1788 – 1928*] Robinson was the appointed Aboriginal Protector for Victoria in the early 1840s, but without any legal power to stop the killing or prosecute the perpetrators, he became an observer (only) to Aboriginal destruction, with La Trobe and his appointed administrators passively looking on.

the British occupation process and the rise of settler sovereignty. But the myth ignores ancient Aboriginal society, which was ruthlessly displaced and marginalised. We still see the consequences today. Aboriginals continue to suffer through high levels of suicide, incarceration and systemic disadvantage. We do not heed. Perhaps we do not care. Australia's repressive history will haunt us for as long as we allow Aboriginal injustice to continue.

*

Genocide embodies the concept of intent, and intentionally is embedded in any process at different levels of abstraction. If we examine the overall *type* model of the invasive occupation process⁴² we will see the living process played out across the chronological presentation of the documents that collectively shaped Australia, finishing in a subjugation phase, which we continue to live through right now, where increasing Aboriginal disadvantage should be a measure of our national dishonour and humiliation:



Occupation: First, Aboriginals were removed from prime pastoral lands; beachhead settlements metastasized; squatters assumed *de facto* sovereignty; military forts and outposts were set up.

Protection: If Aboriginals resisted the occupation process, they were killed; military (up to 1838) and police were used to protect occupied land; squatters were encouraged to arm themselves, with few questions asked, if they took the law into their own hands. Aboriginals were driven off their homelands, but they had nowhere to go.

Consolidation: Laws were introduced to make dispossession legal (land legislation, Aboriginal Acts).

Repression: When Aboriginals became homeless, they were progressively forced into detention centres and their children taken away; Aboriginal culture was deliberately eroded; eugenics was used in an attempt to erase the Aboriginal traits; then they were forcibly assimilated; wages were ‘managed’ or stolen.

⁴² The *occupation process* is further outlined in FWAYAF *Deconstructing colonial myths: the massacre at Murdering Creek* and detailed in FWAYAF *The Political Uses of Australian Genocide*, which sets out the overall methodology and semantic typology for investigating the rise of settler sovereignty and the consequent destruction of Aboriginal society. A further source is *Deconstructing Tasmanian genocide the extermination of the Palawa*

Subjugation: Many Aboriginals, particularly those in remote areas, now live in third world conditions, under the beneficent eye of Government. Preventable disease rages. Suicide is high. Harsh policing is used as a social weapon. Hope is a luxury. When some Aboriginals wanted to return to remote areas they once called home, and because the land had no commercial purpose (for a time), they were allowed to move,⁴³ with the Commonwealth providing rudimentary services that, even these, the Commonwealth now plans to withhold,⁴⁴ once again to force them to move back to cities. But where? And why? And for how long can this cruel, genocidal process continue, where the conditions for Aboriginals to support some less than normal life are further squeezed by Government?

*

In Australia today, the genocidal process continues in our full view. This time, it is characterised by the Aboriginal loss of hope, the pain of transgenerational despair, the erosion of health by preventable diseases, the escape of alcohol and petrol sniffing, the physical and mental impairment, the excessive incarceration, the domestic violence, the family destruction, the fostering of children, the trans-generational trauma. While we watch.

Our continuing mistreatment of Aboriginal society is sustained by the same behaviours that drive racism and social inequality. Everywhere around us, we see humanitarian concerns made hostage to mob rule, to normalized self-interest, to far-right conservatism, to the right of rapacious exploitation without end, to the derogation of ‘otherness’ as an existential threat, to the inexorable rise of inequity, to the phenomenon of the 1% doctrine, to the excessive power of economics and self-interest. We sacrifice

⁴³ One of these remote settlements was Weipa at Cape York, but when bauxite was discovered, Aboriginals were forcibly relocated in 1963 by the Queensland Government’s Aboriginal ‘Protector’ (Pat Killoran, a member of the far right wing repressive Bjelke-Petersen Government; see <https://www.qld.gov.au/atsi/cultural-awareness-heritage-arts/community-histories-new-mapoon/>). Another was Maralinga, in the northern desert of South Australia, where Aboriginals were living relatively unmolested (or at least, not displaced) until the British Government demanded its use for nuclear weapons testing in the 1950s, whether or not Aboriginals remained there. Menzies (the Prime Minister) readily agreed. At the time, Aboriginals could not vote and could not protest. Some number perished from radiation poisoning. The land still remains off limits, made desolate. No one bothered to check the Aboriginal dead. Britain has never apologised, or accepted accountability, or offered reasonable compensation. The examples abound. Governments, both State and Federal, allowed Aboriginals to reclaim (but not own) land that appeared worthless, until some worth was discovered. See Ray Gibbons, *FWAYAF Recollections from a (Homicidal) Frontier*; for Killoran policies, see Kidd, Rosalind, *The Way We Civilise*, University of Queensland Press, St. Lucia, 1997.

⁴⁴ Aboriginal freehold community occupation is being forced into leasehold tenure by Government policy.

altruism and democracy to Mammon, to the politics of why me (or why not me), to a contrived 'us and them' divide, where the rights of others, other races, other species, are of small account compared to our own. There is always a price to pay. We are our predecessors, although we may protest our beginnings.

*

At the end of the millennium, when Manuel Castells was talking hopefully about the information age and the rise of the network society,⁴⁵ anything seemed possible, the future better than before, with automation (we were told) bringing massive improvements to productivity, and the efficiency gains being shared by all workers, with increased wages and fewer working hours. The reality was different. Yes, Australia's productivity is steadily growing, along with GDP, but most people are working longer for less financial reward. For many, owning a house has become a receding dream. And although Australia is one of the most energy-abundant nations on earth, the average householder now pays more than double what they did a decade ago. An increasing number of people can't afford power at all.

Kurzweil and others are now urgently predicting the rise of the machines, with artificial intelligence about to overtake our own.⁴⁶ Some futurists such as Elon Musk suggest the answer is to sequester a proportion of the economic efficiency dividends to provide a fair living wage for all.⁴⁷ It is unlikely to happen. What is more probable: the benefits of automation will be diverted to an increasingly smaller part of our society. Once it was our labour that capitalism inexorably devalued; now people themselves are becoming irrelevant to a capital driven future.

*

How is any of this relevant to our discussion of the British invasive impact on Aboriginal society? The answer is that the past and the present have followed a similar

⁴⁵ Manuel Castells (2001), *The Rise of the Network Society*

⁴⁶ Ray Kurzweil (2005), *Singularity is Near When humans transcend biology*

⁴⁷ Elon Musk, CEO Tesla <http://www.cnn.com/2016/11/04/elon-musk-robots-will-take-your-jobs-government-will-have-to-pay-your-wage.html> The Committee for Economic Development of Australia (CEDA) estimates 40% of working Australians will likely lose their jobs in the next 10 to 15 years, the result of autonomous agents like driverless cars, robotic surgery, claims assessment, paralegal automation and so on. After redundancy, what then? [<http://www.ceda.com.au/research-and-policy/policy-priorities/workforce> ; <http://www.abc.net.au/news/2015-06-16/technology-could-make-almost-40pc-of-jobs-redundant-report/6548560> ; http://adminpanel.ceda.com.au/FOLDERS/Service/Files/Documents/26792~Futureworkforce_June2015.pdf

pattern. For Aboriginals, first their land was taken, then their labour, and they were left in what some have derogatively describes as parasitism, refugees in their own land. Aboriginals are now us. Once we were the aggressors; now we (many of us) are the aggrieved. Now we are all (as a majority) becoming redundant, encumbrances on society, displaced and now discharged. Exploitation has evolved to a terrifying new form that the British Imperium would still approvingly recognize. Now we are all beginning to know the disruptive loss caused by invasion. This time the invader is technology. This time the killing won't be overt. We will die slowly. While a small number prosper.⁴⁸

Exploitation, gaining advantage at someone else's expense, was little different in colonial times except in the manner of its doing. We did the killing and the cultural destruction. We brought the disease, the settler death squads, the roving military and police ethnic cleansing campaigns. We introduced the toxic land legislation, the racist apartheid policies. We broke up the families. We still carve the huge pastoral lease holdings from Aboriginal land. We defiantly cause Aboriginals, particularly those in remote communities, to be among the most disadvantaged on Earth.

Today, we unconscionably and implacably force many Aboriginal children to spend more time in gaol than school. As a nation, we are shamed. We are also becoming superfluous. Capital is the new master. And capital has no morality, only a return on investment, just as pastoralists sought in colonial Australia where there was no better investment than stolen Aboriginal land and where displaced Indigenous human capital could be removed without legal consequence. Aboriginal vulnerability to unconstrained market forces is now our own.⁴⁹

⁴⁸ The rise and decline of populations, whether they are a company or a society, has been extensively studied through the logistics (or sigmoid) function, which we investigate in relation to Aboriginal depopulation in Ray Gibbons (2017), *Deconstructing Tasmanian genocide the extermination of the Palawa*. In this companion document, we represent the sigmoid function (also known as the 'S' curve) as:

$$f(x) = x(t) = 1 / (1 + (1 / x_0 - 1)) e^{-rt}$$

where r can be positive or negative and the initial conditions $x_0 = x(t = 0)$ ranging from 0.00 to 1.00 in steps of 0.05, as shown in the diagrams.

It begins to explain how genocide is more than mass killing and intentional depopulation is more than extermination.

⁴⁹ The paragraph is an allusion to Paul Keating's magnificent Redfern speech – the provenance hardly matters - on 10 December 1992. The entire speech is quoted in FWAYAF *Recollections of a (Homicidal) Pastoral Frontier*.

*

In a recent book, Yuval Harari ⁵⁰ argues that the old societal stressors of ‘plague’, ‘war’, and ‘famine’ - what we may generalise as disease, conflict and food security - are no longer a significant problem. This may be partially so for First World countries. But it also ignores that some populations in First World countries are surviving in Third World conditions, groups such as Aboriginals living in remote areas, or those who depend on Government assistance to survive. That is not to say there are not other emerging threats that Harari barely mentions. These are global warming, surging refugee migrations, the rise in wealth inequality, and the accelerating destruction of the biosphere. Unsustainable exploitation along with non-renewable resource depletion are the new constraints on our future, a dilemma of our own construction, but instead Harari asserts that war is obsolete, we are more at risk of obesity than famine, and data is the new religion.

In fact, the new enemy is ‘us’. Within an economic pyramid, as fewer people demand more of what exists in the global pie, it becomes a scramble for deck chairs on the Titanic. No, we have not changed that much from the time when Aboriginals were reduced from free possessors of the soil, to trespassers, to insurgents, to deportees, to welfare recipients.

Now it is ‘we’ who are becoming marginalised through the casualization of labour. Once, we might expect a job for life. Now, we may be lucky to have a job at all. Democracy has become vulnerable.

The oppressive pattern that began this story with British Imperialism and the erosion of Indigenous rights has now been further normalized as an exploitative social cancer. We are now all at risk.

*

The environment significantly shapes our biological phenotype: the physical characteristics of an individual organism, or collectively that of a society. It is the fast-developing science of epigenetics, the inheritance of acquired characteristics, the role of ‘nurture’ in the Lamarckian expression of the genome and the transgenerational consequences, of how nurture shapes nature. Or why all cells share the same DNA but a

⁵⁰ Yuval Noah Harari (2016), *Homo Deus A Brief History of Tomorrow*.

skin cell is different from a neuron. Or how society shapes heritable individual behaviour in a codependent embrace.

That is not to say we aren't responsible for our actions, that we don't have choices. But those choices become harder to make, depending on our circumstances in a found environment (whether we are rich or poor, black or white, the accidents of birth), an environment that imposes behavioural constraints, much as the shape of a football field and the governing rules determine the fluidic movement of the players and the strategies of the game, like a societal imprint on the individual psyche and its heritable mapping across generations.

To a determinable extent, we are what we were; what our predecessors acquired through adaptation can now be us. Racism and other normalized behavioural disorders can form part of our cultural – and quite possibly epigenetic - inheritance.⁵¹ With sufficient numbers of a population sharing these destructive behaviours, they can form part of our collective identity, a social identikit, as for an extended Gini coefficient.⁵²

When we read the post-contact history of Australia, we are struck by the determined racism of Britain and its cohort, the collective denigration of Aboriginal society, the single-minded occupation of Aboriginal land, the transgenerational imprinting of normalized psychopathic morbidity, the pursuit of economics over humanitarianism.

If, for the moment, we accept that Britain's occupation of Australia was genocidal in its intention and in its effect, we can ask the questions: Why? What were the determinants? Was brutalising British behaviour an unintended consequence of violent Indigenous

⁵¹ <https://www.theatlantic.com/politics/archive/2014/03/epigenetics-the-controversial-science-behind-racial-and-ethnic-health-disparities/430749/> ; <http://theconversation.com/if-were-not-careful-epigenetics-may-bring-back-eugenic-thinking-56169> ; Bridget Goosby, Chelsea Heidbrink (2014), *Transgenerational Consequences of Social Discrimination for African American Health* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4026365/> ; Christopher Kuzawa , Elizabeth Sweet (2008), *Epigenetics and the Embodiment of Race: Development Origins of US Racial Disparities in Cardiovascular Health* [American Journal of Human Biology] http://groups.anthropology.northwestern.edu/lhbr/kuzawa_web_files/pdfs/Kuzawa%20and%20Sweet%20AJHB%20early%20view.pdf ; Tabitha Powledge (2011), *Behavioral Epigenetics: How Nurture Shapes Nature*, BioScience (2011) 61 (8): 588-592. DOI: <https://doi.org/10.1525/bio.2011.61.8.4> Published: 01 August 2011 <https://academic.oup.com/bioscience/article/doi/10.1525/bio.2011.61.8.4/336969>

⁵² The Gini index is a generalized measure of well-being in some bounded population that is heavily weighted towards economic indicators. <http://data.worldbank.org/indicator/SI.POV.GINI>

dispossession, as unreasonable as that contention appears? ⁵³ Could Britain have avoided large scale Aboriginal depopulation by changing its discriminatory policies? Or was the racially displacive conflict shaped by the role and agency of the British State through its endorsed practices and procedures (both legislative and administrative), enabled by the armed enforcement of its territorial ambitions? Were colonists induced to respond, in an almost Pavlovian manner, to self-enriching behaviours that were encouraged by the State?

These are some of the questions we will examine, through the lens of official British documents, in this book. It may make for uncomfortable answers, if we listen. Or reflexive denial, if we don't.

*

This, then, is the true story of our history told by the actors themselves through official documents, the story we are now asked to forget. Why? Because it is embarrassing. It exposes our human rights credentials, of how we prefer to see ourselves. Many of us do not want to be reminded. Some Australian politicians go further and encourage us to forget. And perhaps, we may hope, if we can ignore the past, if we discourage criticism of our history, the problem can somehow be made to go away, like an unwanted illness we refuse to have diagnosed.

The important documents that shaped our nation through a demonstrably Lemkinian genocidal process include an intentional Government policy of dispossession (stolen land) and extermination (stolen lives), but also extends to 'stolen children', 'stolen wages', and then an elongated subjugation phase of physical, mental and cultural destruction (stolen hopes) that is still with us. They are not all that easy for any individual to put together (it certainly took me some considerable time as many of the documents are relatively inaccessible), and are rarely collected within a theme of legislated extirpation and repression. It is more common to find episodic treatment of historical events, with a rash of inserted quotes weaving some kind of reflexive narrative.

⁵³ For genocide historians and scholars, there is a circular debate in the context of the holocaust about functionalism v intentionalism, the polarity between bureaucratic ('bottom up') or State-driven ('top-down') genocide.⁵³ In fact, they are *co-determinate* in the same way as functions (more properly events) and processes (with conditional triggers) are mutually dependent within a State driven intentionality envelope at different levels of abstraction. The false schism is exposed by modelling the referents.

This edited and deconstructed compilation of official documents may address the difficulty of ‘the great Australian silence’, the miasma of a cognitive gap, and provide a single repository that allows us to see, perhaps for the first time, a cruel and genocidal process in action, one that was racially and economically motivated. Whole document sections are provided, rather than transcribing carefully selected phrases and paragraphs, from which it is possible to support almost any line of argument when fragments are excised from their context.

The documents reveal a pattern of sustained oppression, of considered intentionality, of *mens rea*, that is difficult to ignore but has rarely been acknowledged, not by the reasonable standards of a professed civil society. The pattern defines the *occupation process*, which overlaps that of *genocide*, the common actionable components being mass killing and calibrated societal destruction.

From the documents we present in this book, we conclude that ‘they’ are ‘us’. And we (for the most part) are who we were, the descendants of our bloody predecessors, with further immigration influxes augmenting the racially disruptive process, both dispossessionary and displacive, leaving Aboriginal society to be absorbed or pushed to the margins. And many are, living in isolated groups where services are stretched and opportunities are few.

In summary, these documents are primary sources, which are presented in full, each with a brief analysis. They communicate with us directly, free of a syncretic narrative that might impose almost any interpretation on the original material through unintended (or intended) observer bias or selective quoting. Unmodified, they have a powerful voice, requiring no hermeneutics for their rendering. Perhaps they are too confronting, the sentiments almost too raw. Together, they reveal an intentional genocidal process in action.

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Introduction

Who owns Australian post-contact history? Is it authenticated through revisionism? Or a Kuhnian cohort? Is historicity therefore relative, an exercise in post-structuralism, where the narrative expression of epidemiological post-traumatic stress among the First Nation is simply a procedural means to reclaim collective Aboriginal identity, to overcome the epistemological impotence of shared loss, of dispossession, of alienation, numbness and despair? Are there many interpretations of the past or is there a fundamental shape, a defining landscape for post-contact events? Must we perceive our colonizing history through the uncertainty of reductive and often confected myth, through the overburden of what we are taught to believe, or is there a structure, an architecture of actionable instances within a determinable genocidal process, of imposed *de jure* supremacy, which was purposefully constructed in a found environment like evolutionary niche construction? Does an introduced society have an obligation to recognize and repair past mistakes before social and cultural healing can begin?

We will argue that Australian post-contact history is an artefact of British Imperial calibrated intentionality, of genocidal policies that saw Aboriginal society as an impediment to possessing the continent, so colonial governments ruthlessly thrust Indigenous civilization aside in a brutal and overwhelmingly genocidal process that included specific and carefully crafted racist proclamations, edicts, and legislation. This quasi-legal⁵⁴ dispossessionary framework forms the building blocks of Australia's territorial occupation today, where Aboriginal society remains among the most marginalised and disadvantaged on Earth.

The dispossession of the First People was prolonged and deliberate. Genocide was a means to an end, a categorial behaviour that was embedded in Imperial colonizing policy where the 'inferior' race was forced to kneel to British superiority. It was not so much a war of the races as a misconceived belief that the weak must give way to the strong, the argument of hegemony.

The expansionist economic needs of the pastoral and mining frontiers shaped Government policy towards Aboriginal people. As the eminent historian, Noel Loos, summarized when writing of the bloodshed in the brutal Queensland genocidal operations:

In the overall expansion of the British Empire, the army and its local commanders had played a vital part. In Queensland, the Native Police force, its commander, the Police

⁵⁴ The term 'quasi-legal' connotes that Britain, as the occupying power, could impose its own self-serving laws and Aboriginal society had no recourse to any higher authority for the existential assaults on their future.

*Commissioner, and the police officers attempting to control the Aborigines were similarly agents of imperialist expansion. It was their duty to meet local challenges when economic 'progress' and expansion of settlement were being inhibited.*⁵⁵

The dispossessory process of settler sovereignty moved from being *de facto* through a juridical process to *de jure*, where sovereignty was progressively legislated or proclaimed. Britain almost completely destroyed Aboriginal society and culture in the process. Aboriginal depopulation exceeded 95% over a period exceeding one hundred years of conflict and Aboriginal resistance. In this homicidal pastoral frontier, Britain fought a one-sided war for the land, a contested space that the Australian War Memorial defiantly refuses to recognize; instead, it focuses on the derivative myths of Anzac and questionable endeavours in foreign conflicts.

Many of these documents are inordinately difficult to retrieve without some determined effort. This repository may therefore serve some small purpose. In reading, you will see the architecture of the dispossession process, of invasive occupation as it metastasized across the continent following the heavily armed pastoral frontier. Government cleared the way through a carefully conceived framework of declarations, proclamations and legislation, with the military and police enforcing official policies and, all too often, the law of the bush where there were no witnesses.

We conclude that, without recognising the shape of the past, without collective memory reconsolidation, without group behavioural renormalization, the dysfunctional psychopathy that drove us then will continue to drive us now. Racism and unsustainable exploitation still define us to a measurable extent. Economic considerations still tend to outweigh humanitarian concerns. We have not sufficiently learned from the past, our amnesia self-induced. We are who we were. It is all a matter of degree.

Contemporary Australia remains a bloody bandage on a festering genocidal sore, where reconciliation with the present demands urgent recognition of our true history. Only then can national healing begin.

⁵⁵ Noel Loos (1982), *Invasion and Resistance Aboriginal European Relations on the North Queensland Frontier 1861 – 1897*: 103

Applicable Land Legislation 1833 – 1910⁵⁶

Land legislation was one of the important legal instruments that Governments used to dispossess Aboriginals of what they once owned. It accelerated the process of a condemnable normalized behaviour, something we now call genocide (under the UN Lemkin Convention), but in the past simply involved removal – or ethnic cleansing - of Aboriginals from their homelands, a process that often required one-sided force. When Aboriginals began to disappear, settler society slyly ascribed it to some ‘mysterious agency’, or ‘Law of Nature’, unrelated to violence in the war for the land.

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the Queensland Parliamentary Library;
the New South Wales Parliamentary Library;
and the Queensland University of Technology Law Library*

*Another valuable resource for land legislation is ozcase.library.qut.edu.au/qlhc/lands.jsp
This material is supplied courtesy of the DL Phillips Fox Library, Brisbane Justi*

United Kingdom

- [Australian Colonies Waste Lands Act 1842 5 & 6 Vic c 36](#)
- [Waste Lands Australia Act 1846 9 & 10 Vic c 104](#)
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New South Wales

with particular thanks to the Queensland and New South Wales Parliamentary Libraries

- [Crown Lands Protection Act 1833 4 Wm 4 c10](#)
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- [Crown Land Claims Act 1835 5 Wm IV c 21](#)
- [Validity of Grants Act 1836 6 Wm IV c 16](#)
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- [Crown Grants Confirmation Act 1848 11 Vic c 54](#)

⁵⁶ See <http://ozcase.library.qut.edu.au/qlhc/lands.jsp> last accessed 30 July 2009.

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Queensland

- [Letters Patent](#)
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- [Crown Lands \(Unoccupied Act 1860 24 Vic c 11](#)
- [Crown Lands \(Alienation of\) Act 1860 24 Vic c 15](#)
- [Crown Lands \(Leasing of\) Act 1860 24 Vic c 16](#)
- [Real Property Act 1861 24 Vic c 14](#)
- [Pastoral Occupation Act 1862 26 Vic c 8](#)
- [Crown Lands \(Pastoral Leases\) Act 1863 27 Vic c 17](#)
- [Agricultural Reserves Act 1863 27 Vic c 23](#)
- [Leasing Act 1866 30 Vic c 12](#)
- [Crown Lands Alienation Act 1868 31 Vic c 46⁵⁷](#)
- [Town and Suburban Lands Act 1869 33 Vic c 8](#)
- [Pastoral leases, Unsettled Districts Act 1869 33 Vic c 10](#)
- [Homestead Areas Act 1872 36 Vic c 20](#)
- [Land Orders Act 1874 38 Vic c 8](#)
- [Crown Lands Alienation Act 1876 40 Vic c 15](#)
- [Settled Districts Pastoral Leases Act 1876 40 Vic c 16](#)
- [Crown Lands Alienation Act Amendment Act 1879 43 Vic c 12](#)
- [Corrected Titles to Land Act 1882 46 Vic c 4](#)
- [Settled Districts Pastoral Leases Act Amendment Act 1882 46 Vic c 11](#)
- [Crown Lands Act 1884 48 Vic c 28](#)
- [Crown Lands, First Amendment Act 1885 49 Vic c 7](#)
- [Crown Lands, Second Amendment Act 1886 50 Vic c 33](#)
- [Crown Lands 1884 To 1886 Amendment Act 1889 53 Vic c 14](#)
- [Pastoral Leases Extension Act 1890 54 Vic c 14](#)
- [Crown Lands Acts 1884 To 1889 Amendment Act 1891 55 Vic c 19](#)
- [Crown Lands Acts 1884 To 1891 Amendment Act 1892 56 Vic c 16](#)
- [Pastoral Leases Extension Act 1892 56 Vic c 30](#)
- [Crown Lands Acts 1884 To 1892 Amendment Act 1894 58 Vic c 25](#)
- [Pastoral Leases Extensions Act 1892 Amendment Act 1894 58 Vic c 26](#)
- [Agricultural Lands Purchase Act 1894 58 Vic c 27](#)
- [Crown Lands Acts 1884 To 1894 Amendment Act 1895 59 Vic c 31](#)
- [Pastoral Leases Extensions Act 1892 To 1894 Amendment Act 1895 59 Vic c 30](#)

⁵⁷ http://ozcase.library.qut.edu.au/qlhc/documents/CrownLandsAlienationAct1868_31_Vic_c_46 is a pdf that does not properly copy across to a Word document, but is of particular interest to the history of Aboriginal land dispossession in relation to ethnic cleansing. It will be no surprise that the legislation was enacted in Queensland, a few years after its separation from New South Wales.

- [Agricultural Lands Purchase Act Amendment Act 1897 61 Vic c 13](#)
- [Pastoral Leases Extension Acts 1892 To 1895 Amendment Act 1897 61 Vic c 14](#)
- [Land Act 1897 61 Vic c 25](#)
- [Pastoral Leases Act 1869 Amendment Act Of 1898 62 Vic c 7](#)
- [Pastoral Leases Act Of 1869 Amendment Act Of 1900 64 Vic c 3](#)
- [Pastoral Leases Act 1900 64 Vic c 14](#)
- [Pastoral Leases Extension Act 1900 64 Vic c 20](#)
- [Agricultural Lands Purchase Amendment Act 1 EdwVII c 9](#)
- [Special Agricultural Homesteads Act 1901 1 EdwVII c12](#)
- [Agricultural Lands Purchase Amendment Act 1901 1 EdwVII c 23](#)
- [Land Acts Amendment Act 1902 2 EdwVII c 18](#)
- [Land Acts and Agricultural Purchase Acts Amendment Act 1905 \(5 Edw VII. No 28\)](#)
- [Land Acts Amendment Act 1908 \(8 Edw VII No 14\)](#)
- [Land Acts Amendment Act 1909 \(9 Edw VII No 20\)](#)

Aboriginals and the Law - Orders, Proclamations, Enquiries and Acts

These various official proposals, instructions, proclamations, legislative Acts and Select Enquiries are seminal in determining how Australia was annexed and shaped as a nominally civil society.⁵⁸ They are each quoted in full, except for the enquiries. They show how Britain used their laws to give legal force to ethnic cleansing, primarily effected through land dispossession. They are organized in historical sequence. This is a summary list:

- 1768 Secret Instructions to Captain Cook, 30th June 1768
- 1770 Cook's 1770 Log, Regarding his Claim to the East Coast of New Holland, in the Name of King George the Third
- 1783 James Maria Matra's Proposal for Establishing a Settlement in New South Wales, 23rd August 1783
- 1787 Draught Instructions For Governor Phillip, 25 April 1787
- 1805 Atkins' advice to Governor King
- 1816 Macquarie's proclamation of Martial Law in New South Wales
- 1824 Brisbane's proclamation of Martial Law in New South Wales
- 1825 Governor Darling's Commission 1825 (UK)
- 1825 Bathurst's advice to Governor King
- 1828 Annexation of Western Australia
- 1828 Arthur's Proclamation of Martial Law in Van Diemen's Land
- 1832 Boatman or Jackass and Bulleye, Feb 10, 1832
- 1834 South Australia Foundation Act
- 1835 South Australian Commission Land Sale Regulations 1835 (issued by the Commissioners in the UK)
- 1835 Governor Bourke's 1835 Proclamation
- 1836 Governor Bourke's Squatting Act (Crown Lands Unauthorised Occupation Act)
- 1837 Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements), 1837
- 1839 Instructions to Governor Latrobe, 1839
- 1842 Wastelands Act 1842
- 1855 Australian Waste Lands Act 1855

⁵⁸ See www.foundingdocs.gov.au which is a work in progress, as more documents are discovered.

- 1855 Torrens Title Land Act (SA)
- 1861 New South Wales Crown Lands Alienation Act 1861
- 1861 Queensland enquiry into the Native Police
- 1863 Letters Patent Annexing the Northern Territory to South Australia, 1863
- 1868 Crown Lands Alienation Act 1868 31 Vic c 46

Many of the myths of history are clouded in secrecy or inaccuracy. Among them is the discovery of Australia. Was *terra australis incognita*, or the unknown land to the south, Australia? No, it is a misconception, still common in popular understanding, partly caused by Mathew Flinders, who proposed the name *Terra Australis* or Australia in 1803, having circumnavigated the continent and found it was not part of any other land mass.

After successfully observing the transit of Venus, it is correct that Cook's instructions were to find and map *terra australis incognita*,⁵⁹ what we now call Antarctica.⁶⁰ Cook never discovered the great south land, being driven back by the cold,⁶¹ so he was unable to take possession 'with the consent of the natives', as he was instructed. Nevertheless, after tacking generally west from Tahiti,⁶² he determined that New Zealand was not part of some larger land mass, and then decided to explore the east coast of New Holland,⁶³ where he 'took possession' of the coastline in the name of King George III without specifying a longitudinal band. This may have been in recognition of the Dutch claim to Western New Holland. There is no evidence he sought the 'consent of the natives', as were his secret instructions. Nor did Britain insist upon it after the event. The pattern was set for what was to become a violent process of British occupation, beginning with east New Holland, renamed New South Wales, and rapidly expanding west.

⁵⁹ The earliest speculative maps of *terra australis incognita* include *Mappe-Monde Geohydrageographique*, Nicholas Sanson-Alexis Hubert Jaillot (1719), first published in 1651. But *Terra Australis* appeared even earlier, in *Americae Sive Novi Orbis*, Abraham Ortelius, 1570, or even earlier: *Ptolemy's Geographica* (Ulm Edition), Leonard Holle (1482) The speculation around Terra Australis below the 40th parallel was perpetuated with: *Totius Orbis Cogniti Universalis Descriptio*, Cornelius de Jode, 1593; *Orbis Terrae Compendiosa Descriptio*, Rumold Mercator, 1595; and *Orbus Terrarum Typus de Integro Multis in Locis Emendatus*, Petrus Plancius, 1599. Later maps of the unknown southern continent include *Nova Orbis Terrarum*, Phillip Eckebrecht, 1630, 1658. [*The Mapping of Terra Australis*, Robert Clancy, 1995]. All of these maps placed *terra australis incognita* to the south of New Holland, which is also where Cook and the British Admiralty presumed the unknown continent to be, if it existed.

⁶⁰ In 1820, mainland Antarctica was discovered by three explorers within a short time of, each other: Fabian von Bellingshausen, Edward Bransfield, and Nathaniel Palmer.

⁶¹ Cook's first expeditionary voyage was from 1768 to 1771. On his second expedition (1772 to 1775), he attempted once more to find the 'unknown continent' that Ptolemaic theory predicted was below the 40th parallel, but once again was unsuccessful.

⁶² Although the Spanish had visited the Marquesas Islands in 1595, Samuel Wallis officially took possession of *Otaheiti* (or Tahiti) for the British in 1767, which he renamed "King George III Island".

⁶³ Prior to Cook, a number of explorers had mapped New Holland, of which the most significant was the Dutch navigator Abel Tasman in 1642 and 1644.

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BEGIN TRANSCRIPT

Secret

By the Commissioners for executing the office of Lord High Admiral of Great Britain & ca.

Additional Instructions for Lt James Cook, Appointed to Command His Majesty's Bark the Endeavour

Whereas the making Discoverys of Countries hitherto unknown, and the Attaining a Knowledge of distant Parts which though formerly discover'd have yet been but imperfectly explored, will redound greatly to the Honour of this Nation as a Maritime Power, as well as to the Dignity of the Crown of Great Britain, and may tend greatly to the advancement of the Trade and Navigation thereof; and Whereas there is reason to imagine that a Continent or Land of great extent, may be found to the Southward of the Tract lately made by Captn Wallis in His Majesty's Ship the Dolphin (of which you will herewith receive a Copy) or of the Tract of any former Navigators in Pursuit of the like kind, You are therefore in Pursuance of His Majesty's Pleasure hereby requir'd and directed to put to Sea with the Bark you Command so soon as the Observation of the Transit of the Planet Venus shall be finished and observe the following Instructions. You are to proceed to the Southward in order to make discovery of the Continent abovementioned until you arrive in the Latitude of 40°, unless you sooner fall in with it. ⁶⁴ [But not having discover'd it or any Evident sign of it in that Run you are to proceed in search of it to the Westward between the Latitude beforementioned and the Latitude of 35° until' you discover it, or fall in with the Eastern side of the Land discover'd by Tasman and now called New Zeland. If you discover the Continent abovementioned either in your Run to the Southward or to the Westward as above directed, You are to employ yourself diligently in exploring as great an Extent of the Coast as you can carefully observing the true situation thereof both in Latitude and Longitude, the Variation of the Needle; bearings of Head Lands Height direction and Course of the Tides and Currents, Depths and Soundings of the Sea, Shoals, Rocks &ca and also surveying and making Charts, and taking Views of Such Bays, Harbours and Parts of the Coasts as may be useful to Navigation. You are

⁶⁴ Latitude 40 degrees south is roughly in line with Tasmania or New Zealand's south island, but the area referred to was imagined to lie between South America and New Zealand, somewhere to the south of latitude 40 degrees south, based on Wallis' exploration.

also carefully to observe the Nature of the Soil, and the Products thereof; the Beasts and Fowls that inhabit or frequent it, the Fishes that are to be found in the Rivers or upon the Coast and in what Plenty and in Case you find any Mines, Minerals, or valuable Stones you are to bring home Specimens of each, as also such Specimens of the Seeds of the Trees, Fruits and [FIRST PAGE ENDS] and Grains as you may be able to collect, and Transmit them to our Secretary that We may cause proper Examination and Experiments to be made of them.

You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be surprized by them, but to be always upon your guard against any Accidents. You are also with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors. But if you shall fail of discovering the Continent beforemention'd, you will with upon falling in with New Zeland carefully observe the Latitude and Longitude in which that Land is situated and explore as much of the Coast as the Condition of the Bark, the health of her Crew, and the State of your Provisions will admit of having always great Attention to reserve as much of the latter as will enable you to reach some known Port where you may procure a Sufficiency to carry You to England either round the Cape of Good Hope, or Cape Horn as from Circumstances you may judge the Most Eligible way of returning home.

You will also observe with accuracy the Situation of such Islands as you may discover in the Course of your Voyage that have not hitherto been discover'd by any Europeans and take Possession for His Majesty and make Surveys and Draughts of such of them as may appear to be of Consequence.⁶⁵

⁶⁵ Historical Records of New South Wales (HRNSW), Vol I, Part I

Cook's 1770 Log, Regarding his Claim to the East Coast of New Holland, in the Name of King George the Third

Some historians argue that Cook was unaware of the maps of New Holland by Dutch explorers. However, Cook's own log and journal indicate that he was fully aware of the Dutch discovery and their detailed mapping of the west coast of what they called New Holland.

Cook's official log, Wednesday, 22nd August 1770:

*[...] At 6 possession [sic] was taken of this country in his majesty's name and under his colours [...]*⁶⁶

Cook's private log, Wednesday, 22nd August 1770:

*[...] A little before sunset I took possession [sic] of the country in his Majesty's name, and fired 3 volleys of small arms on the occasion, which was answered from the ship. [...]*⁶⁷

Neither Cook nor any of his officers mention New South Wales in any of their original papers. They simply referred to it as the eastern coast of New Holland, or alternatively New Wales. The name New South Wales may have been added by Cook's editor, Hawkesworth, while Cook was absent on his second voyage round the world. However the words 'by the name of New South Wales', which appears to be the name decided upon sometime later, does appear to be in Cook's handwriting.⁶⁸ Cook laid claim to the East coast, from what we now call Cape York down to Wilson's Promontory, excluding Van Diemen's Land, but did not specify a 'meridian' or western longitude. Hawkesworth transcribed Cook's journal (under the date 21st August, 1770):

[...] As I was now about to quit the eastern coast of New Holland, which I had coasted from latitude 30 to this place, and which I am confident no European had seen before, I once more hoisted English colours, and though I had already taken possession of

⁶⁶ Historical Records of New South Wales (HRNSW), Vol I, Part I, Cook, 1762 – 1780, p. 157.

⁶⁷ Ibid, p. 78, pp. 169-170.

⁶⁸ Cook's log, British Museum; also Parkin op. cit.

several parts, I now took possession of the whole eastern coast from latitude 38 to this place, latitude 10 ½ S., in right of his Majesty King George the Third, by the name of New South Wales, with all the bays harbours, rivers, and islands situated upon it.[...] ⁶⁹

In addition to the officers' logs, there was also an anonymous log, generously attributed to Joseph Banks, also with the date of possession as 21st August 1770:

[...] On the 31st of March we left Admiralty Bay [New Zealand] and sailed south-westerly towards New Holland, taking our departure from a point which we named Cape Farewell. By instructions opened here we were directed to return home by Cape Horner [Cape Horn] and to stop at the East Indies, if necessary. April the 18th, towards the evening, judging ourselves near the land, we hauled topsails, and at night lying to we sounded with 130 fathom line, but found no ground. The next morning we made sail, and an hour after discovered the coast of New Holland rising very high between N.E. by N. and W. by S., and distant 8 leagues, being in latitude 37degrees 50' S. and longitude 31 degrees 00' W. from Cape Farewell. [...] On Monday, the 21st of August, we passed several flats and observed several openings in the mainland, which appeared like islands, some of them at a great distance; and at half-past 2 in the afternoon we stood towards a passage which seemed to extend through the country, and the same evening anchored about the middle of it, at the distance of near a mile from either shore, in 7 fathom of water, with good ground. Immediately after a party landed from the ship to examine the country, and from a small eminence discovered the Indian Sea, upon which they fired several vollies, and were answered by a general discharge from the ship. We then took possession of the country, &c., in the name of his Britannic Majesty.[...] ⁷⁰

As well as the confusion over the actual date of 'taking possession' – either the 21st or the 22nd, there is also confusion over how the eastern coast of New Holland was renamed as New South Wales, and what were Cook's instructions if he failed to find the 'great south land' at or below 40 degrees south, somewhere between South America and New Zealand. According to Hawkesworth, Cook was anxious to return to Britain via Cape Horn, in order to 'set at rest the question whether there was a southern continent'. He was dissuaded from it, after a conference with his officers, because 'we must have kept in a high southern latitude in the very depth of winter, with a vessel which was not thought sufficient for the undertaking.'⁷¹

⁶⁹ HRNSW, Ibid, p.170. <http://southseas.nla.gov.au/journals/hv23/615.html>

⁷⁰ Ibid, p.494

⁷¹ Ibid, p. 494, and Vol iii, p. 433 from original logs in the British Museum.

Also, his secret instructions were to return home either by Cape Horn or the Cape of Good Hope, depending on his best judgment, but there is no mention of any instruction to explore the east coast of New Holland or lay claim to it, which appears to have been done on Cook's sole initiative:

[...] But if you shall fail of discovering the Continent beforemention'd, you will with upon falling in with New Zeland carefully observe the Latitude and Longitude in which that Land is situated and explore as much of the Coast as the Condition of the Bark, the health of her Crew, and the State of your Provisions will admit of having always great Attention to reserve as much of the latter as will enable you to reach some known Port where you may procure a Sufficiency to carry You to England either round the Cape of Good Hope, or Cape Horn as from Circumstances you may judge the Most Eligible way of returning home.

Cook's official log for the 22nd August 1770 also records:

After landing [on Possession Island, just off Cape York, to the north-west] I went upon the highest hill which however was of no great height, yet not less than twice or thrice the height of the ships mast heads, but I could see from it no land between sw and wsw so that I did not doubt but what there was a passage. I could see plainly that the lands laying to the nw of this passage were composed of a number of islands of various extent both for height and circuit, ranged one behind the other as far to the northward and westward as I could see, which was not less than 12 or 14 leagues. Having satisfied myself of the great probability of a passage, thro' which I intended to go with the Ship, and therefore may land no more upon this eastern coast of New Holland, and on the western side I can make no new discovery the honour of which belongs to the Dutch Navigators [and as such they may lay claim to it as their property (deleted)]; but the eastern coast from the latitude of 38 degrees South down to this place I am confident was never seen or visited by any European before [and therefore by the same rule belongs to Great Britton (deleted)] us, and notwithstanding I had in the name of His Majesty taken possession [sic] of several places upon this coast, I now one more hoisted the English colours in the name of His Majesty King George the Third took possession [sic] of the whole eastern coast [...].⁷²

⁷² Parkin, Ray, *H.M Bark Endeavour*, The Miegunyah Press, Melbourne, 2003, p. 442.

The controversy over who might have originally named the eastern part of New Holland as 'New South Wales' was likely due to the existence of many versions or transcriptions of Cook's journal. Cook's original journal, in his handwriting with undated revisions, is thought to be the version held by the National Library of Australia.⁷³ This version has the name 'New South Wales' written in over an erasure. We do not know when Cook made this particular revision. It may have been after he read Hawkesworth's version, sometime after 1775, and wanted to bring his personal copy into agreement with the published account.

There are several other copies in existence, at least one of which was probably transcribed by Richard Orton, who was Cook's clerk on the Endeavour. Orton's version shows the name 'New Wales'. It is this version that Hawkesworth, Cook's editor, seems to have used for the 1773 edition of the account of Cook's first voyage, where the name New South Wales is printed.⁷⁴ This suggests that Hawkesworth changed the name 'New Wales, which appears in the Mitchell Library holograph copy, to 'New South Wales'. Cook did not return from his second voyage until 1775, which was two years after Hawkesworth published his journal.

We note that Cook, in his hand written journal, was careful not to acknowledge any claim to New Holland by the Dutch, specifically the western part of the continent down to Van Diemen's Land, based on their prior discovery. We also note that Cook believed he could claim any territory on the basis that it was something 'no European had ever seen before'. Of course, it ignored the uncomfortable fact that Aboriginals had been living in the area for millennia.

Some historians argue that Cook claimed the territory of New South Wales inland to the 139° meridian. The assertion is incorrect. This argument appears to be based on Dutch maps showing the eastern boundary of New Holland at roughly 139° longitude. However, in Cook's journal, he states 'and on the western side I can make no new discovery the honour of which belongs to the Dutch Navigators [and as such they may lay claim to it as their property (deleted)]'. In fact, Cook made no mention of any specific longitude for his claim, in the name of the Sovereign, as if to imply that Sovereignty was next to God. He certainly did not attempt to secure 'the consent of the natives'. Cook's exploration of the eastern part of New Holland was an accident, and not part of his 'secret instructions'. Cook decided to explore the coast on a whim, after he had established that New Zealand was an island (or two islands) by the simple expedient of sailing around it. That is, Cook acknowledged the Dutch prior discovery of New Holland and then retracted his journal statement by deleting his reference to

⁷³ www.nla.gov.au/apps/cdview?pi=nla.ms-s289r-c Cook, James, 1728 – 1779... Journal of H.M.S. Endeavour, 1768 – 1771 [manuscript]. See images for Wednesday 22nd August 1770 journal entry, in Cook's handwriting, which are attached at the end of this section. They also show an erasure and correction, in Cook's handwriting, of 'New South'. 'Wales' is inserted above the line of script.

⁷⁴ <http://southseas.nla.gov.au/journals/hv23/622.html> Vols II-III, London 1773 edition (Hawkesworth).

prior Dutch discovery. He could hardly ignore their claim to discovery, as he was familiar with the Dutch maps and may have been carrying them on his expedition. The reason for his retraction can only have been to allow Britain to negotiate possession rights to the continent with the Dutch. We are not privy to the secret discussions between Britain and Holland that carved up the world and New Holland as territorial European possessions.⁷⁵ In this Imperial game of global reach and influence, prior indigenous occupation counted for little, and was the cause of the murderous conflict to follow in New Holland, for which Britain was solely responsible. Yet Britain has never been found accountable in any legal or moral sense.

Cook did excise Van Diemen's Land from his claim of possession, perhaps because he recognised Tasman's discovery over a century before. A claim of possession was one thing, but it would only be accepted by other European powers if the claim was followed by settlement and cultivation. This was the task assigned to Phillip. Cook's excision of land below the 40th parallel was corrected in Phillip's instructions, where Van Diemen's Land was formally included in the territory of New South Wales. As the world was being carved up for ownership (or 'possession'), only European claims counted for anything, supported by European laws of possession. Britain was equal to this task, and had its armed might to support it. God was on Britain's side. Perhaps after Henry VIII, God was an Englishman, obedient to the will of the Sovereign, and the British sovereign was God's instrument. Aboriginal resistance was therefore illegal, and the British occupation of their land lawful, according to the imposed laws of Britain. It led to Lemkinian genocide, for which the societal repercussions still ring.

⁷⁵ Part of the reason for British sensitivities, during the Pitt administration, was the 1777 *Treaty of Santo Ildefonso*, between Spain and Portugal, which divided the known world between the combatants, further recognising the old line of separation identified in their 1494 *Treaty of Tordesillas*. The Dutch were acting on behalf of Spain in this later treaty negotiation, and also had a primary interest in New Holland, having 'discovered' it. In Australia, this line of demarcation or 'Ancient Line of Separation' around the globe [Article 21] was probably the 135th meridian.

Two of them are of any extent the southernmost
is the largest and much higher than any part
of the main land, on the east side of this Island
seem'd to be good anchorage and falls that
to all appearance would afford both wood and
fresh water These Islands are known in the
Chart by the name of Yorks Isles.

To the southward end of them and even to
the eastward and northward are several low
Islands rocks and shoals out depth of
water in sailing between them and the main
was 12. 13 & 14 fathoms.

Wednesday 22^d gentle breeze at 8/131 and clear
weather. We had not stood above 3 or 4 miles along
shore to the westward before we discovered the land
a head to be Islands detached by several channels
from the main land upon this we brought too
to wait for the gawler called the other boats
on board and after giving ^{them proper instructions} sent them away
again to lead us through the channels next
the main and as soon as the gawler was on
board made sail with this ship after them,
soon after we discovered rocks & shoals in
this channel upon which I made the signal

have opposed our landing but as we approached
 the shore they all made off and left us in
 peaceable possession of as much of this Island
 as served our purpose. After landing I went
 upon the highest hill which however was of
 no great height, yet not less than twice or
 thrice the height of the ships masts heads
 but I could see from it no land between
 SW and WSW so that I did not doubt but
 that there was a passage. I could see plainly
 that the Lands lying to the N of this passage
 were composed of a number of Islands of various
 extent, both for height and circuit ranged
 one behind another as far to the Northward and
 Westward as I could see which could not be
 less than 12 or 14 Leagues. Having satisfied
 my self of the great Probability of a Passage
 thro' which I intend going with the Ship
 and therefore land no more upon this ^{Eastern} ~~Western~~
 Coast of New Holland and on the ~~Western~~ side
 I can make no new discovery the Honour of
 which belongs to the Dutch Navigators ~~and~~
~~and the English to it as their property~~
 but the Eastern Coast from the Latitude
 of 38° South down to this place I am confident

James Maria Matra's Proposal for Establishing a Settlement in New South Wales, 23rd August 1783 ⁷⁶

James Maria Magra was an American midshipman on board Cook's Endeavour. He later changed his surname to Matra to press his claim for a Corsican inheritance. After Cook annexed New South Wales (the coastline of east New Holland), the next consideration was what to do with it? Matra argued that, following the loss of the Americas, New South Wales be set aside as an area of free settlement for American loyalists to the British Crown, who had been displaced by the War of Independence. Matra wrote:

I am going to offer an object to the consideration of our Government what [that] may in time atone for the loss of our American colonies.

By the discoveries and enterprise of our officers, many new countries have been found which know no sovereign, and that hold out the most enticing allurements to European adventurers. None are more inviting than New South Wales.

Capt. Cook first coasted and surveyed the eastern side of that fine country, from the 38th degree of south latitude down to the 10th, where he found everything to induce him to give the most favourable account of it. In this immense tract of more than 2,000 miles there was every variety of soil, and great parts of it were extremely fertile, peopled only by a few black inhabitants, who, in the rudest state of society, knew no other arts than such as were necessary to their mere animal existence, and which was almost entirely sustained by catching fish.

The climate and soil are so happily adapted to produce every various and valuable production of Europe, and of both the Indies, that with good management, and a few settlers, in twenty or thirty years they might cause a revolution in the whole system of European commerce, and secure to England a monopoly of some part of it, and a very large share of the whole.

⁷⁶ Matra, James Maria. 'Proposal for establishing a Settlement in New South Wales', 23 August 1783 in *The Founding of Australia: The Argument about Australia's Origins*, ed. Ged Martin, Hale and Iremonger, Sydney, 1981. Historical Records of New South Wales, Vol I, Part 2, Phillip 1783 – 1792, pp. 1 – 6, plus related correspondence at pp. 7 – 10, with commentary by Alexander Britton at pp. xxiv – xxvi. A transcript is available online from New Zealand at <http://nzetc.victoria.ac.nz/tm/scholarly/tei-McN01Hist-t1-b2-d1.html> but surprisingly not from Australia, for example www.foundingdocs.gov.au, which appears to be lacking adequate Commonwealth funding.

Part of it lies in a climate parallel to the Spice Islands, and is fitted for the production of that valuable commodity, as well as the sugar-cane, tea, coffee, silk, cotton, indigo, tobacco, and the other articles of commerce that have been so advantageous to the maritime powers of Europe.

I must not omit the mention of a very important article, which may be obtained in any quantity, if this settlement be made the proper use of, which would be very considerable consequence, both among the necessaries and conveniences of life. I mean the New Zealand hemp or flax-plant, an object equally of curiosity and utility. By proper operations it would serve the various purposes of hemp, flax, and silk, and it is more easily manufactured than any one of them. In naval equipment it would be of the greatest importance; a cable of the circumference of ten inches would be equal in strength to one of eighteen inches made of European hemp. Our manufacturers are of the opinion that canvas would be superior in strength and beauty to any canvas of our own country. The threads or filaments of this plant are formed by nature with the most exquisite delicacy, and they may be so minutely divided as to be small enough to make the finest cambric; in colour and gloss it resembles silk. After my true, though imperfect description of this plant, I need not enlarge on it, as a very singular acquisition, both to the arts of convenience and luxury.

This country may afford asylum to those unfortunate American loyalists to whom Great Britain is bound by every tie of honour and gratitude to protect and support, where they may repair their broken fortunes, and again enjoy their former domestic felicity.

That the Government may run no risqué nor be left to act in a business of this kind without sufficient information, it is proposed that one ship of the peace establishment (to incur the least possible expence [sic]) be directly sent to that country, for the discovery and allotment of a proper district, for the intended settlement; that one or two gentlemen of capacity and knowledge, as well in soil and situation, as in every other requisite, be sent in her, that there may be no imposition on the Government, nor upon the Americans, who, with their families, shall adventure there.

If the Government be disposed to extend this plan, two vessels may be sent with two companies of marines, selected from among such of that corps as best understand husbandry, or manufacturies, and about twenty artificers, who are all the emigration required from the parent State; these last to be chiefly such as are taken on board ships of war for carpenters' and armourers' crews, with a few potters and gardeners.

These twenty men and the marines, under a proper person, to be left at the new settlement, with materials and provisions, to prepare for the reception of the intended settlers, that their wants may be as few as possible on their arrival.

As the ship, or ships, stop at the Cape of Good Hope, a sufficient stock to begin with of cows, sheep, goats, hogs, poultry, and seeds may be obtained there. A supply of the like articles, as well as cotton seeds, plantains, grapes, grain, &c., &c., may be had in any quantity at Savu or any of the Moluccas, which are very near New South Wales.

When the landing is effected the smaller vessel may be dispatched home with the intelligence; and while the party designed to be left are superintending the gardens and increase of live stock, the other ship may, if thought proper, be despatched to New Caledonia, Otahite, and the neighbouring islands to procure a few families there, and as many women as may serve for the men left behind. There is every reason to believe they may be obtained without difficulty. If but one vessel goes, the party with their stock may be left without apprehension of danger from the natives.

Sir Joseph Banks is of the opinion that we may draw any number of useful inhabitants from China, agreeably to an invariable custom of the Dutch in forming or recruiting their eastern settlements.

As it is intended not to involve the Government in either a great or a useless expense (for the settlement is designed to increase the wealth of the parent country, as well as for the emolument of the adventurers), a sum not exceeding 3,000 pounds will be more than adequate to the whole expense of Government. Most of the tools, saws, axes, &c., &c., for the use of the party left may be drawn from the ordnance and other public stores, where at present they are useless; and the vessels also, being part of the peace establishment, neither can, nor ought to be, fairly reckoned in the expenditure.

That the Ministry may be convinced that this is not a vain, idle scheme, taken up without due attention and consideration, they may be assured that the matter has been seriously considered by some of the most intelligent and candid Americans, who all agree that, under the patronage and protection of Government, it offers the most favorable [sic] prospects that have yet occurred to better the fortunes and to promote the happiness of their fellow-sufferers and countrymen.

Sir Joseph Banks highly approves of the settlement, and is very ready to give his opinion of it, either to his Majesty's Ministry or others, whenever they may be pleased to require it.

Should this settlement be made, we may enter into a commerce that would render our trade to China, hitherto extremely against us, very favourable. The Aleutian and Foxes islands, situated between Asia and America, which abound with the choicest furs, lie nearly north of New South Wales. It is from these islands the Russians get the most and best of their furs, with which they carry on a very lucrative trade by land with the Chinese. Our ships that sailed under the command of Captain Cook and Clerke stopped at some of them, and the skins they procured then sold in China at 400 hard dollars each, though for the few they brought home, of the same quality, they only received about ten pounds each. As our situation in New South Wales would enable us to carry on this trade with the utmost facility, we should be no longer under the necessity of sending such immense quantities of silver for the different articles we import from the Chinese Empire.⁷⁷

There is also a prospect of considerably extending our woollen trade. We know that large quantities of woollen cloth are smuggled to Japan by the Russians, which, as it is taken by land carriage from St. Petersburg to Kamchatka, and then to the islands by a very precarious navigation in boats, must be extremely dear. The Japanese, however, go in their junks to the islands and purchase great quantities of it.

The peninsula of Korea, a kingdom of tributary to the Chinese, and unvisited by Europeans, has its supply at second-hand chiefly from the Japanese. No ship has ever attempted this commerce, excepting once or twice that the Spaniards ventured thither from their American dominions; but as the inhabitants of New Spain are but indifferent navigators for the high, cold latitudes, they could not oftener repeat the enterprise.

It may be seen by Captain Cook's voyage that New Zealand is covered with timber of size and every quality that indicates long duration; it grows close to the water's edge, and may be easily obtained. Would it not be worth while for such as may be dispatched to New South Wales to take in some of this timber on their return, for the use of the King's yards? As the two countries are within a fortnight's run of each other, and as we might be of the utmost service to the New Zealanders, I think it highly

⁷⁷ Britain eventually solved this trade imbalance with China by forcibly replacing silver with opium, in payment for tea and other goods. When China objected to the opium trade, Britain forced them to submit by waging two wars

probable that this plan might become eminently useful to us as a naval power, especially as we might thus procure masts, a single tree of which would be large enough for a first-rate ship, and planks superior to any that Europe possesses.

By the preliminary articles of peace with Holland we are entitled to a free navigation in the Molucca seas. Without a settlement in the neighbourhood, the concession is useless; for the Dutch have an agent almost on every island in those seas. If we have a settlement, it is unnecessary; for as spices are the only articles we could expect by it, it is probable we should stand in no need of their indulgence, for as part of New South Wales lies in the same latitude with the Moluccas, and is even very close to them, there is every reason to suppose that what nature has so bountifully bestowed on the small islands may also be found on the larger. But if, contrary to analogy, it should not be so, the defect is easily supplied, for, as the seeds are procured without difficulty, any quantity may speedily be cultivated.

To those who are alarmed at the idea of weakening the mother country by opening a channel for emigration, I must answer that it is more profitable that a part of our countrymen should go to a new abode, where they may be useful to us, than to the American States. If we cannot keep our subjects at home, it is sound policy to point out a road by following of which they may add to the national strength.

The place which New South Wales holds on our globe might give it a very commanding influence in the policy of Europe. If a colony from Britain was established in that large tract of country, and if we were at war with Holland or Spain, we might very powerfully annoy either State from our new settlement. We might, with a safe and expeditious voyage, make naval incursions on Java and the other Dutch settlements; and we might with equal facility invade the coast of Spanish America, and intercept the Manilla [sic] ships, laden with the treasures of the west. This check which New South Wales would be in time of war on both those powers makes it a very important object when we view it in the chart of the world with a political eye.

Sir Joseph Bank's high approbation of the scheme which I have here proposed deserves the most respectful attention of every sensible, liberal, and spirited individual amongst his countrymen. The language of encomium, applied to this gentleman, would surely be inequitably censured as the language of adulation. To spurn the alluring pleasures which fortune procures in a frivolous and luxurious age, and to encounter

extreme difficulties and dangers in pursuit of discoveries, which are of great benefit to mankind, is a complicated and illustrious event, as useful as it is rare, and which calls for the warmest publick gratitude and esteem.

I shall take this opportunity to make a remark on colonization which has not occurred to me in any author, and which I flatter myself will contain some important civil and political truth.

Too great a diminution of inhabitants of the mother country is commonly apprehended from voluntary emigration – an apprehension which seems to me not to be the result of mature reflexion. That we almost universally have a strong affection for our native soil is an observation as true as it is old. It is founded on the affections of human nature. Not only a Swiss, but even an Icelander, when he is abroad, sickens and languishes in his absence from his native country; therefore, few of any country will ever think of settling in any foreign part of the world, from a restless mind and from romantic views. A man's affairs are generally in a very distressed, in a desperate situation when he resolves to take a long adieu of his native soil, and of connections which must always be dear to him. Hence a body of emigrants, nay a numerous body of emigrants, may in a commercial view be of great and permanent service to their parent community in some remote part of the world, who, if they continue at home, will probably live to see their own ruin, and will be very prejudicial to society. The politician of an expanded mind reasons from the almost invariable actions of human nature. The doctrine of the petty statesman is hardly applicable to a larger extent than that of his own closet. When our circumstances are adverse in the extreme they often produce illegal and rapacious conduct. If a poor man of broken fortunes and of any pretensions be timid in his nature, he most probably becomes a useless, if he has an ardent spirit, he becomes a bad and a criminal, citizen. There are indeed some epochs in a State when emigrations from it may be too numerous; but when from some calamitous and urgent publick cause it must be unworthy of inhabitants.

James Matra, August 23rd, 1783

Draught Instructions for Governor Phillip, 25 April 1787

When Britain issued these instructions, it corrected an apparent error of Cook's, who had only claimed the coastline between two latitudes, inexplicably without specifying longitudinal boundaries, in the name of the British sovereign. Or perhaps there were secret British negotiations with the Dutch, to agree the eastern meridian boundary of their claim to New Holland. Arriving with Phillip, Britain now extended its claim of possession inland from the

coast to longitude 135° east, roughly mid way across the continent, and including Van Diemen's Land, which Britain had previously deemed the possession of the Dutch, through earlier discovery by Tasman in 1642.

Britain included the following instruction to Phillip, concerning the treatment of Aboriginals. There is evidence that Phillip initially attempted to comply, although sometimes he had to resort with kidnapping 'to conciliate their affections'. It is certain that land grants and military operations were far from conciliation. The particular instruction, which Britain repeated to other incoming Governors for their tour of duty, can be seen as empty rhetoric, mere window dressing for forcible occupation, where all land belonged to the Crown:

*'You are to endeavour by every possible means to open an intercourse with the natives and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them; and if any of our subjects shall wantonly destroy them, or give them an unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence'*⁷⁸

The draft instructions make no mention or acknowledgment of Aboriginal prior possession, and allowed Phillip's right to make grants of 'Crown' land to whomever he chose, presumably excluding the Aboriginals. Thus, Britain's intent was clear from the first day of the invasion, that Aboriginals had no rights to their homelands. Perhaps the thought was that Britain could assimilate Aboriginals into British 'civilisation' through 'conciliation'. The violent racial consequences over the next one hundred and fifty years were therefore inevitable.

Philip was the first Governor of the newly formed colony of New South Wales. He began the practices of land grants and settlement, acting on Britain's general instructions. He allowed the sexual predation, driven by the shortage of women. He excluded Aboriginals from land ownership. He used the military to enforce Britain's occupation. Therefore, he must carry the responsibility, as Britain's first administrative instrument, for the long-term consequences of Britain's invasion.

⁷⁸ See HRA 1/1: 13-14.

A Lemkinian genocidal process began with Phillip, exacerbated by introduced infective disorders. The most significant was a smallpox epidemic, which first broke out in April 1789, probably caused by some variole major samples held amongst the colony's medical supplies. Without Watkin-Tench's account, we would not know that the samples existed. And although Tench said it was unthinkable that the samples had been misused, there is no reported evidence that anyone even checked that they were still intact, certainly not Phillip, given the substance of his despatches.

Phillip did not report the devastating outbreak to his superiors until ten months after it first appeared, an extraordinary omission, although he thought it significant enough to include a mention, in despatches dated February 1790, the sole death from smallpox of an American sailor on board the Supply in May the previous year, about a month after the outbreak began amongst the Aboriginal population.

In February 1790, Phillip wrote to Lord Sydney:

Whether the small-pox, which has proved fatal to great numbers of the natives, is a disorder to which they were subject before any Europeans visited this country, or whether it was brought by the French ships, we have not yet attained sufficient knowledge of the language to determine It never appeared on board any of the ships in our passage, nor in the settlement, until some time after numbers of the natives had been seen dead with the disease in different parts of the harbour...[...] the small-pox never appeared in the settlement until the 2nd of May, when a man belonging to the Supply was seized with the disorder and died a few days afterwards..⁷⁹

Why did Phillip wait ten months before reporting the outbreak to his superiors? Why did Phillip fail to mention that the outbreak had begun some nine months prior? Why did Phillip not mention the medical supplies as a probable cause of the outbreak? Between May 1789 and February 1790, there were numerous despatches to Britain, none of which mentioned the sudden devastating disease occurrence. If there were smallpox samples in his medical supplies, and Watkin-Tench informs us that there were,⁸⁰ why did Phillip not do a simple check to see if they were still present? Why did the Home Office show so little interest in the outbreak? There is no evidence from the British despatch record over the ensuing years that they mentioned smallpox at all, following the February 1790 communication from Phillip about the human calamity. Perhaps the British Government was unsurprised. At a minimum, it

⁷⁹ See Historical Records of New South Wales, Vol I, Part 2, Phillip, 1783 – 1792, Governor Phillip to Lord Sydney, February 12th 1790, p. 299

⁸⁰ <https://ebooks.adelaide.edu.au/t/tench/watkin/botany/>

was unconcerned. In fact, the most significant despatch in 1789 was between Lord Grenville and Phillip in August 1789, and it concerned land grants to non-commissioned officers.⁸¹ And why is Major Ross so curiously silent? We do know that smallpox infected blankets were used by General Sir Jeffrey Amherst in his war against the North American Indians in 1763. According to the American revolutionaries, the British also used smallpox against them in 1775, and we also know that Ross fought in the North American war, although Connor argues that Ross may not have known about this because he served in Canada from 1757 to 1760, and 'left three years before the ' smallpox incident occurred'. However, Ross also served in Boston around 1775, when the Americans claimed that the British used smallpox against them.⁸²

There is a detailed Aboriginal oral record that the disease epicentre was at what is now called Balmoral Beach, north of the Sydney Cove settlement on Port Jackson, where British soldiers under Major Ross- the second in command of the First Fleet - had been distributing blankets as a supposedly friendly gesture.⁸³

History can be defined by what is left unsaid, the hidden history, which slowly and inevitably becomes revealed even when there is official suppression of the actual evidence. Phillip's administration is no different. The British version is that Phillip was a capable and humane bureaucrat, tasked with establishing penal colonies in remote New South Wales and New Norfolk, when the supply line was twelve months away and help was uncertain. His secondary objective was to build a settlement, provide land grants, encourage immigration and become a source of supply for flax and timber, used for masts and sails. Another way of expressing the truism regarding the exercise of power: oppressors write history, and rarely allow the victims a voice. *Force majeure* exerts its repressive authority, the forceful argument that might is right.

When Phillip arrived, he almost immediately began commandeering large tracts of land along the waterways and prime agricultural areas in order to feed the colony. From 1792, as the settlement grew, Phillip began a process of land grants to his favoured few. Near historic Rydalmere where I live, close by Parramatta and its river, the local Ermington library proudly carries an external bicentennial plaque, dated 1792, commemorating the first land grants in the area by Governor Phillip. In Phillip's extensive and generous land allocations across the

⁸¹ 20 August, 24 August, *ibid*, pp. 256 – 260.

⁸² John Connor, *The Australian Frontier Wars 1788 – 1838*, p. 29.

⁸³ FWAYAF *Recollections From a (Homicidal) Pastoral Frontier*.

newly formed colony, the Ermington grants were a very small amount, perhaps 600 or 700 acres, but his largesse did not consider the Aboriginals, whose land it was. After a portion of land was granted, Aboriginals were simply driven off, like wraiths, and expected to survive without access to their customary food sources along the riverbanks and on the plains.

As a general policy, the British did not permit Aboriginals to own land. After all, the purpose of land in British thinking was to own it as 'property' and to cultivate it, and Aboriginals had no interest in cultivation or private property. They held the perverse view that land was for hunting and common enjoyment for the benefit of all. The Ermington plaque reads

'Settlement of Ermington. Governor Phillip granted land in this vicinity to eight marines and settlement took place in 1792. These pioneer settlers were: Isaac Archer, Alexander McDonald, John Carver, James Manning, John Colthred, Thomas Swinnerton, Thomas Caltrell, Thomas Tynan'.

I have not been able to determine the exact location of their land grants, or the actual size. Not surprisingly, Ermington library does not have any cadastral map information, but I managed to unearth that each marine was awarded about 80 acres, before some of the allotments were acquired and consolidated around the Field of Mars district by the infamous Rev. Samuel Marsden, who managed to prey on Aboriginals in many ways, generally for his self-enrichment.

Britain continued this inequitable practice of awarding land to favoured applicants for a nominal amount or consideration until the 1820s. At this time, colonial Governors began to make a series of declarations that certain 'unoccupied' land was 'waste land' which they then alienated (claimed) in the name of the Crown, leaving them free to replace grants with a far more profitable system of land sales across the continent. This change of British Government land policy was a result of Commissioner Bigge's recommendations in 1823. Eventually, as the pastoral map covered most of Australia outside the so-called 'settled areas', Aboriginals were left with nowhere to go. They were expected, and sometimes violently encouraged, to die out.

The policy almost succeeded. In the 1911 census, there were only about 30,000 full blood Aboriginals recorded, a cataclysmic population fall exceeding 95%, leaving the survivors shell-shocked and their tormentors triumphant, resolved to continue with an end stage policy of incarceration in detention centres, if they accepted their plight, and filthy gaols, if they didn't. Many more died. Britain expected them to. However, their spirit willed them to live. Today, Aboriginals suffer one of the highest proportionate rates of incarceration and ill health

in the world for any ethnic group - far worse than South Africa, for example, during its inhumane period of apartheid.

History often considers Phillip as a fair-minded administrator, operating under difficult conditions. Many historians note his refusal to prosecute or punish Bennelong, when he speared Phillip at Manly Beach. But consider the facts. Yes, Bennelong speared Phillip. The spear was not a death spear, with detachable stones that would cause a fatal infection when dislodged. Bennelong wanted to achieve respect from his tribe, after Phillip had kidnapped him. Phillip knew all this. Phillip needed Bennelong. He needed Bennelong's support, when the British colony was vulnerable. Therefore, he extended an olive branch. But was Phillip really so benevolent?

We will spend some time with Phillip, New South Wales' first Governor, in order to appreciate his capability for dishonest, frequently devious, and sometimes murderous behaviour. We will examine Phillip's relationship with two of his officers, Watkin Tench and William Dawes, as an instructive case instance of state sponsored Aboriginal repression, what became a lengthy, patterned process. Phillip was the first in a long conga line of such administrators, many far more oppressive than Phillip, all pressing the cause of Britain Pty Ltd in its antipodean colony through the rise of settler sovereignty and the destruction of Aboriginal society. By understanding Phillip in some detail, we may reasonably claim to better understand his successors; for a similar Imperial occupation process, based on force of arms and racist legislation, shaped their collective administrative behaviours for an extended period. This process depended on Indigenocide and forcible deprivation of land and culture to achieve pastoral supremacy. To understand this process is to know ourselves. Perhaps it will allow us to learn.

John Connor, a military historian, and Inga Clendinnen, a very respected and eloquent colonial historian, are both key proponents of the popular view that 'we cannot judge the past, that standards were different then'. But were the standards different then? When facts are indisputable, the only feasible counter argument is that 'the actions were appropriate for the standards of the times', which often translates as 'people were acting with the best of intentions', so it follows, their actions were reasonable. What are the facts, upon which Connor and Clendinnen depend? Did Phillip know what he was doing was wrong? More importantly, did his officers? Both Clendinnen and Connor assert that Phillip was acting appropriately, according to the 'standards of the time', and did not believe that his actions were wrong, either morally or legally. This defence may be valid, but only if his officers also

had the same view. Nevertheless, Tench and Dawes both knew that Phillip's command for a punitive reprisal against Aboriginals was against their moral code, showed callous indifference to Aboriginal life, and both rejected Phillip's order, in rather different ways.

Does the refusal to obey Phillip's command, or bumbling compliance, then translate as insubordination, rather than moral rejection? Are Clendinnen and Connor exposed as presenting a morally flawed argument, that they are selectively presenting the facts? Both Connor and Clendinnen propone that we cannot judge the past. Their argument: If someone believes their actions are justified, according to the circumstances of the time, it follows that they would not accept that they were aware their actions were wrong. But Phillip's officers clearly knew that Phillip's orders to murder Aboriginals were morally repugnant, so they rejected them. Even Phillip probably believed he was wrong, because he invited Tench to propose another punitive tack, which Phillip readily accepted in a private meeting. Phillip was also deceptively careful not to include all the facts that so antagonised Tench and Dawes, when he sought to apprise Grenville, the Secretary of State, of Dawes' alleged insubordination.

If Phillip manipulated the facts to his superiors, it is clear evidence he knew his actions were wrong (or *mens rea*, a legal principle meaning 'guilty mind', an important basis for British criminal jurisprudence from at least the 12th century). We will present the evidence that Phillip, far from being the pillar of virtue and approbation where history currently presents him, was at times a duplicitous, vindictive and morally compromised rodent in the loyal service of the British Government, beset by myriad problems that might challenge his authority and the viability of the colony, concerned to keep his superiors onside, unwilling to recognise Aboriginal rights to their land, his behaviour by no means unique among colonial administrators who were generally driven by their career aspirations and the need for self-preservation. When Aboriginals resisted the occupation process, he took harsh and vindictive measures against them, convinced he was right, convinced that any resistance was an affront to the British Empire and its authority to impose summary justice. He saw no wrong in Aboriginal dispossession, was prepared to destroy the careers of officers who did not mindlessly follow his orders, who knew right from wrong but believed the chain of command was paramount, and is therefore deserving of our contempt. You may say 'where is the evidence'? Here it is.

We begin by quoting Connor. He writes:

The punitive expeditions of December 1790 have become notorious because Phillip's original orders instructed the expedition to capture two Bidjigal men and kill ten. The dead were to be beheaded, and their heads bought back to Sydney 'for which purpose,

hatchets and bags would be furnished'. Reynolds refers to this original order when he states that Phillip advocated using terror against Aborigines. This is true, but the word 'terror' must be understood in the way Phillip would have defined it, as an integral part of the legal system. The British historian Douglas Hay has written that the eighteenth century British were 'a people schooled in the lessons of Justice, Terror and Mercy'. Inga Clendinnen adds that Phillip, in issuing this first order, was attempting to stage 'a histrionic performance of the terror of British law in accordance with the fine late-18th-century tradition of formal floggings, elaborate death rites, and breathless last-minute reprieves and repentances'.⁸⁴

Reynolds neglects to mention that the expedition did not take place under the original order to behead ten Aborigines. As part of the legal 'theatre', Phillip decided to moderate his terror with mercy and asked Tench, the expedition's commander, if he wished to 'propose any alteration of the orders'. Tench suggested that the capture of two and killing of ten be reduced to the capture of six. Phillip 'instantly' agreed, though he insisted that if six were captured, two would be hanged as punishment for the deaths for which the Bidjigal were responsible; if six could not be captured, they were to be shot. Phillip farther restrained the conduct of the punitive expedition by stating that women and children were not be harmed, huts were not to be destroyed, and that no ruses were to be used to draw the Bidjigal towards the expedition.

The first expedition — consisting of Tench, Captain Hill of the newly arrived New South Wales Corps, Lieutenant Poulden and Lieutenant Dawes, the surgeons Worgan and Lowe, three sergeants, three corporals, and forty privates — left Sydney with three days' provisions at 4:00 AM on 14 December 1790. They halted for the night, probably between Cook's and George's rivers, and began marching at dawn the next day towards the mouth of the George's River with the aim of working down the coastline towards the Cook's River. However, the two convict guides, who had been with McEntire when he had been speared, and were perhaps anxious to avoid a similar fate themselves, turned towards the coast too early, with the result that the marines suddenly found themselves on the bay, halfway between the two rivers, near five Eora men. Tench wrote: 'We pursued; but a contest between heavy-armed Europeans, fettered by ligatures, and naked unencumbered Indians, was too unequal

⁸⁴ Henry Reynolds, 'From Armband to Blindfold', *Australian Review of Books*, April 2001, p. 8; Douglas Hay, 'Property', Authority and the Criminal Law', in Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, Allen Lane, London, 1975, p. 63; Inga Clendinnen, 'First Contact', *Australian Review of Books*, May 2001, p. 7. The footnotes are those of Connor.

to last long'. The expedition then rushed to some nearby huts, but the people there escaped by canoe. Tench ordered a search of the huts for weapons, but they found only fishing gear.

The expedition having failed, the party returned to Sydney. Phillip then ordered Tench out for a second expedition. This time Tench used three tactics in an attempt to gain surprise. The first, in an attempt to lull the Bidjigal into a false sense of security, was an open announcement that the new expedition was aimed at the man who speared Phillip at Manly and not the Bidjigal at Botany Bay. The second, to save time and keep the element of surprise, was his attempt to cross the Wolli Creek estuary.' This decision backfired, because three men — including Tench — got stuck in the mud and had to be hauled out with ropes. The third attempt to surprise the Bidjigal occurred when the party came near the huts just before dawn. Tench divided the detachment into three groups and ordered them, under 'the most perfect silence ... to take a different route, so as to meet at the village at the same moment'. Tench was pleased with the marines' execution of this order: he wrote 'nothing could succeed more exactly than the arrival of the several detachments'. However, the huts were empty and had probably been so since the first expedition. The party rested up in the heat of the day and returned to Sydney at 9:00 AM the next morning. Private John Easty took part in both expeditions and reckoned they were nothing but a 'Troublesome Teadious March'.⁸⁵

We now turn to Watkin Tench's ⁸⁶ journal account of the incident. Tench was an eloquent and truthful observer of early Sydney, and his report is completely engaging, unlike the turgid and uninteresting journal attributed to Phillip, whom we are inclined to dismiss for his demonstrable lack of truthfulness.⁸⁷ We learn from Tench that Phillip invited Tench's opinion on the plan to make a reprisal military assault on Aboriginals to the south and bring back a number of heads. Phillip proposed this would cause fear in the Aboriginal community and thereby reduce ongoing conflict and resistance. Phillip was aware that his plan had some resistance among his officers, Lieutenant William Dawes of the marines in particular. Captain Tench, Dawes' superior officer, knew Phillip's vindictive plan was wrong, inhumane and lacked proportionality, so he convinced Phillip of a softer alternative. It is likely, in this keystone cops attempt at retribution, that Tench was going out of his way to make the

⁸⁵ John Connor, *The Australian Frontier Wars 1788 – 1838*, pp. 31 – 33.

⁸⁶ *A Complete Account of the Settlement at Port Jackson Including An Accurate Description of the Situation of the Colony; of the Natives; and Of Its Natural Productions* Tench, Watkin (1759-1833), pp. 64 – 73.

<http://setis.library.usyd.edu.au/ozlit/pdf/p00044.pdf>

⁸⁷ *The Voyage of Governor Phillip to Botany Bay* is a compilation from various sources, and was published by John Stockdale in 1789. It is unknown what Phillip contributed. As a journal with questionable authenticity, it lacks the immediacy of Tench.

execution of Phillip's plan a failure. Tench was also aware that McEntire had probably caused his own demise from a death spear, because of McEntire's likely random killing of Aboriginals and sexual predation on their women, something that Phillip, in his flawed judgment, was clearly not prepared to accept. The likely reason? Phillip depended on the gamekeeper to hunt for food in what was little more than a foraging economy. Moreover, he did not want his authority challenged. But Phillip was also concerned that Aboriginal resistance to the British occupation process had already killed or wounded seventeen British, without loss to Aboriginals, so he decided on his own vengeful random killing by way of reprisal, to try and shock Aboriginals into terrified submission. If Phillip thought terror tactics would work, they failed. From this point, the conflict escalated and became systemic, and would follow the beachhead settlements all around Australia as settler society began its cancerous spread, while successive British Governments passively looked on, occasionally with amused detachment.

CHAPTER XII.

Transactions of the Colony in Part of December, 1790.

ON THE 9th of the month, a serjeant of marines, with three convicts, among whom was Mc'Entire, the governor's gamekeeper (the person of whom Baneelon had, on former occasions, shewn so much dread and hatred) went out on a shooting party. Having passed the north arm of Botany Bay, they proceeded to a hut formed of boughs, which had been lately erected on this peninsula, for the accommodation of sportsmen who wished to continue by night in the woods: for, as the kanguroos in the daytime, chiefly keep in the cover, it is customary on these parties to sleep until near sunset, and watch for the game during the night, and in the early part of the morning. Accordingly, having lighted a fire, they lay down, without distrust or suspicion.

About one o'clock, the serjeant was awakened by a rustling noise in the bushes near him, and supposing it to proceed from a kangaroo, called to his comrades, who instantly jumped up. On looking about more narrowly, they saw two natives, with spears in their hands, creeping towards them, and three others a little farther behind. As this naturally created alarm, Mc'Entire said, 'don't be afraid, I know them,' and immediately laying down his gun, stepped forward, and spoke to them in their own language. The Indians, finding they were discovered, kept slowly retreating, and Mc'Entire accompanied them about a hundred yards, talking familiarly all the while.

One of them now jumped on a fallen tree, and without giving the least warning of his intention, launched his spear at Mc'Entire, and lodged it in his left side. The person who committed this wanton act, was described as a young man, with a speck,

or blemish, on his left eye; that he had been lately among us, was evident from his being newly shaved.

The wounded man immediately drew back, and joining his party, cried, 'I am a dead man'. While one broke off the end of the spear, the other two set out with their guns in pursuit of the natives; but their swiftness of foot, soon convinced our people of the impossibility of reaching them. It was now determined to attempt to carry Mc'Entire home, as his death was apprehended to be near, and he expressed a longing desire not to be left to expire in the woods. Being an uncommonly robust muscular man, notwithstanding a great effusion of blood, he was able, with the assistance of his comrades, to creep slowly along, and reached Sydney about two o'clock the next morning. On the wound being examined by the surgeons, it was pronounced mortal. The poor wretch now began to utter the most dreadful exclamations, and to accuse himself of the commission of crimes of the deepest dye; accompanied with such expressions of his despair of God's mercy, as are too terrible to repeat.

In the course of the day, Colbee, and several more natives came in, and were taken to the bed where the wounded man lay. Their behaviour indicated, that they had already heard of the accident, as they repeated twice or thrice the name of the murderer Pim-el-wì, saying, that he lived at Botany Bay. To gain knowledge of their treatment of similar wounds, one of the surgeons made signs of extracting the spear; but this they violently opposed, and said, if it were done, death would instantly follow.

On the 12th, the extraction of the spear was, however, judged practicable, and was accordingly performed. That part of it which had penetrated the body, measured seven inches and a half long, having on it a wooden barb, and several smaller ones of stone, fastened on with yellow gum, most of which, owing to the force necessary in extraction, were torn off and lodged in the patient. The spear had passed between two ribs, and had wounded the left lobe of the lungs. He lingered⁸⁸ until the 20th of January, and then expired. On opening the corpse, it was found that the left lung had perished from suppuration, its remains adhering to the ribs. Some pieces of stone, which had dropped from the spear, were seen, but no barb of wood.

The governor was at Rose-hill when this accident happened. On the day after he returned to Sydney, the following order was issued: —

“Several tribes of the natives still continuing to throw spears at any man they meet unarmed, by which several have been killed, or dangerously wounded: — the governor, in order to deter the natives from such practices in future, has

⁸⁸ From the aversion uniformly shown by all the natives to this unhappy man, he had long been suspected by us of having in his excursions shot and injured them. To gain information on this head from him, the moment of contrition was seized. On being questioned with great seriousness, he, however, declared that he had never fired but once on a native, and then had not killed but severely wounded him, and this in his own defence. Notwithstanding this death-bed confession, most people doubted the truth of the relation, from his general character and other circumstances.

ordered out a party to search for the man who wounded the convict Mc'Entire, in so dangerous a manner on Friday last, though no offence was offered on his part, in order to make a signal example of that tribe. At the same time, the governor strictly forbids, under penalty of the severest punishment, any soldier, or other person, not expressly ordered out for that purpose, ever to fire on any native except in his own defence; or to molest him in any shape, or to bring away any spears, or other articles, which they may find belonging to those people. — The natives will be made severe examples of whenever any man is wounded by them: but this will be done in a manner which may satisfy them, that it is a punishment inflicted on them for their own bad conduct, and of which they cannot be made sensible, if they are not treated with kindness, while they continue peaceable and quiet.

“A party, consisting of two captains, two subalterns, and forty privates, with a proper number of non-commissioned officers, from the garrison, with three days provisions, &c. are to be ready to march to-morrow morning at day-light, in order to bring in six of those natives who reside near the head of Botany Bay; or, if that should be found impracticable, to put that number to death.”

Just previous to this order being issued, the author of this publication received a direction to attend the governor at head quarters immediately. I went, and his excellency informed me, that he had pitched upon me to execute the foregoing command. He added, that the two subalterns who were to be drawn from the marine corps, should be chosen by myself: that the serjeant, and the two convicts who were with Mc'Entire, should attend as guides: that we were to proceed to the peninsula at the head of Botany Bay; and thence, or from any part of the north arm of the bay, we were, if practicable, to bring away two natives as prisoners: and to put to death ten: that we were to destroy all weapons of war, but nothing else: that no hut was to be burned: that all women and children were to remain uninjured, not being comprehended within the scope of the order: that our operations were to be directed, either by surprize, or open force: that after we had made any prisoners, all communication, even with those natives with whom we were in habits of intercourse, was to be avoided, and none of them suffered to approach us. — That we were to cut off, and bring in the heads of the slain, for which purpose, hatchets and bags would be furnished. — And finally, that no signal of amity or invitation should be used, in order to allure them to us; or if made on their part, to be answered by us: for that such conduct would be not only present treachery, but give them reason to distrust every future mark of peace and friendship on our part.

His Excellency was now pleased to enter into the reasons which had induced him to adopt measures of such severity. He said that since our arrival in the country, no less than seventeen of our people had either been killed or wounded by the natives: — that he looked upon the tribe known by the name of Bid-ee-gâl, living on the beforementioned peninsula, and chiefly on the north arm of Botany Bay, to be the principal aggressors: — that against this tribe he was determined to strike a decisive blow, in order, at once to convince them of our superiority, and to infuse an universal terror, which might operate to prevent farther mischief. — That his observations on the natives had led him to conclude, that although they did not fear death individually, yet that the relative weight and importance of the different tribes appeared to be the highest object of their estimation, as each tribe deemed its strength and security to consist wholly in its powers, aggregately considered. — That his motive for having so long delayed to use violent measures, had arisen from believing, that in every former instance of hostility, they had acted either from having received injury, or from misapprehension.

“To the latter of these causes,” added he, “I attribute my own wound; but in this business of Mc'Entire, I am fully persuaded that they were unprovoked, and the barbarity of their conduct admits of no extenuation: for I have separately examined the serjeant, of whose veracity I have the highest opinion, and the two convicts; and their story is short, simple, and alike. I have in vain tried to stimulate Baneelon, Colbee, and the other natives who live among us, to bring in the aggressor: yesterday, indeed, they promised me to do it, and actually went away, as if bent on such a design; but Baneelon, instead of directing his steps to Botany Bay, crossed the harbour in his canoe, in order to draw the foreteeth of some of the young men; and Colbee, in the room of fulfilling his engagement, is loitering about the look-out house. Nay, so far from wishing even to describe faithfully the person of the man who has thrown the spear, they pretended that he has a distorted foot, which is a palpable falsehood. So that we have our efforts only to depend upon; and I am resolved to execute the prisoners who may be brought in, in the most public and exemplary manner, in the presence of as many of their countrymen as can be collected, after having explained the cause of such a punishment; and my fixed determination to repeat it, whenever any future breach of good conduct on their side, shall render it necessary.”

Here the governor stopped, and addressing himself to me, said, if I could propose any alteration of the orders under which I was to act, he would patiently listen to me: encouraged by this condescension, I begged leave to offer for

consideration, whether, instead of destroying ten persons, the capture of six would not better answer all the purposes for which the expedition was to be undertaken; as out of this number, a part might be set aside for retaliation; and the rest, at a proper time, liberated, after having seen the fate of their comrades, and being made sensible of the cause of their own detention.

This scheme, His Excellency was pleased instantly to adopt, adding, "if six cannot be taken, let this number be shot. Should you, however, find it practicable to take so many, I will hang two, and send the rest to Norfolk Island for a certain period, which will cause their countrymen to believe, that we have dispatched them secretly." The order was accordingly altered to its present form; and I took my leave to prepare, after being again cautioned not to deceive, by holding signals of amity.

At four o'clock on the morning of the 14th we marched: the detachment consisted, besides myself, of captain Hill of the New South Wales corps, lieutenants Poulder and Dawes, of the marines, Mr. Worgan and Mr. Lowes, surgeons, three serjeants, three corporals, and forty private soldiers, provided with three days provisions, ropes to bind our prisoners with, and hatchets and bags, to cut off and contain the heads of the slain. By nine o'clock this terrific procession reached the peninsula, at the head of Botany Bay; but after having walked in various directions until four o'clock in the afternoon, without seeing a native, we halted for the night.

At daylight on the following morning our search recommenced. We marched in an easterly direction. intending to fall in with the south-west arm of the bay, about three miles above its mouth, which we determined to scour, and thence passing along the head of the peninsula, to proceed to the north arm, and complete our Search. However, by a mistake of our guides, at half past seven o'clock instead of finding ourselves on the south-west arm, we came suddenly upon the sea shore, at the head of the peninsula, about midway between the two arms. Here we saw five Indians on the beach, whom we attempted to surround; but they penetrated our design, and before we could get near enough to effect our purpose, ran off. We pursued; but a contest between heavy-armed Europeans, fettered by ligatures, and naked unencumbered Indians, was too unequal to last long. They darted into the wood and disappeared.

The alarm being given, we were sensible that no hope of success remained, but by a rapid movement to a little village (if five huts deserve the name,) which we knew stood on the nearest point of the north arm, where possibly some one unapprized of our approach, might yet be found. Thither we hastened; but before we could reach it three canoes, filled with Indians, were seen paddling over in the utmost hurry and

trepidation, to the opposite shore, where universal alarm prevailed. All we could now do was to search the huts for weapons of war: but we found nothing except fish gigs, which we left untouched.

On our return to our baggage (which we had left behind under a small guard near the place where the pursuit had begun) we observed a native fishing in shallow water not higher than his waist, at the distance of 300 yards from the land. In such a situation it would not have been easily practicable either to shoot, or seize him. I therefore determined to pass without noticing him, as he seemed either from consciousness of his own security, or from some other cause, quite unintimidated at our appearance. At length he called to several of us by name, and in spite of our formidable array, drew nearer with unbounded confidence. Surprized at his behaviour I ordered a halt, that he might overtake us, fully resolved, whoever he might be, that he should be suffered to come to us and leave us uninjured. Presently we found it to be our friend Colbee; and he joined us at once with his wonted familiarity and unconcern. We asked him where Pimelwi⁸⁹ was, and found that he perfectly comprehended the nature of our errand, for he described him to have fled to the southward; and to be at such a distance, as, had we known the account to be true, would have prevented our going in search of him, without a fresh supply of provisions.

When we arrived at our baggage, Colbee sat down, eat, drank, and slept with us, from ten o'clock until past noon. We asked him several questions about Sydney, which he had left on the preceding day;⁹⁰ and told us he had been present at an operation performed at the hospital, where Mr. White had cut off a woman's leg. The agony and cries of the poor sufferer he depicted in a most lively manner.

At one o'clock we renewed our march, and at three halted near a fresh water swamp, where we resolved to remain until morning: that is, after a day of severe fatigue, to pass a night of restless inquietude, when weariness is denied repose by swarms of musquitoes and sand-flies, which in the summer months bite and sting the traveller, without measure or intermission.

⁸⁹ Pimelwi (Pemulwuy) was a Darug Aboriginal leader and remarkably successful resistance fighter. Pemulwuy continued his hit and run guerrilla war against the British until 1802, when he was eventually killed, not by the British military that had been after him for some time, but by a seaman called Henry Hacking. Governor King had Pemulwuy decapitated, and sent his head to Sir Joseph Banks, who gratefully accepted the gift. [Ed.]

⁹⁰ He had, it seems, visited the governor about noon, after having gained information from Nanbaree of our march, and for what purpose it was undertaken. This he did not scruple to tell to the governor, proclaiming at the same time a resolution of going to Botany Bay, which His Excellency endeavoured to dissuade him from by every argument he could devise: a blanket, a hatchet, a jacket, or aught else he would ask for, was offered to him in vain, if he would not go. At last it was determined to try to eat him down, by setting before him his favourite food, of which it was hoped he would feed so voraciously as to render him incapable of executing his intention. A large dish of fish was accordingly set before him. But after devouring a light horseman [snapper] and at least five pounds of beef and bread, even until the sight of food became disgusting to him, he set out on his journey with such lightness and gaiety as plainly showed him to be a stranger to the horrors of indigestion.

Next morning we bent our steps homeward; and, after wading breast-high through two arms of the sea, as broad as the Thames at Westminster, were glad to find ourselves at Sydney, between one and two o'clock in the afternoon.

The few remarks which I was able to make on the country through which we had passed, were such as will not tempt adventurers to visit it on the score of pleasure or advantage. The soil of every part of the peninsula, which we had traversed, is shallow and sandy, and its productions meagre and wretched. When forced to quit the sand, we were condemned to drag through morasses, or to clamber over rocks, unrefreshed by streams, and unmarked by diversity. Of the soil I brought away several specimens.

Our first expedition having so totally failed, the governor resolved to try the fate of a second; and the 'painful pre-eminence' again devolved on me.

The orders under which I was commanded to act differing in no respect from the last, I resolved to try once more to surprise the village beforementioned. And in order to deceive the natives, and prevent them from again frustrating our design by promulgating it, we feigned that our preparations were directed against Broken Bay; and that the man who had wounded the governor was the object of punishment. It was now also determined, being full moon, that our operations should be carried on in the night, both for the sake of secrecy, and for avoiding the extreme heat of the day.

A little before sun-set on the evening of the 22d, we marched. Lieutenant Abbot, and ensign Prentice, of the New South Wales corps, were the two officers under my command, and with three serjeants, three corporals, and thirty privates, completed the detachment.

We proceeded directly to the fords of the north arm of Botany Bay, which we had crossed in our last expedition, on the banks of which we were compelled to wait until a quarter past two in the morning, for the ebb of the tide. As these passing-places consist only of narrow slips of ground, on each side of which are dangerous holes; and as fording rivers in the night is at all times an unpleasant task, I determined before we entered the water, to disburthen the men as much as possible; that in case of stepping wrong every one might be as ready, as circumstances would admit, to recover himself. The firelock and cartouche-box were all that we carried, the latter tied fast on the top of the head, to prevent it from being wetted. The knapsacks, &c. I left in charge of a serjeant and six men, who from their low stature and other causes, were most likely to impede our march, the success of which I knew hinged on our ability, by a rapid movement, to surprize the village before day-break.

The two rivers were crossed without any material accident: and in pursuit of my resolution, I ordered the guides to conduct us by the nearest route, without heeding difficulty, or impediment of road. Having continued to push along the river-bank very briskly for three quarters of an hour, we were suddenly stopped by a creek, about sixty yards wide, which extended to our right, and appeared dry from the tide being out: I asked if it could be passed, or whether it would be better to wheel round the head of it. Our guides answered that it was bad to cross, but might be got over, which would save us more than a quarter of a mile. Knowing the value of time, I directly bade them to push through, and every one began to follow as well as he could. They who were foremost had not, however, got above half over when the difficulty of progress was sensibly experienced. We were immersed, nearly to the waist in mud, so thick and tenacious, that it was not without the most vigorous exertion of every muscle of the body, that the legs could be disengaged. When we had reached the middle, our distress became not only more pressing, but serious, and each succeeding step, buried us deeper. At length a serjeant of grenadiers stuck fast, and declared himself incapable of moving either forward or backward; and just after, ensign Prentice, and I, felt ourselves in a similar predicament, close together. 'I find it impossible to move; I am sinking;' resounded on every side. What to do I knew not: every moment brought increase of perplexity, and augmented danger, as those who could not proceed kept gradually subsiding. From our misfortunes, however, those in the rear profited. Warned by what they saw and heard, they inclined to the right towards the head of the creek, and thereby contrived to pass over.

Our distress would have terminated fatally, had not a soldier cried out to those on shore to cut boughs of trees,⁹¹ and throw them to us: a lucky thought, which certainly saved many of us from perishing miserably; and even with this assistance, had we been burdened by our knapsacks, we could not have emerged; for it employed us near half an hour to disentangle some of our number. The serjeant of grenadiers in particular, was sunk to his breast-bone, and so firmly fixed in, that the efforts of many men were required to extricate him, which was effected in the moment after I had ordered one of the ropes, destined to bind the captive Indians, to be fastened under his arms.

Having congratulated each other on our escape from this 'Serbonian Bog,' and wiped our arms (half of which were rendered unserviceable by the mud) we once more pushed forward to our object, within a few hundred yards of which, we found ourselves about half an hour before sunrise. Here I formed the detachment into three divisions, and having enjoined the most perfect silence, in order, if possible, to deceive

⁹¹ I had often read of this contrivance to facilitate the passage of a morass. But I confess that in my confusion I had entirely forgotten it, and probably should have continued to do so until too late to be of use.

Indian vigilance, each division was directed to take a different route, so as to meet at the village at the same moment.

We rushed rapidly on, and nothing could succeed more exactly than the arrival of the several detachments. To our astonishment, however, we found not a single native at the huts; nor was a canoe to be seen on any part of the bay. I was at first inclined to attribute this to our arriving half an hour too late, from the numberless impediments we had encountered. But on closer examination, there appeared room to believe, that many days had elapsed since an Indian had been on the spot, as no mark of fresh fires, or fishbones, was to be found.

Disappointed and fatigued, we would willingly have profited by the advantage of being near water, and have halted to refresh. But on consultation, it was found, that unless we reached in an hour the rivers we had so lately passed, it would be impossible, on account of the tide, to cross to our baggage, in which case we should be without food until evening. We therefore pushed back, and by dint of alternately running and walking, arrived at the fords time enough to pass with ease and safety. So excessive, however, had been our efforts, and so laborious our progress, that several of the soldiers, in the course of the last two miles, gave up, and confessed themselves unable to proceed farther. All that I could do for these poor fellows, was to order their comrades to carry their muskets, and to leave with them a small party of those men who were least exhausted, to assist them, and hurry them on. In three quarters of an hour after we had crossed the water, they arrived at it, just time enough to effect a passage.

The necessity of repose, joined to the succeeding heat of the day, induced us to prolong our halt until four o'clock in the afternoon, when we recommenced our operations on the opposite side of the north arm to that we had acted upon in the morning. Our march ended at sun-set, without our seeing a single native. We had passed through the country, which the discoverers of Botany Bay extol as 'some of the finest meadows in the world.'⁹² These meadows, instead of grass, are covered with high coarse rushes, growing in a rotten spongy bog, into which we were plunged kneedeep at every step.

Our final effort was made at half past one o'clock next morning; and after four hours toil, ended as those preceding it had done, in disappointment and vexation. At nine o'clock we returned to Sydney, to report our fruitless peregrination."

⁹² The words which are quoted may be found in Mr Cook's first voyage, and form part of his description of Botany Bay. It has often fallen to my lot to traverse these fabled plains, and many a bitter execration have I heard poured on those travellers, who could so faithlessly relate what they saw.

But if we could not retaliate on the murderer of Mc'Entire, we found no difficulty in punishing offences committed within our own observation. Two natives, about this time, were detected in robbing a potatoe garden; when seen, they ran away, and a serjeant and a party of soldiers were dispatched in pursuit of them. Unluckily it was dark when they overtook them, with some women at a fire; and the ardour of the soldiers transported them so far, that, instead of capturing the offenders, they fired in among them. The women were taken, but the two men escaped.

On the following day, blood was traced from the fire-place to the seaside, where it seemed probable, that those who had lost it, had embarked. The natives were observed to become immediately shy; but an exact knowledge of the mischief which had been committed, was not gained until the end of two days, when they said, that a man of the name of Ban`gai (who was known to be one of the pilferers) was wounded and dead. Imeerawanyee, however, whispered, that though he was wounded, he was not dead. A hope now existed, that his life might be saved; and Mr. White, taking Imeerawanyee, Nanbaree, and a woman with him, set out for the spot where he was reported to be. But on their reaching it, they were told by some people who were there, that the man was dead, and that the corpse was deposited in a bay about a mile off. Thither they accordingly repaired, and found it as described, covered, except one leg, which seemed to be designedly left bare, with green boughs, and a fire burning near it. Those who had performed the funeral obsequies, seemed to have been particularly solicitous for the protection of the face, which was covered with a thick branch, interwoven with grass and fern, so as to form a complete screen. Around the neck was a strip of the bark, of which they make fishing lines, and a young strait stick growing near, was stripped of its bark, and bent down so as to form an arch over the body, in which position it was confined by a forked branch stuck into the earth.

On examining the corpse, it was found to be warm. Through the shoulder had passed a musquet ball, which had divided the subclavian artery, and caused death, by loss of blood; no mark of any remedy having been applied could be discovered. Possibly the nature of the wound, which even among us, would baffle cure without amputation of the arm at the shoulder, was deemed so fatal, that they despaired of success, and therefore left it to itself. Had Mr. White found the man alive, there is little room to think that he could have been of any use to him; for that an Indian would submit to so formidable and alarming an operation seems hardly probable.

None of the natives who had come in the boat would touch the body, or even go near it, saying, the Mawn would come; that is literally, the spirit of the deceased would seize them. Of the people who died among us, they had expressed no such apprehension. But how far the difference of a natural death, and one effected by violence, may operate on their fears to induce superstition; and why those who had performed the rites of sepulture, should not experience similar fears and reluctance, I

leave to be determined. Certain it is (as I shall insist upon more hereafter), that they believe the spirit of the dead not to be extinct with the body.

Baneelon took an odd method of revenging the death of his countryman: at the head of several of his tribe, he robbed one of the private boats of fish, threatening the people, who were unarmed, that in case they resisted, he would spear them. On being taxed by the governor with this outrage, he at first stoutly denied it: but on being confronted with the people who were in the boat, he changed his language, and, without deigning even to palliate his offence, burst into fury, and demanded who had killed Bangäi.

THE RIGHT HON. W. W. GRENVILLE TO GOVERNOR PHILLIP.

Sir, *Whitehall, 16th Novem'r, 1790.*

In my letter to you. No. 6, which was forwarded to you by the Neptune, transport, I gave you reason to suppose that his Majesty's ship the Gorgon with the remainder of the New South Wales Corps would then shortly be dispatched, but from a variety of causes her departure has hitherto been delayed. She will now, however, I hope, proceed to sea in the course of a few days with Major Grose and a detachment of the said corps on board.

By letters which have lately been received from the Cape of Good Hope, I observe that the Lady Juliana, transport, with female convicts and some provisions and other supplies on board, left that place in the latter end of March, and that the Neptune, with the Scarborough and Surprize, transports, sailed from thence for Port Jackson. Those ships will convey information to you of the unfortunate fate of the Guardian, and by them and the Gorgon you will receive such parts of the stores and provisions taken out of the Guardian at the Cape as are supposed to be serviceable. Lieutenant Riou has, I find, sent on by the Neptune the five superintendents and the twenty-one of the convicts mentioned on board the Guardian on her arrival at the Cape, and I hope they will have j

The orderly behaviour of those convicts before the Guardian was disabled, and their good conduct after the accident happened to her, which Lieutenant Riou has strongly represented in his letters, has induced his Majesty to consent that they shall be pardoned on condition of their continuing abroad, in such parts or places as may hereafter be directed by you, for the terms specified in their several sentences of transportation; and I am to signify to you his Majesty's pleasure that you are, under the authority given to you, to issue your warrant accordingly, omitting, however, in such pardon, the names of any of the said convicts as may from a subsequent

misconduct have forfeited this mark of his Majesty's favour. As all the above-mentioned convicts have either been accustomed to agriculture, or have been brought up to some trade or profession, it is likely that they will be able to employ their time with advantage to themselves; and the better to enable them so to do, it is his Majesty's pleasure that those whose services are remitted shall be supplied from his Majesty's stores with such tools and implements as are suitable to their several professions, together with such proportions of provisions as you may deem necessary for persons in their situation.

The vessels now ordered to be taken up will be sufficient for the accommodation of at least 1,800 convicts, and will, I expect, be ready to sail with that number, and the remainder of the New South Wales Corps on board, in the course of the next month. They will have on board a suitable quantity of provisions, clothing, &c., for the use of the convicts after their landing, and also an assortment of stores equal to those intended to be conveyed to you by the Guardian, which have either been damaged or destroyed. The quantity and quality of each article is specified in the inclosed list.

I have already explained to you in my former letter his Majesty's intention with respect to the disposal of the marine corps on the arrival of Major Grose, to which it is only necessary for me to add that Lieutenant Dawes being represented to be an officer who may be usefully employed in the settlement in the capacity of engineer, it is his Majesty's pleasure, in case you should not have nominated him to the proposed company to be formed out of the marines and to be annexed to the New South Wales Corps, that he should be permitted to continue in the settlement, if he should be inclined so to do, and for his services in that capacity it is intended that he shall be placed on the same footing in point of emolument as officers of the corps of engineers of a similar rank.

The Lords of the Treasury have been pleased to appoint Mr. Chas. Grimes, who takes his passage in the Gorgon, to be Deputy-Surveyor of Roads, to be employed on Norfolk Island, or in any other part of your government where you may conceive his services to be most useful; and in consequence of your recommendation of Mr. Zach. Clarke, he has been appointed Deputy-Commissary of Stores and Provisions. Each of these officers will be placed on the civil establishment, with salaries of five shillings per diem.

I am, &c.' W. W. GRENVILLE⁹³

⁹³ Historical Records of New South Wales, Vol. I, Part 2, Phillip 1783 – 1792, pp. 414 – 415. William Grenville, 1st Baron Grenville (1759 – 1834) was the son of a Prime Minister and served as Prime Minister from 1806 to 1807. From 1789 to 1791, he was Home Secretary and from 1791 to 1801, he was Foreign Secretary. He was

GOVERNOR PHILLIP TO LIEUTENANT DAWES.

Copy of the Message delivered to Lieut. Dawes, on Saturday, the 5th Nov'r, 1791.

As it has been his Majesty's pleasure that Lieutenant Dawes should be permitted to remain in this country as an engineer, with the same emoluments as are enjoyed by an officer of the corps of engineers of a similar rank, the Governor is willing to forget the impropriety of Lieut. Dawes's conduct;

In purchasing the convicts' ration contrary to repeated orders on that head;

In the declaration made by Lieut. Dawes respecting the general order of the 13th of last December;

And in his unofficerlike behaviour to the Governor in the presence of Lieut, and Adjutant Long.

If Lieut. Dawes is desirous of remaining in this country, and declares himself convinced of the impropriety of his conduct on the above occasions, and acknowledges it in such a manner as may leave no reason to suppose that anything similar will happen in future.⁹⁵

[Enclosure]

ANSWER FROM LIEUT. DAWES.

At present I cannot think that I was guilty of any impropriety whatever in purchasing provisions from a convict, as I had no reason whatever to suppose that it was any part of his ration.

Neither in my declaration of the 13th of December, 1790, which I do not by any means wish to have forgotten, nor in what I said to his Excellency in the presence of Lieut, and Adjutant Long ; it being an answer which I thought it incumbent on me to make to what his Excellency had been pleased to say to me just before.

These are my present sentiments; but as I wish to act with as much deference and respect as possible to his Excellency's opinion, I would choose to defer giving a final answer until to-morrow, and of course do not wish this to be considered as such.⁹⁶

[Enclosure.]

LIEUTENANT DAWES TO GOVERNOR PHILLIP.

⁹⁵ Ibid, p. 54

⁹⁶ Ibid, pp. 543, 544.

Sir, Marine Quarters, Sydney, 6th November, 1791.

In compliance with my assurance of yesterday, in answer to your message by Captain Collins, I now beg leave to state fully to your Excellency my sentiments on the occasion.

I confess it does not appear to me that I was guilty of any impropriety in purchasing provisions from a convict, as I had every reason to suppose it was no part of his ration; it being at that time publicly known to all the officers that he, in his situation of baker to the garrison, gained weekly a very considerable quantity of flour, as the just perquisite of his business, which I therefore presumed became his property, and as such was deemed by every one to be entirely at his own disposal. To this I presume your Excellency alluded in the first part of your message, as I never have bought any other article of a convict's ration from any person of that description whatever.

With regard to my declaration of the 13th December, 1790, I beg leave to state to your Excellency, that after so long a time having elapsed, and repeated reflections on the subject, I feel at this instant no reason to alter the sentiments I then entertained.

In respect to what I said to y'r Excellency in the presence of Lieut, and Adjutant Long, I have to observe that it was far from my intenton to express anything, either in word or manner, in any degree improper or disrespectful, I conceived what y'r Excellency had said to me just before amounted to a direct charge of leaving the Observatory without sufficient cause; and I then thought, and still think, it was but justice to myself to deny such charge in terms sufficiently clear and expressive to leave no possibility of misconception.

I confess I was exceedingly pained to find your Excellency entertained such an idea; and from the distress which a discovery of it could not but occasion, it is possible something might have escaped me, which might appear to your Excellency improper or disrespectful; if so, I very readily acknowledge that I am exceedingly sorry for it, but think it necessary again to disclaim any intention of the kind. I have, &c.,

WILLIAM DAWES, Lieut, of Marines.⁹⁷

[Enclosure.]

⁹⁷ Ibid, p. 544.

COMMENTS BY GOVERNOR PHILLIP.

REPEATED orders had been given to prevent the convicts from selling any part of their ration, but which they continued to do, and carried on that trade with those, who from their situation were not likely to be suspected, consequently detection was not very practicable. Robberies were too frequently the consequence, and it was not possible that it should be otherwise, for every man could eat his ration, and with which very few of those people were satisfied; at the same time they made a practice of joining together a part of their ration of flour, and giving ten pounds of flour for a bottle of rum, and thirty pounds of flour for a pound of tobacco. This was at a time when the ration was only four pounds of flour for a man for seven days.

A convict being detected, who, it appeared on his examination before the magistrates, had made a practice of receiving flour and other species of provision from the convicts, and exchanging them for spirits and other articles, he declared that Lieut. Dawes was one with whom he had made such exchanges, having given forty pounds of flour for twenty pounds of sugar to that officer.

It does not appear that Lieut. Dawes could know to whom the flour belonged, as the man of whom the purchase was made (a blacksmith) carried on that trade for a variety of people; nor, can the Governor admit that Lieut. Dawes never purchased any other species of provisions, as his Major-Commandant had been some time before desired to point out to him the impropriety of his purchasing pease from convicts.

Extract from the General Orders of the 13th of December, 1790.

"Several tribes of the natives still continuing to throw spears at any man they meet unarmed, by which several have been killed or dangerously wounded, the Governor, in order to deter the natives from such practices in future, has ordered out a party to search for the man who wounded the convict in so dangerous a manner on Friday last, though no offence was offered on his part, and to make a severe example of that tribe. At the same time the Governor strictly forbids (under pain of the severest punishments), any soldier or other person not expressly ordered out for that purpose, ever to fire on any native, except in his own defence, or to molest him in any shape, or to take away any spears or articles which they may find belonging to those people. The natives will be made severe examples of whenever any man is wounded by them, but that will be done in a manner which may satisfy them that it is a punishment inflicted on them for their own bad behaviour; and of which they cannot be made sensible if they are not treated with kindness while they continue peaceable and quiet.

"A party consisting of 2 captains, 2 subalterns, and 40 privates (with a proper number of non-commissioned officers) from the garrison, with three days' provisions, &c., to be ready to go out to-morrow morning at daylight, in order to bring in six of those

natives who reside near the head of Botany Bay, or if that should be found impracticable, to put that number to death.

"Every possible attention is to be paid not to injure any women or children; and nothing belonging to the natives is to be brought away, but all their spears and other weapons are to be destroyed and left on the ground."

On this order appearing, Lieut. Dawes, whose tour of duty it was to go out with the party, refused that duty by letter to the senior officer of the detachment (Capt. Campbell), who, finding it impossible to persuade Lieut. Dawes to obey the order, brought the letter to the Governor, who likewise took great pains to point out the consequence of his (Lieut. Dawes) being put under an arrest. Late in the evening Lieut. Dawes informed Capt. Campbell that the Mr. Johnson thought he might obey the order, and that he was ready to go out with the party, which he did; but after the service was over, informed the Governor that " he was sorry he had been persuaded to comply with the order," and very clearly shewed that he would not obey a similar order in future.

Lieut. Dawes's expressions when Lieut, and Adjutant Long was present were such as would have subjected him to a courtmartial had he been amenable to one.

Since we have access to some of the primary accounts (unfortunately not including that of Dawes), we are able to analyse the facts without regard to secondary or other derived sources. But first, we must remind ourselves that The First Fleet was an initial attempt by Britain to clear the prison hulks, rotting on the Thames because of overcrowded gaols, and the loss of the Americas as a destination for Britain's unwanted intransigents. Many more transportation ships were to follow. When Phillip arrived at Sydney Cove, he had to find a way to put a carceral population to work.

In the First Fleet, according to Copley, there were 778 transportees. Between 1788 and 1792, there were about 3546 male and 766 female convicts. The Australian Dictionary of Biography (ADB) states, in its biography of Phillip,

'Historians no longer regard them as the innocent victims of adverse social conditions and a harsh penal code. In dispelling this myth recent research has presented them as including a high proportion of professional criminals drawn from the more worthless element in society'.

ADB does not provide a source for this ‘recent research’ or who the ‘historians’ may have been. The ADB assertion is a little like pleading that the Guantanamo detainees are the ‘worst of the worst’, in G. W. Bush’s terminology, when most were never charged with an offense (although some pleaded guilty under torture, or as the CIA prefers to call it ‘enhanced interrogation techniques’), and many have been repatriated, with or without charge.

John Cobley, a meticulous historian, has compiled a complete list of the crimes caused by convicts who were transported on the First Fleet, which shows that, far from being, in ADB’s words ‘*professional criminals drawn from the more worthless elements in society*’ were in fact the underprivileged and often destitute, the victims of British industrialisation (where the benefits of the efficiency of production went increasingly to the few) and the assault by ‘nobility’ on the free use of the commons (the enclosure of the ‘commons’). This was commonly shared land which was used at one time by the less fortunate for farming, until the aristocracy restricted its use through punitive legislation, and caused a drift of agricultural workers to the cities, where they were prey to exploitation and poverty.

With revolution in France and North America, Britain was determined to cauterise the threat from its disadvantaged underclass, and put them to work in the service of Empire, preferably well away from home soil. It leaves the ADB without credibility on this important matter, as we will see. Cobley informs us that there were 778 convicts in the First Fleet, most of them charged with petty theft, a few for mutiny, and none for political dissidence (that would come later), for which the usual sentence was seven years.

‘Neither youth nor old age was a disqualification to transportation; both the very old and the very young embarked. The administration gave no consideration to the date of expiry of sentences, and several of the First Fleeters had been tried as early as 1781 and 1782. As seven years’ transportation was the most common sentence, many had already served five-sevenths of their time at embarkation, and six-sevenths on disembarkation at Sydney Cove. It is curious that the first Governor, Captain Arthur Phillip, was not provided with a list of these sentences and thus had no means of knowing when each convict became free.’

As an example of a transportee, consider Elizabeth Beckford, aged 70, transported for 7 years,

*‘indicted for stealing, on the 26th of October last, twelve pounds weight of Gloucester cheese, value 4s. The property of Henry Austen’.*⁹⁸

⁹⁸ John Cobley, *The Crimes of the First Fleet Convicts*, pp. vii, viii, 21

Clearly, Elizabeth was a ‘professional criminal’, in ADB’s parlance. But ‘The First Fleet Australian History Research’ website gives slightly different figures to Cobley (there is a difference of 22 people) and also provides a gender breakdown. It says:

‘The Fleet consisted of six convict ships, three store ships, two men -o-war ships with a total of 756 convicts (564 male, 192 female), 550 officers/marines/ship crew and their families. The planning of Britain's colonisation of New South Wales was not the best.’⁹⁹

Although some people dismiss Robert Hughes as overly theatrical (in fact, he had a wonderful use of the English language, and a myriad of facts to support him, provided by many able helpers), he also confirms Cobley’s view that most of the First Fleet convicts were simply disadvantaged people who suffered the excesses of a flawed and one sided legal system, where those with money had the power, a rigidly class based hierarchy imposed their criminal penalties on poverty, and poverty begat theft in order for underprivileged people to survive, when there was no social security safety net. The convicts were not blameless, but they were often victims. As Hughes says:

The ‘criminal class’ threatened middle-class property, but what most worried the authorities was the moral contagion it offered to workers and their impressionable children. They had tried to remove the bad apples from the lower classes before they could contaminate the good. The New Poor Law had tried to separate the independent labouring poor from the paupers; the ragged schools tried to keep the offspring of the lowest and most depraved paupers apart from the respectable. Transportation sought to remove, once and for all, the source of contamination from the otherwise decent bosom of the lower classes, and ship it ‘beyond the seas’ to a place from which it could not easily return. There it would stay, providing slave labour for colonial development and undergoing such mutations toward respectability as whips and chains might induce. The main point was not what happened to it there, but that it would no longer be here. The final aim of the transportation system, then, was less to punish individual crimes than to uproot an enemy class from the British social fabric.¹⁰⁰

⁹⁹ www.australianhistoryresearch.info/the-first-fleet/

¹⁰⁰ Robert Hughes, *The Fatal Shore The Epic of Australia’s Founding*, p. 168.

Hughes' epic has rarely been bettered, and brings the early British colony to life in a unique way. We may reflect that little has changed today, where money buys justice in our inherited jurisprudence, and those without money are cast aside as unworthy citizens, where what is 'right' is what is 'lawful', and what is 'lawful' is what is imposed by a powerful elite. Hughes also describes the convicts of the First Fleet.¹⁰¹ So where does that leave the ADB, except as a revisionist attempt at history that ignores the facts or demonstrates clear bias. Their generally hagiographic biographies can therefore be questioned as unreliable, and not presenting a balanced view of history.

The ADB describes Phillip as a 'humanitarian', that is, a person who seeks to improve human welfare. Aboriginals are humans. Therefore, to deserve this approbation -for humanitarianism is often considered to be praiseworthy – Phillip must be seen to be acting for the good of Aboriginals as well as the British arrivals. Considered in this context, kidnapping, theft of land and punitive operations might reasonably be seen as less than humanitarian behaviour, for Phillip's time, or for any time. But this is exactly what Philip did, without objection from the Home Office. Soon after the arrival of the First Fleet, Phillip kidnapped an Aboriginal to try and 'conciliate their affections'. He wrote to Lord Sydney:

In December, 1788, one of the natives was seized for the purpose of learning the language and reconciling them to us (as mentioned in my former letter to your Lordship)¹⁰², none of the natives having for some months come near the settlement.¹⁰³

On December 1790, Phillip went much further, and ordered indiscriminate reprisals against Aboriginals in the Botany Bay area, including Pemulwuy, who had been resisting Phillip's occupation of Aboriginal land.

This is an analysis of the facts around Phillip's order for a punitive reprisal operation, ostensibly as punishment for the 'unwarranted' killing of the gamekeeper McEntire, but also for Aboriginal resistance generally:

1. Phillip was acting as the lawful representative of His Majesty's government in his capacity as Governor of New South Wales, with absolute authority conferred by Britain, only negated by the unlike possibility of Phillip's sedition.
2. At first, Phillip attempts to be friendly with local Aboriginals and tolerant of any unfriendly conduct. He needs Aboriginal goodwill while the settlement is vulnerable.

¹⁰¹ Ibid,(pp. 158 – 203.

¹⁰² This earlier letter is reproduced in the next section.

¹⁰³ HRNSW, Vol I, Part 2, Phillip, 1788 – 1792, p. 308.

Phillip is often commended, for example, for not punishing Bennelong, when, on 7 September 1790, Bennelong threw a spear at him on Manly Beach, after Phillip was trying to get Bennelong to return to the settlement as a go-between. Phillip may have known that the barbed spear was only meant to cause a wound and not death.¹⁰⁴ He may also have understood that Bennelong was trying to save face with his people, after Phillip had kidnapped him to ‘conciliate his affections’ In February 1790, Philip writes to Lord Sydney:

*Not succeeding in my endeavours to persuade some of the natives to come and live with us, I ordered one to be taken by force, which was what I would gladly have avoided, as I knew it must alarm them; but not a native had come near the settlement for many months, and it was absolutely necessary that we should attain their language, or teach them ours, that the means of redress might be pointed out to them if they are injured, and to reconcile them by showing the many advantages they would enjoy by mixing with us...*¹⁰⁵

Our society is still showing Aboriginals ‘*the many advantages they would enjoy by mixing with us*’

3. Grenville advises Phillip on 16 November 1790 that Dawes ‘*should be permitted to continue in the settlement, if he should be inclined so to do*’. The phrase signifies that Grenville must have received an earlier despatch from Phillip regarding Dawes, but I am unable to locate this particular letter.
4. On 10 December 1790, Phillip’s gamekeeper McEntire was mortally wounded by a spear (probably a death spear thrown by Pemulwuy, an Aboriginal leader who was resisting Phillip’s invasion and the ongoing Aboriginal mistreatment, including sexual predation, destruction of game, and occupation of Aboriginal land). McEntire dies on 20 January 1791, after confessing some of his crimes against Aboriginals, while out hunting game.
5. After McEntire’s death, Phillip’s attitude changes towards the Aboriginals. He complains ‘*Several tribes of the natives still continuing to throw spears at any man they meet unarmed, by which several have been killed or dangerously wounded.*’ Philip does not ask the obvious question: What has caused the Aboriginals to try and make their white oppressors go away? Perhaps he knows the answer, but he will not limit the scope of the settlement. In a rage, Phillip orders a punitive reprisal operation that same month, led by Tench. At first, Dawes refuses to participate because he thinks it is simply wrong to be ordered to kill any number Aboriginals as exemplary

¹⁰⁴ A death spear had loose stones glued to its tip, which dislodged in the wound and caused suppuration, usually followed by painful death through infection.

¹⁰⁵ HRNSW, Vol I, Part 2, Governor Phillip to Lord Sydney, 12 February 1790, p. P. 298:

punishment for the actions of one (probably Pemulwuy), who believed he was acting honourably, for the good of his people. Clearly, the ‘standards of the time’ had similar moral standards to our own, when it came to recognising that murder is murder. But British law allows some murders to be ‘legal’ if carried out on behalf of the Crown. In other words, any murders carried out by a representative of His Majesty’s Government, provided they were soberly executed on behalf of the State as a necessary extension of British power, were called ‘justifiable homicide’ or ‘self defence’.

6. On 7 November 1791, Phillip writes a self-contradictory letter to Grenville, untruthful or deceptive in many of its facts. Clearly, Phillip is attempting to get support from the British Government on some form of exemplary punishment for Dawes. Phillip attaches (encloses) other letters, which attempt to shore up Phillip’s argument for Dawes’ punishment, including a letter from Dawes dated 6 November 1791, which refers to an earlier letter (which Phillip does not attach) of 13 December 1790. Dawes’ letters are respectful and do not specifically mention any poor behaviour from Phillip that would highlight Phillip’s lack of proportionality or fairness. Probably out of deference to his superiors, Dawes does not cite the reasons for his unwillingness to accept Phillip’s order to take part in what was planned as a murderous and indiscriminate reprisal operation. Phillip was able to use Dawes’ deference against him.
7. In the despatch of 7 November 1791, Phillip advises Grenville that a convict (the gamekeeper McEntire) was wounded *‘though no offence was offered on his part’*. This seems to be a direct lie. Tench almost certainly knew it as a lie, and if Tench, then probably others, including Dawes and other officers. Certainly, the Aboriginals knew, or had their strong suspicions, including Bennelong, who was close to Phillip. Phillip does not advise Grenville on why some Aboriginals are becoming more hostile to the British occupation. Nor does Phillip question the gamekeeper on the allegations, prior to his mortal wounding. For Phillip, the Aboriginal hostility is a mystery.

‘Several tribes of the natives still continuing to throw spears at any man they meet unarmed, by which several have been killed or dangerously wounded, the Governor, in order to deter the natives from such practices in future, has ordered out a party to search for the man who wounded the convict in so dangerous a manner on Friday last, though no offence was offered on his part, and to make a severe example of that tribe’.
8. Phillip is trying to convince Grenville that his orders are eminently reasonable, even humanitarian, that Aboriginals can only be shot by a soldier ‘in his own defence’ and that soldiers cannot take away *‘any spears or articles which they may find belonging to those people’*. Phillip knew that ‘spears’ and unnamed ‘articles’ and ‘other weapons’, presumably including nets, canoes, digging implements and construction tools, were

essential for Aboriginal survival, and that if he could destroy their means of survival he might go some way to destroying them. Phillip wrote:

At the same time the Governor strictly forbids (under pain of the severest punishments), any soldier or other person not expressly ordered out for that purpose, ever to fire on any native, except in his own defence, or to molest him in any shape, or to take away any spears or articles which they may find belonging to those people.

But later in his swingeing despatch he contradicts himself by saying *nothing belonging to the natives is to be brought away, but all their spears and other weapons are to be destroyed and left on the ground.*

According to the ADB,

'Phillip's discipline was firm, but by the standards of his time could not be considered unduly harsh or severe [...] One of the offences Phillip refused to tolerate was ill treatment of the Aboriginals. [...] Friction later developed and matters eventually reached the point where Phillip was forced to take punitive action, though he continued to exercise restraint even after being wounded by spear at Manly Cove. Throughout he sought to maintain harmony while gradually persuading the Aboriginals of the superiority of British civilisation.'

No. Phillip was not 'forced' to take punitive action. Nor were his actions humane. He did not recognise that his policies were causing 'ill treatment of Aboriginals'. By the 'standards of his time', and ours, Phillip's actions in some cases were definitely 'harsh and severe'. There is no evidence he sought to address the underlying reason for Aboriginal resistance, because he expected them to accept British superiority and bow before it. When they refused, he became enraged, like any petty administrator who resents a challenge to their authority. Conflict over land was the primary driver of racial conflict, along with sexual predation, erosion of Aboriginal culture, and white men's disease, all associated with invasive occupation, supported by armed force. Phillip would not curtail the growth of the settlement, nor would his successors. After Phillip, land alienation and squatting accelerated, driven by Britain's emigration policies. Aboriginals had no rights, not to land, or representative Government, or involvement in modifying discriminatory Home Office policies.

9. From Tench's account of the reprisal operation we know that it was farcical, no doubt because Tench was trying to make it unsuccessful while appearing to carry out Phillip's order. We also know that, during Tench's operation, a soldier killed an Aboriginal for stealing a potato, so presumably the soldier was fearful of his life because of the threat of the potato weapon. The soldier who killed the unarmed Aboriginal was certainly not subject to '*the severest punishment*' by Phillip.

10. Phillip asserts to Grenville that the reprisal is
'punishment inflicted on them for their own bad behaviour; and of which they cannot be made sensible if they are not treated with kindness while they continue peaceable and quiet.'

He then goes on that the military operation should

'bring in six of those natives who reside near the head of Botany Bay, or if that should be found impracticable, to put that number to death'.

Phillip has no reasonable evidence that a randomly selected number of Aboriginals, targeted for 'severe punishment', will encourage them to be 'peaceable and quiet'.

11. Phillip does not inform Grenville that, just prior to the 'official' order, he had called a meeting with Tench that

'our operations were to be directed either by surprise or open force; that after we had made any prisoners, all communication, even with those natives with whom we were in habits of intercourse, was to be avoided, and none of them suffered to approach us. That we were to cut off and bring in the heads of the slain; for which purpose hatchets and bags would be furnished. And finally, that no signal of amity or invitation should be used in order to allure them to us; or if made on their part, to be answered by us: for that such conduct would be not only present treachery, but give them reason to distrust every future mark of peace and friendship on our part'.

Tench also tells us that Phillip's secret orders included that

I am resolved to execute the prisoners who may be brought in, in the most public and exemplary manner, in the presence of as many of their countrymen as can be collected, after having explained the cause of such a punishment; and my fixed determination to repeat it, whenever any future breach of good conduct on their side, shall render it necessary

We are grateful to Tench for allowing us this insight into Phillip's unofficial or secret orders. Phillip does not inform Grenville that Tench also objected to his orders (along with Dawes). Nor does Phillip inform Grenville of his secret orders to Tench and possibly others. We know that Phillip asked Tench for his opinion regarding the secret orders. After all, Tench was a senior officer in the marines and Phillip was asking Tench to lead the operation. Tench, who was sympathetic to the Aboriginals, was appalled. He successfully argued for amended 'secret' orders.

12. Phillip is *particularly* incensed that Dawes refused the order to be part of a vengeful reprisal operation, to limit the guerrilla attacks led by Pemulwuy and others. Dawes believed that McEntire was to blame for the attack. He believed that punitive attacks against Aboriginals would only increase hostilities. He believed that Phillip's order was morally wrong and refused to obey. Tench also knew it was wrong, but adopted a tactic of bumbling compliance.

13. Phillip thundered to Grenville about court-martial and the like, because he did not want his authority challenged by Dawes. So Phillip constructs an elaborate web of deceit to paint Dawes as a miscreant. In fact, Dawes was one of the very few members of the First Fleet whom we can admire, along with Tench, as we shall see.¹⁰⁶
14. Phillip continues his complaint against Dawes, as he marshals his contrived facts for Grenville's consideration. Unfortunately, Dawes' letter to Capt. Campbell is lost. Campbell pointed out to Dawes the consequences of disobeying an order, no matter how reprehensible. Dawes is reluctantly persuaded to change his mind, but after thinking about his moral position, he makes it clear he '*would not obey a similar order in future*', although he did accompany Tench on the reprisal operation in December 1790. It is this that so enrages Phillip, who is exposed as vindictive and cunning, without any sense of proportionate behaviour, guided by loyalty to the Empire, his career, and the chain of command. Based upon Phillip's behaviour, we should not be surprised at the ethnic calamity to follow over the next one hundred years and more.

On this order appearing, Lieut. Dawes, whose tour of duty it was to go out with the party, refused that duty by letter to the senior officer of the detachment (Capt. Campbell), who, finding it impossible to persuade Lieut. Dawes to obey the order, brought the letter to the Governor, who likewise took great pains to point out the consequence of his (Lieut. Dawes) being put under an arrest. Late in the evening Lieut. Dawes informed Capt. Campbell that the Mr. Johnson thought he might obey the order, and that he was ready to go out with the party, which he did; but after the service was over, informed the Governor that " he was sorry he had been persuaded to comply with the order," and very clearly shewed that he would not obey a similar order in future.

Lieut. Dawes's expressions when Lieut, and Adjutant Long was present were such as would have subjected him to a courtmartial had he been amenable to one.

15. Grenville does not disagree with Phillip's punitive operation, not even after the event. In fact, he does not refer to Dawes at all after 1790. There is no evidence, from a careful examination of the available record, that Grenville or his successor ever responds to Phillip's whining and defensive letter. There was a succession of British incumbents in the Home Office after Grenville was elevated and before Phillip returned to Britain. They included Hon. Henry Dundas, Lord Sydney (again),

¹⁰⁶ Comparable situations have happened more recently. For example, if Australia's military commanders had challenged the British High Command instruction to land and fight at Gallipoli, tens of thousands of digger lives may not have been needlessly lost. It is rare for officials to be held accountable for their actions (or their culpable stupidity). It is usually those who disobey myopic instructions, or who expose unlawful actions, who are prosecuted or otherwise punished.

Secretary Stephens and others, none of whom were concerned about worsening Aboriginal relations. Land grants exacerbated the deepening humanitarian problem.

16. On 22 February 1792, Phillip makes the pronouncement of the first land grant of thirty acres to James Ruse: *Whereas full power and authority for granting lands in the Territory of New South Wales to such persons as may be desirous of becoming settlers therein is vested in me, his Majesty's Captain-General and Governor-in-Chief over the said territory and its dependencies....*¹⁰⁷ It began a flood of such grants.¹⁰⁸ Only Aboriginals were excluded from Phillip's largesse. Britain had cast the die for Lemkinian genocide. No one has ever been held accountable.
17. Phillip destroyed Dawes' promising career. He shipped Dawes back to Britain on the HMS Gorgon, on 18 December 1791, a month after he wrote a mendacious despatch to Grenville. We do not seem to have any other despatches between Grenville and Phillip about Dawes. The primary despatch from Phillip dated 7 November 1791 is that of a typical and manipulative administrator who is attempting to dress up the facts to suit his purposes. In Phillip's November 1791 despatch, he appears to be trying to find a way to go around Grenville's earlier instruction of 1790 to keep Dawes in the colony. Subsequently, Dawes never rose above the position of Lieutenant. Dawes eventually died in poverty, probably the only truly moral officer in the early colony, and certainly one of the most talented.

Grenville showed little interest in Dawes' fate or those of the Aboriginals. We can reflect that if there had been more officers like Dawes in the First Fleet, and less like Phillip (among many others of his kind), Australia might now be very different. Phillip expected Aboriginals to disappear compliantly and without murmur into the bush, or to obey British authority in a peaceable way, while their land was stolen. When they resisted, as was inevitable, Phillip reacted harshly, with military resolve, to teach the Aboriginals who was superior. Phillip was a member of that detestable school of vertically integrated power, where might makes right, no less so for the British Imperium as it flexed its hairy chest. It is a particularly egregious effect of utilitarian thinking that what is right can be trumped by obedience to the chain of command, whose power in turn devolves from a privileged few.

¹⁰⁷ Ibid, HRNSW, p. 592.

¹⁰⁸ The ADB reports '*Historians have been unable to agree as to the exact area he alienated. Judging by the Register of Land Grants, which has not been used by earlier writers, he granted 3440 acres (1392 ha) on the mainland. [...] This was considerably less than the area alienated by his immediate successors, a fact which resulted not from niggardliness but from the unwillingness of more than a handful of persons to try their hand at what was to most an unfamiliar occupation. Apart from James Ruse there were no requests for land until 1791 and by December 1792 only seventy-three persons occupied holdings on the mainland*'. ADB does not cite its specific sources or name the historians. After 1792, land grants became a flood. Only Aboriginals could not apply. The British Home Office excluded them from land ownership.

The commonly heard argument that Phillip was a humanitarian is put to a severe test by this particular case study, and was strained further to the point of incredulity when we consider Phillip's accelerating land grants. The oppressively racist behavioural pattern was to continue across subsequent British administrations. British policy demanded it.

We know Phillip's actions were wrong then, when he ordered reprisals against innocent Aboriginals. Some of Phillip's officers knew that Phillip's actions were wilfully wrong in this instance. We certainly know that his order is wrong now, and would never be tolerated by any reasonable civil society. We can be thankful that Tench managed to obstruct Phillip's order. Dawes was not so lucky. Therefore, we can reject the special pleading from some historians that 'standards were different then, and appropriate for the time, so we cannot judge their behaviour by our current standards'. No, the first hand documents of the key players clearly show that Dawes and Tench (and possibly others, Collins perhaps) knew that Phillip's punitive order was simply wrong, and Phillip's irrational and vindictive reaction to Dawes suggests that Phillip knew he was wrong also. We live with the consequences of the British occupation process today, with the echoes of Lemkinian genocide still exerting their effects through lingering and systemic Aboriginal disadvantage.

What happened to the protagonists of our case study into this sorry episode, and what were their career trajectories: Watkin Tench, William Dawes, and Arthur Phillip? The answer is instructive.

William Dawes (1762 – 1836)¹⁰⁹ joined the Marines as a second Lieutenant on 2 September 1779. From all accounts, he was a brave soldier, being wounded in North America in 1781, in a naval battle against the French at Chesapeake. He volunteered for service with the First Fleet, and was accepted as an engineer and surveyor. Dawes laid out the original planning for Sydney and Parramatta. He explored the country to the Blue Mountains. He constructed defensive batteries around Sydney Cove. He was a capable astronomer, and built the first observatory at Dawes Point. Most importantly, he left us invaluable language notebooks on the local Aboriginal language, the first of their kind. These small and incomplete notebooks provide most of what we now know of the Sydney language. He was one of the most talented officers among those first arrivals.

Phillip might have allowed him to stay in the colony if he apologised. Dawes refused, on principle. Although he tried to return to Australia, Britain rebuffed his requests. As a result of a meeting with William Wilberforce in 1792, Dawes became an energetic campaigner against the practice of slavery. Subsequently, Dawes played a key role in the colony of Sierra

¹⁰⁹ Australian Dictionary of Biography, Phyllis Mander-Jones. 1966 <http://adb.anu.edu.au/biography/dawes-william-1968/text2377>

Leone, being at one time its Governor. Much of his work received little or no payment. By 1826, he was living in poverty.

Because of Phillip's vindictiveness, Dawes' valuable skills were forever lost to the colony where he always wished to return. We will never know what he might have achieved. He may have completed his Aboriginal language study, acquired a Dharug spoken language skill, completed more surveying and exploring, and been central to a more compassionate relationship with Aboriginal society, where the rights to their homelands were properly recognised. This most excellent human being, 'with a great sweetness of disposition',¹¹⁰ was never allowed to achieve his potential, falling prey to a small-minded administrator called Phillip, who was consumed by his notions of self-importance. The story of Dawes, a humanitarian and scholar, is the story of hard-edged British colonial policy. Imperial Britain did not value such people as Dawes, unless they were blindly obedient to authority. Dawes did not respect a command structure that failed to value human life. We may conclude that, more than Phillip or Tench, the only real humanitarian was the unrecognised Dawes.

Watkin Tench (1758 – 1833)¹¹¹ Little is known of Tench's life, apart from his service record, and there would be still less if he had not written an outstanding journal of the voyage to Australia and the following settlement at Port Jackson.¹¹²

Timeline

1776 Joined British Marines as a Second Lieutenant.

1778 Promoted to First Lieutenant. Fought against the Americans in the War of Independence. Captured by the French on the Maryland coast. Transported to Philadelphia, imprisoned and exchanged.

1782 Promoted to Captain-Lieutenant

1786 Went on half-pay

1787 Sailed for Botany Bay, one of two captain-lieutenants under Major Ross.

1788 Arrived in New South Wales. Placed under arrest by Ross for refusing to alter a court-martial finding, for which Tench was president. Close friend of Dawes. Tench shared Dawes' interest in astronomy, Aboriginal culture, and exploration.

1791 Sailed for England on the Gorgon, with his friend Dawes.

1792 Promoted to brevet major. Joined the war against France.

1794 Captured by the French and spent six months as a prisoner of war.

¹¹⁰ Zachary Macauley, quoted in Australian Dictionary of Biography for William Dawes.

¹¹¹ L.F. Fitzhardinge, 'Tench, Watkin (1758 – 1833)', Australian Dictionary of Biography, Australian National University <http://adb.anu.edu.au/biography/tench-watkin-2719/text3829>

¹¹² *Narrative of the Expedition to Botany Bay* <http://www.gutenberg.org/etext/3535>; *Complete Account of the Settlement at Port Jackson* <http://www.gutenberg.org/etext/3534>.

- 1798 Promoted to brevet lieutenant-colonel.
- 1816 Retired on half-pay as major-general.
- 1819 Returned to active service as commandant of the Plymouth Division.
- 1821 Retired with the rank of lieutenant-general.

We remember Tench from his fascinating and well-written journals. Without them, we would not know of Phillip's order for a punitive reprisal operation against the Aboriginals of the Botany Bay area, or the existence of small pox matter among the medical supplies, the most probable cause of the devastating 1789 outbreak that was played down by Phillip to his superiors.

Arthur Phillip (1738 - 1814). ¹¹³

Timeline¹¹⁴

- 1755 Graduated from Merchant Navy, after two years at sea. Transferred to the Royal Navy.
- 1762 Promoted to lieutenant.
- 1763 Retired from Navy when Seven Years War ended.
- 1763 – 1774 Farming on his properties at Lyndhurst in Hampshire. He had married a wealthy widow in 1763.
- 1774 – 1778 Served with the Portuguese in South America against the Spanish.
- 1778 Returned to the Navy and fought in the American War of Independence.
- 1781 Promoted to post captain.
- 1781 – 1786 Doing survey work for the British Admiralty.
- 1786 Appointed as New South Wales' first governor, probably on the recommendation of Sir George Rose, treasurer of the navy, who lived near Philip at Lyndhurst.
- 1787 Phillip's second commission of 2 April had '*given him the power of granting land to approved persons, defined in his first instructions as former convicts.*'
- 1789 Secretary of State authorised Phillip to give land grants to migrants.
- 1792 On 11 December, Phillip returned to Britain on the Atlantic, to seek

¹¹³ Primary reference is B. H. Fletcher, 'Phillip, Arthur (1738 – 1814)', Australian Dictionary of Biography, Volume 2, Melbourne Press, 1967 www.adbonline.anu.edu.au/biogs/A020292b.html Aboriginal dispossession is not mentioned. If we relied on the ADB for our biographical history, we would struggle to find any accountability for the process of Lemkinian genocide.

¹¹⁴ L.F. Fitzhardinge, 'Tench, Watkin (1758 – 1833)', Australian Dictionary of Biography, Australian National University <http://adb.anu.edu.au/biography/tench-watkin-2719/text3829>

medical treatment. He had intended to return to Port Jackson, but poor health forced him to resign from the Navy in 1793.

- 1796 Resumed naval duties.
- 1799 Appointed as rear admiral.
- 1805 Retired from the Navy.
- 1814 Promoted to admiral of the blue. Died shortly afterwards, leaving an estate of £25,000, an enormous sum at that time, and indeed today.¹¹⁵

The interest in Phillip's life arises from his role in the birth of the first British settlement in Australia. Many historians and biographers paint Phillip as a fair-minded humanitarian and friend to the Aborigines. They have to some extent rewritten the past to place Phillip on a pedestal. They often cite his refusal to punish Bennelong, a leader of his tribe, for wounding him with a spear. Perhaps Phillip knew that the spear was not intended to kill him (after all, it was not a death spear, and was accurately delivered to a fleshy part of the body where there were no vital organs), but simply to allow Bennelong to regain his tribal standing after Phillip had previously kidnapped him by force to 'conciliate Aboriginal affections'.

The Australian Dictionary of Biography effusively records

'Phillip was in general so humane in his treatment of the Aborigines that it is surprising that Dawes could not agree with him that this particular attack was unprovoked and that harsh measures were justified, but he seems to have had reason to suspect the victim.'

How Phillip's supposed '*humane treatment of the Aborigines*' is to be reconciled with his vindictiveness towards Dawes, when Dawes refused to participate in an excessively punitive expedition against the Aborigines, is quite unclear. Both Dawes and Tench knew that Phillip's punitive expedition was wrong, and so, probably, did Phillip. Phillip ordered (in his secret orders, kept secret from Grenville, although it probably would not have made an iota of difference to the Home Office) '*that we were to cut off, and bring in the heads of the slain, for which purpose, hatchets and bags would be furnished*', which Phillip proposed to display publicly, to create terror amongst the Aborigines he was treating so 'humanely'.

Phillip becomes diminished in history as an administrative apparatchik of British colonial power, puffed up with the conceit of his authority and self-importance. Far from being '*so*

¹¹⁵ In today's income or wealth value, £25,000 UKP in 1814 is about (61 x 25000 x 1.6, or) 2.44 million AUD (in terms of the historic standard of living) or (964 x 25000 x 1.6 or) 38.56 million AUD (in terms of economic status) or (3,234 x 25000 x 1.6 or) 129 million AUD (in terms of economic power). See 'Measuring Worth' <http://www.measuringworth.com/exchange/>

humane in his treatment of the Aborigines’, Phillip can be seen as a devious Aboriginal manipulator and persecutor: he sought Aboriginal help when the colony was at risk of starvation, introduced germ warfare (possibly inadvertently, because the jury is still out), destroyed the career of any officer who objected to his ‘humane’ treatment of Aboriginals, then took Aboriginal land and awarded it to favoured cronies. When Aboriginals resisted the occupation of their land, Phillip aggressively pursued and allowed their murder, unsuccessfully at first, but something his successors were to perpetuate with renewed determination. Britain wanted land for settlement. Aboriginals were in the way and had to be removed.

The invasive occupation process drew in a wave of voracious British settlers that Britain encouraged,¹¹⁶ where the ‘rule of British law’ was ‘the rule of the bush’ and the gun spoke with ultimate authority and ‘humanity’. But like a rock thrown into a pool, Phillip’s effects continue to influence us, and not for the better. Lemkinian genocide began with Phillip’s armed occupation. Phillip had the full support of Britain. Aboriginal disadvantage still continues. Racism continues. British accountability has yet to be realized. Their accountability is now ours.

Phillip has many devoted biographers, most of them effusive, among the more recent: Michael Pembroke.¹¹⁷ Pembroke is a barrister and judge, so should be familiar with the rules of evidence. Unfortunately, his evidentiary framework on many important points would not pass muster in a first year law degree. For example, in discussing the smallpox outbreak in 1789, he repeats the now discounted theory that ‘*recent opinion suggests that the virus may have originated with Macassan fishermen and been transported overland. They came seeking trepang and traded with the Aborigines.*’¹¹⁸ He does not provide any source for this ‘recent opinion’. In fact, current exhaustive historical research suggests that Macassan fishermen are almost completely ruled out as a smallpox disease vector.¹¹⁹ Pembroke compounds the problem, when he indirectly quotes Watkin Tench that vials of the smallpox virus were kept in the medical supplies:

¹¹⁶ Land grants 1788 to 1792 <http://www.records.nsw.gov.au/state-archives/guides-and-finding-aids/short-guide-8>

<http://www.records.nsw.gov.au/state-archives/indexes-online/colonial-secretary/index-to-the-colonial-secretarys-papers-1788-1825/colonial-secretary-papers-1788-1825>

¹¹⁷ Michael Pembroke, *Arthur Phillip: Sailor, Mercenary, Governor, Spy*, 2014

¹¹⁸ *Ibid*, p. 209

¹¹⁹ See *FWAYAF Recollections of a (Homicidal) Pastoral Frontier*.

*‘Watkin Tench wondered about the smallpox virus that surgeons usually kept in vials secured in their medicine chests. But he dismissed the idea that it might have been the cause’*¹²⁰

Pembroke concludes that *‘there is no support for the speculation that any vials were unaccounted for’*,¹²¹ but provides no evidence for his assertion. In fact, Pembroke provides no endnotes whatsoever on this matter. The simple fact is that there is no evidence that anyone, including Tench and Phillip, thought to check if the smallpox vials were missing, surely a simple matter.

Pembroke’s work is dangerously inaccurate in many of the misconceptions he perpetuates, which tend to involve ‘speculation’ and ‘opinion’, but little hard evidence that can be tested. There are many examples like this, where opinion is offered as fact, without supporting evidence. An example, which involves *‘terra nullius’*:

*Both the British and French claims to possession, on the east and west of the Australian continent, were only conditional. When it came to annexation of new lands, the international law of nations had two principal tenets. The first was an assumption that a country could be effectively without an owner, and therefore terra nullius, even when it was inhabited, as long as the occupants consisted of no more than an indefinite population of itinerant hunter-gatherers.*¹²²

Pembroke is a legal scholar of undoubted ability. It is therefore puzzling why he offers no legal opinion on the contentious doctrine of ‘terra nullius’. Although the term *Terra Nullius* or ‘empty land’ is a relatively recent introduction into historical debate,¹²³ possibly concocted – it was never referred to in Blackstone or Vattel or Wolff in their laws of sovereignty, but has a precedent from the times of Latium or Roman pre-history - we must remind ourselves that British sovereignty over Australia was first claimed on the legal subterfuge that the East Coast of the continent of New Holland was ‘uninhabited’ and ‘not visited by any European before’; alternatively, it was not claimed by any other European sovereign. Through a process of legal obfuscation, we’ll see that Britain convinced itself that while New Holland was clearly inhabited, the Aboriginals did not ‘inhabit’ the continent in a way which Britain would legally accept, according to its own laws, and was further unclaimed by any other European

¹²⁰ Ibid, pp. 208, 209.

¹²¹ Ibid, p. 209

¹²² Ibid, p. 129.

¹²³ I can find no reference to the term ‘terra nullius’ in any of the British Government’s correspondence or despatches in the late 18th century as a legal pretext for claiming Australia in the name of the sovereign. Nevertheless the term was introduced by the Romans two thousand years prior as they sought legitimacy for their territorial expansion across Europe and Asia. It may be that Enlightenment thinkers such as Wolff and Vattel were familiar with the term, but I’ve been unable to confirm it.

sovereign or recognized power. Ergo: the Aboriginals were not inhabitants, therefore did not exist, so the British could claim possession. It is unlikely that any of this legal argument passed through Cook's mind when he claimed possession. He was a simple sailor, and all he did was to plant a flag. More properly, 'terra nullius' (or empty land) should be called 'res nullius', or land with no 'inhabitants', meaning there were no agricultural workers working the soil, in British legalese. But Australia had been discovered millennia before. The 'non-inhabitants' would have been bemused if Cook had told them his intent, to claim the continent for the Sovereign, contrary to his orders that any such claim should be with 'the consent' of the inhabitants. Thus began the myth of *terra nullius*,¹²⁴ and finished a few months later in August 1770 (although given the juridical *fait accompli* by Governor Bourke's Crown Land Proclamation in 1835 and Peel's Government in 1842 through the UK Wastelands Act) with Cook taking 'possession' and 'sovereignty' for the entire eastern seaboard of this 'uninhabited' and 'unclaimed' land in the name of the British Crown and we can assume without the 'consent of the natives'. However, Australia had been discovered millennia before.

The term '*terra nullius*' is interesting and has had a certain amount of public discussion, particularly about the time of the Mabo debate in the nineties; but is it historically valid? There appears to be no reference to the phrase in any of the British Government's correspondence or despatches in the 17th to the late 18th century as a legal pretext for claiming Australia in the name of the sovereign. Nevertheless, we know the term was adopted by the Romans two thousand years prior, as they sought legitimacy for their territorial expansion across Europe and Asia. But the term was never referred to in Blackstone or Vattel or Wolff in their laws of sovereignty, although it seems to have a precedent from the times of Latium or Roman pre-history. It may be that Enlightenment thinkers such as Wolff and Vattel were familiar with the term, but I've been unable to confirm it from any of their writings. Nor does Blackstone's influential '*Laws of sovereignty*' mention this term. No, 'terra nullius' seems to have first appeared into Australian legal thinking in 1992, with Mabo.

¹²⁴ Neither Vattel's (*Law of Nations*) nor Blackstone (*Commentaries on the Laws of England*) mentions the concept of *terra nullius* as a basis for unilateral possession, through first discovery and right of occupation. See www.archive.org for an uploaded copy of the Commentaries. I verified this by the simple expedient of doing an online search on each document, using the search argument '*terra nullius*', which returned a null result. In 1770, the British determined that, although Australia was clearly inhabited, it was not occupied by people whom they regarded as civilized (that is, there was no evidence of agriculture in a form the British could recognize); nor had the east of New Holland been claimed by any other sovereign power recognized by Britain. The term *terra nullius* – or more appropriately *res nullius* – first seems to have been introduced into Australian judicial proceedings in the Mabo case (*Mabo v. the State of Queensland*, F.C. 92/014 (3 June 1992), 19 – 21 as a result of Henry Reynold's advocacy. Of course, the origin of the term is much older, first appearing in Roman Law, but seems then to have fallen into disuse, disguised by European concepts of 'sovereignty' and 'occupation' and the meaning of the word 'inhabited'. Also see Merete Borch, *Rethinking the Origins of Terra Nullius*, Australian Historical Studies, 117, 2001.

Another example from Pembroke:

*‘Since the time of the philosopher John Locke, Enlightenment thinkers had maintained that ownership of land through habitation could only be established when labour was mixed with the land through agricultural activity and construction’.*¹²⁵

But Locke did not say this. Locke in his *Second Treatise* (1690) does mention *vacuum domicilium* (‘vacant soil or ‘empty of inhabitants’), which some have interpreted as an argument for American native dispossession, except that Locke clearly asserts that the natives had rights by prior occupation:

‘the inhabitants of any country who are descended and derive title to their estates from those who are subdued and had a government forced upon them against their free consents retain a right to the possession of their ancestors.. s194’.

Locke does argue that

*‘the labour of his body and the work of his hands...whatsoever then he removes out of the state that nature has provided... and joined to it something that is his own, and thereby makes it his property’, but the right of ‘prior occupation’ overrides the right of ownership by labour.*¹²⁶

The rules of sovereignty had vexed European thinkers for centuries, but after Locke, one of the most influential was Vattel (*Law of Nations*, 1759), from whom Blackstone, the eminent British jurist, derived many of his ideas in the four volume *Commentaries on the Laws of England* (1765 to 1769), just in time for Britain’s occupation of New Holland. The question for sovereign nations, including the British, was how to give a semblance of legality to annexation of another state or country and avoid unnecessary territorial conflict. Blackstone set out these detailed rules as a kind of Catch 22 for those who were occupied, which we will shortly come to. With these rules, I’m inescapably reminded of Douglas Adams, where he has the Vogons demolishing the Earth to make way for a galactic super highway. When the hitchhiking hero protests, the Vagon commander says matter-of-factly that *‘all the planning*

¹²⁵ Ibid, pp. 129, 130.

¹²⁶ Roger Woolhouse, *Locke: A Biography*, 2007; Ray Gibbons, *FWAYAF Recollections from a (Homicidal) Pastoral Frontie*, 2014; John Locke, *Second Treatise of Government*, Dover, 2002; Paul Corcoran, *John Locke on the Possession of Land: Native Title vs. the ‘Principle’ of Vacuum domicilium*, University of Adelaide, digital.library.adelaide.edu.au/dspace/bitstream/2040/44958/1/hdl_44958.pdf last accessed 9 Sept. 2013

charts and demolition orders have been on display in Alpha Centauri for fifty years, so you've had plenty of time to lodge any formal complaints.'

Blackstone¹²⁷ set out the rules for native dispossession where he proclaimed through tortured reasoning in his *Commentaries* that if the invaded country was 'inhabited', the British could declare it 'uninhabited' through a convoluted definition of the meaning of inhabited: to be inhabited, the land must be worked for agriculture; the 'occupants' of the land must be 'civilized', with a system of laws and settlements and productive ('cultivated') land use and Christian religion. If 'uninhabited' all British laws immediately applied.¹²⁸ If conquered or ceded, British law overrode local law. If claimed in the name of the Crown, because no other recognized power had made a prior claim, the land and its 'inhabitants' or notional 'occupiers' – including 'uninhabitants' or 'unoccupiers' if Britain so deemed - immediately became British citizens, subject to British law. However, if the country was 'inhabited' according to Blackstone's logic, it may not necessarily be 'occupied', because there were no recognized settled communities, within a narrow British definition; or there was no system of property laws acknowledged by Britain to give prior title; therefore, all land belonged to the Crown. And if 'inhabited' and 'occupied', but 'conquered' and 'non Christian', the local laws could be supplanted by Britain. Ergo, for Aboriginal and other indigenous people who were confronted by Britain's global territorial ambitions: checkmate. Britain gave themselves the right, through the British Sovereign, to occupy any 'unclaimed' country by force if necessary, or simply by planting a flag in some remote corner in the name of the Crown, the significance of which would have astonished the Aboriginal owners, even if they were informed.

¹²⁷ Sir William Blackstone (1723 – 1780) was an English judge, jurist and professor who produced the influential historical and analytic treatise on the common law entitled *Commentaries on the Laws of England*, first published in four volumes over 1765 – 1769.

¹²⁸ During the 18th century, when there was a frenzy of sovereignty claims and initial colonization by European powers, the British legal expert Sir William Blackstone had attempted in 1765 to distinguish settled colonies from those conquered or ceded through what became known as the '*doctrine of reception*':

Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held, that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony [...] But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country. [Commentaries on the Laws of England, Bk I, Ch. 4, pp. 106-108].

The legal framework for British Imperialism included the structural idea of ethnic cleansing, both globally and in Australia. The act of sovereign possession generally overrode indigenous rights. For the occupying British force, the aetiology of any coldly calibrated intention (such as organised and deliberate ethnic cleansing) devolves to modality and rules. Modality is both administrative and militarised, and for Britain Inc. modality was a practiced imperial art in the methods for imposing and enforcing power. Rules were developed in association with the extension of imperial reach: the rules for legal dispossession, rules for sovereignty, evidence, land ownership, enfranchisement and citizenship, rules based on the canon of English Law, given local juridical interpretation and augmentation, the rules of arbitrarily imposed power, solemnly enforced by the armed fist of appointed representatives of the Crown.

Consider other factual errors by Pembroke: *'Phillip was given authority over the whole of the land of New South Wales from Cape York in the north to Van Diemen's Land in the south and as far west as longitude 135° E. Curiously, the western boundary was seven degrees further west than even Cook had claimed in 1770.'*¹²⁹ But Cook did not specify any western longitude in his claim of possession. Britain asserted the longitudinal claim afterwards.

Probably the most egregious omission is that Pembroke barely mentions Phillip's formative role in forcible Aboriginal dispossession. I spoke with a bookseller about this. Her pragmatic answer: *He had a job to do.* She was right, of course. Phillip was part of an administrative Imperium called Britain Pty Ltd.

Pembroke does not discuss Phillip's land grants at all, which were a key part of his responsibility, and began the dispossession process. Pembroke also ignores or plays down any episodes that might count against Phillip's rational judgment or humanitarian legacy. The singular incident of McEntire's death at the hands of Pemulwuy is briefly mentioned, as is Phillip's order for Tench to conduct a reprisal operation, and Dawes' initial refusal to participate in Phillip's punitive expedition, which is surprising when the episode challenges the heart of Phillip's supposed 'egalitarian benevolence' and desire to serve 'the cause of humanity'.¹³⁰ Pembroke dismisses this incident in a few sentences, as if to diminish Phillip's character flaw:

When Phillip had been speared three months earlier, he pointedly directed that there be no retaliation. He now took a different approach, ordering Watkin Tench to take a party of marines to Botany Bay with instructions to bring back the heads of ten men of the Botany Bay tribe and to capture two men alive for execution. Dawes initially refused, then relented, but

¹²⁹ Ibid, pp. 139, 140

¹³⁰ Ibid, pp. 201, 205

*regretted doing so and fell out with Phillip. Tench at least successfully bargained with Phillip to reduce the number of heads to six. Eventually on 14 December a troop of over 50 men departed for Botany Bay armed with muskets, hatchets for beheading, and bags for carrying heads.*¹³¹

Pembroke barely touches on Phillip's vindictiveness towards Dawes. Pembroke says '*McIntire had apparently committed some atrocious offence against the Eora for which he was speared with a cannadiul, an Aboriginal death spear studded with legal jagged stones*'.¹³² Presumably Pembroke means McEntire, as recorded by Tench (although he appears in the First Fleet list as MacIntire and Major Ross's Returns as Mackintire). Pembroke does not mention that the death spear did not cause death by its attached stones, but by the fact that the stones caused infection when they became loose within the body, an important detail. But detail is what Pembroke tends to overlook, where hyperbole might add a flamboyant flourish. Too often, we are left with insufficient information. The use of the adverb *apparently* (or 'seeming real, but not necessarily so') connotes hearsay, which is not admissible in a law court, and does not substitute for the fact that McEntire admitted on his death bed that he was guilty of many assaults against the Aboriginals, something which Phillip was not prepared to believe, unlike Tench. Pembroke mentions none of this, nor does he provide citable sources for us to check many of his assertions around this event (or others). Pembroke passes no judgment on Phillip for ordering this punitive expedition, possibly because it detracts from his humanitarian thesis. Nor does Pembroke quote any of the primary sources concerning the details of the operation, for which Tench is the most eloquent. Pembroke's use of the word *Eora* for the local tribe is also inaccurate, what Inga Clendinnen calls a contextual referent, based on a linguistic misunderstanding with Phillip's personnel, who had a tentative understanding at best of the local dialect.

Pembroke skips over the reality and terrible consequences of Phillip's armed occupation, defends what we now call 'terra nullius' but at the time was simply 'claiming land belonging to no known sovereign', and briefly mentions the supposedly legal principles upon which territorial claims might be recognised (de Vattel is quoted, but not Blackstone, who is more relevant).¹³³ In fact, Pembroke's book offers a surfeit of opinion, where facts are often incidental.

¹³¹ Ibid, pp. 212, 213.

¹³² Ibid, pp. 212, 213

¹³³ Ibid, pp. 129, 130.

Pembroke's book represents everything that is wrong with an historical biography, in many respects like much of the Australian Dictionary of Biography, where mindless hagiography tends to carry the narrative, and we are left with little sense of the real forces that shaped our nation, for better or worse.

What can we surmise from this small case study into the arrival of the First Fleet, and the consequences of that invasive occupation? First, we must observe that Phillip now has many places commemorating his honour as the first British Governor, and he is held in the popular consciousness with some reverence. But is the honour deserved? We can conclude from the biographical evidence that similar hagiographic acknowledgment as Phillip's has been given to most of Phillip's successors, and that our remembered history is consequently flawed. Why have we allowed our recorded past to be defined by such people, when their actual achievements were in consolidating the process of invasive occupation? In part, it is determined by the logic of history, where chest-thumping primate behaviour makes for right action, where deference to authority is preferred to accountability, and where political leaders are invariably given embellished recognition.

Until we recognise our true history, we must inevitably repeat the mistakes of those who preceded us. We must confront the possibility that much of our recorded history is mere junk, with equivalent worth, perhaps of the kind sometimes propped by Manning Clark or Geoffrey Blainey or the Australian Dictionary of Biography, representing a general rejection of the 'black armband' view of history. It is a view of history as a confection of pastoral triumphalism rising from a foraging economy, but ultimately a reflection of violent and legislated dispossession that used, and still uses, Lemkinian genocide as its sharp instrument, with Aboriginal disadvantage remaining on clear display. In raising Phillip to a pedestal, we deny his role, as the representative of the British Government, in commencing the process of Aboriginal ethnic cleansing in Australia. Therefore, for as long as we admire his role, we must all be accountable.

Grace Karskens, an eminent historian, makes the dispossessionary point well:

On October 1790 [..] Maugaron came to Sydney to protest the loss of his people's land to the governor, the first recorded formal protest in Australia. 'Indeed, if this man's information could be depended upon', wrote Phillip, 'the natives were angry at so many people being sent to Rose Hill'. He acknowledged their dispossession quite frankly:

'Certain it is that wherever our colonists fix themselves, the natives are obliged to leave that part of the country.'

*But instead of attempts at compromise or amelioration one might expect from a governor so committed to peaceful relations, Phillip simply 'reinforced the detachment at that post'. The policy of amity and kindness did not include sharing the land with Aboriginal people, or protecting their food sources.*¹³⁴

Perhaps the invasive and genocidal behaviour shown by Phillip could have predicted our present situation, where we have moved from conflict with Aboriginal society to conflict with the ecosystem. In the 21st century, humanity is now vulnerable to non-sustainable exploitation of its environment. It is questionable if we may survive our own nature, being unable to adapt

Darwin believed that adaptation was through sexual selection, whereby only those organisms or species that are best adapted to prevailing environmental conditions will survive to produce more offspring. It follows from evolutionary theory that humanity can successfully survive by breeding people who are better able to adapt to a warming climate. Perhaps we can envisage growing reflective scales or developing niche controlled eco-environments? But what will we do about food and water? No. We will only adapt by modifying our learned behaviour that damages the environment in the first instance.

Epigenetics, the inheritance of environmentally acquired characteristics, is now our judge. The enormously complex epigenome, a sophisticated and poorly understood programme that controls gene expression through a switching mechanism, will achieve far more importance for our short-term survival than our genome, which changes relatively slowly and over millions of years.

The father of modern biology, Lamarck, may show us the way. In 1817, Lamarck wrote on our ability to turn fertile forests into desiccated wastelands, driven by tribalism and greed:

By his egoism too short-sighted for his own good, by his tendency to revel in all that is at his disposal, in short, by his lack of concern for the future and for his fellow man, man seems to work for the annihilation of his means of conservation and for the destruction of his own species. In destroying everywhere the large plants that protect the soil in order to secure things to satisfy his greediness of the moment, man rapidly

¹³⁴ Grace Karskens (2010), *The Colony A history of early Sydney*: 454, quoting Tench, *Complete Account*: 181 and Phillip (in Hunter), *Journal*: 312 [John Hunter (1793), *An Historical Journal of Events at Sydney and at Sea 1877 - 1792*; Watkin Tench (1789 and 1793), *A Narrative of the Expedition to Botany Bay and A Complete Account of the Settlement at Port Jackson*; Lyn Stewart (2015), *Blood Revenge Murder on the Hawkesbury 1799*.

*brings about the sterility of the ground on which he lives, dries up the springs, and chases away the animals that once found their subsistence there. He causes large parts of the globe that were once very fertile and well-populated in all respects to become dead, sterile, uninhabitable, and deserted. Neglecting always the words of experience, abandoning himself to his passions, he is perpetually at war with his kind, destroying them everywhere and under all pretexts, so that one sees formerly great populations become more and more diminished. One could say that he is destined to exterminate himself, after having rendered the globe uninhabitable.*¹³⁵

We are all children of the past and the behaviours, both innate and learned, of our ancestors. We are all the fortunate children of random catastrophes, such as meteor strikes or ice ages, which pay little heed to biological fitness. Epigenetics exercises a profound influence on human destiny, where Darwin is now shown to be spectacularly misguided or even wrong within the actual unfolding of biological Nature. If we are to learn anything from the short British history in Australia, it is that our introduced civilisation is unsustainable. We could do well to learn from Aboriginal society. Phillip had the opportunity, but failed, as did his successors. So may we.

¹³⁵ Honeywell, Ross, *Lamarck's Evolution*, Murdoch Books, Sydney, p. 57

Collection

British Public Records Office, London. UK

Object Name

Draught Instructions for Governor Phillip, 25 April 1787

Object Description

The Draught Instructions for Governor Phillip is the first official communication concerning the occupation and settlement of Australia. It empowers Captain Arthur Phillip to establish the first British Colony in Australia and to make grants of land and issue regulations for the Colony. They comprise a type of founding 'Constitution' for the new Colony. Paper. Dimensions 330 mm long x 220 mm wide.

Draught Instructions for Governor Phillip, 25 April 1787

Six years after James Cook landed at Botany Bay and gave the territory its English name of 'New South Wales'¹³⁶, the American colonies declared their independence and war with Britain began. Access to America for the transportation of convicts ceased, and overcrowding in British gaols soon raised official concerns.

In 1779, Joseph Banks, the botanist who had travelled with Cook to NSW, suggested Australia as an alternative place for transportation. The proposal was repeated later by James Matra,

¹³⁶ This comment by www.foundingdocs.gov.au is also disappointingly wrong, as Cook's voyage narrator and editor, Hawkesworth, may be responsible for this name, while Cook was on yet another expedition. Cook's records do not show any name at all for east New Holland, apart from recognizing that the Dutch had completed substantial mapping of the continent's coastline prior to his arrival, although Parkin suggests that a recently available 'holograph journal' of Cook's has the name 'New South Wales' apparently in Cook's handwriting. See J.C. Beaglehole, *The Life of Captain James Cook*, p. 249 : "Cook did not give it the name New South Wales, or any name at all". Also see *Historical Records of New South Wales, Volume 1, Part 2*, 1893, p. xxvi, "Cook does not state, as Hawkesworth his editor does, that the territory was proclaimed a British possession under the name "New South Wales". However, Ray Parkin's research among Cook's original journals and logs throws up an important observation: "It appears that Cook did not name this coast New South Wales just at this time, for the entry here has been put in over an erasure. The transcript in the Mitchell Library simply has 'New Wales'. No other log or journal mentions New South Wales. It has even been suggested that this name originated with Hawkesworth's editing and publication of the Endeavour Voyage, which was taking place while Cook was on his second voyage. This suggestion was made in the *Historical Records of New South Wales*, 1893. The existence of the holograph journal, from which the present work was originally taken, was not known to Dr Arnold Wood (the historian) nor had it been available to Hawkesworth most probably. But the words 'by the name of New South Wales' appear to be in Cook's own handwriting, whatever the controversy. It does however appear to have been a name that was decided upon some time after this date." [Ray Parkin, op. cit., pp. 442 – 443]. Parkin does not provide a bibliographical reference for this 'holograph journal'.

who had also sailed on the Endeavour.¹³⁷ The advantages of trade with Asia and the Pacific were also raised, alongside the opportunity NSW offered as a new home for the American loyalists who had supported Britain in the War of Independence. Eventually the British Government settled (although not without criticism) on Botany Bay as the site for a colony. Secretary of State, Lord Sydney, chose Captain Arthur Phillip of the Royal Navy to lead the fleet there and to be the first governor.

Before his departure for NSW, Phillip received his Instructions (composed by Lord Sydney) from King George III, 'with the advice of his Privy Council'. The first Instructions included Phillip's Commission as Captain-General and Governor-in-Chief of NSW. This Draught Instructions for Governor Phillip was apparently an amended Commission. It designates the territory of NSW as including 'all the islands adjacent in the Pacific Ocean' and running westward to the 135th meridian, that is, about mid-way through the continent.

The Instructions advised Phillip about managing the convicts, granting and cultivating the land, and exploring the country. The Aboriginal peoples' lives and livelihoods were to be protected and friendly relations with them encouraged, but the Instructions make no mention of protecting or even recognising their lands. It was assumed that Australia was 'terra nullius', that is, land belonging to no one, that is, no recognized European sovereign. This assumption shaped land law and occupation for more than 200 years.⁴

With this document came British Law, European concepts of land ownership and the political and social structures that would form the institutions and culture of modern Australia.

The original Instructions are not held in any Australian or international collection. The Draught Instructions for Governor Phillip is the only known physical remnant of the original document which set out the constitutional foundation of the Colony under Captain Arthur Phillip.

Transcription of the first six pages of the Draught Instructions for Governor Phillip

Instructions for Our Trusty George R and well beloved Arthur Phillip Esq. Our Captain General and Governor in Chief, in and over (LS.) Our Territory of New South Wales and its Dependencies, or to the Lieutenant Governor or Commander in Chief of the said Territory for the time being. Given at Our Court at St. James the 25th day of April 1787. In The Twenty Seventh year of Our Reign.

With these Our Instructions you will receive Our Commission under Our Great seal constituting and appointing you to be Our Captain General and Governor in Chief of Our Territory called New South Wales extending from the Northern Cape or Extremity of the Coast

¹³⁷ Matra was probably Magra. Ray Parkin's *H.M. Bark Endeavour*, mentions an American, James Maria Magra as a midshipman on the Endeavour, where he was a shipmate of Banks. Yet in the *Historical Records of New South Wales, Vol. 1, Part 1*, Cook, 1762 – 1780, pp. xxi - xlii) there is neither mention by Alexander Britton of Magra nor for that matter any of Banks' log entries, which were copiously recorded by Parkin. Magra (or Matra) might have exerted some influence on Cook and Banks, perhaps to the point of later recommending annexation of the East Coast of Australia in the name of the Sovereign. His background, according to HRNSW Vol. 1, Part 2 (pp. xxiv-xxvi), was most likely Corsican. For a time, he was the Consular representative of Great Britain in Morocco. It is not clear why he commanded so much attention from British Government ministers. He appears to have been a well-connected and wealthy political refugee from Corsica. According to a later entry in adb online <http://adbonline.anu.edu.au/biogs/AS10326b.htm> the mystery may be resolved. Magra apparently changed his name to Matra on his return to the U.K after the completion of the Endeavour voyage, in order to improve his chances at a Corsican hereditary claim.

called Cape York in the Latitude of Ten Degrees thirty seven Minutes south, to the Southern Extremity of the said Territory of New South Wales, or South Cape, in the Latitude of Forty three Degrees Thirty nine Minutes south, and of all the Country Inland to the Westward as far as the One hundred and Thirty fifth Degree of East Longitude, reckoning from the Meridian of Greenwich including all the Islands adjacent in the Pacific - Ocean within the Latitudes aforesaid of 10 ° 37' South, and 43° 39' and that it is your Majesty's pleasure we should grant him such powers as have usually been granted to the Governors of your Majesties Colonies in America.

We beg leave to represent you Majesty that the powers usual granted by this board to the governors of your Majesty's Colonies in America, are those of a Vice Admiral, but we are empowered by our commission to constitute Vice Admirals at such places only where Vice Admirals have usually been appointed by the High Admiral; we do therefore beg leave to submit to your majesty whether it may not be necessary, that we shall be empowered to appoint a Vice Admiral, and also a Judge, and other officers requisite for a Court of Vice Admiral with in the Territory called New South Wales.

Whereas there was this day read at this board, a Report from the Right Honourable the Lords of the Committee of Council appointed for the consideration of all matters relating to Trade and Foreign Plantations upon the Draught of Instruction for Captain Arthur Phillip whom his Majesty has been pleased to appoint Captain General and Governor in Chief of the Territory of New South Wales; - His Majesty, taking the said Report and Draught of Instructions into consideration, was pleased with the advice of his Privy Council, to approve of the said Draught Instructions, and to order, as it is hereby ordered that the Right Honorable Lord Sydney, one of his Majesty's Principle Secretaries of State do cause the said Draught of Instructions (which are hereunto annexed) to be prepared for his Majesty's Royal Signature.

25th April 1787

New South Wales

Draught of Instructions

For Governor Phillip

*Approved.*²

The *Draught Instructions for Governor Phillip* is historically significant as it defines the new land of NSW, and formalises Britain's claim over land that Aboriginal peoples had lived in for over 40,000 years. It also establishes the system of government and political culture of the Colony. It establishes the concept of 'terra nullius' that would be the foundation for the dispossession of Aboriginal homeland and pre-empt European settlement of the continent. It is the founding document for the nation.

The document has aesthetic significance in that it is a government document hand written in clear classic Georgian font style in an age before instant printing technology.

These *Instructions* have considerable research value as they detail how, in a brave experiment, Phillip is to found a colony. Clearly a settlement brief, they allude to the concept of *terra nullius*, the British assumption that the land can simply be claimed as Britain's own.

The *Draught Instructions for Governor Phillip* is of social significance as evidence of the experiment of the First Fleet and the experience of the convicts, army, administrators and Aboriginal peoples in the settlement and dispossession of Australia.

The document is well provenanced to the Public Records Office, London, UK and is in good condition.

The *Draught Instructions for Governor Phillip* is extremely rare. It is the only draft of Phillip's instruction in existence. The original instruction that Phillip received upon his Commission as Governor of NSW remains missing.

The *Draught Instructions for Governor Phillip* provides considerable potential to interpret the themes of British exploration and colonial expansion into the Pacific as well as the achievements of Governor Phillip in carrying out his brief and sustaining the settlement from a rudimentary level to a growing Georgian town. The *Draught Instructions* provides a tangible link to the official British decree to claim Aboriginal lands and administer them without acknowledgment of prior ownership or use.

Footnotes

1 www.foundingdocs.gov.au/item.asp?dID=35

2 Transcription by Stephen Thompson from a facsimile copy obtained from The National Archives, Kew, Richmond, Surrey, UK.

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Migration Heritage Centre NSW
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Edited by Helen Cumming

- **Object Name** *Draught Instructions For Governor Phillip, 25 April 1787*
- **Collection** [Britain](#)
- **Cultural background** [English](#)
- **Era** [1788](#)
- **Themes** [Exploration](#), [First Fleet](#), [Gaol](#), [Government](#), [Indigenous Relations](#), [Military](#), [Settlement](#)

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<http://www.migrationheritage.nsw.gov.au/>

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Atkins' 1805 advice to Governor King on lawful Aboriginal killing

In July 1805, the New South Wales Judge-Advocate Atkins, in advice to Governor King, deemed it was lawful to kill Aboriginals in 'reprisal' operations, and that their witness testimony was inadmissible if any were killed. Britain did not amend or rescind this ruling. It led to widespread extermination without fear of prosecution for the entire colonization period.¹³⁸

The one-sided (and it must be said racist) legislative and juridical process of ever-tightening settler sovereignty began with Cook's (and Britain's) declaration of territorial sovereignty over the eastern part of New Holland in 1770, followed by Phillip's (and later Governors') bestowed authority from 1788 to grant land while 'conciliating the affections of the Natives', with King's¹³⁹ subsequent violent acquisition of farming land along the Hawkesbury River between 1800 and 1806, cemented by Atkins's 1805 advice to King that it was lawful to kill Aboriginals in 'reprisal' operations, and that their witness testimony was inadmissible if some were killed by 'settlers'.¹⁴⁰

It didn't stop there. In 1802, Hunter and King refused to convict five white Argyle Reach settlers. These settlers were responsible for the brutal murder, in August 1799, of two young Aboriginal men on the Hawkesbury River, which had become the food bowl for the Sydney settlement. One of the Aboriginals was '*cut into pieces with a tomahawk and a death spear run through his yard and came thro' the back part of his neck*'.¹⁴¹ 'Yard' was the figurative term for anus. Lord Hobart, the British Secretary of State, pardoned the white murderers for the extrajudicial killings.¹⁴²

Hobart's appalling decision became a precedent for the condoned killing of Aboriginals. No white would be convicted of killing an Aboriginal for the next century or more, apart from the white perpetrators of the Myall Creek massacre on 1838, which provoked such outrage by the 'settlers' and media against the Government of George Gipps¹⁴³ that such prosecutions became extremely rare – for fear of causing a public backlash - and never successful under the racially antagonistic British jury system.

¹³⁸ Judge-Advocate Atkins' *Opinion on the Treatment of Natives, 20 July 1805*, HRA 1/5, 1804 – 1806: 502 – 504.

¹³⁹ Phillip King (1758 – 1808) was the third Governor of New South Wales, from 1800 to 1806.

¹⁴⁰ Judge-Advocate Atkins' *Opinion on the Treatment of Natives, 20 July 1805*, HRA 1/5, 1804 – 1806: 502 – 504.

¹⁴¹ Lyn Stewart (2015), *Blood Revenge murder on the Hawkesbury 1799*: 19.

¹⁴² *Hobart to King, 13th June 1802*, HRNSW, Volume 4: 788; Hobart pardoned the murderers for 'their general good conduct' from the time of the murders. British justice would never recover.

¹⁴³ George Gipps (1791 – 1847) was New South Wales Governor from 1837 to 1846.

King's subsequent ethnic cleansing policy for the Hawkesbury area was efficient and total.¹⁴⁴ It was also racist and, in character, genocidal. Thenceforth, settler rights over-ruled Aboriginal rights in any contested space. English Law as practised in Australia would not recover its impartiality, not for another two centuries, and still struggles with the humanitarian issues we see now.

King's land policy was a key forerunner of Australia-wide death squads carried out by police and pastoralists until at least 1928, of the longest land war in our history, of Australian 20th century apartheid (or legalized racial segregation) into the 1960s, and of the widespread (legalized) Aboriginal repression of today, where – for example - non-payment of often arbitrary fines leads to incarceration and the social politics of racially targeted victimisation. In this dispossessory process, we see how Government policies and practices shape normative behaviour, giving rise to the enduring politics of suffering, of disempowerment, of alienation.

Britain did not amend or rescind this ruling by Atkins and it acquired the force of law for much of the ensuing century and beyond. It led to normalised Aboriginal extermination without fear of white prosecution for the entire colonization period of an expanding pastoral frontier until the region-by-region Aboriginal insurgency was overcome by armed force and the unequal provisions of British Law, where all-white juries delivered unequal British justice in the slim event of a prosecution against a white perpetrator for the murder of any Aboriginal.¹⁴⁵

Governor King to Earl Camden, 20th July 1805.¹⁴⁶ The apprehended bias of British Law was further exposed by legal advice on 8th July 1805 from the New South Wales Judge-Advocate on the admissibility (or not) of Aboriginal witness testimony.

King submitted a lengthy despatch to Camden in July 1805 that enclosed advice from the NSW Judge-Advocate, Atkins, that Aboriginal witness testimony was inadmissible and therefore should be disallowed.

Britain never reversed or amended this advice. The result was a catastrophic failure of British justice, or conversely, the triumphant success of colonist-settler supremacy during the period of rampaging displacive pastoral expansion into the 20th century, where colonists could

¹⁴⁴ Stewart, Op. Cit.

¹⁴⁵ *Judge-Advocate Atkins' Opinion on the Treatment of Natives, 20 July 1805*, HRA 1/5, 1804 – 1806: 502 – 504.

¹⁴⁶ HRA 1/5: 496 - 504

use force to defend their property and Aboriginals could not legally object if members of their group were murdered.

Atkins upheld the legal right of colonists to defend their 'property' with lethal force and that Aboriginal witness testimony would be a 'mocking' of juridical procedure so should therefore be inadmissible.

The object of this letter is to impress the Idea that the Natives of this Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as Evidences; that it would be a mocking of Judicial Proceedings, and a Solecism in Law; and that the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit.

The colonists' legal right to 'use force against force' was reinforced by Bathurst to Darling in 1825,¹⁴⁷ advice that was quickly circulated by Arthur in defence of heavily armed counter-insurgency measures against the Palawa resistance.

This is Atkins' opinion to Governor King on the admissibility of Aboriginal witness testimony. It was quickly made Government policy and later cited by Arthur. With such racist policies, Aboriginals had little chance under British justice for having any of their rights protected, including the right not to be murdered:

*JUDGE-ADVOCATE ATKINS' OPINION ON THE TREATMENT OF NATIVES.*¹⁴⁸

IN obedience to your Excellency's Injunctions to me, I have given the two Paragraphs in the Letter of H.M. Secretary of State to the Executive Government of this Colony, respecting the Treatment of the Natives, all the consideration in my Power. I have further read the whole of the Correspondence of Mr. Arndell and others with your Excell'y, stating the Outrages committed by the Natives of the Hawkesbury, &c., and I am now to give my Opinion thereon, which I do with the greatest deference.

It is in vain to make it a Question from whence those excesses originated - from the inherent brutality of the Natives or from real or supposed Injuries they may have sustained from the Settlers. It becomes more the Object to consider of the best method to prevent it in future; and here two Paths naturally present themselves - that of rigor or lenity. If the first is pursued, can

¹⁴⁷ HRA 1/12: 21. Earl Bathurst to Governor Darling, 14th July 1825. Despatch No. 6, per ship Catherine Stewart Forbest ; acknowledged by Governor Darling, 5th May, 1826.

¹⁴⁸ HRA 1/5: 502 - 504

*it be done legally? I mean, can it be done conformable to the existing Laws? I think it cannot; for **the evidence of Persons not bound by any moral or religious Tye can never be considered or construed as legal evidence.** Your Excellency well knows that the Members of the Court of Criminal Judicature are sworn "to give a true Verdict according to the Evidence"; and however strong the necessity of making Public Examples of the Offending Natives may appear, can it supersede that Obligation on their (the Members) consciences? And should the Members of the Court apply to me for my opinion as Judge-Advocate, can I say it is legal, and according to Law? The Natives are within the Pale of H.M. protection; but how can a Native, when brought to Trial, plead Guilty or not Guilty to an Indictment, the meaning and tendency of which they must be totally ignorant of? Plead they must before Evidence can be adduced against them, and Penal Laws cannot be stretched to answer a particular exigency.*

Under these conclusions, it may be asked, What remedy can be applied? In any other Country Arms would be put into the hands of such persons who might be the most likely to suffer, that they might materially protect each other; but this experiment might be subject in this Colony to great inconveniences, and it is what must be submitted to the Executive Government. It would have been a fortunate Circumstance had Villages been built for the residence of the Settlers, and their Farms have radiated, as from a Center; but as it is, they must devise some means of protecting themselves by dedicating part of their time to their mutual protection, and no doubt will receive from Government all that assistance within its power to give.

Might not such Settlements most subject to the visits of the Natives be divided into Districts, and a certain number of its Inhabitants be daily employed in guarding that District?

Lenient measures with the Natives adjacent to the Hawkesbury I fear (from experience) will avail but little.

*It appears that the Evidence of Henry Lamb and Rich'd Morgan goes very much in favor of Dunn; for therein it is stated that **Dunn was only defending his own property from common Depredators**, who, at the time he wounded one of them, were in the act of Stealing and carrying away that property, and resistance against them the Laws justified.*

Major Johnston's letter to Your Excellency states that Talloon, one of those who Murdered Mrs. McArthur's Stockmen, was shot by the Party.

And'w Thompson's Letter of the 27th April to Mr. Arndell says that a considerable Number of them were killed by his party.

Ob. Ikin's letter states his party as having destroyed many of them.

It fully appears from the above that a considerable number of them have fallen Sacrifices to their excesses. This may possibly (through fear) point out to the Survivors the necessity of regulating their future conduct by other means than those hitherto adopted; if not, self-defence will justify the most coercive measures being exercised against them.

The object of this letter is to impress the Idea that the Natives of this Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as Evidences; that it would be a mocking of Judicial Proceedings, and a Solecism in Law; and that the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit.

As Your Excellency wished me to write fully on this subject, the above is submitted to Your Excellency's consideration by

Yours, &c.,

Sydney, July 8th, 1805. RD. ATKINS, J.-A.

To quote a truism: the absence of 'evidence' does not mean the evidence of absence. Aboriginal evidence was mostly disallowed by 19th century British law, thereby disproving 'British culpability', surely a false syllogism: *x is disallowed, therefore y is false.*

Aboriginal testimony was disallowed for the greater period of ethnic cleansing, which peaked in the mid-nineteenth century for the south and continued into the 20th century for the north. In one hundred and fifty years of sustained killing of Aboriginals, there were only a small handful of prosecutions, notwithstanding Aboriginal witnesses whose testimony was disallowed by British Law. After all, it was not in the best interest of the settlers to support changes to the laws of evidence until the Aboriginal 'problem' had been substantially removed as an impediment to British land ownership.

The Law, especially British derived common and statutory law, did not have to be and was not just. Land could be, and was, unilaterally expropriated in the name of the Crown. Aboriginals were expendable. The sooner they could be made to disappear, the sooner the land could be made profitable. There was little prospect and less will from the British government or its colonial authorities to prevent squatters moving into the interior. Instead an

attempt was made to derive government revenue from the uncontrolled Aboriginal dispossession.

An initial act was passed in 1833 to protect the Crown Lands of the New South Wales colony but illegal squatting remained rampant. In 1836, a further Act was passed that required pastoralists beyond the limits of location to pay an annual license fee of 10 pounds to depasture their stock, and also divided the interior into seven squatting districts, each to be administered by a Land Commissioner.

The well known 1838 Myall Creek massacre, on the Liverpool Plains, was a result of the squatters' antipathy to sharing the land, but it was certainly not the first example. The rights of Aboriginals to own their tribal lands were barely or never considered, and only acknowledged by default as dispossession by right of conquest, their resistance declared illegal by the Secretary of State, Glenelg, where Aboriginals were Subjects but not Citizens.

Through a carefully worded piece of legal tap-dancing, Lord Glenelg declared Aboriginals to be 'nominal' subjects of the Crown, the original possessors or owners of the land, but not citizens or combatants:

*[...] all the natives inhabiting those Territories must be considered as Subjects of the Queen and as within H. M.'s Allegiance. To regard them as Aliens with whom a War can exist, and against whom H. M.'s troops may exercise belligerent right, is to deny the protection to which they derive the highest possible claim from the Sovereignty which has been assumed over the whole of their Ancient Possessions.*¹⁴⁹

so they were responsible before British law for any acts of resistance and ineligible for any treaties, their legal rights as British subjects were not supported by any Act of a Legislative Council or the British Parliament; nor was one ever considered; therefore Glenelg's exhortation to Bourke can be seen as a simple stratagem to avoid the *recognized* legal rights of enemy combatants engaged in a war through the pretense that they were British subjects, but without any agreed rights as subjects, and certainly not as citizens.

¹⁴⁹ *Historical Records of Australia, Series I, Volume 19* ie HRA 1/19, Despatch No. 353, pp. 47 – 50. This is a Despatch from Lord Glenelg to Governor Bourke in 1837: admitting that Aboriginal land had been expropriated; but denying their right to armed resistance, which would acknowledge that they were 'enemy combatants'; pressing the stratagem that they should be treated as subjects of the Crown who, in resisting, could therefore be charged with a civil or criminal offence, according to British law, but without the right to provide evidence in court actions against whites, or in their own defence, or the right to own land, as would apply to a citizen.

1816 Cumberland Plains NSW: Governor Macquarie's Proclamation of Martial Law

Timeline

- 10 April 1816 Macquarie's journal entry where he proposes ethnic cleansing
- 17 April 1816 Wallis' military action at Appin where 17 or more Aboriginals (men, women and children) are murdered
- 8 June 1816 Macquarie's despatch to Bathurst, where he downplays the size of the massacre, evidence of *mens rea*.
- 20 July 1816 Macquarie's official proclamation of martial law, where he makes no mention of ethnic cleansing. The proclamation was made *after* the military campaign

Britain's dispossession of Aboriginals drove violence; the loss of Aboriginal food sources, unchecked settler predation on Aboriginal women and children, and indiscriminate Aboriginal killing were the direct consequence of Britain's resolve to take the land by any necessary means, including force. It was a slippery slope to genocide.

After 1809, when British settlers began moving into the Cumberland Plains, southwest of Sydney, the area became yet another contested space.

The Appin massacre had its roots in the murder of an Aboriginal boy in 1814, when three soldiers shot him for stealing maize from a Lachlan Vale farm. Settlers would not tolerate the right of Aboriginals to the free use of their homelands. Nor would the British Government. The military and colonists could defend 'property' by imposing summary execution. The killings and reprisals escalated. British Law did not protect Aboriginals. Economic development trumped Indigenous human rights.

On 10th April 1816, Governor Macquarie¹⁵⁰ - who has a benevolent reputation in history and indeed is honoured with many buildings and public institutions, even a bank, in his name - wrote in his diary of his intention to ethnically cleanse any resisting Aboriginals - the Gundungurra, southwest of Sydney and any remnant Dharawal and Dharuk to the west.¹⁵¹ If the Aboriginals resisted in any way, or refused to surrender when asked, Macquarie instructed his military to kill them and hang their bodies on trees. However, Macquarie's military forces

¹⁵⁰ Lachlan Macquarie (1762 – 1824) <http://adb.anu.edu.au/biography/macquarie-lachlan-2419> NSW Governor from 1810 to 1821.

¹⁵¹ Val Attenbrow (2010), *Sydney's Aboriginal Past Investigating the archaeological and historical records*.

could interpret ‘resisting’ as simply surrounding an Aboriginal group and shooting them if they tried to escape.

There is no doubting Macquarie’s intent (*mens rea*), nor can we reflexively argue that times were different then. Macquarie’s intent was genocide in the form of ethnic cleansing: to destroy a targeted group in whole or in part. It was a policy that earlier Governors had adopted, and others would dutifully follow thereafter, notably including Arthur in Tasmania (1824 to 1836).

*I therefore, tho, very unwillingly felt myself compelled, from a paramount sense of public duty, to come to the painful resolution of chastising these hostile tribes, and to inflict terrible and exemplary punishments upon... I have this day ordered three separate military detachments to march into the interior and remote parts of the colony, for the purpose of punishing the hostile natives, **by clearing the country of them entirely, and driving them across the mountains...** In the event of the natives making the smallest show of resistance – or refusing to surrender when called upon so to do – the officers commanding the military parties have been authorised to fire upon them to compel them to surrender; hanging up on trees the bodies of such natives as may be killed on such occasions, in order to strike the greater terror into the survivors.*

On April 17th 1816, Captain Wallis trapped a number of Muringong Aboriginals at Appin Gorge, near the Brougham Pass south west of Camden and opened fire indiscriminately, killing men, women and children, forcing the others towards the gorge. Some tried to flee from the approaching soldiers but were unable to escape except by throwing themselves into the gorge 60 metres below, while they were being pursued. It is unknown how many died, as Government officials tend to under-estimate. Wallis suggested 17 but this was unlikely to include those Aboriginals who were forced over the cliff face. This was the first very large massacre by the military in New South Wales, although there had been many earlier murderous reprisals and racially motivated killings beginning with the initial British invasion in 1788 under Phillip’s command.¹⁵²

Macquarie sought to downplay the circumstances of the Appin massacre with his superiors in Britain, but it is questionable whether they would have been too concerned. The success of

¹⁵² Grace Karskens (2015), *Appin Massacre* (supported by NSW Office of Environment and Heritage) http://dictionaryofsydney.org/entry/appin_massacre last viewed 2nd July 2017; James Kohen (1993), *The Darug and their Neighbours*; Grace Karskens (2010), *The Colony A history of early Sydney*: 454 - 516.

the settlement was paramount; the British Government would not tolerate any Aboriginal insurgency. After the massacre, Indigenous resistance in the area became minimal, indicating that most of the tribe had either been exterminated or forced from the area, where their physical safety was under constant threat. Tribes could number many hundreds of people, depending on the availability of good land, water and game. It is likely that many fled from the persecution, to the temporary safety of elsewhere. But 'elsewhere' was becoming harder to find, as settlers continued their displacive aggression in the unequal contest for space. What happened at Appin would repeat across Australia. For Britain, there was no turning back. The country to the west of the Blue Mountains would be next, the home of the Wiradjuri. This time, Macquarie's successor, Brisbane, would lead the assault.

In Macquarie's carefully worded despatch to Earl Bathurst on 8th June 1816, he did not mention that among the Aboriginals killed at Appin were women and children; nor did he mention that the captured Aboriginal prisoners were not armed guerrilla fighters but women and children. Perhaps he was ashamed. The actual number of Aboriginal deaths was probably under-reported, as there was no proper accounting or inquest. Wallis received no reprimand; martial law made it pointless, even if it was proclaimed after the massacre. Macquarie succeeded in his ethnic cleansing policy for the Cumberland Plains. Other prime pastoral areas were to follow, as Britain extended its colonial reach.

The Governor's Diary & Memorandum Book Commencing on and from Wednesday the 10th. Day of April 1816. — At Sydney, in N. S. Wales. ¹⁵³

Wednesday 10. April 1816

The Aborigines, or Native Blacks of this Country, having for the last three years manifested a Strong and Sanguinary Hostile Spirit, in repeated instances of murders, outrages, and Depredations of all descriptions against the Settlers and other White Inhabitants residing in the Interior and more remote parts of the Colony, notwithstanding their having been frequently called upon and admonished to discontinue their hostile Incursions and treated on all these occasions with the greatest kindness and forbearance by Government; — and having nevertheless recently Committed several cruel and most barbarous murders on the Settlers and their Families and Servants, killed their Cattle, and Robbed them of their Grain and other Property to a considerable amount, it becomes absolutely necessary to put a stop to these outrages and

¹⁵³ Macquarie, Lachlan. *Diary 10 April 1816 - 1 July 1818* Original held in the Mitchell Library, Sydney. ML Ref: A773 pp.1-8. [Microfilm Reel CY301 Frames #237-245]. Also www.lib.mq.edu.au/digital/lema/1816/1816April.html

disturbances, and to adopt the strongest and most coercive measures to prevent a recurrence of them, so as to protect the European Inhabitants in their Persons & Properties against these frequent and sudden hostile and sanguinary attacks from the Natives. — I therefore, tho, very unwillingly felt myself compelled, from a paramount Sense of Public Duty, to come to the painful resolution of chastising these hostile Tribes, and to inflict terrible and exemplary Punishments upon them without further loss of time; as, they might construe any further forbearance or lenity, on the part of this Government, into fear and cowardice.

In pursuance of this resolution, and on the grounds of the most imperious necessity, arising from their own hostile, daring, outrageous, and sanguinary Proceedings, I have this Day ordered three Separate Military Detachments to march into the Interior and remote parts of the Colony, for the purpose of Punishing the Hostile Natives, by clearing the Country of them entirely, and driving them across the mountains; as well as if possible to apprehend the Natives who have committed the late murders and outrages, with the view of their being made dreadful and severe examples of, if taken alive. — I have directed as many Natives as possible to be made Prisoners, with the view of keeping them as Hostages until the real guilty ones have surrendered themselves, or have been given up by their Tribes to summary Justice. — In the event of the Natives making the smallest show of resistance – or refusing to surrender when called upon so to do – the officers Commanding the Military Parties have been authorized to fire on them to compel them to surrender; hanging up on Trees the Bodies of such Natives as may be killed on such occasions, in order to strike the greater terror into the Survivors. — These Military Detachments consist of the two Flank Companies of the 46th. Regt., Commanded severally by Capt. Schaw, Capt. Wallis, and Lieut. Dawe of the same Corps, and marched this forenoon from Sydney for Windsor, Liverpool, and the Cow Pastures respectively; furnished with proper Guides of Europeans and friendly Natives, Ammunition, Provisions &c. &c., the Officers Commanding these Detachments respectively being directed by their Instructions to commence their Operations at and from the several Points herein mentioned of Windsor, Liverpool, and the Cow Pastures; exploring and scouring the whole of the Country on the East side of the Blue Mountains from the Kurry-Jong Brush on the North side of the River Hawkesbury, to the Five

Islands, alias Illawarra, on the South and Eastward of the Cow Pastures and River Nepean. — I have sent an Orderly Dragoon (mounted) – and a light Cart with each of the two large Detachments Commanded by Capts. Schaw and Wallis the Detachment commanded by Lieut. Dawe being intended to remain Stationary in the Cow Pastures for some time. —

GOVERNOR MACQUARIE TO EARL BATHURST.¹⁵⁴

(Despatch marked " No. 10 of 1816," per brig Alexander.)

Government House, Sydney, N. S. Wales,

My Lord, 8th June, 1816. s June.

*In My Dispatch No. 7 of the present Year P'r H.M.C. Brig Emu, which sailed from hence on the 25th of March last, I had the Honor to inform Your Lordship that, in consequence of the hostile and Sanguinary disposition Manifested for a Considerable time past by the Aborigines of this Country, I had determined to send out some Military Detachments into the **interior** , either to apprehend or destroy them.*

*Pursuant to this determination and in consequence of various Punitive Subsequent Acts of Atrocity being Committed by the Natives in the remote parts of the Settlements, I found it Necessary **on** the 10th of April to Order Three Detachments* of the 46th Regiment under the several Commands of Captains Schaw and Wallis, and Lieutenant Dawe of that Corps, to proceed to those Districts most infested and Annoyed by them on the Banks and in the Neighbourhood of the rivers, Nepean, Hawkesbury and Grose, giving them instructions to make as many Prisoners as possible; this Service Occupied a Period of 23 days, during which time the Military Parties very rarely met with any of the Hostile Tribes; the Occurrence of most importance which took place was under Captain Wallis's direction, who, having Surprized One of the Native Encampments and meeting with some resistance , killed 14 of them and made 5 Prisoners; among the killed there is every reason to believe that Two of the most ferocious and Sanguinary of the Natives were included, some few other Prisoners were taken in the Course of this route and have been lodged in Gaol, This necessary but painful Duty was Conducted by the Officers in Command of the Detachments perfectly in Conformity to the instructions I had furnished them.*

¹⁵⁴ *Macquarie to Bathurst 25th May 1816, HRA Series I Volume IX, 139 and note 36, 854; Instructions to Captain Schaw, CSC 4/1734, 149-68; Brook and Kohen, Parramatta Native Institution, 22-3*

Previous to the return of the Military Party, I issued a Proclamation dated the 4th Ulto. a Copy of which I do Myself the honor to transmit herewith for Your Lordship's information, stating in the first instance the causes which had led to the necessity of resorting to Military Force, and holding out to the Natives various encouragements with a view to invite and induce them to relinquish their Wandering Predatory habits and to avail themselves of the indulgences offered to them as Settlers in degrees suitable to their Circumstances and Situations. It is scarcely possible to calculate with any degree of Precision on the result that this Proclamation may eventually have on so rude and unenlightened a race; but it has already produced the good effect of bringing in some of the most troublesome of the Natives, who have promised to cease from their Hostility and to avail themselves of the Protection of this Government by becoming Settlers, or engaging themselves as Servants, as Circumstances may suit; and upon the whole there is reason to hope that the examples, which have been made on the One hand, and the encouragements held out on the other, will preserve the Colony from the further recurrence of such Cruelties. Under all these Considerations I trust Your Lordship will approve of the Measures I have taken.

*I am much Concerned to have to report to Your Lordship that the long and continued Droughts which I mentioned in a former Dispatch have been Succeeded by incessant and heavy rains, which fell with such Violence for the last fortnight as to produce a Calamitous Inundation thro' those parts of the Country where the Rivers Hawkesbury and Nepean pass. The Flood on this occasion rose to so great a height as nearly to equal the greatest ever known in this Country; this unfortunate Visitation has occasioned considerable distress to the Settlers and their Families in those parts, tho' I have not heard of any Lives being lost, the Chief damage having extended to the great injury, if not to the utter destruction, of the Young Crops, and also to their Stock, Stacked Grain and Dwellings. Under these Circumstances it will be necessary that the destitute Sufferers should have some assistance from Government in Seed Wheat and temporary rations; but as I cannot help thinking that considerable blame attaches to them in general for not availing themselves of the Opportunities afforded them for removing to the Township where they would have been Secure from Floods, It is my intention to administer this Aid in the Way of a Loan and to make the Settlers **reimburse** it hereafter to Government.*

Since the last Arrivals I had the honor to Announce to Your Lordship, I have to report those of Two Irish Convict Transports, Namely, the Brig Alexander with Females, which arrived on the 4th of April, and the Ship Guildford with Males on the 8th April. The Prisoners by both of which have Arrived in good health. This Dispatch will be delivered to Your Lordship by Dr. McDonald R.N. late Surgeon and Agent of the Transport Ship Fanny, who returns a Passenger in the Brig Alexander, And whom I beg leave to recommend to Your Lordship's favourable Consideration.

I have, &c.,

L. MACQUARIE.

[Enclosure .]

PROCLAMATION.

By His Excellency Lachlan Macquarie, Esquire, &c., &c.

WHEREAS the Ab-origines, or Black Natives of this Country, have Governor for the last three Years manifested .a strong and sanguinary Spirit of Animosity and Hostility towards the British Inhabitants residing in the Interior and remote Parts of the Territory, and have been recently guilty of most atrocious and wanton Barbarities in indiscriminately murdering Men Women and Children, from whom they had received no Offence or Provocation; and also in killing the Cattle, and plundering and destroying the Grain and Property of every Description, belonging to the Settlers and Persons residing on or near the Banks of the Rivers Nepean, Grose, and Hawkesbury, and South Creek, to the great Terror, Loss and Distress of the suffering Inhabitants.

And whereas, notwithstanding that the Government has heretofore acted with the utmost Lenity and Humanity towards these Natives in forbearing to punish such wanton Cruelties and Depredations with their merited Severity, thereby hoping to reclaim them from their barbarous Practices and to conciliate them to the British Government, by affording them Protection, Assistance and Indulgence, instead of subjecting them to the Retaliation of Injury, which their own wanton Cruelties would have fully justified; yet they have persevered to the present Day in committing every Species of sanguinary Outrage and depredation on the Lives and Properties of the British Inhabitants, after having

been repeatedly cautioned to beware of the Consequences that would result to themselves by the continuance of such destructive and barbarous Courses.

And whereas His Excellency the Governor was lately reluctantly compelled to resort to coercive and strong Measures to, prevent the Recurrence of such Crimes and Barbarities, and to bring to condign Punishment such of the Perpetrators of them as could be found and apprehended; and with this View sent out a Military Force to drive away these hostile Tribes from the British Settlements in the remote Parts of the Country, and to take as many of them Prisoners as possible; in executing which Service several Natives have been unavoidably killed and wounded, in Consequence of their not having surrendered themselves on being called on so to do, amongst whom, it may be considered fortunate, that some of the most guilty and atrocious of the Natives concerned in the late Murders and Robberies are numbered. And although it is to be apprehended that some few innocent Men, Women, and Children may have fallen in these Conflicts, yet it is earnestly to be hoped that this unavoidable Result, and the Severity which has attended it, will eventually strike Terror amongst the surviving Tribes, and deter them from the further Commission of such sanguinary Outrages and Barbarities.

And whereas the more effectually to prevent a Recurrence of Murders, Robberies, and Depredations by the Natives, as well as to protect the Lives and Properties of His Majesty's British Subjects residing in the several Settlements of this Territory, His Excellency the Governor deems it his indispensable Duty to prescribe certain Rules, Orders, and Regulations to be observed by the Natives, and rigidly enforced and carried into Effect by all Magistrates and Peace Officers in the Colony of New South Wales; and which are as follows:-

First. - That from and after the Fourth Day of June ensuing, that being the Birth Day of His Most Gracious Majesty King George the Third, no Black Native or Body of Black Natives shall ever appear at or within one Mile of any Town, Village, or Farm, occupied by, or belonging to any British Subject, armed with any warlike or offensive Weapon or Weapons of any Description, such as Spears, Clubs, or Waddies, on Pain of being deemed and considered in a State of Aggression and Hostility, and treated accordingly.

Second. - That no Number of Natives, exceeding in the Whole Six Persons, being entirely unarmed, shall ever come to lurk or loiter about any Farm in the Interior, on the Pain of being considered Enemies, and treated accordingly.

Third. - That the Practice, hitherto observed amongst the Native Tribes, of assembling in large Bodies or Parties armed, and of fighting and attacking each other on the Plea of inflicting Punishments on Transgressors of their own Customs and Manners at or near Sydney, and other principal Towns and Settlements in the Colony, shall be henceforth wholly abolished, as a barbarous Custom repugnant to the British Laws, and strongly militating against the Civilization of the Natives, which is an Object of the highest Importance to effect, if possible. Any Armed Body of Natives, therefore, who shall assemble for the foregoing purposes, either at Sydney or any of the other Settlements of this Colony after the said Fourth Day of June next, shall be considered as Disturbers of the Public Peace and shall be apprehended and punished in a summary Manner accordingly. The Black Natives are therefore hereby enjoined and commanded to discontinue this barbarous Custom, not only at and near the British Settlements but also in their own wild and remote Places of Resort.

*Fourth. - That such of the Natives as may wish to be considered under the Protection of the British Government, and disposed to conduct themselves in a peaceful, inoffensive, and honest Manner, shall be furnished with Passports or Certificates to that Effect, signed by the Governor, on their making Application for the same at the Secretary's Office at Sydney, on the First Monday of every succeeding Month; which Certificates they will find will protect them from being injured or molested by any Person, so long as they conduct themselves peaceably, **inoffensively**, and honestly, and do not carry or use offensive Weapons, contrary to the Tenor of this Proclamation.*

The Governor, however, having thus fulfilled an imperious and necessary Public Duty, in prohibiting the Black Natives from carrying or using offensive Weapons, at least in as far as relates to their usual Intercourse with the British Inhabitants of these Settlements, considers it equally a Part of his Public Duty as a Counterbalance for the Restriction of not allowing them to go about the

Country armed to afford the Black Natives such Means as are within his Power to enable them to obtain an honest and comfortable Subsistence by their own Labour and Industry. His Excellency therefore hereby proclaims and makes known to them that he shall always be willing and ready to grant small Portions of Land, in suitable and convenient Parts of the Colony, to such of them as are inclined to become regular Settlers, and such occasional Assistance from Government as may enable them to cultivate their Farms. Namely,

First. - That they and their Families shall be victualled from the King's Stores for Six Mouths, from the Time of their going to reside actually on their Farms.

Secondly. - That they shall be furnished with the necessary Agricultural Tools, and also with Wheat, Maize and Potatoes for Seed, and

Thirdly. - To each Person of a Family, one Suit of Slops and one Colonial Blanket from the King's Stores shall be given. But these Indulgencies will not be granted to any Native, unless it shall appear that he is really inclined, and fully resolved to become a Settler, and permanently to reside on such Farm as may be assigned to him for the Purpose of cultivating the same for the Support of himself and his Family.

His Excellency the Governor therefore earnestly exhorts, and thus publicly invites the Natives to relinquish their wandering idle and predatory Habits of Life, and to become industrious and useful Members of a Community where they will find Protection and Encouragement. To such as do not like to cultivate Farms of their own, but would prefer working as Labourers for those Persons who may be disposed to employ them, there will always be found Masters among the Settlers who will hire them as Servants of this Description. And the Governor strongly recommends to the Settlers and other Persons, to accept such Services as may be offered by the industrious Natives, desirous of engaging in their Employ. And the Governor desires it to be understood, that he will be happy to grant Lands to the Natives in such Situations as may be

agreeable to themselves, and according to their own particular Choice, provided such Lands are disposable, and belong to the Crown.

And Whereas His Excellency the Governor, from an anxious Wish to civilize the Aborigines of this Country so as to make them useful to themselves and the Community, has established a Seminary or Institution at Parramatta for the Purpose of educating the Male and Female Children of those Natives who might be willing to place them in that Seminary:-His Excellency therefore now earnestly calls upon such Natives as have Children to embrace so desirable and good an Opportunity of providing for their helpless Offspring and of having them brought up, clothed, fed and educated in a Seminary established for such humane and desirable Purposes. And in Furtherance of this Measure, His Excellency deems it expedient to invite a general Friendly Meeting of all the Natives residing in the Colony, to take place at the Town of Parramatta, on Saturday the Twentyeighth of December next at Twelve o'Clock at Noon, at the Public Market Place there, for the Purpose of more fully explaining and pointing out to them the Objects of the Institution referred to, as well as for Consulting with them on the best Means of improving their present Condition. On this Occasion, and at this public general Meeting of the Natives, the Governor will feel happy to Reward such of them as have given Proofs of Industry, and an Inclination to be civilized.

And the Governor wishing that this General Meeting, or Congress of friendly Natives, should in future be held annually, directs that the Twenty-eighth Day of December, in every succeeding Year, shall be considered as fixed for this Purpose, excepting when that Day happens to fall on a Sunday, when the following Day is to be considered as fixed for holding the said Congress.

And finally, His Excellency the Governor hereby orders and directs, that on Occasions of any Natives coming armed, or in a hostile Manner without Arms, or in unarmed Parties exceeding Six in Number, to any Farm belonging to or occupied by British Subjects in the Interior, such Natives are first to be desired in a civil Manner to depart from the said Farm, and if they persist in remaining thereon, or attempt to plunder, rob, or commit any kind of Depredation, they are then to be driven away by Force of Arms by the Settlers themselves; and in case they are not able to do so, they are to apply to a Magistrate for aid from the nearest Military Station; and the Troops stationed there are hereby commanded to render their Assistance when so required. The Troops are also

to afford aid at the Towns of Sydney, Parramatta, and Windsor respectively, when called on by the Magistrates or Police Officers at those Stations:

Given under my Hand,, at Government House, Sydney, this Fourth Day of May, in the Year of Our Lord One Thousand eight hundred and sixteen.

LACHLAN MACQUARIE.

By Command of His Excellency,

J. T. CAMPBELL, Secretary.

God save the King !

Note 36, page 139.

Three Detachments of the 46th Regiment.

Instructions were issued by Governor Macquarie to the three officers in command of these detachments on the 9th of April, 1816. Captain W. G. B. Schaw was ordered to proceed into the interior for the purpose of punishing the natives, who had manifested a strong feeling of hostility against the settlers on the banks of the Nepean, Grose, and Hawkesbury rivers, and had committed many cruel murders. Directions were given that all aborigines, men, women, and children, who were met with from Sydney onwards, were to be made prisoners of war; any who " showed fight " or endeavoured to run away were to be shot, and their bodies hung from trees in the most conspicuous places near where they fell, so as to strike terror into the hearts of the surviving natives. Lieutenant Charles Dawe was ordered to the Cowpasture district, and to cooperate with captain Schaw. Captain James Wallis was ordered to the districts of Appin and Airs, and was ultimately to meet captain Schaw at George Woodhouse's farm in the last-named district. The detachments set out on the 10th of April, and twenty days later Governor Macquarie sent orders to captain Schaw for their return to headquarters. The most important episode of these punitive expeditions occurred to the party under Captain Wallis. This detachment had a moonlight skirmish with the natives near William Broughton's farm in the Appin district. Fourteen of the natives were killed, and a considerable number were taken prisoners. The killed included several women and children, who met their death by rushing in despair over precipices. Amongst the men killed there were several who had committed recent murders.

Proclamation¹⁵⁵

20 July 1816

By His Excellency LACHLAN MACQUARIE

Esquire, Captain General and Governor in Chief in and over His Majesty's Territory of New South Wales and its Dependencies

&c. &c. &c.

WHEREAS the sanguinary Disposition of certain BANDITTI, or TRIBES of the BLACK NATIVES, which had been for some Time manifested by their frequently committing the most wanton and barbarous MURDERS on several of His Majesty's Subjects residing in the remote Settlements, rendered it expedient and necessary to send Military Parties in pursuit of them, with a View by inflicting summary Punishment on them, to deter others from a Repetition of such atrocious and cruel Outrages: And although this measure was long delayed, and at length reluctantly resorted to, the numerous Atrocities committed rendered it indispensable, where by several of the most sanguinary and guilty of them met with and suffered the Punishment due to their flagrant Enormities.

And whereas, by Proclamation under Date the 4th of May last, the GOVERNOR, after expressing his Regret at the Necessity which recent Circumstances had placed him under of proceeding to such Extremities against those hostile Natives; and anxious, if possible, to avoid the Recurrence of such Atrocities, did earnestly invite and exhort the said Native hostile Tribes to render Submission, and to return again to those peaceable and unoffending Habits and Manners which had been formerly their best Safeguard from Injury, by securing them all the Protection of the most favored of His Majesty's Subjects.

And whereas, since the issuing of the said Proclamation (with which it is well known the said Natives soon became fully acquainted), it has appeared, that there are still among these People some Individuals far more determinedly hostile and mischievous than the rest, who, by taking the lead, have lately instigated their deluded Followers to commit several further atrocious Acts of Barbarity on the unoffending an unprotected Settlers and their Families:

And whereas, the ten Natives whose Names are hereunder mentioned are well known to be the principal and most violent Instigators of the late Murders; namely,

¹⁵⁵ www.lib.mq.edu.au/digital/lema/1816/proclamation20July1816.html

- 1 *Murrah*
- 2 *Myles;*
- 3 *Wallah, alias Warren;*
- 4 *Carbone Jack, alias Kurringy;*
- 5 *Narrang Jack;*
- 6 *Bunduck;*
- 7 *Kongate;*
- 8 *Woottan;*
- 9 *Rachel;*
- 10 *Yallaman*

Now it is hereby publicly proclaimed and declared, that the said ten Natives above named, and each and every of them are deemed and considered to be in a State of Outlawry, and open and avowed Enemies to the Peace and good Order of Society, and therefore unworthy to receive any longer the Protection of that Government which they have so flagrantly revolted against and abused. And all and every of His Majesty's Subjects, whether Free Men, Prisoners of the Crown, or Friendly Natives, are hereby authorised and enjoined to seize upon and secure the said ten outlawed Natives, or any of them, whensoever they may be found, and to bring them before, and deliver them up to the nearest Magistrate to be dealt with according to Justice.

And in Case the said proscribed ten hostile Natives cannot be apprehended and secured for that Purpose; then such of His Majesty's Subjects herein before described, are and shall be at Liberty by such Means as may be within their Power, to kill and utterly destroy them as Outlaws and Murderers as aforesaid ; and with this View, and to encourage all His Majesty's said Subjects, whether white Men or friendly Natives, to seize upon, secure, or destroy the said Outlaws, a Reward of Ten Pounds Sterling for each of the said ten proscribed Natives, will be paid by Government to any Person or Persons who shall under such Circumstances bring in their Persons, or produce satisfactory Proof of their having lured or destroyed them within the Period of three Months from the Date hereof. Provided always, that nothing in this Proclamation contained is to be construed to extend to allow of Government Servants, of any Description, to depart from their Duty or Services, without the special Permission of those Persons to whom they may be assigned.

In Furtherance of the Object of this Proclamation, and of the Measures to be adopted pursuant thereto, the several District Magistrates are hereby enjoined

forthwith to assemble the Settlers, and other Persons dwelling within their respective Districts, at some convenient central Situation, and to point it out to them the Necessity of forming themselves into Associations, along the Rivers Hawkesbury and Nepean, so as to be prepared to afford each other mutual Relief and Assistance on Occasions of any Attack or Incursions of the hostile Natives; and in Cases of any Outrages being attempted against them, their Families, or Property, they are to consider themselves authorised to repel such Attacks or Incursions by Force of Arms ; at the same Time they are not wantonly or unprovokedly to commence any Aggressions, but only to guard against and resist the Depredations or Attacks of the hostile Natives, with a View to their own immediate Defence and Protection.

And the Settlers are further hereby strictly enjoined and commanded, on no Pretence whatever, to receive, harbour, or conceal any of the said outlawed Banditti, or afford them any Countenance or Assistance whatever; nor are they to furnish Aid or Provisions to any of the friendly Natives who may frequent their farms, but upon the express Condition of them engaging and promising to use their best Endeavours to secure and bring in the said Ten Outlaws, and deliver them up to the nearest Magistrate, or lodge them in Prison; And those friendly Natives are to be given to understand, that if they faithfully and earnestly exert themselves in apprehending and bringing in the said Outlaws, every reasonable Indulgence and Encouragement will be afforded them by Government; whilst, on the contrary, until this Object is attained, no Peace or Amnesty with the Natives at large in this Territory will be made or conceded.

It being impossible to station Military Detachments as a Protection for every Farm in the disturbed or exposed Districts, the GOVERNOR is desirous of apprising the Settlers in this public Manner thereof, in Order that they may the more speedily and effectually adopt the best Means in their Power for their future Security: but with a View to overawe the hostile Natives generally, in those Parts of the Colony where they have committed the more flagrant and violent Acts of Cruelty and Outrage, three separate Military Detachment, will be forthwith stationed at convenient Distances from the Rivers Nepean, Grose, and Hawkesbury, to be ready to assist and afford Protection to the Settlers whenever Occasion may require it, when called upon by the nearest Magistrate, for that Purpose; each Detachment to be provided with an European and also a native Guide, which the District Magistrates are enjoined to furnish them with, carefully selecting them from the most intelligent and trustworthy Persons within their several Districts.

The Military Parties stationed at Parramatta, Liverpool, and Bringelly, will receive similar Instructions to those to be given to the three Military Detachments before mentioned.

And the several Magistrates throughout the Territory are hereby directed to give every possible Publicity and Effect to this Proclamation.

Given under my Hand, at Government House, Sydney,

this Twentieth Day of July, One thousand eight hundred and sixteen.

"LACHLAN MACQUARIE."

By Command of His Excellency

J. T CAMPBELL, Secretary.

GOD SAVE THE KING

1824 Bathurst NSW: Governor Brisbane's Proclamation of Martial Law

Brisbane's¹⁵⁶ Proclamation formalised the British war against the Wiradjuri of the Bathurst plains, who were resisting the violent encroachment by squatters on Aboriginal homelands. During the period of martial law, squatters were able to kill without provocation, and did.

Governor Brisbane's Proclamation

On August 14, 1824, Governor Brisbane issued a Proclamation of Martial Law.¹⁵⁷

NEW SOUTH WALES.

PROCLAMATION,

His Excellency SIR THOMAS BRISBANE, /Knight Commander of the Most Honorable Military Order of the Bath, Captain General and Governor in Chief in and over His majesty's Territory of New South Wales and its Dependencies, &c. &c. &c.

WHEREAS the ABORIGINAL NATIVES of the Districts near Bathurst, have, for many Weeks past, carried on a Series of indiscriminate Attacks on the STOCK STATIONS there, putting some of the Keepers to cruel Deaths, wounding Others; and dispersing and plundering the Flocks and Herds – themselves not escaping sanguinary Retaliation; --

AND WHEREAS the ordinary Powers of the Civil Magistrates (although most anxiously exerted) have failed to protect the Lives of His Majesty's Subjects; and every conciliatory Measure has been pursued in vain; and the Slaughter of Black Women and Children, and unoffending White Men, as well as of the lawless Objects of Terror continue to threaten the before-mentioned/Districts:

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¹⁵⁶ Sir Thomas Brisbane (1773 – 1860 <http://adb.anu.edu.au/biography/brisbane-sir-thomas-makdougall-1827> Governor of NSW from 1821 to 1825.

¹⁵⁷ <http://trove.nla.gov.au/ndp/del/article/2183147>

AND WHEREAS, by Experience, it hath been found, many times, Bloodshed may be stopped by the Use of Arms against the Natives beyond the ordinary Rule of Law in Time of Peace; and, for this End, Resort to summary Justice has become necessary : --

NOW THEREFORE, by Virtue of the Authority in me vested by His Majesty's Royal Commission, I do declare, in Order to restore Tranquillity, MARTIAL LAW TO BE INFORCE IN ALL THE COUNTRY WEST/WARD OF MOUNT YORK: -- And all Soldiers are hereby ordered to assist; and obey their lawful Superiors in suppressing the Violence aforesaid; and all His Majesty's subjects are also hereby called upon to assist the Magistrates in executing such Measures as any one or more of the said Magistrates shall direct to be taken for/the same Purpose, by such Ways and Means as are expedient, so long as Martial Law shall last; being always mindful, that the Shedding of Blood/is only just where all other Means of Defence, or of Peace, are exhausted; that Cruelty is never lawful; and that, when personal Attacks become necessary, the helpless Women and Children are to be spared.

In Witness whereof I, the Governor aforesaid, have hereunto set my Hand, and caused the Seal of my Office, as Governor of the Colony of New South Wales and its Dependencies, to be affixed, this Fourteenth Day of August, in the Year of Our Lord One thousand eight hundred and twenty-four,

"THOMAS BRISBANE." (L.S.)

By His Excellency's Command,

F. GOULBURN, Colonial Secretary.

GOD SAVE THE KING!

Governor Brisbane's Proclamation

On August 14, 1824, Governor Brisbane issued a Proclamation of Martial Law.¹⁵⁸

NEW SOUTH WALES.

PROCLAMATION,

His Excellency SIR THOMAS BRISBANE, /Knight Commander of the Most Honorable Military Order of the Bath, Captain General and Governor in Chief in and over His majesty's Territory of New South Wales and its Dependencies, &c. &c. &c.

WHEREAS the ABORIGINAL NATIVES of the Districts near Bathurst, have, for many Weeks past, carried on a Series of indiscriminate Attacks on the STOCK STATIONS there, putting some of the Keepers to cruel Deaths, wounding Others; and dispersing and plundering the Flocks and Herds – themselves not escaping sanguinary Retaliation; --

AND WHEREAS the ordinary Powers of the Civil Magistrates (although most anxiously exerted) have failed to protect the Lives of His Majesty's Subjects; and every conciliatory Measure has been pursued in vain; and the Slaughter of Black Women and Children, and unoffending White Men, as well as of the lawless Objects of Terror continue to threaten the before-mentioned/Districts: --

AND WHEREAS, by Experience, it hath been found, many times, Bloodshed may be stopped by the Use of Arms against the Natives beyond the ordinary Rule of Law in Time of Peace; and, for this End, Resort to summary Justice has become necessary : --

NOW THEREFORE, by Virtue of the Authority in me vested by His Majesty's Royal Commission, I do declare, in Order to restore Tranquillity, MARTIAL LAW TO BE INFORCE IN ALL THE COUNTRY WEST/WARD OF MOUNT YORK: -- And all Soldiers are hereby ordered to assist; and obey their lawful Superiors in suppressing the Violence aforesaid; and all His Majesty's

¹⁵⁸ <http://trove.nla.gov.au/ndp/del/article/2183147>

subjects are also hereby called upon to assist the Magistrates in executing such Measures as any one or more of the said Magistrates shall direct to be taken for/the same Purpose, by such Ways and Means as are expedient, so long as Martial Law shall last; being always mindful, that the Shedding of Blood/is only just where all other Means of Defence, or of Peace, are exhausted; that Cruelty is never lawful; and that, when personal Attacks become necessary, the helpless Women and Children are to be spared.

In Witness whereof I, the Governor aforesaid, have hereunto set my Hand, and caused the Seal of my Office, as Governor of the Colony of New South Wales and its Dependencies, to be affixed, this Fourteenth Day of August, in the Year of Our Lord One thousand eight hundred and twenty-four,

"THOMAS BRISBANE." (L.S.)

By His Excellency's Command,

F. GOULBURN, Colonial Secretary.

GOD SAVE THE KING!

Governor Darling's Commission 1825 (UK)

Darling¹⁵⁹ followed his predecessors in the persecution of Aboriginal society, denying their right to own any land and forcibly punishing them if there was any resistance to their dispossession. He went further: under instructions from Lord Bathurst, he authorized 'settlers' to 'oppose force by force'. The instruction allowed colonists to take the law into their own hands, with little fear of prosecution. It was an edict that Governor Arthur in Tasmania was quick to follow. Aboriginal extermination became normalized, driven by Government policy. After all, if there were no white witnesses, who could claim that colonists were not simply protecting themselves. If ethnic cleansing was carried out with impunity before, the British Government now gave colonists the ordinary protection of British Law.



Significance

This document, Letters Patent of 16 July 1825,¹⁶⁰ extended the boundary of the Colony of New South Wales west from the line of longitude at 135 degrees to longitude 129 degrees. This was done so that a trading post set up the year before on Melville Island, off the coast of northern Australia, would be a British possession within the jurisdiction of the Governor of New South Wales.

Darling's Commission also provided for the establishment of an Executive Council to advise him. This was the foundation of the executive arm of government in the Colony.

History

Captain [Arthur](#) as New South Wales Governor made the boundary of the Colony 135 degrees east longitude, a convenient line which included only the eastern one-third of the future [Northern Territory](#). This provision continued in the Commissions of the Governors until the British government decided to establish a military and trading post on the north coast of Australia.

The site of the first trading post set up in 1824, Fort Dundas on Melville Island, was some five

¹⁵⁹ Ralph Darling (1772 – 1858) <http://adb.anu.edu.au/biography/darling-sir-ralph-1956> NSW Governor from 1825 to 1831.

¹⁶⁰ This appears to be an error. It should read 1825.

degrees west of the boundary of the Colony. Earl Bathurst, at the Colonial Office, saw to it that this Commission issued to the next Governor of New South Wales, [Ralph Darling](#), extended the western boundary of New South Wales to 129 degrees east longitude.

The three British military/trading posts set up on the north coast (Fort Dundas, 1824–1828; Fort Wellington, Raffle's Bay, 1827–1829; Victoria, Port Essington, 1838–1849) emphasised Britain's claim to the whole of the Australian continent but were mainly concerned with British commercial and strategic interests in the Indian Ocean. They were temporary and not intended to promote colonisation in the Northern Territory. So, documents relating to them are not considered founding constitutional instruments for the Northern Territory.

When Lieutenant-General Ralph Darling succeeded Sir Thomas Brisbane as Governor of New South Wales on 19 December 1825, his Commission thus differed significantly from the Commissions received by his predecessors by extending the Colony's western boundary, set in 1788 at 135 degrees east longitude, to the 129th meridian. This longitude later became the [border](#) dividing Western Australia and South Australia. To the south, everything beyond Wilson's Promontory, the southeastern 'corner' of the continent, ceased to be under the control of New South Wales and was placed under the authority of the Governor of [Van Diemen's Land](#).

Darling's Commission was also unusual in that it provided for the creation (by prerogative act) of an Executive Council (in addition to the Legislative Council created by the [New South Wales Act 1823](#)) which the Governor was directed to consult and upon the advice of which he was to act.

In 1846 a colony of North Australia was established by Letters Patent and intended for settlement. This colony included the present area of the Northern Territory. These Letters Patent were revoked in December the same year and all plans for settlement abandoned.

Description

This parchment document has a sketch of King George IV on the first page and a decorative border on each page. The pages are bound at the bottom by a plaited cord which has a 'portion of seal' attached in a stapled manilla envelope.

Long Title:	Ralph Darling's Commission as Governor of New South Wales, 1825
No. of pages:	3
Medium:	Parchment
Measurements:	Page 1: 75.5 x 62.5 cm Pages 2–3: 70.5 x 59.5 cm
Provenance:	British Government
Features:	The sketch of the King, decorative border and plaited cord binding indicate the importance of the document in delegating Royal authority to the Governor
Location & Copyright:	State Records New South Wales

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Governor Darling's Commission 1825 (UK)

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NOTE: original document is on oversized pages.

A copy of this document is available in the Historical Records of Australia.

[PAGE ENDS HERE] signifies page ending of original document.

BEGIN TRANSCRIPTION

GEORGE the Fourth, by the Grace of God of the United Kingdom of Great Britain and Ireland To our trusty and well-beloved RALPH DARLING Esquire Lieutenant General of our forces Greeting

WHEREAS by Letters Patent under the Great Seal of our United Kingdom of Great Britain and Ireland bearing date at Westminster the third day of February in the second year of our reign We did constitute and appoint Sir Thomas Brisbane Knight Commander of the Most Honorable Military Order of the Bath to be Captain General and Governor in Chief in and over the Territory of New South Wales extending from the Northward Cape or extremity of the Coast called Cape York in the latitude of Ten degrees thirty seven minutes south to the Southern extremity of the said Territory of New South Wales or South Cape in the latitude of forty three degrees thirty nine minutes south and of all the Country inland to the westward as far as the hundred and thirty fifth degree of East Longitude reckoning from the Meridian of Greenwich including all the Islands adjacent in the Pacific Ocean within the latitude aforesaid of ten degrees thirty seven minutes south and of forty three degrees thirty nine minutes south and of all Towns Garrisons Castles forts and all other fortifications or other military works which might be erected upon the said Territory or any of the said Islands for and during our Royal will and pleasure as by the said recited Letters Patent relation being thereunto had may more fully and at large appear

NOW KNOW YOU that we have revoked and determined and by these presents do revoke and determine the said recited Letters Patent and every clause article and thing therein contained

AND FURTHER know you that we reposing especial trust and confidence in the prudence courage and loyalty of you the said Ralph Darling of our especial grace certain knowledge and meer motion have thought fit to constitute and appoint and by these presents do constitute and appoint you the said Ralph

Darling to be our Captain General and Governor in Chief in and over our Territory called New South Wales extending from the Northern Cape or extremity of the Coast called Cape York in the latitude of ten degrees thirty seven minutes south to the Southern Extremity of the said Territory of New South Wales or Wilson Promontory in the latitude of thirty nine degrees twelve minutes south and of all the Country inland to the Westward as far as the hundred and twenty ninth degree of east longitude reckoning from the meridian of Greenwich including all the Islands adjacent in the Pacific Ocean within the latitude aforesaid of ten degrees thirty seven minutes south and thirty nine degrees twelve minutes south and of all Towns Garrisons Castles forts and all other fortifications or other military works which are or maybe hereafter erected upon the said territory or any of the said Islands And we do hereby require and command you to do and execute all things in due manner that shall belong to your said command and the trust we have reposed in you according to the several powers and directions granted or appointed you by this present Commission and the instructions and authorities herewith given to you, or according to such further powers instructions and authorities as shall at any time hereafter be granted or appointed you under our Signet or Sign Manual or by our order in our Privy Council or by us through one of our principal secretaries of state and according to such laws and ordinances as are now in force or as hereafter shall be made under and by virtue of a certain Act of Parliament made in the fourth year of our reign intituled "An Act to provide until the first day of July One thousand eight hundred and twenty seven and until the end of the next Session of Parliament for the better Administration of Justice in New South Wales and Van Diemens Land and for the more effectual Government thereof and for other purposes relating thereto" and our will and pleasure is that you the said Ralph Darling as soon as may be after the publication of these our Letters Patent do in the first place take the Oaths appointed to be taken by an act passed in the first

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year of the reign of King George the first intituled "An Act for the further security of his Majesty's person and Government and the Succession of the Crown in the heirs of the late Princess Sophia being Protestants and for

extinguishing the hopes of the pretended Prince of Wales and his open and secret Abettors" as altered and explained by an Act passed in the sixth year of the reign of our late Royal Father intituled "An Act for altering the Oath of Abjuration and the Assurance and for amending so much of an Act of the seventh year of her late Majesty Queen Anne intituled "An Act for the improvement of the Union of the two Kingdoms" as after the time therein limited requires the delivery of certain lists and copies therein mentioned to persons indicted of High Treason or Misprision of Treason" As also that you make and subscribe the Declaration mentioned in an Act of Parliament made in the twenty fifth year of the reign of King Charles the second intituled "An Act for preventing dangers which may happen from Popish Recusants" And likewise that you take the usual oath for the due execution of the office and Trust of our Captain General and Governor in Chief in and over our said Territory and its dependencies and for the due and impartial Administration of Justice And further that you take the oath required to be taken by Governors in the Plantations to do their utmost that the several laws relating to Trade and the Plantations be duly observed which said Oaths and declaration Our Chief Justice of our Supreme Court of New South Wales is hereby authorized and required to tender and administer unto you and in your absence to our Lieutenant Governor if there be any upon the place which being duly performed you shall administer to our Lieutenant Governor if there be any upon the place And to our Chief Justice, the oaths mentioned in the first recited Act of Parliament altered as above as also cause them to make and subscribe the afore mentioned declaration

AND WE do hereby authorize and empower you to keep and use the public seal for sealing all things whatsoever that shall pass the Great Seal of our said Territory and its dependencies

OUR FURTHER will and pleasure is that there shall henceforward be an Executive Council of Government within our said Territory and its dependencies to consist of the persons nominated and appointed in our Instructions under the royal sign manual and Signet herewith given to you or who shall hereafter be nominated and appointed by us any two of whom shall be a quorum And you are as soon as conveniently may be to call together the members of our said Council and to administer to them respectively the oaths mentioned in the before mentioned Act passed in the first year of the reign of King George the first as altered and explained by the before mentioned Act passed in the sixth year of the reign of our late Royal father And also to cause

them to make and subscribe the aforementioned Declaration and Administer to them the usual oath for the due execution of their place and trust respectively All which oaths shall also be administered by the Governor or person administering the Government of our said Territory and its dependencies for the time being to all such persons as shall hereafter be appointed to be members of our said Executive Council and he shall also cause them to make and subscribe the afore mentioned declaration before they respectively enter upon the execution of the duties of such their Office AND WE do hereby Give and Grant unto you full power and authority to suspend any of the Members of our said Council from sitting voting or

*[DOCUMENT FIRST PAGE ENDS
HERE]*

ASSISTING therein if you shall find cause for so doing And if it shall happen at any time that by the death resignation or departure from Our said territory and its dependencies of any of the said Councillors there shall be a vacancy in our said Council you are hereby authorized and required by a Warrant or Commission under the seal of our said Territory and its dependencies to appoint to be members of our said Council so many fit and proper persons as shall make up the number present to be two and no more It being nevertheless Our will and pleasure that you do signify to us by the first opportunity every such vacancy with the occasion thereof as also the names and qualifications of the persons appointed by you to the intent that such appointments may be disallowed or confirmed by us and until such disallowance or confirmation by us shall be signified and made known to you the persons so appointed by you shall be to all intents and purposes Executive Councillors within our

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said Territory and its dependencies And if in consequence of the suspension of any of the members of our said Council or their inability to attend from any Temporary Cause, there should be not a sufficient number of Councillors on the spot to form a quorum you are hereby authorized provided the nature of the Case shall in your judgment render it necessary by temporary appointments

under the seal of our said Territory and its dependencies as aforesaid to make up the number present to be two and no more And the persons so nominated by you shall be deemed Executive Councillors until the members so originally appointed are enabled to resume their seats or until others are appointed in their stead

WE do further Give and Grant unto you the said Ralph Darling full power and authority from time to time and at any time hereafter by yourself or by any other to be authorized by you in that behalf to administer and give the oaths mentioned in the said Act of Parliament of the first year of the reign of King George the first altered as above to all and every such person or persons as you shall think fit who shall at any time or times pass into our said Territory and its dependencies or shall be resident or abiding therein

AND WE do hereby authorize and empower you to constitute and appoint Justices of the Peace Coroners Constables and other necessary officers and ministers in our said territory and its dependencies for the better administration of justice and putting the laws in execution and to administer or cause to be administered unto them such oath or oaths as are usually given for the performance and execution of their offices and places AND WE do hereby Give and Grant unto you full power and authority where you shall see cause or shall judge any offender or offenders in any Criminal Matters or for any fines or forfeitures due unto Us fit objects of our mercy to pardon all such offenders and to remit all such offences fines and forfeitures Treason and wilful murders only excepted in which cases you shall likewise have power upon extraordinary occasions to grant reprieves to the offenders until and to the intent OUR ROYAL PLEASURE may be known therein

AND WE do hereby Give and Grant unto you the said Ralph Darling by yourself or by your Captains or Commanders by you to be authorized full power and authority to levy arm muster command and employ all persons whatsoever residing within our said Territory and its dependencies under your Government and as occasion shall serve to march them from one place to another or to embark them for the resisting or withstanding all Enemies Pirates and Rebels both at Sea and Land and such Enemies Pirates and Rebels if there shall be occasion to pursue and prosecute in and out of the limits of our said territory or its dependencies And if it shall so please God them to Vanquish Apprehend and take and being taken according to law to put to death or keep and preserve alive at your discretion and to execute Martial Law in

time of Invasion or at other times when by Law it may be executed and to do and execute all and every other thing or things which to our Captain General and Governor in Chief doth or ought of right to belong

AND WE do hereby Give and Grant unto you the said Ralph Darling full power and authority with the advice and consent of our said Executive Council to issue a proclamation dividing our said territory of New South Wales and its dependencies into Districts Counties Hundreds Towns Townships and Parishes and appointing the limits thereof respectively

AND WE do hereby give and grant unto you full power and authority with the advice and consent of our said Executive Council to erect raise and build in our said Territory and its dependencies such and so many Forts Platforms Castles Cities Boroughs Towns and fortifications as you shall judge necessary And the same or any of them to fortify and furnish with Ordnance and Ammunition and all sorts of arms fit for and necessary for the security and defence of the same And the same again or any of them to demolish or dismantle as may be most convenient And for as much as divers mutinies and disorders may happen by persons shipped and employed at sea during the time of war And to the end that such persons as shall be shipped and employed at sea during the time of war may be better governed and ordered

WE DO hereby give and grant unto you the said Ralph Darling full power and authority to constitute and appoint Captains Lieutenants Masters of Ships and other Commanders and Officers and to grant to such Captains Lieutenants Masters of Ships and other Commanders and Officers Commissions to execute the Law Martial during the time of war according to the directions

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of an Act passed in the twenty second year of the reign of his late Majesty King George the second intituled "An Act for amending explaining and reducing into one Act of Parliament the laws relating to the Government of His Majesty's Ships Vessels and Forces by Sea" as the same is altered by an Act passed in the nineteenth year of the reign of our late Royal Father intituled "An Act to explain and amend an Act made in the twenty second year of the

reign of his late Majesty King George the second intituled "An Act for amending explaining and reducing into One Act of Parliament the laws relating to the Government of His Majesty's Ships Vessels and Forces by Sea" And to use such proceedings authorities punishments corrections and executions upon any offender or offenders who shall be mutinous seditious disorderly or any way unruly either at Sea or during the time of their abode or residence in any of the ports Harbours or Bays of our said Territory and its dependencies as the case shall be found to require according to martial law and the said directions during the time of war as aforesaid provided that nothing herein contained shall be construed to the enabling you or any by your Authority to hold plea or have any jurisdiction of any offence cause matter or thing committed or done upon the High Seas or within any of the Havens Rivers or Creeks of our said Territory or its dependencies under your Government by any Captain Commander Lieutenant Master Officer Seaman Soldier or other person whatsoever who shall be in actual service and pay in or on board any of our Ships of War or other vessels acting by immediate Commission or warrant

[DOCUMENT SECOND PAGE ENDS HERE]

FROM our Commissioners for executing the office of our High Admiral of our United Kingdom of Great Britain and Ireland or from our High Admiral of our said United Kingdom of Great Britain and Ireland for the time being under the Seal of our Admiralty but that such Captain Commander Lieutenant Master Officer Seaman Soldier or other person so offending shall be left to be proceeded against and tried as the merits of their offences shall require either by our Supreme Court of New South Wales in pursuance of the provisions in that behalf contained in the before mentioned Act of Parliament made and passed in the fourth year of our reign or by Commission under our Great Seal of this Kingdom as the Statute of the twenty eighth of King Henry the eighth directs or by Commission from our Commissioners for executing the Office of our High Admiral of our United Kingdom of Great Britain and Ireland or from our High Admiral of our United Kingdom of Great Britain and Ireland for the time being according to the aforesaid Act intituled "An Act for amending explaining and reducing into one Act of Parliament the laws relating to the Government of His Majesty's Ships vessels and forces by Sea" as the same is altered by the aforesaid Act passed in the nineteenth year of the reign of our late Royal father intituled "An Act to explain and amend an Act passed in the twenty second year of the reign of his late Majesty King George the second

intituled "An Act for amending, explaining and reducing into one Act of Parliament the laws relating to the Government of His Majesty's Ships vessels and forces by Sea"

PROVIDED NEVERTHELESS that all disorders and misdemeanors committed on shore by any Captain Commander Lieutenant Master Officer Seaman Soldier or any other person whatsoever belonging to any of our Ships of War or other Vessels acting by immediate Commission or Warrant from our Commissioners for executing the office of our High Admiral of our United Kingdom of Great Britain and Ireland or from our High Admiral of our United Kingdom of Great Britain and Ireland for the time being under the seal of our Admiralty may be tried and punished according to the Laws of the place where any such disorders offences and misdemeanours shall be committed on shore notwithstanding such Offender be in our actual service and borne in our pay on board any such our Ships of War or other vessels acting by immediate Commission or Warrant from our Commissioners for executing the office of our High Admiral of our United Kingdom of Great Britain and Ireland or from our High Admiral of our United Kingdom of Great Britain and Ireland for the time being as aforesaid so as he shall not receive any protection for the avoiding of justice for such offences committed on shore from any pretence of his being employed in our Service at Sea

OUR WILL and PLEASURE is that all public monies which shall be raised be issued out by warrant from you and disposed of by you for the

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support of the Government or for such other purposes as shall be particularly directed and not otherwise

AND WE do hereby give and grant unto you full power and authority with the advice of our Executive Council of our said territory and its dependencies to agree for such Lands Tenements and Hereditaments as shall be in our power to dispose of and them to grant to any person or persons upon such terms and under such moderate quit rents services and acknowledgements to be thereupon reserved unto us according to such instructions as shall be given to

you under our Sign Manual which said Grants are to pass and be sealed with the Seal of our said Territory and its dependencies and being entered upon record by such Officer or Officers as shall be appointed thereunto shall be good and effectual in Law against us our Heirs and Successors

AND WE do hereby give you the said Ralph Darling full power to appoint fairs Marts and Markets and also such and so many Ports Harbours Bays Havens and other places for the convenience and security of Shipping and for the better loading and unloading of goods and merchandise within our said Territory and its dependencies as by you with the advice of our Executive Council shall be thought fit and necessary

AND WE DO hereby require and command all Officers and Ministers Civil and Military and all other Inhabitants of our said Territory and its dependencies to be obedient aiding and assisting to you the said Ralph Darling in the execution of this our Commission and of the powers and authorities herein contained and in case of your death or absence out of our said Territory and its dependencies or in case from any especial circumstances we shall judge it expedient by warrant under the Royal Sign Manual or otherwise to provide for the civil Administration of the Government notwithstanding your actual presence in our said Territory and its dependencies to be obedient aiding and assisting unto such person as shall be appointed by us to be our Lieutenant Governor or Commander in Chief or to administer the Government of our said Territory and its dependencies TO whom we do therefore by these presents in either of such cases Give and Grant all and singular the powers and authorities herein granted to be by him executed and enjoyed during our pleasure and if upon your death or absence out of our said Territory and its dependencies there be no person upon the place commissioned or appointed by us to be our Lieutenant Governor of our said Territory and its dependencies or specially appointed by us to administer the Government

OUR WILL AND PLEASURE is that the Executive Councillor whose name is first placed in our said Instructions to you and who shall be at the time of your death or absence residing within our said Territory and its dependencies shall take upon him the Administration of the Government and execute this our Commission and instructions and the several powers and authorities therein contained in the same manner and to all intents and purposes as other our Lieutenant Governor in Chief should or ought to do in case of your absence until your return or in all cases until our further pleasure be known therein

PROVIDED nevertheless And it is our will and pleasure that neither Our Chief Justice of our Supreme Court of New South Wales nor any other Judge of the said Court who may at any time hereafter be appointed in the manner provided by the said Act of Parliament passed in the fourth year of our reign nor the Archdeacon of New South Wales shall in any case take upon them the Administration of the Government of the said Territory and its dependencies

AND WE do hereby declare ordain and appoint that you the said Ralph Darling shall and may hold execute and enjoy the office and place of our Captain General and Governor in Chief in and over our said Territory and its dependencies together with all and singular the powers and authorities hereby granted unto you for and during our will and pleasure IN WITNESS whereof we have caused these, our Letters to be made Patent WITNESS Ourselves at Westminster the Sixteenth day of July in the sixth year of our reign By Writ of Privy Seal

BATHURST

The following appears to be written on the base of the document:

Entered at the Treasury Chambers

25 July 1825 [illegible]

[illegible]

Entered on Record by me at the Colonial Secretarys Office in Sydney New South Wales in the Register of Governor's Commissions No 1 pages 178 to 212 inclusive the Ninth day of December one thousand eight hundred and forty one

E Deas Thomson

Colonial Secretary and Registrar

END TRANSCRIPTION

It is generally the case that Governments are responsible for genocide. They have the resources and the motivations. Governments are creatures of planning, of intentionality, of resolve subordinated to political will.

In 1825, the British Secretary of State (Lord Bathurst) instructed Darling (the New South Wales Governor) and Arthur (Lieutenant Governor of Tasmania) to 'oppose force by force'.¹⁶¹ Military and paramilitary force against Aboriginals becomes normalised. Armed settlers could 'protect' their property without legal consequence, although the consequences of extrajudicial killing pre-1825 were effectively non-existent, given Atkins 1805 ruling.

Bathurst's¹⁶² advice to Governor Darling¹⁶³ is unambiguous; it makes the British policy on any Aboriginal resistance very clear:

*In reference to the discussions, which have recently taken place in the Colony respecting the manner in which the Native Inhabitants are to be treated when making hostile incursions for the purpose of Plunder, you will understand it to be your duty, when such disturbances cannot be prevented or allayed by less vigorous measures, to oppose force by force, and to repel such Aggressions in the same manner, as if they proceeded from subjects of any accredited State.*¹⁶⁴

From this point, settlers knew their Governments were unlikely to punish them for mass killings or any other form of mass violence. The order from Bathurst officially rendered an Aboriginal life as worthless. Britain could take Aboriginal land and Aboriginals were expected to accede without protest or they could legally be killed. Nevertheless, they continued to resist their occupation. They had little choice.

In 1826, Governor Arthur vigorously executed Bathurst's advice in his war of Palawa extermination. Other areas of the continent followed.

¹⁶¹ HRA 1/12: 21. Earl Bathurst to Governor Darling, 14th July 1825. Despatch No. 6, per ship Catherine Stewart Forbest ; acknowledged by Governor Darling, 5th May, 1826; Ibid, Shaw (1971), *Government Notice*, 29th November 1826: 20 – 21.

¹⁶² Henry Bathurst (1762 - 1834) was a member of the House of Commons from 1783 to 1794 when he succeeded to the earldom. He was lord of the admiralty 1783-89, lord of the treasury 1789-91, commissioner of the board of control 1793-1802, and was a member of the cabinet as president of the board of trade 1807-12, and briefly foreign secretary in 1807. In Lord Liverpool's ministry he was secretary of state for the colonies from 1812 to 1827, the significant period when Tasmanian colonisation was belligerently displacing the Palawa at an exponential rate (although the militarised racial violence would shortly peak under Arthur, from 1828 to 1832). In 1828-30 he was lord president of the council in Wellington's ministry.
[<http://adb.anu.edu.au/biography/bathurst-henry-1751>]

¹⁶³ General Sir Ralph Darling, GCH (1772 - 1858) was Governor of New South Wales from 1825 to 1831. The Tasmania Governor reported to NSW until 1825.

¹⁶⁴ HRA 1/12: 21. Earl Bathurst to Governor Darling, 14th July 1825. Despatch No. 6, per ship Catherine Stewart Forbest ; acknowledged by Governor Darling, 5th May, 1826.

29 November 1826 **Government Notice to oppose ‘force with force’, following Bathurst’s edict to Darling** *‘If it should be apparent that there is a determination on the part of one or more of the native tribes to attack, rob, or murder the white inhabitants generally, any person may arm, and, joining themselves to the military, drive them by force to a safe distance, treating them as open enemies’.*¹⁶⁵ The edict legitimised the use of lethal force.

There would be no respite in this British Government legitimised ‘war for the land’ until Aboriginal society in Tasmania - and across the continent - had been exterminated, subjugated or neutralized.

¹⁶⁵ Shaw (1971), *Government Notice*, 29th November 1826: 20 – 21.

Arthur's Proclamation of Martial Law in Van Diemen's Land on 15th October 1828¹⁶⁶

If Bathurst's edict to 'oppose force by force' was enthusiastically adopted by Colonial Governors as a solution to the Aboriginal problem, then a proclamation of martial law took Aboriginal ethnic cleansing to another level, like a fire hose replacing the output of a domestic faucet, civilians and military collaborating in a concentrated effort under the Governor's overall command. For Arthur, the war of extermination began in earnest.

A Proclamation.

Whereas, by my proclamation, bearing date the 1st day of November, 1828, reciting, (amongst other things), that the black or aboriginal natives of this Island, had for a considerable time carried on a series of indiscriminate attacks upon the persons and property of His Majesty's subjects, and that repeated inroads were daily made by such natives into the settled districts, and that these acts of hostility and barbarity, were then committed by them, as well as the more distant stock runs, and in some instances, upon unoffending and defenceless women and children, and that it had become unavoidably necessary, for the suppression of similar enormities, to proclaim Martial Law, in the manner hereinafter directed, I, the said Lieutenant Governor, did declare and proclaim, that from the date of that my proclamation, and until the cessation of hostilities, Martial Law was, and should continue to be in force against the said black or aboriginal natives within the several districts of this Island, excepting always the places and portions of this Island in the said proclamation after mentioned; and whereas, the said black or aboriginal natives, or certain of their tribes, have of late manifested, by continued repetitions of the most wanton and sanguinary acts of violence and outrage, an unequivocal determination indiscriminately to destroy the white inhabitants, whenever opportunities are presented to them for doing so; and whereas, by reason of the aforesaid exceptions so contained in the said proclamation, no natives have been hitherto pursued or molested in any of the places or portions of the Island so excepted; from whence they have accordingly of late been accustomed to make repeated incursions upon the settled districts with impunity, or having committed outrages in the settled districts, have escaped into those excepted places, where they remain in security; and whereas,

¹⁶⁶ <http://trove.nla.gov.au/ndp/del/article/4219798>

therefore, it hath now become necessary; and because it is scarcely possible to distinguish the particular tribe or tribes by whom such outrages have been in any particular instance committed, to adopt immediately, for the purpose of effecting their capture, if possible, an active and extended system of military operations against all the natives generally throughout the Island, and every portion thereof, whether actually settled or not. Now, therefore, by virtue of the powers and authorities in me in this behalf vested, I the said Lieutenant Governor, do by these presents declare and proclaim, that from and after the date of this my proclamation, and until the cessation of hostilities in this behalf shall be by me hereafter proclaimed and directed, Martial Law is and shall continue to be in force against all the black or aboriginal natives, within every part of this Island (whether exempted from the operation of the said proclamation or not) excepting always such tribe, or individuals of tribes, as there may be reason to suppose are pacifically inclined, and have not been implicated in any such outrages, and for the purposes aforesaid, all soldiers and others His Majesty's subjects, civil and military, are hereby required and commanded to obey and assist their lawful superiors in the execution of such measures as shall from time to time be in this behalf directed to be taken. But I do, nevertheless, hereby strictly order, enjoin and command, that the actual use of arms be in no case resorted to, by firing against any of the natives or otherwise, if they can by other means be captured, that bloodshed be invariably checked as much as possible, and that any tribes or individuals captured or voluntarily surrendering themselves up, be treated with the utmost care and humanity. And all officers, civil and military, and other persons whatsoever, are hereby required to take notice of this my proclamation, and to render obedience and assistance herein accordingly.

Given under my hand and seal at arms, at the Government House, Hobart Town, this first day of October, in the year of our Lord, one thousand eight hundred and thirty.

George Arthur.

By command of His excellency,

J. Burnett Colonial Secretary's Office, Sept. 25, 1830

With a simple letter crafted in Downing Street, Britain dispossessed the entire population of Aboriginals living in the western half of Australia. Aboriginal society would not have been aware that they had lost their homelands until armed forces began arriving to press British territorial hegemony. The genocidal rampage that continued to sweep the east was now about to descend on the west.

(Begin transcription)¹⁶⁷

No 11 1828

Immediate

Downing Street

5 November 1828

My Lords

I have the honour of signifying to your Lordships His Majesty's pleasure that you will give immediate orders to the officer commanding His Majesty's Naval Forces at the Cape of Good Hope to dispatch one of the Ships of War under his command, without the smallest loss of time, to the Western Coast of New Holland, with directions that he take formal possession of the Western side of New Holland in His Majesty's...

The Lords Commissioners of the Admiralty

(Document first page ends here)

Majesty's name. It is desirable that the place, on which he shall take the possession, be at, or as near as possible to Swan River, and that he maintains, on that spot, an uninterrupted possession, on behalf of His Majesty, until the arrival of further Instructions, which I will very shortly enable your Lordships to communicate.

I am, My Lords

Your Lordships

Most Obedient

Humble Servant

G. Murray

(x x x number?) of 7th November Inclosed

(Document second page ends here)

(End transcription)

¹⁶⁷ See www.foundingdocs.gov.au. Also Diary and Letters of Admiral Sir C.H. Fremantle, G.C.B., edited by Lord Cottesloe, C.B., Fremantle Arts Centre Press, 1979, p. 15.

Boatman or Jackass and Bulleye, Feb 10, 1832¹⁶⁸

In expropriating Aboriginal land, Britain was left with a perplexing set of interrelated problems: were Aboriginals now British citizens; if they had no understanding of British Law, could they be prosecuted under a Law that had little meaning to them; if they resisted the dispossessory process, were they criminals or enemy combatants? Britain struggled to find an answer, as evidenced by the following two legal cases in 1832 where contrary verdicts were reached for similar offences.

Decisions of the Superior Courts of New South Wales, 1788-1899

Published by the Division of Law
Macquarie University



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[Aboriginal defendant - stealing, sheep - Aborigines, mens rea - Aborigines, legal status - Hunter River - Aborigines, annual conference]

R. v. Boatman or Jackass and Bulleye

Supreme Court of New South Wales

Dowling J., 10 February 1832

Source: Dowling, Select Cases, Archives Office of N.S.W., 2/3466[\[1\]](#)

[p. 125]

February 10 1832

Rex v Boatman or Jackass

The prisoner, an aboriginal Black native had been committed for trial by country magistrates charged with feloniously stealing a considerable number of sheep at Hunter's River the property of Mr Palmer. The prisoner who was a naked savage was put to the Bar and the

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Solicitor General proposed to try him by the law of England but he informed the Court that the prisoner did not understand a word of English or at least so imperfectly as not to be fully [p. 126] aware of the nature of the proceeding. The Judge (Dowling) under the circumstances stated said he could not put the prisoner on his trial. The utmost he could do would be to put the trial off until an interpreter was properly instructed in the prisoners language so as to make him acquainted with the proceedings on the trial. The Solicitor General said this was a hopeless task and not all probable that there could be an interpreter procured. The Judge then said that he could not try the prisoner in any other way than that prescribed by the law of England. The prisoner was remanded until the last day of the Session.

Dowling J., 23 February 1832

Source: Sydney Gazette, 25 February 1832[\[2\]](#)

Boatman, an aboriginal native, was indicted for stealing two sheep, the property of John Palmer, Esq. at Ennindale, in the district of Hunter's River, on the 19th of Sept. last.

After the prisoner had been arraigned, the Rev. Mr. Threlkeld, who came up from Newcastle for the purpose, was sworn as and interpreter.

The evidence having been gone through, which went to show that the prisoner was one of a party of natives who drove away several sheep from the prosecutor's station.

Mr. Therry, who, at the request of the learned Judge, undertook the prisoner's defence, objected to the jurisdiction of the Court, on the ground that the aboriginal natives of the colony were not subject to the British laws.

The learned Judge said, he would take a note of the objection for the consideration of the full Court, should it be necessary.

His Honour then summed up the evidence, and the Jury found a verdict of - Guilty. Remanded.

The learned Judge directed the gaoler, if the prisoners behaved quietly, not to keep him in irons.

Billy Bulli, an aboriginal native, was then placed at the bar, and indicted for stealing four sheep, the property of John Palmer, Esq.

The Rev. Mr. Threlkeld acted as interpreter.

In this case, also, Mr. Therry undertook the prisoner's defence.

Mr. Justice Dowling asked Mr. Therry if he renewed his objection to the jurisdiction of the Court in this case?

Mr. Therry said he did. It was, in his opinion, a most important question, whether the aboriginal natives were subject to our laws. He had considerable doubt upon the subject, and wished that it should undergo the most mature consideration.

Mr. Justice Dowling said, the regular course of proceeding was to plead to the jurisdiction. He admitted the subject to be one of deep importance to the colony; because, if there really were no law by which these people could be tried, a question would then arise, whether it would not be necessary to resort to the local legislature. With the consent of the Solicitor General, he would take a note of the objection, in the form in which it had been raised by Mr. Therry, and draw out a case to lay before the Judges, which might be argued on a future day.

The Solicitor General consented to assume that all the necessary preliminaries had been gone through, and allowed the question to come on for argument in the manner proposed by His Honor.

The trial then proceeded.

James Casey examined by the Solicitor General. - I am a shepherd in the service of Mr. John Palmer; on the 29th of August I was out with our sheep near the Sugar Loaf; four black fellows came about 10 o'clock in the morning, rushed among the sheep, and took about 30 away; they kept four, and the remainder found their way home again; next morning, I found the four skins at the blacks' camp, about 100 rods off; the blacks were not there; the prisoner was one of the men who took the sheep; I knew him by the name of Billy Bulli for about four months before; he was not above thirty yards from me when he took the sheep; he had a waddy, a womorang, and a spear in his hand; I hallooed to him to let the sheep alone; I have no doubt the prisoner was one of the men, as he had been at the station several times; the prisoner can speak a little English; he understood a great deal of what I said, and I of what he said.

Cross-examined by Mr. Therry - Billy Bulli is the name by which the prisoner was known among the blacks; he had a gin; she was never away from him that I know of; I do not know it to be a custom among the stock-keepers to take away the black-fellows' gins; I can undertake to swear positively to the prisoner as being one of the party; I do not know it to be the custom to

give away the diseased sheep to the natives; if I saw half-a-dozen natives I would not be able to swear to them six days after, unless I knew them; I know of no marks on the prisoner's person, but I would undertake to swear to him among a thousand.

This was the case for the prosecution.

On the part of the prisoner, the Reverend Mr. Threlkeld was called, and examined by Mr. Therry.

I have some knowledge of the customs and language of the natives; I know frequent instances of their gins being taken from them by whites; in two instances I had to interfere, and to appear at the Police Office; I have had repeated complaints from the blacks of their women being taken away from them for improper purposes; I do not think they supposed they had a right to retaliate on that account; they have a notion respecting the rights of property; they do not take what belongs to each other, nor do they make use, to any great extent, of the opportunities they possess of taking the property of the whites; I think this arises from fear; they have no knowledge of the laws of England; they would readily be induced to steal a sheep for a trifling reward; I think one fig of tobacco would induce one of them to do it; their ignorance of the consequences of the offence would induce them to commit it.

By the Court - I have observed a remarkable shrewdness in the native tribes; they are shrewd, and discover, in their language strong reasoning faculties, capable of moral improvement - indeed more so than some of the lower order of Englishmen; they display a remarkable cunning when they wish to accomplish any object; they make a distinction between free settlers and what they call "croppies" - that is, prisoners; if they met a free man in the bush they would not hurt him, but if they met a prisoner they would probably strip him; the reason of this is, that when Newcastle was a penal settlement, the commandants used to give them the clothes of all the runaway prisoner they apprehended as a reward; I do think they know right from wrong; from that natural instinct implanted in the heart of every human being; I resided for 8 years in the South Sea islands, and I think that the natives of this colony are equally capable of moral improvement and civilization as the natives of those islands, who have made such rapid improvement through the exertions of the missionaries; the natives of many of the South Sea islands are nominal Christians; as far as my knowledge goes, there is no foundation for the opinion that prevails at home, that the natives of this colony are utterly incapable of improvement; I form that opinion from a comparison and contrast between them and the natives of other savage countries; they are exceedingly particular with regard to the rights of property amongst each other; they will not allow any thing, however trifling, to be taken by one from another; they lend to each other, and, although not over-particular in exacting the return of the thing lent, lending and giving away; they have distinct words for each in their language; they have also some idea of barter; the Newcastle tribes send up bundles of spears which they

manufacture to tribes up the country, and receive, in return, a cord made of the skin of the wallobi.

John Palmer Esq., examined - I do not know it to be the custom to give away the diseased sheep to the natives, for food, but I know an instances wherein 120 diseased sheep were turned loose into the bush, about three miles from my station, by Mr. Sparke, who now keeps the Australian hotel in Sydney; the greater part of these sheep were taken away by the natives, and no enquiry made after them, and from this circumstance, I think it highly probable that they considered sheep of no value, and that they might take them wherever they might find them; I had never known the natives to steal sheep before the last eighteen months, during which period I lost upwards of 200 from my flocks.

The learned Judge summed up the evidence, and told the Jury, after the last testimony they had heard, if they believed that the unhappy man a the bar had really taken those sheep under an impression that they were of no value, they ought to give him the benefit of that view of the case and acquit him. The jury found a verdict of not guilty.

The Solicitor-General, then rose, and stated that, after the conclusion at which the jury had arrived in this case, and feeling satisfied, had the same evidence been presented to them in the former case, that their verdict would have been the same he did not feel warranted in calling for judgment of the Court on the man who had been convicted.

Mr. Justice Dowling, after complimenting the Solicitor-General on the manner in which he, at all times, discharged his official duties in that Court, said he perfectly coincided in the course pursued by the learned gentleman, as well as in the conclusion to which the jury had come in this case. His learned friend, Mr. Therry, who, at His Honor's request, had kindly undertaken the defence of the prisoners, could not have been supposed, having an unexpected duty suddenly cast upon him, to be prepared in such a manner as, if time for deliberation had been afforded him; or he was satisfied that the line of defence he had set up in the last case, would have at once suggested itself to his accute [sic] and intelligent mind.

The two natives were then placed at the bar and discharged by proclamation.

Dowling J., 23 February 1832

Source: Dowling, Select Cases, Archives Office of N.S.W., 2/3466

[p. 138] *[The Black aboriginal Natives of New South Wales are amenable to the laws of England for offences committed by them against the persons & property of British Subject and are triable by Jury as British subjects provided the [sic] be sufficient proof of their intelligence as reasonable beings knowing right from wrong, and there be sufficient means of interpreting the proceedings of the Court assembled to try them for the infraction of English law.]*

Rex v Boatman & Bulleyes

The prisoner a Black Aboriginal native of the Colony, was charged with Sheep Stealing.

I asked Solicitor General (M Dowel) how he proposed to interpret proceedings to the prisoner

Mr Solicitor General said he was provided with Mr Threlked a Missionary and black native conversant with English and the prisoners language.

The jury found the prisoner Guilty. Vide Vol 64. page 1.

Dowling J., 23 February 1832

Source: Dowling, Proceedings of the Supreme Court of New South Wales, Vol. 64, Archives Office of New South Wales, 2/3247[3]

[p. 11] Dowling J. *The first question for consideration is whether the aboriginal natives of this Colony are subject to the jurisdiction of this court by the law of England. The general principle acted upon, I believe, with respect to these people since the foundation of this as a British Colony, is to regard them as being entirely under the protection of the law of England for offences committed against them by the white settlers & subjects of the Crown, & on the other hand to render them liable for any infraction of the British Law which may be injurious to the persons or properties of His Majesty's white subjects. We interfere not with their own habits, customs or domestic regulations,[4] but leave them to adjust their own disputes & differences amongst themselves. Dirty Dick's case.[5] Vol. 22 p. 98. But before a person of this description can be tried in this court it must be made to appear that he understands what is*

passing & is sensible of the liability he incurs; for if he does not understand what is passing he must be regarded as a person deaf & dumb, or a lunatic. In other words he must be a reasonable & responsible being. Rex v Binge Mhulto[\[6\]](#) Vol. 9. P. 100; but if he be a reasonable being, & understand the nature of his present responsibility [p. 12] then, I hold, as at present advised, that he is liable to the Britis [sic] law. His anomalous position as a savage native of a country which has become the territory of the British Crown, disentitles him[\[7\]](#) to the privileges of a foreigner, of being tried by a jury half English & half foreigners, even if the Act for the administration of justice in this country would authorize us in adopting a course of trial for which we have no machinery. Where should we find the materials for such a jury?

The second question then is whether the prisoner comprehends what is passing. This a matter to be determined by the evidence.

The 3d. whether he took the sheep with knowledge that he had no right to do so, intending to convert it to his own use.

The jury found the Prisoner Guilty.

Notes

[\[1\]](#) *Since the time of Governor Macquarie (who arrived in the colony at the end of 1809), the governor had called an annual conference of the Aboriginal tribes: see Sydney Gazette, 4 January 1828; and see Sydney Gazette, 22 January, and 28 November 1829. On the 1832 conference, see a letter in the Sydney Herald, 13 February 1832, claiming that the indigenes had intellects barely above that of dogs. Not all lawyers agreed with this: see R. v. Ballard, 1829.*

[\[2\]](#) *The Sydney Herald, 27 February 1832, recorded these cases as follows:*

"Boatman, a native black, was indicted for stealing nine sheep, the property of John Palmer, at Ennindale, on the 19th of September last.

"The Second Count charged the prisoner with killing the sheep with intent to steal the carcasses. The Reverend Mr. Threlkeld, acted as interpreter. The prisoner was found Guilty.

"Billy Bulleye, another black native, was indicted for stealing four sheep, the property of John Palmer, at Ennindale, on the 19th September. The second count charged him with killing the

sheep with intent to steal the carcass. The prisoner was acquitted on the ground that he was not aware he was committing a felonious act at the time. The learned Judge then directed that his countryman, Boatman, should be discharged with him, and he requested of Mr. Threlkeld to explain to them that they were not to make free with the settler's sheep in future."

[3] *This notebook record of the trial commences at p. 1, in poor handwriting. Threlkeld acted as interpreter, and Therry for the defence. Therry objected to the jurisdiction of the court, under the law of nature and of nations. The judge's statement of the law reproduced here, is from pp 11-12 of this source.*

[4] *Deletion in original: "~~amongst themselves~~".*

[5] *This reference is to R. v. Ballard, 1829.*

[6] *This reference is to R. v. Binge Mhulto, 1828.*

[7] *Deletion in original: "of".*

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1834 South Australia Foundation Act (UK)

In 1833, Robert Gouger formed the South Australian Association in Britain to found a colony (South Australia) on the principles of EG Wakefield. In 1834, the British Parliament passed the *South Australia Foundation (Colonization) Act* for the occupation of 'waste and unoccupied' land. The legislation was a lie, legal trickery to conform with British law; the land was neither 'waste' nor 'unoccupied'.

In 1835, a *Letters Patent* was issued to legally create the Province of South Australia and define its boundaries, an area larger than France. The Letters Patent was ignored by Justice Blackburn in his 1971 Gove decision, as having no force in law, being overridden by the SA Foundation Act. Why? Because the Letters Patent specifies Aboriginal land rights, not mentioned in the Act: Nothing should be done to '*affect the rights of any Aboriginal natives of the said Province to the actual occupation or enjoyment in their own person or persons of their descendants of any lands therein now actually occupied or enjoyed by such natives*'. The Letters Patent admitted that the land was occupied by Aboriginals, but was contradicted by the Foundation Act, which asserted the land was unoccupied.

It is significant that *nowhere* in this Foundation Act are the Aboriginals mentioned, not their native title rights to shared use of the land, nor the right to a proportion of all land sales, nor the right to certain permanent places of occupation and habitation. The Act was prepared by Torrens et al, reporting to the Land Commissioners in the U.K., with whom the Colonial Office (Glenelg, Grey, Stephen and others) had a fraught relationship. It was never amended as requested by Glenelg, for which a draft amendment was prepared by the Colonial Office and given to Torrens. Nor did Glenelg attempt to ensure that Aboriginals would not be mistreated to the same extent as for the other Australian colonies.

The Colonial Office, the Bible Society and the Church Missionary Society wanted to protect and preserve Aboriginal land rights and culture. The Land Commissioners had an entirely different objective, to maximize revenue from the sale of land to provide funding for assisted immigration to South Australia. With its foundation, South Australia had an opportunity to avoid the humanitarian mistakes and ethnic cleansing of the Eastern states. Mammon won. South Australia and its later protectorate, the Northern Territory, continued exactly the same racist pattern, with a similar genocidal outcome.

An area the size of France was annexed, the homeland of several Aboriginal nations, whose resistance was quickly overcome and whose society was destroyed within thirty years. Gouger

deviously manipulated the Secretary of State, Glenelg, to ensure that the Act did not specify how the Aboriginals would be compensated. Gouger was therefore responsible for much of the human toll. Many of the SA Land Commissioners became very wealthy, buying and selling what was Aboriginal land. Adelaide streets and other places are named in their 'honour'.

The founding of South Australia was all about a legal grab for more land, for more landed wealth. The Foundation Act was quickly followed with the South Australian Commission Land Sale Regulations 1835 (issued by the Commissioners in the UK). The pattern of genocidal dispossession continued, as for the other British colonies in Australia, first by 'legally' taking the Aboriginal homelands, then by exterminating and finally repressing the surviving Aboriginals.¹⁶⁹

¹⁶⁹ See FWAYAF *Recollections From a (Homicidal) Pastoral Frontier 1788 - 1928*

South Australia Act, or Foundation Act of 1834 (UK).

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<.....> signifies scope notes in small type in the margins.

Additional Text ^ text ^

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BEGIN TRANSCRIPT

An Act to empower His Majesty to erect South Australia into a British Province or Provinces and to provide for the Colonisation and Government thereof [15th August 1834]

Anno 5o Gulielmi 4th

South Australia Act, or Foundation Act of 1834 (UK).

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Whereas that part of Australia which lies between the meridians of the one hundred and thirty-second and one hundred and forty-first degrees of east longitude and between the southern ocean and twenty-six degrees of south latitude together with the Islands adjacent thereto consists of waste and unoccupied lands which are supposed to be fit for the purposes of colonization And whereas divers of his majesty's subjects possessing amongst them considerable property are desirous to embark for the said part of Australia And whereas it is highly expedient that his majesty's said subjects should be enabled to carry their said laudable purpose into effect And whereas the said persons are desirous that in the said intended colony an uniform system in the mode of disposing of waste lands should be permanently established Be it therefore enacted by the King's most excellent majesty by and with the advice and consent of the Lords spiritual and temporal and commons in this present Parliament assembled, and by the authority of the same that ^ it shall and may be lawful for His Majesty, with the Advice of His Privy Council, to erect within ^ that part of Australia which lies between the meridians of the one hundred and thirty-second and one hundred and forty-first degrees of east longitude, and between the southern ocean and the twenty-six degrees of south latitude, together with all and every the islands adjacent thereto, and the bays and

continuing commissioners to act as if no such vacancy had occurred And be it further enacted that the said commissioners shall be styled “The Colonization

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Commissioners for South Australia” and the said Commissioners or any two of them may sit from time to time, as they deem expedient as a board of commissioners for carrying certain parts of this act into execution And be it further enacted that the said commissioners shall cause to be made a seal of the said board and shall cause to be sealed or stamped therewith all rules orders and regulations made by the said commissioners in pursuance of this act and all such rules orders and regulations or copies thereof purporting to be sealed or stamped with the seal of the said board shall be received as evidence of the same respectively without any further proof thereof and no such rule order or regulation or copy thereof shall be valid or have any force or effect unless the same shall be so sealed or stamped as aforesaid And be it further enacted that the said commissioners shall and they are hereby empowered to declare all the lands of the said province or provinces (excepting only portions which may be reserved for roads and footpaths to be public lands open to purchase by british subjects and to make such orders and regulations for the surveying and sale of such public lands at such price as the said commissioners may from time to time deem expedient and for the letting of the common of pasturage of unsold portions thereof as to the said commissioners may seem meet A for any period not exceeding three years A and from time to time to alter and revoke such orders and regulations and to employ the monies from time to time received as the purchase money of such lands or as rent of the common of pasturage of unsold portions thereof in conducting the emigration of poor persons from Great Britain or Ireland to the said province A or provinces A provided always, that no part of the said public lands shall be sold except in public for ready money and either by auction or otherwise as may seem best to the said commissioners but in no case and at no time for a lower price than the sum of twelve shillings Sterling per English acre provided also that the sum per acre which the said commissioners may declare during any period to be the upset or selling price at which public lands

shall be sold shall be an uniform price (that is to say) the same price per acre whatever the quantity or situation of the land put up for sale provided also that the whole of the funds from time to time received as the purchase money of the said lands or as the rent of the common of pasturage of unsold portions thereof shall constitute an "Emigration Fund" and shall without any deduction whatsoever except in the case hereinafter provided for be employed in conveying poor emigrants from Great Britain or Ireland And to the said province ^ or provinces^ provided also that the poor persons who shall by means of the said "Emigration Fund" be conveyed to the said province ^ or provinces ^ shall, as far as possible, be adult persons of the two sexes in equal proportions, And not exceeding the age of thirty years

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xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx ^ that no poor person having a husband or wife (as the case may be), or a child or children, shall, by means of the said "Emigration Fund," obtain a passage to the said province ^or provinces^ unless the husband or wife (as the case may be), or the child or children of such poor person, shall also be conveyed to the said province ^or provinces ^

And be it further enacted that it shall be lawful for his Majesty his heirs and successors, by warrant under the sign manual, to be countersigned by his Majesty's principal secretary of state for the colonies, to appoint a commissioner of public lands to be resident in the said colony, and to act under the orders of the said board of commissioners as herein-after directed And be it further enacted that the said commissioners shall and they are hereby empowered to appoint such person or persons as they may think fit treasurer, assistant Surveyors, and other officers, for carrying this act into execution respecting the disposal of the said public lands and the purchase money thereof, and to remove such treasurer or assistant surveyors or other officers at their discretion, and on every or any vacancy in the said office of treasurer, assistant surveyor, or other officer, by removal or by death or otherwise, to appoint, if they see fit, some other person to the said office And be it further enacted that it shall and may be lawful for the said commissioners

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to delegate to the said colonial commissioner, assistant surveyor or other officer or to any of them, such of the powers and authorities with respect to the

disposal of the public lands of the said province ^ or provinces ^ as the said commissioners shall think fit; and the powers and authorities so delegated and the delegation thereof shall be notified in such manner and such powers and authorities shall be at exercised such places for such periods and under such circumstances shall direct and the said commissioners may at any time revoke recall alter or vary all or any of the powers and authorities which shall be so delegated as aforesaid And be it further Enacted that all monies under the control of the said board of commis-sioners shall be received and paid by the treasur-ers who may be appointed by the said board and who shall give security for the faithful discharge of their duties to such amount and in such manner as to the said commissioners may seem fit And be it further Enacted that all accounts of the said treasurer shall be submitted to the lords of his Majesty's treasury and be audited in the same manner as other public accounts And be it further Enacted that the said commissioners may and they are hereby empowered from time to time to appoint a secretary treasurer and all such clerks messengers and officers as they shall think fit and from time to time at the xxxxxxxxxxx ^ discretion ^ of the said commissioners to remove such secretary treasurer clerks messengers and officers or any of them and to appoint others in their stead And be it further Enacted that every commissioner and colonial commissioner to be appointed from time to time shall before he shall enter upon the execution of his office take the following oath before one of the Judges of His Majesty's Court of common pleas or one of the barons of the court of exchequer or (in the case of such colonial commissioners) before the judge of one of his majesty's courts in the said province ^ or provinces ^ (that is to say)

I, A. B. do swear that I shall faithfully impartially and honestly according to the best of my skill and judgment execute and fulfil all the powers and duties of a commissioner [or colonial commissioner as the case may be] under an act passed in the fifth year of the reign of King William the fourth intituled [here set forth the title of this act].

Provided always and be it further Enacted that the salaries to be paid to all such persons as may be appointed to any office under this act shall be fixed by the Lords of His Majesty's Treasury and by them shall be revised from time to time as they may deem expedient And be it further Enacted that the said

commissioners shall at least once in every year and at such other times and in such form as His Majesty's principal secretary of state for the colonies shall direct submit to the said secretary of state a full and particular report of their proceedings and every such report shall be laid before both houses of parliament within six weeks after the receipt of the same by the said secretary of state if parliament be then sitting or if parliament be not sitting then within six weeks after the next meeting thereof And be it further Enacted that it shall and may be lawful for the said commissioners previously and until the sale of public lands in the said province shall have produced a fund sufficient to defray the cost of conveying to the said province from time to time such a number of poor emigrants as may by the said commissioners be thought desirable from time to time to borrow and take up on bond or otherwise payable by instalments or otherwise at Interest not exceeding ten pounds per centum per annum any sum or sums of money not exceeding fifty thousand pounds for the sole purpose of defraying the costs of the passage of poor emigrants from Great Britain or Ireland to the said province by granting and issuing to any person or persons willing to advance such monies bonds or obligatory writings under the hands and seals of the said commissioners or of any two of them which bonds or other obligatory writings shall be

South Australia Act, or Foundation Act of 1834 (UK).

Page 5 of 7.

termed "South Australia public lands securities" and all such sum or sums of money not exceeding in the whole fifty thousand pounds so borrowed or taken up by means of the bonds or writings obligatory aforesaid for the sole purpose aforesaid shall be borrowed on the credit of and be deemed a charge upon the whole of the fund to be received as the purchase money of public lands or as the rent of the common of pasturage of unsold portions thereof and it shall and may be lawful for the said commissioners from time to time to appropriate all or any part of the monies which may be obtained by the sale of public lands in the said province ^ or provinces ^ to the payment of interest on any such sum or sums borrowed and taken up as aforesaid or to the repayment of such principal sum or sums And be it further Enacted that for defraying the necessary costs charges and expences of founding the said intended colony and of providing for the government thereof and for the expences of the said commis-sioners (excepting always the purpose whereunto the said emigration fund is made solely applicable by this act) and for defraying all costs charges and expences incurred in carrying this act into execution and applying for and

obtaining this act it shall and may be lawful for the said commis-sioners from time to time to borrow and take up on bond or otherwise payable by Instalments or otherwise at interest not exceeding ten pounds per centum per annum any sum or sums of money required for the purposes last aforesaid not exceeding in the whole the sum of two hundred thousand pounds by granting or issuing to any person or persons willing to advance such monies bonds or obligatory writings under the hands and seals of the said commissioners or any two of them which bonds or other obligatory writings shall be termed "South Australia colonial revenue securities" and all such sum or sums of money by the said commissioners so borrowed and taken up as last aforesaid shall be and is and are hereby declared to be a charge upon the ordinary revenue or produce of all rates duties and taxes to be levied and collected as hereinbefore directed within the said province ^ or provinces ^ and shall be deemed and taken to be a public debt owing by the said province to the holders of the bond or bonds or other writings obligatory by the said commissioners granted for the purposes last aforesaid And be it further Enacted that it shall and may be lawful for the said commissioners at any time to borrow or take up any sum or sums of money for any of the purposes of this act at a lower rate of interest than any security or securities previously given by them under and by virtue of this act which may then be in force shall bear and therewith to pay off and discharge any existing security or securities bearing a higher rate of interest as aforesaid And be it further Enacted that in case it should so happen that the said commis-sioners shall be unable to raise by the issue of the said colonial revenue securities the whole of the said sum of two hundred thousand pounds or that the ordinary revenue of the said province ^ or provinces ^ shall be insufficient to discharge the obligations of all or any of the said securities then and in that case but not otherwise the public lands of the said province ^ or provinces ^ then remaining unsold and the monies to be obtained by the sale thereof shall be deemed a collateral security for payment of the principal and interest of the said colonial debt provided always that no monies obtained by the sales of public lands in the said province ^ or provinces ^ shall be employed in defraying the principal or interest of the said colonial debt so long as any obligation created by the said South Australian public lands securities shall remain undischarged provided also that in case after the discharge of all obligations created by the said South Australian public lands securities any part of the monies obtained by the sale of public lands in the said province ^ or

provinces ^ shall be employed to discharge any of the obligations created by the said colonial revenue securities then and in that case the amount of such deduction from the said emi-gration fund shall be deemed a colonial debt owing by the said province to the colonization commissioners for South Australia and be charged upon the ordinary revenue of the said province ^ or provinces ^ And be it further Enacted that the commissioners nominated and appointed by his majesty as

South Australia Act, or Foundation Act of 1834 (UK).

Page 6 of 7.

aforesaid may sue and be sued in the name or names of any one of such commissioners or of their secretary clerk or clerks for the time being and that no action or suit to be brought or commenced by or against any of the said commissioners in the name or names of any one of such commissioners or their secretary or clerk shall abate or be discontinued by the death or removal of such commissioner secretary or clerk or any of them or by the act of such commissioner secretary or clerk or any of them without the consent of the said commissioners but that any one of the said commissioners or the secretary or clerk for the time being to the said commissioners shall always be deemed to be the plaintiff or defendant (as the case may be) in every such action or suit Provided always that nothing herein contained shall be deemed construed or taken to extend to make the commissioners who shall sign execute or give any of the bonds or obligatory writings so hereby authorized or directed to be given personally or their respective estates lands or tenements goods and chattels or such secretary or clerk or their or either of their lands and tenements goods and chattels liable to the payment of any of the monies so borrowed and secured by reason of their giving any such bonds or securities as aforesaid or of their being plaintiff or defendant in any such action as aforesaid but that the costs charges and expences of every such commissioner secretary or clerk by reason of having been made plaintiff or defendant or for any contract act matter or thing whatsoever made or entered into in the bonâ fide execution of this act from time to time be defrayed by the said commissioners out of the money so borrowed and taken up as aforesaid And be it further Enacted that no person or persons convicted in any court of justice in Great Britain or Ireland or elsewhere shall at any time or under any circumstances be transported as a convict to xxxxxxxxxxxxxxxxxxxxxxxx ^ any place within the limits herein-before described ^ And be it further Enacted that it shall and may be lawful for his majesty by and with the advice of his privy

disposed of shall be invested in the names of the said trustees by the said commissioners so that the said guarantee or security fund of twenty thousand pounds shall not at any time be reduced below that amount Provided always that the interest and dividends accruing from time to time upon the said Exchequer bills or other government securities shall be paid to the said commissioners and by them be devoted to the purposes to which as hereinbefore directed the monies to be raised by the issue of the aforesaid South Australian colonial revenue bonds are made applicable

And be it further Enacted That if after the Expiration of Ten Years from the passing of this Act the population of the said province or provinces shall be less than Twenty thousand natural born Subjects of His Majesty then and in that Case all the public Lands of the said province or provinces which shall then be unsold shall be liable to be disposed of by His Majesty His Heirs and Successors, in such Manner as to him or them shall seem meet Provided always, that in case any of the Obligations created by the said South Australian Public Lands Securities should then be unsatisfied the Amount of such Obligations shall be deemed a Charge upon the said unsold public Lands, and shall be paid to the Holders of such Securities out of any Monies that may be obtained by the Sale of the said Lands. And be it further Enacted that until the said commissioners shall by the granting and issuing of bonds and writings obligatory as aforesaid that is to say South Australian colonial revenue securities have raised the sum of twenty thousand pounds and have invested the same in the purchase of exchequer bills or other government securities as hereinbefore directed and until the persons intending to settle in the said province ^ or provinces ^ and others shall have invested (either by payment to the said commissioners or in the names of trustees to be appointed by them) for the purchase of public lands in the said province ^ or provinces ^ the sum of thirty five thousand pounds none of the powers and authorities hereby given to his majesty or to the said commissioners or to any person or persons except as respects the exercise by the said commissioners of such powers as are required for raising money by means of and on the security of the bonds or securities last aforesaid and for receiving and investing the aforesaid sum of thirty five thousand pounds for the purchase of public lands shall be of any effect or have any operation whatsoever. xxxxxx

END TRANSCRIPT

However, there is an attachment to the Foundation Act, assented to on 15th August 1834 (and enacted on 19th February 1836) which has different wording and *does* refer to the rights of Aboriginals, the Letters Patent, which incorporated the 1834 Foundation Act into law. The Letters Patent does not contain any of the amendments to the Act which were drafted by Glenelg to protect the land rights of the Aboriginals. I am so far unable to reconcile the two versions: the 1834 Act or the Letters Patent. Neither version contains or reflects the Glenelg amendments, including appropriate compensation, if Aboriginals chose to sell their land.

Act empowering His Majesty to erect South Australia into a Province.

[...] NOW KNOW YE that with the advice of Our Privy Council and in pursuance and exercise of the powers in us in that behalf vested by the said recited Act of Parliament **WE do hereby erect and establish one Province to be called the Province of SOUTH AUSTRALIA** – And we do hereby fix the Boundaries of the said Province in manner following (that is to say) On the North the twenty-sixth degree of South Latitude – On the South the Southern Ocean – On the West the one hundred and thirty-second degree of East Longitude – And on the East the one hundred and forty-first degree of East Longitude including therein all and every the Bays and Gulfs thereof together with the Island called Kangaroo Island and all and every the Islands adjacent to the said last mentioned Island or to that part of the main Land of the said Province **PROVIDED ALWAYS that nothing in these our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own persons or in the persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives** IN WITNESS whereof We have caused these Our Letters to be made Patent WITNESS Ourselves at Westminster the Nineteenth day of February in the Sixth Year of our Reign.

BY WRIT OF PRIVY SEAL

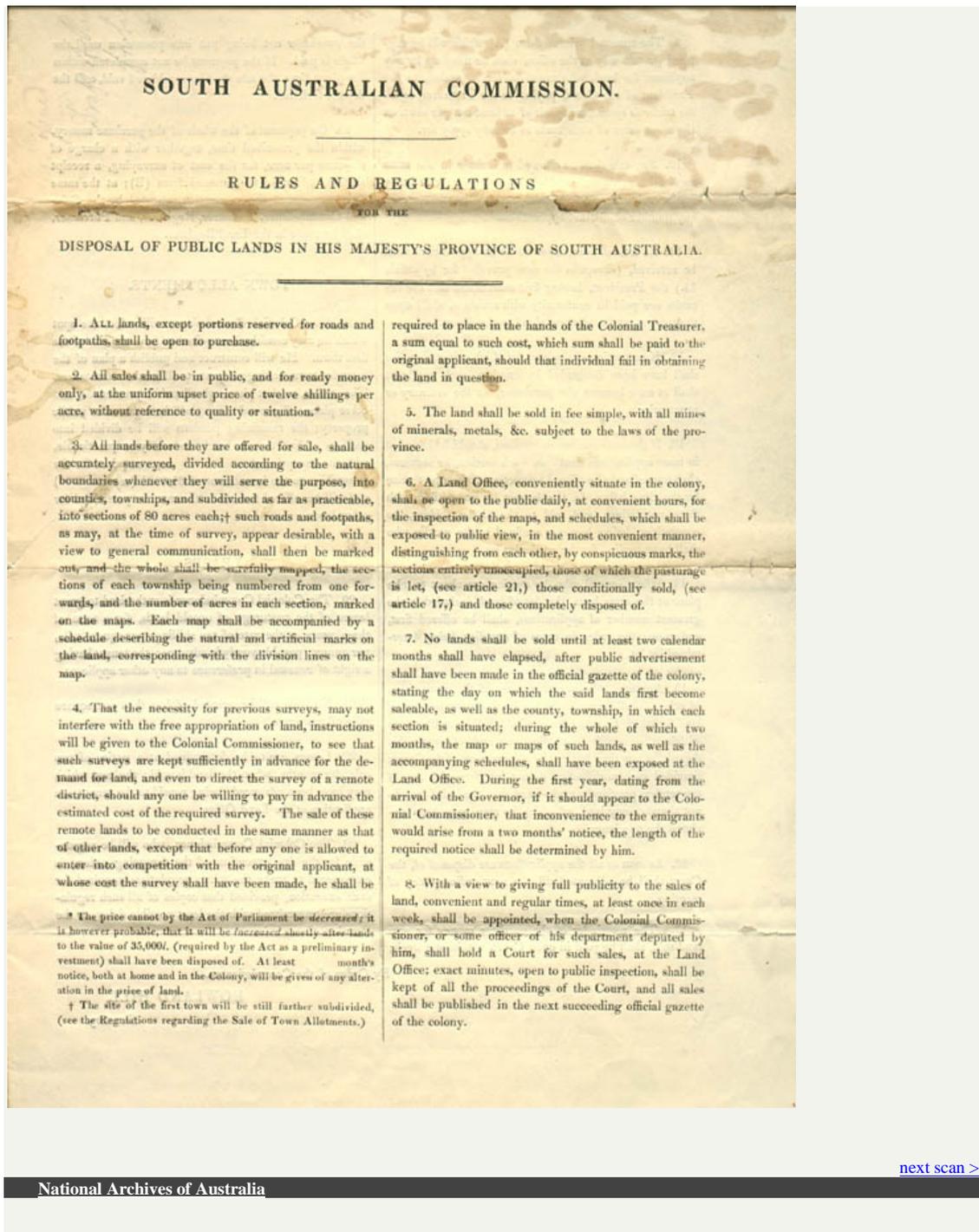
EDMUNDS¹⁷⁰

¹⁷⁰ <http://historysouthaustralia.net/Comrs.htm>

South Australian Commission Land Sale Regulations 1835**(issued by the Commissioners in the UK)****Transcript**

The South Australian Commission Land Sale Regulations 1835 (issued by the Commissioners in the UK) is still being transcribed.

Please contact foundingdocs@naa.gov.au to request a copy of the transcript when it becomes available.¹⁷¹



¹⁷¹ This message is now several years old. It seems lack of Government funding is making important historical documents inaccessible.

9. The annexed printed form (A) which will be supplied gratuitously at the office, shall be filled up by any applicant for land, who must deliver it, sealed, to the President of the Court, paying to the Treasurer, *before the tender is opened*, a deposit of at least ten per cent. on the upset price of such lands as he may apply for.

10. Any one shall be allowed to include in the same application any number of whole sections, provided they adjoin each other: he may also, at the same time, make any number of distinct applications.

11. At a fixed hour, after which no applications shall be received, (except in the case provided for by article 15.) the President, having first ascertained that the deposits are paid in conformity with article 9, shall open the tenders, and read them aloud to the Court.

12. If no portion of the land for which any one applies shall have been demanded by another, such applicant shall at once become the purchaser, at the ordinary or upset price.

13. If the same section, or sections, should be included in more applications than one, such section, or sections, shall immediately be offered by auction at the upset price for the time being, in the largest lot compatible with these regulations, and sold to the highest bidder, the competition being however confined to the parties who shall have applied for the particular lot.

14. When several sales by auction are about to take place at the same hour, that lot of land, included in the greatest number of applications, shall be offered first, and so on; the order, in cases of equality, being determined by lot.

15. Any one, who in consequence of the competition of others, shall be unable to obtain the exact portion of land for which he may have applied, shall be at liberty to withdraw, or modify his application; and, of course, his deposit, at any time before the adjournment of the Court; provided such modification do not interfere with any of the tenders previously made—and that the individual do not abandon any land, of which he may have been declared the purchaser.

16. As soon as all the applications are disposed of, the Court shall be adjourned till the next ordinary day of meeting.

17. The remainder of the purchase money for any land sold, shall be paid in open Court, within one week;

the purchaser not being put into possession until the whole is paid. If the payment be not completed within the given time, the sale shall be considered void, and the deposit forfeited.

18. On payment of the whole of the purchase money, within the prescribed time, together with a charge of sixpence per acre, for the cost of surveying, a receipt shall be given in the annexed form (B); at the same time, a record of the transaction, attested by the Colonial Commissioner, Treasurer, Registrar, and Purchaser, shall be made in the Land Register.

TOWN ALLOTMENTS.

19. The Colonial Commissioner will select the spot which he may consider best suited to form the site of the first town. He will construct and publish a plan of the intended town, having reference to all local circumstances. The streets, market place, wharf, public promenade, and other places of general resort, will be reserved as public property; the remaining portions will be divided into sections of half an acre each, as nearly as practicable, with the exception of _____ acres required for the subscribers to the investment of 35,000*l.* (see _____) and will be offered for sale in the manner prescribed for other lands.

LEASES.

20. The Colonial Commissioner is authorised to grant leases of the pasturage of unsold lands, for a term of three years, at the rate of ten shillings per square mile, per annum, payable yearly in advance; the tenant having a right of renewal in preference to any other applicant.

21. No lease will be granted of less than one square mile of pasturage.

22. Leases are to be determined at a notice of two calendar months, when the land is sold; the rent which may have been advanced, being repaid to the tenant, on application at the Land Office.

23. The Colonial Commissioner, who will be responsible for the due execution of the foregoing orders, is empowered to make the minor regulations required for such execution, provided that copies of all such regulations are transmitted with the least possible delay, to the Board of Commissioners.

By Order of the Commissioners.

ROWLAND HILL,

Secretary.

APPENDIX.

A Application for the Purchase of Land.

No. _____
 SOUTH AUSTRALIAN LAND OFFICE,
 day of _____ 183

I*
 of †
 in the Township of _____
 County of _____
 hereby offer to purchase the fee simple of section

Number ‡
 in the Township of _____ Hundred of _____
 County of _____ measuring
 in all, as stated in the maps, acres, at the
 upset price for land, namely, twelve shillings per acre,
 on the conditions specified in the printed "Rules and
 Regulations for the disposal of public lands," now in force.

(Signed)

To the Colonial Commissioner.

Every applicant is requested to take particular notice, that a deposit of ten per cent. on the upset price must be paid before the tender is opened, and that the remainder of the purchase money must be paid in open court within one week from the time of sale, the purchaser not being put into possession until the whole debt is discharged. Also, that if the payment be not completed within the given time, the sale will be considered void, and the deposit forfeited.

* Write christian and surname legibly, and at full length.

† State accurately the usual place of residence.

‡ If several sections, state the number of each: they must all be contiguous.

B Receipt for the Purchase Money of Land.

No. _____
 SOUTH AUSTRALIAN LAND OFFICE,
 day of _____ 183

The Colonial Commissioners of Public Lands, at a Court of Sales held on _____ acknowledge to have sold to _____ residing at _____ in the Township of _____ County of _____ for the sum of _____ section (or sections) number _____ in the Township of _____ County of _____ Measuring in all _____ acres, which lands are hereby declared to be the sole and absolute property in fee simple of the said _____ subject only to the laws of the Province.

(Signed)

Colonial Commissioner.

The said sum of _____ has been paid into this office, in the following manner, namely,
 on _____
 as a Deposit £
 this day to complete the purchase £
 Making a total of £
 Charge for surveying at the rate of 6d. } £
 per acre }

(Signed)

Treasurer.

A record of the sale of the said lands to the said _____ for the said sum of £ _____ has been made by me this day in the Land Register.

(Signed)

Registrar.

Governor Bourke's 1835 Proclamation¹⁷²

Following Batman's attempt to come to some arrangement with the people of Port Phillip Bay for the sale of their land, Bourke's proclamation on behalf of the British Government was to rescind any possibility of a treaty with the Aboriginals. The proclamation asserts Britain's right of sovereignty over a prescribed part of the Australian continent, what some historians call a document of Terra Nullius, although Bourke does not use the term, nor does it appear in any despatches.

NOTE: original document handwritten.

A copy of this document is available in the New South Wales Government Gazette

(Copy) No 3 411

Proclamation

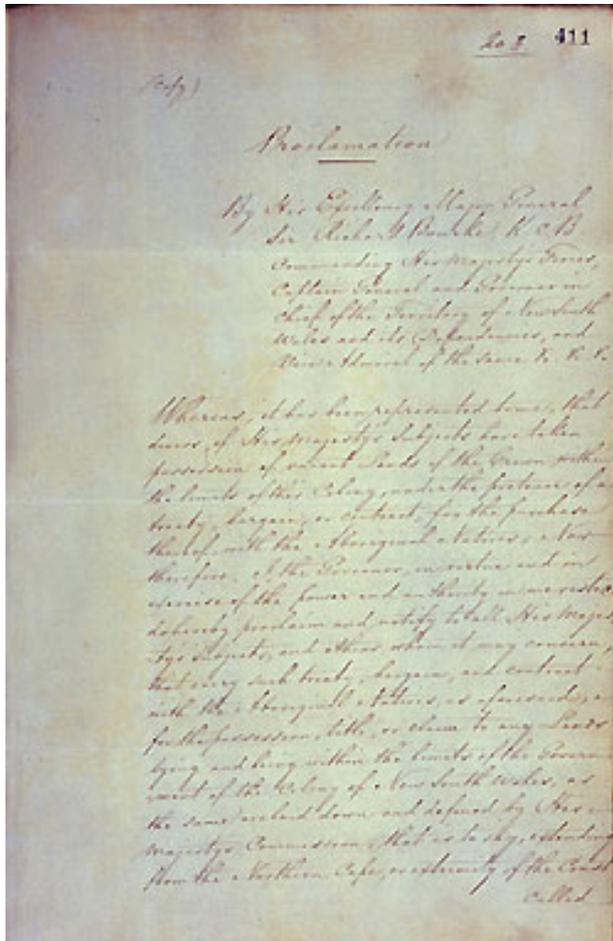
By His Excellency Major General Sir Richard Bourke, K.C.B. Commanding His Majesty's Forces, Captain General and Governor in Chief of the Territory of New South Wales and its Dependencies, and Vice Admiral of the same &c. &c. &c.

Whereas, it has been represented to me, that divers of His Majesty's Subjects have taken possession of vacant Lands of the Crown, within the limits of this Colony, under the pretence of a treaty, bargain, or contract, for the purchase thereof, with the Aboriginal Natives; Now therefore, I, the Governor, in virtue and in exercise of the power and authority in me vested, do hereby proclaim and notify to all His Majesty's Subjects, and others whom it may concern, that every such treaty, bargain, and contract with the Aboriginal Natives, as aforesaid, for the possession, title, or claim to any Lands lying and being within the limits of the Government of the Colony of New South Wales, as the same are laid down and defined by His Majesty's Commission; that is to say, extending from the Northern Cape, or extremity of the Coast called Cape York, in the latitude of ten degrees thirty seven minutes South, to the Southern extremity of the said Territory of New South Wales, or Wilson's Promontory, in the latitude of thirty nine degrees twelve minutes South, and embracing all the Country inland to the Westward, as far as the one hundred and twenty ninth degree of east longitude, reckoning from the meridian of Greenwich, including all the Islands adjacent, in the Pacific Ocean within the latitude aforesaid, and including also Norfolk Island, is void and of no effect against the rights of the Crown; and that all Persons who shall be found in possession of any such Lands as aforesaid, without the license or authority of His Majesty's Government, for such purpose, first had and obtained, will

¹⁷² This is a transcript from the original two page document held by the UK National Archives. See <http://www.foundingdocs.gov.au/item.asp?dID=42>

be considered as trespassers, and liable to be dealt with in like manner as other intruders upon the vacant Lands of the Crown within the said Colony.

Given under my Hand and Seal, at Government House, Sydney, this (L.S) twenty sixth Day of August, One thousand eight hundred and thirty five.



Proclamation of Governor Bourke, 10 October 1835. Image courtesy of <http://www.foundingdocs.gov.au/>

Collection

National Archives of the United Kingdom, Kew, Richmond, Surrey, U.K

Object Name

Proclamation of Governor Bourke, 10 October 1835

Object Description

Two pages paper with black ink. The paper displays some foxing and watermarks. Dimensions unknown. It is currently held at the National Archives of the United Kingdom.

When James Cook sailed on the east coast of Australia in 1770 he named it New South Wales.

As the interior was explored and mapped, squatters and free settlers followed eager to take up land. Where ever Europeans went Aboriginal people were pushed from their home lands.

When John Batman, one of the pioneers in the founding of Victoria, first settled at Port Phillip, he made an attempt to buy the land from the Aboriginal people through a treaty. New South Wales Governor, Sir Richard Bourke, effectively quashed the treaty with this Proclamation issued by the Colonial Office and sent to the Governor with Despatch 99 of 10 October 1835. Its publication in the Colony meant that from then, *all* people found occupying land without the authority of the government would be considered illegal trespassers.

The *Proclamation of Governor Bourke* implemented the doctrine of terra nullius upon which British settlement was based, reinforcing the notion that the land belonged to no one prior to the British Crown taking possession of it. Aboriginal people therefore could not sell or assign the land, nor could an individual person acquire it, other than through distribution by the Crown.

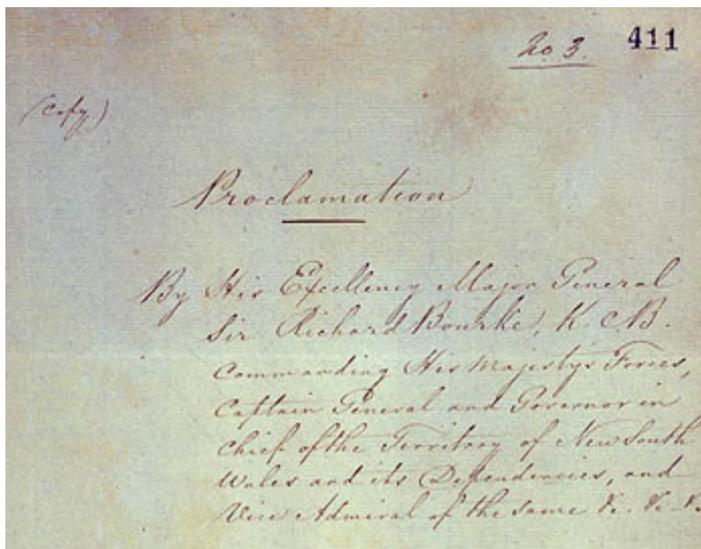
Although many people at the time also recognised that the Aboriginal occupants had rights in the lands (and this was confirmed in a House of Commons report on Aboriginal relations in 1837), the law followed and almost always applied the principles expressed in Bourke's proclamation. This would not change until the Australian High Court's decision in the Eddie Mabo Case in 1992.¹

The *Proclamation of Governor Bourke, 10 October 1835* is historically significant. It implemented the doctrine of terra nullius upon which British settlement was based, reinforcing the notion that the land belonged to no one prior to the British Crown taking possession of it.

The *Proclamation of Governor Bourke* has research value in the study of British settlement of Australia, the legal principle of 'terra nullius' and dispossession. The *Proclamation of Governor Bourke, 10 October 1835* contains evidence of the construction of the legal principle of 'terra nullius' upon which the British settlement was based.

The *Proclamation of Governor Bourke* has social value as evidence of the changing migration patterns on Australia in the early 19th century and the demands for land. It provides a powerful symbol of the British Government's attempt to control social and land policy in Australia and the dispossession of the Aboriginal people.

The document is well provenanced. It is the copy of the Proclamation retained by the Colonial Office; the document despatched to Governor Bourke has not been located. This document was from Colonial Office of the British Government and is currently in the National Archives of the United Kingdom, Kew, Richmond, Surrey, U.K.



Proclamation of Governor Bourke, 10 October 1835 [Detail]

The *Proclamation of Governor Bourke* is extremely rare. It is the only the *Proclamation of Governor Bourke, 10 October 1835* in existence. The original the document despatched to Governor Bourke has not been located.

The *Proclamation of Governor Bourke* represents a time early in Australia's history when the England was still attempting to apply and enforce the legal principle of 'terra nullius' upon which the British settlement was based.

The *Proclamation of Governor Bourke* is in good condition.

The *Proclamation of Governor Bourke* provides the potential to interpret the themes of British settlement, terra nullius, Aboriginal land and dispossession. The *Proclamation of Governor Bourke* provides a material evidence of the intangible legal principle of 'terra nullius' upon which the British settlement was based.

Footnotes

1 <http://www.foundingdocs.gov.au/item.asp?dID=35>

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<http://www.dreamtime.net.au/indigenous/timeline.cfm%20>

Edited by S Thompson

Migration Heritage Centre NSW 2006

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- **Object Name** *Governor Bourke's Proclamation of Terra Nullius c.1835*
- **Collection** [Britain](#)
- **Cultural background** [Aboriginal](#)
- **Era** [1830 - 1840s](#)
- **Theme** [First Contact](#), [Maritime](#)
- **Themes** [Exploration](#), [Government](#), [Indigenous Relations](#), [Settlement](#)

The Migration Heritage Centre at the Powerhouse Museum is a NSW Government initiative supported by the Community Relations Commission.

<http://www.migrationheritage.nsw.gov.au/>

Regional Services at the Powerhouse Museum is supported by Movable Heritage, NSW funding from the NSW Ministry for the Arts.

© [NSW Migration Heritage Centre](#)

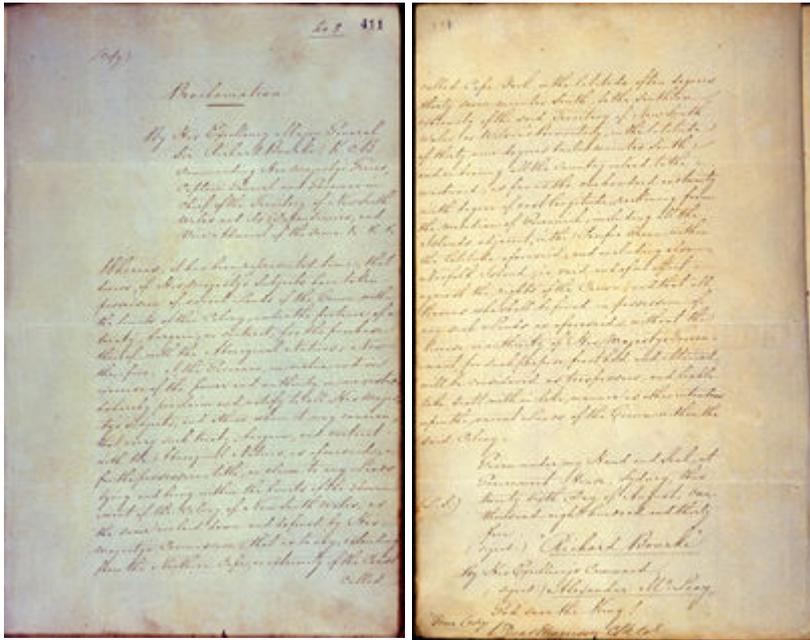
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Governor Bourke's Proclamation 1835 (UK)



Significance

This document implemented the doctrine of *terra nullius* upon which British settlement was based, reinforcing the notion that the land belonged to no one prior the British Crown taking possession of it. Aboriginal people therefore could not sell or assign the land, nor could an individual person acquire it, other than through distribution by the Crown.

History

When John Batman, one of the pioneers in the founding of Victoria, first settled at Port Phillip, he made an attempt to buy the land from the Aboriginal people through a 'treaty'. New South Wales Governor, Sir Richard Bourke, effectively quashed the treaty with this Proclamation issued by the Colonial Office and sent to the Governor with Despatch 99 of 10 October 1835. Its publication in the Colony meant that from then, people found in possession of land without the authority of the government would be considered trespassers.

Although many people at the time also recognised that the Aboriginal occupants had rights in the lands (and this was confirmed in a House of Commons report on Aboriginal relations in 1837), the law followed and almost always applied the principles expressed in Bourke's proclamation. This would not change until the Australian High Court's decision in the [Mabo](#) in 1992.

Description

The document shown is the copy of the Proclamation retained by the Colonial Office; the document despatched to Governor Bourke has not been located.

Provenance:	Colonial Office of the British Government
Features:	A document not available in Australia
Location &	National Archives of the United Kingdom

Copyright:	
Reference:	PRO UK: CO 201/247 ff 411 r + v



Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements), 1837

This important enquiry was an opportunity for Britain to have turned away from its destructive colonial policies. Instead, it mostly ignored the enquiry's findings and recommendations. The result was accelerated ethnic cleansing, which often slipped into a policy of genocide. Aboriginal destruction was justified as bringing superior civilization to colonial territories, along with Christian education. In reality, it was a massive transfer of wealth, wealth in the form of land, from one group to another.

In 1837, this Select Committee in Great Britain considered the alarming and destructive effect on native populations of all British imperial colonization around the globe and whether anything could be done to prevent further racist violence. It took into account Newfoundland, North American, British Guiana, West Indies, New Holland, Van Diemen's Land, Islands in the Pacific (including New Zealand), and South Africa, I have excerpted certain text from the overall report¹⁷³.

What emerges is that almost anywhere in the world where the British wished to trade or wanted to colonize, particularly in the 19th century, the results for the original inhabitants were always the same: racially based extermination, or in the extreme cases, ethnic cleansing, accompanied by the sharp edge of genocide. The exceptions were India, China and South Africa, where the indigenes were simply too numerous. India was a subservient trading partner to Britain until the 1857 uprising, which was ruthlessly put down, after which it became a colony until 1947. China also rose against British imperialism, but was brutally crushed between 1839 and 1841, and again between 1856 and 1860.

Although the Committee correctly identified much of the indigenous slaughter, and that land dispossession was the major factor in ethnic cleansing, it neglected to make the many known government perpetrators of massacres accountable, for example Governor Stirling (in Western Australia) or Governor D'Urban (in South Africa) or Governor Brisbane (in New South Wales) or Governor Arthur (in Tasmania) and many others, nor did it recommend any change of policy regarding land usurpation by the Crown. Instead it recommended Christian

¹⁷³ *Report of the Parliamentary Select Committee on Aboriginal Tribes*, William Ball, Aldine Chambers, Paternoster Row and Hatchard and Son, Piccadilly, 1837; republished by The Cornell University Library Digital Collections (no ISBN or date) and also available online <http://catalog.library.cornell.edu/cgi-bin/Pwebrecon.cgi?BBID=6357526&DB=local> from the Cornell University Library, last viewed on 21st April, 2009. The report is quite lengthy, 140 pages, but sobering. To view the electronic record, click on the above address for the catalog record and then click on the electronic link provided in the record. Once you open the book, you may wish to change the viewing from "image" to "text". If so, from the first page of the manuscript, go to the top left menu, under **Format**, and change **Image** to **Text**.

education, while having direct evidence that even Christian missions had been deliberately attacked by racist para-military squads.

Such a moral objective perhaps salved Britain's conscience, but did little for the Australian Aboriginals, for whom the process of extermination accelerated after 1837, and after the report was released. This extermination took place in full view of the British

Of course, after the different Australian states were formed over the next fifty years, this allowed the British Government to claim that they were powerless to intervene, because it was then a matter for the colonial governments, a convenient pretext that preserved Australia as a trading partner, emigration destination, and source of raw materials, but superficially absolved Britain from responsibility in further crimes against humanity.

PREFACE

[...] The appalling facts which it discloses, and the judicious suggestions it contains, combine to render it one of the most important documents which has ever come before the legislature. Replete with evidence as to the injustice and cruelty with which the Aborigines have hitherto been treated, and the pernicious effects which have resulted to them from their intercourse with European nations, it abundantly proves the necessity of immediate legislative interference. [...]

Another, and yet stronger inducement to the publication of the appended statements arise from the indifference which still too generally pervades the public mind in reference to the wrongs of the Aborigines. It is a mournful reflection, that among the many philanthropic designs which have recently called forth the active energies of the good and benevolent in this country, no effort, at all commensurate with the magnitude of the object, has yet been made to check the progress of oppression in our colonies. In an age distinguished for its liberality, its enlightened sentiment, and its Christian zeal, atrocities, the most daring and dreadful in their character, which, even in a darker era of the world's history, would have excited universal horror, have passed unnoticed and unproved. To a foreigner, acquainted only with the general reputation of the British people, the facts, detailed in the ensuing pages might appear as little other than idle tales, the dreams of excited imagination. The injuries we have inflicted, the oppression we have exercised, the cruelties we have committed, the vices we have fostered, the desolation and utter ruin we have caused, stand in strange and melancholy contrast with the enlarged and generous exertions we have made for the advancement of civil freedom, for the

moral and intellectual improvement of mankind, and for the furtherance of that sacred truth, which alone can permanently elevate and civilize mankind. Accustomed to view with indignation the tyranny of neighboring states, we have yet by our silence given sanction to a policy not less iniquitous in its principles, and destructive in its tendency. Every law of humanity and justice has been forgotten or disregarded. Through successive generations the work of spoliation and death has been carried on, until to the colonial possessions of the most religious nation in the world the emphatic language of Scripture may with truth be applied – they are “the dark places of the earth, full of the habitations of cruelty.” It would be an idle, as well as a painful task to trace the motives which may fairly be supposed to have actuated those, whose names will for ever be connected with the oppression of the innocent and unoffending Aborigines. The policy of Spain was pre-eminent for its hypocrisy. Vainly attempting to conceal her ambition under the garb of piety, she sent forth her armies with the Bible in one hand, and the sword in the other, presenting death or conversion as the only alternatives of the hapless beings she sought to plunder and destroy. The guilt of our own nation, though equal in degree, is somewhat different in its character. We have been content to assume the office of the murderer, without adding to it the baseness of the hypocrite. The lust for power, and the love of gain, have in our case been the open and avowed incitements to injustice. Borne away by these master passions, we have left to the helpless victims of our colonial policy one only choice, - to fall by the sword, or to perish by famine. While, however, the motives which have influenced the different nations of Europe in their treatment of the Aborigines themselves, those especially of the Western hemisphere, has in all cases been the same. To them the brutal tyranny of Holland, the ferocious bigotry of Spain, and the insatiable cupidity of England, have proved alike degrading and destructive. Destitute, afflicted, tormented, death has been their only refuge suffering so intense, as almost to justify their curses upon the memory of him, who first published to Europe the fact of their existence.

The leading causes of these frightful calamities are not difficult of discovery. Much of the evil may be regarded as resulting from vicious or mistaken legislation. The acquisition of new territories, and the advancement of British ascendancy, have too often been preferred to the claims of justice and sound policy. Another, and in the present day, yet more fruitful source of injury to the Aborigines arises from the pernicious character of our commercial intercourse. The amazing power we possess by means of our commerce has too generally been employed for the vilest of purposes. The mighty influence with which Providence has invested us, we have made the means of spreading devastation and ruin. The national honour has been tarnished; common honesty has been thrown aside; life itself has again and again been sacrificed, for the mere convenience of trade. On the native inhabitants of our colonies our mercantile enterprise and skill have produced effects scarcely less

lamentable, than those occasioned by our open hostility. Men calling themselves Christians; subjects of a Christian government, professors of the christian faith, have stooped, for the attainment of selfish ends, to practise upon the confiding ignorance of these simple and untutored children of the desert. On the mischievous consequences which have resulted from the guilty conduct of our seamen, it would be superfluous to enlarge. By the sanction their example has given to the worst of vices; the diseases they have introduced; the dark and dreadful crimes against property and life which they have perpetrated, the efforts of our Missionaries have too often been counteracted or rendered comparatively useless. While holy and devoted men have been labouring to disseminate the seeds of knowledge, to extend the light and purity of the gospel, the ministers of evil have also been at work, striving with unwearied assiduity to stay the progress of the truth, to perpetuate the existence and misery. Which of these antagonist powers has hitherto prevailed, may be gathered from the following Report. A perusal of its pages, if it accomplish no better purpose, may, at any rate, serve to humble our national pride, to teach us that the feelings of tyrrany and bigotry, which once reigned over Europe, are not yet altogether extinct – that the spirit of Cortes and Pizarro still survives.

The indifference with which the treatment of the Aborigines has to the present day been viewed by the religious public of Great Britain seems, at first sight, almost unaccountable. It may well excite surprise, that oppression so grievous, and cruelty so atrocious, should have been permitted to go on for centuries without restraint. Amid the excitement of party politics, and the pressing claims of our own population, the degraded state of the unfortunate Aborigines has been almost entirely overlooked. The prevailing apathy must, in charity, be ascribed to the prevailing ignorance. Comparatively little of what was passing in our colonies has been published at home. Sensible of the danger that would result to their own individual interests from the publication of the truth, it has been the almost invariable practice of the colonial authorities to hide their conduct towards the natives as much as possible from the public view. If occasionally facts of startling import have forced themselves upon the popular notice, it has been through the agency of men who have received the reward of their honesty in general hatred and abuse. For the greater part of the information we now possess, we are indebted to the Christian Missionaries sent out from this country. To the labours of these invaluable men the cause of humanity is unspeakably indebted. Amid persecution and scorn, obloquy, ridicule, and contempt, they have steadily persevered in their work of faith and labour of love, until to them, in an especial degree, belongs the honour of having first exposed the evil workings of our colonial policy. They have taken from us the plea of ignorance, with which we have hitherto sought to palliate

our neglect of this all-important subject. The silence is broken; the darkness has passed away; and THE TRUTH, ungarbled and undisguised, stands forth before the public gaze in all its dreadful and tremendous reality.

It will be well for the interests of justice, if the increase of our knowledge produce a corresponding diminution of our prejudices – if it lead us to abandon the false and groundless opinions, which still prevail respecting the claims of the Aborigines. Forgetful of Him “who hath made of one blood all nations that dwell upon the earth,” we have too long been accustomed to look upon the coloured races as possessing a nature far inferior to our own. To justify our oppression, we have resorted to calumny, and sought to vindicate by falsehood our cruel treatment of those whose existence has been their only crime. The injustice of the allegation is enhanced by consideration that the only circumstance which can give it the semblance of truth, results mainly from our own disgraceful policy. The mere fact, that scarcely one of the native tribes in the British colonies has become civilized, is sufficiently discreditable to our national character – the dishonour is increased when we attempt to found upon this the monstrous assumption, that they are naturally incapable of improvement. It is obviously unreasonable to expect that men habituated and attached to a roving, unsettled life, should abandon their wandering habits, and engage in agricultural pursuits, when the experience of every day is reminding them, that the cultivation of the soil will, in their case, prove only a preparatory step to its seizure by others. We may look in vain for any marked and decided amelioration in the condition of the yet uncivilized tribes, affected by our influence, until a widely different system of government is adopted in our colonies; until we learn to act upon milder and more equitable principles; until we cease to foster prejudices as wicked as they are absurd.

It is not, however, in reference only to the capacities and capabilities of the Aborigines, that delusion and error still possess the public mind. Not a few, even in the present day, are inclined to the belief, that in spite of all our efforts, the speedy extinction of the Aborigines is inevitable.¹⁷⁴ Their extermination, it would seem, is an appointment of Heaven, and every attempt to avert their doom must, therefore, of necessity prove utterly unavailing. The atrocity of such a sentiment is only surpassed by its impiety. To imagine that there now exists a race of men devoted by Providence to destruction, is assuredly to libel

¹⁷⁴ This of course misrepresents the reality that it was not ‘in spite’ of British efforts, but *because* of them, that a speedy and convenient Aboriginal extinction was predicted. This misrepresentation became increasingly common for the rest of the century: that the Aboriginal race was doomed because they were inferior, perhaps, as some argued, a sub-species not ‘fit for survival’.

Before Darwin, in the early 19th century, there was much discussion about comparative anatomy and a presumed hierarchy of human and other species, to which Darwin lent considerable support after publishing the first of his extensive observations in 1859. The popular interpretation of Darwin’s conclusions, followed on naturally from ‘The Origin of the Species’ and ‘The Descent of Man’, giving some formal but flawed corroboration of what until then had been ‘unscientific’ opinion. Such a hierarchy fitted in well with the social attitudes and structure of British class based society. It led to a racist bias in the concept of ‘civilization’, and what it meant to be ‘civilized’. It later gave rise to the ideal of Nietzschean Aryan supremacy and the eugenics movement, first championed by a relative of Darwin’s, Francis Galton.

the beneficent and merciful character of the Most High. The devastation and ruin, of which the ensuing pages contain so dreadful a detail, have been caused by no mysterious, and to us inexplicable process; they have followed, as natural consequences, from the guilty ambition and avarice of men professedly civilized and Christian. There is as little mystery about the origin, as in the reality of the evil. Acquainted with the one, we may with certainty anticipate the other. Oppression .has produced its invariable effects. It remains with the British nation to decide whether such shall be the ruling principle for the time to come, or whether justice and mercy shall henceforth be permitted to exert their legitimate and salutary influence.

While ignorance, prejudice, and error have thus been operating on the minds of many, others have been deterred from an attention to the subject by the apparent hopelessness of the case. Sickened at the remembrance of the past, and looking onward with dismay to the future, they seek in a gloomy despondency an excuse for their supineness and neglect. It would be well for such persons to remember the vast amount of good which has, in modern times, been accomplished by a comparatively feeble instrumentality. The extinction of the Slave-trade, and the abolition of Colonial Slavery, were achieved by men armed with no more formidable weapon than the Truth. Ridiculed and despised, they knew no such feeling as despair. Firm in their convictions of duty, and faithful in its performance, they left the consequences to God. Amid darkness and gloom they looked forward with sure and certain hope to a brighter day, and steadfastly laboured on, until public opinion was at length enlisted on their side, and the triumph of justice was secured. To the same spirit of dauntless determination we owe the recent act of justice to the native tribes of Southern Africa. The energy which has once prevailed, may prevail again. It has already rescued thousands, it may yet be the saviour of millions.

The present volume, as will be seen from the title-page, is published under the sanction and superintendence of the British and Foreign Aborigines Protection Society. The object of this association is sufficiently indicated by its name. It is established as the protector of those, who have no power to protect themselves. In this character, and in this alone, the Society makes its appeal to the public for support. The means to be employed for the attainment of its great design are too obvious to need minute detail. By diffusing correct information concerning the character and condition of the Aborigines; by appealing to the government, or to parliament when appeal is needed; and by bringing popular opinion to exert its proper influence in advancing the cause of justice, it is hoped that much may be done towards the diminution of those gigantic evils, the continuance of which reflects such deep dishonour on the British name.

The Society's proceedings will, of course, be mainly guided by the communications of its corresponding members, located in the countries occupied by Aborigines. The information they supply, and the suggestions they may offer, will form the ground-work of its future operations. Though but recently established, it has already been productive of good. The degree of its efficiency must depend on the measure of its support. Only one thing is requisite to render the Society worthy of the cause – that its power be proportioned to the magnitude and importance of its objects.

It can hardly be necessary, after what has now been stated, to dwell at any length upon the circumstances which vindicate the formation of this Society, and entitle it to the sanction of the public. A review of the past history and present degraded state of the Aborigines, is sufficient to show the absolute necessity of adopting immediate measures for their protection and preservation. The same unjust and unhallowed principles which have already wrought such fearful desolation, still reign on our earth – they have lost little of their former prevalence, and none of their original tendency. While we are slumbering at our posts, deaf to the call of duty, and indifferent to the claims of mercy, the oppressor and the spoiler are abroad, outraging the dearest rights of humanity, and devoting thousands of our race to ruin. To delay our interference in the hope that the rapid diffusion of Christian feelings may soon render interference unnecessary, will be but to wait until the last office of oppression is performed, until the work of death has reached its perfect and final consummation. It was the lament of an a tyrant that, having subjugated to his power every nation then known to exist upon the earth, he had no ambition left to gratify, no further conquest to achieve. Let us see to it, that his case, in a yet more melancholy sense, be not our own. Let us now, by unceasing vigilance and effort, seek to guard against the fearful possibility, that, persevering in the practice of cruelty and injustice towards our uncivilized fellow-men, the day may at length arrive, when not one of all their race will remain in whom the purer and nobler features of our character may be reflected. Every consideration, as well of national interest as of moral obligation, every dictate of reason, every motive of humanity; the retrospect of the past, the events of the present, the prospects of the future; our duty, our patriotism, our religion – all alike incite and impel us to immediate and energetic exertion. The case is urgent – the danger is imminent – the demand is imperative. At once, then, let us awake to our duty, and relying on the blessing from on high, let every energy be exerted, and every nerve strained, to hasten the arrival of that period, when the voice of the oppressor, and the cry of the oppressed, shall no more be heard on our earth: when men shall dwell together as brethren – children of one common Father - heirs of the same glorious immortality.¹⁷⁵

¹⁷⁵ The Committee's call to action was ignored. The public remained indifferent. The British government had an insatiable desire for land, even at the expense of Aboriginal dispossession and extermination, preferring to offer a palliative that Aboriginal redemption would be through Christian education and the appointment of 'Aboriginal

20th February, 1837

Ordered, That a Select Committee be appointed to consider what Measures ought to be adopted with regard to the Native Inhabitants of Countries where British Settlements are made, and to the neighboring Tribes, in order to secure to them due observance of Justice, and the protection of their Rights; to promote the spread of Civilization among them; and to lead them to the peaceful and voluntary reception of the Christian Religion.

And Committee was formed of:

<i>Mr. Fowell Buxton</i>	<i>Mr. Pease</i>
<i>Mr. William Gladstone</i>	<i>Mr. Baines</i>
<i>Mr. Hawes</i>	<i>Mr. Andrew Johnston</i>
<i>Mr. Bagshaw</i>	<i>Mr. Hindley</i>
<i>Sir Rufane Donkin</i>	<i>Mr. Plumptre</i>
<i>Mr. Holland</i>	<i>Mr. Wilson</i>
<i>Mr. Charles Lushington</i>	<i>Colonel Thompson</i>
<i>Sir George Grey</i>	

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Protectors’, many of whom were among those responsible for Aboriginal oppression and ‘dispersal’. The opportunity for the British government to stop Aboriginal slaughter was not taken. But the British government could never more claim they knew nothing.

After 1837, Aboriginal ethnic cleansing accelerated, driven by Land Acts and the formation of roving paramilitary police units.

In India, up until 1857 a highly profitable trading outpost of the East India Company, rebelled against British excesses. British retribution was swift. Many hundreds of thousands of civilians were slaughtered. India became a British dominion until 1947, when Ghandi led a peaceful rebellion.

From 1839 to 1842, Britain brutally crushed a Chinese rebellion against the profitable opium trade, and again from 1856 to 1860. At the time, Britain was the world’s largest drug dealer.

In 1879, the Zulus fought against British oppression. In North America, in the early years of British colonisation, there was the Pequot War of 1637, King Phillip’s War in 1675, the Susquehannock War in 1675 – 1677, and the Yamasee War in 1715 King William’s War between 1689 and 1697, the War of the League of Augsburg, was a war against the French for control of North America, followed by Queen Anne’s War between 1702 and 1713, ultimately lost with the American War of Independence in 1776.

and to lead them to the peaceful and voluntary reception of the Christian Religion;” and to whom the Report of the Committee of 1836 was referred; and who were empowered to report their Observations thereupon, together with the Minutes of Evidence taken before them, to The House; -Have examined the matters to them referred, and have agreed to the following Report:

*The situation of Great Britain brings her beyond any other power into communication with the uncivilized nations of the earth. We are in contact with them in so many parts of the globe, that it has become of deep importance to ascertain the results of our relations with them, and to fix the rules of our conduct towards them. We are apt to class them under the sweeping term of savages, and perhaps, in so doing, to consider ourselves exempted from the obligations due to them as our fellow men. This assumption does not, however, it is obvious, alter our responsibility; and the question appears momentous, when we consider that **the policy of Great Britain in this particular, as it has already affected the interests, and, we fear we may add, sacrificed the lives, of many thousands, may yet, in all probability, influence the character and the destiny of millions of the human race.***

*The extent of the question will be best comprehended by taking a survey of the globe, and by observing over how much of its surface **an intercourse with Britain may become the greatest blessing, or the heaviest scourge.** It will scarcely be denied in word, that, as an enlightened and Christian people, we are at least bound to do to the inhabitants of other lands, whether enlightened or not, as we should do in similar circumstances desire to be done by; but, beyond the obligations of common honesty, we are bound by two considerations with regard to the uncivilized: first, that of the ability we possess to confer upon them the most important benefits; and secondly, that of their inability to resist any encroachments, however unjust, however mischievous, which we may be disposed to make. **The disparity of the parties, the strength of the one, and the incapacity of the other to enforce the observance of their rights, constitutes a new and irresistible appeal to our compassionate protection.***

The duty of introducing into our relations with uncivilized nations the righteous and the profitable laws of justice is incontrovertible, and it has been repeatedly acknowledged in the abstract, but has, we fear, been rarely brought into practice; for, as a nation, we have not hesitated to invade many of the rights which they hold most dear.

Thus, while acts of parliament have laid down the general principles of equity, other and conflicting acts have been framed, disposing of lands without any reference to the

*possessors and actual occupants, and without making any reserve of the proceeds of the property of the natives for their benefit.*¹⁷⁶

Such omissions must surely be attributed to oversight; for it is not to be asserted that Great Britain has any disposition to sanction unfair dealing: nothing can be more plain, nothing can be more strong, than the language used by the government of this country on the subject. We need only refer to the instructions of Charles II., addressed to the Council of Foreign Plantations in the year 1670.

“Forasmuch as most of our said colonies do border upon the Indians, and peace is not to be expected without the due observance and preservation of justice to them, you are, in our name, to command all the governors, that they, at no time, give any just provocation to any of the said Indians that are at peace with us,” &c.

Then, with respect to the Indians who desire to put themselves under our protection, that they “be received”.

“And that the governors do by all ways seek firmly to oblige them.

“And that they do employ some persons to learn the languages of them.

“And that they do not only carefully protect and defend them from adversaries, but that they more especially take care that none of our own subjects, nor any of their servants, do any way harm them.

¹⁷⁶ The Select Committee noted the blatant example of South Australia in dispossessing Aboriginals of their land. In the preamble of an Act passed August 1834, “empowering his Majesty to erect South Australia into a British Province,

” [...] it is stated that the part of Australia which lies as there described, together with the islands adjacent, “consists of waste and unoccupied lands, which are supposed to be fit for the purposes of colonization.”

In the account of the proposed colony, which appears to be authorized by the Company who have purchased land under this act, it is stated that “great numbers of natives have been seen along that part of the coast”.

Aboriginal dispossession was legally contrived by the British, based on the self-serving fiction that land could arbitrarily be declared ‘waste’ or ‘unoccupied’ or ‘uninhabited’. With nowhere to live, generally they died, or their deaths were expedited by the police and settlers.

“And that if any shall dare to offer any violence to them in their persons, goods or possessions, the said governors do severely punish the said injuries, agreeably to justice and right.”¹⁷⁷

“And you are to consider how the Indians and slaves may be best instructed and invited to the Christian religion, it being both for the honour of the Crown and of the Protestant religion itself, that all persons within any of our territories, though never so remote, should be taught the knowledge of God, and be acquainted with the mysteries of salvation.”

Nor is modern authority wanting to the same effect: the Address of the House of Commons to the King, passed unanimously July, 1834, states, “That his Majesty’s faithful Commons in Parliament assembled, are 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 them protection in the enjoyment of their civil rights, and of imparting to them that degree of civilization, and that religion, with which Providence has blessed this nation; and humbly prays 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 civilization amongst them, and lead them to the peaceful and voluntary reception of the Christian religion.”

This Address, as the Chancellor of the Exchequer observed, so far from being the expression of any new principle, only embodies and recognizes principles on which the British government has for a considerable time been disposed to act.

In furtherance of these views, your Committee was appointed to examine into the actual state of our relations with uncivilized nations; and it is from the evidence brought before this Committee during the last two sessions, that we are enabled to compare our actions with our avowed principles, and to show what has been, and what will assuredly continue to be, unless strongly checked, the course of our conduct towards these defenceless people.

¹⁷⁷ In many cases, as we shall see, colonial Australian Governors were directly responsible for atrocities, people such as Stirling, Brisbane, Broome, Arthur and so on. Their accountability was usually ignored beneath another more urgent priority: the strident and pressing clamour for land. Macquarie, that most enlightened of early Governors, lost his position because of protests by wealthy New South Wales landowners to the British Government that he wanted to curb cheap indentured labour and the rapid release of Crown land.

It is not too much to say, that the intercourse of Europeans in general, without any exception in favour of the subjects of Great Britain, has been, unless when attended by missionary exertions, a source of many calamities to uncivilized nations.

Too often, their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilization impeded. European vices and diseases have been introduced amongst them, and they have been familiarized with the use of our most potent instruments for the subtle or the violent destruction of human life, viz. brandy and gunpowder.

*It will be only too easy to make out the proof of all these assertions, which may be established solely by the evidence above referred to. It will be easy also to show that the result to ourselves has been as contrary to our interest as to our duty; that **our system has not only incurred a vast load of crime**, but a vast expenditure of money and amount of loss.*

*On the other hand, we trust it will not be difficult to show by inference, and even to prove, by the results of some few experiments of an opposite course of conduct, that, setting aside all considerations of duty, **a line of policy, more friendly and just towards the natives, would materially contribute to promote the civil and commercial interests of Great Britain.***

*It is difficult to form an estimate of the population of the less civilized nations, liable to be influenced for good or for evil, by contact and intercourse with the more civilized nations of the earth. **It would appear that the barbarous regions likely to be more immediately affected by the policy of Great Britain, are the south and west of Africa, Australia, the islands in the Pacific Ocean,** a very extensive district of South America at the back of our Essequibo settlement, between the rivers Orinoco and Amazon, with the immense tract which constitutes the most northerly part of the American continent, and stretches from the Pacific to the Atlantic Ocean.*

These are the countries in which we have either planted colonies, or which we frequent for the purposes of traffic, and it is our business to inquire on what principles we have conducted our intercourse.

It might be presumed 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 undoubtedly lords of the soil, 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.

“If they have been found upon their own property, they have been treated as thieves and robbers. They are driven back into the interior as if they were dogs or kangaroos.”

From very large tracts we have, it appears, succeeded in eradicating them; and though some parts their ejection has not been so apparently violent as from others, it has been equally complete, through our taking possession of their hunting grounds, whereby we have despoiled them of the means of existence.

Newfoundland

To take a review of our colonies, beginning with Newfoundland. There, as in other parts of North America, it seems to have been for a length of time accounted a “meritorious act” to kill and Indian.¹⁷⁸

On our first visit to that country the natives were seen in every part of the coast. We occupied the stations where they used to hunt and fish, thus reducing them to want, while we took no trouble to indemnify them, so that doubtless many of them perished by famine; we also treated them with hostility and cruelty, and “many were slain by our own people as well as by the Micmac Indians,” who were allowed to harass them. They must, however, have been recently very numerous, since in one place Captain Buchan found they had “run up fences to the extent of 30 miles,” with a variety of ramifications, for the purpose of conducting the deer down to the water, a work which would have required the labour of a multitude of hands.

It does not appear that any measures were taken to open a communication with them before the year 1810, when, by order of Sir J. Duckworth, an attempt was made by Captain Buchan which proved ineffectual. At that time he conceived that their numbers around their chief place of resort, the Great Lake, were reduced to 400 or 500. Under our treatment they continued rapidly to diminish; and it appears probable that the last of the tribe left at large, a man and a woman, were shot by two Englishmen in 1823. Three women had been taken prisoners shortly before, and they died in captivity. In the colony of Newfoundland it may therefore be stated that we have exterminated the natives.

¹⁷⁸ Cotton Mather records, that, amongst the early settlers, it was considered a “religious act to kill Indians.”

North American Indians

The general account of our intercourse with the North American Indians, as distinct from missionary efforts, may be given in the words of a converted Chippeway chief, in a letter to Lord Goderich: “We were once very numerous, and owned all Upper Canada, and lived by hunting and fishing; but the white men, who came to trade with us, taught our fathers to drink the fire waters, which has made our people poor and sick, and has killed many tribes, till we have become very small.”

It is a curious fact, noticed in the evidence, that some years ago the Indians practised agriculture, and were able to bring corn to our settlements then suffering from famine; but we, by driving them back and introducing the fur trade, have rendered them so completely a wandering people that they have very much lost any disposition which they may have felt to settle.¹⁷⁹

All writers on the Indian race have spoken of them in their native barbarism as a noble people, but those who live among civilized men, upon reservations in our own territory, are now represented as “reduced to a state which resembles that of gipsies in this country.” Those who live in villages among the whites “are a very degraded race, and look more like dram-drinkers than people it would be possible to get any work.”

To enter, however, into a few more particulars. The Indians of New Brunswick are described by Sir H. Douglas, in 1825, as “dwindled in numbers”, and in a “wretched condition.”

Those of Nova Scotia, the Micmacs (by Sir J. Kempt), as disinclined to settle, and in the habit of bartering their furs, “unhappily, for rum.”

General Darling’s statements as to the Indians of the Canadas, drawn up in 1828, speaks of the interposition of the government being urgently called for in behalf of the helpless individuals whose landed possessions, where they have been assigned to them, are daily plundered by their designing and more enlightened white brethren.

Of the Algonquins and Nipissings, General Darling writes, “Their situation is becoming alarming, by the rapid settlement and improvement of the lands on the

¹⁷⁹ In Australia, the effect of British colonisation on where many Aboriginals were able to co-locate or assemble as a group for the purposes of gaining some form of livelihood was the reverse from North America, although very similar in health outcomes.

By the British freely expropriating Aboriginal tribal lands without any compensation whatsoever, the Aboriginals had little option, apart from quickly quelled resistance, than to gravitate finally to the outskirts of British settlements, where they were forced to beg for survival, and became very vulnerable to sexual predation and addictive drugs such as opium, tobacco and alcohol, as well as introduced disease.

Some Australian historians call this effect ‘parasitism’, as though it was somehow self-induced, a fatal character flaw and therefore unavoidable: their implied conclusion; that the British were not responsible for the Aboriginals’ desperate plight, but the Aboriginals themselves.

banks of the Ottawa, on which they were placed by government in the year 1763, and which tract they have naturally considered as their own. The result of the present state is obvious, and such as can scarcely fail in time to be attended with bloodshed and murder; for, driven from their own resources, they will naturally trespass on those of other tribes, who are equally jealous of the intrusion of their red brethren as of white men. [...]

The general also speaks of the “degeneracy” of the Iroquois, and of the degraded condition of most of the other tribes, with the exception of those only who had received Christian instruction. [...] That he stated most unequivocally that previously to the introduction of Christianity they were rapidly wasting away; and he believed that, if it had not been for the introduction of Christianity, they would speedily have become extinct. As the causes of this wasre of Indian life, he mentioned the decrease of the game, the habit of intoxication, and the European diseases. The small-pox had made great ravages. [...] Of the ulterior tribes, the account given by Mr. King, who accompanied Capt. Back in his late Arctic expedition, is deplorable; he gives it as his opinion, that the Northern Indians have decreased greatly, and “decidedly from contact with the Europeans.”

Thus the Cree Indians, once a powerful tribe, “have now degenerated into a few families, congregated about the European establishments, while some few still retain their ancient rights, and have become partly allies of a tribe of Indians that were once their slaves.” He supposes their numbers to have been reduced within 30 to 40 years from 8,000 or 10,000, to 200, or at most 300, and has no doubt the remnant being extirpated in a short time, if no measures are taken to improve their morals and to cultivate habits of civilisation.¹⁸⁰ [...]

The Copper Indians also, through ill-management, intemperance, and vice, are said to have decreased within the last five years to one-half the number of what they were.[...]

But whatever may be the actual condition of the Indians at the present moment, on which subject there appears to be some diversity of testimony, we may entirely concur in the wisdom, the humanity, and the right feeling which dictated the following paragraph: -

It appears to me that the course which has hitherto been taken in dealing with these people has had reference to the advantages which might be derived from their friendship in times of war, rather than to any settled purpose of gradually reclaiming them from a state of barbarism, and of introducing amongst them the industrious and peaceful habits of civilized life. Underv the peculiar circumstances of the times, it may have been originally morev difficult to pursue a more enligytended courseof policy; the

¹⁸⁰ Across all dispossessed indigenous peoples, it is common to see that the British tended to blame the indigenes' abject predicament on their absence of morals, for which the solution was Christianity. Their own 'morality' was unquestioned.

system may, perhaps, have been persisted in by the home and colonial governments rather as a matter of routine than upon any well-considered grounds of preference, whilst, on the part of the Indians themselves, there is no doubt that its accordance with their natural propensities and with their long established habits rendered it more acceptable to them than any other, nor is it unlikely that, if on the one hand there existed a disposition in the aboriginal inhabitants to cling to their original habits and mode of life, there was a proneness also in the new occupants of America to regard the natives as an irreclaimable race, and as inconvenient neighbours, whom it was desirable ultimately wholly to remove. Whatever may have been the reasons which have hitherto recommended an adherence to the present system, I am satisfied that it ought not be persisted in for the future; and that so enlarged a view of the nature of our connexions with the Indian tribes should be taken as may lead to the adoption of proper measures for their future preservation and improvement; whilst, at the same time, the obligations of moral duty and sound policy should not be lost sight of.¹⁸¹

South America

In South America, British Guiana occupies a large extent of country between the rivers Orinoco and Amazons, giving access to numbers of tribes of Aborigines who wander over the vast regions of the interior. The Indian population within the colony of Demerara and Essequibo, is derived from four nations, the Caribs, Arawacks, Warrows, and Accaways.

It is acknowledged that they have been diminishing ever since the British came into possession of the colony. In 1831 they were computed at 5,096; and it is stated "it is the opinion of old inhabitants of the colony, and those most competent to judge, that a considerable diminution has taken place in the aggregate number of the Indians of late years, and that the diminution, although gradual, has become more sensibly apparent within the last eight or ten years." The diminution is attributed, in some degree, to the increased use of rum amongst them. [...] The whole territory which has been occupied by Europeans, on the northern shores of the South American continent, has been acquired by no other right than that of superior power; and I fear that the natives whom we have dispossessed, have to this day received no compensation for the loss of their lands on which they formerly subsisted. However urgent is the duty of economy in every branch of the public service, it is impossible to withhold from the natives of the country the inestimable benefit which they would derive from appropriating to their religious and moral instruction some moderate part of that income which results from the culture of the soil to which they or their fathers had an indisputable title.

Caribs

¹⁸¹ Sir G. Murray's despatch, 25th January 1830. papers Abor. Tribes, 1834. No. 617, p. 88.

Of the caribs, the native inhabitants of the West Indies, we need not speak, as of them little more remains than the tradition that they once existed.

New Holland

The inhabitants of New Holland, in their original condition, have been described by travellers as the most degraded of the human race; but it is to be feared that intercourse with Europeans has cast over their original debasement a yet deeper shade of wretchedness.

These people, unoffending as they are towards us, have, as might have been expected, suffered in an aggravated degree from the planting amongst them of our penal establishments. In the formation of these settlements it does not appear that the territorial rights of the natives were considered, and very little care has since been taken to protect them from the violence or the contamination of the dregs of our countrymen.

The effects have consequently been dreadful beyond example, both in the diminution of their numbers and in their demoralization.

Many deeds of murder and violence have undoubtedly been committed by the stock-keepers (convicts in the employ of farmers in the outskirts of the colony), by the cedar cutters, and by other remote free settlers, and many natives have perished by the various military parties sent against them; but it is not to violence only that their decrease is ascribed. This is the evidence given by Bishop Broughton: "They do not so much retire as decay; wherever Europeans meet with them they appear to wear out, and gradually to decay: they diminish in numbers; they appear actually to vanish from the face of the earth. I am led to apprehend that within a very limited period, a few years, "(adds the Bishop), "those who are most in contact with Europeans will be utterly extinct – I will not say exterminated – but they will be extinct."

As to their moral condition, the bishop says of the natives around Sydney, "They are in a state which I consider one of extreme degradation and ignorance; they are, in fact, in a situation much inferior to what I supposed the to have been before they had any communication withn Europe." And again, in his care, "it is an awful, it is even an appalling consideration, that, after an intercourse of nearly half a century with Christian people, these hapless human beings continue to this day in their original benighted and degraded state. I may even proceed farther, so far as to express my fears that our settlement in their country has even deteriorated a condition of existence, than which, before our interference, nothing more miserable could easily be conceived. While, as the contagion of European intercourse has extended itself among them, they gradually lose the better properties of their own character, they appear in exchange to acquire none but the most objectionable and degrading of ours."

The natives about Sydney and Parramatta are represented as in a state of wretchedness still more deplorable than those resident in the interior.

“Those in the vicinity of Sydney are so completely changed, they scarcely have the same pursuits now; they go about the streets begging their bread, and begging for clothing and rum. From the diseases introduced among them, the tribes in immediate connexion with those large towns almost became extinct; not more than two or three remained, when I was last in New South Wales, of tribes which formerly consisted of 200 or 300.”

Dr. Lang, the minister of the Scotch church, writes, “From the prevalence of infanticide, from intemperance, and from European diseases, their number is evidently and rapidly diminishing in all the older settlements of the colony, and in the neighbourhood of Sydney especially, they present merely the shadow of what were once numerous tribes.” Yet even now “he thinks their number within the limits of the colony of New South Wales cannot be less than 10,000; an indication of what must once have been the population, and what the destruction. It is only, “Dr. Lang observes, “through the influence of Christianity, brought to bear upon the natives by the zealous exertions of devoted missionaries, that the progress of extinction can be checked.”

The case of these people has not been wholly overlooked at home. In 1825 his Majesty issued instructions to the governor to the effect that they should be protected in the enjoyment of their possessions, preserved from violence and injustice, and that measures should be taken for their conversion to the Christian faith, and their advancement in civilisation. An allowance has been made to the Church Missionary Society in their behalf, and efforts for their amelioration have been made, and attended with some degree of utility; but much as we rejoice in the act of justice, we still must express our conviction that if we are ever able to make atonement to the remnant of these people, it will require no slight attention, and no ordinary sacrifices on our part to compensate the evil association which we have inflicted; but even hopelessness of making reparation for what is past would not in any way lessen our obligation to stop, as far as in us lies, the continuance of iniquity. “The evil,” said Mr. Coates, “resulting from immoral intercourse between the Europeans and the Aborigines, is so enormous that it appears to my mind a moral obligation on the local government to take any practicable measures in order to put an end to it.”

In this opinion the Committee entirely concur.

A new colony is about to be established in South Australia, and it deserves to be placed on record, that parliament, as lately as August 1834, passed an act disposing of the lands of this country without once adverting to the native population. With this remarkable exception, we have had satisfaction in observing the preliminary measures for the formation of this settlement, which appears, if we may judge from the Report of the Colonial Commissioners, likely to be undertaken in a better spirit than any such enterprises that have come before our notice. The Commissioners acknowledge that it

is “a melancholy fact, which admits of no dispute, and which cannot be too deeply deplored, that the native tribes of Australia have hitherto been exposed to injustice and cruelty in their intercourse with Europeans; and they lay down certain regulations to remedy these evils in the proposed settlement.

On the western coast of Australia collisions have not unfrequently taken place between the colonists and the natives, on the subject of which we may adopt the just language of Lord Glenelg: “It is impossible to regard such conflicts without regret and anxiety, when we recollect how fatal, in too many instances, our colonial settlements have proved to the natives of the places where they have been formed; and this too by a series of conflicts, in every one of which it has been asserted, and apparently with justice, that the immediate aggression has not been on our side. The real causes of these hostilities are to be found in a course of petty encroachments and acts of injustice committed by the new settlers, at first submitted to by the natives, and not sufficiently checked in the outset by the leaders of the colonists. Hence has been generated in the minds of the injured party a deadly spirit of hatred, and vengeance, which breaks out at length into deeds of atrocity, which, in their turn, make retaliation a necessary part of self-defence.”¹⁸²

It is true that to remain passive under actual outrages, would encourage savages in their perpetration, but we regret that in any instance, punishment, which appears disproportionate, should have been inflicted. We find the natives on the Murray River mentioned as amongst the most troublesome in this quarter; and in the summer of the year 1834 they murdered a British soldier, having in the course of the previous five years killed three other persons. In the month of October 1834 Sir James Stirling, the governor, proceeded with a party of horse to the Murray River, in search of the tribe in question. On coming up with them, it appears that the British horse charged this tribe without any parley, and killed fifteen of them, not, as it seems, confining their vengeance to the actual murderers. After the rout, the women who had been taken prisoners were dismissed, having been informed, “that the punishment had been inflicted because of the misconduct of the tribe; that the white men never forget to punish murder; that on this occasion the women and children had been spared; but if any other person should be killed by them, not one would be allowed to remain on this side of the mountains.”¹⁸³

However needful it may be to overawe the natives from committing acts of treachery, we cannot understand the principle of such indiscriminate punishment, nor approve of threats extending to the destruction of women and children. “It would also be satisfactory, “as Lord Glenelg has observed, “to know that there had been no previous misconduct, or act of harshness or injustice, which had originally provoked the enmity of the natives.”

¹⁸² Despatch from Lord Glenelg to Governor Sir J. Stirling, 23rd July, 1835.

¹⁸³ Despatch of Sir J. Stirling to Mr. Secretary Stanley, 1st November, 1834.

*We are, however, happy to learn that, in his general policy, Sir James Stirling has pursued conciliatory measures towards the neighboring tribes, and that measures are in progress for effecting their civilisation.*¹⁸⁴

Van Diemen's Land

*The natives of Van Diemen's Land, first, it appears, provoked by the British colonists, whose early atrocities, and whose robberies of their wives and children, excited a spirit of indiscriminate vengeance, became so dangerous, though diminished to a very small number, that their remaining in their own country was deemed incompatible with the safety of the settlement.*¹⁸⁵

In their case, it must be remembered, the strongest desire was felt by the government at home, and responded to by the local governor, to protect and conciliate them; and yet, such was the unfortunate nature of our policy, and the circumstances into which it had brought us, that no better expedient could be devised than the catching and expatriating of the whole of the native population. There is no doubt that the outrages of the Aborigines were fearful; but while the local "Aborigines Committee" in 1831, who recommended the removal, speak of the "forbearance" exercised both by the government and the greater part of the community, they state that there is the "strongest feeling among the settlers that so long as the natives have only land to

¹⁸⁴ Governor Sir James Stirling was responsible for many massacres, including that at Pinjarra, on Western Australia's Murray River, where his report to Secretary Stanley grossly underestimated the number of Aboriginals murdered, other reports stating that seventy or more had been killed. Of course, we should not be surprised that having counted the bodies, as was normal military procedure, Stirling did not reveal the true number. Notwithstanding his supposed 'conciliatory measures', directed violence against the Aboriginals continued well into the 20th century. Stirling was never held accountable for any of the massacres he conducted or directed. Instead he was rewarded with further government honours.

There has been much discussion among historians as to whether Pinjarra was a battle or a massacre. When unarmed Aboriginals are struggling in the river where they fled for self-preservation, to be shot at leisure in the head like bobbing ducks in a shooting gallery at an amusement park, that is a massacre, killing a large number of people who could not resist the slaughter.

Stirling claimed in despatches to his superiors that women and children were not murdered, but how can we believe him, when he lied on other matters of substance, like the numbers murdered and the circumstances of their murder. See *The Australian Frontier Wars 1788 – 1838*, pp. 82, 120 (Evans, Broome, Connor, Thorpe). If as some claim it was a battle, it was quite one sided, as no British military were killed.

After 1838, the British military were no longer used against the Aboriginals, apart from a few exceptions, such as the 96th Regiment's deployment to Port Lincoln in South Australia in 1842. Instead, Lord Glenelg encouraged the Australian colonies to manage problems with the Aboriginals as a policing matter, with Aboriginals to be treated as Australian citizens who, if they 'broke the law', should be charged and convicted.

This was the start of an escalation of the conflict, which was exacerbated by further one-sided land legislation in the name of the Crown, and cemented itself as ethnic cleansing, where armed police and settlers took the law into their own hands and administered arbitrary 'justice', without fear of retribution.

¹⁸⁵ Henry Bathurst (1762 – 1834), the third Earl Bathurst, was secretary of state for the colonies in Lord Liverpool's ministry from 1812 to 1827. In 1817 he worried that the Australian colony was becoming too expensive and in 1820 he appointed John Bigge to conduct an enquiry into the Colony's finances and find ways for it to generate more revenue. Bigge's solution was the expanded sale of 'Crown' land. In Bigge's instructions, Bathurst made no reference to providing for the Aboriginals. We can conclude that Bathurst thought the Aboriginals disposable, if he thought about them at all. Bathurst's administrative actions accelerated ethnic cleansing. Bathurst went on to become lord president of the council in Wellington's ministry from 1828 to 1830. The example shows very clearly just how closely involved the British Government was in the colony's land policies and resultant Aboriginal ethnic cleansing.

traverse, so long will life and every thing valuable to them be kept in a state of jeopardy;" and they intimate their fear that if the measure recommended be not adopted, "the result will be that the whites will individually, or in small bodies, take violent steps against the Aborigines, a proceeding which they cannot contemplate the possibility of without horror; but which, they do believe, has many supporters in this colony:" they therefore urge the removal under the "persuasion that such a measure alone will have the effect of preventing the calamities which his Majesty's subjects have for so long a period suffered, and of preventing the entire destruction of the Aborigines themselves."

The governor Colonel Arthur's words on this subject are these: "Undoubtedly the being reduced to the necessity of driving a simple, but warlike, and, as it now appears, noble-minded race from their native hunting-grounds, is a measure in itself so distressing, that I am willing to make almost any prudent sacrifice that may tend to compensate for the injuries that the government is unwillingly and unavoidably made the instrument of inflicting."¹⁸⁶

The removal accordingly proceeded under the management of Mr. Robinson (which is described by Colonel Arthur as able and humane); and in September 1834 it was nearly so effected, that the governor writes thus: "The whole of the aboriginal inhabitants of Van Diemen's land (excepting four persons) are now domiciliated, with their own consent, on Flinder's Island."

From still later reports it appears that not a single native now remains upon Van Diemen's land. Thus, nearly, has the event been accomplished which was thus predicted and deprecated by Sir G. Murray: -

The great decrease which has of late years taken place in the amount of the aboriginal population, render it not unreasonable to apprehend that the whole race of these people may, at no distant period, become extinct. But with whatever feelings such an event may be looked forward to by those of the settlers who have been sufferers by the collisions which have taken place, it is impossible not to contemplate such a result of our occupation of the island as one very difficult to be reconciled with feelings of humanity, or even with principles of justice and sound policy; and the adoption of any line of conduct, having for its avowed or secret object the extinction of the native race, could not fail to leave an indelible stain upon the British government.¹⁸⁷

Islands in the Pacific

We next turn our view to those islands in the Pacific Ocean to which we resort for purposes of traffic, without having planted colonies upon them; and again we must repeat our belief that our penal colonies have been the inlet of incalculable mischief to

¹⁸⁶ Despatch to Lord Goderich, 6th April, 1833. Papers, 1834.

¹⁸⁷ Despatch, 5th November, 1830. papers on Van Diemen's land, 1831, No. 259, p. 56.

this whole quarter of the world. It will be hard, we think, to find compensation not only to Australia, but to New Zealand and to the innumerable islands of the South Seas, for the murders, the misery, the contamination which we have brought upon them. Our runaway convicts are the pests of savage as well as civilized society; so are our runaway sailors; and the crews of our whaling vessels, and of the traders from New South Wales, too frequently act in the most reckless and immoral manner when at a distance from the restraints of justice: in proof of this we need only refer to the evidence of the missionaries. [...]

Till lately the tattooed heads of New Zealanders were sold at Sydney as objects of curiosity; and Mr. Yate says he has known people give property to a chief for the purpose of getting them to kill their slaves, that they might have some heads to take back to New South Wales. [...]

We cannot conclude this melancholy detail without quoting the expressions of indignation with which thia and other atrocities committed in New Zealand are spoken of by the then Secretary-of-State for our colonies, Lord Goderich:-

It is impossible to read, without shame and indignation, the details which these documents disclose. The unfortunate natives of New Zealand, unless some decisive measures of prevention be adopted, will, I fear, be shortly added to the number of those barbarous tribes who, in different parts of the globe, have fallen a sacrifice to their intercourse with civilized men, who bear and disgrace the name of Christians. When, for mercenary purposes, the natives of Europe minister to the passions by which these savages are inflamed against each other, and introduce them to the knowledge of depraved acts and licentious gratifications of the most debased inhabitants of our great cities, the inevitable consequence is a rapid decline of population, preceded by every variety of suffering. Considering what is the character of a large part of the population of New South Wales and Van Diemen's land, what opportunities of settling themselves in New Zealand are afforded them by the extensive intercourse which has recently been established, adverting also to the conduct which has been pursued in those islands by the masters and crews of British vessels, and finding from the letter of the Rev. Mr. Williams, that the work of depopulation is already proceeding fast, I cannot contemplate the too probable results without the deepest anxiety. There can be no more sacred duty than that of using every possible method to rescue the natives of those extensive islands from the further evils which impend over them, and to deliver our own country from the disgrace and crime of having either occasioned or tolerated such enormities.¹⁸⁸ [...]

¹⁸⁸ Despatch of Lord Goderich to Major-general Bourke, 31st January, 1832. What this despatch reveals is that Goderich was aware of the massacres, or what we now call crimes against humanity, but did nothing about them, neither to prosecute nor prevent their occurrence. Bourke went on, soon afterwards, in 1835, to issue an infamous proclamation that gave legal justification to the complete dispossession of the Aboriginals of Australia, by declaring that no formal treaties with Aboriginals would be tolerated, as they gave recognition to Aboriginal land

[...] In connexion with this subject we cannot forbear noticing the inequality of the measure of justice which appears to be dealt out to the European and the native by our Australian courts. This is especially noticed by the late Attorney-General of New South Wales; and when we find that within the precincts of our chief settlement it is yet a subject of recommendation that coroners should be required to sit on the bodies of Aborigines, whenever there “might be any reason to suppose that British subjects had been in any way accessory to their deaths,” we cannot be surprised that the enactors of savage deeds on shores remote from all abodes of civilized men find it easy to evade their due consequences.[...]

“We have scarcely ever, “says Mr. Ellis, “inquired into a quarrel between the natives and the Europeans, in which it has not been found to have originated either in violence towards the females, or in injustice in traffic or barter, on the part of the Europeans.”

We have felt it our duty to advert to these glaring atrocities, perpetrated by British subjects, but we must repeat that acts of this nature form but the least part of the injuries which we have inflicted on the South Sea Islanders. The effects of our violence are as nothing compared to the diffusive moral evil which we have introduced; and many as are the lives of natives known to have been sacrificed by the hands of Europeans, the sum of these is treated as bearing but a trifling proportion to the mortality occasioned by the demoralization of the natives.

This is the view taken by those who have witnessed the proceedings of Englishmenn in these remote regions, and also by those whose opinion, though they have not all personally visited them, are yet entitled to a large measure of consideration, from the offices they hold bringing them into constant communication with persons experimentally acquainted with the condition of the natives. With regard, then, to the fact of the depopulation of these South Sea Islands, the Rev. William Ellis states –

*It has been most fearful; but I am not aware that it is traceable to the operation of the cruelty of Europeans*¹⁸⁹. It is traceable, in a great measure, to the demoralizing effects of intercourse with Europeans; the introduction of diseases, of ardent spirits, and of fire-arms. These results of intercourse with Europeans have produced a

entitlement and their prior rightful ownership of tribal lands. Bourke’s proclamation gave legal force to what we now call ‘terra nullius’, which, with the establishment of local paramilitary policing and squatter death squads, began accelerated ethnic cleansing.

¹⁸⁹ Native depopulation in the various British colonies around the world was often ascribed by the British as a ‘mystery’, and not related to unrestrained killing by the British. Native immorality was piously blamed for the catastrophic reduction in native numbers, and for which the proposed solution was Christian teaching. In Australia, as elsewhere, self-inflicted causes such as infanticide were also soberly proposed for causing the population collapse, which, if it existed, would have also been a constant in population dynamics, and can therefore be discounted. Some British functionaries maintained that the indigenous populations, including the Australian Aborigines, were dying because of the inevitability of their extinction, like wisps before the wind of British superiority, a lesser race of people, less fit to survive, doomed by Nature, and that segregation would be a merciful act, allowing them to disappear in relative peace. At the beginning of the Australian invasion, whalers and merchant seamen inflicted awful casualties on the natives, and were allowed to go unpunished, so it continued, first with the British military, then with squatters and police escalating the slaughter, particularly at the expanding frontier of a cattle and sheep based pastoral society, for which greed for land was paramount.

destruction of human life that is truly awful. When Captain Cook was at the Sandwich Islands he estimated the population at 400,000. In 1823, when, with other missionaries, I made a tour of some of the islands, we counted every house in one of the largest islands, which is 300 miles in circumference, and endeavoured to obtain as accurate a census as several months' labour would afford; and there was not in the entire group of islands at that time above 150,000 people. That diminution is to be ascribed to the above causes – wars promoted by fire-arms, ardent spirits, and foreign diseases, and also to the superstitions of the people, the offering of human sacrifices. The practice of infanticide, which destroyed so many of them in the southern islands, did not prevail to any extent in the Sandwich Islands. Their wars were rendered far more destructive than heretofore by their being possessed of fire-arms. Where both parties are possessed of fire-arms the destruction is not so serious, but when one party is possessed of fire-arms and the other party not, it is almost murder. With reference to the South Sea Islands, the depopulation has been as serious. Captain Cook estimated the population of the island of Tahiti at 200,000. I have reason to believe, from actual observation, that his estimate was much too high; but the ruins of former dwellings, which still spread over every part of the island, show that it must have been much more densely peopled formerly than it is now. When the missionaries first arrived there were not more than 16,000, and after they had been there ten or fourteen years, such had been the extent of depopulation, from the introduction of European diseases, ardent spirits, and of fire-arms, that the entire population was not above 8,000, some supposed not even 6,000. Since Christianity has prevailed among the people there has been a reaction; the population is increasing, and perhaps it has increased one-fourth since Christianity has been introduced. I do not ascribe the depopulation which had taken place in the South Sea Islands to overt acts of cruelty, but chiefly to the indirect operation of intercourse with Europeans.

On this subject, the moral effect of the intercourse of Europeans in general with these people, savages and cannibals as they were before we visited them, Mr. Williams adds his testimony: "I should say with few exceptions, that it is decidedly detrimental, both in a moral and civil point of view. And, in attempting to introduce Christianity among people, I would rather by far go to an island where they had never seen an European, than go to a place after they have had intercourse with Europeans. I had ten times rather meet them in their savage state than after they have had intercourse with Europeans."

South Africa

In the beginning of the last century, the European colony in Africa was confined to within a few miles of Cape Town. From that period it has advanced, till it now includes more square miles than are to be found in England, Scotland, and Ireland; and with regard to the natives of great part of this immense region, it is stated: "any traveller who may have visited the interior of this colony little more than twenty years

ago, may now stand on the heights of Albany, or in the midst of a district of 42,000 square miles on the north side of Graaff Reinet, and ask the question, Where are the aboriginal inhabitants of this district which I saw here on my former visit to this country? Without any one being able to inform him where he is to look for them to find them." [...]

In 1774, an order was issued for the extirpation of the whole of the Bushmen, and three commandos, or military expeditions, were sent out to execute it. The massacre at that time was horrible, and the system of persecution continued unremitting, so that, as we have seen, Mr. Barrow records it came to be considered a meritorious act to shoot a Bushman. [...]

[...] in 1834, Dr. Roth wrote in a memorial to the government:-

A few years ago, we had 1,800 Boschmen belonging to two missionary institutions, among that people in the country between the Snewbergen and the Orange river, a country comprehending 42,000 square miles [...] In 1832, I spent seventeen days in that country, travelling over it in different directions. I then found the country occupied by the boors, and the Boschmen population had disappeared, with the exception of those that had been brought up from infancy in the service of the boors. In the whole of my journey, during the seventeen days I was in the country, I met with two men and one woman only of the free inhabitants, who had escaped the effects of the commando system, and they were travelling by night, and concealing themselves by day, to escape being shot like wild beasts. [...]

It is important to know the number of sheep, goats, and horses, they carried with them. Could we ascertain this, we would then be enabled to form an idea of the misery they must have inflicted on the natives, who live entirely by pasturage or game. The number of animals of all kinds would probably be estimated low at 2,000 for each; but if we allow 1,500 boors, and 1,000 only to each, the effects of such an immigration must be ruinous to the natives. It is cruel robbery, followed by starvation and death in its most appalling shapes; yet these men complain that cattle are occasionally stolen from them by the natives from beyond the boundary. When the farmers received their grants from the government, they knew the nature of the soil and climate, that they would support only a certain number of sheep and cattle, and that droughts often occurred. If they chose to collect a greater number of livestock than the lands could support at all seasons, they should have provided places of retreat behind them; but for this they must have paid, and this is the sole reason for the unjust proceedings of these men. Avarice is the motive, and its fruits are systematic robbery and murder [...]

*The inhabitants of the frontier have, it seems, from the earliest times, been accustomed to unite in “armed assemblages, called commandos,” for the purpose of recovering stolen cattle. The system was recognized by the government, who appointed a field-commandant to each district, and a field-cornet to each sub-division of the district.*¹⁹⁰

For the mode of conducting the commandos, we refer to the evidence:-

63. *Please to describe a commando*¹⁹¹; *how the orders are originally given, and the process? – A commando is merely a name attached to a force collected, either a regular or military force, or partly military and partly civil. The magistrates in that country have power to order farmers upon military duties when occasion requires. The commandant of the frontier, or the civil authority, demands assistance from the military and from the neighboring counties, to check any inroad the Caffres may make, or to recover beasts that may have been stolen; these when collected are called a commando. [...]*

1014. *Do you think it is in vain to attempt to civilize and Christianize them as long as this system of plundering them of their cattle continues? – Yes, it is in vain to attempt to civilize and Christianize, if people have nothing to eat. [...]*

“We scarcely know whether or not to complain of the conduct of the Caffres in affairs of this kind; they have an unquestionable right to defend their territory against the inroads of colonial troops; and if we are to have no other system adopted than that of Might is Right, let us look to it that in future no patrols consisting of about a dozen men, and headed by a mere stripling, be sent across the Border to beard a whole nation within their own limits.”

...] Suggestions [...]

1. – *Protection of Natives to devolve on the Executive*¹⁹²

¹⁹⁰ Report of Commissioners of Enquiry, Parliamentary papers on Native Inhabitants of the Cape of Good Hope, Part I, p.194.

¹⁹¹ The purpose of these armed paramilitary groups, or commandos, was to punish Aboriginals for alleged theft of livestock. When the aboriginals resisted, then violence was thought to be justified.

¹⁹² The Aboriginal Protector generally reported to the Executive, either directly or indirectly, but did not have powers to ‘protect’ or prosecute. They were invariably unarmed, unless the ‘protector’ was a police officer. The role of Aboriginal Protector was introduced by various state governments at different times, notionally starting with G. A. Robinson in Tasmania in 1830 (although this was a ‘conciliation’ role devised by Governor Arthur, to expedite Aboriginal removal, primarily from the settled areas of Tasmania, where pastoralists objected to their presence), and was almost completely ineffective in its putative role of ‘protection’. Robinson simply observed or was informed of massacre incidents, but did not investigate or prosecute. Nor did he do so when appointed Port Phillip’s Chief Aboriginal Protector by Gipps in 1839.

For Tasmania, the British Government was keenly aware of unfolding genocide, but chose to do nothing. Sir George Murray, who was secretary of state for the colonies in Wellington’s administration from May 1828 to November 1830, wrote to Governor Arthur:

'[...] and the adoption of any line of conduct having for its avowed or for its secret object, the extinction of the Native race, could not fail to leave an indelible stain upon the Character of the British Government.'

[HRA 3/9, *Sir George Murray to Lieutenant-Governor Arthur*, Despatch No. 43, dated 5 November 1830, pp. 572 – 576].

Between 1830 and 1834, the Whig Government consisted of the Grey Ministry (Earl Grey, November 1830 to July 1834), followed by the first Melbourne Ministry (viscount Melbourne, July to November 1834). During the Melbourne ministry, the Home Secretary was Viscount Melbourne (November 1830 to July 1834). The secretary of state for War and the colonies was the Viscount Goderich (November 1830 to April 1833), Edward Smith-Stanley (April 1833 to June 1834), and Thomas Spring Rice (June 1834 to July 1834). The Under-Secretary of State for War and the Colonies were Viscount Howick (23 November 1830), followed by Sir John Shaw-Lefevre (13 January 1834), then Sir George Grey, Bt (16 July 1834). This was the period when Arthur's worst excesses against Aboriginals became increasingly evident. Glenelg (1778 – 1866) was secretary of state for the colonies under Melbourne from 1835 – 39.

In Tasmania, the process of end stage genocide was left to an Aboriginal 'Protector'. The Protector's role was first defined and shaped by Arthur, with Britain's approval. Through Robinson, Arthur made vague promises of giving Aboriginals a safe place to live where they would be well looked after, away from settler violence, and with the possibility of a treaty. None of the promises were kept. Arthur forced or coerced the few Aboriginal survivors of martial law and settler violence to be incarcerated on Flinders Island (operating as a detention centre), where they rapidly succumbed to respiratory disease and malnutrition, while kept under harsh Government administration. Reynolds argues that '*they were exiles but far from being prisoners of a concentration camp*', [Reynolds, *An Indelible Stain*, p. 85] but this begs the question: Were they free to leave? The answer is No. The reason is that they were forcibly detained under a Commandant, without adequate housing or provisions. They were expected to die out. Flinders Island was a prison, an open gaol, whose borders were the sea. The British Colonial Office was gaoler.

Under-Secretary Sir James Stephen was the instrument for late stage Tasmanian genocide, where Arthur was the pliant administrator. In 1834, Stephen was appointed assistant under-secretary in the Colonial Office. In 1836, he was made permanent under-secretary, holding this position until 1847, when he retired. The Australian Dictionary of Biography describes Stephen as '*one of the greatest civil servants of the nineteenth century*'. Stephen was fully aware, through dispatches, of Tasmanian genocide, but did nothing.

In 1847, the British Home Secretary, George Grey belatedly instructed Governor Denison to repatriate the remaining handful from Wybalenna to Oyster Cove, south of Hobart. [Some of this Grey/ Denison/ Darling/ Wilmot correspondence is held by the Tasmanian Archives, *Governor to Secretary of State (draft despatch)*, 2 December 1847 (CSO 24/8/101), and for such a significant historical event, should really be more widely known, as it marked the end of a bloody period of ethnic cleansing. Unfortunately, many of the Mitchell Library Colonial Secretary microfilm records - before its operations were reduced by the NSW Government as a cost saving measure - have been lost due to age, and had never been backed up. As ML staff comment : 'the film turned to vinegar'. In this way, through official neglect, our history is lost.]

The last full blood Tasmanian aboriginal, Fanny Cochrane Smith, a deeply religious woman, died in 1905 aged seventy-four. [Lyndall Ryan, *Tasmanian Aborigines*, 2012, 170 – 171] They became extinct, although many mixed blood descendants remain, mostly the product of sexual predation and miscegenation by Bass Strait sealers. Women were scarce at the frontier. Rules of civil and legal behavior could be ignored. Prosecutions were rare. Britain had purposefully achieved genocide in Tasmania. They had 'removed the Aboriginal problem'. Britain gratefully rewarded Arthur with a baronetcy. When Arthur returned to Britain, he was a wealthy man, made rich on land dealings, land that had been confiscated from Aboriginals. [See FWAYAF, *Recollections from a (Homicidal) Pastoral Frontier*]. No one was held to account. For Britain to do so would be to criticize its own administration. The pattern of genocidal conduct was to repeat across Australia. Settlers achieved supremacy. British immigration increased. The rate of land alienation accelerated. The result was inevitable. Now we are asked to forget the past and 'move on'.

After the peak period of mass killings in any area, many remnant Aboriginal groups tried to play by the Governments' changing rules, as repression inexorably grew more harsh. For example, in 1863, with the help of John Green, Aboriginals established a very successful farming community at Coranderrk (an area about 9.6 km², which was a traditional camping site) near Healesville in Victoria; but in 1874 and thereafter, the Aboriginal Protection Board took their earnings and tried forcing them to relocate, because white settlers thought the land was too valuable for Aboriginal use. An 1881 Parliamentary Inquiry into the 'Aboriginal problem' resulted in the 1886 Aborigines Protection Act, which legally forced half-castes under the age of 35 to leave Coranderrk, and with almost half the land resumed by 1893. The Government closed it altogether in 1924. [In 1836, there were between 30,000 and 70,000 Aboriginals in the Port Phillip Bay area; in 1863, there were only 250]. Another example. In 1877, the Queensland Government allowed Aboriginals to establish a self-sustaining fishing community on Bribie Island, with the help of Tom Petrie, and sell their excess seafood into Brisbane; but they were too successful: some whites complained of the competition. Premier (Sir Thomas) McIlwraith closed the community in 1879 and forced their relocation to detention centres, a concept that should still be familiar to us, where Governments try to relocate unwanted immigrants in order to manage a 'problem', under the strident outcry of shock jock driven public opinion. Something similar happened to the Kabi of the Sunshine Coast, where the Herbert Government degazetted the extensive Aboriginal bunya lands of southeast Queensland in 1860, and the 10,000 acre Lake Weyba reserve was degazetted by the McIlwraith Government in 1878, with successive Queensland Governments responding to settler pressure for access to more and more land. Remnant Aboriginal groups were removed progressively to detention centres, where they were closely managed. When

The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the executive government, as administered either in this country or by the governors of the respective colonies. This is not a trust which could conveniently be confided to the local legislatures. In proportion as those bodies are qualified for the right discharge of their proper functions, they will be unfit for the performance of this office.[...] Whatever may be the legislative system of any colony, we therefore advise that, as far as possible, the Aborigines be withdrawn from its control. [...] and that the governor of each colony should be invested by Her Majesty, so far as the royal prerogative should be adequate to the purpose, with authority for the decision of all questions affecting the interests of the native tribes. [...]

2. – *Contracts for Service to be limited.*

No vagrancy laws or other regulations should be allowed, the effect of which might be to cripple the energies of the natives, by preventing them selling their labour at the best price, and at the market most convenient for themselves. All contracts for service into which any of the Aborigines may enter with any of the colonists, should be expressly limited in their duration to a period which should, in no case, exceed 12 months. [...] But every contract for service should be made in the presence of an officer specially appointed for that purpose, in whom should be vested a summary jurisdiction to enforce the payment of the stipulated wages. To the neglect of regulations of this kind is to be ascribed the growth of a servile relation, differing little from slavery, properly so called, into which the natives were formerly brought in some of our foreign possessions.

3. – *Sale of ardent Spirits to be prevented.*

The prohibition of the sale of ardent spirits, or the delivery of them to the natives in barter, is an object of the deepest interest, which it is, therefore, impossible to pass over in silence [...] It is useless, therefore, to advance further than to recommend this subject to the diligent attention of all the local governments, who will remember, that for the extermination of men who are exempt from the restraints both of Christianity and of civilization, there is no weapon so deadly or so certain as the produce of the distilleries.

4. – *Regulations as to Lands within British Dominions.*

Queensland introduced the 1897 Aboriginal Protection Act, it created a further repressive period that continued into the 1970s, and still exists in some form today. The lessons were clear for Queensland Government Aboriginal policy. After the rate of mass killings began to slow, after Aboriginal resistance was overcome, after the numbers of Aboriginals had plummeted, Governments would not allow Aboriginal commercial ventures to become self-sustaining, or would not allow Aboriginals to have the use of certain land, if it threatened white values and financial prospects. Punitive legislation would be introduced, under the guise of ‘Aboriginal protection’, to control Aboriginal lives in an end stage Lemkinian genocidal process. The process continues today, where Aboriginals are the most disadvantaged in our society, the target of heavy policing and inhumane social policies, resulting in high levels of suicide and a sense of overwhelming despair.

So far as the lands of the Aborigines are within any territories over which the dominion of the Crown extends, the acquisition of them by Her Majesty's subjects, upon any title of purchase, grant, or otherwise, from their present proprietors, should be declared illegal and void. This prohibition might also be extended to lands situate within territories which, though not forming a part of the Queen's dominions, are yet in immediate contiguity to them. But it must be admitted, that we have not the power to prevent transactions of this nature in the countries which are neither within the Queen's allegiance, nor affected by any of those intimate relations which grow out of immediate neighbourhood. In such cases it may be impracticable to prevent the acquisition of lands by British subjects; but it should be distinctly understood, that all persons who embark in such undertakings must do so at their own peril, and have no claim on Her Majesty for support in vindicating the titles which they may so acquire, or for protecting them against any injury to which they may be exposed in the prosecution of any such undertakings.

5. – *New Territories not to be acquired without Sanction of Home Government.*

Your Committee recommend that it should be made known to all governors of Her Majesty's colonies, that they are forbidden by Her Majesty to acquire in her name any accession of territory, either in sovereignty or in property, without the previous sanction of an Act of Parliament¹⁹³. If, however, at any time, under special circumstances, such accession of territory shall have been made upon the responsibility of the colonial executive, then it ought to be distinctly announced to those who may avail themselves of it, that they acquire no valid title to any part of such lands, nor a claim to be defended by the Crown in their occupancy, until the formal authority of the legislature shall have thus been obtained. This and the preceeding rule, of course, does not apply to the settlement of vacant lands comprised within any of the existing British colonies, the extent of which, both in North and South

¹⁹³ By 1835, most Australian colonies had been established (Tasmania 1803, New South Wales 1788, Western Australia 1825 (1828), South Australia 1834 (1836), Victoria 1851, Queensland 1859). In 1836, Governor Bourke of New South Wales – which at that time included Victoria - went further in Aboriginal dispossession. With Britain's approval, he enacted legislation to make it absolutely clear that the Crown owned all land within the New South Wales colony, and this legislation was quickly adopted by every other colony in Australia, with the full support of the British Home Office. Such legislation can only be seen as legalized theft, and entirely against the recommendations of the 1837 Select Committee, whereby the states used legal loopholes such as redefining 'vacant' land, to deny property rights for Aborigines as a race. Such legislation, clearly racist in that it intentionally discriminated against an ethnic group, was designed to facilitate ethnic cleansing, for which the most important step was to remove an ethnic group from an area, and then use common law to police the arrangement, which resulted in widespread 'dispersal' operations, often involving indiscriminate killing. Who could protect Her Majesty's declared 'citizens' from murder and massacre, when Her Majesty's loyal police were the instruments of state sponsored ethnic cleansing, operating under a rule of law that denied Aborigines the right to land or the right to justice or even, in many cases, the right to exist?

When self-government was later granted to the various colonies, each of them went further with this legislation, to declare all non-leased land as 'wasteland' or vacant land, which was a legal device to remove any Aboriginal entitlement. That is, unless land was being used by a non-Aboriginal settler, it was declared 'vacant', and therefore the legal property of the Crown. Aborigines were precluded from leasing or owning their own land, unless through an 'Aboriginal Protector', and this continued until the mid-twentieth century for most states. Statehood and various forms of self-government followed in due course (NSW had a Legislative Council appointed by Britain from 1825 and a partly elective Council from 1855; Victoria 1851; Tasmania in 1825 (1856); South Australia in 1836 (1856); Queensland in 1859 (1861); Western Australia in 1829 (1890); Northern Territory in 1911). In 1901 of course the states – except for the Northern Territory – federated within the Commonwealth of Australia, a body with its own constitution and elected parliament.

America, in Australia, and in Southern Africa, is certainly sufficient to absorb whatever labour or capital could be profitably devoted to colonization.

6. – *Religious Instruction and Education to be provided.*

The revenue of each colony should be considered as subject to a charge for such sums as may be necessary to provide for the religious instruction and for the protection of the survivors of the tribes to which the lands comprised in that colony formerly belonged; and the same rule should apply to the tribes inhabiting those territories which are now in progress of settlement by Her Majesty's subjects. The specific appropriation of such funds to their immediate object must be referred to the governors of the various colonies, subject to such instructions as they may receive from Her Majesty's government in this country. Although it be true that the land in our colonies has derived the greater part of its exchangeable value from the capital and the labour employed in the cultivation of it, yet, even in its most rude and wild state, that land is demonstrably worth a very large amount of money. Thus, Parliament has fixed a minimum price of 12s. per acre for the lands of South Australia, at which rate they appear to have been sold in London to the amount of some hundred thousand pounds sterling, before a single European had landed on the spot; yet for this important acquisition the ancient occupiers of the soil have not received so much as a nominal equivalent.¹⁹⁴ In North America and South America, and in Southern Africa, the ancient lords of the wilderness have been dispossessed with little, if any, more ceremony; yet, on the banks of Lake Huron, and of the river Essequibo, wild lands are now bought and sold at prices not seldom exceeding even that which is obtained in South Australia. It requires no argument to show that we thus owe to the natives a debt, which will be but imperfectly paid by charging the land revenue of each of those

¹⁹⁴ There is some moral and legal ambiguity here. The Committee recognizes that they were stealing land from their rightful owners, but nevertheless were aware that the sale of such land was contributing large sums to the coffers of the British Crown. Indeed, the land act, drawn up for South Australia by Britain in 1834 states:

And be it further enacted that the said commissioners shall and they are hereby empowered to declare all the lands of the said province or provinces (excepting only portions which may be reserved for roads and footpaths to be public lands open to purchase by British subjects and to make such orders and regulations for the surveying and sale of such public lands at such price as the said commissioners may from time to time deem expedient and for the letting of the common of pasturage of unsold portions thereof as to the said commissioners may seem meet and for any period not exceeding three years and from time to time to alter and revoke such orders and regulations and to employ the monies from time to time received as the purchase money of such lands or as rent of the common of pasturage of unsold portions thereof in conducting the emigration of poor persons from Great Britain or Ireland to the said province and or provinces provided always, that no part of the said public lands shall be sold except in public for ready money and either by auction or otherwise as may seem best to the said commissioners but in no case and at no time for a lower price than the sum of twelve shillings Sterling per English acre provided also that the sum per acre which they said commissioners may declare during any period to be the upset or selling price at which public lands shall be sold shall be a uniform price (that is to say) the same price per acre whatever the quantity or situation of the land put up for sale provided also that the whole of the funds from time to time received as the purchase money of the said lands or as the rent of the common of pasturage of unsold portions thereof shall constitute an "Emigration Fund" and shall without any deduction whatsoever except in the case

provinces with whatever expenditure is necessary for the instruction of the adults, the education of their youth, and the protection of them all.

7. – *Punishment of Crimes.*

Provision has already been made by law for the punishment of crimes committed by Her Majesty's subjects¹⁹⁵ on the North American continent, beyond the northern and western limits of the Canadas; in Southern Africa, beyond the limits of the Cape of Good Hope; and in the islands of the South Sea, beyond the jurisdiction of the Australian colonies. But the provision thus made for the redress of wrongs is defective and unsatisfactory. Beyond the frontier justice is feebly administered, and within it ignorant savages are often made amenable to a code of which they are absolutely ignorant, and the whole spirit and principles of which are foreign to their modes of thought and action. [...] Thus, when the British law is violated by the Aborigines within the British dominions, it seems right that the utmost indulgence compatible with a due regard for the lives and properties of others, should be shown for their ignorance and prejudices. Actions which they have been taught to regard as praiseworthy we consider as meriting the punishment of death. [...]

Again: in the case of offences committed beyond the borders, British subjects are amenable to colonial courts – the Aborigines are not.

8. – *Treaties with Natives inexpedient.*¹⁹⁶

As a general rule, however, it is expedient that treaties should be frequently entered into between the local governments and the tribes in their vicinity. Compacts between parties negotiating on terms of such entire disparity are rather the preparatives and

¹⁹⁵ The rule of British law regarding its 'subjects' was often honoured in the breach, particularly so far as it concerned Aborigines. In Australia, for over one hundred and thirty years, few white settlers were ever convicted for murdering an Aboriginal, the military or police not at all. In the improbable event that a charge was laid against a white for some transgression against an Aboriginal, the all white jury, usually comprised of squatters with an interest in Aboriginal dispossession, overwhelmingly resolved 'Not Guilty'.

Aborigines were not allowed as witnesses in this adversarial process. A much fairer system of administering justice, less exposed to bias on the part of the jury, was the inquisitorial, made popular in mainland Europe, where an impartial judge could expertly determine the facts of the case and make some unbiased determination without recourse to a jury, yet still leave open an appeal process. But this was never considered by the British, who beyond martial law, made the military and armed settlers and police collectively the judge, jury and executioner of the Aborigines, the law of the bush, of the rabble, the law when there was no law to punish Aboriginal extermination and mistreatment. And should a white be foolish enough to leave evidence of some atrocity, of which there were many, he could be assured of an outcry by newspapers in his defence and likely exoneration by a jury of his peers.

Through the legal device of proclaiming colonial natives as British subjects, responsible as British citizens to obey a law of which they had almost no knowledge, the British imposed the exquisitely cruel deception of justice for all. In this sense, British law was patently racist and discriminatory; it was a travesty of fairness; but then, it was not meant to be fair; it was intended simply to provide the appearance and illusion of fairness, while denying the legitimate rights of the natives, human, economic and cultural.

¹⁹⁶ The British government never offered a formal treaty to the Aborigines, apart from the abortive 1835 attempt by Batman in Victoria, which was overruled by Governor Bourke. Why would they, when they perceived they had the upper hand and could simply take what they wanted with negligible cost? However, Britain did establish such treaties, for example, with the New Zealand Maories (the 1840 Treaty of Waitangi). An equivalent Australian treaty would have gone a great way towards respecting the rights of Aborigines and the mutual obligations between the British and the Aborigines. The lack of a treaty contributed to their continuing dispossession and mistreatment, indeed the state sponsored ethnic cleansing. The lack of a treaty meant that the British believed they could do as they chose.

the apology for disputes than securities for peace: as often as the resentment or the cupidity of the more powerful body may be excited, a ready pretext for complaint will be found in the ambiguity of the language in which the agreements must be drawn up, and in the superior sagacity which the European will exercise in framing, in interpreting, and in evading them. The safety and welfare of an uncivilized race require that their relations with their more cultivated neighbours should be diminished rather than multiplied.

9. – *Missionaries to be encouraged.*

To the preceding statement an exception is to be made as far as respects the pastoral relation formed between Christian missionaries and the Aborigines. [...] in such situations it is necessary that, with plans of moral and religious improvement, should be combined well-matured schemes for advancing the social and political improvement of the tribes, and for the prevention of any sudden changes which might be injurious to the health and physical constitution of the new converts.

On the 1st and 8th Suggestion, however, we would be allowed to make some remarks. In reference to the 1st, “That the protection and management of the Aborigines should devolve entirely upon the executive power, and not be subject to local legislature, is, we think, maintained upon solid grounds; but the Committee could not be ignorant that it has been the plan generally, though not always acted upon hitherto; and that it has failed, because this power was lodged in the hands of inefficient men. It was in this capacity that Lord Charles Somerset deprived the Caffres of their territory, that Sir Lowry Cole followed his example, and that Sir Ben. D’Urban attempted the same thing: it is evident then, that the agency in whom this power is lodged is every thing; that it must either be composed of men of high and tried principles, or much more responsibility must attach to it than has formerly been the case.

With respect to the 8th suggestion, that “treaties with the natives are inexpedient,” we do not think satisfactory. The reason given by the Committee in support of this opinion, is, that “the safety and welfare of an uncivilized race require that “their relations with their more cultivated neighbours should “be diminished rather than multiplied.” The relations between neighboring nations must ever be extensive, however great the disparity of intellect or cultivation; and it is very questionable, whether it would be proper to restrain this relationship, when it might be conducted in an enlightened manner, - and treaties we conceive calculated to secure this; but, if the relation of contiguity alone existed, we should still consider a treaty necessary and highly advisable. Treaty or compact is natural to man in every state: it arises out of his social condition; and he does not feel himself at ease with his fellow-man except in the security which is afforded by conventional compact. And the Caffre or the Indian are as capable of understanding the nature of a treaty, when it is plainly stated to them, as the civilized man. We cannot in any sense agree with the Committee in

considering it as a cause of evil: it may be an instrument by which wicked and violent men will pervert justice; but if no treaty existed, such dispositions would only lead them to similar conduct by more direct means. It is an unquestionable fact that the vacillating character of our border policy, and the uncertainty and disquietude arising from it to both parties, has been mainly owing to the deficiency of a written treaty; the line of conduct pursued today has been altered tomorrow; until, by the weakness and inconsistency of our conduct, we have irritated the feelings, and merited the contempt of those whom we despised. The treatment of Gaika by Lord Charles Somerset, and of Macomo by Sir Lowry Cole and Col. Wade, is fully illustrative of this, and frequently has that chief been heard to complain of the uncertainty that marked our policy; while, on the other hand, the treaty which has been entered into with Waterboer, the Griqua chief, has afforded the greatest satisfaction to his people, and has established among them a degree of confidence in the colonial government which they did not formerly feel. On these facts and arguments we therefore form our opinion that treaties may not only in general be entered into with safety and advantage, but are also absolutely necessary to the peace and prosperity of both parties. [...]

[...]

Australian Colonies

Passing to the case of the Australian colonies, it appears that on the eastern, western and southern shores of New Holland, the British settlements are brought into contact with aboriginal tribes, forming, probably, the least-instructed portion of the human race in all the arts of social life. Such, indeed, is the barbarous state of these people, and so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded. The land has been taken from them without the assertion of any other title than that of superior force; and by the commission under which the Australian colonies are governed, Her Majesty's sovereignty over the whole of New Holland is asserted without reserve. It follows, therefore, that the Aborigines of the whole territory must be considered as within the allegiance of the Queen, and as entitled to her protection. Whatever may have been the injustice of this encroachment, there is no reason to suppose that either justice or humanity would now be consulted by receding from it. On the contrary, it would now appear eminently desirable to impress upon the Australian government, and upon the inhabitants of those colonies, the consequences of the principles upon which they have been thus founded. If the whole of New Holland be part of the British empire, then every inhabitant of that vast island is under the defence of British law as often as his life or property may be attacked; and the appeal to arms for adjusting controversies with any part of the primitive race, exposes those by whom blood may be shed to the same responsibility, and to the same penalties, as if the sufferers were white persons. Yet the most recent intelligence from New South Wales and from Western Australia records conflicts between the Europeans and the Aborigines, in which the former acted avowedly upon the principle of enforcing belligerent rights against a public enemy.

When it is remembered that unsettled land has been sold by the government of New South Wales, yielding in a single year returns to the local treasury exceeding 100,000l., and that in the recollection of many living men every part of this territory was the undisputed property of the Aborigines, it is demanding little indeed on their behalf to require that no expenditure should be withheld which can be incurred judiciously for the maintenance of missionaries, who should be employed to instruct the tribes, and of protectors, whose duty it should be to defend them. With regard to the duties of missionaries, your Committee have no other suggestion to make than that the choice of them, and the direction of their labours, should be confided to the missionary societies in this kingdom. But with regard to the office of Protector, there is greater room for specific suggestions.

Duties of Protector of Natives

The duties of the protectors of the Aborigines in New Holland should consist, first, in cultivating a personal knowledge of the natives, and a personal intercourse with them; and with that view these officers should be expected to acquire an adequate familiarity with the native language. To facilitate the growth of confidence, the protectors should be furnished with some means of making to the tribes occasional presents of articles either of use or ornament, of course abstaining from the gift of liquors. The protectors should ascertain what is that species of industry which is least foreign to the habits and disposition of the objects of their care, and should be provided with all the necessary means of supplying them with such employment. Especially they should claim for the maintenance of the Aborigines such lands as may be necessary for their support. [...]

In the event of a native being slain, it should be the duty of the protector to perform, as far as the nature of the case will admit, the office of coroner.

To require from the ignorant hordes of savages living in Eastern or Western Australia the observance of our laws would be absurd, and to punish their non-observance of them by severe penalties would be palpably unjust. On the other hand, if they are placed beyond the pale of the law as a rule of their conduct to others, they will infallibly lose the advantage of it, considered as a rule of conduct of others towards them. To determine under what special regulations they should be placed, is a task to be performed only by those who can study the question with the aid of the most minute and close observation. It should therefore be one branch of the duty of the protectors to suggest to the local government, and through it to the local legislature, such short and simple rules as may form a temporary and provisional code for the regulation of the Aborigines, until advancing knowledge and civilization shall have superseded the necessity for any such special laws.

The practice of employing the Aborigines as a species of police to detect and counteract the thefts practised by the convicts in the remoter districts of the colony should be prevented or discouraged by the protectors. It is not difficult thus to enlist the instinct and passions of uncivilized men in defence of order; but they invariably become the victims of their own zeal in this service. The deadly antipathy which was excited between the Aborigines and the Bushrangers of Van Diemen's Land provoked a series of outrages which would have terminated in the utter extermination of the whole race, if the local government had not interposed to remove the last remnant of them from the island; an act of real mercy, though of apparent severity. [...]

Each protector of Aborigines should be invested with the character of a magistrate, and should be required to promote the prosecution of all crimes committed against their persons or their property; while, in the event of any of them being charged with the commission of such offences, the protector should, either in person or through the agency of some practitioner of the law, to be employed and instructed by him, undertake and superintend the defence of the accused party.

Finally, the protector should be required to make periodical reports to the local government of all his proceedings in the execution of the duties of his office, with every suggestion which increasing experience might enable him to offer for advancing the interests and maintaining the security of the objects in his care. The local government should, in its turn, be required to transmit those reports to this kingdom, with a report of the proceedings taken or contemplated in furtherance of the recommendations of the protector. The collection of accurate statistical information should be one of the principal objects of these periodical reports. It is probable that the depopulation and decay of many tribes which, in different parts of the world, have sunk under European encroachments, would have been arrested in its course, if the progress of the calamity had from time to time been brought distinctly under the notice of any authority competent to redress the wrong. In many cases, the first distinct apprehension of the reality and magnitude of the evil has not been acquired until it was ascertained that some uncivilized nation had ceased to exist. [...].

SOUTH SEA ISLANDS

The fertile and populous islands of the Pacific Ocean have, as has been seen already, undergone the most disastrous calamities from their intercourse with the natives of Europe. [...]

In the statement submitted to the Select Committee by the Rev. Dr. Philip, the following important remarks are made:-

[...] The conduct of the Caffres towards us when they invaded the colony was no more than a simple re-action of a system we have been carrying on against them for many years past. They have been dealing with us exactly on our own principles. We missed cattle, and we were in the habit of going into Caffreland and taking the first cattle we met with to make up the loss. The Caffres complained that many thousand head of

cattle were unjustly taken from them in this way; and not being able to put a stop to the system, or to obtain redress, they at last determined to right themselves, and to serve us in the same way in which we for many years had been in the habit of serving them. What is there, therefore, in the conduct of the Caffres, in this instance, which gives us a right to complain? We burnt their houses in our commandos, and they in return have burnt some of ours. We robbed the innovent, and they have taken the cattle of a people many of whom have never wronged them. We fired among the Caffres and shot them when they resisted our commandos; now they have wounded and killed some of our people who resisted them. We began the system and carried it on against them for many years, and they have now done no more than followed the example we set before them. It has been justly remarked, "that at no period in the history of late years had the conduct of the military been so harsh and unwarrantable towards the Caffres as during the five or six months preceding the invasion. Upon the slightest pretext their cattle were seized, their kraals fired upon, their houses burnt to the ground, and themselves driven to seek elsewhere a place of shelter." On the intelligence of Lieutenant Sutton's patrol, even the editor of the Graham's Town Journal felt constrained to express his indignation against such proceedings in the following spirited language: "We scarcely know whethenot to complain of the conduct of the Caffres in affairs of this kind: they have an unquestionable right to defend their own territory against the inroads of colonial troops; and if we are to have no other system adopted than that of Might is Right, let us look to it that in future no patrols, consisting of about a dozen men, and headed only by a stripling, be sent across the border to beard a whole nation within its own limits." [...]

There has been in the Cape colony a great deal of discussion about the propriety of entering into written treaties with the Caffres. It has been said that the Caffres are not Christians, and that therefore incapable of being bound by the moral obligations of treaties. But what is said against entering into written treaties with the Caffres betrays equal ignorance of history, of the present state of the world, and of human nature. [...] but I beg to refer to one case in the history of America (how deplorable there should be but one!) which is of itself a conclusive proof that the obligation of treaties may be powerfully felt by a people in a still ruder state of society than that which the Caffres are: it is needless to say that the case I refer to is that of "Penn." His conduct towards the Indians was as remarkable for kindness, honour and good faith, as that of others had been the reverse. Penn and his friendly Quakers were not only well spoken of while they lived, but after their death they were long spoken of; and down to a recent date they never ceased to be spoken of by the remains of the Delawares in terms of enthusiastic regard. When war between the Indians and whites was raging in Pennsylvania, the Quaker's habit was a protection in every Indian camp, and the unarmed wearer experienced a friendly welcome in every wigwam. [...]

One of the first steps to be adopted to secure the peace of the frontier and the prosperity of the colony, will be to put a stop to the practice of the boors in crossing the boundaries of the colony at certain seasons of the year with numerous flocks and herds. In 1834 there were said to be about 1,500 boors on the other side of the Orange River, and for the most part in Griqua country. Of these there were 700 boors, for several months during that year, in the district of Philippolis alone, with at least 700,000 sheep, cattle and horses. Besides destroying the pastures of this people, in many instances their corn fields were destroyed by them, and in some cases they took possession of their houses. This evil has been increasing for years, and all that time the Griquas have been remonstrating; but nothing has yet been done effectively to check it; and consequently, when the Griquas remonstrated with the boors, the latter replied, that it was useless for the former to complain, because the government would pay no attention to their complaints; and that if the government interfered, it would only be to grant the Griqua country to the boors. [...]

One of the first steps towards the establishment of amicable relations with tribes on the frontiers will be the abandonment of the commando and patrol system. [...] In any country in which such a system is carried on, the seeds of humanity and civilization cannot flourish [...] There is no law of God that sanctions robbery and murder, and the extermination of men, because they have black skins, and live upon milk and wild roots, or because they are too weak to assert their own rights; and there is no necessity that can be urged in this case that may not be urged with equal propriety to justify the slave-trade and slavery, and highway robbery and murder. [...]

Instructions to Latrobe, 1839¹⁹⁷

Under Latrobe, Victorian Aboriginals suffered fearful squatter predations, their numbers dropping catastrophically during the forties. Latrobe oversaw the genocidal process, first in the Port Phillip area, then across the state as the pastoral frontier pushed onwards. Squatters were free to massacre as they chose. So were the police. Latrobe had no policy as to where Aboriginals were to go, once they were forcibly removed from their homelands. He was never held accountable. After all, ethnic cleansing (or removal of Aboriginals from their land) was Government policy. The associated genocidal process was tolerated as necessary, if the land was to be claimed by the British.

Until 1850, Latrobe was both Port Phillip superintendant and police commissioner. Britain did nothing to prevent the Aboriginal slaughter, its priorities (as penal transportation was progressively cut back) being self-sustaining colonies, trade, and emigration. For Britain, Imperial reach and economics were more important than human rights.

Little has changed today, where economics trumps matters of the environment, where the sale of coal is more important than its effect on global warming, and where the fossil fuel industry can be subsidised but Governments allow chronic Aboriginal disadvantage to continue. Australian history now venerates Latrobe, with many places named in his honour.

Governor La Trobe's Instructions 11 September 1839 (NSW)

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[HANDWRITTEN DOCUMENT]

11th Sept 1839.

General Instructions to the Superintendent of Port Phillip

No. 39 Colonial Secretary's Office,

No. 37 Sydney, New South Wales,

10th September 1839

Sir,

¹⁹⁷ Charles LaTrobe (1801 – 1875) was appointed by Governor Gipps as Superintendent of the Port Phillip District in 1839 and held the position until 1850 when Victoria was given its own representative Government. In 1851, LaTrobe became Lieutenant Governor and had considerable power, until he left the position in 1854. LaTrobe was a protégé of Gipps and they had a close relationship. See Gibbons, *FWAYAF Recollections from a (Homicidal) Pastoral Frontier 1788 – 1928*.

Her Majesty having been pleased to appoint you to the Superintendent of Port Phillip, I am directed by His Excellency the Governor to transmit the accompanying Commission, containing such appointment under the Great Seal of the Territory, and to request that you will proceed by the earliest opportunity and assume the command of the District. The Police Magistrate, Captain Lonsdale, who has hitherto been in charge, has been instructed that, from the date of your arrival

His Honor Charles Joseph La Trobe Esq

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arrival his duties will be confined to such as properly belong to his own Office, and a similar notification will be inserted in the Government Gazette.

2. The District to which you are appointed is considered as consisting of that part of the Territory of New South Wales, which lies to the South of the thirty sixth Degree of South Latitude and between the one hundred and forty first and one hundred and forty sixth degrees of East Longitude. Within these limits, you will exercise the powers of a Lieutenant Governor, and will stand in the same position in respect to the Governor of New South Wales, as the Governor himself stands in with respect to the Right Honorable the Secretary of State for the Colonies.

3. All Public Officers within the District of Port Phillip, as above

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above described, whose appointments are strictly of a local nature, will look only to you for instructions.

4 Public Officers at Port Phillip, belonging to Departments of which the Head is established at Sydney, or who receive instructions from the Head of any Departments in Sydney, will stand in the same relation to you as the Heads of certain Departments in Sydney (as for instance the Ordnance and Commissariat) stand to the Governor of the Colony. They will

*Governor La Trobe's Instructions 11 September 1839 (NSW)
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carry into effect the orders which they receive from the Heads of their respective Departments in the same way as the Commanding Royal Engineer and the Deputy

Commissary General carry into effect the orders which they receive from the Ordnance or the Treasury, but are nevertheless bound always to communicate to the Head of the Local Government

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Government the nature of those instructions, as well as the nature of the measures which they themselves suggest, and are also bound to give their assistance to the Head of the Local Government in any matter whatsoever, wherein he may require it.

5. All Officers of the Civil Government, without exception, will look upon you as their immediate Head.

6. On the occurrence of vacancies, you are at liberty to make appointments where the Salary or Emoluments [?] do not exceed one hundred pounds per annum. But all above that amount must be reported for the approval of the Governor, and on no account is the authorised Establishment to be exceeded in any way, without His Excellency's previous sanction.

7. In case of necessity, you are

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are empowered to suspend until the pleasure of the Governor shall be known, any Officer appointed in the Colony, but not such as hold appointments from Her Majesty's Government. If however, you shall have occasion to disapprove of the conduct of any of the latter, you will immediately report the circumstance for His Excellency's information and decision, with a full detail of the particulars, and the grounds of any recommendation which you may think it necessary to make in the case.

8. With respect to the senior Officer of Her Majesty's Troops in the District, you will stand in the same relation as the Governor stands to the Major General Commanding in the Colony. In all cases wherein the preservation of the Peace is concerned, or the enforcement of Convict Discipline, you will be entitled

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entitled to call for his assistance, but you will carefully avoid interference in matters purely Military, and you will have no control whatever over expenses defrayed out of the Military Chest. Military Officers, however, holding appointments under the Colonial Government will be responsible to you for the performance of their Civil Duties, and in this Class all Officers of the Mounted Police are included.

9. All Letters and Returns, intended for the Governor's information, instead of being addressed to the Colonial Secretary,

*Governor La Trobe's Instructions 11 September 1839 (NSW)
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will be addressed to you.

*10. You will forward to the Colonial Secretary as many of these letters, or extracts from them, as you may think necessary, expressing your own opinion in a separate letter where the subject is important, in other
or*

[DOCUMENT SIXTH PAGE ENDS HERE]

or ordinary cases making a minute in the margin; and at all times, for the sake of avoiding confusion, confining each communication to a single subject.

11. The Rules to be observed in all matters of Revenue and Expenditure will form the subject of a Separate Instruction.

12. In cases which are not met by those Rules, You will act on your own discretion, adhering however to the general principles which govern the expenditure of the Public Money in this as well as in all other parts of the British Empire, viz:

(1) that no Expense can be incurred which has not been provided for by the Local Legislature, or expressly charged upon the Land Revenue, and specifically authorised by the Governor.

2

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(2) that funds provided for one service cannot be expended on another; neither can savings on one item of any Service be applied to another.

(3) that Savings are to be made whenever practicable and that because a certain sum of money has been provided for any particular service it does not follow that it must necessarily be expended.

(4) that any person who authorises a departure from any one of the three foregoing Rules, does so on his own responsibility.

13. In all matters of Convict Discipline, or in the distribution of Convict Labor, you will exercise all the functions of the Governor, subject however to confirmation

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confirmation or disallowance by His Excellency, and with this exception, rendered necessary by the Law, namely, that you will not be authorised to withdraw Convicts from the service of any Individual without the express order of the Governor. In cases, therefore, where assigned Servants are taken from their Masters, either for Police purposes, or for any infraction of the Regulations, they are to be kept in Government employment until an order for their final disposal may be received from Sydney.

14. The Convicts so kept are to be considered as under the Police Magistrate, as far as their custody and discipline are

*Governor La Trobe's Instructions 11 September 1839 (NSW)
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List annexed.*

concerned. But the direction of their labor will rest with the Clerk of Works or other Officer in charge of any Department to which you may desire them to be attached.

15.

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15. In further compliance with the law, you will not be authorised to exercise the Prerogative of the Crown in the pardoning of Offenders, or the Remission of Punishments. The practice, however, of sending Petitions, or applications for Mercy or Remission through You, is to be adopted as far as possible, and in all such cases, you will be pleased to express your own opinion on them, obtaining, if practicable, the opinion or report of the Judge, Chairman of Quarter Sessions or Magistrate before whom the case may have been tried or decided.

16. Cases will probably arise wherein it may be desirable for you to put yourself in direct communication with the Heads of Departments in Sydney, especially perhaps, the Heads of the Convict and the Emigration Departments

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Departments– The general rule to guide such communication is that they relate only to the detail or fulfilment of instructions previously conveyed through the Colonial Secretary; and that they be continued so long as the despatch of public business is facilitated by them, without disturbing the harmony of the service; but that they be discontinued, and the subject brought through the Colonial Secretary before the Governor, the moment a difference of opinion, or any thing likely to lead to a difference of opinion arises.

17. I am directed in a particular manner to invite your attention to the treatment of the aborigines, and to the prevention as far as possible of collisions between them and the Colonists. For your information and guidance in this very important part of your

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your duty, I enclose copies of the principal Government orders now in force respecting them, as also of the Instructions which have been issued to the Chief Protector of Aborigines, and the Commissioners of Crown Lands.

18. In conclusion I am directed to inform you that Extracts of the foregoing Instructions have been communicated to the several Departments accompanied by the Governor's commands that strict attention be paid thereto – and His Excellency suggests that, upon your assuming charge it will be expedient to cause the whole of the present communication to be read in public, for general information and guidance – Further instructions will be transmitted

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to you from time to time, as the exigencies of the service may require; and I am commanded to add, His Excellency

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Excellency Sir George Gipps will at all times be happy to receive every information and suggestion connected with your duties, or the welfare of the District entrusted to your control, which it may be in your power to offer.

I have the honor to be,

Sir,

Your Honor's Most obedient Servant

Deas Thomson.

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This Act was a turning point for the way in which Britain viewed so-called ‘Crown’ land. It reaffirmed that, under proclaimed British law, Aboriginals had no rights of ownership to any of the land they once possessed, except for designated purposes that were rarely upheld. A parade of similar Government land legislation was to follow. Land legislation was the sharp instrument of British genocidal policy.

An Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies [22d June 1842]

Whereas it is expedient that an uniform System of disposing of the Waste Lands of the Crown in the Australian Colonies should be established: Be it enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That within the Australian Colonies the Waste Lands of the Crown shall be disposed of in the Manner and according to the Regulations herein-after prescribed, not otherwise.

II. And be it enacted, That the Waste Lands of the Crown in the Australian Colonies shall not, save as herein-after is excepted, be conveyed or alienated by Her Majesty, or by any Person or Persons acting on the Behalf or under the Authority of Her Majesty, either in Fee Simple or for any less Estate or Interest, unless such Conveyance or Alienation be made by way of Sale, nor unless such Sales be conducted in the Manner and according to the Regulations herein-after prescribed.

III. Provided always, and be it enacted, That nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty, or any Person or Persons acting on the Behalf or under the Authority of Her Majesty, from excepting from Sale, and either reserving to Her Majesty, Her Heirs and Successors, or disposing of in such other Manner as for the public interest may seem best, such Lands as may be required for public Roads or other internal Communications, whether by Land or Water, or for the Use or Benefit of the aboriginal Inhabitants of the Country, or for the Purposes of Military Defence, or as the Sites of Places of public Worship, Schools, or other public Buildings, or as Places for the Interment [sic] of the Dead, or Places for the Recreation and Amusement of the Inhabitants of any Town or Village, or as the Sites of public Quays or Landing Places on the Sea Coast or Shores of navigable streams, or for any other Purpose of public Safety, Convenience, Health, or Enjoyment; and

¹⁹⁸ This Act has been transcribed from:
[//ozcase.library.qut.edu.au/qhlc/documents/AustralianColonialWasteland1842.pdf](http://ozcase.library.qut.edu.au/qhlc/documents/AustralianColonialWasteland1842.pdf)

provided also, that nothing in this Act contained shall extend or be construed to extend to prevent Her Majesty, or any Person or Persons acting on Her Behalf or under the Authority of Her Majesty, from fulfilling any Promise or Engagement made or hereafter to be made by or on the Behalf of Her Majesty in favour of any Military or Naval Settlers in the said Colonies respectively in pursuance of any Regulations made by Her Majesty's Authority in favour or for the benefit of any such Settlers.

IV. And be it enacted, That, save as herein-after is excepted in reference to Blocks of Twenty thousand acres of Land or upwards, no Waste Lands of the Crown in any of the said Colonies shall be so conveyed or alienated as aforesaid until the same shall have been surveyed, and shall have been delineated in the public Charts of such Colony, in such Lots as shall be subsequently offered and put up for Sale, which Lots shall in no Case, save as aforesaid, contain an Area exceeding One superficial Square Mile.

V. And be it enacted, That, under and subject to the various Provisions and Regulations herein-after contained, the Governor for the Time being of each of the said Colonies is hereby authorized and required, in the Name and on the Behalf of Her Majesty, to convey and alienate in Fee Simple, or for any less Estate or Interest, to the Purchaser or Purchasers thereof, any Waste Lands of the Crown in any such Colony, which Conveyances or Alienations shall be made in such Forms and with such Solemnities as shall from Time to Time be prescribed by Her Majesty, and being so made shall be valid and effectual in the Law to transfer to and vest in possession in any such Purchaser or Purchasers any such Lands as aforesaid, for any such Estate or Interest as by any such Conveyance as aforesaid shall be granted to him, her, or them.

VI. And be it enacted, That once at the least in each of the Four usual Quarters of the Year, and on as many other Occasions as to the Governor for the Time being of any such Colony shall seem meet, there shall be holden One or more public Sales by Auction of the Waste [end page 1]

Waste lands of the Crown within such Colony; and that every such Governor shall, by Proclamation or Proclamations, to be from Time to Time by him for that Purpose made in manner herein-after mentioned, declare with all practicable Precision the Times and the Places at which such Auctions will be holden, and what are the Lands

to be offered for Sale at each of such Auctions, and what are the upset Prices at which they will be offered for Sale; and it shall not be lawful for any such Governor to sell or to cause to be sold any such Lands, unless they shall have been specified as about to be offered for Sale by such Proclamation as aforesaid, issued at some Time within Three Calendar Months next preceding the actual Sale thereof.

VII. And be it enacted, That in every such Proclamation as aforesaid the Lands specified therein as about to be offered for Sale shall be distinguished into Three separate Classes, the First of which shall be described as Town Lots, the Second of which shall be described as Suburban Lots, and the Third of which shall be described as Country Lots; and within the First of the said Classes shall be comprised all Lands situate [sic] within the Limits of any existing Town to be in that Behalf especially named and described by the Governor, or within any Locality to be designated by the Governor as the Site of any Town to be thereon erected; and within the Second of the said Classes shall be comprised all Lands situate [sic] within the Distance of Five Miles from the nearest Point of any existing or contemplated Town, unless in any Case the Governor for the Time being of any such Colony shall see fit to exclude any such last-mentioned Lands from the said Class of Sunurban Lots, on the Ground that they will not in his Judgment derive any increased Value from their Vicinity to any such Town; and within the Third of the said Classes shall be comprised all Lands not comprised within the First and Second Classes: Provided nevertheless, that nothing herein contained shall extend or be construed to extend to prevent the putting up for Sale of Lands of any One or more of the said Classes apart from Lands of both or either of the other Classes.

VIII. And be it enacted, That none of the Waste Lands of the Crown shall be sold at any such Auction in any of the said Colonies unless the Sum of One Pound at the least for each Acre of such Land be then and there offered for the same, which Sum of One Pound per Acre shall be the lowest upset Price of any of the Waste Lands of the Crown in any of the said Colonies, but which lowest upset Price shall be liable to be from Time to Time raised in any such Colony in manner herein-after mentioned.

IX. And be it enacted, That it shall be lawful for the Governor of any such Colony, at his Discretion, by any such Proclamation or Proclamations as aforesaid, to raise the lowest upset Price of the Waste Lands of the Crown in any such Colony; and it shall be lawful for Her Majesty, by any Instructions addressed to any such Governor under Hwr Majesty's Signet and Sign Manual, with the Advice of Her Majesty's Privy Council, either to raise the lowest upset Price of the Wasre Lands of the Crown in any such Colony, or to disallow and reduce back, either wholly or in part, any Increase of

the said upset Price which, in exercise of the Authority hereby vested in him, any such Governor may, in manner aforesaid, have made of the said upset Price, by any such Proclamation or Proclamations as aforesaid: Provided always, that no such Instructions reducing the lowest upset Price of Land as raised by any such Proclamation or Proclamations shall be so issued as aforesaid by Her Majesty after the Lapse of Six Months from the Receipt of One of Her Majesty's Principal Secretaries of State from such Governor of a Transcript of any such Proclamation: Provided also, that if such upset Price be so reduced by Her Majesty as aforesaid, and if any Person shall in the meanwhile have purchased of the Crown any Lands not being Town or Suburban Lots or Special Lots, it shall be lawful for the Governor either to return to such Person the Difference between the lowest upset Price named by the Governor and the Amount to which such lowest upset Price shall have been reduced by Her Majesty, or to grant to such Person or Persons Lands equal in Value to the said Difference.

X. And be it enacted, That it shall not be competent to the Governor of any such Colony, nor, save as aforesaid, to Her Majesty, to reduce the Amount to which, in manner aforesaid, the lowest upset Price of Lands within such Colony may at any Time have been so increased by such Governor or by Her Majesty.

[end page 2]

XI. And be it enacted, That in respect of any Part not exceeding One Tenth of the whole of the Lands of the Third Class for the First Time offered for Sale at any such Auctions as aforesaid it shall be lawful for any such Governor, by any such Proclamation or Proclamations as aforesaid, to name an upset Price higher than the lowest upset Price of Waste Lands in the Colony, and such excepted Lands of the Third Class shall be designated as 'Special Country Lots', and that in respect of any Lot or Lots consisting of Lands either of the First or of the Second Classes, to be comprised in any such Sales, it shall be lawful for the Governor for the Time being to fix the upset Price of any such Lot or Lots at any Sum exceeding the lowest upset Price of Waste Lands within the Colony in which the same may be situated, and from Time to Time to raise or lower, as to him may seem requisite for the public Interest, the Price of such Lots consisting of Lands of the First or Second Class, so always that such upset Price shall never be less than the lowest upset Price of Waste Lands within the said Colony.

XII. *And be it enacted, That no Land comprised in the said First or Second Classes shall be sold in any of the said Colonies otherwise than by public Auction; but that any Lands comprised in the Third of the said Classes shall and may be sold by the Governor for the Time being of the Colony within which the same are situate [sic] by private Contract, if the same shall first have been put up to public Auction in manner aforesaid, and shall not have been sold at such Auction, provided that no such Land shall be so sold by any such private Contract for less than the upset Price at which the same was last put up for Sale by Auction, or if any Bidding above that Price was made for the same at such last preceding Auction, than at less than the Amount of such Bidding, after deducting the Amount of any Deposit that may have been paid thereon: Provided also, that if between any Two successive Sales by Auction an Increase shall in manner aforesaid have been made of the upset Price of Lands, no Land affected by such Increase shall subsequently be sold by private Contract until after the same shall again have been put up to Sale by Auction at such increased upset Price.*

XIII. *And be it enacted, That no Waste lands of the Crown shall be sold in any such Colony by any such private Contract as aforesaid except for ready Money, to be paid at the signing of such Contract; and that no Waste Lands of the Crown shall be sold at any such public Auction as aforesaid unless on Condition of paying at the Time of the Sale, in ready Money, a Deposit, the Amount of which shall be fixed by any such Proclamation or Proclamations as aforesaid, at not less than One Tenth of the whole Price, nor unless the Purchaser or Purchasers shall contract to pay the Residue of such Price within One Calendar Month next after the Time of such Sale by Auction, and shall further contract, that on Failure of such Payment the Deposits shall be forfeited, and that the Contract shall be thenceforward null and void.*

XIV. *And be it enacted, That by any Proclamation or Proclamations to be from Time to Time for that Purpose issued by the Governor of any such Colony, for the Purposes herein-after mentioned, it shall be lawful for him to divide such Colony, for the Purposes herein-after mentioned, into any Number of Territorial Divisions not exceeding Four; and for the Purposes and within the Meaning of this present Act, but for no other Purpose, each of such Territorial Divisions shall be considered as a distinct and separate Colony, saving only that as regards the Appropriation herein-after directed of a certain Portion of the Proceeds of Sales of Land to the Introduction of Emigrants from the United Kingdom, it shall be sufficient that such Emigrants be introduced into any Part of the entire Colony, without reference to the Territorial Division in which such Proceeds of Sales may have accrued: And provided always,*

that it shall be lawful for Her Majesty, by any Instructions to be issued by Her Majesty in manner before mentioned, to disallow and annul any such Proclamation or Proclamations; provided that such Instructions be issued within Six Calendar Months next after the Receipt by One of Her Majesty's Principal Secretaries of State, from such Governor, of the Transcript of such Proclamation; provided also, that such Instructions shall take effect within the said Colony upon the Receipt thereof by the said Governor, and not before.

XV. And be it enacted, That if any Person or Persons shall offer to purchase from the Governor of any such Colony by private Contract any Block of unsurveyed Land comprising

[end page 3]

Twenty thousand Acres or more, and forming, as nearly as the natural Landmarks of the Country will admit, a Parallelogram, of which no one Side shall be more than twice the Length of any other Side, it shall be lawful for the Governor, by any such private Contract, to effect any such Sale, on such Terms and Conditions as to him shall seem meet, provided that such Lands be not sold for less than the lowest upset Price of Lands per Acre in the Colony in which the same may be situated, and provided that the Purchaser or Purchasers of any such Lands shall not be entitled to any Survey thereof, except: so far as may be necessary to ascertain the external Marks and Bounds thereof.

XVI. And whereas it may be convenient that Means should be provided for the Payment within the United Kingdom of the Purchase Money of Waste Lands of the Crown within the said Colonies: And whereas by a Warrant under Her Majesty's Sign Manual, bearing Date on the Tenth Day of January One thousand eight hundred and forty, Her Majesty was pleased to appoint certain Persons therein named to be, during Her Majesty's Pleasure, Commissioners, in the United Kingdom, for the Sale of Waste Lands of the Crown in Her Majesty's Colonies, and for superintending the Emigration of Her Majesty's Subjects to such Colonies: Be it therefore enacted, That if any Person or Persons shall pay for the Purchase of Waste Lands of the Crown in any of Her Majesty's Australian Colonies, any Sum or Sums of Money to the Commissioners of Her Majesty's Treasury of the United Kingdom of Great Britain and Ireland, or to any Person or Persons to be appointed by the said Commissioners of Her Majesty's

Treasury, or any Three of them, to receive the same, the said Commissioners of Colonial Lands and Emigration for the Time being are hereby authorized and required, subject to such Rules as shall be prescribed for their Guidance on that respect by the Commissioners of Her Majesty's Treasury, to grant, under their Hands and Seal of Office, Certificates to any such Purchaser or Purchasers of the Amount of any such Payments, which Certificates shall, on Production thereof to the Governor for the Time being of any such Colony, be received by him as equivalent to the Amount of Money for which the same shall respectively be given, so far and only so far as the same may be tendered to such Governor in Payment for the Price of any Waste Lands of the Crown to be there purchased, either at public Auction or by private Contract, in the Manner and subject to the Regulations by this present Act prescribed in respect of such Purchasers.

XVII. And be it enacted, That nothing herein shall extend or be construed to extend to prevent the Governor or any of the said Colonies from granting to any Person or Persons a Licence for the Occupation, for any Time not exceeding Twelve Calendar Months from the Date thereof, of any Waste lands of the Crown in any such Colony, or a Licence for felling, removing, and selling the Timber growing on any such Lands; and that no such Lands shall be sold until after the Expiration of the Licence for the Occupation of the same.

XVIII. And be it enacted, That all Charges which shall be incurred in any of the Australian Colonies for the Expence [sic] of the Survey and management of the Waste Lands of the Crown therein, or for effecting such Sales by Auction or by private Contract, or otherwise in carrying into effect the Provisions of this present Act within any such Colony, shall in the first instance be chargeable upon and defrayed from the Proceeds of Sales of Waste Lands, unless Provision shall otherwise be made for defraying such Charges by any Law or Ordinance to be enacted by the Local Legislature of any such Colony.

XIX. And be it enacted, That, subject to the Charge above mentioned, the gross Proceeds of the Sales of the Waste Lands of the Crown in each of the said Colonies shall be appropriated and applied to the public Service of the said Colonies respectively, in such Manner as Her Majesty, or the Commissioners of Her Majesty's Treasury, or any Three of them, shall from Time to Time direct; Provided always, that One equal Half Part at least of such gross Proceeds shall be and the same is hereby appropriated towards defraying the Expense of the Removal from the United Kingdom to the Colony wherein such Revenue accrued of Emigrants not possessing the Means of defraying the Expence of their own Emigration thither, which Money shall be

expended by the Commissioners of Her Majesty's Treasury, or by such Person or Persons as shall be authorized by them to expend the same, but subject to such Regulations regarding the Selection of Emigrants, the Means to be provided

[end page 4]

for their Conveyance, and their Superintendence during the Voyage to the Colony to which they are destined, and for their Reception and Settlement in that Colony, as shall from Time to Time be prescribed by Her Majesty in Her Privy Council, or through One of Her Majesty's Principal Secretaries of State, to the Governor of such respective Colonies, and to the Commissioners for the Time being of Colonial Lands and Emigration.

XX. Provided always, and be it enacted, 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 the Behalf of Her Majesty with respect to any Lands situate in any of the said Colonies in Cases where such Contracts, Promises, or Engagements shall have been lawfully made before the Time at which this Act shall take effect in any such Colony.

XXI. And be it enacted, That this Act shall take effect and have the Force of Law in each of the Australian Colonies from the Day of the Receipt of a Copy thereof by the Governor of such Colony, which Day such Governor shall certify and make known to the Inhabitants of such Colony by a Proclamation, to be by him for that Purpose forthwith issued.

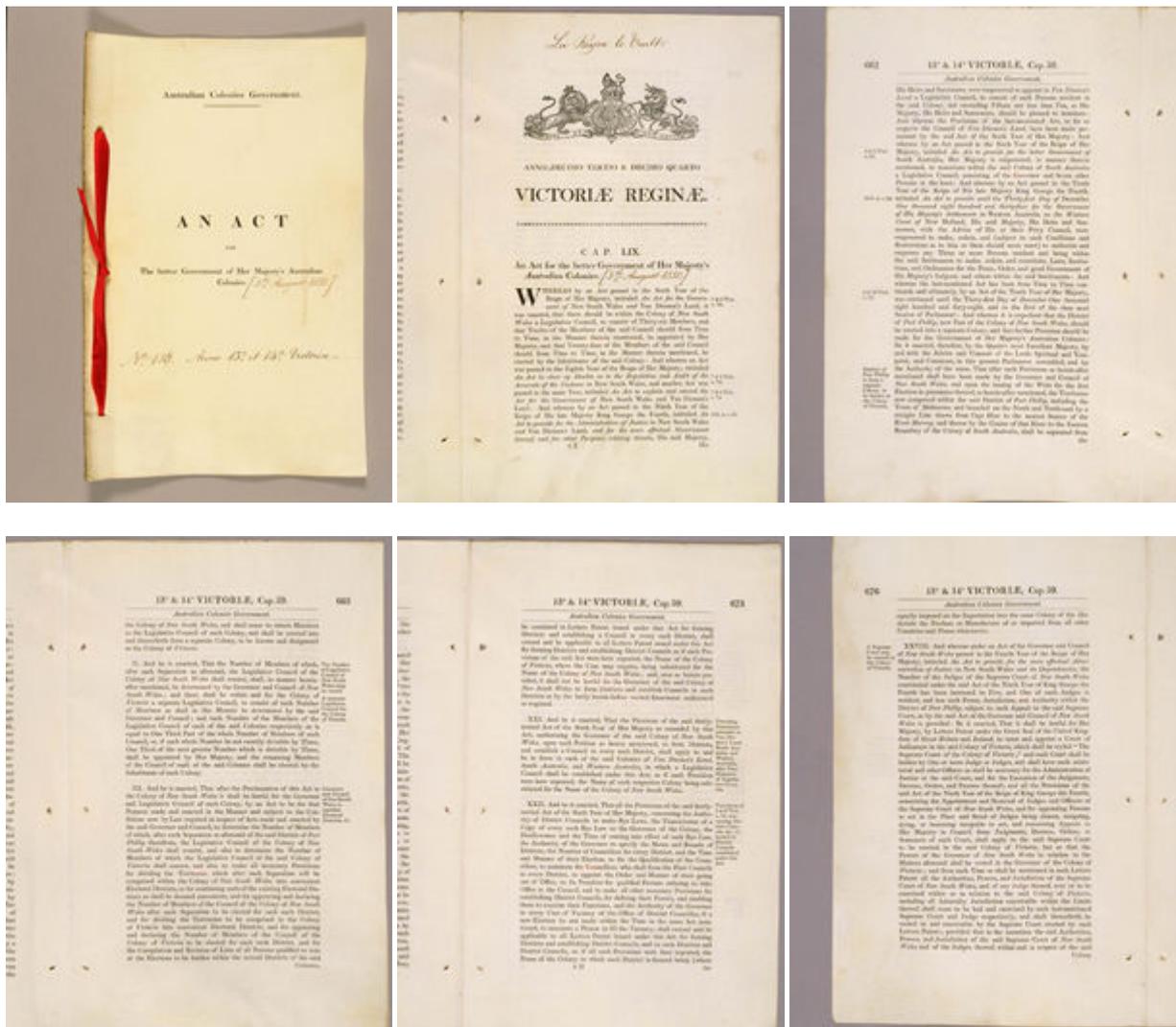
XXII. And be it enacted, That by the Words "Australian Colonies" as employed in this Act, are intended and described the Colonies of New South Wales, Van Diemen's Land, South Australia and Western Australia, and New Zealand, with their respective Dependencies, as such Colonies are now or shall hereafter be defined and limited, and also any other Colonies which it shall in any Case seem fit to Her Majesty, by any Instrument under the Great Seal by which any such new Colony may be founded, to postpone, either for any Period to be therein limited, or indefinitely, as to Her Majesty shall seem meet, the Time at which this Act shall take effect within any such new Colony, in which Case this Act shall take effect therein from the Time to be so limited by such Commission, and not before.

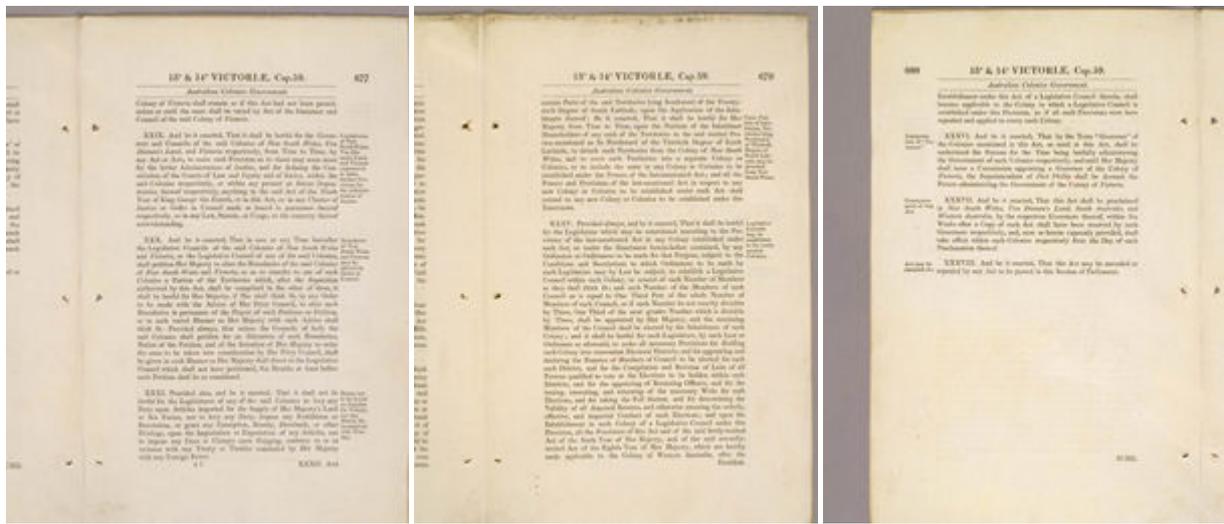
XXIII. And be it enacted That by the Word “Governor”, as employed in the present Act, is intended and described the Person who for the Time being shall be lawfully administering the Government of any of the said Colonies respectively; and that several Proclamations which the Governors of the said respective Colonies are hereby authorized to issue shall be so issued by him under the public Seal of the Colony, and shall be made public in the most authentic and formal Manner in use in any such Colony; and that by the Words “Waste Lands of the Crown”, as used in the present Act, are intended and described any Lands situate therein, and which now are or shall hereafter be vested in Her Majesty, Her Heirs and Successors, and which have not been already granted or lawfully contracted to be granted to any Person or Persons in Fee Simple, or for an Estate of Freehold, or for a Term of Years, and which have not been dedicated and set apart for some public Use.

XXIV. And be it enacted, That this Act may be altered or amended during the present Session of Parliament.

Australian Constitutions Act 1850 (UK) ¹⁹⁹

This formal British Government document allowed for self-government to begin in the various Australian colonies. It continued the inexorable process of increasing settler *de jure* sovereignty, where Aboriginals had fewer and fewer rights.





Significance

This document is significant for all four Australian colonies established before the 1850s. The Assent original of the British Act of Parliament separating Victoria from New South Wales, and naming and providing a Constitution for the new Colony, it was signed by Queen Victoria on 5 August 1850.

The New South Wales Parliament passed the necessary enabling legislation before separation took effect on 1 July 1851. This was formally the founding moment of the Colony of Victoria, its separation from New South Wales established by Section 1 of this Act.

This document was also important in its effects on the government of all four established colonies, New South Wales, Van Diemen's Land (Tasmania), South Australia and Western Australia.

For New South Wales, the Act not only reduced the territory of the government in separating Victoria from New South Wales, but provided for changes to government within New South Wales. It liberalised the franchise qualifications for the New South Wales Legislative Council (Section 4) and it empowered the Governor and the Legislative Council, with Britain's approval, to establish a Parliament of two Houses, either appointed or elected (Section 2).

For Van Diemen's Land, the Act authorised a number of important changes:

- *creation of a Legislative Council with two-thirds of the members elected (Section 7)*
- *empowering the Governor, with the advice and consent of this Legislative Council, to make laws 'for the Peace, Welfare and good Government' of the Colony, with the proviso that such laws not be repugnant to the law of England (Section 14)*
- *laws in force when writs were issued for the election of the Legislative Council were to remain in force (Section 25)*
- *the new Legislative Council could make further provision for the administration of justice, including juries (Section 29)*
- *any Bill passed by the new Legislative Council could be reserved by the Lieutenant-Governor 'for the signification of Her Majesty's pleasure thereon' (Section 33).*

The Legislative Council also received the power to prepare Bills for Royal Assent altering the constitution of the Legislative Council by varying the qualifications of electors and elected members. It could also present a Bill for Royal Assent to replace itself with a Legislative Council and 'House of Representatives' whose members might be appointed or elected (Section 32). The way was paved for creating a colonial version of the two chambers (the House of Lords and the House of Commons) of the Imperial Parliament.

Western Australia had just begun to [receive convicts](#), and was thus subject to special provisions in Section 9 of the Act providing that, upon the petition of not less than one-third of the householders of the colony, and when the Colony ceased to depend on grants from the United Kingdom, a Legislative Council (to consist of members of whom two-thirds might be elected) could be established by the existing Council.

History

1. Victoria

The Port Phillip District grew rapidly. By 1850 it was a wealthy region with a population of more than 70 000 and contained nearly six million sheep (two-fifths of the Australian total).

Throughout the 1840s the residents of the Port Phillip District agitated for independence from New South Wales. After the enactment of the [New South Wales Constitution Act](#) in 1842, they were granted the right to elect six of the 24 elected members of the Legislative Council of New South Wales. Despite this concession, an independence movement continued to petition the British government for Victoria's own representative government. They succeeded when this Act became law on 5 August 1850, and conferred on the colony a Constitution similar to that enjoyed by New South Wales since 1842, with a separate, partly elected [Legislative Council](#) (Section 2).

The news reached Victoria on 11 November 1850, and was celebrated along with the opening of the new Princes Bridge over the Yarra. Separation took effect on 1 July 1851.

2. New South Wales

In New South Wales this Act was criticised for insufficiently providing for local control of revenue, and for failing to give the Legislative Council full powers. The Act did not satisfy growing demands for self-government and a draft Constitution for New South Wales was prepared. This was submitted to Britain and amended, becoming part of the [New South Wales Constitution Act](#) and passed by the British Parliament in 1855.

3. Tasmania

In New South Wales and Victoria, where transportation of convicts virtually ceased after 1840, the Australian Constitutions Act was widely welcomed as providing processes of constitutional reform. The eventual goal for many was responsible government, with colonial premiers and ministries more closely resembling the British Prime Minister and ministries. The colonial governor's role would be broadly similar to that of the monarch in Britain – to commission as chief minister and thus head of government, whoever commanded a majority in the legislature. The immediate effect of this Act for Tasmania was partly representative government on the model in operation in New South Wales since [1842](#). In this model, the Governor remained, in an active and practical sense, the chief executive as well as the Vice-Regal representative in the Colony.

Continuing transportation of convicts from Britain meant 'responsible government' for the Island was a remote prospect in 1850. While anti-transportation agitation was part of public life in Van Diemen's Land from 1847, it is hard to detect much impact of this on the British Parliament.

In 1851 that situation changed. The discovery of extensive alluvial gold in Victoria from 1851 persuaded the British government that sending convicts to a Colony close to probably the richest goldfield in the world was bad policy. By 1850 the Tasmanian anti-transportation movement had developed into a crusade for 'social freedom', the phrase of prominent Launceston anti-transportationist, the Reverend John West. The crusade quality of this movement found expression at mass meetings in Van Diemen's Land and Victoria. It also produced a [Federation Flag](#) very similar to the present Australian ensign.

The Colonial Secretary in Britain, Sir John Pakington, on 14 December 1852 wrote to Lieutenant-Governor Denison, a resolute defender of transportation, foreshadowing its end. The Duke of Newcastle, Pakington's successor, confirmed the demise in a despatch of 22 February 1853, (CO 408/37). Cessation of transportation was confirmed by an Order-in-Council of 29 December 1853, which repealed an 1847 designation of Van Diemen's Land as a penal colony.

In December 1852 Pakington (and the following year his successor Newcastle) wrote to the governors of New South Wales, Victoria and South Australia encouraging them to draft constitutions under the 1850 Act. He suggested these embody a bicameral legislature with an elected Lower House, control over colonial waste lands (a prize hitherto retained by the British Parliament) and, in effect, responsible government. Here Denison perhaps showed himself a good loser. He wrote to Newcastle on 25 August 1853 requesting that Van Diemen's Land receive the same invitation. Newcastle agreed on 30 January 1854. However the Island was already on track to responsible government, and on 1 September 1853, Thomas Daniel Chapman moved in the Legislative Council for the introduction of a Bill which became the [Constitution Act 1855](#).

4. Western Australia

At the time the Australian Constitutions Act was passed, Western Australia had just started [receiving convicts](#) with the first boatload arriving on 1 June 1850. There were thus special provisions in the Act for what was now the only penal colony in Australia, limiting rights to participation in government. Householders petitioned for greater representation in 1865 and although the petition was rejected, six additional members were added to the Council. In 1867 the Governor agreed to nominate those elected on an adult suffrage basis. When transportation ended in 1868 the provisions of Section 9 were fully implemented and a Legislative Council with two-thirds of its members elected was created in 1870.

When Western Australia moved to establish a bi-cameral legislature and responsible government in 1889, Section 32 of this 1850 Act meant the Bill had first to be agreed in the British Parliament, before being enacted as the [Constitution Act 1890](#).

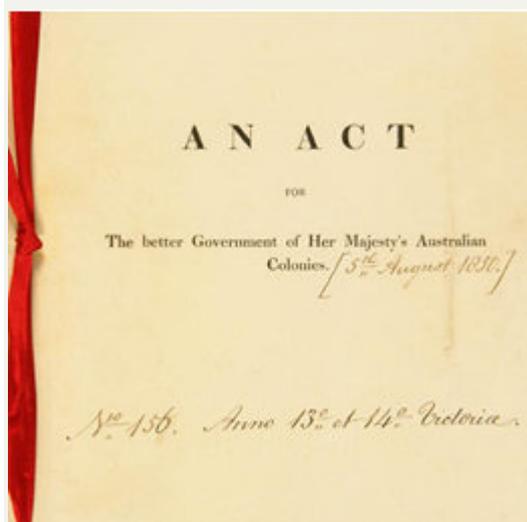
Sources

*Townsley, WA, The Struggle for Self-Government in Tasmania, 1842–1856, *Tasmanian Government Printer, 1951.**

*Waugh, John, The Rules: An Introduction to the Australian Constitutions, *Melbourne University Press, Melbourne, 1996.**

Description

Printed in black ink on gatherings of off-white vellum leaves which are pierced with three holes in the left-hand margin and bound by a red silk tape passed through them and tied on the front cover.



Detail from the front cover of the Australian Constitutions Act 1850 (UK).

Long Title:

An Act for the better Government of Her Majesty's Australian Colonies.

Deconstructing Australian genocide

No. of pages:	22 + cover (9 + cover shown here)
Medium:	Vellum
Measurements:	Each leaf approximately 8 inches x 12 inches
Provenance:	British Parliament, received in the Record Office 1850
Features:	A comprehensive document affecting five colonies.
Location & Copyright:	House of Lords Record Office
Reference:	13 & 14 Vic. No. 156

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Australian Waste Lands Act 1855

The Waste Lands Act continued the process of legislated Aboriginal dispossession.



Australian Waste Lands Act 1855

Reprinted as in force on 11 April 1996

Reprint No. 1*

This reprint is prepared by
the Office of the Queensland Parliamentary Counsel
Warning—This reprint is not an authorised copy

* Minor differences in presentation between this reprint and another reprint with the same number are due to the conversion to new styles. The content has not changed.

Information about this reprint

This Act is reprinted as at 11 April 1996. The reprint—

- shows the law as amended by all amendments that commenced on or before that day (Reprints Act 1992 s 5(c))
- incorporates all necessary consequential amendments, whether of punctuation, numbering or another kind (Reprints Act 1992 s 5(d)).

The reprint includes a reference to the law by which each amendment was made—see list of legislation and list of annotations in endnotes. Also see list of legislation for any uncommenced amendments.

Minor editorial changes allowed under the provisions of the Reprints Act 1992 mentioned in the following list have also been made to—

- use different spelling consistent with current drafting practice (s 26(2))
- use expressions consistent with current drafting practice (s 29)
- relocate marginal or cite notes (s 34)
- use aspects of format and printing style consistent with current drafting practice (s 35)
- omit provisions that are no longer required (s 39)
- omit the enacting words (s 42A).

Also see endnotes for information about—

- **when provisions commenced**
- **editorial changes made in the reprint, including table of obsolete and redundant provisions.**

Dates shown on reprints

Reprints dated at last amendment All reprints produced on or after 1 July 2002, hard copy and electronic, are dated as at the last date of amendment. Previously reprints were dated as at the date of publication. If a hard copy reprint is dated earlier than an electronic version published before 1 July 2002, it means the legislation was not further amended and the reprint date is the commencement of the last amendment.

If the date of a hard copy reprint is the same as the date shown for an electronic version previously published, it merely means that the electronic version was published before the hard copy version. Also, any revised edition of the previously published electronic version will have the same date as that version.

Replacement reprint date If the date of a hard copy reprint is the same as the date shown on another hard copy reprint it means that one is the replacement of the other.

1 The Act of the sixth year of the reign of Her Majesty Queen Victoria ch 36 intituled 'An Act for regulating the sale of waste lands belonging to the Crown in the Australian Colonies' and the Act of the tenth year of the reign of Her Majesty Queen Victoria ch 104 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 for the management thereof'.

s 6 4 s 9
Australian Waste Lands Act 1855

so repealed, and subject to any such alteration or amendments, every such order in council shall have the same force and effect as if this Act had not been passed.

5 Power to the Legislature of Van Diemen's Land and of South Australia when its constitution is altered to dispose of waste land notwithstanding provisions of 5 and 6 Vic c 76 and 13 and 14 Vic c 59

(This section is not reprinted as it is not applicable to Queensland.)

6 Existing regulations maintained in force until altered

All regulations respecting the sale or other disposal of the waste lands of the Crown, made under the authority of the said recited Acts or either of them, which shall be legally in force in New South Wales, Victoria, Van Diemen's Land, or South Australia, at the date when the present Act shall take effect in the said colonies respectively, shall remain in force in each of the said colonies respectively until the Legislature of such colony shall otherwise provide.

8 Past appropriations to be valid

No appropriation which has been or shall be made of the proceeds of the sale or disposal of the waste lands of the Crown in either of the said colonies shall be deemed invalid by reason of its not having been made in accordance with the provisions of the said Acts of Parliament hereby repealed.

9 As to the term Governor

In this Act—

Governor shall mean the person for the time being lawfully administering the government of any colony.

Endnotes

1 Index to endnotes

Page

2 Date to which amendments incorporated	5
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5 List of legislation	6
6 List of annotations	6
7 Table of obsolete and redundant provisions	7

2 Date to which amendments incorporated

This is the reprint date mentioned in the Reprints Act 1992, section 5(c). Accordingly, this reprint includes all amendments that commenced operation on or before 11 April 1996. Future amendments of the Australian Waste Lands Act 1855 may be made in accordance with this reprint under the Reprints Act 1992, section 49.

3 Key

Key to abbreviations in list of legislation and annotations

Key Explanation Key Explanation

AIA = Acts Interpretation Act 1954 (prev) = previously
 amd = amended proc = proclamation
 amdt = amendment prov = provision
 ch = chapter pt = part
 def = definition pubd = published
 div = division R[X] = Reprint No.[X]
 exp = expires/expired RA = Reprints Act 1992
 gaz = gazette reloc = relocated
 hdg = heading renum = renumbered
 ins = inserted rep = repealed
 lap = lapsed (retro) = retrospectively
 notfd = notified rv = revised edition
 o in c = order in council s = section
 om = omitted sch = schedule
 orig = original sdiv = subdivision
 p = page SIA = Statutory Instruments Act 1992
 para = paragraph SIR = Statutory Instruments Regulation 2002
 prec = preceding SL = subordinate legislation
 pres = present sub = substituted
 prev = previous unnum = unnumbered

Australian Waste Lands Act 1855

4 Table of reprints

Reprints are issued for both future and past effective dates. For the most up-to-date table of reprints, see the reprint with the latest effective date. If a reprint number includes a letter of the alphabet, the reprint was released in unauthorised, electronic form only.

5 List of legislation

Australian Waste Lands Act 1855 18 & 19 Vic c 56 (Imp)

*date of assent 16 July 1855
commenced on date of assent
amending legislation—*

Western Australia Constitution Act 1890 53 & 54 Vic c 26 (Imp) s 4(1)

*date of assent 25 July 1890
commenced on date of assent*

Statute Law Revision Act 1892 55 & 56 Vic c 19 (Imp) s 1 sch

*date of assent 20 June 1892
commenced on date of assent*

Short Titles Act 1896 59 & 60 Vic c 14 (Imp) s 1 sch 1

*date of assent 20 July 1896
commenced on date of assent*

6 List of annotations

Note—The short title was given to this Act by the Short Titles Act 1896 59 & 60 Vic c 14 (Imp) s 1 sch 1.

Preamble amd 55 & 56 Vic c 19 s 1 sch

***5 and 6 Vic c 36 and 9 and 10 Vic c 104 repealed
s 1 om 1892 55 & 56 Vic c 19 s 1 sch***

***Periods at which this Act is to take effect in the Australian colonies respectively 13
and 14 Vic c 59***

s 2 om 1892 55 & 56 Vic c 19 s 1 sch

Powers of the repealed Acts continued for certain purposes in this country

s 3 amd 1892 55 & 56 Vic c 19 s 1 sch

Reprint

No.

Amendments to Effective Reprint date

1 1896 59 & 60 Vic c 14 20 July 1896 11 April 1996

7

Australian Waste Lands Act 1855

*Power to the Legislature of Van Diemen's Land and of South Australia when its constitution is altered to dispose of waste land notwithstanding provisions of 5 and 6 Vic c 76 and 13 and 14 Vic c 59
s 5 (This section is not reprinted as it is not applicable to Queensland.)*

*Power to regulate the disposal of waste lands in Western Australia
s 7 om 1890 53 & 54 Vic c 26 s 4(1)*

7 Table of obsolete and redundant provisions

under the Reprints Act 1992 s 39

*Omitted provision
definitions to be read in context
© State of Queensland 2006*

*Provision making omitted provision obsolete/redundant
Acts Interpretation Act 1954 s 32A*

s 3 3 s 4

Australian Waste Lands Act 1855

If Bourke's 1835 proclamation gave further legal force to the concept of 'terra nullius', the comprehensive 1855 Torrens Title legislation (enacted by South Australia in 1858) made Aboriginal dispossession a *fait accompli*, giving legal precedent to all future British land claims, which even High Courts could not ignore (see *Mabo v Queensland* 1992).²⁰⁰ Torrens Title was quickly adopted by all states, as it gave certainty to land title and ownership by the British settlers. Aboriginals were precluded from participating in this legal arrangement until well into the 20th century.

²⁰⁰ <http://www.foundingdocs.gov.au/item-did-33.html> <https://aiatsis.gov.au/sites/default/files/docs/research-and-guides/native-title-research/overturning-doctrine-terra%20nullius-the-mabo-case.pdf>

In a Colony with land settlement and tenure as the basis of its establishment, it is not surprising that a simplified system of conveyancing, where the government takes responsibility for registering and validating title, was developed there. The system takes its name from Robert Richard Torrens, Registrar-General, who steered the measure through the South Australian Parliament. He claimed the idea was based on simplified principles used in transferring shipping property, but credit for its chief features belongs to Ulrich Hubbe, who introduced the concepts from his native Germany.

The legislation was refined over the next three years, including a provision which further reduced costs by breaking the monopoly of lawyers in land transactions, achieved by the licensing of registered land brokers.

Description



Detail showing the crest on the title page of the Real Property or 'Torrens Title' Act 1858 (SA).

Long Title:	An Act to simplify the Laws relating to the transfer and encumbrance of freehold and other interests in Land (No.15 of 1857–58)
No. of pages:	51 + cover
Medium:	Paper
Measurements:	34 x 21.5 cm
Provenance:	House of Assembly, South Australia
Features:	This document is held in a tightly bound volume: the Governor's signature is thus not visible as the volume could not be opened sufficiently to provide a full image of the cover page
Location & Copyright:	Legislative Council of South Australia
Reference:	LCSA store

ANNO VICESIMO PRIMO
VICTORIÆ REGINÆ
No 15.

*An Act to simplify the Laws relating to the transfer and encumbrance
of freehold and other interests in Land.*

[Assented to, 27th January, 1858.]

WHEREAS the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants, it is therefore expedient to amend the said laws—Be it Enacted, by the Governor-in-Chief, of the said Province, with the advice and consent of the Legislative Council and House of Assembly of the said Province, in this present Parliament assembled, as follows:

1. All Laws, Statutes, Acts, Ordinances, rules, regulations, and practice whatsoever, relating to freehold and other interests in land, so far as inconsistent with the provisions of this Act, are hereby repealed, so far as regards their application to land under the provisions of this Act, or the bringing of land under the operation of this Act.

2. This Act may be cited for all purposes as the “Real Property Act.”

3. In the construction, and for the purposes of this Act, and in all instruments purporting to be made or executed thereunder (if not inconsistent with the context and subject matter), the following terms shall have the respective meanings hereinafter assigned to them, that is to say—

The word “Land” shall extend to and include messuages, tenements, and hereditaments, corporeal and incorporeal, of every

Kind

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kind and description, (whether of a greater or less description than life estates, and whether at law or in equity), together with all paths, passages, ways, waters, water-courses, liberties, privileges, easements, plantations, gardens, mines, minerals, and quarries, and all trees and timber thereon or thereunder, lying or being, unless the same are specially excepted:

“Grant” shall mean the land grant of any land of the Crown by any Resident Commissioner or Governor of the said Province, to any person or persons:

“Proprietor” shall mean any person seised or possessed of any estate at law or in equity, in possession, in futurity, or expectancy, whether a life estate, or of a greater or less description than a life estate, in any land. “Transfer” shall mean the execution of every instrument, and the performance of every formality, including registration, required by this Act, to give validity to the passing, either of the whole of the proprietor’s interest in land, or of any less estate therein:

“Memorandum of Sale” shall mean the instrument executed by the person having estate or interest in land under the operation of this Act, for the purpose of transferring such estate and interest in form of the Schedule hereto annexed, marked B:

“Transmission” shall mean the acquirement of title to or interest in lands, consequent on the will, intestacy, bankruptcy, insolvency, or marriage of a proprietor:

“Certificate of Title” shall mean the instrument executed by the Registrar-General, in form A of the Schedule hereto annexed, duplicate of which constitutes a separate page in the register book, vesting the fee simple, or any less estate (as the case may be), in land brought under the operation of this Act:

“Mortgage” shall be applicable to every charge on, or interest in land, created merely for securing a loan:

“Mortgagor” shall mean the borrower of money on the security of any estate or interest in land under the operation of this Act:

“Mortgagee” shall mean the lender of money upon the security of any estate or interest in land under the operation of this Act:

“Bill of Mortgage” shall mean the instrument in form of the Schedule hereto annexed, marked D, required under this Act to be executed by the intending mortgagor, with a view to creating such mortgage as last aforesaid:

“Encumbrance” and “Assignment” shall mean the execution by a person of every necessary or suitable instrument, and the performance of every formality, including registration, required by this Act, for assigning, surrendering, or otherwise transferring land of which such person is possessed, either for the whole estate of the person so possessed or for any less estate, in order to render such land available for securing the payment of any annuity or dower, or for the payment of any sum

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sum of money either absolutely or subject to conditions, restrictions, or contingencies; including also the execution, by the Registrar-General, of every instrument, and the performance by him of every formality required by this Act to give validity to such encumbrance or assignment:

“Encumbrancer” shall mean the person, not being a mortgagor, who shall have assigned any estate or interest in land under the operation of this Act for the purpose of securing any annuity, dower, or sum of money:

“Encumbrancee” shall mean the person, not being a mortgagee, to whom or for whose benefit any estate or interest in land under the provisions of this Act shall have been encumbered or assigned:

“Bill of Encumbrance” or “Bill of Trust” shall mean the instrument creating such encumbrance or assignment executed by the person having estate or interest in land under the operation of this Act in form of one or other of the Schedules hereto annexed, marked respectively E or F:

“Estate in Fee Simple” shall mean the absolute property in land, such as is originally vested by a “Grant” in the meaning of this Act:

“Registration Abstract” shall mean the instrument under the hand and seal of the Registrar-General, executed in form of the Schedule hereto marked H, or in words to the like effect, available in lieu of the Register Book, for the purpose of enabling a person to mortgage or to sell, in places without the limits of the said Province, land under the operation of this Act whereof he may be seised as proprietor:

“Lunatic” shall mean any person who shall have been found to be a lunatic upon inquiry by the Supreme Court, or by any Judge thereof, or upon a Commission of Inquiry issuing out of the Supreme Court in the nature of a writ de lunatico inquirendo:

The expression “Person of Unsound Mind” shall mean any person not an infant, who, not having been found to be a lunatic, shall be incapable, from infirmity of mind, to manage his own affairs:

“Consular Officer” shall include Consul-General, Consul, and Vice-Consul, and any person for the time being discharging the duties of Consul-General, Consul, or Vice-Consul:

“Registrar-General” shall mean the Registrar-General, or other officer duly authorized or appointed to carry out the provisions of this Act, or any person duly authorized as Deputy of such Registrar-General, or to act on his behalf in respect to this Act:

“Instrument” shall mean and include any land grant, certificate of title, or other document in writing, relating to the transfer, encumbrance, or other dealing with land:

“Register

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“Register Book” shall mean the book hereinafter directed to be kept for the purpose of recording therein, in order, grants and certificates of titles issued, and the execution of instruments affecting land under the operation of this Act:

“Person,” used and referred to in the masculine gender, shall include a female as well as a male, and shall include a body corporate:

The naming any person as proprietor, vendor, mortgagor, mortgagee, encumbrancer, encumbrancee, lessor or lessee, or as trustee, or as seised of or having any estate or interest in any land, shall be deemed to include the heirs, executors, administrators, and assigns of such person:

And, generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

4. The department of the Registrar-General shall be the department to undertake the general superintendence of matters relating to the transfer, transmission, sale, mortgage, and encumbrancing of all land under the operation of this Act, and the releasing of such land from any mortgage or encumbrance, and shall be authorized to carry into execution the provisions of this Act, and of any Acts to amend or extend the provisions of this Act in force for the time being.

5. All documents whether purporting to be issued or written by or under the directions of the Registrar-General, and purporting either to be sealed with his seal or signed by him, or by one of his deputies shall be received in evidence, and shall be deemed to be issued or written by or under the direction of the Registrar-General without further proof unless the contrary be shown.

6. The Registrar-General may, with the consent of the Governor, for the purposes of carrying into effect the provisions contained in this Act, give such instructions as to the manner of making entries in the register book, as to the execution and attestation of instruments as to any evidence to be required for identifying any person, and generally as to any act or thing to be done in pursuance of this Act, as he may think fit.

7. The Registrar-General may, with the consent of the Governor of the said Province from time to time prepare and sanction forms of the various books, instruments, and papers required by this Act, and may with like sanction from time to time make such alterations therein as he deems requisite ; and shall, before finally issuing or altering any such form, give such public notice thereof as he deems

Necessary

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necessary in order to prevent inconvenience ; and shall cause every such form to be sealed with such seal as aforesaid, or marked with some other distinguishing mark, and to be supplied at the General Registry Office free of charge, or at such moderate prices as he may from time to time fix, or may licence any person to print and sell the same ; and every such instrument and paper as aforesaid shall be made in the form issued by the Registrar-General, and sanctioned by him as the proper form for the time being ; and every such instrument or paper, if made in a form purporting to be a proper form, and to be sealed or marked as aforesaid, shall be taken to be made in the form hereby required, unless the contrary is proved.

8. Every person who counterfeits, assists in counterfeiting, or procures to be counterfeited, such seal or other distinguishing mark as aforesaid, or who fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any form issued by the Registrar-General with the view of evading any of the provisions of this Act or any condition contained in such form, shall for each offence be deemed guilty of a misdemeanor, and shall incur a penalty not exceeding One Hundred Pounds ; or may, at the discretion of the Court before whom such case may be tried, be imprisoned for any period not exceeding twelve calendar months ; and every person who, in any case in which a form sanctioned by the Registrar-General is by this Act required to be used, uses without reasonable excuse any form not purporting to be so sanctioned, or who prints, sells, or uses any document purporting to be a form so sanctioned knowing the same not to be so sanctioned for the time being, or not to have been prepared and issued by the Registrar-General, shall for each such offence incur a penalty not exceeding Ten Pounds.

9. The Registrar-General may exercise the following powers, that is to say -

(1.) He may require the proprietor or other person making application to have any land brought under the operation of this Act, or the proprietor, or mortgagee, or other person interested in any land under the operation of this Act, in respect of which any transfer, lease, mortgage, or other encumbrance, or any release from any mortgage or encumbrance, is about to be transacted, or in respect of which any transmission is about to be registered, or a registration abstract granted under this Act, to produce any land grant, certificate of title, conveyance, bill of sale, mortgage deed, lease, will, or any other instrument in his possession or within his control affecting such land or the title thereto :

(2.) He may summon any such proprietor, mortgagee, or other person as aforesaid to appear, and give any explanation respecting such land, or the instruments affecting the title thereto, and if, upon requisition duly made by the Registrar-General, such proprietor, mortgagee, or other person refuses or neglects

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to produce any such instrument, or to allow the same to be inspected, or refuses or neglects to give any explanation which he is hereinbefore required to give, or knowingly misleads or deceives any person hereinbefore authorized to demand any such explanation, he shall for each such offence incur a penalty not exceeding Twenty Pounds ; and the Registrar-General, if the instrument or information so withheld appears to him material, shall not be bound to proceed with the bringing of such land under the operation of this Act, or with the registration of such mortgage or sale, or with the issuing of such powers of mortgage or sale as the case may be:

(3.) He may administer oaths, or, in lieu of administering an oath, may require any person examined by him to make and subscribe a declaration of the truth of the statements made by him in his examination.

10. It shall be lawful for the Governor, with the advice of the Executive Council, by warrant under his hand and the public seal of the said Province, to appoint two persons, not being legal practitioners, who, together with the Registrar-General, shall be Commissioners for investigating and dealing with claims for the bringing of land under the provisions of this Act, and from time to time with like advice and in like manner to remove any of such Commissioners so appointed from office, and to appoint another person in his place.

11. The style of such Commissioners shall be the "Lands Titles Commissioners." The Registrar-General shall receive a reasonable salary. The other Commissioners shall be remunerated by fees on applications referred to them for bringing lands under the operation of this Act as set forth in the Schedule hereto marked T. At meetings of the said Lands Titles Commissioners, two shall form a quorum, and the Registrar-General, if present, shall preside as Chairman.

12. It shall be lawful for the said Commissioners, subject to the approval of the Governor, to appoint two legal practitioners, at reasonable salaries, to be their solicitors and permanent counsel, and also, subject to the like approval, to dismiss and discharge such solicitors and to appoint others in their stead.

13. All land alienated from the Crown within the said Province, from and after the first day of July, one thousand eight hundred and fifty-eight, shall be subject to the provisions of this Act.

14. Land, in the said Province, the grants of which may have been signed prior to the day appointed for this Act to come into operation, (whether such land shall constitute the entire or part only of the land included in any grant), may, at the desire of the proprietor, be brought under the operation of this Act in the following manner, that is to say — The proprietor shall deliver to the Registrar-General an application

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cation in form of the Schedule, hereto annexed, marked I, or in words to the like effect, and shall at the same time deposit with the Registrar-General all instruments in his possession or under his control constituting or in any way affecting his title to such land, together with an abstract of title in which he shall set forth and describe every instrument constituting or in any way affecting his title to such land, with the names and, so far as shall be within his knowledge, the addresses of all persons, if any, seised or possessed of any estate or interest in such land at law or in equity, in possession or in futurity, or expectancy, whether a life estate or of a greater or less description than a life estate, and shall make and subscribe a declaration to the truth of such abstract ; or if such applicant proprietor be the sole and only person having estate or interest in such land, then he shall make and subscribe a declaration to that effect.

15. *If, upon receipt of such application, it shall appear to the satisfaction of the Registrar-General that the applicant proprietor is the original grantee of the land in respect to which application is made, and that such land has been granted on or subsequent to the nineteenth day of October, one thousand eight hundred and forty two, and that no sale, mortgage, or other encumbrance transaction in any way affecting the title to such land has at any time been registered in the said Province, then, and in such case, the Registrar-General shall, once in each of two successive weeks, give public notice by advertisement in the South Australian Government Gazette, and in, at the least, one newspaper published in the City of Adelaide, in the said Province, that application has been made for the bringing of such land under the operation of this Act, which notice shall be in the form of the Schedule hereto annexed, marked J, or in words to the like effect ; and the Registrar-General shall likewise cause copy of such notice to be posted in a conspicuous place in his office, and in such other public places as he may deem necessary ; and in any such case if the Registrar-General shall not, within the space of two calendar months from the date of the latest of such advertisements as hereinbefore directed to be published, receive any caveat as hereinafter described, with respect to such land, it shall be lawful for him, by notice to that effect published in the South Australian Government Gazette, to bring such land under the operation of this Act.*

16. *If it shall appear to the satisfaction of the Registrar-General that the applicant proprietor is not the original grantee of the land included in such application, or that the said land was granted prior to the nineteenth day of October, one thousand eight hundred and forty two, or that any transfer, transmission, mortgage, encumbrance, or beneficial interest, affecting the title to such land has been made, or has been registered in the said Province, or elsewhere, then and in such case the Registrar-General shall refer such application to the Lands Titles Commissioners for their consideration, and if it shall appear to the satisfaction of the said Commissioners that the title to the land included in such application has not been*

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derived by transmission, and that every mortgage, encumbrance, or beneficial interest, affecting the title to the land so included has been released and satisfied, or if any such mortgage, encumbrance, or interest, remains unsatisfied, that the parties interested therein are also parties to such application, then, and in either such case, the said Commissioners shall make and subscribe a warrant addressed to the Registrar-General, in form of the Schedule hereto annexed marked K, or in words to the like effect, which warrant shall contain a direction to the Registrar-General to cause notice of such application to be advertised three several times in the South Australian Government Gazette, and in at least one newspaper published in the City of Adelaide, and shall further limit and appoint a time, not less than one month nor more than twelve months from the date of the latest of such advertisements, upon or after the expiration of which, it shall be lawful for the Registrar-General, unless he shall in the interval have received a caveat as hereinafter described, to bring such land under the operation of this Act ; but if it shall appear to the satisfaction of the said Commissioners that the title to the land included in such application has been derived by transmission, or that any parties interested in any unsatisfied mortgage or encumbrance affecting the title to such land,

or any other party, beneficially interested therein, are not parties to such application, or that the evidence of title set forth by such applicant proprietor is imperfect, it shall be lawful for such Commissioners to direct the Registrar-General to reject such application altogether or, at their discretion, by warrant under their hand, in form of the Schedule hereto annexed marked K, or in words to the like effect, to direct the Registrar-General to cause notice of such application to be published in the South Australian Government Gazette, and in the London Gazette and in the Official Gazettes of each of the Colonies of New South Wales, Victoria, Tasmania, and New Zealand, or in any one or more of such Gazettes, and the said Commissioners shall in such warrant specify the number of times, and at what intervals, such advertisement shall be published in each or any of such Gazettes, and shall also limit and appoint a time, not less than two months nor more than three years from the date of the latest of such advertisements, upon or after the expiration of which, it shall be lawful for the Registrar-General, unless he shall in the interval have received a caveat as hereinafter described, to bring such land under the operation of this Act.

17. The Registrar-General, upon receipt of any such warrant as is hereinbefore for either case respectively directed to be issued under the hand of such Commissioners, shall cause notice to be published in such manner as in such warrant may be directed, that application had been made for bringing the land referred to in such warrant under the operation of this Act, and shall also cause copy of such notice to be posted in a conspicuous place in his office, and in such other public places as he may deem necessary ; and the Registrar-General shall likewise forward through the post office copy of such notice, addressed to each former proprietor, mortgagee, or other person who may then, or at any previous time, have had or

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held any legal or equitable title, claim, or encumbrance, to or upon such land, as far as his knowledge of the facts of the case, and of the names and addresses of such persons may enable him, and if the Registrar-General shall not, within the time for that purpose limited and appointed in any such warrant, receive any caveat as hereinafter described, it shall be lawful for him, by notice published in the South Australian Government Gazette, to bring the land referred to or described in such warrant under the operation of this Act.

18. It shall be lawful for any person having or claiming an interest in any land so advertised as aforesaid, or for the attorney of any person having or claiming interest therein, within the time hereinbefore limited and appointed, or that may be warrant as aforesaid, under the hands of the Lands Titles Commissioners, be for that purpose limited and appointed, to lodge a caveat with the Registrar-General forbidding the bringing of such land under the operation of this Act, which caveat shall be in the form of the Schedule hereto annexed, marked L, or as near thereto as circumstances permit, and shall particularize the estate, interest, lien, or charge, claimed by the person lodging the same ; and if such claim is made under any instruments other than those set forth in the abstract deposited by the applicant proprietor, the person lodging such caveat shall deliver a full and complete abstract of his title, which shall contain the same matters, and be subject to the same regulations as are hereinbefore prescribed for the case of an abstract deposited by the applicant proprietor.

19. *The Registrar-General, upon receipt of any such caveat within the time for either case limited as aforesaid, shall notify the same to such applicant proprietor, and shall suspend further action in the matter, and the lands in respect of which such caveat may have been lodged shall not be brought under the operation of this Act until such caveat shall have been withdrawn or shall have lapsed from any of the causes hereinafter provided, or until a decision shall have been obtained from the Court having jurisdiction in the matter.*

20. *After the expiration of three calendar months from the date thereof, every caveat shall be deemed to have lapsed unless the person by whom or on whose behalf the same was lodged shall, within that time, have taken proceedings to establish his title to the estate, interest, lien, or charge therein specified, and every person who shall fail to show probable cause for lodging such caveat to the satisfaction of the Judge before whom any prosecution may in such case be instituted, shall forfeit and pay a penalty not exceeding One Hundred Pounds.*

21. *If, upon the application of any proprietor to have land, of which he is seised, brought under the operation of this Act, the Registrar-General shall refuse so to do, or if such applicant proprietor*

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prietor shall be dissatisfied with the direction upon his application, given by the Lands Titles Commissioners as hereinbefore provided it shall be lawful for such applicant proprietor to require the Registrar-General to set forth in writing, under his hand, his objections to the title of such applicant proprietor or the grounds upon which such direction was given, and such applicant proprietor may, if he think fit, at his own costs, summons such Registrar-General to appear before the Supreme Court to substantiate and uphold his objections to such title, such summons to be issued at the request of such applicant proprietor, or his solicitor, under the hand of a Judge of the said Court, and served upon such Registrar-General six clear days, at least, before the day appointed for the hearing of such objections, and such objections shall be heard by the said Court upon motion ; and upon such hearing the said Court shall, if any such objections be a question of fact, direct an issue to be tried to decide such fact ; and it shall thereupon be lawful for the said Court to forbid the bringing of such land under the operation of this Act, or to order that such land may be brought under the same, after the expiration of such period of time, as the said Court shall think fit, not exceeding the period limited by any law, for the time being in force in the said Province, as the period within which actions of ejectment may be brought, and the Registrar-General shall obey such order.

22. *Upon any such motion as aforesaid, it shall be lawful for any person interested in any land touching or concerning the title to which such motion shall be made, and for the said Registrar-General by himself or his counsel, to argue the same before the said Court, in support of or objection to, the bringing of such land under the operation of this Act, and the Registrar-General, or his solicitor, shall have the right of reply ; and all expenses attendant upon any of the matters or proceedings aforesaid, shall be borne and paid by the person requiring such land to be brought under the operation of this Act.*

23. Every notice for bringing land under the operation of this Act, hereinbefore directed to be published, shall be in the form of the Schedule hereto annexed, marked M, or in words to the like effect, and shall take effect and be valid to all intents from the date of the publication thereof.

24. The person entitled to bring land under the operation of this Act, and to receive a certificate of title in respect of the same, shall be the person in whom the fee simple is vested, or if there be no person in whom the fee simple is vested, then the person so entitled shall be the person holding the greatest estate and interest in such land, not being a mortgagee thereof: Provided always, that no mortgagor shall be entitled to bring land under the operation of this Act, or to receive a certificate of title for the same, without the consent of his mortgagee, which consent may be endorsed on the form of application in manner hereinafter prescribed.

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25. It shall be lawful for any proprietor, being an applicant to have land brought under the operation of this Act, to withdraw his application at any time prior to the issuing of such notice ; and the Registrar-General shall, in such case, upon request in writing, signed by such applicant proprietor, return to him the abstract, and all instruments of title, deposited by such proprietor for the purpose of supporting his application.

26. The Registrar-General shall not notice any caveat forbidding the bringing of land under the operation of this Act, if the party lodging the same claims only an estate or interest to take effect after the determination, or in defeasance of an estate tail, or forbids the bringing of such land under the operation of this Act, on the plea only of the absence of legal evidence that a former proprietor was in being and capable at the time when any power of attorney executed by such proprietor was exercised by his attorney in the selling or purchasing, or releasing of such land.

27. Every grant, certificate of title, memorandum of sale, bill of mortgage, power of attorney, registration abstract, revocation order, bill of encumbrance, bill of trust, lease, or other instrument transferring or in any way affecting any estate or interest in land under the operation of this Act shall be in duplicate, and one original of every such instrument shall be filed in the Registry Office, and the other delivered to the proprietor or other person interested therein, or entitled thereto, and every instrument in this Act directed to be filed or bound up in the register book, being so filed or bound up shall be held to be "Registered by Deposit," in terms of an Act passed by the Governor and Legislative Council of the said Province on the ninth day of December, in the year of our Lord one thousand eight hundred and fifty-three, and in the seventeenth year of Her Majesty Queen Victoria, intituled "An Act to provide for the Deposit of Deeds, Agreements, Writings, and Assurances, Maps and Plans, relating to Hereditaments in the Province of South Australia, and for other purposes therein mentioned."

28. The Registrar-General shall keep a book to be called the "Register Book of Real Property," and shall bind up therein the duplicates of all grants and of all certificates of title issued from and after the first day of July, one thousand eight hundred and fifty eight, and shall open therein a separate page for each grant and certificate of title, and shall record thereon the

particulars of all instruments affecting the land included under each such grant or certificate of title, distinct and apart.

29. *So soon as any land has been brought under the operation of this Act, the Registrar-General shall make out and deliver to the proprietor a certificate of title to the same in form hereinafter described, and every such certificate of title shall contain a reference to the original grant or other instrument evidencing title, which may have been deposited by such proprietor when making application*

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in manner hereinbefore described, and the Registrar-General shall endorse on every such grant or instrument so surrendered a memorandum setting forth that the said grant or instrument had been surrendered by such proprietor in exchange for a certificate of title to such land pursuant to the provisions of this Act, with the date of such deposit ; and if any grant or other instrument so deposited shall relate to or include any property, whether personal or real, other than the land included in such certificate of title, then the Registrar-General shall endorse on such grant or other instrument a memorandum setting forth that the said grant or instrument is cancelled in so far only as relates to the land included in such certificate of title, and shall return such grant or other instrument to such proprietor, otherwise he shall retain the same in his office.

30. *Every certificate of title made out by the Registrar-General shall be in duplicate, and in the form marked A in the Schedule hereto, and the Registrar-General shall note by endorsement thereon, and in such manner as to preserve their priority, the particulars of all unsatisfied mortgages or other encumbrances, and of every lease, rent, charge, or term of years, or outstanding estate whatsoever, affecting such land, which shall have been registered, or of which he may have notice, and shall cause one of such certificates of title to be bound up in the register book, and deliver the other to the proprietor entitled to the land described in such certificate, and every such certificate, duly authenticated under the hand and seal of the Registrar-General shall be received in all Courts of Justice as evidence of the particulars therein set forth and of their being entered in the register book in the manner set forth in such certificate.*

31. *No instrument shall be effectual to pass any estate or interest in any land under the operation of this Act, or to render such land liable as security for the payment of money, but so soon as the Registrar-General shall have entered the particulars thereof in the book of registry, and made endorsement on such instrument as hereinafter directed to be made in each such case respectively, the estate or interest shall pass or, as the case may be, the land shall become liable to security in manner and subject to the conditions and contingencies set forth and specified in such instrument ; and should two or more instruments executed by the same proprietor, and purporting to transfer or encumber the same estate or interest in any land, be at the same time presented to the Registrar-General for registration and*

endorsement, he shall register and endorse that instrument, under which the person claims property, who shall present to him the grant or certificate of title of such land for that purpose.

32. The Registrar-General shall not register any instrument purporting to transfer, or otherwise to deal with or affect any estate or interest in land under the operation of this Act, unless such instrument be in accordance with the provisions thereof.

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33. Every certificate of title or entry in the register book shall be conclusive, and vest the estate and interests in the land therein mentioned in such manner and to such effect as shall be expressed in such certificate or entry valid to all intents, save and except as is hereinafter provided in the case of fraud or error.

34. Upon the first bringing of any land under the operation of this Act, and also upon the registering of the title to any land transmitted by will or intestacy, there shall be paid to the Registrar-General the sum of one farthing in the pound sterling on the value of the land so brought under the operation of this Act or so transmitted, and if such land be situated within the limits of any Corporation or District Council, the declaration of such applicant proprietor, or person entitled under such transmission, accompanied by the certificate of the Major or of the Chairman of such Corporation or District Council, setting forth the marketable value of such land at the time then being, and the amounts at which such land had been assessed at the assessment last before the bringing of such land under the operation of this Act, or last before such transmission, as the case may be, shall be received by the Registrar-General as sufficient evidence of the value of such land; and if such land be not situated within the limits of any Corporation or District Council, or being within such limits it shall not have been assessed, the oath or solemn affirmation of the applicant proprietor or of the party entitled under such transmission, made before the Registrar-General, or any Justice of the Peace, shall be received by such Registrar-General as evidence of the value of such land: Provided always that if the Registrar-General shall not be satisfied as to the correctness of the value so declared or sworn to, it shall be lawful for him to require such proprietor or other person as aforesaid to produce a certificate of such value under the hand of a sworn appraiser, which certificate shall be received as conclusive evidence of such value for the purposes herein specified.

35. All sums of money so received as aforesaid, shall be paid to the Treasurer of the said Province to constitute an Assurance Fund, out of which shall be made good the full amount awarded by any verdict or decree of Court to the rightful heir or proprietor of land under the operation of this Act as hereinafter provided, failing the recovery of such amount from the person who may by fraud, misrepresentation, or error, have become registered as proprietor of the same ; and the said Treasurer may from time to time invest such sums in the South Australian Government Securities: Provided always that in case of deficiency in such Assurance Fund the full amount so awarded shall be made good to such rightful heir or proprietor out of the General Revenues of the said Province.

36. *When land under the operation of this Act is intended to be disposed of by sale, the vendor shall execute a memorandum of sale, in form of the Schedule hereto annexed marked B, or as near thereto as circumstances permit, which memorandum shall contain such*

description

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description of the land intended to be transferred as is contained in the original grant, or in the certificate of title of such land, or such description as may be sufficient to identify that particular portion of land which it is intended to dispose of, and shall contain an accurate statement of the estate or interest of such vendor intended to be transferred, and a memorandum of all mortgages and other encumbrances affecting the same; and if such land be leased, the name and description of the lessee with a memorandum of the lease, and every such memorandum of sale shall be attested by a witness.

37. *Every memorandum of sale for the transfer of land under the operation of this Act, when duly executed, shall be produced to the Registrar-General, who shall thereupon enter in the register book, under the original entry respecting such land, the name, residence, and description of the vendor, or of each vendor if more than one; the name, residence, and description of the purchaser, or of each purchaser if more than one; the amount of the consideration money paid; the date of the memorandum of sale, and of its production, and such other particulars as the Registrar-General may deem necessary, and shall endorse on such memorandum of sale, and also on the grant or certificate of title, the fact of such entry having been made, with the date and hour thereof, and shall sign each such endorsement and shall affix his seal to such memorandum of sale, and the particulars of every such memorandum of sale shall be entered in the register book in the order of the production thereof, and upon such entry being made by the Registrar-General, the land, or the estate or interest therein, as set forth and limited in such memorandum of sale as to be transferred, shall pass to and vest in the purchaser.*

38. *If the estate or interest in such land, so passed to and vested in such purchaser in manner aforesaid, shall be of a description less than a fee simple, the memorandum of sale so endorsed and authenticated, under the hand and seal of the Registrar-General, shall be received in any Court of Justice as sufficient evidence of the title of such purchaser to the estate or interest therein set forth and limited.*

39. *If the memorandum of sale purports to transfer a full estate in fee simple in any land, the vendor shall at the same time deliver up the grant or certificate of title of such land, and the Registrar-General shall in such case endorse on such grant or certificate of title, a memorandum cancelling such grant or certificate of title, setting forth the day and hour on which such grant or certificate of title had been delivered up to him for that purpose, with the name, residence, and description of the vendor by whom the same was so given up, and the particulars of the transfer occasioning the surrender and cancelling of such grant or certificate of title.*

40. *The Registrar-General shall thereupon make out a certificate of title of such land to the purchaser, referring therein to the original*

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grant of such land, and to the memorandum of sale thereof, to such purchaser; and in case the vendor shall, by such memorandum of sale as aforesaid, have contracted to transfer the fee simple of part only of the land included under the grant or certificate of title so delivered up to be cancelled, then the Registrar-General shall make out a certificate of title to such proprietor of the unsold balance of such land so included as aforesaid.

41. *If any estate or interest in land under the operation of this Act, or any charge on such land, become transmitted in consequence of the death, or bankruptcy, or insolvency of any proprietor, or in consequence of the marriage settlement of any female proprietor, or by any lawful means other than by a transfer according to the provisions of this Act, such transmission shall be notified to the Registrar-General, by a declaration of the person to whom such estate or interest has come by transmission, made in the form marked N, in the Schedule hereto, and containing a statement describing the manner in which and the party to whom such estate or interest has come by transmission, and such declaration shall be made and subscribed if the declarant resides at or within ten miles of the General Registry Office, then in the presence of the Registrar-General; if beyond that distance, then in the presence of the Registrar-General or any Justice of the Peace; if the declarant resides in the United Kingdom of Great Britain and Ireland, or in any British Possession, other than the said Province, or in any foreign place, then in the presence of any of the persons hereinafter appointed respectively as persons before whom the execution of instruments executed beyond the limits of the said Province may be proved.*

42. *If such transmission has taken place by virtue of the bankruptcy or insolvency of any proprietor, the said declaration shall be accompanied by such evidence as may, for the time being, be receivable in courts of justice in the said Province as proof of the title of parties claiming under any bankruptcy or insolvency; and if such transmission has taken place by virtue of the marriage settlement of a female proprietor, the said declaration shall be accompanied by such marriage settlement, or by a copy thereof duly authenticated, and a copy of the register of such marriage, or other legal evidence of the celebration thereof, and shall declare the identity of the said female proprietor; and if such transmission has taken place by virtue of any will or testamentary instrument, then if such will or testamentary instrument shall have been made in the said Province, the said declaration shall be accompanied by such will ; and if made in England, Wales, or Ireland, the said declaration shall be accompanied by such will, or by the probate thereof ; and if made in Scotland, or in any British Possession, or in any foreign country, such declaration shall be accompanied by such will, or by any copy thereof, that may be evidence by the laws of Scotland, or of such possession or foreign country ; and if such transmission shall have taken place in consequence of an intestacy, then, if such intestacy shall have occurred in the said Province, or in England, Wales, or Ire-*

land, the said declaration shall be accompanied by the letters of administration or an official copy thereof; and if in Scotland, or in any British Possession, or foreign country, then by letters of administration, or any copy thereof, or by such other documents as by the laws of Scotland, or of such possession, or foreign country, may be receivable in the Courts of Judicature thereof as proof of intestacy, together with such documentary or other evidence as may be sufficient to prove the title of such declarant to the estate or interest in such land, according to the laws for the time being in force in the said Province.

43. The Registrar-General, upon the receipt of such declaration, so accompanied as aforesaid, shall, in the case of insolvency, or marriage settlement, enter the name of the person, entitled under such transmission, in the register book as owner of the estate or interest so transmitted, and shall file such declaration in his office, and shall also endorse on the grant or certificate of title of the land in which the estate or interest is transmitted, or as the case may be, on the bill of mortgage, bill of encumbrance, lease, or other instrument evidencing title to the estate or interest transmitted, a memorandum stating the day and hour on which such transmission had been recorded in the register book as aforesaid.

44. In the case of transmission by will, or in consequence of an intestacy, the Registrar-General, upon receipt of such declaration, so accompanied as aforesaid, shall give notice by advertisement, published once in each of two successive weeks in the South Australian Government Gazette, and in at least one newspaper published in the City of Adelaide, that he has received such declaration, which notice shall be in the form of the Schedule hereto annexed, marked J, or in words to the like effect; and the Registrar-General shall cause copy of such notice to be posted in a conspicuous place in his office, and in such other public place as he may deem necessary; and in any such case, if the Registrar-General shall not, within the space of one calendar month from the date of the latest of such advertisements, receive any caveat forbidding compliance with such application, he shall enter the name of the person entitled under such transmission, in the register book, as owner of the estate or interest so transmitted ; and shall, in other respects, proceed as hereinbefore directed for the case of a transmission by insolvency ; and the Registrar-General, if he shall receive any such caveat within the time for such case above limited, shall, if the party lodging the same show reasonable grounds for so doing, suspend action in the matter, until such caveat shall have been withdrawn or until a decision shall have been obtained from the Court, having jurisdiction in the matter ; and every person who shall fail to show reasonable cause for lodging such caveat to the satisfaction of the Judge, before whom any prosecution or suit may in such case be instituted, shall forfeit and pay a penalty not exceeding One Hundred Pounds.

45. No transmission of land under the operation of this Act either by descent, will, appointment of assignees or trustees, vesting order,

Letters

letters of administration, order of the Supreme Court, or otherwise howsoever, by any proceeding filed of record, shall be valid and effectual against any subsequent purchaser,

mortgagee, or lessee, unless legal evidence of heirship, the probate or exemplification of probate of such will, appointment of assignees or trustees, vesting order, letters of administration, order of the Supreme Court, or other instrument hereinbefore required to be in such case produced, has been so produced to the Registrar-General, and the particulars of the transmission entered in the register book.

46. It shall be lawful for the Supreme Court, without prejudice to the exercise of any other power such Court may possess, upon the summary application of any person interested in transmitted land, made either by petition or otherwise, and either ex parte, or upon service of notice on any other person, as the Court may direct, to issue an order prohibiting for a time to be named in such order any dealing with such land; and it shall be in the discretion of such Court to make or refuse any such order, and to annex thereto any terms or conditions it may think fit, and to discharge such order when granted with or without costs, and generally to act in the premises in such manner as the justice of the case may require; and the Registrar-General, without being made a party to the proceedings, upon being served with such order or an official copy thereof, shall obey the same.

47. When any land under the operation of this Act is intended to be leased or demised for a term of years, the proprietor shall execute a lease in form of the Schedule hereto annexed marked C, or as near thereto as circumstances permit, and every such lease shall contain the same description that is given in the grant or certificate of title or such other description as may be sufficient to identify the land intended to be leased, and shall be attested by a witness; and such lease when so executed, together with the grant, certificate of title, or other instrument evidencing the title of such proprietor to an estate in such land, shall be presented to the Registrar-General, who shall record in the register book the date and hour of such production to him, the date of the lease, the amount of rent or consideration money, the dates on which it is appointed to be paid, and the names and description of the proprietor and of the lessee, and shall record the like particulars by memorandum on the grant, certificate of title, or other instrument as aforesaid, and shall endorse on the lease a memorandum of the day and hour on which the said particulars had been entered in the register book, and shall authenticate such memorandum by signing his name and affixing his seal thereto; and every lease bearing such memorandum, so authenticated, shall be received as sufficient evidence of the title of the lessee to the estate or interest therein demised, and of all covenants, conditions, and restrictions therein expressly set forth, or by this Act declared to be implied against the lessor and lessee respectively.

48. A right to purchase land under the operation of this Act may be granted in any such lease by the words "that the said

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lessee shall have the option of purchasing the said land subject to such conditions, limitations, and restrictions as are herein specified;" which form of words shall operate as an expressed covenant in such lease, and shall apply as follows, that is to say —if the said lessee shall elect to purchase the said land, and shall in all respects comply with such conditions as may be expressed in such lease, or are by this Act declared to be implied therein, and shall pay the purchase-money therein mentioned, together with all rent, arrears of rent, and other moneys

due and owing under or by virtue of such lease, then and in such case the lessor will execute a memorandum of sale of such land to such lessee, and will perform all acts and execute all instruments by this Act prescribed to be performed or executed by a vendor, in order to transfer to such lessee the estate or interest in such land specified.

49. The entry of every such lease in the register book, shall be held to transfer to the lessee an estate in such land as tenant, subject, nevertheless, to all such conditions and covenants as may be expressly set forth in such lease, if any, and to the conditions and covenants which are hereinafter declared to be implied against a lessor and against a lessee, or to all or any of such last-mentioned covenants as shall not be negatived or modified by express declaration in such lease or endorsed thereon: Provided always, that no lease of mortgaged land executed subsequent to the mortgage, shall be valid and binding against the mortgagee, unless such mortgagee shall have consented to such lease, in form and manner hereinafter provided.

50. Whenever any lease or demise for a term of years is intended to be surrendered, there shall be endorsed upon such lease the word "surrendered," with the date of such surrender, and upon such lease bearing such endorsement, signed by the lessee, and by the lessor accepting such surrender, and duly attested in manner hereinafter prescribed, being brought to the Register-General, he shall enter in the register book a memorandum recording the date of such surrender, and shall likewise endorse upon the lease a memorandum recording the fact of such entry having been made in the register book, and upon such entry being so made in the register book, the estate or interest of the lessee in such land shall revert in the lessor, or in such other person as, having regard to other intervening circumstances, if any, the same would be vested in had no such lease ever been executed, and the production of such lease bearing such endorsement authenticated by the hand and seal of the Registrar-General shall be sufficient evidence that such lease had been so surrendered.

51. When any estate or interest in land, under the operation of this Act, is intended to be made security for a loan or other valuable consideration, the borrower shall execute a bill of mortgage, in form of the Schedule hereto annexed, marked D, or as near thereto as circumstances permit, and every such bill of mortgage shall contain an accurate statement of the estate or interest intended to be mortgaged, and such description as is given in the grant or certificate

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of title of the land in which such estate or interest is held, or such other description as may be necessary to identify such land, and shall be attested by a witness ; and every bill of mortgage so executed, together with the grant or certificate of title of such land, or as the case may be, the lease or other instrument, proving the title of the mortgagor to such estate or interest in such land, shall be produced to the Registrar-General, who shall enter in the register book the date and hour of such production to him; the date of mortgage ; the name, residence, and description of the mortgagor and of the mortgagee ; the amount of consideration money ; the rate of interest, and the date, if any, appointed for the redemption of such mortgage ; and the

dates on which interest is appointed to be paid ; and shall record the like particulars by a memorandum endorsed upon such grant or certificate of title, lease, or other instrument of title, and shall also endorse upon such grant or certificate of title, lease, or other instrument, a memorandum stating the day and hour of the day in which the particulars of such mortgage had been recorded in the register book, and, upon such entry being made, as aforesaid, in the register book, the estate or interest in the land referred to, and described in such bill of mortgage, shall be held by such mortgagor, subject to and liable for the payment of the principal sum and interest therein set forth, at the times and under the conditions and covenants therein prescribed, or hereafter declared to be implied in bills of mortgage.

52. The repayment of any sum of money by weekly instalments, or other periodical payments, may be secured on any land or on any estate or interest therein, by bill of mortgage, in the form or to the effect of the said Schedule D to this Act annexed, by varying such form so as to express fully the terms and modes and plan of payment of such sum of money : Provided also, that the period of time hereinafter limited as the period after expiration of which it shall be lawful for a mortgagee to sell an estate pledged as security, in the event of default made in payment of interest or principal, or in the non-fulfilment of any covenant, may, by condition expressed in any such bill of mortgage, be extended or shortened, and, notwithstanding such variations in such form, the like covenants, rights, powers, and obligations, shall be implied thereunder and thereby, both against the mortgagor and the mortgagee as would be implied if no such variation had been made in the form of such Schedule.

53. In case default shall be made for the space of two calendar months in payment of the principal money or interest, or any part thereof, secured by any such bill of mortgage, so recorded as aforesaid, or if default shall be made in observance of any covenant that may be expressed in such bill of mortgage, or that is therein as against the mortgagor hereinafter declared to be implied, and the mortgagee shall have caused a written demand of payment of such principal sum or interest, or as the case may be, for the fulfilment of any such expressed or implied covenant, in respect to which such default may have been made, to be served on the mortgagor, or left at his last or usual place of abode, or if the mortgage be made by a corporate body, with the clerk thereof; and if default be made in

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either such respect for the further space of two calendar months from the service of such demand, then, in such case, it shall be lawful for the mortgagee to sell the estate or interest pledged to him as security by such bill of mortgage, or any part thereof, and either altogether or in lots, and either by public auction or private contract, or by both of such means, and subject to such conditions as he may think fit, and with power to buy in and resell the same, without being liable for any loss occasioned thereby, and to make and execute all such instruments, and to perform all such acts as in accordance with the provisions of this Act may be necessary for carrying into effect the powers hereby given, including the act of entering upon, and taking and giving possession to the purchaser of the land so pledged as security ; all which sales, contracts, matters, and things hereby authorized, shall be as valid and effectual, as if the mortgagor had made, done, or executed the same ; and the receipt or receipts in writing of the mortgagee shall be a sufficient discharge to any purchaser of any part of such mortgaged property, for so much of his purchase-money as may be thereby expressed

to be received ; no such purchaser shall be answerable for the loss, misapplication or nonapplication, or be obliged to see to the application of the purchase-money by him paid, nor shall he be concerned to inquire as to the fact of any such default or demand, as aforesaid, having been made ; the moneys to arise from such sale, as aforesaid, shall be applied: First —In payment of the expenses attending any such sale, or otherwise incurred in the execution of the power of sale hereby given: Secondly —In repayment of the principal money and interest remaining due, together with any costs and expenses occasioned by the non-payment thereof, or the non-observance of any such expressed or implied covenant ; the surplus (if any) shall be paid to the mortgagor.

54. The Registrar-General, in any such case as aforesaid, upon receipt of a memorandum of sale of such estate or interest, so pledged as aforesaid, signed by such mortgagee, together with proof to his satisfaction that all the requirements for such case by this Act provided have been duly executed and fulfilled, shall enter the particulars of such memorandum of sale in the register book, and record the fact of such entry by endorsement on such memorandum of sale, and shall in all other respects proceed in manner herein prescribed for the case of the transfer of a like estate or interest by the proprietor thereof, and every such transfer, when so recorded by the Registrar-General, shall be as valid and effectual to pass such estate or interest, as if the memorandum of sale had been executed by the mortgagor prior to the date of the execution of the bill of mortgage ; and if such memorandum of sale shall purport to pass an estate in fee simple, and the existing grant or certificate of title be for that purpose surrendered to him, the Registrar-General shall make out and deliver to the purchaser a certificate of title to such land, having first endorsed thereon memoranda setting forth the particulars of all unsatisfied mortgages or other encumbrances, and of all leases, transfers, or other transactions affecting such land if any, which shall appear to have been registered and recorded upon such grant or certificate of

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title so surrendered, and shall in all other respects proceed as hereinbefore is directed in the case of the sale of an estate in fee simple in land under the operation of this Act.

55. The Registrar-General, on the production of any bill of mortgage, executed under the provisions of this Act, and having thereon a receipt for the mortgage money duly signed and attested, shall make an entry in the register book to the effect that such mortgage has been discharged ; and upon such entry being made, the estate or interest, which by such bill of mortgage had been pledged as security for such loan, shall cease to be subject to or liable for the same, or any charges incident thereon, and the Registrar-General shall likewise endorse upon the grant or certificate of title, lease, or other instrument constituting or evidencing the title of the mortgagor to the estate or interest in such land, a memorandum of the discharge of such mortgage, and of the date of such discharge, and shall cancel such bill of mortgage : Provided always, that if at or after the date appointed for the redemption of any such mortgage, the mortgagee shall be absent from this Colony, or shall not be in attendance to receive the mortgage money either personally, or by his attorney duly authorised in that

respect, it shall be lawful for the Registrar-General to receive such mortgage money, with all arrears of interest then due thereon, in trust for such mortgagee, and the Registrar-General shall, thereupon, make entry in the register book discharging such mortgage, stating the day and hour in which such entry is made, and such entry shall be a discharge for such mortgage, valid to all intents, and shall have the same force and effect as is hereinbefore given to a like entry when made upon the production to the Registrar-General of the bill of mortgage, with the receipt of the mortgagee, and the Registrar-General shall, if demanded, give to the mortgagor a receipt for the money so paid to him in trust, and shall endorse on the grant, certificate of title, or other instrument, as aforesaid, and also on the bill of mortgage, whenever those instruments shall be brought to him for that purpose, the several particulars hereinbefore directed to be endorsed on each of such instruments respectively.

56. Whenever it is intended to render an estate or interest in land, under the operation of this Act, available for securing any dower, annuity, or sum of money, or to invest such estate or interest in trust, the proprietor shall execute a bill of encumbrance, in form of the Schedule hereto annexed marked E, or as near thereto as circumstances will permit ; or, as the case may require, a bill of trust, in form of the Schedule hereto annexed marked F, or as near thereto as circumstances will permit, which bill of encumbrance or bill of trust shall be attested by a witness, and shall set forth the nature of the estate or interest intended to be encumbered or invested in trust ; the amount of dower, or annuity, or sum of money for securing which such estate or interest is intended to be encumbered or invested in trust ; the date on which, the manner in which, and the conditions or contingencies under which such dower, annuity, or sum of money is to become payable; and the uses, contingencies, restrictions,

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restrictions, reversions, and remainders to which it is intended such dower, annuity, or sum of money should be subject or liable, if any, together with such description as may be sufficient to identify the land in which the estate or interest intended to be encumbered or vested in trust is held; and such bill of encumbrance, or bill of trust, together with the grant, certificate of title, lease, or other instrument, evidencing the title of the encumbrance to the estate or interest in such land intended to be encumbered or vested in trust shall be produced to the Registrar-General, who shall enter the particulars of such bill of encumbrance or bill of trust in the register book, and shall endorse upon the grant, certificate of title, lease, or other instrument, as aforesaid, a memorandum stating the date and hour of such production to him, for the purpose of such record being made, the date of the bill of encumbrance or bill of trust, the amount of the encumbrance, the contingencies, restrictions, reversions, and remainders, to which it is intended to be subject, if any, and the names and descriptions of the parties for whose benefit the same is created, or for whose uses such land is vested in trust, together with the names and descriptions of the trustees, if any, appointed, and upon such entry being made in the register book the estate or interest set forth in such bill of encumbrance or bill of trust shall become subject to and liable for the payment of such sums of money, dower, annuity, or other encumbrance in accordance with the conditions and limitations and subject to the covenants set forth in such bill of encumbrance or of trust, or which are hereinafter declared to be implied in any such instrument or as the case may be, such estate or interest shall become vested in the trustees named in such bill of trust, subject to such conditions and trusts as aforesaid.

57. *The Registrar-General, on the production of any bill of encumbrance, or of any bill of trust executed under the provisions of this Act, with a receipt for the amount of the encumbrance money, or trust money, endorsed thereon, duly signed and attested, or upon the receipt of proof to his satisfaction that the occurrence of the circumstances under which the amount of such encumbrance or trust could become chargeable against such land, in accordance with the conditions, limitations, and restrictions prescribed in such bill of encumbrance or bill of trust has ceased to be possible, shall make an entry in the register book to the effect that such encumbrance or trust has been discharged, or has lapsed, stating the day and hour in which such entry is made, and upon such entry being made, the interest, if any, which passed to the encumbrancee, or to the trustees under such bill of trust, shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested, if no such bill of encumbrance or bill of trust had ever been executed or made, and the Registrar-General shall thereupon cancel such bill of encumbrance or bill of trust, and shall also endorse on the grant, certificate of title, lease, or other instrument, constituting or evidencing the title of the encumbrancer to the estate or interest in the land referred to in such bill of encumbrance,*

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encumbrance, a memorandum stating that such encumbrance had been discharged, and the date on which such entry of discharge had been made in the register book.

58 *Every bill of mortgage, or bill of encumbrance, or of trust, shall be entered by the Registrar-General in the register book in the order of time in which the same is produced to him for that purpose ; and the Registrar- General shall record by memorandum on such bill of mortgage, or bill of encumbrance, or of trust, that the same has been so entered by him, stating the day and hour of such entry, and shall certify such memorandum by signing the same and affixing his seal thereto, and every such bill of mortgage, bill of encumbrance, or of trust, so certified, shall be received in all Courts of Justice as sufficient evidence that the estate and interest therein described had been so mortgaged, encumbered, or vested in trust as the case may be, and of all other particulars therein contained.*

59. *If more than one mortgage, bill of encumbrance or of trust, be registered in respect to or affecting the same estate or interest in any land under the operation of this Act, the mortgagees, encumbrancees, and trustees, shall, notwithstanding any express, implied, or constructive notice, be entitled in priority one over the other according to the date at which each instrument is recorded in the register books, and not according to the date of each instrument itself.*

60. *When any estate or interest in land under the operation of this Act shall by bill of encumbrance, or bill of trust, be transferred to any person or body corporate, to the use of, or in trust for any other person, the whole legal ownership of such estate or interest shall vest in the person or body corporate to whom the same shall be so immediately and directly*

transferred ; subject, however, to a trust for the benefit of such other person. Every limitation which before the passing of this Act might have been made by way of shifting, springing, or executory use, shall hereafter be made by transfer, in manner hereinbefore provided, without the intervention of uses, but not otherwise.

61. No registered mortgage or encumbrance of any land under this Act shall be affected by any act of bankruptcy or insolvency committed by the mortgagor or encumbrancer, after the date of the entry in the register book of the bill of mortgage, bill of encumbrance, or bill of trust, creating such mortgage or encumbrance, notwithstanding such mortgagor, or encumbrancer, at the time of his becoming bankrupt may have in his possession and disposition and be the registered owner of such land ; and such mortgage or encumbrance shall be preferred to any right, claim, or interest in such land, which may belong to the assignees of such bankrupt or insolvent.

62. A registered mortgage, a registered lease, or the interest of a
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registered encumbrancee of any land under this Act may be transferred to any person, by endorsement on the bill of mortgage, lease, bill of encumbrance, or bill of trust, which endorsement, shall be in the form of the Schedule hereto annexed marked O, or in words to the like effect; and on the production of such bill of mortgage, lease, or bill of encumbrance, so endorsed, to the Registrar-General, he shall enter in the register book the name of the transferee as mortgagee, lessee, or encumbrancee, of the land therein mentioned, and shall, by memorandum under his hand, record on such bill of mortgage, or bill of encumbrance, or lease, and, if the same be presented to him for that purpose, on the grant, certificate of title, or other instrument evidencing title to the estate or interest mortgaged or encumbered, that such transfer had been recorded by him, stating the date and hour of such record ; and, upon such entry being so made, the estate or interest of the transferor, as set forth in such instrument, with all rights, powers, and privileges thereto belonging or appertaining, shall pass to the transferee ; and such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable if named in such instrument originally as mortgagee, encumbrancee, or lessee, of such land, estate, or interest, and the Registrar-General shall certify such endorsement by signing the same, and affixing his seal thereto, and every transfer, so certified, shall be received in evidence by any Court of Justice as sufficient evidence of its having been so entered in the register book.

63. In every memorandum of sale, bill of mortgage, bill of encumbrance, bill of trust, lease, or other instrument of transfer, for valuable consideration, under provisions of this Act, there shall be implied the following covenants by each transferring party, severally for himself, to the extent of the interest departed with by him, that is to say —

(1.) That such transferring party hath good right and full power to transfer and assure the estate and interest purported to be transferred, and that free and clear from all encumbrances, other than such as are therein mentioned : That it shall be lawful for the party to whom such estate or interest is transferred quietly to enjoy the same, without any disturbance, by any act

whatsoever, of such conveying party, or any person claiming under him, or by any rightful act of any other person :

(2.) That such transferring party will, at the cost of the party requiring the same, do all such acts and execute all such instruments as in accordance with the provisions of this Act may be necessary to give effect to all covenants, conditions, and purposes expressly set forth in such memorandum of sale, bill of mortgage, bill of encumbrance or trust, lease, or other instrument of transfer as aforesaid, or by this Act declared to be implied against the transferring party in any such instrument.

64. In

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64. In every bill of mortgage, there shall be implied the following covenants against the mortgagor, that is to say —

(1.) That he will pay the principal money, and interest thereby secured, after the rate, and at the times therein mentioned, without any deduction whatsoever:

(2.) That the mortgagor will repair and keep in repair all buildings or other improvements erected and made upon such land ; and that the mortgagee may, at all convenient times, until such mortgage be redeemed, be at liberty, with or without surveyors or others, to enter into and upon such land, to view and inspect the state of repair of such buildings or improvements.

65. In every lease there shall be implied the following covenants against the lessee, that is to say —

(1.) That he will pay the rent thereby reserved at the times therein mentioned, and all rates and taxes which may be payable in respect of the demised property, during the continuance of the lease:

(2.) That he will keep and yield up the demised property in good and tenantable repair:

66. In every lease there shall also be implied the following powers in the lessor, that is to say —

(1.) That he may, by himself or his agents, at all reasonable times, enter upon the demised property, and view the state of repair thereof, and may serve upon the lessee, or leave at his last, or usual place of abode, a notice, in writing, of any defect, requiring him, within a reasonable time to be therein prescribed, to repair the same :

(2.) That whenever the rent reserved shall be in arrear for twenty-one days, he may levy the same by distress:

(3.) That in case the rent, or any part thereof, shall be in arrear for the space of six calendar months; or in case insurance as aforesaid shall not have been effected, or in case default in the fulfilment of any covenant expressly set forth in such lease as against the lessee shall not have been repaired, or in case the repairs required by such notice as aforesaid shall not have been completed within three calendar months after the service or leaving thereof, it shall be lawful for him to re-enter upon the demised property, and, upon proof of such re-entry, under any such circumstances, being made to the satisfaction of the Registrar-General, he shall note the same by entry in the register book, and the estate in the lessee in such land shall thereupon determine, but without releasing him from his liability in respect of the breach of any covenant in such lease expressed or implied.

67. Such of the covenants hereinafter set forth as shall be expressed in any lease or mortgage, as to be implied against the lessee or mortgagor, shall, if expressed in the form of words hereinafter appointed

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and prescribed for the case of each such covenant respectively, be so implied against such lessee or mortgagor as fully and effectually as if such covenants were set forth fully and in words at length in such lease or mortgage ; that is to say, the words "that he will insure," shall imply as follows —that he will insure and so long as the term expressed in the said mortgage or lease shall not have expired, will keep insured, in some public insurance office, to be approved by such mortgagee or lessor, against loss or damage by fire, to the full amount specified in such lease or bill of mortgage, or if no amount be specified, then to their full value all buildings, tenements, or premises erected on such land, which shall be of a nature or kind capable of being insured against loss or damage by fire, and that he will, at the request of the mortgagee or lessor, hand over to, and deposit with him, the policy of every such insurance, and produce to him the receipt or receipts for the annual or other premiums payable on account thereof : Provided always, that all moneys to be received under or by virtue of any such insurance shall, in the event of loss or damage by fire, be laid out and expended in making good such loss or damage: Provided also, that if default shall be made in the observance or performance of the covenant last above-mentioned, it shall be lawful for the mortgagee or lessor, without prejudice nevertheless, to and concurrently with the powers granted him by his bill of mortgage or lease, in manner in and by this Act provided, to insure such building, and the costs and charges of such insurance shall, until such mortgage be redeemed, or such lease shall have expired, be a charge upon the said land; the words "and paint outside every alternate year" shall apply as follows, viz. —and also will, in every alternate year, during the currency of such lease, paint all the outside woodwork and iron work belonging to the hereditaments and premises mentioned in such lease, with two coats of proper oil-colors, in a workmanlike manner ; the words "and paint and paper inside every third year" shall imply as follows, viz. —and will, in every third year, during the currency of such lease, paint the inside wood, iron, and other works now or usually painted with two coats of proper oil-color, in a workmanlike manner ; and also repaper, with paper of a quality as at present, and such parts of the said premises as are now papered ; and also wash, stop, whiten, or color such parts of the said premises as are now whitened or colored respectively ; the words "and will fence" shall apply as follows, viz. —and also will, during the continuance of the said lease, erect and put up on the boundaries of the land therein mentioned, or upon such

boundaries upon which no substantial fence now exists, a good and substantial fence capable of resisting the trespass of horses, oxen, bulls, and cows; the words "and cultivate" shall apply as follows, viz. —and will at all times during the said lease cultivate, use, and manage all such parts of the land therein mentioned as are or shall be broken up or converted into tillage in a proper and husbandlike manner, and will not impoverish or waste the same ; the words "that the said lessee will not use the said premises as a shop" shall apply as follows, viz. —and also that the said lessee will not convert, use, or occupy the said hereditaments and premises mentioned in such lease, or any part thereof,

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into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or permit or suffer the said hereditaments and premises, or any part thereof, to be used for any such purpose or otherwise than as a private dwelling-house, without the consent in writing of the said lessor ; the words "and will not carry on offensive trades" shall apply as follows: — and also that no noxious, noisome, or offensive art, trade, business, occupation, or calling shall at any time during the said term be used, exercised, carried on, permitted, or suffered in or upon the said hereditaments and premises above mentioned, and that no act, matter, or thing whatsoever shall at any time during the said term be done in or upon the said hereditaments and premises, or any part thereof, which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of the adjoining lands and hereditaments ; the words "and will not, without leave, assign, or sublet" shall apply as follow, viz. —and also that the said lessee shall not nor will during the term of such lease assign, transfer, demise, sublet, or set over, or otherwise by any act or deed procure the lands or premises therein mentioned, or any of them, or any part thereof, to be assigned, transferred, demised, sublet, or set over unto any person whomsoever without the consent in writing of the said lessor first had and obtained ; the words "and will not cut timber" shall apply as follows —and also that the said lessee shall not nor will cut down, fell, injure, or destroy and growing or living timber, or timber-like trees, standing and being upon the said hereditaments and premises above mentioned, without the consent in writing of the said lessor ; the words "and will carry on the business of a publican, and conduct the same in an orderly manner," shall apply as follows, viz. —and also that the said lessee will, at all times during the currency of such lease, use, exercise, and carry on, in, and upon the premises therein mentioned, the trade or business of a licensed victualler or publican and retailer of spirits, wines, ale, beer, and porter, and keep open and use the messuage, tenement, or inn, and buildings standing and being upon the said land as and for an inn or public-house for the reception, accommodation, and entertainment of travellers, guests, and other persons resorting thereto or frequenting the same, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed, any act, matter, or thing whatsoever, whereby or by means whereof any licence shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner howsoever; the words "and will apply for renewal of licence" shall apply as follows, viz —and also shall and will from time to time during the continuance of the said term, at the proper times for that purpose, apply for and endeavour to obtain, at his own expense, all

such licences as are or may be necessary for carrying on the said trade or business of a licensed victualler or publican, in and upon the said hereditaments and premises, and keeping the said messuage, tenement, or inn open as and for an inn or public-house as aforesaid ; the words "and will facilitate the transfer of licence" shall apply as follows, viz. —and also shall and will,

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will, at the expiration or other sooner determination of the said lease, sign and give such notice or notices, and allow such notice or notices of a renewal or transfer of any licence as may be required by law to be affixed to the said messuage, tenement, or inn, to be thereto affixed, and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things, as shall be necessary to enable the said lessor, or any other person authorized by him, to obtain the renewal of any licence, or any new licence, or the transfer of any licence then existing and in force.

68. In every transfer of land under a bill of encumbrance, or of trust, by way of marriage settlement, there shall be implied the following powers in every tenant for life, in possession of the property or of any undivided share thereof, or in his guardian, or in the committee of his estate, or in case there shall be no tenant for life in possession, then in the trustees of the settlement, that is to say —that he or they may demise or lease, or concur in respect of such share in demising or leasing the property, estate or interest in settlement, for any term not exceeding twenty-one years, to take effect in possession at a reasonable yearly rent, without taking any fine or premium for the making such lease, and so that the lessee or lessees do execute a counterpart thereof.

69. There shall also be implied in the trustees of the settlement, at the request in writing of any tenant for life in possession, or his guardian, or Committee; or if there be no such tenant for life, then at their own discretion, the following powers, that is to say —that they may dispose of the property in settlement, or any part thereof, either by way of sale, or in exchange for other property of the like nature and tenure, situated within the said Province ; or where such property shall consist of an undivided share, may concur in the partition of the entirety of such property ; and may give or take any money by way of equality of exchange or partition : Provided that the moneys to arise from any such sale, or be received for equality of exchange or partition, shall, with all convenient speed, be laid out in the purchase of other property, of like nature and tenure, situate within the said Province ; and, moreover, any property so purchased or taken in exchange, shall be settled in the same manner and subject to the same trusts, powers, and provisoes, as the property so sold or given in exchange : Provided also, that until the moneys received in consequence of such sale, or exchange, or partition, shall be laid out as aforesaid, the same shall be invested on real security in the said Province, or in Government securities, and the interest thereof shall be paid to the persons entitled to the rents and profits of the property in settlement.

70. In every memorandum of sale or other instrument executed by a trustee, as trustee only, and not as the person beneficially interested in the land thereby contracted to be transferred or otherwise dealt with, there shall be implied a covenant only that such trustee hath

Not

not at any time before the execution of such memorandum of sale or other instrument done, or knowingly suffered to be done, any act, matter, or thing, whereby or by means whereof the land therein referred to can or may be impeached, charged, encumbered, or in any manner prejudicially affected in title, estate, or otherwise howsoever.

71. Where any memorandum of sale or other instrument in accordance with the provisions of this Act, is executed by more parties than one, such implied covenants shall be construed to be several and not to bind the parties jointly, and in any declaration in an action for a supposed breach of any such covenants, the covenant alleged to be broken may be set forth, and it shall be lawful to allege that the party against whom such action is brought did so covenant precisely in the same manner as if such covenant had been expressed in words in such memorandum of sale or other instrument, and law or practice to the contrary notwithstanding.

72. That when the deceased owner shall by any instrument or covenant bind or have bound his heirs, the term "heirs" shall be construed to mean the person or several persons who by law shall be chargeable with the debts of such deceased owner.

73. In every case where any of the covenants or powers aforesaid would be implied by or in any woman if unmarried, the same shall be implied by or in her husband if she shall be married.

74. Every covenant which shall be implied by virtue of this Act shall have the same force and effect, and be enforced in the same manner as if it had been set out at length in the instrument wherein the same shall be implied.

75. Every covenant and power to be implied in any instrument by virtue of this Act may be negatived or modified by express declaration on the instrument, or endorsed thereon.

76. No vendor of any land under the operation of this Act shall have any equitable lien thereon by reason of the non-payment of the purchase-money, or any part of the purchase-money, for the same.

77. Except as hereinbefore provided in the case of right of purchase covenanted in a lease, no agreement for the sale, lease, or other dealing with any estate or interest in land under the operation of this Act to be performed in futuro, shall be entered in the register book ; but any person claiming an interest in any such land under any such contract or agreement, or having any claim or interest adverse to any will may, by caveat in the form of the Schedule hereto marked P, or as near thereto as circumstances will permit, forbid the registration of any will or other instrument affecting such land, estate, or interest.

78. *The proprietor of land under the operation of this Act, or any person registered as having estate or interest therein, may authorize*

And

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and appoint any person to act for him, or on his behalf, in respect to the leasing of such land, or the sale or mortgage of his estate or interest therein, or otherwise lawfully to deal with such land, in accordance with the provisions of this Act, by executing a power in form of the Schedule hereto marked G, or as near thereto as circumstances will permit, which power shall contain the same description of such land as is contained in the grant, or existing certificate of title thereof, or such other description as may be sufficient to identify the said land, and shall set forth accurately the estate or interest of such proprietor in the said land, and shall specify the nature of the power intended to be conferred, the name and description of the person by whom, the places where, and the time within which it is to be exercised ; and upon such power being brought to the Registrar-General, he shall enter the particulars of the same in the register book, and shall record upon such power a memorandum of the day and hour on which the said particulars were so entered, and shall authenticate such record by signing the same and affixing thereto his seal ; and from and after the date of such entry in the register book, all acts lawfully done or performed by the person so appointed under authority of and within the limits prescribed in such power, shall have the same force and effect, and be equally binding on such proprietor, as if the said acts had been done or performed by such proprietor ; and every such power bearing such endorsement, authenticated as aforesaid, shall be received in evidence as sufficient proof that the person to whom such power has been granted is duly authorized to make all contracts, to sign all instruments, and to perform all other lawful acts in accordance with the powers therein limited and appointed for the attainment of the objects therein specified, or any of them : Provided always, that nothing herein contained shall be interpreted to invalidate any power of attorney executed without the limits of the said Province, or prior to the passing of this Act, although such power may not be in accordance with the provisions of this Act.

79. *The Registrar-General, upon the application of any registered proprietors of land under the operation of this Act, shall grant to such proprietor a registration abstract enabling him to sell, mortgage, or otherwise deal with his estate or interest in such land at any place without the limits of the said Province, which registration abstract shall be in the form in the Schedule hereto marked H, or as near to such form as circumstances will permit, and the Registrar-General shall at the same time enter in the register book a memorandum recording the issue of such registration abstract, and shall endorse on the grant, certificate of title, or other instrument evidencing or constituting the title of such applicant proprietor to such estate or interest a like memorandum recording the issue of such registration abstract, and from and after the issuing of any such registration abstract, no sale, mortgage, lease, or other transaction transferring, encumbering, or in any way affecting the estate or interest in respect of which such registration abstract is issued shall be entered in the register book until such abstract shall have been surrendered to the*

Registrar

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Registrar-General to be cancelled, or the loss or destruction of such abstract proven to his satisfaction, or until the same shall have been revoked in manner hereinafter provided.

80. Whenever any sale, mortgage, or lease is intended to be transacted under any of such registration abstract, a memorandum of sale, bill of mortgage, or lease as the case may require, shall be prepared in duplicate in the forms for such case hereinbefore appointed and prescribed, or as near to such form as circumstances will permit, and shall be produced to some one of the persons hereinafter appointed as persons before whom the execution of instruments without the limits of the said Province may be proven, and record shall be made upon such registration abstract of the several particulars hereinbefore required to be entered in the register book by the Registrar-General in the case of a transfer, mortgage, or lease, as the case may be, made within the limits of the said Province, and upon such record being authenticated by the signature of such authorized person as aforesaid, such transfer, mortgage, or lease shall be as valid and binding to all intents as if the same had been made within the limits of the said Province, and recorded in the register book by the Registrar-General, and subject to the rules hereinafter for each such case prescribed, every person whose name shall have been so recorded as purchaser, mortgagee, or lessee of such land upon such registration abstract, shall be held and taken to be registered as such, and shall have the same rights and powers, and be subject to the same liabilities as he would have had and been subject to if his name had been registered in the register book instead of on such abstract as proprietor, mortgagee, or lessee of such land or of such estate or interest therein.

81. The following rules shall be observed as to powers of attorney and registration abstracts :—

(1.) The power shall be exercised in conformity with the directions contained therein:

(2.) No sale, mortgage, or lease bona fide made thereunder shall be impeached by reason of the person by whom the power was given dying before the making of such sale, mortgage, or lease:

(3.) Whenever the power contains a specification of the place or places at which, and a limit of time within which, the sale is to be exercised, no sale, mortgage, or lease bona fide made to a purchaser, mortgagee, or lessee without notice shall be impeached by reason of the bankruptcy or insolvency of the person by whom the power was given :

(4.) If sale be effected, there shall be delivered up to the Registrar- General the memorandum of sale by which the land or any estate or interest therein is contracted to be transferred, the registration abstract, and the grant, certificate of title, lease, or other instrument of title; the Registrar-General shall enter in the register book a memorandum of the particulars of such sale, and of the cancelling of such abstract, and shall endorse on such memorandum, and also on the grant, certificate of title,

lease,

lease, or other instrument of title a memorandum of the date and hour on which such entry was made, and if a full estate in fee simple, in such land, or in any part thereof, shall have been passed by such memorandum of sale, he shall cancel the grant or certificate of title delivered up, and shall issue a certificate of title of such land, or of the sold portion thereof to the purchaser, and if part only be sold, he shall also issue a certificate of title of the unsold portion to the proprietor ; and shall, before issuing the same, endorse on each of such certificates of title, a memorandum of the particulars of all unsatisfied mortgages or encumbrances appearing in the registry book, or on the registration abstract affecting the land included under each such certificate of title respectively:

(5.) Every mortgage which is so endorsed as aforesaid on the registration abstract shall have priority over all bills of mortgages of the same estate executed subsequently to the date of the entry of the issuing of such abstract in the register book ; and if there be more mortgages than one so endorsed, the respective mortgagees claiming thereunder shall, notwithstanding any express, implied, or constructive notice, be entitled one before the other according to the date at which a record of each instrument is endorsed on such abstract, and not according to the date of the bill of mortgage:

(6.) The discharge and also the transfer of any mortgage, so endorsed on such abstract may be endorsed on such abstract by any person hereinbefore authorized to record a mortgage thereon upon the production of such evidence and the execution of such instruments as are hereinbefore required to be executed and produced to the Registrar on the entry of the discharge or transfer of a mortgage in the register book ; and such endorsement, so made on such abstract, shall have the same effect and be as valid, to all intents, as if such transfer or discharge had been entered in the register book by the Registrar-General in manner hereinbefore provided.

(7.) Upon proof, at any time, to the satisfaction of the Registrar-General that any power or registration abstract is lost, or so obliterated as to be useless, and that the powers thereby given have never been exercised, or if they have been exercised then upon proof of the several matters and things that have been done thereunder, it shall be lawful for the Registrar-General, with the sanction of the Lands Titles Commissioners, as circumstances may require, either to issue a new power or registration abstract, as the case may be, or to direct such entries to be made in the register book, or such other matter or thing to be done as might have been made or done if no such loss or obliteration had taken place.

(8.) Upon the delivery of any abstract to the Registrar-General, he shall, after recording in the register book in such manner as to preserve its priority, the particulars of every unsatisfied mortgage registered thereon, cancel such abstract, and enter the fact of such cancellation in the register book; and shall also, by

Endorsement

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endorsement on the grant, or certificate of title, lease, or other instrument, evidencing the title of such proprietor to such land, note the particulars of every such unsatisfied mortgage, and of every such lease, and the cancellation of such certificate of mortgage, and every certificate so

cancelled shall be void to all intents, and shall file in his office the duplicates of every memorandum of sale, bill of mortgage, lease, or other instrument executed thereunder, which may for that purpose be delivered to him.

82. The registered owner for the time being of any land in respect of which a power of attorney has been issued may, by an instrument, under his hand, in the form Q in the Schedule hereto, or as near thereto as circumstances will permit, revoke such power; and if the holder of such power shall neglect or refuse to surrender the same to such owner, or his agent exhibiting such revocation order, duly certified by the Registrar- General, he shall be guilty of a misdemeanour, and on conviction thereof shall forfeit and pay a sum not exceeding One Hundred Pounds, unless it shall be made to appear to the satisfaction of the Court before whom the case may be tried, that the powers given therein had been exercised prior to the presentation of such revocation order.

83. After the presentation of such revocation order to the holder of such power, the said power shall, so far as concerns any mortgage or sale to be thereafter made, be deemed to be revoked and of no effect.

84. Whenever it is intended that partition should be made by copartners, joint tenants, or tenants in common, of any land under the operation of this Act, or of any estate or interest in such land, such copartners, joint tenants, or tenants in common, may execute a memorandum of sale, lease, or other such instrument of transfer as in accordance with the provisions of this Act the nature of the estate or interest may require, purporting to sell, lease, or otherwise transfer, to each or any of such copartners, joint tenants, or tenants in common respectively, such part of the said land, or their estate or interest in such part of the said land as shall be expressed and described in such memorandum of sale, lease, or instrument of transfer; and upon such memorandum of sale, lease, or other instrument being presented to the Registrar-General, he shall enter the particulars of the same in the register book, and proceed in other respects as is hereinbefore directed for the case of the transfer of a like estate or interest in land under the operation of this Act, and upon such entry being made in the register book, the estate or interest of such copartners, joint tenants, or tenants in common, in the particular piece of land described in such memorandum of sale, lease or other instrument, shall pass from such copartners, joint tenants, or tenants in common, and shall vest in the individual named and described as purchaser, lessee, or transferee, of the estate or interest of such copartners, joint tenants, or tenants in common, as set forth, limited,

And

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and described in such memorandum of sale, lease, or other instrument of transfer.

85. If the consent or direction of any person shall be requisite or necessary upon a sale or other disposition of land under the operation of this Act, or any estate or interest therein, such consent or direction may be endorsed upon the memorandum of sale, or other instrument executed for the purpose of transferring, or otherwise dealing with such land, or estate or

interest therein, in the words following, that is to say —“I consent hereto,” which consent or direction, when signed by such consenting or directing party, and attested in manner hereinafter prescribed, shall have full validity and effect.

86. *Every instrument signed by any married woman, as a vendor, mortgagor, or lessor, or otherwise, for the purpose of disposing of, releasing, surrendering, or extinguishing any estate, right, title, or interest in any land under the operation of this Act, if produced and acknowledged by her in manner provided by the Ordinance of the Governor in Council of the said Province, No.15 of 1845, intituled “An Ordinance to render effectual Conveyances by Married Women, and to declare the effect of certain Deeds relating to Dower,” shall have the same effect and validity as is by this given to instruments of the like nature when signed by male persons of full age and sound mind, attested in manner hereinbefore prescribed.*

87. *If any person interested in any land under the operation of this Act is, by reason of infancy, lunacy, or other inability, incapable of making any declaration or doing anything required or permitted by this Act to be made or done by a proprietor in respect of registry, transfer, or transmission, mortgage, or encumbrance of such land, or the release of the same from any mortgage or encumbrance, or the leasing, assigning, or in any other manner dealing with such land, then the guardian or committee, if any, of such incapable person, or, if there be none, any person appointed by any Court or Judge possessing jurisdiction in respect of the property of incapable persons, upon the petition of any person on behalf of such incapable person, or of any other person interested in the making such declaration, or doing such thing, may make such declaration, or a declaration as nearly corresponding thereto as circumstances permit, and do such thing in the name and on behalf of such incapable person; and all acts done by such substitute shall be as effectual as if done by the person for whom he is substituted.*

88. *The execution of any instrument made in accordance with the provisions of this Act, or the discharge of any mortgage or encumbrance, or the transfer or surrender of any lease, may be proved, if the parties executing the same be resident within ten miles of the Registry Office, then before the Registrar-General; if the parties executing the same be resident at a distance from the Registry Office greater than ten miles, then before the Registrar-General or a Justice of the Peace; if the said parties be resident in Great Britain, then by the Mayor*

Or

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or other Chief Officer of any Corporation, or before a Notary Public; if the said parties be resident in any British Possession, then before the Chief Justice, Judge of any Superior Court having jurisdiction in such Possession, or before the Governor, Government Resident, or Chief Secretary thereof; if the said parties be resident at any foreign place, then before the British Consular Officer resident at such place; and a certificate of such proof, under the hand and seal of the Registrar-General, or of any such Justice of the Peace, Notary Public, Mayor, or other Chief Officer, Chief Justice, Judge, Governor, Resident, Chief Secretary, or Consular Officer, as the case may be, shall be sufficient evidence that the execution of such instrument, had been duly proved.

89. *The execution of any such instrument, release, transfer, or surrender, may be proved before any such person as aforesaid, by the oath or solemn affirmation of the parties*

executing the same, or of a witness attesting the signing thereof; and if such witness shall answer in the affirmative, each of the questions following, that is to say — Are you the witness who attested the signing of this instrument, and is the name or mark purporting to be your name or mark as such attesting witness your own handwriting? Do you personally know, the person signing this instrument, and whose signature you attested? Is the name purporting to be his signature his own handwriting —is he of sound mind —and did he freely and voluntarily sign the same? Then the Registrar-General, Justice, or other person before whom such witness shall prove such signature as aforesaid, shall endorse upon such instrument a certificate in form of the Schedule hereto annexed marked R, or as near thereto as circumstances will permit; Provided also, that, if any person signing any such instrument, transfer, release, or surrender, as aforesaid, as the maker thereof, shall be personally known to the Registrar- General, Justice, or other person as aforesaid, it shall be lawful for such person to attend and appear before such Registrar-General, Justice, or other person to whom he is personally known, and then and there acknowledge that he did freely and voluntarily sign such instrument, transfer, release, or surrender; and upon such acknowledgment, the Registrar-General, Justice, or other person, as the case may be, shall endorse on such instrument a certificate, in the form or to the effect of the Schedule hereto marked S, or as near thereto as circumstances will permit, and it shall not be necessary for such instrument to be proved by the attesting witness in manner aforesaid: Provided also that such questions as aforesaid may be varied as circumstances shall or may require, in case any person shall sign such instrument by his mark: Provided also, that, on the signing of any such instrument by any married woman, and the acknowledgment thereof by her in manner mentioned or referred to in this Act, no further or other proof or acknowledgment shall be requisite or necessary.

90. *Every such Justice as aforesaid, sitting in open Court, shall be, and he is hereby required to administer the oath, or take the solemn*

affirmation,

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affirmation, or the acknowledgment, of any person attending before him for the purpose of proving or acknowledging any such instrument as aforesaid.

91. *It shall not be lawful for any person to institute or prosecute any action of ejectment for the recovery of land under the operation of this Act, against the registered proprietor, save and except only in the case of a mortgagee against his mortgagor, an encumbrancee against his encumbrancer, or a lessor against his lessee, in default, under the terms, conditions, or covenants of a bill of mortgage, bill of encumbrance, bill of trust, or lease, as the case may be, executed and registered in accordance with the provisions of this Act, or in the case of any person duly authorised by any Court having jurisdiction in cases of bankruptcy or insolvency, against a bankrupt or insolvent, or in case the registered proprietor has obtained such land by fraud or misrepresentation.*

92. Any person who shall, by the decree of any Court having jurisdiction in such case, be declared to be the lawful heir to any land under the operation of this Act, or any person who shall by any such decree be declared to have been deprived of an estate or interest in such land, through the entry in the register book of any memorandum of sale or other instrument affecting such land, made, or procured to be made by fraud, error, misrepresentation, oversight, or deceit, may bring and prosecute an action at law in the Supreme Court for the recovery of damages against the person who may, by fraud or other means as aforesaid, have become registered as proprietor of such land; and the Court or Jury before whom such action is tried shall, if such person obtains a verdict in his favour, find damages against the person so registered as proprietor through fraud, or error, or other means aforesaid, for such sum of money as the Court or Jury may think fit, not exceeding the value of such land at the time when such person did so wrongfully, or in error become registered as proprietor of the same, together with interest on the amount of such value, computed at Six Pounds in the One Hundred Pounds per annum, from the date when such person so became wrongfully, or in error, registered as proprietor.

93. In case the person against whom damages shall in any such case be awarded, shall have been so registered as proprietor, through error or misconception, and not through fraud, misrepresentation, or deception, it shall be lawful for such last-named person, in lieu of paying such sums of money so awarded as damages (if he shall so elect and is in a position so to do), to transfer such land to the person who shall have obtained such verdict, clear of any mortgage, encumbrance, or any lien or liability of such nature or amount as to reduce the value of the said land, estate, or interest below the amount so awarded as damages; and the memorandum of sale, or other instrument evidencing transfer of such land, estate, or interest to the person who shall have obtained such verdict, duly executed and registered in accordance with the provisions of this Act, shall be received in any

Court

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Court of Law or Equity as a sufficient discharge for the liability on account of the sum of money so awarded as damages.

94. If it shall be made to appear, to the satisfaction of the Court before whom such action shall be tried, that any person, at the time then being registered as proprietor in respect of such estate or interest, has been so registered through fraud or misrepresentation, or in any manner otherwise than as purchaser, or mortgagee for bona fide valuable consideration, or by transfer, or transmission from or through a purchaser or mortgagee for bona fide valuable consideration, it shall be lawful for such Court to direct the Registrar-General to cancel the entry in the register book recording the proprietorship of the person who shall by such fraud or misrepresentation have been so registered, together with all subsequent entries therein relating to the same estate or interest, and the Registrar-General shall obey such order, and the estate or interest referred to in such order shall thereupon revert to and vest in the persons in whom (having regard to intervening circumstances, if any) the same would have vested had no such entries been so made in the register book.

95. If, at the date of making such decree as aforesaid, the person who shall, by fraud, misrepresentation, or error, have been registered as proprietor of the estate or interest therein

referred to, shall still be registered as proprietor of the same estate, or of any portion thereof, notice of such decree, signed by the Master of the Supreme Court, or by the Judge by whom such decree was made, served upon the Registrar-General, shall operate as a destringas, and the Registrar-General, upon the receipt of such notice, and until the damages awarded shall be paid or satisfied, shall abstain from recording on the register book any transfer, mortgage, or other transaction, affecting the same estate or interest, except for the purpose of satisfying such award in manner hereinbefore provided.

96. In case the person against whom such verdict shall have been obtained shall fail to pay, within reasonable time, the amount of damages so awarded, or to convey the estate or interest to the person who shall have obtained such verdict, the amount of such award may be levied by distress upon the goods of such person, or he may be attached, and lodged in the common gaol in Adelaide until such amount be paid or satisfied in manner aforesaid: and, in case of a return of nulla bona, or if the amount recovered by such distress shall not suffice to cover the amount of damages so awarded, together with all costs of suit, the Registrar-General shall address to the Treasurer of the said Province, a requisition for the payment of the amount so awarded, or of the balance thereof, and the said Treasurer upon receipt of such requisition, and of a warrant under the hand of the Governor, countersigned by the Chief Secretary of the said Province, shall pay such amount, and shall charge the same to the account of the assurance fund hereinbefore described.

97. No action of ejectment, or for recovery of damages, shall be in any case instituted against any registered proprietor after the

Expiration

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expiration of the time within which it shall be lawful, by any law for the time being in force in the said Province, to bring or commence an action for ejectment for the recovery of any land.

98. If any certificate of title, or other instrument affecting land, under the operation of this Act, or any entry, memorandum, or endorsement, in or upon any such instrument, shall be obtained from or issued by the Registrar-General through or by means of fraud, error, misrepresentation, oversight, or deceit, it shall be lawful for the said Registrar-General, by summons under the hand of a Judge of the Supreme Court, to be issued to such Registrar-General upon verbal application made by him, to summon the person to whom such certificate, or other instrument, shall have been issued, to surrender and yield up such certificate, or other instrument to such Registrar General ; and if such person shall neglect or refuse to surrender and yield up such certificate, or other instrument, it shall be lawful for the said Court, or any Judge thereof, upon proof that such summons had been duly served, and upon the like application of the Registrar-General, to issue an attachment against such person, and commit him to the common gaol at Adelaide, until such certificate, or other instrument, be surrendered and yielded up; and the Registrar-General shall give public notice, by advertisement, published once in each of three successive weeks in the South Australian Government Gazette, and at least one newspaper published in the City of Adelaide, that such

certificate, or other instrument, or such entry, memorandum, or endorsement, had been obtained or issued in manner as aforesaid, and shall declare such certificate, or other instrument, or such entry, memorandum, or endorsement, to be void and of no effect: Provided always, that nothing herein contained shall be held to operate in any such manner as to subject to impeachment or to defeat the title of any person who, before the issue of such summons as aforesaid, shall, upon payment of bona fide valuable consideration, have become registered as proprietor in respect to the estate or interest referred to in such certificate, entry, memorandum, or endorsement.

99. In the event of the grant or certificate of title of any land registered under this Act being lost, mislaid, or destroyed, the proprietor of such land, together with other persons, if any, having knowledge of the circumstances, may make a declaration before the Registrar-General, stating the facts of the case, the names and descriptions of the registered owners, and the particulars of all mortgages, encumbrances, or other matters affecting such land and the title thereto, to the best of declarant's knowledge and belief; and the Registrar-General, if satisfied as to the truth of such declaration, and the bona fides of the transaction, may, with the consent of the Lands Titles Commissioners, issue to such applicant a provisional certificate of title of such land, which provisional certificate shall contain an exact copy of the original grant, or certificate of title, bound up in the register book, and of every memorandum and endorsement thereon at the time appearing, and shall also contain a statement

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ment of the circumstances under which such provisional certificate is issued; and the Registrar-General shall, at the same time, enter in the register book notice of the issuing of such provisional certificate, and the date thereof, and the circumstances under which it was issued; and such provisional certificate shall be available for all purposes and uses for which the grant, or certificate of title, so lost or mislaid would have been available, and as valid to all intents as such lost grant or certificate.

100. The Registrar-General, upon receipt of any caveat in accordance with the provisions of this Act, shall cause the same to be published in the Government Gazette of the said Province, and also in at least one newspaper published in the City of Adelaide, three several times in each of three successive weeks, at the expense of the person serving such caveat, and in case such person shall refuse to pay the expense thereof, the Registrar-General shall not be bound or obliged to receive such caveat.

101. The Registrar-General shall give notice of the receipt of such caveat to every person registered as proprietor in respect to the estate or interest referred to in such caveat, and to every person presenting for purpose of registration any instrument relating to such estate or interest, and such registered proprietor, or other person claiming estate or interest in the same land, may, if he think fit, summon the person signing such caveat to attend before the Judges of the Supreme Court of the said Province, or one of them, to show cause why such caveat should not be withdrawn; and it shall be lawful for the said Court, or a Judge thereof, upon proof that such last-mentioned person has been summoned, to make such order in the premises, either ex parte or otherwise, as to the said Court or Judge shall seem fit.

102. *Within three calendar months from the entering of such caveat, the person entering the same shall take proceedings to establish his claim, and such proceedings shall be by way of petition to the Supreme Court, which shall be filed on oath, and shall contain as concisely as may be, a statement of the material facts on which the petitioner relies, such statement to be divided into paragraphs, numbered consecutively, and each paragraph shall contain, as nearly as may be, a separate and distinct allegation, and shall state specifically what estate, lien, or charge the petitioner claims, and the said Court, upon receipt of such petition, shall issue an order appointing a time for hearing the same.*

103. *The petitioner shall cause a copy of such petition and of the order for hearing to be served upon the registered proprietor of the estate or interest in respect to which such caveat is lodged, or upon the person applying to have land brought under the operation of this Act as the case may be, fourteen days at least before the day appointed for the hearing of the said petition.*

104. *On the day of hearing, the claimant is personally, or by counsel, to show cause in Court if he can, and if necessary by affidavit, why the matters claimed by such petitioner should not be ordered.*

105. *If*

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105. *If the claimant shall not appear on the day appointed for the hearing, the Court may, upon due proof of the service of such petition and order, make such order, in the absence of the claimant, either for the establishment of the rights of the petitioner, or as the nature and circumstances of the case may require, as to such court may seem meet. Hearing of petition.*

106. *On the day appointed for the hearing of the petition, and on hearing the same, and the affidavits, if any, filed in support thereof, and hearing what may be alleged on behalf of the claimant, the Court may, if it shall think fit, make an order establishing the right of the petitioner, or directing any inquiries to be made, or other proceedings taken, for the purpose of ascertaining the rights of the parties, or may dismiss the petition.*

107. *The Supreme Court may, if it shall think fit, direct any question of fact brought before it to be decided before a Judge thereof; and for that purpose may direct an issue to be tried, wherein the petitioner shall be plaintiff, and the claimant shall be defendant; and the said Court shall direct when and where the trial of such issue shall take place, and shall also require the claimant and petitioner severally to name an attorney to act on his behalf; and the Court may also direct the parties to produce all deeds, books, papers, and writings, in their custody or power, on a day to be named by the Court, and each party shall have liberty to inspect the same, and take copies thereof, at their own expense; and such of them as either party shall give notice to have produced at the trial, shall be produced accordingly; and, in case the parties differ upon the question or questions to be tried, the Court may either settle the same, or otherwise refer it to the Land Titles Commissioners.*

108. If the Court shall find that the petitioner is entitled to all or some of the matters claimed by him, the order of the Court shall declare what is the estate, interest, lien, or claim to which the petitioner is entitled, and shall direct such order to be served upon the Registrar-General, who shall obey the same or act in accordance therewith. Effect of order.

109. Every order of the Court shall have such and the like effect as a decree or decretal order of the Court made in a suit commenced by bill, and duly prosecuted to a hearing, according to the present practice of the Equitable Jurisdiction of the Court.

110. If, at the hearing of such petition, it shall appear to the Court that, for the purposes of justice, it is necessary or expedient that a bill should be filed, the Court may order or authorize such bill to be filed subject to such terms as to costs or otherwise as may be thought proper.

111. The Court shall have power in all cases to order the payment of the costs occasioned by entering the caveat or incidental thereto, to

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to be paid by or to the petitioner, as the case may require and as the Court may think fit.

112. The procedure and practice in the matter of a petition presented under this Act shall, unless otherwise provided, be regulated by the procedure and practice of the Equitable Jurisdiction of the said Supreme Court in a claim filed under an Act passed in the year of our Lord one thousand eight hundred and fifty-three, and being numbered 14 of that year, intituled "An Act to amend the practice and proceeding in the Equitable Jurisdiction of the Supreme Court of South Australia."

113. From and after the passing of this Act all public maps delineating the Waste Lands of the Crown in the said Province for the purpose of sale, shall be made in duplicate, and the Surveyor-General shall sign each duplicate, and shall certify the accuracy of the same, and such duplicates of such maps shall be deposited in the Registry Office, and whenever, in any instrument relating to land brought under the operation of this Act, and executed subsequent to the passing thereof, reference is made to the public maps of the said Province deposited in the office of the Surveyor-General, such reference shall be interpreted and taken to apply equally, and with the same force and effect, and for the same purposes, to either of such duplicates.

114. It shall be lawful for any proprietor, subdividing any land under the operation of this Act, for the purpose of selling the same in allotments as a township, to deposit with the Registrar-General a map of such township, provided that such map shall be on a scale of not less than one inch to the chain, and shall exhibit, distinctly delineated, all roads, streets, passages, thoroughfares, squares, or reserves, appropriated or set apart for public use, and also all allotments into which the said land may be divided, marked with distinct numbers or symbols, and the person depositing such map shall sign the same, and shall certify the accuracy thereof by declaration before the Registrar-General, or a Justice of the Peace.

115. *It shall be lawful for the Registrar-General, if he shall think fit, to require the proprietor applying to have any land brought under the operation of this Act, or desiring to transfer or lease the same, or any portion thereof, to deposit, at the Registry Office, a map or plan of such land, and if the said land, or the portion thereof proposed to be transferred or leased, shall be of less area than one statute acre, then such map or plan shall be on a scale not less than one inch to the chain; and if such land, or the portion thereof, about to be sold or leased, shall be of greater area than one statute acre, then such map or plan shall be upon a scale not less than one inch to six chains, and such proprietor shall sign such map and shall declare to the accuracy of the same before the Registrar-General, or a Justice of the Peace; and if such proprietor shall neglect or refuse to comply with such requirement, it shall not*

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be incumbent on the Registrar-General to proceed with the bringing of such land under the operation of this Act, or with the registration of such transfer or lease: Provided always, that subsequent subdivisions of the same land may be delineated on the map or plan of the same, so deposited, if such map be upon a sufficient scale, in accordance with the provisions herein contained, and such proprietor shall certify the correctness of the delineation of each such subdivision, by declaration in manner prescribed for the case of the deposit of an original map.

116. *Any person may, upon payment of a fee specified in Schedule T hereto, have access to the register book for the purpose of inspection at any reasonable time during the hours and upon the days appointed for search.*

117. *The Registrar-General, upon payment of such reasonable sum as may be appointed by any regulation made by him for such case, with sanction of the Governor, shall furnish to any person applying at a reasonable time for the same, a certified copy of any instrument affecting or relating to land registered under the provisions of this Act, and every such certified copy signed by him and sealed with his seal, shall be received in evidence in any Court of Justice, or before any person having by law, or by consent of parties, authority to receive evidence as prima facie proof of all the matters contained or recited in or endorsed on the original instrument, and the production of any such certified copy, so signed and sealed, shall be as effectual in evidence to all intents as the production of the original.*

118. *The Registrar-General shall not be liable to damages or otherwise for any loss accruing to any person by reason of any act done or default made by him in his character of Registrar-General, unless the same has happened through his neglect or wilful act.*

119. *The Registrar-General shall keep a correct account of all such sums of money as shall be received by him in accordance with the provisions of this Act, and shall pay the same into the Public Treasury of the said Province at such times, and shall render accounts of the same to such persons, and in such manner as may be directed in any regulations that may for that purpose be prescribed by the Governor-in-Chief of the said Province, by and with the advice of*

the Executive Council thereof; and the Registrar-General shall address to the said Treasurer requisitions to pay moneys received by him, in trust or otherwise, on account of absent mortgagees or other persons entitled in accordance with the provisions of this Act; which requisitions, when proved and audited in manner directed, by any such regulations framed as aforesaid at the time being in force in the said Province, and accompanied by warrant for payment of the same under the hand of the Governor, countersigned by the Chief Secretary thereof, the said Treasurer shall be bound to obey, and all fines and fees received under the provisions of this Act, except fees payable to

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the Lands Titles Commissioners for the bringing of land under the operation of this Act, shall be carried to account by the said Treasurer as General Revenue.

120. Any persons who shall wilfully or knowingly, by fraud or misrepresentation, make, or cause, or obtain to be made in the register book, any entry which might in any way affect the right, title, estate, or interest of himself, or of any other person, in any land under the operation of this Act, or who shall wilfully or knowingly, by fraud or misrepresentation, procure from the Registrar-General any certificate of title, registration abstract, or other instrument evidencing or relating to title to, or estate or interest in land under the operation of this Act, or shall cause or procure to be made any entry, certificate, memorandum, or endorsement by this Act prescribed to be made in or upon any such certificate, abstract, or other instrument by the Registrar-General, or other authorized person, or who shall use or utter any such certificate, abstract, or other instrument, knowing the same to be counterfeited, forged, or altered, or to have been obtained by fraud or misrepresentation, or to contain or bear any entry, memorandum, certificate, or endorsement as aforesaid, forged, counterfeited, or altered, or obtained by fraud or misrepresentation, and who shall be thereof lawfully convicted, shall be deemed guilty of felony, and be sentenced to be imprisoned for any period not exceeding four years, and to be kept to hard labor or solitary confinement for any part of the period aforesaid; and if any person shall wilfully or knowingly make a false oath or affirmation touching or concerning any matter or procedure made or done in pursuance of this Act, and be thereof lawfully convicted, such person shall be deemed guilty of perjury, and be imprisoned for the period, and in the manner aforesaid, and, in addition to such punishment, any person damnified or suffering loss by any such fraud, misrepresentation, forgery, counterfeit, alteration, use, or utterance, of any such certificate, abstract, or other instrument, as aforesaid, or by the making of any such false oath or affirmation, shall have a right of action against, and be entitled to recover damages from, the person guilty of such fraud, misrepresentation, forgery, counterfeit, alteration, use, or utterance, or making such false oath or affirmation, the amount of all damages he may have sustained thereby, with full costs of suit, as hereinbefore provided.

121. Unless in any case herein otherwise expressly provided, all offences against the provisions of this Act may be prosecuted, and all penalties or sums of money imposed or declared to be due or owing by or under the provisions of the same, may be sued for and recovered in the name of the Attorney-General, or of the Registrar-General, before any Court

in the said Province, having jurisdiction for punishment of offences of the like nature, or for the recovery of penalties or sums of money of the like amount.

122. It shall be lawful for the Registrar to charge and receive

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such fees as shall be appointed by the Governor of the said Province, by and with the consent of the Executive Council, not in any case exceeding the several fees specified in the Schedule hereto marked T.

123. This Act shall commence and take effect from and after the first day of July, one thousand eight hundred and fifty-eight.

1861 Select Committee of Enquiry into the Native Police (Qld)

In 1861, the newly formed Queensland Government under Herbert held an enquiry into how it could make the police force more 'efficient'. R. R. Mackenzie,²⁰¹ a pastoralist, chaired the enquiry.²⁰² He became premier in 1867. Henry Challinor, a pastoralist, was particularly frank with his recommendation, not believing that the Committee would ever contemplate such extreme measures, but he was wrong. He wrote:

With regard to the Protective Force to be employed, I still think that it ought to consist of white men and black trackers, and that it should be sufficiently numerous and efficient as to deter, if possible, from the commission of crime. If, however, the sole object of a Protective Force is to pursue the aborigines into scrubs and there slaughter them without discrimination or remorse, I think no force could be better adapted for that work than the present Native Police Force. But, as this mode of protection appears to be as utterly repugnant to British law as it is to every principle of justice and equity, I could never consent to the continuance of such a system;

*I have the honor to be, Sir,
Your most obedient servant,
HENRY CHALLINOR.²⁰³*

This is exactly what the Queensland Government put in place, a secretive police extermination squad under the management of Police Commissioner David Seymour, what Henry Reynolds described as 'the most violent organisation in Australian history',²⁰⁴ whose responsibility was the 'dispersal' of Aboriginals from their homelands. This horse-mounted police force, and the murderous Governments who directed them, have never been called to account; nor in a wider context were any settlers and pastoralists who participated in bloody Aboriginal removal ever prosecuted and convicted, perhaps with one exception, that of the perpetrators of the Myall Creek massacre in 1838.

The Queensland Native Police force became a model for other states to follow as pastoralists pushed their way into the northern reaches of the continent. While mounted police

²⁰¹ Sir Robert Ramsay Mackenzie, 10th Baronet (21 July 1811 - 19 September 1873) was premier of Queensland from 1867 to November 1868. Mackenzie entered politics in 1859 and became colonial treasurer on 18 December 1859 in the ministry of Robert Herbert. Mackenzie represented Burnett in the Legislative Assembly of Queensland from 1860 to 1869. Mackenzie formed a government in 1867 on the resignation of Arthur Macalister, taking on the roles of premier and colonial treasurer. He resigned on 25 November 1868.

²⁰² 1861 *Select Committee of Enquiry into the Native police Force*. [Archive.aiatsis.gov.au/removeprotect/92123.pdf](http://archive.aiatsis.gov.au/removeprotect/92123.pdf) last accessed 21 August 2013 (167 pages)

²⁰³ Ibid, Evidence of Challinor (a leaseholder), pp 166 – 167.

²⁰⁴ H. Reynolds, *The Weekend Australian*, 11 – 12 March 1989.

<http://www.ngadjonji.bigpondhosting.com/History/history10.html> Last accessed July 2014. Also quoted by Clive Moore (1990), *Blackgin's Leap: A Window into Aboriginal-European Relations in the Pioneer Valley, Queensland in the 1860s*, Aboriginal History, Volume 14, Part I, 1990, p. 68.

and settlers diligently ‘cleared’ area after area of Aboriginals, the survivors from different family groups and tribes were rounded up and held in detention centres under repressive Government control. Gradually, by the early 20th century, these facilities were replaced by Government managed ‘reserves’ and a form of apartheid established, a pattern of racial containment that spread across Australia. It was an approach that worked for Arthur when, in the 1830s, he deported all remaining Palawa to an island in Bass Strait.

Australia maintained a racist policy of segregation and Indigenous separatism until at least 1967, when a referendum allowed Aboriginals the right to vote and to be counted in a census.

Equality was (and is) longer in coming. As a group, Aboriginal society remains marginalized and discriminated against, which a sobering succession of investigative reports confirm.²⁰⁵

During the 1861 Government enquiry, Morisset - the Commandant of the Native Police Force - provided this response to improving police ‘efficiency’:

245. What description of firearms are used—would you suggest any improvement in the firearms?

*Yes, if it, were possible to arm all the men with Terry's breech-loaders, I think it would be desirable to do so, particularly in new country, where the blacks are troublesome.*²⁰⁶

In 1861, soon after the enquiry had completed, the Queensland Government purchased 163 Callisher & Terry carbines from Britain at £6.15.0 each, and then a further 206 Callisher & Terry rifles at £9 each. These rifles and carbines were breech loading, with a .539 (or 30 bore) calibre and were accurate to 1,000 yards.²⁰⁷ Another carbine widely used throughout the Colonies by the police and military at this time was the Snider-Enfield cavalry carbine, with a .577 inch calibre; the Mk II carbines were mostly converted from the Pattern 1861 Cavalry Carbine.²⁰⁸

Thereafter, the Government of the day continued to purchase more and more ‘efficient’ weapons. In 1871, Britain sold 1000 Snider rifles, of the latest pattern, along with bayonets and 500,000 cartridges, to the Queensland Government, primarily for use by the Native Police paramilitary in ‘dispersal’ operations.

²⁰⁵ See for example <http://closingthegap.pmc.gov.au/sites/default/files/ctg-report-2017.pdf>

²⁰⁶ Ibid, Evidence of E.Morisset, Commandant of the Native Police Force, 1861, p. 149

²⁰⁷ I. D. Skennerton, *Australian Service Longarms*, 1976: 90, 91

²⁰⁸ Ibid, p. 99. Clearly, Britain benefited considerably from its role as arms supplier to Colonial Governments. Britain was well aware of how the weapons were used, but kept at a moral distance while their commercial interests were being served. However, morality rarely played a part in Britain’s occupation process.

David T. Seymour was Queensland Police Commissioner from 1864²⁰⁹ to 1895. During this time, he was the architect of Aboriginal ethnic cleansing on behalf of successive Queensland Governments. He scrupulously maintained personnel spreadsheets that managed the deployment of his native mounted police, as he pressed his dispersal policy, area by area, until the State was quiet.

From his spreadsheets, we can determine how Seymour deployed his mounted police to areas of Aboriginal resistance over time.

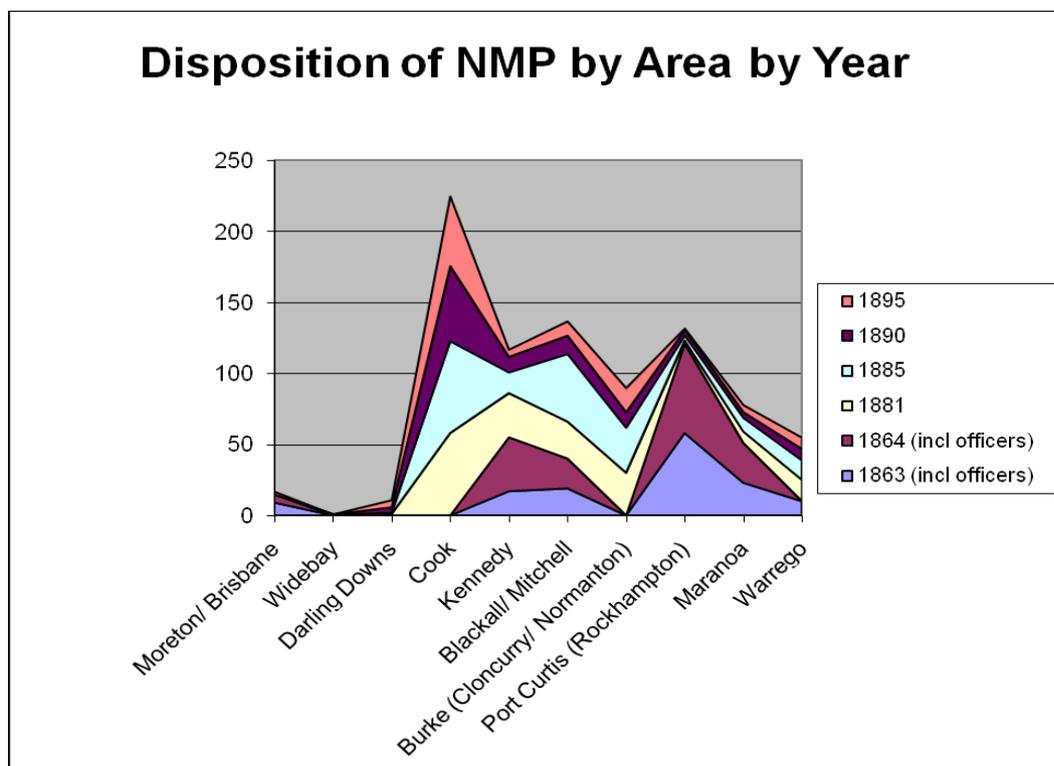


Figure 3. Disposition of Native Mounted Police, by area and year

The cumulative graph, prepared by Gibbons from Seymour's police deployment spreadsheets, shows how Seymour managed and subdued trouble spots, as he cleared the country of Aboriginals, year by year.²¹⁰ Dispersal operations in the populous district of Cook in the Far North were the bloodiest and most prolonged.

Clive Moore, of the University of Queensland, provides us with a keen insight into the nature and use of British weaponry against the relatively defenceless Queensland Aboriginals during the 1860s, immediately after Queensland became self-governing. He writes:²¹¹

Social historians have not dealt in detail with European weaponry and attacks on Aborigines in Queensland during the 1860s, too often generalising on the period from

²⁰⁹ On 13 January 1861 Seymour arrived in Brisbane in command of the first detachment in Queensland after separation. He was appointed aide-de-camp and private secretary to the governor on 11 May 1861. On 1 January 1864 he retired from the army to become acting commissioner of police under the Police Act of 1863 and was confirmed in office in July. [<http://adb.anu.edu.au/biography/seymour-david-thompson-4562>]

²¹⁰ The Queensland Police Museum curator is the source of Seymour's deployment spreadsheets, from which this graph was developed. Records for the 1870s are missing.

²¹¹ Clive Moore (1990), *Blackgin's Leap: A Window into Aboriginal-European Relations in the Pioneer Valley, Queensland in the 1860s*, Aboriginal History, Volume 14, Part I, 1990: 69 – 72. The footnotes are those of Moore.

*scraps of information. There is need for more detailed studies of the Aboriginal-European relations in the first decade after Queensland separated from New South Wales, a transition period in the development of firearms, and a decade crucial to the expansion of the frontier to the north and west.*²¹²

Frontier conflict in the 1860s revolved around the use of guns of an almost outmoded design, mostly muzzle loading. Within the decade European military technology developed so that weapons could be multiple-loaded with cartridges, the forerunners of modern repeating rifles. Although individuals may have owned more sophisticated weapons, most of the frontier conflict of the 1860s depended on the use of smooth bore cavalry carbines, usually Enfield style, and muzzle loading shotguns, muzzle-loading pistols and the occasional revolver.

The "Enfield"²¹³ carbines were muzzle loading 20-bore guns, ignited by percussion cap, generally charged by a paper cartridge, and often equipped with a captive ramrod system for reloading on horseback. The carbine was a shorter evolution of longer barrelled guns, very useful for use while mounted or in a confined space. The paper cartridges containing gunpowder and shot had to be loaded straight down the barrel: the cartridge was ripped open, the powder exposed and poured down the barrel right to the base, then the rest of the paper was added as a wad, followed by either round ball or shot which was rammed home with the captive ramrod. Loading took around ten to twenty seconds from a standing position, or longer on horseback, and required using both hands. Double barrelled carbines worked on the same principle. Depending on the charge used (and the larger the charge the larger the kickback and the less the accuracy) a smooth bore carbine loaded with a lead ball could kill a human, if hit in the torso or head, at about thirty to forty metres. The lead ball, five-eighths of an inch across, spread on impact, making a small entry and a large exit. If loaded with shot the range was a little longer, and chances of killing were still good as the 10-ball Swan Drops in use could easily lodge in two or three victims. The guns were more difficult to load from horseback, and shooting a moving target from a moving horse was difficult. Muzzle-loading guns were subject to misfiring, through faulty manufacture of the paper cartridges and because powder soon became

²¹² The only substantial book on the Queensland Native Police is L. E. Skinner's *Police of the pastoral frontier* (1975). Gordon Reid's *A nest of hornets* (1982) also deals with the late 1850s. Noel Loos's *Invasion and resistance* and Dawn May's *From bush to station* (1983) cover the whole 1861 – 1897 period, while Anne Allingham's *Taming the wilderness* (1977) concentrates on the 1860s in North Kennedy. Jonathon Richards'

²¹³ Authentic Enfield cavalry carbines had a 21-inch barrel and a .577-calibre 25 bore. All arms issued to the Queensland Native police were 20 bore. The New South Wales Police in the Northern District pre-separation were armed with 'yeomanry' pattern carbines, smooth 20 bore, circa 1844. After 1855, supplies of 'cape' pattern double-barrel smooth bore carbines became available and were issued in pre-separation Queensland. A further supply was of 'Native Foot Police' pattern carbines of 20 bore, with single 31.5-inch barrels. Letter from Mr. J. S. Robinson, 21 March 1989.

damp and would not ignite in the tropical conditions. It was never possible to load up one's carbine or pistol in the morning with perfect certainty that it would fire later in the day.

The troopers in the Native Police were issued with 'Enfield' single-barrelled carbines until 1870, when these were replaced by Sniders.²¹⁴ Occasionally they also had double-barrelled carbines or even muzzle-loading single shot pistols, and also sabres, particularly after 1865 when the Queensland Volunteer Force was disbanded and their weapons were passed on to the police and Native Police.²¹⁵

Officers in the Native Police, pastoralists and other settlers used single- and double-barrelled carbines and rifles, muzzle-loading single- and double-barrelled shotguns and muzzle-loading single- and multiple-shot pistols, as well as the occasional five or six-shot revolver. The shotguns, known as fowling pieces, were a standard weapon used on pastoral properties in the 1860s. Like the carbines they were slow to load. A solid lead ball was almost impossible to use because of the kick from the large charge needed to move it and most shot-guns used one and a half ounces of shot. An 1860s shotgun could kill at twenty-five to thirty-five metres, but beyond that distance only peppering could be achieved. Single-shot pistols were as primitive as the carbines. The revolvers were mainly five- and six-shot weapons, ignited by percussion cap and loaded through the cylinder. The user could either reload using a captive device, pouring powder and shot down each chamber, or could carry spare cylinders or paper cartridges. Revolvers were accurate to about fifteen to twenty metres, depending on whether the target was still or moving.²¹⁶

Towards the middle of the nineteenth century European military technology developed repeating weapons that could be loaded once but fired often, and improved the accuracy and range of breech-loading weapons. The American Civil War (1861-65) and European wars helped stimulate these improvements.²¹⁷ Single-barrelled revolvers and rifles were available in Australia in the 1860s, but one difficulty with the

²¹⁴ This statement is slightly puzzling. Skennerton writes that the more lethal Callisher & Terry weapons were available at this time. Zillman confirms that the police picture in 1865 shows the police with breech loading Sniders.[RG].

²¹⁵ I am indebted to Messrs Brian Rough, Ian Skennerton and Stan Robinson of Brisbane for sharing with me their knowledge of the weapons used in Queensland by settlers and government officers such as the Native Police, and for practical instruction in the use of the guns described here; Skennerton I.D. (1975), *Australian service longarms*, Margate (Qld) 1975, Skennerton I.D. (1978), *A treatise on the Snider: the British soldier's firearms, 1866 – c. 1880: Development, manufacture and issue of the Snider rifles and carbines, from 1862 – post 1900*, Margate (Qld), 1978; Johnson D.H. (1975), *Volunteers at heart: The Queensland Defence Forces, 1860 – 1901*, St Lucia, 1975: 46 – 50.

²¹⁶ See also McGuffie, T.H. (1957), *Musket and rifle, Part 2: From Brown Bess of 1727 to the Lee-Enfield of the first world war*, *History Today* 7, 1957: 473-79.; Blackmore H.L. (1965), *Guns and rifles of the world*, London, 1965: 58 – 71; Garavaglia L.A., and Worman C.G. (1984), *Firearms of the American west*, Albuquerque, 1984: 167 – 70.

²¹⁷ Watrouse G.R.(1975), *The history of Winchester firearms, 1866-1975*, New York, 1975: 9 – 10.

latter was the escape of gas and flame from the breech, a problem that was never satisfactorily solved until the invention of the Snider breech-block.²¹⁸ Sniders could kill at fifty to sixty metres and were cleaner, more efficient weapons with a faster rate of fire.²¹⁹ Enfield and Snider style carbines and rifles used the same five-eighth inch lead balls, which at close range simply tore the victim apart. In the space of ten years the efficiency of weapons increased dramatically. Although private individuals may have imported sophisticated revolvers and advanced breech loading weapons during the 1860s, the Queensland government did not buy Sniders for the Native Police until 1870. The extermination of several hundred Aborigines in the Mackay district in the 1860s was accomplished almost entirely with muzzle-loading weapons. Bridgman and Bucas estimated that the majority of the deaths were caused deliberately by the Native Police, the remainder dying from introduced diseases and at the hands of individual settlers. There is no evidence that the Native Police patrolled the area more than about twice or three times a year before 1866: there was no easy way to call them before the telegraph was installed in mid-1866, and patrols were spasmodic until the Bloomsbury base opened in mid-1868. But even given the limited size of the patrols and the type of weaponry avoidable during the 1860s, the Native Police could easily have killed several hundred Aborigines between 1862 and 1870, most in three years 1868-70. The Native Police patrolled in small groups and seldom had time to fire more than two volleys in an attack; although they often pursued Aboriginal groups for several days, killing some each time they were encountered. There is every likelihood that four- to six-man patrols could kill fifteen to thirty Aborigines at one time, and there is a record of the Native Police 59 killing Aborigines during one reprisal on the Burdekin.²²⁰ They certainly could have killed several hundred Aborigines over a few years. The picture that emerges is of attacks on Aboriginal camps on foot by stealth. The possibility of troopers following orders to call on their quarry to 'Stand in die Queen's name' and fire warning blank charges is so remote as to be laughable. The

²¹⁸ Jacob Snider of New York introduced a system to convert Enfield muzzle-loading rifles and carbines. The barrel was shortened by five centimetres at the breech and a slightly wider new breech fitted to accept Boxer's brass cartridges, pushed in with the thumb. The space behind the cartridge was fitted with a breech block hinged on the right and held in place by a spring-loaded pin situated near the base.

²¹⁹ There is a discrepancy between the level of accuracy often claimed for Enfield style carbines and Sniders and that attested to by present-day users of the same guns. For instance Richard Broome suggests that the Snider carbines were accurate to 500 metres but users of identical guns in Brisbane today make no such claims. Broome R. (1988), *The struggle for Australia: Aboriginal-European warfare, 1770 – 1930*, in M. McKernon and M. Browne eds. *Australia: Two centuries of war and peace*: 105.

²²⁰ Letter from Dr. Noel Loos, 4 April 1989. There is only one piece of evidence from the Mackay district that indicates numbers killed. In 1874 Edward Denman was shown fourteen skulls perforated with bullet holes, on land which had formerly been part of *Balnagowan*. He was told that some years before the Native had 'dropped on niggers' at the spot. *Mackay Mercury*, 13 August 1975.

number of deaths presumed here does not exceed the destructive capabilities of the Native Police, but there is also no doubt that settlers mounted their own posses and went out hunting Aborigines, and although there is no proof from the Mackay district, poison may also have been used. The number of deaths purposefully inflicted may have been much higher. It is far easier to estimate the number of local Aborigines killed by regular-sized Native Police patrols, than to hazard a guess at the number of deaths inflicted by individual settlers. European settlement in the South Kennedy region began in 1862, increasing rapidly to 111 males and 45 females by 1864. Separate statistics are available for Mackay and the Pioneer Valley from 1868: 208 males and 132 females in the town; and another 235 males and 83 females in the district. The European population continued to rise, and alongside it the Melanesian population, with a total district population of 1,400 by 1871.²²¹

The punitive expeditions in the early decades of settlement often degenerated into murderous hunts. In their published reminiscences and in interviews with Ken Manning and myself, oldtimers in the district were loath to recall details of hunts, except in situations where they seemed reasonable in the defence of lives and property.²²² Except in situations such as the aftermath of the Hornet Bank and Cullin-la-Ringo massacres, when Aboriginal hunts were implicitly sanctioned by the government, it is rare to find details of settlers making up vigilante groups. But mentions survive in reminiscences, such as G.M. Hess's admission that after some attacks on shepherds in the 1860s messages were sent out to stations to arm all hands.²²³

One hundred times more numerous and better armed, though perhaps more timorous, the European males of the district are likely to have killed as many Aborigines as the Native Police ever did. European women also wore pistols and revolvers and could handle shotguns, carbines and rifles. A conspiracy of silence covers their deeds. There is no record of more than about twenty Europeans, usually shepherds on outstations over the ranges to the west, dying at the hands of the Aborigines. Justification of the Aboriginal deaths is usually expressed in relation to the 1857 Fraser or 1861 Wills massacres well to the south, not because of any local deaths. Research for this paper has unearthed only one exact name (Roberts, presumed killed by Aborigines in 1862),²²⁴ one reference to a shepherd, and oral testimony but no documentary evidence of the massacre of a family named Price, who

²²¹ Queensland Statistics, 1864 Census: 10; 1868 Census: 4 – 5; Moore 1985:128.

²²² Manning K.W. (1983), *In their own hands: A north Queensland sugar story*, Farleigh (QLD), Farleigh Co-op Sugar Milling Association, Mackay, 1983: 4; see also Allingham A. (1977), *Taming the wilderness: The first decade of pastoral settlement in the Kennedy District*, Townsville, 1977: 18-79.

²²³ Jubilee of Mackay 1912: 14.

²²⁴ Inquest 62/149, QSA JUS/N4.

*could reasonably be said to have been killed by Aborigines in the Pioneer valley during the 1860s.*²²⁵

In Southeast Queensland, following the 1861 Government enquiry into making police methods ‘more efficient’, Lieutenant Wheeler was instructed to continue his ‘dispersal’ operations along the Sunshine Coast. His efforts barely raise a blip on the cumulative graph for Moreton/ Brisbane and Widebay areas. We can only imagine the carnage in the Far North of Queensland, as the police secretively pursued the Government’s extermination policies, away from the gaze of the more settled and populous areas in the Southeast of the newly formed state.

The Government did not require the police to keep a record of their ‘dispersal’ patrols, but sometimes there is an independent report. The Brisbane Courier records one such operation by Wheeler, carried out at Caboolture, north of Brisbane, in 1862:²²⁶

²²⁵ Loos Noel (1982), *Invasion and resistance: Aboriginal-European relations on the North Queensland frontier, 1861 – 1897*, Canberra, 1982: 189-247, particularly 197-98; letter from Mr Ken Manning, 1 June 1898.

²²⁶ Brisbane Courier, Monday 1st September 1862, page 2. <http://nla.gov.au/nla.news-page47875>

LOCAL INTELLIGENCE.

THE BLACKS AT THE CABULTURE.—A correspondent signing himself "Black Protector," writes to ask us if we know, or have heard, anything of the slaughter of a certain blackfellow at the Cabulture. We have heard that, some two or three weeks since, several blacks had been shot in that locality by the Native Police, under Lieutenant Wheeler, but we have foreborne to mention the report until we had made some inquiries. The result of those inquiries leads to the conclusion that the blacks had been complained of as troublesome on one of the cattle runs at Cabulture,—although they were not really so,—and that, in pursuance of information he received, Lieutenant Wheeler visited the locality with his troopers and shot some eight or ten of the supposed depredators. Probably, however, one or two of the parties owning stations in the vicinity, and who profess to feel a great interest in the blacks, may be able to throw some light on the subject. The Cabulture residents have often been disturbed by the thievish propensities of the aborigines, and there may have been a good and sufficient cause for a visit on the part of the police; whether the latter were justified in an act of slaughter remains to be seen.

Figure 4. Brisbane Courier, Monday 1st September 1862, page 2

Ray Kerkhove, a Sunshine Coast historian, has conducted painstaking research over many years into the methods employed by the Government for Aboriginal ethnic cleansing from Sandgate (near Brisbane) through to Wide Bay (near Fraser Island). He also investigated the *process* of ethnic cleansing, as it played out between the 1820s and the 1890s, peaking in the 1860s, when the newly formed Queensland Government de-gazetted the Aboriginal bunya reserve on the Sunshine Coast and opened it up for timber getters and squatters. It is a sad and compelling story, where the police performed a key role at the behest of a succession of squatter dominated Governments. Kerkhove brings our attention to Lieutenant Wheeler in particular.

Kerkhove writes:²²⁷

²²⁷ Ray Kerkhove, *Where Did They Go? The Story of Buderim's Indigenous Residents*, prepared for Buderim's 150 year anniversary. This is the summary

<http://media2.apnonline.com.au/93.2/img/media/pdf/B150.pdf> Part 2 sets out the Wheeler 'dispersals' and is archived at http://buderim150.blogspot.com.au/2012_05_01_archive.html The footnotes are those of Kerkhove.

.. as soon as the Bunya Bunya reserve was terminated, Ltnt Fred Wheeler launched “immediate” patrols from his Sandgate base to “disperse” (which he explained meant shoot) blacks in Imbil and Kandanga Creek.²²⁸ This was at the request of local settlers.

Between 1862 and 1863 – in the midst of the early timber-getting – Wheeler reports he was constantly “patrolling... the Mooloolah, Maroochy, Ubi Ubi (Obi Obi) ... districts”.²²⁹

Ironically, Wheeler also used his patrols as an occasion to “recruit” additional black police. Not surprisingly, he was unsuccessful. He reported that sometimes the groups had not yet assembled for the bunya festival. Other times they told him they were too busy preparing for the bunya festival. Still other days, they were too busy washing sheep to join his bloodthirsty group. In apparent frustration, Wheeler “dispersed a large mob ... near the sea coast” – presumably somewhere between Mooloolaba and Maroochydore.²³⁰

Wheeler also chased the Gubbi Gubbi around other parts of the countryside – for instance, having a confrontation with them when they were visiting Esk. During this, he states: “at last I was obliged to fire upon them in self defence.”²³¹

Kerkhove briefly mentions the Murdering Creek massacre in a manuscript:

Settlers were ‘shooting out’ Aboriginals to take their land. In the 1870s a party of squatters descended on some seventy Aboriginals fishing from canoes at Murdering Creek, by Lake Weyba... and shot the lot.²³²

Let us assume for the moment that Kerkhove’s statement is correct, that a shooting party slaughtered seventy Aboriginals at Lake Weyba in the 1870s. What is the most effective way to shoot a large number of Aboriginals within a short time, using the weaponry of a given period?

Kerkhove cites no primary sources for his statement, so we cannot directly crosscheck the reported event. If the massacre occurred in the 1870s, this was a considerable delay from the time of the 1869 newspaper article.

²²⁸ COL/A44/63/2144, Z5671.

²²⁹ COL/A32 from Col. Secretary Correspondence 62/2186; ID 846772 63/ 1511.

²³⁰ COL/A47/63/2889, Z5680.

²³¹ ID 846761 62/1897 Z5605.

²³² Ray Kerkhove (1986), *A Concise Aboriginal History of the Sunshine Coast*, Buranda, Qld, Unpublished manuscript for the Foundation for Aboriginal Islanders Research Action, p. 77. No source given.

*5 May 1869. The blacks have lately been spearing cattle in the most wanton manner on the Yandina run, and unless checked at once, will be emboldened by impunity and commit more serious crimes. It would not be creditable to the Executive were such a state of things allowed to continue in the main road between Brisbane and Gympie.*²³³

If the shooting party only comprised eight individuals, as Bull claims, how could they have shot seventy Aboriginals with single shot weapons? How could they have shot ‘about seventy’ without multiple weapons each, or without a repeating firearm? What standard weaponry was available at the time?

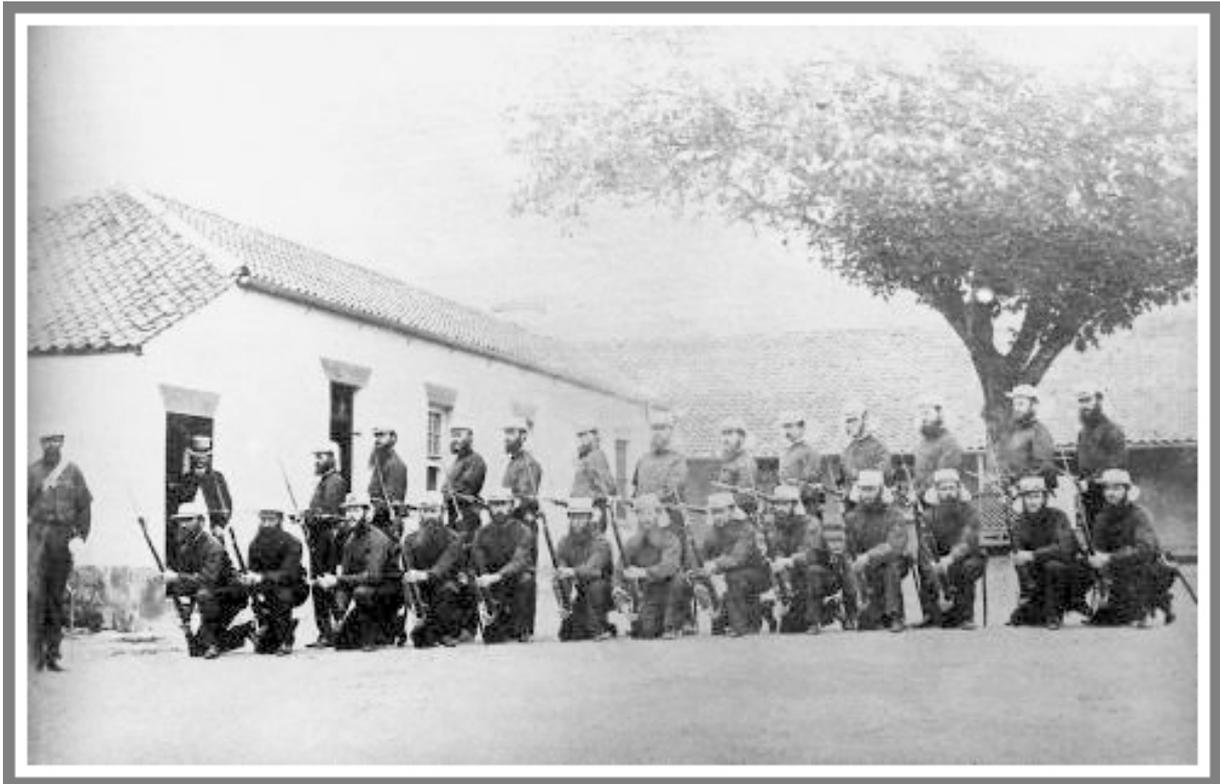


Figure 5 Show of force at the police barracks, Brisbane, 1868²³⁴

In the early sixties, the Native Police frequently used the Terry. From the mid 1860s, the Snider snub nosed, single shot, breach loading carbine, converted from the Enfield musket, was widely available, and capable of ten rounds per minute. The first widely available repeating rifle in Australia was the Winchester, in about the late 1870s or early 1880s, after which the Martini-Henry became popular. As the available police weaponry became more lethal, the police ‘dispersal’ operations became more ‘efficient’.

With Queensland’s successful deployment of roving Native police during the 60s through to the 90s, David Seymour – the long-serving Police Commissioner - became Queensland’s

²³³ Gympie Times, 5 May 1869.

²³⁴ I have had a very interesting conversation with Mark Zillman, of Gympie. Mark is a 19th century weapons expert, who confirms that the weapons in this photograph are Snider breech loading large bore rifles.

secretive architect of genocidal policy and practice.²³⁵ ‘Dispersal’, the code word for extermination, was rapidly adopted throughout Australia as the means to rid the country of ‘blacks’, and continued in the north until late into the 1920s. It was an ethnic cleansing policy that found its roots in Arthur’s ‘roving’ and ‘pursuing’ parties in the 1820s, for which the intended consequence was the rounding up of Aboriginal survivors and deporting them to detention centres where their lives were rigidly controlled under a system of apartheid.

²³⁵ For example, see Hannah Baldry, Ailsa McKeon, Scott McDougall, *Queensland’s Frontier Killing Times – Facing Up to Genocide*, QUT Law Review, Volume 15, Issue 1, pp. 92 – 113 <https://lr.law.qut.edu.au/article/view/583> ; Carl Feilberg (1880), *The Way We Civilise* nla.gov.au/nla.aus-f14656 last accessed 2 October 2013; Timothy Bottoms (2013), *Conspiracy of Silence Queensland’s frontier killing times*

1861.

Legislative Assembly.
QUEENSLAND.

NATIVE POLICE FORCE.

REPORT.

THE SELECT COMMITTEE of the Legislative Assembly, appointed by ballot on the 1st May, 1861, with power to send for persons and papers, and sit during any adjournment of the House, to enquire into and report on the organisation and management of the Native Police Force; and further to enquire into and report how far it may be practicable to ameliorate the present condition of the aborigines of this Colony, have agreed to the following Report:—

Your Committee, entering on their duties fully impressed with the importance of the subjects under consideration, have examined upwards of thirty witnesses, including the principal Officers of the Native Police Corps, and have thus collected a mass of evidence of the most comprehensive character.

To make this record more complete, your Committee have availed themselves of portions of the evidence taken before a Select Committee held in Sydney in the year 1858, and in addition, the Appendices attached to this Report contains much valuable information.

Your Committee cannot but express their regret that more than one witness, capable of affording important information regarding the Native Police, should have refused to submit themselves to an examination.

The questions brought under the notice of your Committee have been:—

1. The

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1. The present condition and organization of the Native Police Force.
 2. The charges of unnecessary cruelty brought against their officers when dealing with the Natives, and protecting the settlers against their aggressions.
 3. The prospect of civilising, or in any way improving the condition of the aboriginal population.

I. In acquiring information on the subject of the working of the Native Police, your Committee, by selecting persons from all classes, have endeavoured to avoid making the evidence merely the expression of the views of any section of the community, favourable or otherwise, to the abstract question of the employment of an aboriginal protective Force.

The whole weight of the evidence, with one or two exceptions, tends to prove :—

1. That any change in the organisation of this Force by the substitution of white troopers for Native, would destroy its efficiency.
2. That since its establishment and reconstruction under its present Commandant, the destruction of property and loss of life on either side has considerably diminished
3. That any attempt to disband the Force suddenly, would, as on a previous occasion, lead to disastrous results.

It is clearly shown by the evidence of the Commandant and some of the witnesses, that any want of discipline that has existed in this Force, or any excesses that are attributable to the Troopers, have arisen mainly from the inefficiency, the indiscretion, and the intemperate habits of some of the Officers, rather than from any defect in the system itself.

It also appears evident that no advantage would accrue on the score of economy, by a re-construction of this corps in the way that has been proposed by some of the witnesses. Your Committee, therefore, have directed their attention to the necessity of improving the internal organisation of the existing Native Police, and, in pursuing this enquiry, the following points have presented themselves as worthy of recommendation :—

1. That it is of the highest importance to secure the services of efficient Officers ; the successful working of the Force depending almost entirely on their energy, ability, and sobriety.

-
- sobriety. That Cadets should be appointed, who should serve a certain period under the supervision of the head of the Force before they are considered eligible to hold commissions, and that appointments to the Corps should be made solely on the recommendation of the Commandant for the time being, who should be held responsible for the efficiency of his Officers.
2. That no detachment of Native Police should be stationed in the vicinity of any of the towns, as the facilities for obtaining intoxicating liquors tend to demoralize the Troopers, and have, in some cases, resulted in the most serious outrages and breaches of the law.
 3. That the Troopers should, in all cases, be recruited from districts at a distance from those in which they are likely to be employed.
 4. Monthly returns of all proceedings, and the state of the troops, should be forwarded by each Officer in command of a detachment to the Commandant of the Force, who would furnish a general abstract thereof to the Colonial Secretary, or the head of the Executive Department, under which he may be placed.
 5. A more simple and efficient system of keeping the accounts, and furnishing the supplies of clothing, ammunition, &c., to the different divisions, appears to your Committee highly necessary, and, unless in cases where it may be urgently required, your Committee deprecate the practice of removing efficient Officers from the districts they have been accustomed to serve in.

II. The charges brought against the Officers of the Native Police have been investigated as far as practicable.

Your Committee, although aware how difficult it may be in cases where depredations are committed by the blacks to make them amenable to British Law, cannot countenance the indiscriminate slaughter which appears on more than one occasion to have taken place.

Lieutenant Wheeler appears to have acted with indiscretion on his late visit to the Logan and Fassifern. Your Committee recommend that he should be reprimanded, and removed to another district: were it not that in other respects he is a most valuable and zealous Officer, they would feel it their duty to recommend his dismissal.

With

With respect to the affray at Mr. Mortimer's, it appears that the detachment of Police stationed at Maryborough was most improperly handed over by the Officer in charge, Lieutenant Murray, to Second Lieutenant Morrisset, a young officer newly appointed, unacquainted with his duties, and also with the Troopers placed under his control. It also appears by the evidence that the natives had been committing depredations in that neighbourhood for some time previous, and that the assistance of the Police had been demanded. It is likewise shown by Mr. Morrisset's report that they attacked the Police in the first instance. After a careful consideration of the evidence in this case, your Committee recommend that Lieutenant Murray should be removed from the Force, both on this account, and his general unfitness for his duties.

Lieutenant Bligh appears, as far as evidence in his case was procurable, to have been justified in his attack on the natives in the town of Maryborough. He is generally spoken of as a zealous and efficient officer, and bears a high character from the Commandant.

Your Committee having been informed that the present Commandant has resigned, or is about to resign, his appointment, feel themselves relieved from the necessity of making any comments on his management of the Force.

Touching the murder of Fanny Briggs by Troopers of the Native Police, it does not appear to your Committee that this unfortunate occurrence militates in any way against the Force. The detachment was stationed too near the Town of Rockhampton, which gave facilities for procuring liquor. The Troopers were on friendly terms with this young woman, and, by the evidence of the Commandant, Mr. Morrisset, it will be seen that she promised Toby, one of the Troopers, a bottle of grog if he found the horses belonging to the station. On the day after this note was written she was murdered. Instances of rape and murder resulting from the influence of liquor, have occurred when the aborigines committing such excesses have not been members of the Police Force.

III. The evidence taken by your Committee shews beyond doubt that all attempts to Christianize or educate the aborigines of Australia have hitherto proved abortive. Except in one or two isolated cases, after being brought up and educated for a certain period, the Natives of both sexes invariably return to their savage habits. Credible witnesses shew that they are addicted to cannibalism; that they have no idea of a future state; and are sunk in the lowest depths of barbarism. Missions have been established amongst them at different periods with but partial success; and the same may be said of the schools established in the different Colonies.

Nevertheless

Nevertheless, any improvement in the social condition of this benighted race is an object so desirable of attainment, that your Committee feel justified in recommending to the notice of the Government the plan sketched forth in the evidence of Mr. Zillman, whose great experience entitles his opinion to favourable consideration.

This proposal embraces the establishment of a Missionary Cotton Company, who, receiving land and other assistance from the Government, would endeavour to educate the children while employing the parents in the necessary work of the plantation. Such a proposal appears to your Committee sufficiently feasible to justify a trial. Should it succeed, the system may be operated upon to any extent.

In bringing their labours to a close, your Committee are desirous to bring under the notice of your Honorable House the assistance they have received from several of the witnesses, who, at great personal inconvenience to themselves, have given so much valuable information.

R. R. MACKENZIE,
CHAIRMAN.

*Legislative Assembly Chambers,
Brisbane, 17 July, 1861.*

What was the postscript to the Government policy of ‘dispersal’ that was ratified by the 1861 inquiry into the Native Police? The squatter dominated Queensland Government persisted in its policy of Aboriginal extermination until the 1890s, until the pastoralists had won their war for the land, even into the rainforests of the far north. Some concerned citizens were aghast at the human slaughter but pastoral society either ignored their concerns or vilified them for making public comments. One of those who received the brunt of political anger for daring to speak out was the journalist Carl Feilberg in 1880.²³⁶ At the time, Sir Thomas McIlwraith, KCMG was Premier.

Although Feilberg’s incandescent document is quite long, it is well worth quoting a small part of his first *Queenslander* article, as his impugned observations remain relevant today: that sometimes – if a group believes it is above the law – their intentional acts can erode democracy and accepted standards of humanity. The article clearly shows that the Government and settlers were aware of their wrongdoing (*mens rea*) but went ahead anyway (*actus rea*), leaving a long shadow over the present.

It reminds us that it is difficult for a defined group such as Queensland politicians or pastoralists to shake the past: they tend to remain beholden to it, their behaviours shaped by a formative State history of rampant racism and genocide for which many Queenslanders continue to be petulantly defiant and unapologetic. The swathes of pastoral land are a febrile reminder as to how it was originally acquired, its provenance an accusation. Is it any surprise that Queensland, the home of Jo Bjelke Petersen and Pauline Hanson, has a reputation for red neck conservatism?

The Queensland pastoralists, as a group, were not criminally deranged but they were prepared to sacrifice human lives, the lives of another unwanted group, for personal economic advantage. This makes their conduct far more reprehensible, of the culpable type identified by Rafael Lemkin a century later. However, the legal system has never called them to account, this roll call of upstanding politicians and landowners and the conga line of pastoralists who carved their holdings from Aboriginal land, arguing their right to expropriate at the point of a gun, confiscation by force, more akin to robbery with violence than heroic triumphalism.

This failure to uphold the Law for all groups may be a partial explanation for why genocide was accepted by Queensland settler society. After chairing the iniquitous 1861

²³⁶ Carl Feilberg (1844 – 1887) was a journalist and human rights activist. He was employed by the Brisbane Courier as editor of its weekly, *The Queenslander*, from January 1879 to December 1880, when he wrote a series of articles deploring Aboriginal genocide. The political fallout was immediate. He was steadily demoted and was forced to move interstate. In 1882, he wrote: *I despair of doing much good for the blacks, and I have incurred enough personal ill will by writing on their behalf during my residence in Queensland.* The proponents of genocide had won, and would continue their eradication policies. [Feilberg to Sir Arthur Gordon, former Governor and High Commissioner of the Western Pacific, 23rd September 1882, cited by Henry Reynolds (1998), *This Whispering in Our Hearts*: 108 – 158; https://en.wikipedia.org/wiki/Carl_Feilberg]

enquiry into making the police force more 'efficient', Mackenzie went on to become Premier in 1867.

Name	Commencement of Office
Robert Herbert	10 December 1859
Arthur Macalister	1 February 1866
Robert Herbert	20 July 1866
Arthur Macalister	7 August 1866
Robert Mackenzie	15 August 1867
Charles Lilley	25 November 1868
Arthur Palmer	3 May 1870
Arthur Macalister	8 January 1874
George Thorn	5 June 1876
John Douglas	8 March 1877
Thomas Mclwraith	21 January 1879
Samuel Griffith	13 November 1883
Thomas Mclwraith	13 June 1888
Samuel Griffith	12 August 1890
Thomas Mclwraith	27 March 1893
Hugh Nelson	27 October 1893

Figure 6 Premiers of Queensland: 1859 - 1898

In this genocidal conflict, the Law failed to protect one targeted group from the predations of another. And when the war was won, a late-stage Lemkinian process took hold, where racial persecution continued without pity or hope of respite for the victims. Apartheid became normalised, along with 'Living under the Act'.²³⁷ Not until 1967 did the rule of Law begin to show its face tentatively to all races, including the First People.

We hear from Feilberg on this normalised settler psychopathy.

This, in plain language, is how we deal with the aborigines: On occupying new territory the aboriginal inhabitants are treated in exactly the same way as the wild beasts or birds the settlers may find there. Their lives and their property, the nets, canoes, and weapons which represent as much labour to them as the stock and buildings of the white settler, are held by the Europeans as being at their absolute disposal. Their goods are taken, their children forcibly stolen, their women carried

²³⁷ 1897 Queensland Aboriginals Protection and Restriction of Sale of Opium

away, entirely at the caprice of the white men. The least show of resistance is answered by a rifle bullet; on fact, the first introduction between blacks and whites is often marked by the unprovoked murder of some of the former – in order to make a commencement of the work of “civilising” them.

Little difference is made between the treatment of blacks at first disposed to be friendly and those who from the very outset assume a hostile attitude. As a rule the blacks have been friendly at first, and the longer they have endured provocation without retaliating the worse they have fared, for the more ferocious savages have inspired some fear, and have therefore been comparatively unmolested.

In regard to these cowardly outrages, the majority of settlers have been apparently influenced by the same sort of feeling as that which guides men in their treatment of brute creation. Many, perhaps the majority, have stood aside in silent disgust whilst these things were being done, actuated by the same motives that keep humane men from shooting or molesting animals which neither annoy nor are of service to them; and a few have always protested in the name of humanity against such treatment of human beings, however degraded. But the protests of the minority have been disregarded by the people of the settled districts; the majority of outsiders who take part in the outrages have been either apathetic or inclined to shield their companions, and the white brutes who fancied the amusement, have murdered, ravished, and robbed the blacks without let or hindrance. Not only have they been unchecked, but the Government of the colony has been always at hand to save them from the consequences of their crime.

When the blacks, stung to retaliation by outrages committed on their tribe, or hearing the fate of their neighbours, have taken the initiative, and shed white blood, or speared white men’s stock, the native police have been sent to “disperse” them. What disperse means is well enough known. The word has been adopted into bush slang as a convenient euphemism for wholesale massacre.

Of this force we have already said that it is impossible to write about it with patience. It is enough to say of it that this body, organised and paid by us, is sent to do work which its officers are forbidden to report in detail, and that a true record of its proceedings would shame us before our fellow-countrymen in every part of the British Empire. When the police have entered on the scene, the race conflict goes on apace. It

is a fitful war of extermination waged upon the blacks, something after the fashion in which other settlers wage war upon noxious wild beasts, the process differing only in so far as the victims, being human, are capable of a wider variety of suffering than brutes.

*The savages, hunted from the places where they had been accustomed to find food, driven into barren ranges, shot like wild dogs at sight, retaliate when and how they can. They spear the white man's cattle and horses, and if by chance they succeed on overpowering an unhappy European they exhaust their savage ingenuity in wreaking their vengeance upon him, even mutilating the senseless body out of which they have pounded the last breath of life. Murder and counter murder, outrage repaid by violence, theft by robbery, so the dreary tale continues, till at last the blacks, starved, cowed, and broken-hearted, their numbers thinned, their courage overcome, submit to their fate, and disease and liquor finish the work which we pay our native police to begin.*²³⁸

One of the most powerful contributions in the field of Queensland race relations is the important 1975 work by Raymond Evans, Kay Saunders and Kathryn Cronin. They provide a sad commentary on the prejudice that still surrounds any investigation of societal dysfunction and Aboriginal mistreatment:

*We produced this book ourselves, with little institutional help. Our expressed intentions to pursue the spectre of racism were mostly greeted with academic apathy and unease – at times outright hostility.... When the book at last appeared, some of Brisbane's leading bookstores refused to stock it and the city's main daily newspaper neglected to review it.*²³⁹

²³⁸ Carl Feilberg (1879 – 1880), *The Way We Civilise; Black and White: The Native Police a series of articles and letters reprinted from the "Queenslander"*: 3 – 4 <http://nla.gov.au/nla.aus-f14656> last accessed 2 October 2013.

²³⁹ Raymond Evans, Kay Saunders, Kathryn Cronin (1975), *Race Relations in Colonial Queensland* (1975): xiv. Among the many others who have contributed to our understanding of Queensland's racist and genocidal history are: Robert Orsted-Jensen (2011), *Frontier History Revisited – Colonial Queensland and the 'History War'*; Gordon Reid (1982), *A Nest of Hornets*; Patrick Collins (2002), *Goodbye Bussamarai The Mandandanji Land War, Southern Queensland 1842 – 1852*; Jonathon Richards (2008), *The Secret War A true history of Queensland's Native Police*, Timothy Bottoms (2013), *Conspiracy of Silence Queensland's frontier killing times*; Noel Loos (1982), *Invasion and Resistance*; Bill Rosser (1990), *Up Rode the Troopers The Black Police in Queensland*.

New South Wales Crown Lands Alienation Act 1861

Other states produced similar legislation at about the same time, for example, Queensland's inaugural Unoccupied Crown Lands Occupation Act of 1860. None of this land legislation considered the rights of Aboriginals, which caused Aboriginal society to become victims in an extended genocidal process, suffering ongoing cultural and physical destruction.

The squatter dominated Herbert Government of 1860 to 1863 passed a flurry of legislation, but it was entirely focussed on white interests. Aboriginals were non-people. Their rights could be ignored by the increasing numbers of immigrant British settlers and their elected representatives.

Queensland gained an appalling record of genocidal conduct, which continued well into the 20th century and arguably beyond. New South Wales, Queensland's parent state, was not far behind. But then, no state was dilatory in suppressing Aboriginal rights, so all must stand condemned.

Crown Lands Acts 1861

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NOTES: A copy of the this document is available in the Statutes of New South Wales.

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BEGIN TRANSCRIPTION

NEW SOUTH WALES

ANNO VICESIMO QUINTO

VICTORIÆ REGINÆ

No. 1

An act for regulating the Alienation of Crown Lands
[Assented to 18th October 1861]

Whereas it is an expedient to make better provisions for the alienation of Crown Lands. Be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council And Legislative Assembly of New South Wales in Parliament assembled and by the authority of the same as follows:

1. The following terms within inverted commas shall for the purposes of this Act unless the context otherwise indicate bear the meanings set against them respectively -

"Crown Lands" - All Lands vested in Her Majesty which have not been dedicated to any public purpose or which have not been granted or lawfully contracted to be granted in fee simple.

"Town Lands" - Crown Lands in any City, Town or Village or set apart as site for the same.

"Suburban Lands" - Crown Lands declared in the Gazette to be Suburban by the Governor and Executive Council.

"First Class Settled Districts" - Lands declared to be of the settled Class by the Queen's Orders in Council.

"Second Class Settled Districts" - Lands converted into the Settled Class by the Act twenty-three Victoria number four or that may be hereafter be converted under the Crown Lands Occupation Act of 1861.

"Orders

[DOCUMENT FIRST PAGE ENDS HERE]

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25° VICTORIÆ No. 1

Crown Lands Alienation - 1861

"Orders in Council" - The Orders in Council and Regulations from time to time issued under the Imperial Act fifth and sixth Victoria chapter thirty-six and ninth and tenth Victoria chapter one hundred and four.

"Minister" - The Minister for the time being charged with the administration of the Public Lands.

"Land Agent" - Any person duly appointed to sell Crown Lands.

"Land Office Days" - Days notified in the Gazette upon which Land Agents shall attend at the Land Offices of their Districts respectively.

"Appraisement" - Settlement of price value or damage by appraisers appointed in manner prescribed by this Act.

"Arbitration" - Settlement of boundaries by arbitrators appointed in manner prescribed by this Act.

"Improvements" - Improvements on Crown Lands or Lands conditionally sold to be the value to be determined by appraisement if disputed in Town and Suburban lands of not less than twice the upset price of the allotment or portion on which the improvements may stand and in other lands of not less than the unimproved value of the lands to be in like manner determined not being less than one pound per acre.

"Frontage" - Frontage to any road river stream or watercourse which according to the practice of the Survey Department ought to form a boundary between different section or lots of land.

2. On and after the passing of this Act the Orders in Council shall be repealed. Provided that nothing herein shall prejudice or affect anything already lawfully done or commenced or contracted to be done thereunder respectively or to prevent the several provisions of the said Orders in Council from being carried into effect with respect to lands under lease or promise of lease made previously to the twenty-second day of February one thousand eight hundred and fiftyeight during the currency of such leases as fully as if the same had not been hereby repealed.

3. Any Crown Lands may lawfully be granted in fee simple or dedicated to any public purpose under and subject to the provisions of this Act but not otherwise And the Governor with the

advice of the Executive Council is hereby authorized in the name and on behalf of her Majesty so to grant or dedicate any Crown Lands.

4. *The Governor with the advice of the Executive Council may by notice in the Gazette declare what portions of Crown Lands shall be set of apart as the sites of new cities towns or villages and define the limits of the suburban lands to be attached thereto and to any existing city town or village and also the portions of town lands or suburban lands to be dedicated to public purposes and what lands shall be reserved from sale until surveyed for the preservation of water supply or other public purpose And upon any such notice being published in the Gazette such lands shall become and be set apart attached dedicated or reserved accordingly Provided that within one month should Parliament be then in Session and otherwise within one month after the commencement of the next ensuing Session of Parliament there shall be laid before both Houses of Parliament an abstract of all such declarations.*

5.

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*Crown Lands Acts 1861
Page 3 of 11
25^o VICTORIÆ No. 1 3.*

Crown Lands Alienation - 1861

5. *The Governor with the advice aforesaid may by notice in the Gazette reserve or dedicate in such manner as may seem best for the public interest any Crown Lands for any railway or railway station - any public road canal or other internal communication - any public quay or land-place - any public reservoir aqueduct or water course - or for the preservation of Water supply - or for any purpose of defence or as the site for any place of public worship any hospital asylum or infirmary any public market, or slaughter-house any college school mechanics' institute public library museum or other institution for public instruction or amusement - or for any pasturage common - or for public health recreation convenience or enjoyment - or for the interment of the dead - or for any other public purpose And upon any such notice being published in the Gazette such lands shall become and be reserved or dedicated accordingly and may at any time thereafter be granted for such purposes in fee simple Provided that an abstract of any intended reservation or dedication shall be laid before both Houses of Parliament one calender month before such reservation or dedication is made.*

6. *After any land shall have been temporarily reserved from sale the same shall not be sold or otherwise disposed of until such reservation shall be revoked by the Governor with the advice aforesaid and the notice of such revocation published in the Gazette And all lands which have hitherto been or shall hereafter be permanently reserved for any of the purposes aforesaid shall be deemed to be set apart attached and dedicated accordingly and every conveyance or alienation thereof except for the purpose for which such reservation shall have been made shall be absolutely void as well against Her Majesty as all other persons whomsoever.*

7. Crown Lands held under lease or promise of lease issued or made previously to the twenty-second day of February one thousand eight hundred and fifty-eight shall during the currency of such lease be exempt from sale under this Act unless where such lands have been lawfully withdrawn from the holding of the lessee in accordance with the Orders in Council or may hereafter be lawfully withdrawn from such holding Provided that the lessee may be permitted to exercise a pre-emptive right purchase over one portion and no more of an area not exceeding six hundred and forty acres out of each block of twenty-five square miles and at a value to be determined by appraisement not being less than one pound per acre Provided nevertheless that any land purchased under the Orders in Council previously to the passing of this Act shall be estimated in the six hundred and forty acres aforesaid And provided that such appraisement shall not include any value for improvements And provided that every application for the purchase of land under these conditions shall be advertised in the Government Gazette for the period of one calendar month before the sale is completed.

8. Upon application made within twelve months after the passing of this Act by any person or his alienee who may prior thereto have made improvements on any Crown Lands or upon application within twelve months after the notification to the Gazette of any reserve from lease or promise of lease under the Orders in Council within which improvements may be situated or upon application by the holder of any lease or promise of lease of Crown Lands containing improvements made previously to the expiration of such lease or upon application by the improver or his alienee made at any period for the sale of improved lands in proclaimed Gold Fields the Governor may with the like advice sell and grant such lands to the owner of such improvements without competition in fee simple at a price to be fixed by appraisement not being less than the minimum upset price of the class of land as set forth in section twenty-three of this Act and in no case less than one pound per acre but such appraisement shall not include any value for improvements Provided that nothing herein contained shall be held to require the sale of any land which may contain auriferous deposits Provided

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Provided also that such sales shall be made in accordance with the general sub-division of the land whether town suburban or other lands and shall embrace only allotments or portions on which improvements may stand and that the area shall not for each improvement exceed half acre for town land two acres for suburban land and land on Gold Fields and three hundred and twenty acres for other lands.

9. The governor with the like advice may authorize any proprietor of land having frontage to any harbour or river to fill in and reclaim any land adjoining thereto and lying beyond or below high-water-mark or to erect a wharf or jetty upon or over the same and on payment of an adequate money consideration to be determined by appraisement for the unimproved value of the land such land or any land may already have been reclaimed shall become vested in fee simple in such proprietor and may be granted to him accordingly Provided always that no such reclamation shall be authorized with shall be calculated in any way to interrupt or interfere with the navigation of such harbour or river or with the rights or interests of adjoining proprietors

and Provided also that the intention to grant such land shall have been previously announced in the Gazette for four consecutive weeks before such land is granted in fee simple.

10. Whenever the owner or owners of any lands adjoining a road which has been reserved for access to such lands only and is not otherwise required for public use or convenience shall make application to the Minister to close such road or whenever any road which shall have been proclaimed through any land shall have rendered unnecessary a reserved or other road bounding or traversing such or neighbouring land it shall be lawful for the Governor with the advice aforesaid to notify in the Gazette and in the local newspapers if any that such reserved or boundary road will be closed and at any period not less than three months after the first publication of such notice a grant or grants of the site of the road so closed may issue to the owner or owners of adjoining lands in fair proportion or in accordance with agreement among such owners Provided that an adequate money consideration to be determined by appraisement shall be paid for the same.

11. In cases in which no way of access to any portion of Crown - Land may exist or may be attainable or in which any such portion may be insufficient in area for sale conditional or by auction or in which a portion of Crown Land may lie between land already granted and a street or road which forms or should form the way to approach to such granted land or in which buildings erected on lands already granted may have extended over Crown Land or in any other cases of a like kind the Governor may with the advice aforesaid sell and grant such lands to the holder or holders of adjacent lands without competition and at a price to be determined by appraisement being not less than the minimum upset price per acre of the class of land as set forth in section twenty-three of this Act.

12. The Governor may with the like advice rescind any reservation of water frontage on the sea coast or any bay inlet harbour or navigable river or land adjoining such frontage contained in any Crown grant either wholly or to such extent and subject to such conditions or restrictions as shall be deemed advisable and the land being the subject of such rescission shall on payment of an adequate money consideration to be determined by appraisement being not less than the minimum upset price per acre of the class of land as set forth in section twenty-three of this Act be granted to the owner of the land conveyed in the original Crown grant accordingly Provided that nothing in this clause contained shall empower the Governor to grant any land below high-water-mark or to interfere with any land used as a public thoroughfare or with any land set apart and dedicated for any public purpose Provided also that for four consecutive weeks notice shall be given in the Gazette previous to issuing such grant. 13.

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13. On and from the first day of January one thousand eight hundred and sixty-two **Crown Lands other than town lands or suburban lands and not being within a proclaimed Gold Field nor under lease for mining purposes to any person other than the applicant for purchase and not being within areas bounded by lines bearing north east south and west and distant ten miles from the outside boundary of any city or town containing according to the then last Census ten thousand inhabitants or five miles to the outside boundary of any town containing according to the then last Census five thousand inhabitants or three miles from the outside boundary of any town containing according to the then last Census one thousand inhabitants or two miles from the outside boundary of any town or village containing according to the then last Census one hundred inhabitants and not reserved for the site of any town or village or for the supply of water or from sale for any public purpose and not containing improvements and not excepted from sale under section seven of this Act shall be open for conditional sale by selection in the manner following that is to say Any person may upon any Land Office day tender to the Land Agent for the district a written application for the conditional purchase of any such lands not less than forty acres nor more than three hundred and twenty acres at the price of twenty shillings per acre and may pay to such Land Agent a deposit of twenty-five per centum of the purchase money thereof** And if no other like application and deposit for the same land be tendered at the same time such person shall be declared the conditional purchaser thereof at the price aforesaid Provided that if more than one such application and deposit for the same land or any part thereof shall be tendered at the same time to such Land Agent he shall unless all such applications but one be immediately withdrawn forthwith proceed to determine by lot in such manner as may be prescribed by regulations made under this Act which of the applicants shall become the purchaser.

14. **Crown Lands within proclaimed Gold Fields and not within areas excluded by special proclamation and not occupied for gold mining purposes shall be open for conditional sale** subject to all the provisions applicable to sales under the thirteenth section of this Act Provided that at any period persons specially authorized by the Minister shall be at liberty to dig and search for gold within the lands selected and that should the land be found to contain auriferous deposits it shall be in the power of the Governor and Executive Council to annul the sale and thereupon the conditional purchaser shall be entitled to compensation for the value other than auriferous of the lands and improvements such value to be determined by appraisalment.

15. Every Land Agent shall duly enter at the time in a book to be provided for the purpose the particulars of every application for conditional purchase lodged with him under the provisions of sections thirteen and fourteen of this Act and shall transmit to the proper Officer of the Government on Monday in each week a true extract therefrom shewing the particulars of all such applications for the week preceding.

16. If at the time of conditional purchase of any Crown Land under sections thirteen and fourteen of this Act such land shall not have been surveyed by the Government temporary boundaries thereof shall be determined by the conditional purchaser who shall within one month after such time of purchase occupy the land And any dispute between such purchaser and other person other than a holder in fee or his alienee claiming any interest therein respecting such boundaries shall be settled by arbitration Provided that if such land shall not be surveyed by the Government within twelve months from the date of application it shall be

lawful for the conditional purchaser by notice in writing to the Land Agent for the district to withdraw his application and thereupon he shall be entitled to demand and recover back any deposit paid by him or the purchaser shall have the option of having the land surveyed

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surveyed by a duly qualified licensed surveyor and the expense of such survey shall be allowed to such purchaser as part payment of his purchase money such expense to be allowed in accordance with the scale of charges fixed or to be fixed by the Surveyor General.

17. Crown Lands conditionally purchased under this Act shall if measured by the authority of the Government previously to such purchase be taken in portions as measured if not exceeding three hundred and twenty acres and if unmeasured and having frontage to any river creek road or intended road shall if within the First Class Settled Districts have a depth of not less than twenty chains and otherwise shall have a depth of not less than sixty chains and shall have their boundaries other than the frontages directed to the cardinal points by compass and if having no frontages as aforesaid shall be measured in square block and with boundaries directed to such cardinal points *Provided that should it seem to the Minister to be expedient the boundaries of portions having frontages may be made approximately at right angles with the frontage and otherwise modified and the boundaries of portions having no frontages may be modified and necessary roadways and water reserves excluded from such measurement.*

18. At the expiration of three years from the date of conditional purchase of any such land as aforesaid or within three months thereafter the balance of the purchase money shall be tendered at the office of the Colonial Treasurer together with a declaration by the conditional purchaser or his . alienee or some other person in the opinion of the Minister competent in that behalf under the Act ninth Victoria number nine to the effect that improvements as hereinbefore defined have been made upon such land specifying the nature extent and value of such improvements and that such land has been from the date of occupation the bona fide residence either continuously of the original purchaser or of some alienee or successive alienees of his whole estate and interest therein and that no such alienation has been made by any holder thereof until after the bona fide residence thereon of such holder for one whole year at the least And upon the Minister being satisfied by such declaration and the certificate of the Land Agent for the District or other proper officer of the facts aforesaid the Colonial Treasurer shall receive and acknowledge the remaining purchase money and a grant of the fee simple but with reservation of any minerals which the land may contain shall be made to the then rightful owner Provided that should such lands have been occupied and improved as aforesaid and should interest at the rate of five per centum per annum on the balance of the purchase money be paid within the said three months to the Colonial Treasurer the payment of such balance may be deferred to a period within three months after the first day of January

then next ensuing and may be so deferred from year to year by payment of such interest during the first quarter of each year But on default of a compliance with the requirements of this section the land shall revert to her Majesty and be liable to be sold at auction and the deposit shall be forfeited.

19. Crown Lands may be conditionally selected for the purposes of mining other than gold mining under section thirteen of this Act except that in such case the price shall be forty shillings per acre and except that in such case instead of the conditions applicable to other cases in regard to the declaration and certificate required a declaration shall be required only of the fact that not less than an average sum of two pounds per acre has been expended in mining operations other than gold mining on the land And upon such conditions being satisfied as hereby altered and on payment of the balance of purchase money a grant in fee simple shall be made without reservation of minerals other than gold and the same may be made on satisfaction of such conditions and payment of such balance notwithstanding the period of three years required in other cases shall not have expired And a grant may be made in like manner of any portion

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portion (not being less than forty acres) of a large portion originally selected for purchase upon a declaration shewing an expenditure in such mining operations as aforesaid of an average sum of not less than five pounds per acre on the land so to be granted And in that case the purchase of the remainder of the land selected shall be rescinded and any deposit paid thereon applied in or towards satisfying the balance of purchase money of the land granted Provided further that if the minister shall be dissatisfied with any such declaration as aforesaid he may cause the fact of the expenditure required to authorize a grant to be referred to arbitration under this Act and the issue of a grant shall in that case be dependent on the award thereon.

20. Crown Lands conditionally purchased under sections thirteen and fourteen of this Act and proved to the satisfaction of the Governor and Executive Council to have been abandoned by the purchaser thereof or his legal alienee before the expiration of three years from the date of purchase shall be declared forfeited by notice in the Government Gazette and may then be sold at auction.

21. Conditional purchasers of portions of Crown Lands under sections thirteen and fourteen of this Act not exceeding two hundred and eighty acres of their legal alienees may made additional selection of lands adjoining to the first selection or to each other but not otherwise and not exceeding in the whole three hundred and twenty acres and subject to all the conditions applicable to the original purchase except residence Provided that in the measurement of such additional selection of lands the frontage shall not exceed the extent which would be allowed to an original selection of three hundred and twenty acres provided also that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such further conditional purchase shall have been made. Holders in fee simple

of lands granted by the Crown in areas not exceeding two hundred and eighty acres who may reside on such lands may make conditional purchases adjoining such lands the areas of which shall not with that of the lands held in fee simple exceed three hundred and twenty acres and which shall not be subject to the condition of residence applicable to conditional purchases in other cases Provided that nothing herein contained shall prevent the sale of the adjoining lands to any other person before such further conditional purchase shall have been made.

22. Crown Lands intended to be sold without conditions for residence and improvement shall be put up for public auction in lots not exceeding three hundred and twenty acres each at such places in the Police District in which the lands are situated and at such times as the Minister shall direct to be notified by advertisement in the Gazette not less than one month, nor more than three months before the day of sale And the upset prices per acre shall not be lower than for Town Lands Eight pounds - Suburban Lands Two pounds - other Lands One pound Provided that the upset prices may be respectively fixed at any higher amounts.

23. Town lands and suburban lands without improvements shall be sold by public auction only.

24. Any Crown Lands put up for sale by public auction and not sold may be again put up in like manner Provided that all lands other than town or suburban so put up and not sold shall be open for sale at the upset price or in case of a higher price having been offered for the same then at such higher price less in either case the deposit if any paid thereon Provided also that the Minister may withdraw any such lands from selection and again submit them to public auction.

25. A deposit of twenty-five per centum of the purchase money for all lands sold by auction under any provision of this Act shall be paid .by the purchaser at the time of sale And unless the remainder of such

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purchase money be paid within three months thereafter the sale and contract shall be void and the deposit shall be forfeited Should the purchaser fail to pay the deposit the land shall be forthwith again put up by the Agent and who shall not accept any bid by the person so failing to pay.

27. Every Land Agent shall duly enter in a book to be provided for the purpose the particulars of all sales made by him under this Act.

28. Whenever it shall become necessary or desirable to fix or ascertain any price value or sum of money which by this Act it is provided may be fixed or ascertained by appraisement in case of dispute as to the amount of any compensation to be made under the provisions of this Act

and in case of any matter which by this Act is authorized or directed to be settled by arbitration the appraiser or appraisers arbitrator or arbitrators and umpire shall be appointed and the appraisement or arbitration shall be conducted in manner hereinafter mentioned that is to say:-

(1.) The Minister or an Officer authorized by him in that behalf and the claimant in matters hereinbefore directed or .authorized to be settled by appraisement or the parties interested in any dispute which by the provisions of this Act may be left to arbitration may concur in the appointment of a single appraiser or arbitrator or failing such appointment each party on the request of the other shall appoint an appraiser or arbitrator as the case may require to whom the matter shall be referred And every such appointment shall be made by the Minister or Officer and the claimant or by the parties to the matter in dispute under their hands in writing or if such party be a corporation aggregate under its common seal and such appointment shall be delivered to the appraisers or arbitrators and attached to the award when made and shall be deemed a submission to appraisement or to arbitration as the case may be by the parties making the same.

(2.) After the making of any such appointment the same shall not be revoked without the consent of both parties nor be .shall the death of either party operate as a revocation.

(3.) If for the space of sixty days after any such dispute or matter shall have arisen and notice in writing by one party who has himself duly appointed an appraiser or arbitrator .to the other party stating the dispute or matter to be referred and accompanied by a copy of such appointment the party to whom notice is given fail to appoint an appraiser or arbitrator the appraiser or arbitrator appointed by the party giving the notice shall be deemed to be appointed by and shall act on behalf of both parties.

(4.) The award of any appraiser or appraisers arbitrator or arbitrators appointed in pursuance of this Act shall be .binding final and conclusive upon all persons and to all intents and purposes whatsoever.

(5.) If before the determination of any matter so referred any appraiser or arbitrator die to become incapable to act the party by whom such arbitrator was appointed may appoint in writing another person in his stead and if he fail so to .do for the space of sixty days after notice in writing from the other party in that behalf the remaining appraiser or arbitrator may proceed ex parte and every appraiser or arbitrator so appointed shall have the same powers and authorities as were vested in the appraiser or arbitrator in whose stead the appointment is made.

(6)

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(6.) *In case a single arbitrator die or become incapable to act before the making of his award or fail to make his award within sixty days after his appointment or within such extended time if any not exceeding thirty days as shall have been duly appointed by him for that purpose the matters referred to him shall be again referred to appraisement or arbitration under the provisions of this Act as if no former reference had been made.*

(7.) *In case there be more than one appraiser or arbitrator the appraisers or arbitrators shall before they enter upon the references appoint by writing under their hands an umpire and if the person appointed to be umpire die or become incapable to act the appraisers or arbitrators shall forthwith appoint another person in his stead and in case the appraisers or arbitrators neglect or refuse to appoint an umpire within thirty days after being requested so to do by any party to the appraisement or arbitration the Minister may appoint an umpire and he is hereby empowered so to do and the award of the umpire shall be binding final and conclusive upon all persons and to all intents and purposes whatsoever.*

(8.) *In case appraisers or arbitrators fail to make their award within sixty days after the day on which the last of them was appointed or within such extended time if any not exceeding thirty days as shall have been duly appointed by them for that purpose the matters referred shall be determined by the umpire and the provisions of this Act with respect to the time for making an appraisement or award and with respect to extending the same in the case of a single arbitrator shall apply to any umpirage.*

(9.) *Any appraiser arbitrator or umpire appointed by virtue of this Act may require the production of such documents in the possession or power of either party as he may think necessary for determining the matters referred and may examine the parties as witnesses on oath.*

(10.) *All costs of and consequent upon the reference shall be in the discretion of the appraiser or appraisers arbitrator or arbitrators or of the umpire in case the matters referred are determined by an umpire.*

(11.) *Any submission to arbitration under the provisions of this Act may be made a Rule of the Supreme Court of the said Colony on the application of any party thereto. (12.) Before any appraiser arbitrator or umpire shall enter upon the consideration of any matter referred to him as aforesaid he shall make out and subscribe a declaration in the form following before a Justice of the Peace that is to say*

I A B do solemnly and sincerely declare that I am not directly or indirectly interested in the matter referred to me and that I will faithfully honestly and to the best of my skill and ability hear and determine the matters referred to me under the Crown Lands Alienation Act of 1861.

(13.) *And such declaration shall be annexed to the appraisement or award when made and if any appraiser arbitrator or umpire shall wilfully act contrary to such declaration he shall be guilty of a misdemeanor.*

(14.)

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(14.)Every appraisement or award shall be in writing and shall be transmitted to the Surveyor General and deposited in his office. .

29. Any instrument of sale or conveyance made and issued under this Act may be proved in all legal proceedings by the production of a certified copy thereof signed by the officer to be authorized for that purpose under any regulation made as hereinafter enacted.

30. The Governor with the advice aforesaid may make regulation for carrying this Act into full effect so as to provide for all proceedings forms of grants and other instruments - and all other matters and things arising under and consistent with this Act and not herein expressly provided for And all such regulations shall upon being published in the Gazette be valid in law Provided that a copy of every such regulation shall be laid before both Houses of Parliament within one month from the issue thereof if Parliament be then in Session or otherwise within one month after the commencement of the next ensuing Session.

31. This Act shall be styled and may be cited as the "Crown Lands Alienation Act of 1851".

*[In the name and on the behalf of
Her Majesty I assent to this Act
Government House
18 October 1861]*

*[John Young
Governor]*

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*[Transmitted for Enrolment according to law
Legislative Council Chamber)
Sydney 18 October, 1861)*

*R O'Connor
Clk. Legis. Council]*

*[Recorded and Enrolled in the Office of
the Registrar General this twenty first
day of October AD 1861]*

*[Chris Rolleston
Registrar General]*

END TRANSCRIPTION

Letters Patent annexing the Northern Territory to South Australia, 1863

This annexation began a period of heavy policing for Aboriginals in the area, who were also preyed upon by squatters and large leaseholders. There were many significant massacres,²⁴⁰ none of which resulted in convictions.

South Australia prides itself on having had no penal settlements. But it was no better than the other British colonies in Australia in its frenzy to dispossess Aboriginals of their homelands.



Significance

This document established a nameless part of New South Wales as the Northern Territory of South Australia. The land from the western border of Queensland (138 degrees east longitude to the eastern border of Western Australia (129 degrees east longitude) was thus given a name, and placed under South Australian administration. These original Letters Patent sent to the Governor of South Australia in 1863 defined and named the area, laid the legal basis for government and ensured that its citizens had the same rights to political representation as 'old' South Australians.

History

In 1787 Governor Arthur [Phillip](#) established as his domain all land from the east coast charted by Lieutenant James Cook to 135 degrees east longitude (covering the eastern one-third of the future Northern Territory). In 1824, during Governor Brisbane's term of office, the British Government decided to set up a military and trading post on the north coast of Australia. Fort Dundas, on Melville Island, was some 5 degrees west of the defined boundaries of New South Wales, so the Colonial Office included in

²⁴⁰ See FWAYAF *Recollections of a (Homicidal) Pastoral Frontier*.

the [Commission](#) issued to the next Governor of New South Wales, Ralph Darling, an extension of the western boundary of New South Wales to 129 degrees east longitude.

In 1829 this became the permanent boundary of the new Colony of [Western Australia](#). The three British military/trading posts set up on the north coast (Fort Dundas, 1824–1829); Fort Wellington, Raffles Bay, 1827–1829; and Victoria, Port Essington, 1838–1849) marked Britain's claim to the whole of the Australian continent. In practice each was mainly concerned with British commercial and strategic interests in the Indian Ocean. They failed as trading posts and by the 1840s it was clear that no other country would challenge Britain's claim to the whole of Australia.

In 1846 the British Government produced Letters Patent formally creating a colony of 'North Australia' including the present Northern Territory; but this was revoked in December 1846 and all plans for settlement abandoned.

The [boundaries](#) of the future Northern Territory were the result of fixing the northern boundary of South Australia in [1836](#) and the western boundary of Queensland in [1859](#) and [1862](#). Nominally, the 'left-over' area remained part of New South Wales, though after 1862 no part of it touched the border of that Colony. In that year, on the sixth attempt over four years, John McDouall Stuart crossed the continent from Adelaide to the Arafura Sea. He travelled through the entire length of the Northern Territory and earned a £2000 reward offered by the South Australian government. The South Australian government used the work of explorers such as Stuart to justify a claim to include the area within the boundaries of their Province.

South Australia had a European population of 140 000 and half the existing area of the Colony was still unexplored. The Duke of Newcastle, at the Colonial Office, had well-founded doubts about the ability of the South Australian colonists to develop such a vast northern extension, but no other Colony sought responsibility for the 'left-over' area. South Australia's persistence wore down the resistance of a British government believing any development to be better than none, so long as it cost the home country nothing.

On 6 July 1863 these Letters Patent, revocable at Britain's will, were issued, annexing the Northern Territory to South Australia.

This document was the legal basis for South Australian occupation and ensured people in the Northern Territory had the same rights to legal representation as other South Australians. These rights were given effect from 1882; Territorians gained the vote when the Northern Territory was added to the South Australian electorate of Flinders. From 1888 they possessed two members of their own in the South Australian Legislative Assembly and voting rights for the Legislative Council. The few white women in the Northern Territory shared the franchise with their South Australian sisters when that Colony became the first to grant full voting rights to women in [1894](#). South Australia automatically included all white adult Territorians in Commonwealth electorates after Federation.

Sources

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Victoria by the Grace of God of the United Kingdom of Great Britain and Ireland Queen
Defender of the Faith **TO** Our trusty and well beloved **Sir Dominick Daly** Knight

Greeting

Whereas by an Act passed in the Session of Parliament holden in the fifth and sixth years of Our Reign entitled "An Act for the Government of New South Wales and Van Diemen's Land" It was enacted that it should be lawful for Us by Letters Patent to be from time to time issued under the Great Seal of Our United Kingdom of Great Britain and Ireland to define as to Us should seem meet the limits of the Colony of New South Wales and to erect into a separate Colony or Colonies any territories which then were or were reputed to be or thereafter might be comprized within the said Colony of New South Wales

And whereas by an Act passed in the Session of Parliament holden in the twenty fourth and twenty fifth years of Our Reign entitled "An Act to remove doubts respecting the authority of the Legislature of Queensland and to annex certain territories to the Colony of South Australia and for other purposes" it was amongst other things provided that it should be lawful for Us by such Letters Patent as aforesaid to annex to any Colony which was then or which might thereafter be established on the Continent of Australia any Territories which (in the exercise of the powers thereinbefore mentioned) might have been erected into a separate Colony. Provided always that it should be lawful for Us in such Letters Patent to reserve such powers of revoking or altering the same as to Us should seem fit or to declare the period during which such Letters Patent should remain in force and also on the revocation or other determination of such Letters Patent again to exercise in respect of the territories referred to therein or any part thereof all such powers and authority as might have been exercised if the said Letters Patent had never been made **now know you** that We have thought fit in pursuance of the powers so vested in Us and of all other powers and authorities to Us in that behalf belonging to annex

And We do hereby annex to Our said Colony of South Australia until We think fit to make other disposition thereof or of any part or parts thereof so much of Our said Colony of New South Wales as lies to the Northward of the twenty sixth Parallel of South Latitude and between the One hundred and twenty ninth and One hundred and thirty eighth degrees of East Longitude together with the bays and gulfs therein and all and every the Islands adjacent to any part of the mainland within such limits as aforesaid with their rights members and appurtenances.

And We do hereby reserve to Us Our heirs and successors full power and authority from time to time to revoke alter or amend these Our Letters Patent as to Us or them shall seem fit **In witness** whereof We have caused these Our Letters to be made Patent. **Witness** Ourselves at Westminster the sixth day of July in the twenty seventh year of Our Reign.

By Warrant under the Queen's Sign Manual C.Romilly

Aboriginals and the Law – Protection Legislation

As Governments achieved legal and overwhelmingly violent possession of Aboriginal society's homelands, the problem then became: Where were the remnant indigenous populations to go? This was the problem noted as early as the 1840s by G. A. Robinson, when he was Chief Protector for the Port Phillip area, but the problem was never adequately addressed by any Government, at least, not in the beginning. Extermination was time consuming and relatively costly.

The solution eventually became a series of detention centres, or closely managed reserves, perhaps unsurprising, when we remember that Australia was first established by Britain as a penal colony, with a carceral population providing very cheap labour. It was also a model that had been prototyped by George Arthur, when in 1832 he removed the handful of remaining Tasmanian Aboriginals to Flinders Island, in Bass Strait, where they would not offend the sensibilities of upstanding settlers. By the 1860s, the Australia wide genocidal process moved into legislated subjugation and repression. Aborigines Protection Acts were the favoured instruments.

Aboriginal 'protection' or professed 'humanitarian' concern was often a euphemism for harsh and discriminatory Government policies, many of which continue today: for example, the 'intervention' order enacted by the Howard Government in 2007, supposedly for humanitarian reasons, but left remote communities as disadvantaged as before. Or more recently, in September 2014, when Senator Nigel Scullen, the Indigenous Affairs Minister in the Abbott Government, announced that the Commonwealth would no longer provide funding for essential services such as power, water, and rubbish collection in remote indigenous communities. The objective? To try and force Aboriginal fringe dwellers out of their homelands (land which has no commercial value for now) and back to the cities.

One of the more severe – but certainly not unique - proponents of Aboriginal 'protection' was the Queensland Government, which introduced fiercely punitive legislation in 1897, with amendments into the 1970s. Aboriginals still fearfully recall this long period of racist persecution as 'living under the Act', which Queensland adopted from similar Victorian legislation in 1869 and 1886, and was later picked up by Western Australia in 1905. Other states followed, perhaps with the exception of Tasmania, which had already solved the 'Aboriginal problem' by exterminating them. Embedded in these 'protectionist' Acts was the

principle of segregation and forced detention, otherwise called apartheid, a policy taken up by the South African administration from Australia after WWII. Some Australian states also adopted a eugenics policy, which was carefully woven into Aboriginal ‘protection’ legislation.

The ‘protectionist’ period of Government Aboriginal policy across Australia further fits the Lemkinian definition of genocide,²⁴¹ which specifies that genocide exists if *any* of the conditions in Article 2 are satisfied:

- a) Killing members of the group;
- b) Causing serious bodily or mental harm to the group;
- c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- d) Imposing measures intended to prevent births within the group;
- e) Forcibly transferring children of the group to another group.

Although the UN Convention carefully excises member States from culpability, Article 4 states that ‘constitutional rulers, public officials or private individuals’ can be ‘punished’. Australia became a signatory to the Convention in 1949, but has *still* not introduced specific domestic legislation to make genocide a crime. Perhaps the Commonwealth Government has good reason to be dilatory.

Aspects of late stage Lemkinian genocide remain in our society today, particularly (b) and (c), where Aboriginals – especially in remote communities – suffer some of the highest suicide rates, levels of incarceration, systemic disadvantage and chronic ill-health in the world.

For a full list of all so-called protection legislation affecting Aboriginals, much of it excessively punitive, see John McCorquodale, *Aborigines and the Law, a Digest (1987)*. This contains the full list of specific protection legislation²⁴², including the key statutes from late in the 19th century through to the mid 20th century, such as:

Northern Territory

Northern Territory Aboriginals Act 1910 (administered by South Australia)

Northern Territory – Aboriginals Ordinance 1911 (administered by the federal Government)

²⁴¹ The full United Nations *Convention on the Prevention and Punishment of the Crime of Genocide* can be found at www.hrweb.org/legal/genocide

²⁴² Aboriginals were variously discriminated against, not just through so-called ‘protection’ statutes, but also by the various land acts listed separately, including ‘wasteland’ acts, which legally handed over leased and not yet leased Aboriginal land to white settlers, as a deliberate policy of ethnic cleansing, or removing Aboriginals from lands they once possessed.

NSW

Aborigines Protection Act 1909

Queensland

Aboriginals Protection and Restriction of the Sale of Opium Act 1897 (included here, both for its significance and its repression of Aboriginals in Queensland until well into the 20th century, what Aboriginals fearfully recall as 'living under the Act').

Aboriginals Preservation and Protection Act 1939

South Australia

Aborigines Act 1911

Tasmania

Cape Barren Island Reserve Act 1912

Victoria

Aborigines Protection Act 1869

Aborigines Protection Act 1886

Western Australia

An act to prevent the enticing away of Girls of the Aboriginal Race from School or from any Service in which they are employed 1844 (I'm not making this up)

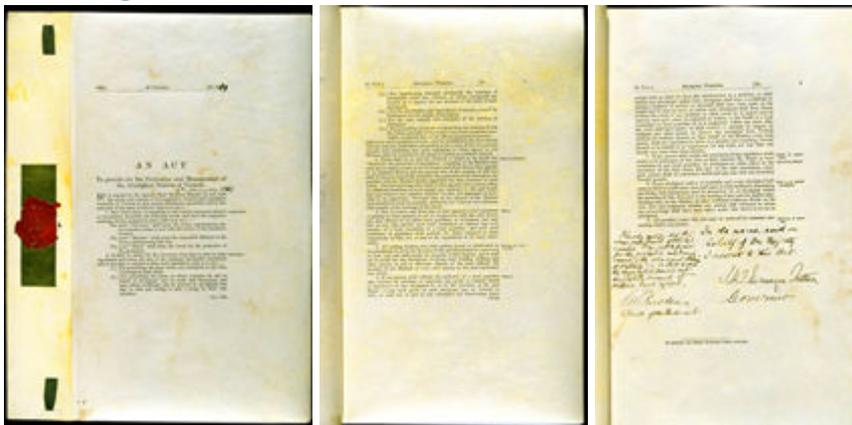
Aborigines Protection Act 1886

Aborigines Act 1905

1869 Aboriginal Protection Act 1869 (Vic) – Half Caste Act

The Victorian Half Caste Act of 1869, and its later variants in 1886 and beyond, became a model for similar punitive legislation in other States. It was a racist model for forced assimilation of Aboriginals who were the result of miscegenation, and forced detention under the control of an ‘Aboriginal Protection Board’ for those who were not.

The different State Governments believed this ‘humanitarian’ policy would lead to the decline and demise of those Aboriginals who were confined to ‘reserves’ (or detention centres), perhaps becoming a solution to the Aboriginal problem.

Aboriginal Protection Act 1869 (Vic)²⁴³**Significance**

This document made Victoria the first Colony to enact a comprehensive scheme to regulate the lives of Aboriginal people. This Act gave powers to the Board for the Protection of Aborigines which subsequently developed into an extraordinary level of control of people's lives including regulation of residence, employment, marriage, social life and other aspects of daily life.

History

Victoria enacted this law to regulate the lives of Aboriginal people at the same time as democratic reforms were being achieved in Britain and the Australian colonies. These reforms included extending the right to vote to all men, not just the wealthy, and measures such as free public education. For Aboriginal people, however, there was no such progress. The powers this Act gave to the Board for the Protection of Aborigines developed into controls over where people could live, where they could work, what kinds of jobs they could do, who they could associate with and who they could marry.

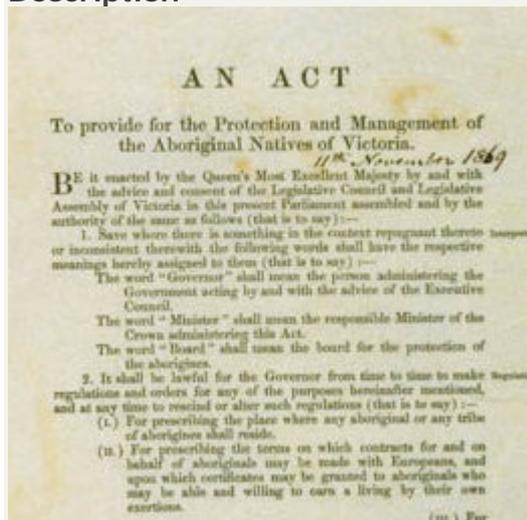
In 1886 in a further Act, Victoria also initiated a policy of removing Aboriginal people of mixed descent from the Aboriginal stations or reserves to merge into white society. The Board refused assistance to those it expelled from the reserves. This effective separation of communities and family members caused distress and protest. People like Bessy and Donald Cameron, who lived on

²⁴³ <http://foundingdocs.gov.au/item-sdid-22.html>
http://www.foundingdocs.gov.au/resources/transcripts/vic7i_doc_1869.pdf

the reserve at Ramahyuck (Lake Tyers), fought to stay together after Victoria's 'half-caste' Act made this unlawful in 1886.

The policy of excluding so-called 'half-castes' assumed that numbers of Aboriginal people on the reserves would decline, so that reserves could be reduced and eventually closed down. The inadequacy and inhumanity of the policy and legislation led to the [Aborigines Act 1910](#) (Vic) and the [Aboriginal Lands Act 1970](#) (Vic).

Description



Detail showing the title page of the Aboriginal Protection Act 1869 (Vic).

Long Title:	An Act for the Protection and Management of the Aboriginal Natives of Victoria.
No. of pages:	3
Medium:	Waxy paper
Measurements:	35.7 x 41.3 cm
Provenance:	Parliament of Victoria
Features:	It is tied with a green silk ribbon and stamped with the red seal of the Parliament. This is the Clerk of Parliaments Assent copy of the Act.
Location & Copyright:	Parliament House Victoria
Reference:	33 Vic. No. 349

AN ACT

To provide for the Protection and Management of
the Aboriginal Natives of Victoria.[11th November 1869]

BE it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Council and Legislative Assembly of Victoria in this present Parliament assembled and by the authority of the same as follows (that is to say) :—

1. Save where there is something in the context repugnant thereto or inconsistent therewith the following words shall have the respective meanings hereby assigned to them (that is to say) :—

Interpretation.

The word "Governor" shall mean the person administering the Government acting by and with the advice of the Executive Council.

The word "Minister" shall mean the responsible Minister of the Crown administering this Act.

The word "Board" shall mean the board for the protection of the aborigines.

2. It shall be lawful for the Governor from time to time to make regulations and orders for any of the purposes hereinafter mentioned, and at any time to rescind or alter such regulations (that is to say) :—

Regulations.

(I.) For prescribing the place where any aboriginal or any tribe of aborigines shall reside.

(II.) For prescribing the terms on which contracts for and on behalf of aborigines may be made with Europeans, and upon which certificates may be granted to aborigines who may be able and willing to earn a living by their own exertions.

(III.) For

[DOCUMENT FIRST PAGE ENDS HERE]

(III.) For apportioning amongst aborigines the earnings of aborigines under any contract, or where aborigines are located on a reserve, the net produce of the labor of such aborigines.

(IV.) For the distribution and expenditure of moneys granted by Parliament for the benefit of aborigines.

(V.) For the care custody and education of the children of aborigines.

(VI.) For prescribing the mode of transacting the business of and the duties generally of the board or any local committee hereinafter mentioned and of the officers appointed hereunder.

And every such regulation or order shall be published in the *Government Gazette*, and any publication purporting to be a copy of the *Government Gazette* and containing any such regulation or order signed by the Minister shall be received in all courts of justice as evidence thereof.

3. There shall be in and for Victoria a Board to be styled the "Board for the protection of aborigines," consisting of the Minister and such and so many persons as the Governor shall from time to time appoint to be members thereof, and the persons who at the passing of this Act shall be the members of the board for the protection of the aborigines are together with the Minister hereby appointed the first members of such board. The Governor may from time to time appoint other persons either as additional members of, or to supply any vacancies in the said board, and may remove any member whether by this Act appointed or hereafter to be appointed : Provided that in the absence of the Minister such member as shall be annually elected by the board as vice-chairman shall preside at the meetings of the board.

Board of
aborigines

4. The Governor may from time to time appoint a local committee consisting of three persons to act in conjunction with the said Board, and also officers to be called local guardians of aborigines, and may also at any time abolish such local committee or remove any such member of a local committee or a local guardian ; and such local committee or guardians shall perform the duties assigned to them respectively by this Act or any of the regulations to be made thereunder.

Officers.

5. All bedding clothing and other articles issued or distributed to the aborigines by or by the direction of the said Board shall be considered on loan only and shall remain the property of Her Majesty, and it shall not be lawful for the aborigines receiving such bedding clothing and other articles to sell or otherwise dispose of the same without the sanction of the Minister or such other person as the said regulations may direct.

Bedding &c.
not to be sold.

6. If any person shall without the authority of a local guardian take whether by purchase or otherwise any goods or chattels issued or distributed to any aboriginal by or by the direction of the said Board (except such goods as such aboriginal may be licensed to sell) ; or shall sell or give to any aboriginal any intoxicating liquor

Offences.

except

[DOCUMENT SECOND PAGE ENDS HERE]

except such as shall be *bonâ fide* administered as a medicine, or shall harbor any aboriginal unless such aboriginal shall have a certificate or unless a contract of service as aforesaid shall have been made on his behalf and be then in force, or unless such aboriginal shall from illness or from the result of any accident or other cause be in urgent need of succour and such cause be reported in writing to the Board or a local committee or local guardian or to a magistrate within one week after the need shall have arisen or shall remove or attempt to remove or instigate any other person to remove any aboriginal from Victoria without the written consent in that behalf of the Minister every such person shall on conviction be liable to a penalty not exceeding Twenty pounds or in default to be imprisoned for any term not less than one month nor more than three months.

7. If any person shall violate the provisions of any regulation made under or in pursuance of this Act, or shall obstruct the Board or local committee or any local guardian of aborigines or other officer in the execution of his duty under this Act or the said regulations, every such person shall on conviction forfeit and pay any sum not exceeding Twenty pounds.

Breach of regulations.
Obstructing officers.

8. Every aboriginal native of Australia and every aboriginal half-caste or child of a half-caste, such half-caste or child habitually associating and living with aborigines, shall be deemed to be an aboriginal within the meaning of this Act; and at the hearing of any case the justice adjudicating may, in the absence of other sufficient evidence, decide on his own view and judgment whether any person with reference to whom any proceedings shall have been taken under this Act is or is not an aboriginal.

Who to be deemed aboriginals.

9. All penalties under this Act may be enforced by summary proceeding before any justice.

Recovery of penalties.

[I hereby certify that the above fair print of the Bill intituled "An Act to provide for the protection and Management of the Aboriginal Natives of Victoria" is the Bill to which the Legislative Council and Legislative Assembly of Victoria have agreed.

G W Rusden

Clerk of the Parliaments]

[In the name and on behalf of Her Majesty I assent to this Act.

J H T Manners Sutton

Governor.]

[DOCUMENT THIRD PAGE ENDS
HERE]

1897 Queensland Aboriginals Protection and Restriction of Sale of Opium ²⁴⁴

This Queensland legislation and its later amendments²⁴⁵ opened a new phase in the repression of Aboriginals and was far more restrictive than for other states. The general Government belief that Aboriginal survivors were a dying race encouraged measures for their further legal control in tightly managed reserves under a Chief Protector of Aboriginals.²⁴⁶ The apartheid system continued well into the 20th century, as it did for other states.

²⁴⁴ http://www.foundingdocs.gov.au/resources/transcripts/qld5_doc_1897.pdf

²⁴⁵ 1901, 1905, 1927, 1928, 1934, 1971. Also see
http://www.austlii.edu.au/au/legis/qld/hist_act/aparosoa19012evn1648/

²⁴⁶ Chief Protector Reports: 1906 https://aiatsis.gov.au/sites/default/files/catalogue_resources/63567.pdf
1907 https://aiatsis.gov.au/sites/default/files/catalogue_resources/63592.pdf
1910 https://aiatsis.gov.au/sites/default/files/catalogue_resources/63720.pdf

Queensland

ANNO SEXAGESIMO PRIMO

VICTORIAE REGIAE

No. [17]

A Bill to make Provision for the better Protection and Care of the Aboriginal and Half-caste Inhabitants of the Colony, and to make more effectual Provision for Restricting the Sale and Distribution of Opium.

WHEREAS it is desirable to make provision for the better protection and care of the aboriginal and half-caste inhabitants of the Colony: And whereas great and widespread injury is being caused to the aboriginal and half-caste and certain other inhabitants of the Colony by the consumption of opium: And whereas the restrictions heretofore imposed by law upon the sale and distribution of opium are found to be insufficient, and it is expedient to make more effectual provision for restricting such sale and distribution, and for preventing the evils arising therefrom : Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same as follows:—

Preamble.

1. This Act shall be styled, and may be cited as, "*The Aboriginals Protection and Restriction of the Sale of Opium Act, 1897*," and shall commence and take effect on and from the first day of January, one thousand eight hundred and ninety-eight.

Short title and commencement.

2. The Acts mentioned in the Schedule hereto are hereby repealed, to the extent mentioned in the third column of the said Schedule, except as to anything lawfully done thereunder before the commencement of this Act, and except so far as may be necessary for

Repeal

Aboriginals Protection and Restriction of the Sale of Opium .Bill.

the purpose of supporting and continuing any proceeding taken, or of prosecuting or punishing any person for any offence committed before the commencement of this Act.

Interpretation.

3. The following terms shall, in this Act (unless the context otherwise indicates), bear the several meanings set against them respectively:—

" Reserve"—Any reserve heretofore or hereafter granted in trust, or reserved from sale or lease by the Governor in Council, for the benefit of the aboriginal inhabitants of the Colony, under the provisions of any law in force in Queensland relating to Crown lands;

"Minister"—The Home Secretary or other Minister of the Crown administering this Act ;

"Protector"—A Protector of Aboriginals appointed under the provisions of this Act;

"Superintendent"—A Superintendent appointed under the provisions of this Act for any Reserve;

"District"—A District proclaimed under the provisions of this Act;

"Regulations"—Regulations made under this Act;

"Prescribed"—Prescribed by this Act or the Regulations under it;

"Liquor"—Liquor as defined by " *The Licensing Act of 1885,*" and any Act amending the same;

"Opium"—Opium, whether in the form of gum or liquid, and every substance, whether solid or liquid, which contains opium, not being a substance compounded exclusively for medicinal purposes, and every substance which is or contains the ash of opium, or charcoal of opium;

"Half-caste"—Any person being the offspring of an aboriginal mother and other than an aboriginal father ; Provided that the term "half-caste," wherever it occurs in this Act elsewhere than in the next following section, shall, unless the context otherwise requires, be construed to exclude every half-caste who, under the provisions of the said section, is deemed to be an aboriginal.

Persons deemed to be aboriginals.

4. Every person who is—
 (a) An aboriginal inhabitant of Queensland; or
 (b) A half-caste who, at the commencement of this Act, is living with an aboriginal as wife, husband, or child; or
 (c) A half-caste who, otherwise than as wife, husband, or child, habitually lives or associates with aboriginals; shall be deemed to be an aboriginal within the meaning of this Act.

Proclamation of Districts.

5. The Governor in Council may, by Proclamation, declare any portion or portions of the Colony to be a District, or Districts, for the purposes of this Act.

Protectors to be appointed.

6. The Governor in Council may from time to time appoint, for the purpose of carrying the provisions of this Act into effect, fit and proper persons, to be severally called " Protector of Aboriginals," who shall, within the Districts respectively assigned to them, have and exercise the powers and duties prescribed.

Aboriginals Protection and Restriction of the Sale of Opium Bill.

7. The Governor in Council may appoint such and so many Superintendents for the reserves, situated within such districts as aforesaid, as may be necessary for carrying the provisions of this Act into effect. Superintendents to be appointed.
8. Every reserve shall be subject to the provisions of this Act and the Regulations. Reserves to be subject to act and Regulation.
9. It shall be lawful for the Minister to cause every aboriginal within any District, not being an aboriginal excepted from the provisions of this section, to be removed to, and kept within the limits of, any reserve situated within such District, in such manner, and subject to such conditions, as may be prescribed. The Minister may, subject to the said conditions, cause any aboriginal to be removed from one reserve to another. Aboriginals may be removed to reserves.
10. Every aboriginal who is— Aboriginals excepted from liability to removal to a reserve.
- (a) Lawfully employed by any person under the provisions of this Act or the Regulations, or under any other law in force in Queensland ;
 - (b) The holder of a permit to be absent from a reserve; or
 - (c) A female lawfully married to, and residing with, a husband who is not himself an aboriginal ;
 - (d) Or for whom in the opinion of the Minister satisfactory provision is otherwise made;
- shall be excepted from the provisions of the last preceding section.
11. It shall not be lawful for any person other than an aboriginal, not being a Superintendent or a person acting under his direction, and not being a person authorised under the Regulations, to enter or remain or be within the limits of a reserve upon which aboriginals are residing, for any purpose whatever. Persons who are prohibited from entering a reserve.
- Any person, without lawful excuse, entering or remaining or being upon such reserve as aforesaid, shall, for every such offence, be liable on conviction to a penalty not exceeding fifty pounds, or to imprisonment for any term not exceeding three months, and the proof of such lawful excuse shall be on the person charged.
12. A Protector may permit any aboriginal or half-caste who, before the commencement of this Act, was employed by any trustworthy person, to continue to be so employed by such person, and, in like manner, may permit any aboriginal or half-caste not previously employed to be employed by a like person. Aboriginals and half-castes may be employed.
13. Every permit, so granted as aforesaid, shall remain in force for twelve months only, but may at any time, before the expiration of such period, be renewed for any period not exceeding twelve calendar months, to commence from the expiration of the previous period of twelve months, and so, from time to time, so long as such aboriginal or half-caste is willing to continue to be employed by such person. Any such permission as aforesaid may be revoked at any time by a Protector by writing under his hand, and thereupon, if such related to an aboriginal, such aboriginal may be removed, by order of the Protector under and subject to the conditions prescribed, to a reserve, or, at the discretion of the Protector, the aboriginal or half-caste to whom such license related may be permitted, in like manner, to enter the employment of some other such trustworthy Duration, renewal, and renovation of permit.

Aboriginals Protection and Restriction of the Sale of Opium Bill.

person as aforesaid. Such revocation shall not entitle any such employer to claim or recover any compensation for the loss of the service of such aboriginal or half-caste, or to maintain any action in respect of any alleged loss or damage that may be occasioned by such revocation.

Harbouring of aboriginals and female half-castes prohibited.

14. Any person who, except under the provisions of any Act or Regulations thereunder in force in Queensland, employs an aboriginal or a female half-caste, otherwise than in accordance with the provisions of this Act or the Regulations, or suffers or permits an aboriginal or a female half-caste to be in or upon any house or premises in his occupation or under his control, shall be guilty of an offence against this Act, and shall be liable, on conviction, to a penalty not exceeding fifty pounds and not less than ten pounds, or to imprisonment for any term not exceeding six months.

Aboriginals and female half-castes to be employed under written agreement.

15. Every person desirous of employing an aboriginal or female half-caste under the provisions of this Act, shall forthwith, upon permission being granted by a Protector, enter into an agreement with such aboriginal or female half-caste, in the presence of any justice of the peace or member of the Police Force, for any period not exceeding twelve months. Every such agreement shall contain particulars of the names of the parties thereto, the nature of the service to be rendered by such aboriginal or female half-caste, the period during which such employment is to continue, the wages or other remuneration to be paid or given by the employer for such service, the nature of the accommodation to be provided for such aboriginal or female half-caste, and the conditions on which the agreement may be determined by either party. Every such agreement shall be in duplicate and be attested by such justice or member of the Police Force, who shall forthwith forward one of the said agreements to the nearest Protector.

Aboriginals and female half-castes in employment to be subject to supervision.

16. Every aboriginal or female half-caste employed by any person, under the provisions of this Act, shall be under the supervision of a Protector, or such other person as may be authorised in that behalf by the Regulations; and every employer of such aboriginal or female half-caste shall permit any Protector, or such other person as aforesaid, to have access to such aboriginal or female half-caste at all reasonable times, for the purpose of making such inspection and inquiries as he may deem necessary.

Prohibition of removal of aboriginals from one District to another or beyond the Colony.

17. Any person who, without the authority of a Protector, by writing under his hand, removes, or causes to be removed, an aboriginal or female half-caste from one District to another District, or to any place beyond the Colony, shall be guilty of an offence against this Act, and shall be liable, on conviction, to a penalty not exceeding one hundred pounds, or to imprisonment for any term not exceeding six months.

Possession of blanket, &c., issued to an aboriginal or half-caste a punishable offence.

18. Every blanket issued by an officer of the Government to any aboriginal or half-caste shall be and remain the property of Her Majesty, and any person, other than an aboriginal or half-caste, who has in his possession or custody any such blanket or portion thereof which shall reasonably appear to the justices, from the marks thereupon or otherwise, to have been so issued for the use of an aboriginal or half-caste, shall be guilty of an offence against this Act, and shall be liable, on conviction, to a penalty not exceeding ten pounds.

Aboriginals Protection and Restriction of the Sale of Opium Bill.

19. Any person who supplies, or causes or permits to be supplied, any liquor to an aboriginal or a half-caste, except for *bond fide* medicinal purposes, proof of which shall be on the person accused, shall, for every such offence, be liable to a penalty not exceeding fifty pounds, or to imprisonment for any term not exceeding three months, and in every case to the costs of the conviction. In the case of a licensed victualler or wine-seller who is convicted of such offence, the penalty, by this section provided, shall be substituted for the penalty provided in respect of such offence by the sixty-seventh section of " *The Licensing Act of 1885.*"

Penalty for supplying liquor to aboriginals and half-castes.

20. Any person who supplies, or causes or permits to be supplied, any opium to an aboriginal or a half-caste, shall be guilty of an offence against this Act, and shall be liable, on conviction, for the first offence, to a penalty not exceeding one hundred pounds and not less than twenty pounds, one-half of which shall be paid to the person giving the information which leads to such conviction, or to imprisonment for any term not exceeding three months, and for the second and every subsequent offence to imprisonment for any term not exceeding six months, and in every case to the costs of the conviction.

Persons supplying opium to aboriginals or half-castes, guilty of a punishable offence, and penalty therefor.

21. Notwithstanding anything in " *The Sale and Use of Poisons Act, 1891,*" to the contrary contained, it shall not be lawful for any person, not being a legally qualified medical practitioner, or a pharmaceutical chemist, or a wholesale dealer in drugs, to sell, or in any manner dispose of, deliver, or supply, opium to any other person, or to have or keep in his possession any opium for any purpose whatever; and it shall not be lawful for any legally qualified medical practitioner or pharmaceutical chemist, residing or carrying on business at a greater distance, by the nearest-practicable road, than one hundred miles from Brisbane, Rockhampton, or Townsville, to have or keep in or upon any premises in his occupation or under his control, at any one time, any greater quantity of opium than two pounds weight avoirdupois :

Possession or sale of opium by certain persons unlawful.

Provided that it shall not be unlawful for a common carrier to have in his possession opium, for the purpose of conveying the same, for delivery to the person to whom it has been lawfully consigned.

22. Any person who unlawfully has in his possession any opium, or unlawfully sells, or in any manner disposes of, delivers, or supplies opium to any person other than an aboriginal or a half-caste, shall, for every such offence, be liable, on conviction, to a penalty not exceeding fifty pounds, one-half of which shall be paid to the person giving the information which leads to such conviction. Any legally qualified medical practitioner or pharmaceutical chemist, residing or carrying on business at a greater distance, by the nearest practicable road, than one hundred miles from Brisbane, Rockhampton, or Townsville as aforesaid, who has or keeps, in or upon any premises in his occupation or under his control, any greater quantity of opium than two pounds weight avoirdupois, shall, be liable, on conviction, for the first offence, to a penalty not exceeding fifty pounds and not less than ten pounds, and for the second, and every subsequent, offence to imprisonment for any term not exceeding six months.

Penalty for unlawful possession or sale or delivery of opium.

23. Upon complaint made or laid on oath, before any justice of the peace, by any person, that he believes that opium is kept or concealed in any house, building, or place, contrary to any of the provisions of this Act, whether by a person authorised under the

Premises may be searched for opium believed to be kept contrary to provisions of Act.

Aboriginals Protection and Restriction of the Sale of Opium Bill.

provisions of " *The Sale and Use of Poisons Act, 1891,*" to sell or deal in poisons or not, such justice may grant a warrant, to any member of the Police Force, to enter and search such house, building, or place, between the hours of six in the morning and twelve at night, and, if admission is refused, to break into the same, and to seize and detain all opium found therein contrary to the provisions of this Act.

Travellers suspected to be in unlawful possession of opium may be searched, &c.

24. Any member of the Police Force, and any person acting under the direction and in the presence of a justice of the peace, may detain any person, found travelling, whom such member of the Police Force or such justice of the peace may suspect to have in his possession any opium contrary to the provisions of this Act, and may search such person, and may open and search any pack, swag, or other receptacle carried or conveyed by such person, and may seize any such opium as aforesaid found in the possession of such person, and may forthwith arrest such person without warrant, and detain him in custody until he can be brought before justices to be dealt with according to law.

Opium found in unlawful possession to be forfeited.

25. If, upon the hearing of a complaint against any person, in whose possession opium has been found in contravention of any of the provisions of this Act, the justices, before whom such complaint is heard, convict such person of the offence stated in such complaint, they shall, in addition to any penalty imposed upon the offender, order that all the opium so found in his possession be forfeited to the Crown, and the same shall be forfeited accordingly.

Averment in complaint sufficient evidence of certain matters.

26. In every prosecution for an offence against any of the provisions of this Act relating to an aboriginal or a half-caste, the averment in the complaint, that any person named therein is an aboriginal or a half-caste, shall be sufficient evidence of the fact unless the contrary is proved.

Persons by whom certain proceedings may be instituted.

27. All actions and proceedings against any person for the recovery of any wages due to an aboriginal or a half-caste, who is, or has been, employed by such person under the provisions of this Act, or for any breach of an agreement entered into by such person under the provisions of this Act, may be instituted and carried on by, or in the name of, a Protector, or by, or in the name of, any other person authorised by the Minister by writing under his hand.

Persons by whom certain complaints may be made.

28. Every complaint for an offence against the provisions of this Act or the Regulations, other than the provisions contained in the twenty-second, twenty-third, twenty-fourth, and twenty-fifth sections hereof, may be made or laid by a Protector or Superintendent, or by a member of the Police Force, and the prosecution may be conducted by the person by whom the complaint is so made or laid. Every complaint for an offence against any of the provisions of this Act, contained in the sections hereinbefore in this section mentioned, shall be made or laid by a member of the Police Force or a justice of the peace only.

Provision for penalties where not specified.

29. Any person who shall be convicted of an offence against this Act or the Regulations, shall, unless hereinbefore or in the Regulations otherwise provided, be liable to a penalty not exceeding ten pounds.

Offences to be prosecuted before any two justices.

30. All offences against this Act, or the Regulations, not herein otherwise specially provided for, may be prosecuted in a summary way before any two justices.

Aboriginals Protection and Restriction of the Sale of Opium Bill.

31. The Governor in Council may from time to time, by Proclamation, make Regulations for all or any of the matters following, that is to say,—

- (1) Prescribing the mode of removing- aboriginals to a reserve, and from one reserve to another;
 - (2) Defining the duties of Protectors and Superintendents, and any other persons employed to carry the provisions of this Act into effect;
 - (3) Authorising entry upon a reserve by specified persons or classes of persons for specified objects, and defining those objects, and the conditions under which such, persons may visit or remain upon a reserve, and fixing the duration of their stay thereupon, and providing for the revocation of such authority in any case;
 - (4) Prescribing the mode of distribution and expenditure of moneys granted by Parliament for the benefit of aboriginals;
 - (5) Apportioning amongst, or for the benefit of, aboriginals or half-castes, living on a reserve, the net produce of the labour of such aboriginals or half-castes ;
 - (6) Providing for the care, custody, and education of the children of aboriginals;
 - (7) Providing for the transfer of any half-caste child, being an orphan, or deserted by its parents, to an orphanage ;
 - (8) Prescribing the conditions on which any aboriginal or half-caste children may be apprenticed to, or placed in service with, suitable persons;
 - (9) Providing for the mode of supplying to any half-castes, who may be declared to be entitled thereto, any rations, blankets, or other necessaries, or any medical or other relief or assistance;
 - (10) Prescribing the conditions on which the Minister may authorise any half-caste to reside upon any reserve, and limiting the period of such residence, and the mode of dismissing or removing any such half-caste from such reserve;
 - (11) Providing for the control of all aboriginals and half-castes residing upon a reserve, and for the inspection of all aboriginals and half-castes, employed under the provisions of this Act or the Regulations ;
 - (12) Maintaining discipline and good order, upon a reserve ;
 - (13) Imposing the punishment of imprisonment, for any term not exceeding three months, upon any aboriginal or half-caste who is guilty of a breach of the Regulations relating to the maintenance of discipline and good order upon a reserve;
 - (14) Imposing, and authorising a Protector to inflict summary punishment by way of imprisonment, not exceeding fourteen days, upon aboriginals or half-castes, living upon a reserve or within the District under his charge, who, in the judgment of the Protector, are guilty of any crime, serious misconduct, neglect of duty, gross insubordination, or wilful breach of the Regulations;
 - (15) Prohibiting any aboriginal rites or customs that, in the opinion of the Minister, are injurious to the welfare of aboriginals living upon a reserve;
-

Aboriginals Protection and Restriction of the Sale of Opium Bill.

- (16) Providing for the due carrying out of the provisions of this Act;
 (17) Providing for all other matters and things that may be necessary to
 give effect to this Act.

32. Such Regulations, not being contrary to the provisions of this Act, shall have the force of law.

33. It shall be lawful for the Minister to issue to any half-caste, who, in his opinion, ought not to be subject to the provisions of this Act, a certificate, in writing under his hand, that such half-caste is exempt from the provisions of this Act and the Regulations, and from and after the issue of such certificate, such half-caste shall be so exempt accordingly.

THE SCHEDULE

Date of Act.	Title of Act.	Extent of Repeal.
55 Vic. No. 31 ...	<i>"An Act for Regulating the Sale and Use of Poisons"</i>	Section 13.
59 Vic. No. 29 ...	<i>"An Act to Amend the Laws relating to the Sale of Intoxicating Liquor"</i>	So much of Section 13 as is contained in the words, "aboriginal native of Australia or half-caste of that race, or to any" ; and in the further words, "of Australia or."

I hereby certify that this PUBLIC BILL has finally passed the Legislative Council and Legislative Assembly of Queensland.

[H W Radford]
 Clerk of the Parliaments

*Legislative Council Chamber,
 Brisbane, [9 December 1987]*

In the name and on behalf of the Queen, I assent to this Act.

[Lamington]

*Government House,
 Brisbane, [15 December 1987]*

[Transmitted from the Legislative Council for enrolment according to Law]

[H W Radford]
[Clerk of the Parliament]

[Legislative Council Offices,
[Brisbane, 15th December, 1897]

[Recorded and enrolled in the Office of the Registrar of Titles of Queensland at
Brisbane this sixteenth day of December One thousand eight hundred and ninety seven.]

[J O Browne]
[Registrar of Titles]

Australia's Constitution Act, 1900 ²⁴⁷

The 1900 Constitution Act of Australia was a symbolic cherry on top of a legislative cake that represented a century of genocidal dispossession. The Act perpetuated the racial oppression of Aboriginal society.

Section 25 denied Aboriginals the right to vote and denied them the right to be counted in a census. The fathers of the Australian Constitution wrote Aboriginals out of existence.

Section 51 (xxvii) allowed the Australian Government to make discriminatory laws against Aboriginals. The 1967 referendum partially repealed these repressive clauses. Sir Gerard Brennan described the result as 'an affirmation of the will of the Australian people that the odious policies of oppression and neglect of Aboriginal citizens were to be at an end'. ²⁴⁸ However, section 51 can still be used to discriminate against Aboriginals. ²⁴⁹

²⁴⁷ <http://www.foundingdocs.gov.au/item-sdid-82.html>

²⁴⁸

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_of_Aboriginal_and_Torres_Strait_Islander_Peoples/Interim_Report/c02

²⁴⁹ See the last chapter: *postscript*

Commonwealth of Australia Constitution Act.

A N A C T

T O

Constitute the Commonwealth of Australia.

Cap. 12.

[9th July 1900]

[63 & 64 VICT.]
12.]

Commonwealth of Australia

[CH.

Constitution Act.

CHAPTER 12.

An Act to constitute the Commonwealth of Australia.

A.D. 1900

[9th July 1900]

WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:

And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Commonwealth of Australia Constitution Act.

Short title.

2. The provisions of this Act referring to the Queen shall extend to Her Majesty's heirs and successors in the sovereignty of the United Kingdom.

Act to extend to the Queen's successors.

3. It shall be lawful for the Queen, with the advice of the Privy Council, to declare by proclamation that, on and after a day therein appointed, not being later than one year after the passing of this Act, the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, and also, if Her Majesty is satisfied that the people of Western Australia have agreed thereto, of Western Australia, shall be united in a Federal Commonwealth under the

Proclamation of Commonwealth.

A.D. 1900.
—

name of the Commonwealth of Australia. But the Queen may, at any time after the proclamation, appoint a Governor-General for the Commonwealth.

Commencement
of Act.

4. The Commonwealth shall be established, and the Constitution of the Commonwealth shall take effect, on and after the day so appointed. But the Parliaments of the several colonies may at any time after the passing of this Act make any such laws, to come into operation on the day so appointed, as they might have made if the Constitution had taken effect at the passing of this Act.

Operation of the
constitution and
laws.

5. This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

Definitions.

6. " The Commonwealth " shall mean the Commonwealth of Australia as established under this Act.

" The States " shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called "a State."

" Original States " shall mean such States as are parts of the Commonwealth at its establishment.

Repeal of Federal
Council Act.
48 & 49 Vict.
c. 60.

7. The Federal Council of Australasia Act, 1885, is hereby repealed, but so as not to affect any laws passed by the Federal Council of Australasia and in force at the establishment of the Commonwealth.

Any such law may be repealed as to any State by the Parliament of the Commonwealth, or as to any colony not being a State by the Parliament thereof.

Application
of Colonial
Boundaries
Act.
58 & 59 Vict.
c. 34.

8. After the passing of this Act the Colonial Boundaries Act, 1895, shall not apply to any colony which becomes a State of the Commonwealth; but the Commonwealth shall be taken to be a self-governing colony for the purposes of that Act.

9. The Constitution of the Commonwealth shall be as follows:—

A.D. 1900

THE CONSTITUTION.

Constitution.

This Constitution is divided as follows:—

Chapter I.—The Parliament:

Part I.—General:

Part II.—The Senate:

Part III.—The House of Representatives:

Part IV.—Both Houses of the Parliament:

Part V.—Powers of the Parliament:

Chapter II.—The Executive Government:

Chapter III.—The Judicature:

Chapter IV.—Finance and Trade:

Chapter V.—The States:

Chapter VI.—New States:

Chapter VII.—Miscellaneous:

Chapter VIII.—Alteration of the Constitution.

The Schedule.

Chap. I.
The Parliament.

Part I.
General.

CHAPTER I.

THE PARLIAMENT.

PART I.—GENERAL.

1. The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called "The Parliament," or "The Parliament of the Commonwealth."

Legislative Power.

2. A Governor-General appointed by the Queen shall be Her Majesty's representative in the Commonwealth, and shall have and may exercise in the Commonwealth during the Queen's pleasure, but subject to this Constitution, such powers and functions of the Queen as her Majesty may be pleased to assign to him.

Governor-General.

3. There shall be payable to the Queen out of the Consolidated Revenue fund of the Commonwealth, for the salary of the Governor-General, and annual sum which, until the Parliament otherwise provides, shall be ten thousand pounds.

Salary of Governor-General.

The salary of a Governor-General shall not be altered during his continuance in office.

Provisions relating to Governor-General.

4. The provisions of this Constitution relating to the Governor-General extend and apply to the Governor-General for the time being, or such person as the Queen may appoint to administer the Government of

the Commonwealth; but no such person shall be entitled to receive any salary from the Commonwealth in respect of any other office during his administration of the Government of the Commonwealth.

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5. The Governor-General may appoint such times for holding

the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.

After any general election the Parliament shall be summoned to meet not later than thirty days after the day appointed for the return of the writs.

The Parliament shall be summoned to meet not later than six months after the establishment of the Commonwealth.

6. There shall be a session of the Parliament once at least in every year, so that twelve months shall not intervene between the last sitting of the Parliament in one session and its first sitting in the next session.

Part II.
The Senate.
The Senate.

PART II. - THE SENATE.

7. The Senate shall be composed of senators for each State,

directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

Qualification
of electors.

8. The qualification of electors of senators shall be in each State that which is prescribed by this Constitution, or by the Parliament, as the qualification for electors of members of the House of Representatives; but in the choosing of senators each elector shall vote only once.

Method of election
of senators.

9. The Parliament of the Commonwealth may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States. Subject to any such law, the Parliament of each State may make laws prescribing the method of choosing the senators for that State.

Times and places.

The Parliament of a State may make laws for determining the times and places of elections of senators for the State.

Applications of
State laws.

10. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each

State, for the time being, relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections of senators for the State.

Failure to choose senators.

11. The Senate may proceed to the despatch of business, notwithstanding the failure of any State to provide for its representation in the Senate.

Issue of writs.

12. The Governor of any State may cause writs to be issued for elections of senators for the State. In case of the dissolution of the Senate the writs shall be issued within ten days from the proclamation of such dissolution.

13. As soon as may be after the Senate first meets, and after each first meeting of the Senate following a dissolution thereof, the Senate shall divide the senators chosen for each State into two classes, as nearly equal in number as practicable; and the places of the senators of the first class shall become vacant at the expiration of the third year, and the places of those of the second class at the expiration of the sixth year, from the beginning of their term of service; and afterwards the places of senators shall become vacant at the expiration of six years from the beginning of their term of service.

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Rotation of
Senators.

The election to fill vacant places shall be made in the year at the expiration of which the places are to become vacant.

For the purposes of this section the term of service of a senator shall be taken to begin on the first day of January following the day of his election, except in the cases of the first election and of the election next after any dissolution of the Senate, when it shall be taken to begin on the first day of January preceding the day of his election.

14. Whenever the number of senators for a State is increased or diminished, the Parliament of the Commonwealth may make such provision for the vacating of the places of senators for the State as it deems necessary to maintain regularity in the rotation.

Further
provision for
rotation.

15. If the place of a senator becomes vacant before the expiration of his term of service, the Houses of Parliament of the State for which he was chosen shall, sitting and voting together, choose a person to hold the place until the expiration of the term, or until the election of a successor as hereinafter provided, whichever first happens. But if the Houses of Parliament of the State are not in session at the time when the vacancy is notified, the Governor of the State, with the advice of the Executive Council thereof, may appoint a person to hold the place until the expiration of fourteen days after the beginning of the next session of the Parliament of the State, or until the election of a successor, whichever first happens.

Casual
vacancies.

At the next general election of members of the House of Representatives, or at the next election of senators for the State, whichever first happens, a successor shall, if the term has not then expired, be chosen to hold the place from the date of his election until the expiration of the term.

The name of any senator so chosen or appointed shall be certified by the Governor of the State to the Governor-General.

16. The qualifications of a senator shall be the same as those of a member of the House of Representatives.

Qualifications
of senator.

17. The Senate shall, before proceeding to the despatch of any other business, choose a senator to be the President of the Senate; and as often as the

Election of
President.

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office of President becomes vacant the Senate shall again choose a senator to be the President.

The President shall cease to hold his office if he ceases to be a senator. He may be removed from office by a vote of the Senate, or he may resign his office or his seat by writing addressed to the Governor-General.

18. Before or during any absence of the President, the Senate may choose a senator to perform his duties in his absence.

Absence of
President.

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Resignation of
senator.

19. A senator may, by writing addressed to the President, or to the Governor-General if there is no President or if the President is absent from the Commonwealth, resign his place, which thereupon shall become vacant.

Vacancy by
absence.

20. The place of a senator shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the Senate, fails to attend the Senate.

Vacancy to be
notified.

21. Whenever a vacancy happens in the Senate, the President, or if there is no President or if the President is absent from the Commonwealth the Governor-General, shall notify the same to the Governor of the State in the representation of which the vacancy has happened.

Quorum.

22. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the senators shall be necessary to constitute a meeting of the Senate for the exercise of its powers.

Voting in
Senate.

23. Questions arising in the Senate shall be determined by a majority of votes, and each senator shall have one vote. The President shall in all cases be entitled to vote; and when the votes are equal the question shall pass in the negative.

Part III.
House of
Representatives.
Constitution of
House of
Representatives.

PART III - THE HOUSE OF REPRESENTATIVES.

24. The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the number of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:—

- (i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
- (ii.) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

Provision as
to races
disqualified
from voting.

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that

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State not be counted.

Representatives in
first Parliament.

26. Notwithstanding anything in section twenty-four, the number of members to be chosen in each State at the first election shall be as follows:

New South Wales - - - - twenty-three;

Victoria - - - - - twenty;

Queensland - - - - - eight;

South Australia - - - - - six;

Tasmania - - - - - five;

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Constitution Act.

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Provided that if Western Australia is an Original State, the numbers shall be as follows:—

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New South Wales	- - - - -	twenty-six;
Victoria	- - - - -	twenty-three;
Queensland	- - - - -	nine;
South Australia	- - - - -	seven;
Western Australia	- - - - -	five;
Tasmania	- - - - -	five.

27. Subject to this Constitution, the Parliament may make laws for increasing or diminishing the number of the members of the House of Representatives.

Alteration of number of members.

28. Every House of Representatives shall continue for three years from the first meeting of the House, and no longer, but may be sooner dissolved by the Governor-General.

Duration of House of Representatives.

29. Until the Parliament of the Commonwealth otherwise provides, the Parliament of any State may make laws for determining the divisions in each State for which members of the House of Representatives may be chosen, and the number of members to be chosen for each division. A division shall not be formed out of parts of different States.

Electoral Divisions.

In the absence of other provision, each State shall be one electorate.

30. Until the Parliament otherwise provides, the qualification of electors of members of the House of Representatives shall be in each State that which is prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of the State; but in the choosing of members each elector shall vote only once.

Qualification of electors.

31. Until the Parliament otherwise provides, but subject to this Constitution, the laws in force in each State for the time being relating to elections for the more numerous House of the Parliament of the State shall, as nearly as practicable, apply to elections in the State of members of the House of Representatives.

Application of State laws.

32. The Governor-General in Council may cause writs to be issued for general elections of members of the House of Representatives.

Writs for general election.

After the first general election, the writs shall be issued within ten days from the expiry of a House of Representatives or from the proclamation of a dissolution thereof.

33. Whenever a vacancy happens in the House of Representatives, the Speaker shall issue his writ for the election of a new member, or if there is no Speaker or if he is absent from the Commonwealth the Governor-

Writs for vacancies.

General in Council may issue the writ.

34. Until the Parliament otherwise provides, the qualifications of a member of the House of Representatives shall be as follows:—

Qualifications of members.

He must be of the full age of twenty-one years, and must be an elector entitled to vote at the election of members of the house of Representatives, or a person qualified to become such elector, and must have been for three years at the least a resident within the limits of the Commonwealth as existing at the time when he is chosen:

- (ii) He must be a subject of the Queen, either natural-born or for at least five years naturalized under a law of the United Kingdom, or of a

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[CH.12.]

Commonwealth of Australia Constitution Act.

[63 & 64 VICT.]

A.D. 1900 —	Colony which has become or becomes a State, or of the Commonwealth, or of a State.
Election of Speaker.	35. The House of Representatives shall, before proceeding to the despatch of any other business, choose a member to be the Speaker of the House, and as often as the office of Speaker becomes vacant the House shall again choose a member to be the Speaker. The Speaker shall cease to hold his office if he ceases to be a member. He may be removed from office by a vote of the House, or he may resign his office or his seat by writing addressed to the Governor-General.
Absence of Speaker.	36. Before or during any absence of the Speaker, the House of Representatives may choose a member to perform his duties in his absence.
Resignation of member.	37. A member may by writing addressed to the Speaker, or to the Governor-General if there is no Speaker or if the Speaker is absent from the Commonwealth, resign his place, which thereupon shall become vacant.
Vacancy by absence.	38. The place of a member shall become vacant if for two consecutive months of any session of the Parliament he, without the permission of the House, fails to attend the House.
Quorum.	39. Until the Parliament otherwise provides, the presence of at least one-third of the whole number of the members of the House of Representatives shall be necessary to constitute a meeting of the House for the exercise of its powers.
Voting in House of Representatives.	40. Questions arising in the House of Representatives shall be determined by a majority of votes other than that of the Speaker. The Speaker shall not vote unless the numbers are equal, and then he shall have a casting vote.
Part IV. Both Houses of the Parliament.	PART IV - BOTH HOUSES OF THE PARLIAMENT.
Right of electors of States.	41. No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.
Oath of affirmation of allegiance.	42. Every senator and every member of the House of Representatives shall before taking his seat make and subscribe before the Governor-General, or some person authorised by him, an oath or affirmation of allegiance in the form set forth in the schedule to this Constitution.
Member of one House	43. A member of either House of the Parliament shall be incapable of being

ineligible for
other.
Disqualification.

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chosen or of sitting as a member of the other House.

44. Any person who—

- (i) Is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power: or
- (ii) Is attainted of treason, or has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer: or
- (iii) Is an undischarged bankrupt or insolvent: or

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[CH. 12.]

(iv.) Holds any office of profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth: or

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(v.) Has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons:

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

But sub-section iv. Does not apply to the office of any of the Queen's Ministers of State for the Commonwealth, or of any of the Queen's Ministers for a State, or to the receipt of pay, half pay, or a pension, by any person as an officer or member of the Queen's navy or army, or to the receipt of pay as an officer or member of the naval or military forces of the Commonwealth by any person whose services are not wholly employed by the Commonwealth.

45. If a senator or member of the House of Representatives —

Vacancy on happening of disqualification.

(i) Becomes subject to any of the disabilities mentioned in the last preceding section: or

(ii) Takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors: or

(iii) Directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State:

his place shall thereupon become vacant.

46. Until the Parliament otherwise provides, any person declared by this constitution to be incapable of sitting as a senator or as a member of the House of Representatives shall, for every day on which he so sits, be liable to pay the sum of one hundred pounds to any person who sues for it in any court of competent jurisdiction.

Penalty for sitting when disqualified.

47. Until the Parliament otherwise provides, any question respecting the qualification of a senator or of a member of the House of Representatives, or respecting a vacancy in either House of the Parliament, and any question of a disputed election to either House, shall be determined by the House in which the question arises.

Disputed elections.

48. Until the Parliament otherwise provides, each senator and each member of the House of Representatives shall receive an allowance of four hundred pounds a year, to be reckoned from the day on which he takes his seat.

Allowance to members.

49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be

Privileges, &c. of Houses.

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such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

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Rules and
orders.

Part V.
Powers of the
Parliament.

Legislative powers
of the Parliament.

50. Each House of the Parliament may make rules and orders with respect to—

- (i) The mode in which its powers, privileges, and immunities may be exercised and upheld:
- (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

PART V. — POWERS OF THE PARLIAMENT.

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

- (i) Trade and commerce with other countries, and among the States:
- (ii) Taxation; but so as not to discriminate between States or parts of States:
- (iii) Bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth:
- (iv) Borrowing money on the public credit of the Commonwealth:
- (v) Postal, telegraphic, telephonic, and other like services:
- (vi) The naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth:
- (vii) Lighthouses, lightships, beacons and buoys:
- (viii) Astronomical and meteorological observations:
- (ix) Quarantine:
- (x) Fisheries in Australian waters beyond territorial limits:
- (xi) Census and statistics:
- (xii) Currency, coinage, and legal tender:
- (xiii) Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money:
- (xiv) Insurance, other than State insurance; also State insurance extending beyond the limits of the State concerned:
- (xv) Weights and measures:
- (xvi) Bills of exchange and promissory notes:
- (xvii) Bankruptcy and insolvency:
- (xviii) Copyrights, patents of inventions and designs,

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and trade marks:

(xix) Naturalization and aliens:

(xx) Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth:

(xxi) Marriage:

(xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants:

(xxiii) Invalid and old-age pensions:

(xxiv) The service and execution throughout the Commonwealth of the civil and criminal process and the judgments of the courts of the States:

(xxv) The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States:

- (xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws:
- (xxvii) Immigration and emigration:
- (xxviii) The influx of criminals:
- (xxix) External affairs:
- (xxx) The relations of the Commonwealth with the islands of the Pacific:
- (xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws:
- (xxxii) The control of railways with respect to transport for the naval and military purposes of the Commonwealth:
- (xxxiii) The acquisition, with the consent of a State, of any railways of the State on terms arranged between the Commonwealth and the State:
- (xxxiv) Railway construction and extension in any State with the consent of that State:
- (xxxv) Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State:
- (xxxvi) Matters in respect of which this Constitution makes provision until the Parliament otherwise provides:
- (xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred or which afterwards adopt the law:
- (xxxviii) The exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States directly concerned, of any power which can at the establishment of this Constitution be exercised only by the Parliament of the United Kingdom or by the Federal Council of Australasia:
- (xxxix) Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the

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Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

52. The Parliament shall, subject to this Constitution, have exclusive power to make laws for the peace, order, and good government of the Commonwealth with respect to—

Exclusive powers of the Parliament.

- (i) The seat of government of the Commonwealth, and all places acquired by the Commonwealth for public purposes:
- (ii) Matters relating to any department of the public service the control of which is by this Constitution transferred to the Executive Government of the Commonwealth:
- (iii) Other matters declared by this Constitution to be within the exclusive power of the Parliament.

53. Proposed laws appropriating revenue or moneys, or imposing taxation, shall not originate in the Senate. But a proposed law shall not be taken to appropriate revenue or moneys, or to impose taxation, by reason only of its containing provisions for the imposition or appropriation of fines or other

Powers of the Houses in respect of legislation.

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pecuniary penalties, or for the demand or payment or appropriation of fees for licences, or fees for services under the proposed law.

The Senate may not amend proposed laws imposing taxation, or proposed laws appropriating revenue or moneys for the ordinary annual services of the Government.

The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.

The Senate may at any stage return to the House of Representatives any proposed law which the Senate may not amend, requesting, by message, the omission or amendment of any items or provisions therein. And the House of Representatives may, if it thinks fit, make any of such omissions or amendments, with or without modifications.

Except as provided in this section, the Senate shall have equal power with the House of Representatives in respect of all proposed laws.

Appropriation Bills.

54. The proposed law which appropriates revenue or moneys for the ordinary annual services of the Government shall deal only with such appropriation.

Tax Bill.

55. Laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect.

Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only.

Recommendation of money votes.

56. A vote, resolution, or proposed law for the appropriation of revenue or moneys shall not be passed unless the purpose of the appropriation has in the same session been recommended by message of the Governor-General to the House in which the proposal originated.

Disagreement between the Houses.

57. If the House of Representatives passes any proposed law, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

If after such dissolution the House of Representatives again passes the proposed law, with

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or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may convene a joint sitting of the members of the Senate and of the House of Representatives.

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The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law, with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.

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58. When a proposed law passed by both Houses of the Parliament is presented to the Governor-General for the Queen's assent, he shall declare, according to his discretion, but subject to this Constitution, that he assents in the Queen's name, or that he withholds assent, or that he reserves the law for the Queen's pleasure.

Royal
assent to Bills.

The Governor-General may return to the house in which it originated any proposed law so presented to him, and may transmit therewith any amendments which he may recommend, and the Houses may deal with the recommendation.

Recommendations by
Governor-General.

59. The Queen may disallow any law within one year from the Governor-General's assent, and such disallowance on being made known by the Governor-General by speech or message to each of the Houses of the Parliament, or by Proclamation, shall annul the law from the day when the disallowance is so made known.

Disallowance
by the Queen.

60. A proposed law reserved for the Queen's pleasure shall not have any force unless and until within two years from the day on which it was presented to the Governor-General for the Queen's assent the Governor-General makes known, by speech or message to each of the Houses of the Parliament, or by Proclamation, that it has received the Queen's assent.

Signification of
Queen's pleasure on
Bills reserved.

CHAPTER II.

THE EXECUTIVE GOVERNMENT.

Chap.II.
The
Government.

61. The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

Executive
power.

62. There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his pleasure.

Federal
Executive
Council.

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Provisions
referring to
Governor-
General.

63. The provisions of this Constitution referring to the Governor-General in Council shall be construed as referring to the Governor-General acting with the advice of the Federal Executive Council.

Ministers of
State.

64. The Governor-General may appoint officers to administer

such departments of State of the Commonwealth as the Governor-General in Council may establish.

Such officers shall hold office during the pleasure of the Governor-General. They shall be members of the Federal Executive Council, and shall be the Queen's Ministers of State for the Commonwealth.

Ministers to sit in
Parliament.

After the first general election no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives.

Number of
Ministers.

65. Until the Parliament otherwise provides, the Ministers of State shall not exceed seven in number, and shall hold such offices as the Parliament prescribes, or, in the absence of provision, as the Governor-General directs.

Salaries of
Ministers.

66. There shall be payable to the Queen, out of the Consolidated Revenue Fund of the Commonwealth, for the salaries of the Ministers of State, an annual sum which, until the Parliament otherwise provides, shall not exceed twelve thousand pounds a year.

Appointment
of civil servant.

67. Until the Parliament otherwise provides, the appointment and removal of all other officers of the Executive Government of the Commonwealth shall be vested in the Governor-General in Council, unless the appointment is delegated by the Governor-General in Council or by a law of the Commonwealth to some other authority.

Command of
naval and
military
forces.

68. The command in chief of the naval and military forces of the Commonwealth is vested in the Governor-General as the Queen's representative.

Transfer of
certain
departments.

69. On a date or dates to be proclaimed by the Governor – General after the establishment of the Commonwealth the following departments of the public service in each State shall become transferred to the Commonwealth:—

Posts, telegraphs, and telephones:

Naval and military defence:

Lighthouses, lightships, beacons, and buoys:

Quarantine.

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But the departments of customs and of excise in each State shall become transferred to the Commonwealth on its establishment.

Certain powers of
Governors to vest in
Governor-General.

70. In respect of matters which, under this Constitution, pass to the Executive Government of the Commonwealth, all powers and functions which at the establishment of the Commonwealth are vested in the Governor of a Colony, or in the Governor of a Colony with the advice of his Executive Council, or in any authority of a Colony, shall vest in the Governor-General, or in the Governor-General in Council, or in the authority exercising similar powers under the Commonwealth, as the case requires.

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CHAPTER III.

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THE JUDICATURE.

Chap. III.

The
Judicature.

71. The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Judicial power
and Courts.

72. The Justices of the High Court and of the other courts created by the Parliament –

Judges'
appointment,
tenure, and
remuneration.

(i.) Shall be appointed by the Governor-General in Council:

(ii.) Shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office.

73. The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences –

Appellate
jurisdiction of
High Court.

(i.) Of any Justice or Justices exercising the original jurisdiction of the High Court:

(ii.) Of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council:

(iii.) Of the Inter-State Commission, but as to questions of law only:

and judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the

conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.

74. No appeal shall be permitted to the Queen in Council from a

decision of the High Court upon any question, howsoever arising, as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States, or as to the limits inter se of the Constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

Appeal to
Queen in
Council.

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The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters in which such leave may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for Her Majesty's pleasure.

Original
jurisdiction of
High Court.

75. In all matters —

- (i.) Arising under any treaty:
- (ii) Affecting consuls or other representatives of other countries:
- (iii.) In which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party:
- (iv.) Between States, or between residents of different States, or between a State and a resident of another State:
- (v.) In which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth:

the High Court shall have original jurisdiction.

Additional
original jurisdiction.

76. The Parliament may make laws conferring original jurisdiction on the High court in any matter—

- (i) Arising under this constitution, or involving its interpretation:
- (ii) Arising under any laws made by the Parliament:
- (iii) Of Admiralty and maritime jurisdiction:
- (iv) Relating to the same subject-matter claimed under the laws of different States.

Power to define
jurisdiction.

77. With respect to any of the matters mentioned in the last two sections the Parliament may make laws—

- (i) Defining the jurisdiction of any federal court other than the High Court:
- (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
- (iii) Investing any court of a State with federal jurisdiction.

Proceedings against
Commonwealth or

78. The Parliament may make laws conferring rights

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State.	to proceed against the Commonwealth or a State in respect of matters within the limits of the judicial power.
Number of judges.	79. The federal jurisdiction of any court may be exercised by such number of judges as the Parliament prescribes.
Trial by jury.	80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

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CHAPTER IV.

FINANCE AND TRADE.

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Chap. IV.
Finance and
Trade.

81. All revenues or moneys raised or received by the Executive Government of the Commonwealth shall form one Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth in the manner and subject to the charges and liabilities imposed by this Constitution.

Consolidated
Revenue Fund.

82. The costs, charges, and expenses incident to the collection, management, and receipt of the Consolidated Revenue Fund shall form the first charge thereon; and the revenue of the commonwealth shall in the first instance be applied to the payment of the expenditure of the Commonwealth.

Expenditure charged
thereon.

83. No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law.

Money to be
appropriated by law.

But until the expiration of one month after the first meeting of the Parliament the Governor-General in Council may draw from the Treasury and expend such moneys as may be necessary for the maintenance of any department transferred to the Commonwealth and for the holding of the first elections for the Parliament.

84. When any department of the public service of a State becomes transferred to the Commonwealth, all officers of the department shall become subject to the control of the Executive Government of the Commonwealth.

Transfer of officers.

Any such officer who is not retained in the service of the Commonwealth shall, unless he is appointed to some other office of equal emolument in the public service of the State, be entitled to receive from the State any pension, gratuity, or other compensation, payable under the law of the State on the abolition of his office.

Any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State. Such pension or retiring allowance shall be paid to him by the Commonwealth; but the State shall pay to the Commonwealth a part thereof, to be calculated on the proportion which his term of service with the State

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bears to his whole term of service, and for the purpose of the calculation his salary shall be taken to be that paid to him by the State at the time of the transfer.

Any officer who is, at the establishment of the Commonwealth, in the public service of the State, and who is, by consent of the Governor of the State with the advice of the Executive Council thereof, transferred to the public service of the Commonwealth, shall have the same rights as if he had been an officer of a department transferred to the Commonwealth and were retained in the service of the Commonwealth.

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Transfer of
property of
State.

85. When any department of the public service of a State is transferred to the Commonwealth –

(i.) All property of the State of any kind, used exclusively in connexion with the department, shall become vested in the Commonwealth; but, in the case of the departments controlling customs and excise and bounties, for such time only as the Governor-General in Council may declare to be necessary:

(ii.) The Commonwealth may acquire any property of the State, of any kind used, but not exclusively used in connexion with the department; the value thereof shall, if no agreement can be made, be ascertained in, as nearly as may be, the manner in which the value of land, or of an interest in land, taken by the State for public purposes is ascertained under the law of the State in force at the establishment of the Commonwealth:

(iii.) The Commonwealth shall compensate the State for the value of any property passing to the Commonwealth under this section; if no agreement can be made as to the mode of compensation, it shall be determined under laws to be made by the Parliament:

(iv.) The Commonwealth shall, at the date of the transfer, assume the current obligations of the State in respect of the department transferred.

86. On the establishment of the Commonwealth, the collection and control of duties of customs and of excise, and the control of the payment of bounties, shall pass to the Executive Government of the Commonwealth.

87. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, of the net revenue of the Commonwealth from duties of customs and of excise not more than one-fourth shall be applied annually by the Commonwealth towards its expenditure.

The balance shall, in accordance with this Constitution, be paid to the several States, or applied towards the payment of interest on debts of the several States taken over by the Commonwealth.

Uniform duties of
customs.

88. Uniform duties of customs shall be imposed within two years after the establishment of the Commonwealth.

Payment to States
before uniform

89. Until the imposition of uniform duties of

duties.

customs —

(The Commonwealth shall credit to each State the revenues collected therein by the Commonwealth.

The Commonwealth shall debit to each State —

(a) The expenditure therein of the Commonwealth incurred solely for the maintenance or continuance, as at the time of transfer, of any department transferred from the State to the Commonwealth;

(b) The proportion of the state, according to the number of its people, in the other expenditure of the Commonwealth.

The Commonwealth shall pay to each State month by

month the balance (if any) in favour of the State.

90. On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise, and to grant bounties on the production or export of goods, shall become exclusive.

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Exclusive power over customs, excise, and bounties.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise, or offering bounties on the production or export of goods, shall cease to have effect, but any grant of or agreement for any such bounty lawfully made by or under the authority of the Government of any State shall be taken to be good if made before the thirtieth day of June, one thousand eight hundred and ninety-eight, and not otherwise.

91. Nothing in this Constitution prohibits a State from granting any aid to or bounty on mining for gold, silver, or other metals, nor from granting, with the consent of both Houses of the Parliament of the Commonwealth expressed by resolution, any aid to or bounty on the production or export of goods.

Exceptions as to bounties.

92. On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

Trade within the Commonwealth to be free.

But notwithstanding anything in this Constitution, goods imported before the imposition of uniform duties of customs into any State, or into any Colony which, whilst the goods remain therein, becomes a State, shall, on thence passing into another State within two years after the imposition of such duties, be liable to any duty chargeable on the importation of such goods into the Commonwealth, less any duty paid in respect of the goods on their importation.

93. During the first five years after the imposition of uniform duties of customs, and thereafter until the Parliament otherwise provides –

Payment to States for five years after uniform tariffs.

The duties of customs chargeable on goods imported into a State and afterwards passing into another State for consumption, and the duties of excise paid on goods produced or manufactured in a State and afterwards passing into another State for consumption, shall be taken to have been collected not in the former but in the latter State:

(ii) Subject to the last subsection, the Commonwealth shall credit revenue, debit expenditure, and pay balances to the several States as prescribed for the period preceding the imposition of uniform duties of customs.

94. After five years from the imposition of uniform duties of customs, the Parliament may provide, on

Distribution of surplus.

such basis as it deems fair, for the monthly payment to the several State of all surplus revenue of the Commonwealth.

95. Notwithstanding anything in this Constitution, the Parliament of the State of Western Australia, if that State be an Original State, may, during the first five years after the imposition of uniform duties of customs, impose duties of customs on goods passing into that State and not originally imported from beyond the limits of the Commonwealth; and such duties shall be collected by the Commonwealth.

Customs duties of Western Australia.

But any duty so imposed on any goods shall not exceed during the first of such years the duty chargeable on the goods under the law of Western

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_____ Australia in force at the imposition of uniform duties, and shall not exceed during the second, third, fourth, and fifth of such years respectively, four-fifths, three-fifths, two-fifths, and one-fifth of such latter duty, and all duties imposed under this section shall cease at the expiration of the fifth year after the imposition of uniform duties.

If at any time during the five years the duty on any goods under this section is higher than the duty imposed by the Commonwealth on the importation of the like goods, then such higher duty shall be collected on the goods when imported into Western Australia from beyond the limits of the Commonwealth.

Financial assistance
to
States.

96. During a period of ten years after the establishment of the Commonwealth and thereafter until the Parliament otherwise provides, the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.

Audit.

97. Until the Parliament otherwise provides, the laws in force in any Colony which has become or becomes a State with respect to the receipt of revenue and the expenditure of money on account of the Government of the Colony, and the review and audit of such receipt and expenditure, shall apply to the receipt of revenue and the expenditure of money on account of the Commonwealth in the State in the same manner as if the Commonwealth, or the Government or an officer of the Commonwealth, were mentioned whenever the Colony, or the Government or an officer of the Colony, is mentioned.

Trade and
commerce includes
navigation and State
railways.

98. The power of the Parliament to make laws with respect to trade and commerce extends to navigation and shipping, and to railways the property of any State.

Commonwealth not
to give preference.

99. The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

Nor abridge right to
use water.

100. The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation.

Inter-State
Commission.

101. There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and

maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.

Parliament may forbid preferences by State.

102. The Parliament may by any law with respect to trade or commerce forbid, as to railways, any preference or discrimination by any State, or by any authority constituted under a State, if such preference or discrimination is undue and unreasonable, or unjust to any State; due regard being had to the financial responsibilities incurred by any State in connexion with the construction and maintenance of its railways. But no preference or discrimination shall, within the meaning of this section, be taken to be undue and unreasonable, or unjust to any State, unless so adjudged by the Inter-State Commission.

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103. The members of the Inter-State Commission –

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(i) Shall be appointed by the Governor-General in Council:

Commissioners' appointment, tenure, and remuneration.

(ii) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.

104. Nothing in this Constitution shall render unlawful any rate for the carriage of goods upon a railway, the property of a State, if the rate is deemed by the Inter-State Commission to be necessary for the development of the territory of the State, and if the rate applies equally to goods within the State and to goods passing into the State from other States.

Saving of certain rates.

105. The Parliament may take over from the States their public debts as existing at the establishment of the Commonwealth, or a proportion thereof according to the respective numbers of their people as shown by the latest statistics of the Commonwealth, and may convert, renew, or consolidate such debts, or any part thereof; and the States shall indemnify the Commonwealth in respect of the debts taken over, and thereafter the interest payable in respect of the debts shall be deducted and retained from the portions of the surplus revenue of the Commonwealth payable to the several States, or if such surplus is insufficient, or if there is no surplus, then the deficiency or the whole amount shall be paid by the several States.

Taking over public debts of States.

CHAPTER V.

Chap. V.
The States.

THE STATES.

106. The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be, until altered in accordance with the Constitution of the State.

Saving of Constitutions.

107. Every power of the Parliament of a Colony

Saving of Power of State Parliaments.

which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

108. Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of

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Inconsistency of laws.	109. When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.
Provisions referring to Governor.	110. The provisions of this Constitution relating to the Governor of a State extend and apply to the Governor for the time being of the State, or other chief executive officer or administrator of the government of the State.
States may Surrender territory.	111. The Parliament of a State may surrender any part of the State to the Commonwealth; and upon such surrender, and the acceptance thereof by the Commonwealth, such part of the State shall become subject to the exclusive jurisdiction of the Commonwealth.
State may levy charges for inspection laws.	112. After uniform duties of customs have been imposed, a State may levy on imports or exports, or on goods passing into or out of the State, such charges as may be necessary for executing the inspection laws of the State; but the net produce of all charges so levied shall be for the use of the Commonwealth; and any such inspection laws may be annulled by the Parliament of the Commonwealth.
Intoxicating liquids.	113. All fermented, distilled, or other intoxicating liquids passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the State as if such liquids had been produced in the State.
States may not raise forces. Taxation of property of Commonwealth or State.	114. A State shall not, without the consent of the Parliament of the Commonwealth, raise or maintain any naval or military force, or impose any tax on property of any kind belonging to the Commonwealth, nor shall the Commonwealth impose any tax on property of any kind belonging to a State.
States not to coin money.	115. A State shall not coin money, nor make anything but gold and silver coin a legal tender in payment of debts.
Commonwealth not to legislate in respect of	116. The Commonwealth shall not make any law for establishing any religion, or for imposing any

religion.

religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Rights of residents in States.

117. A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Recognition of laws & c. of States.

118. Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.

Protection of States from Invasion and violence.

119. The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

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120. Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

Custody of
offenders against
laws of the
Commonwealth.

CHAPTER VI.

NEW STATES.

Chap. VI.
New States.

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

New States may be
admitted or
established.

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

Government
of territories.

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

Alteration of
limits of
States.

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

Formation of
new States.

CHAPTER VII.
MISCELLANEOUS.

Chap. VII.
Miscellaneous.

125. The seat of Government of the Commonwealth shall be determined by the Parliament, and shall be within territory which shall have been granted to or acquired by the Commonwealth, and shall be vested in and belong to the Commonwealth, and shall be in the State of New South Wales, and be distant not less than one hundred miles from Sydney.

Seat of
Government.

Such territory shall contain an area of not less than one hundred square miles, and such portion thereof as shall consist of Crown lands shall be granted to the Commonwealth without any payment therefor.

23

A.D. 1900

Power to Her Majesty to authorise Governor-General to appoint deputies.

Aborigines not to be counted in reckoning population.

Chap. VIII.
Alteration
of Constitution.

Mode of
altering the
Constitution.

The Parliament shall sit at Melbourne until it meet at the seat of Government.

126. The Queen may authorise the Governor-General to appoint any person, or any persons jointly or severally, to be his deputy or deputies within any part of the Commonwealth, and in that capacity to exercise during the pleasure of the Governor-General such powers and functions of the Governor-General as he thinks fit to assign to such deputy or deputies, subject to any limitations expressed or directions given by the Queen; but the appointment of such deputy or deputies shall not affect the exercise by the Governor-General himself of any power or function.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

CHAPTER VIII.

ALTERATION OF THE CONSTITUTION.

128. This Constitution shall not be altered except in the following manner:—

The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned

House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also

Deconstructing Australian genocide

[63 & 64 VICT.]

*Commonwealth of Australia
Constitution Act.*

[CH. 12.]

approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

A.D. 1900.
—

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

SCHEDULE.

OATH.

I, *A.B.*, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.
SO HELP ME GOD!

AFFIRMATION.

I, *A.B.*, do solemnly and sincerely affirm and declare that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, Her heirs and successors according to law.

(NOTE.—*The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the time being is to be substituted from time to time.*)

[Signature 1] [Edward. H. Alderson]

[Reading Clerk]s

C+

Immigration Restriction Act 1901 (White Australia Policy)

The White Australia policy was the result of an extended ‘white supremacist’²⁵⁰ period in Australia that began with first British settlement, saw the genocidal destruction and subjugation of Aboriginals over the ensuing century, then moved with Federation to keeping the white race in Australia pure from the yellow hordes and the blacks of the South Pacific.

The 1901 immigration policy of the first Federal Government under the Barton ministry combined racism and economics. In his speech supporting the restricted immigration bill, Barton dramatically held aloft a copy of Charles Pearson’s *National Life and Character*,²⁵¹ and warned:

*‘The day will come when the European observer will wake to find the black and yellow races no longer under tutelage, but forming independent Governments, in control of their own trade and industry, invited to international conferences and welcomed as allies by the civilised world.’*²⁵²

Barton was worried that the British immigrants might be displaced by low cost labour from overseas, and that the pure white race might be diluted. The racist legislation was not rolled back until 1973, when the newly elected reformist Government of Gough Whitlam introduced amendments that ‘all migrants, of whatever origin, be eligible to obtain citizenship

²⁵⁰ Alastair Bonnett, *From the Crises of Whiteness to Western Supremacism*, Australian Critical Race and Whiteness Studies Association Journal, Vol I, 2005
<http://www.acrawsa.org.au/files/ejournalfiles/96AlastairBonnett.pdf>

²⁵¹ Published in 1893, and now available as an ebook at <https://archive.org/details/nationallifeandc015071mbp>
Pearson (1830 – 1894) was a British born Australian politician and historian.

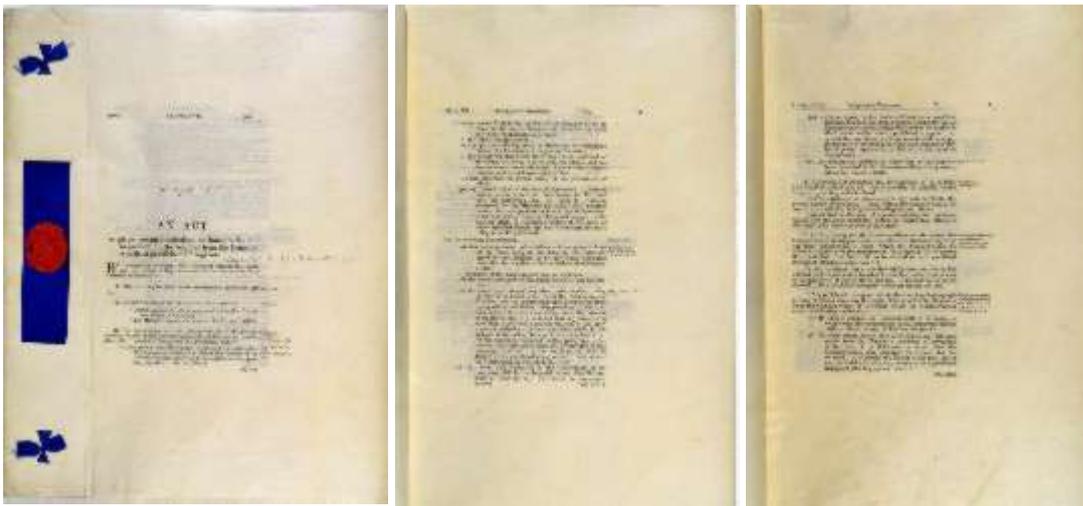
²⁵² The Pearson influence on racist immigration policy in the United States and Australia was pointed out by Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line*, pp. 137 – 167. Lake extended her thesis on the role of Pearson on Australian politics in *The White Man Under Siege: New Histories of Race in the Nineteenth century and the Advent of White Australia*, 2004, History Workshop Journal, Vol 58, no 1, pp. 41 – 62. Barton’s speech is recorded in the Commonwealth Parliamentary Debates, House of Representatives, 7th August 1901, p. 3503 and was quoted by Lake et al (ibid). The Australian Parliamentary web site has useful information on ‘*Federation and the Geographies of Whiteness*’ at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/APF/monogr_aphs/Within_Chinas_Orbit/Chapterone The early post Federation immigration debate is presented at http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/2012-2013/ImmigrationDebate

after three years of permanent residence’, and that Australian overseas posts should ‘totally disregard race as a factor in the selection of migrants’.²⁵³

However, the racist legacy of our past still lives with us. It is particularly evident in chronic Aboriginal disadvantage, the result of discriminatory Government policy that tolerates high levels of Aboriginal incarceration, suicide, and trans-generational despair. Without hope, there is hopelessness. Without inclusive and compassionate policies, there is marginalisation and alienation.

Australia generally turns away from the problem and averts its gaze. The common public reaction is: ‘*Why should Aboriginals get special treatment? The past is the past. Aboriginals should get over it.*’ But none of us can ‘get over it’ until our society becomes accountable. And we are as far from this as ever, for as long as Australia allows racially targeted policing, or tolerates the third world conditions of many remote Aboriginal communities, or refuses to recognise the domestic crime of genocide, or denies compensation to the ‘stolen generations’, or continues to harbour racist provisions in its Constitution, or is compelled to reject the overdue need for a Bill of Rights.

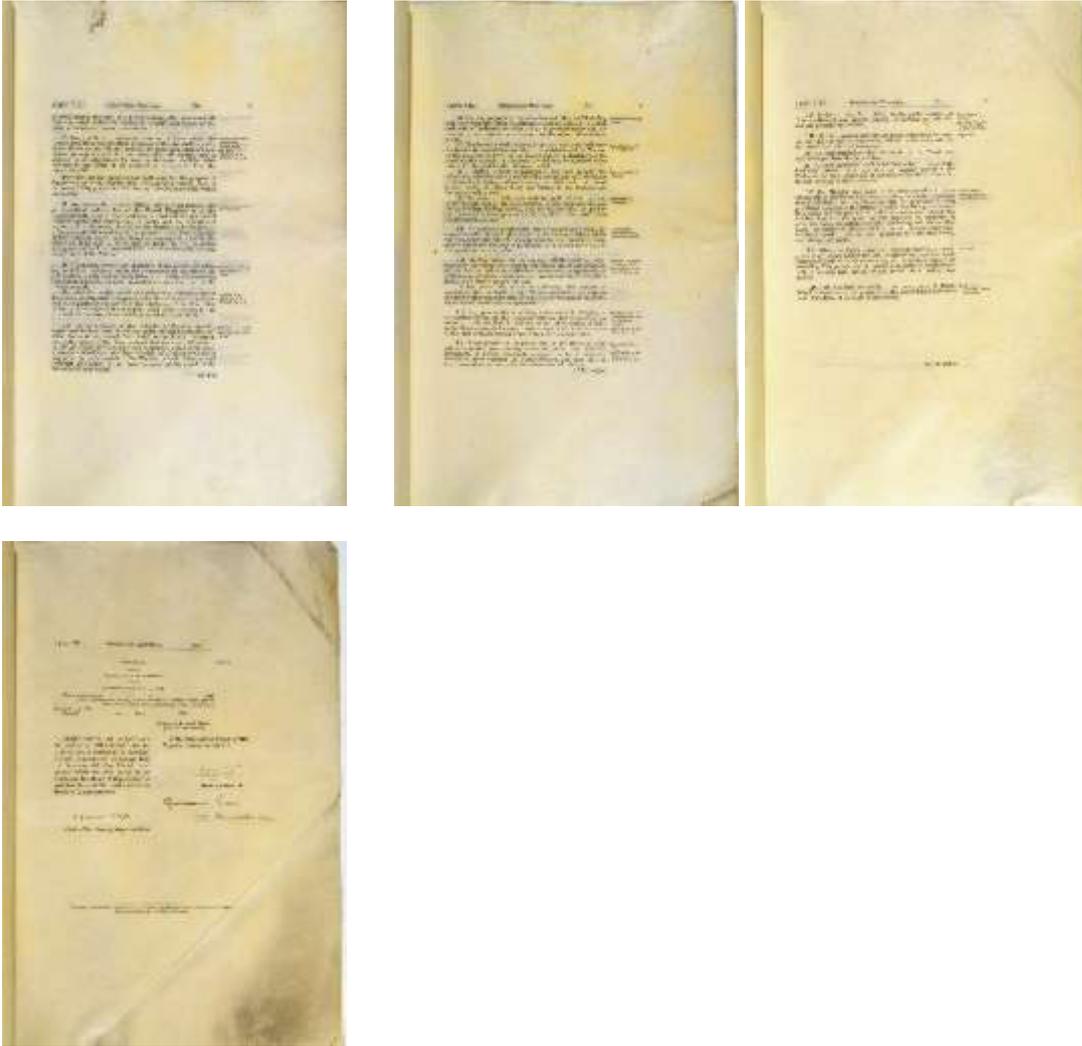
Immigration Restriction Act 1901 (Cth)²⁵⁴



²⁵³ www.immi.gov.au/media/fact-sheets/08abolition.htm
http://www.whitlam.org/gough_whitlam/achievements/foreignaffairsandimmigration

²⁵⁴ <http://www.foundingdocs.gov.au/item-sdid-87.html>
http://www.foundingdocs.gov.au/resources/transcripts/cth4ii_doc_1901a.pdf

Deconstructing Australian genocide



Significance

This document put in place the law that was the cornerstone of Australia's 'White Australia' policy. The Governor-General signed the document two days before Christmas Day 1901, a week after he had signed the [Pacific Islander Labourers Act](#) into law.

Together with Section 15 of the 1901 Post and Telegraph Act (see below), these formed a powerful set of legal instruments shaping immigration policy at the foundation of the Commonwealth. They continued to guide thinking on immigration for half a century.

History

The Immigration Restriction Act was the key part of a package of legislation passed by the new Federal Parliament in 1901, aimed at excluding all non-European migrants. This package included the Pacific Islander Labourers Act and Section 15 of the 1901 Post and Telegraph Act, which provided that ships carrying Australian mails, and hence subsidised by the Commonwealth, should employ only white labour. Its sentiments were in line with Australian nationalism in the late 1880s and 1890s, and moves to restrict non-European immigration to most of the Australian colonies

Deconstructing Australian genocide

dating back to the 1850s.

The mechanism restricting immigration could not be overtly based on race as this was opposed by Britain and frowned upon by Britain's ally, Japan. Instead, the basis was literacy, assessed by a Dictation Test. Similar Dictation Tests, based on legislation used in Natal in South Africa, had been introduced in Western Australia, New South Wales and Tasmania in the late 1890s.

The Immigration Restriction Act enabled the government to exclude any person who 'when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer, a passage of 50 words in length in a European language directed by the officer'. The Dictation Test could be administered to any immigrant during the first year of residence.

It was initially proposed that the Test would be in English, but it was argued that this could discourage European migration and advantage Japanese people, and Americans of African descent. Instead, any 'European language' was specified. In 1905 this was changed to 'any prescribed language' to lessen offence to the Japanese. From 1932 the Test could be given during the first five years of residence, and any number of times.

The Dictation Test was administered 805 times in 1902–03 with 46 people passing and 554 times in 1904–09 with only six people successful. After 1909 no person passed the Dictation Test and people who failed were refused entry or deported.

The Act, frequently amended, remained in force until 1958.

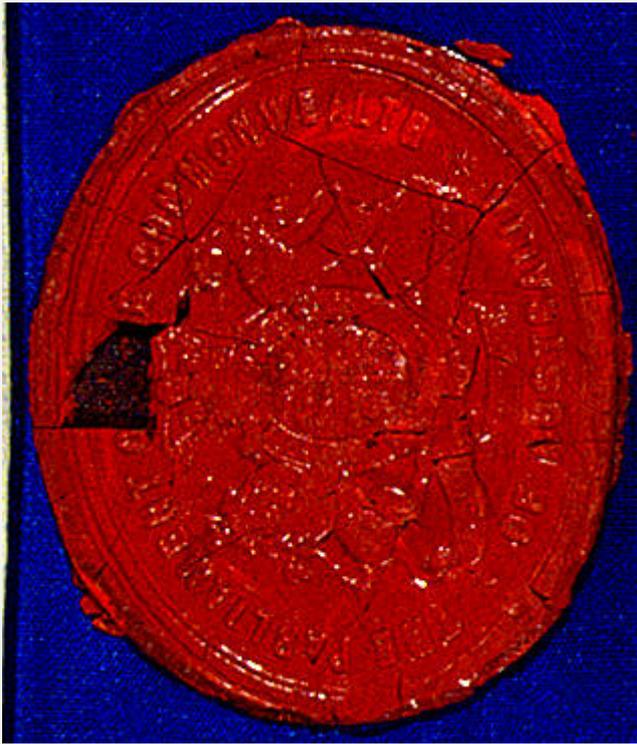
Sources

Jupp, James, *The Australian People*, Angus & Robertson, Sydney, 1988.

Yarwood, AT, *Asian Migration to Australia: The Background to Exclusion 1896–1923*, Melbourne University Press, Melbourne, 1964.

Description

Deconstructing Australian genocide



An Act to place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants (No.17 of 1901)

The wax seal used on the Immigration Restriction Act of 1901 (Cth). **Long Title:**

No. of pages:

7 + back cover

Medium:

Parchment

Measurements:

40 x 32 cm

Provenance:

House of Representatives

Features:

Enacted immediately after the Pacific Island Labourers Act and in the same format, with seal in better condition

Location & Copyright:

[National Archives of Australia](#)

Reference:

NAA: A1559, 1901/17

Deconstructing Australian genocide

NOTE: original document not available.

BEGIN TRANSCRIPTION

1901.] _____ I EDWARD VII. _____ [No.

No. 17 of 1901

A N A C T

To place certain restrictions on Immigration and to provide for the removal from the Commonwealth of prohibited Immigrants. [Assented to 23rd December 1901]

BE it enacted by the King's Most Excellent Majesty the Senate and the House of Representatives of the Commonwealth of Australia as follows:—

1. This Act may be cited as the *Immigration Restriction Act 1901*. Short title.
2. In this Act, unless the contrary intention appears,— Definition.
"Officer" means any officer appointed under this Act, or any Officer of Customs ;
"The Minister" means the Minister for External Affairs.
3. The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (herein-after called "prohibited immigrants") is prohibited, namely:— Prohibited immigrants.
See Natal Act 1897,
No. 1, s.3.
W.A. 1897, No.
13, s.2.
 - (a) Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer;
 - (b) any

- (b) any person likely in the opinion of the Minister or of an officer to become a charge upon the public or upon any public or charitable institution ;
- (c) any idiot or insane person ;
- (d) any person suffering from an infectious or contagious disease of a loathsome or dangerous character ;
- (e) any person who has within three years been convicted of an offence, not being a mere political offence, and has been sentenced to imprisonment for one year or longer therefor, and has not received a pardon ;
- (f) any prostitute or person living on the prostitution of others ;
- (g) any persons under a contract or agreement to perform manual labour within the Commonwealth: Provided that this paragraph shall not apply to workmen exempted by the Minister for special skill required in Australia or to persons under contract or agreement to serve as part of the crew of a vessel engaged in the coasting trade in Australian waters if the rates of wages specified therein are not lower than the rates ruling in the Commonwealth.

But the following are excepted:—

- (h) Any person possessed of a certificate of exemption in force for the time being in the form in the Schedule, signed by the Minister or by any officer appointed under this Act whether within or without the Commonwealth ;
- (i) members of the King's regular land or sea forces ;
- (j) the master and crew of any public vessel of any Government ;
- (k) the master and crew of any other vessel landing during the stay of the vessel in any port in the Commonwealth: Provided that the master shall upon being so required by any officer, and before being permitted to clear out from or leave the port, muster the crew in the presence of an officer ; and if it is found that any person, who according to the vessel's articles was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph, is not present, then such person shall not be excepted by this paragraph, and until the contrary is proved shall be deemed to be a prohibited immigrant and to have entered the Commonwealth contrary to this Act ;
- (l) any person duly accredited to the Government of the Commonwealth by the Imperial or any other Government or sent by any Government on any special mission;
- (m) a wife

Exemptions.

Natal ib. s.2;
W.A. ib. s.2;
N.S.W. ib. s.2.

See Vict. No. 1073
s. 8.

Deconstructing Australian genocide

1 EDW. VII.]

Immigration Restriction.

[No.

3

- (m) a wife accompanying her husband if he is not a prohibited immigrant, and all children apparently under the age of eighteen years accompanying their father or mother if the father or mother is not a prohibited immigrant; but so that the exceptions in this paragraph shall not apply if suspended by proclamation; and such suspension may be of general application or limited to any cases or class of cases;
- (n) Any person who satisfies an officer that he has formerly been domiciled in the Commonwealth or in any colony which has become a State.

N.S.W. ib. s. 6.

4. A certificate of exemption shall be expressed to be in force for a specified period only, and may at any time be cancelled by the Minister by writing under his hand.

Certificates of exemption.

Upon the expiration or cancellation of any such certificate, the person named therein may, if found within the Commonwealth, be treated as a prohibited immigrant offending against this Act:

Provided that in the case of a person entering the Commonwealth from any vessel under this section no penalty shall attach to the vessel or its master owners or charterers.

5. (1) Any immigrant who evades an officer or who enters the Commonwealth at any place where no officer is stationed may if at any time thereafter he is found within the Commonwealth be asked to comply with the requirements of paragraph (a) of section three, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act.

Immigrants evading the officers or found with the Commonwealth.

(2) Any immigrant may at any time within one year after he has entered the Commonwealth be asked to comply with the requirements of paragraph (a) of section three, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act.

6. Any prohibited immigrant within the meaning of paragraph (a) only of section three may if thought fit by an officer be allowed to enter the Commonwealth or to remain within the Commonwealth upon the following conditions :—

Entry permitted on certain conditions. See Natal ib. s. 5; W.A. ib. s. 5; N.S.W. ib. s. 5.

- (a) He shall on entering the Commonwealth or on failing to comply with the requirements of that paragraph deposit with an officer the sum of One hundred pounds.
- (b) He shall within thirty days after depositing such sum obtain from the Minister a certificate of exemption in the form of the Schedule, or depart from the Commonwealth, and thereupon the deposit shall be returned; but otherwise the deposit or any part thereof may be forfeited and he may be treated as a prohibited immigrant offending against this Act.

Provided

Provided that in the case of a person entering the Commonwealth from any vessel under this section no penalty shall attach to the vessel or its master owners or charterers.

7. Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth.

Unlawful entry of prohibited immigrants.
See Natal *ib. s. 4* ;
W.A. *ib. s. 4* ;
N.S.W. *ib. s. 4*.

Provided that the imprisonment shall cease for the purpose of deportation, or if the offender finds two approved sureties each in the sum of Fifty pounds for his leaving the Commonwealth within one month.

8. Any person who is not a British subject either natural-born or naturalized under a law of the United Kingdom or of the Commonwealth or of a State, and who is convicted of any crime of violence against the person, shall be liable, upon the expiration of any term of imprisonment imposed on him therefore, to be required to write out at dictation and sign in the presence of an officer a passage of fifty words in length in an European language directed by the officer, and if he fails to do so shall be deemed to be a prohibited immigrant and shall be deported from the Commonwealth pursuant to any order of the Minister.

Certain persons may be deported.

9. The master, owners, and charterers of any vessel from which any prohibited immigrant enters the Commonwealth contrary to this Act shall be jointly and severally liable to a penalty not exceeding One hundred pounds for each prohibited immigrant so entering the Commonwealth.

Penalty on masters and owners of ships.

Provided that in the case of an immigrant of European race or descent no penalty shall be imposed under this section on any master owner or charterer who proves to the satisfaction of the Court that he had no knowledge of the immigrant being landed contrary to this Act, and that he took all reasonable precautions to prevent it.

Natal *ib. s. 8* ;
W.A. *ib. s. 8* ;
N.S.W. *ib. s. 8*.

10. (1) The Minister, or any Collector of Customs specially empowered by him, may by writing under his hand authorize any officer to detain any vessel from which any prohibited immigrant has, in the opinion of the officer, entered the Commonwealth contrary to this Act; and the vessel may then be detained either at the place where she is found, or at any place to which the Minister or Collector may order her to be brought. The Minister or such Collector shall forthwith give notice to the owner or agent of the vessel of the detention of such vessel.

Detention of vessel.
See Vict. No. 1073
s. 14.

(2) For

Deconstructing Australian genocide

1 EDW. VII.]	<i>Immigration Restriction.</i>	[No. 5
<p>(2) For the purposes of the detention and other lawful dealing with the vessel the officer so authorized shall be entitled to obtain such writ of assistance or other aid as is provided under any law relating to the Customs with respect to the seizure of vessels or goods.</p> <p>(3) The detention shall be for safe custody only, and shall cease if a bond with two sufficient sureties to the satisfaction of the Minister or the collector be given by the master owners or charterers of the vessel for the payment of any penalty which may be adjudged under this Act to be paid for the offence or default.</p> <p>(4) If default is made in payment of any such penalty, the officer may seize the vessel ; and the like proceedings shall thereupon be taken for forfeiting and condemning the vessel as in the case of a vessel seized for breach of any law relating to the Customs, and the vessel shall be sold.</p> <p>(5) The proceeds of the sale shall be applied first in payment of the penalty and of all costs incurred in and about the sale and the proceedings leading thereto, and the balance shall be paid to the owners of or other persons lawfully entitled to the vessel before condemnation and sale.</p>	<p>Powers of detaining officer.</p> <p>Detention to cease if bond given.</p> <p>Sale of vessel on default.</p> <p>Application of proceeds.</p>	
<p>11. No contract or agreement made with persons without the Commonwealth for such persons to perform manual labour within the Commonwealth whereby such persons become prohibited immigrants within the meaning of paragraph (g) of section three shall be enforceable or have any effect.</p>	<p>Contracts for manual labour—when enforceable.</p>	
<p>12. (1) Any person who in any way wilfully assists any other person to contravene or attempt to contravene any of the provisions of this Act, or makes or authorizes any contract or agreement the performance of which would be a contravention of this Act, shall be guilty of an offence against this Act.</p> <p>(2) Any person who makes or authorizes such contract or agreement shall be liable to the Commonwealth for any expense incurred by the Commonwealth in respect of any immigrant prohibited by reason of the contract or agreement.</p>	<p>Assisting persons to contravene Act. See Natal ib. s. 11, N.S.W. ib. s. 10.</p>	
<p>13. Any person who is wilfully instrumental in bringing or attempting to bring into the Commonwealth any idiot or insane person contrary to this Act shall, in addition to any other penalty, be liable to the Commonwealth for any expense in respect of the maintenance of the idiot or insane person whilst within the Commonwealth.</p>	<p>Bringing idiots or insane persons into the Commonwealth. See Natal ib. s. 13 ; W.A. ib. s. 13.</p>	
<p>14. Every member of the police force of any State, and every officer, may with any necessary assistance prevent any prohibited immigrant, or person reasonably supposed to be a prohibited immigrant, from entering the Commonwealth, and may take all legal proceedings necessary for the enforcement of this Act.</p>	<p>Powers to enforce Act. See Natal ib. s. 14 ; W.A. ib. s. 14 ; N.S.W. ib. s. 11.</p>	
<p>15. Subject</p>		

15. Subject to any Act relating to the public service, the Governor-General may appoint officers for carrying out this Act, and may prescribe their duties.

Appointment of officers.
See Natal *ib. s. 15* ;
W.A. *ib. s. 15* ;
N.S.W. *ib. s. 15*.

16. (1) The Governor-General may make regulations for carrying out this Act and for empowering officers to determine whether any person is a prohibited immigrant.

Regulations.

(2) All such regulations shall be notified in the *Gazette*, and shall thereupon have the force of law.

(3) All such regulations shall be laid before both Houses of the Parliament within thirty days after the making thereof if the Parliament be then sitting, and if not then within thirty days after the next meeting of the Parliament.

17. The Minister shall cause to be made annually a return which shall be laid before Parliament, showing the number of persons refused admission into the Commonwealth on the ground of being prohibited immigrants, the nations to which they belong and whence they came, and the grounds on which admission was refused; the number of persons who passed the test prescribed by paragraph (a) of section three, the nations to which they belong and whence they came; the number of persons admitted to the Commonwealth without being asked to pass the test, the nations to which they belong, and whence they came.

Annual return showing persons refused admission.

18. Where no higher penalty is expressly imposed, a person guilty of any offence against this Act, or against any regulation made thereunder, shall be liable on summary conviction to a penalty not exceeding Fifty pounds, and in default of payment to imprisonment with or without hard labour for any period not exceeding three months.

Penalties.

19. This Act shall not apply to the immigration of Pacific Island labourers under the provisions of the Pacific Island Labourers Acts, 1880-1892, of the State of Queensland.

Pacific Island Labourers Acts of Queensland.

SCHEDULE.

SCHEDULE

Section 3.

COMMONWEALTH OF AUSTRALIA

Immigration Restriction Act 1901.

This is to certify that _____ of _____ aged _____
years, a [*insert trade, calling, or other description*] is exempted for a period
of _____ from the date hereof from the provisions of the *Immigration*
Restriction Act 1901.

Dated at _____ this _____ day of _____ 1901.

Minister for External Affairs
[*or as the case may be.*]

I HEREBY CERTIFY that the above is a fair print of
the Bill intituled "An Act to place certain restrictions
on Immigration and to provide for the removal from
the Commonwealth of prohibited Immigrants,"
which has been passed by the Senate and the House
of Representatives, and that the said Bill originated
in the House of Representatives.

In the name and on behalf of His
Majesty, I assent to this Act

[Hopetoun]
Governor-General.

[Government House]
[23rd December 1901]

[C. Gavan Duffy]

Clerk of the House of Representatives.

Printed and Published for the GOVERNMENT of the COMMONWEALTH of AUSTRALIA by ROBT. S. BRAIN
Government Printer for the State of Victoria

TRANSCRIPTION ENDS

Aborigines Act 1905 (5 Edw. VII No. 14)²⁵⁵

WESTERN AUSTRALIA.



ANNO QUINTO

EDWARDI SEPTIMI REGIS,

XIV.

No. 14 of 1905.

AN ACT to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia.

[Reserved, 23rd December, 1905.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows :—

1. This Act may be cited as the *Aborigines Act*, 1905, and shall come into operation on a day to be fixed by proclamation. Short title.

2. In this Act, unless the context otherwise requires,— Interpretation.

“ Aboriginal institution ” means and includes any mission, reformatory, orphanage, school, home, station, reserve, or other institution for the benefit, protection, or care of the aboriginal or half-caste inhabitants of the State, and in receipt of any annual or other subsidy or grant from the Government.

“ Chief Protector ” means the Chief Protector of Aborigines appointed under this Act.

“ Department ” means the Aborigines Department.

²⁵⁵ http://www.austlii.edu.au/au/legis/wa/num_act/aa1905evn14203/

- Q., 1897, No. 17, s. 3.
- “District” means a magisterial district.
- “Half-caste” means any person being the offspring of an aboriginal mother and other than an aboriginal father: Provided that the term “half-caste,” wherever it occurs in this Act, elsewhere than in section three, shall, unless the context otherwise requires, be construed to exclude every half-caste who, under the provisions of the said section, is deemed to be an aboriginal, but shall not apply to quadroons.
- “Minister” means the responsible Minister of the Crown charged with the administration of this Act.
- “Police officer” means any constable or officer of police.
- “Prescribed” means prescribed by this Act or regulations;
- “Protector” means a protector of aborigines appointed under this Act, and includes the Chief Protector;
- “Regulations” means the regulations for the time being in force under this Act.
- “Reserve” means a reserve for aborigines proclaimed under this Act;
- “Superintendent” means a superintendent appointed under this Act for any reserve.
- Persons deemed to be aborigines.
See Q., 1897, No. 17, s. 4.
Q., 1902, No. 1, s. 2.
- 3.** Every person who is—
- (a.) an aboriginal inhabitant of Australia; or
 - (b.) a half-caste who lives with an aboriginal as wife or husband; or
 - (c.) a half-caste who, otherwise than as wife or husband, habitually lives or associates with aborigines; or
 - (d.) a half-caste child whose age apparently does not exceed sixteen years,
- shall be deemed an aboriginal within the meaning of this Act, and of every Act passed before or after this Act, unless the contrary is expressed.
- In this section the term half-caste includes any person born of an aboriginal parent on either side, and the child of any such person.
- The Aborigines Department.
61 Vict., No. 5, s. 5.
- 4.** There shall be a department under the Minister to be called the Aborigines Department, and to be charged with the duty of promoting the welfare of the aborigines, providing them with food, clothing, medicine and medical attendance, when they would otherwise be destitute, providing for the education of aboriginal children, and generally assisting in the preservation and well-being of the aborigines.
- Sum to be placed at the disposal of the department.
See 61 Vict., No. 5, s. 6.
- 5.** The Colonial Treasurer shall, in every year, place at the disposal of the department, out of the Consolidated Revenue Fund, a sum of ten thousand pounds, and such further moneys as may be provided by Parliament, to be applied to the purposes of the department.

If in any year the whole of the said annual sum is not expended, the unexpended balance shall be retained by the department, and expended in the performance of the duties thereof in any subsequent year.

6. It shall be the duty of the department—

Duties of department.

- (1.) To apportion, distribute, and apply, as may seem most fit, the moneys by this Act placed at its disposal ;
- (2.) To distribute blankets, clothes, and other relief to the aborigines, at the discretion of the department ;
- (3.) To provide for the custody, maintenance, and education of the children of aborigines ;
- (4.) To provide, as far as practicable, for the supply of medical attendance, medicines, rations, and shelter to sick, aged, and infirm aborigines ;
- (5.) To manage and regulate the use of all reserves set apart for the benefit of aborigines ;
- (6.) To exercise a general supervision and care over all matters affecting the interests and welfare of the aborigines, and to protect them against injustice, imposition, and fraud.

See 61 Vict., No. 5, s. 7.

7. The Governor shall appoint a Chief Protector of Aborigines, and the Minister may from time to time appoint and dismiss fit and proper persons to be protectors, who shall, within the districts respectively assigned to them, have and exercise the powers and duties prescribed.

Protectors may be appointed.

See 61 Vict., No. 5, s. 4 ;
Q., 1897, No. 17, s. 6.

The Chief Protector shall, under the Minister, be responsible for the administration of the department and the execution of this Act throughout the State.

8. The Chief Protector shall be the legal guardian of every aboriginal and half-caste child until such child attains the age of sixteen years.

Chief Protector to be guardian.

9. Any person who, without the authority, in writing, of a protector, removes or causes to be removed any aboriginal, or a male half-caste under the age of sixteen years, or a female half-caste from one district to another, or to any place beyond the State, shall be guilty of an offence against this Act.

Prohibition of removal of aborigines.
See Q., 1897, No. 17, s. 17.

Before such authority is given the person desiring such removal shall enter into a recognisance with a surety or sureties, at the discretion of the protector, in a sum which the protector considers sufficient to defray the expense of the return of such aboriginal or half-caste to the place from which such aboriginal or half-caste is to be removed.

See Q. 1902, No. 1, s. 7.

Every such recognisance shall be in the prescribed form, and shall be taken in duplicate by a protector or police officer, who shall forthwith forward one of the duplicates to the Chief Protector.

A recognisance may be renewed from time to time at the discretion of the Chief Protector.

The protector may, in his discretion, dispense with such recognisance in any particular case.

Reserves.
See Q., 1897, No. 17,
ss. 7 and 8.

10. The Governor may, by proclamation,—

- (1.) Declare any Crown lands to be reserves for aborigines, not exceeding in any one magisterial district an area of two thousand acres;
- (2.) Alter the boundaries of a reserve;
- (3.) Abolish a reserve.

Superintendents of reserves.
See Q., 1897, No. 17,
s. 7.

11. The Governor may appoint fit and proper persons to be superintendents of reserves.

Aborigines may be removed to reserves.
See Q., 1897, No. 17,
s. 9.

12. The Minister may cause any aboriginal to be removed to and kept within the boundaries of a reserve, or to be removed from one reserve or district to another reserve or district, and kept therein.

Any aboriginal who shall refuse to be so removed to or kept within such reserve or district shall be guilty of an offence against this Act.

In every prosecution under this section an averment contained in the complaint that the Minister directed the defendant to be removed to or kept within a reserve or district shall be deemed to be proved in the absence of proof to the contrary.

Exceptions.
See Q., 1897, No. 17,
s. 10.

13. Every aboriginal—

- (a.) who is lawfully employed by any person; or
- (b.) who is the holder of a permit to be absent from a reserve;
- or
- (c.) who is a female lawfully married to and residing with a husband who is not himself an aboriginal; or
- (d.) for whom, in the opinion of the Minister, satisfactory provision is otherwise made,

shall be exempted from the provisions of the last preceding section.

Persons who are prohibited from entering a reserve.
See Q., 1897, No. 17,
s. 11.

14. It shall not be lawful for any person other than an aboriginal to enter or remain, or be within the boundaries of a reserve for any purpose whatsoever, unless he is a superintendent or a person acting under his direction, or a person authorised in that behalf under the regulations.

Penalty for unlawfully going upon or removing aboriginal from reserve.
See Q., 1897, No. 17,
s. 11.

15. Any person who, without lawful authority or excuse,—

- (a.) goes or remains upon a reserve; or
- (b.) removes an aboriginal, or causes, assists, entices, or persuades an aboriginal to remove from a reserve;

shall be guilty of an offence against this Act.

The proof of such lawful authority or excuse shall be upon the person charged.

16. Every existing indenture of apprenticeship made under the provisions of the Aborigines Protection Act, 1886, shall, at the expiration of six months from the commencement of this Act, by force of this Act, become cancelled and annulled.

Existing apprenticeships determined.

17. It shall not be lawful to employ any aboriginal, or a male half-caste under the age of fourteen years, or a female half-caste, except under permit or permit and agreement.

Aborigines not to be employed without permit.

See Q., 1897, No. 17, ss. 12, 14.

18. Every permit—

- (1.) Shall be granted or refused by a protector;
- (2.) May be granted for any period not exceeding twelve months for employment on land, or not exceeding eight months for employment on any ship or boat;
- (3.) May from time to time be renewed;
- (4.) May contain such conditions as the protector considers fit and proper;
- (5.) May, if the protector thinks fit, be granted as a general permit to employ aborigines;
- (6.) May be cancelled at any time by a protector.

Form and duration of permit.

See Q., 1897, No. 17, s. 13, and 1902, No. 1, s. 5.

Such cancellation shall not entitle any employer to claim or recover compensation for the loss of the service of any aboriginal, or to maintain any action in respect of any loss or damage that may be occasioned by such cancellation:

Provided that, on the death of a holder of a permit, the permit shall continue in force for four months thereafter, and shall be deemed to have been granted to his legal personal representative:

Provided also that, whenever a permit shall be granted to any person being the agent of any other person, and the agency shall determine, the permit shall continue in force for four months thereafter, and shall be deemed to be granted to the principal.

19. No permit shall be granted allowing any male aboriginal or half-caste under the age of sixteen years, or any female aboriginal or female half-caste to be employed on board of, or in connection with, any ship or boat; and it shall not be lawful to suffer any such aboriginal or half-caste to be upon any ship or boat without the authority in writing of a protector.

Youths and females not allowed on ships.

See Q., 1902, No. 1, s. 10.

20. No permit shall be granted allowing any aboriginal or half-caste to be employed on board of or in connection with any ship trading with or voyaging to any place outside the State.

No permit for employment on ocean-going vessels.

21. Any person who, contrary to this Act, employs any aboriginal, or a male half-caste under the age of fourteen years, or a female half-caste, or permits or suffers any aboriginal, or a male half-caste under the age of fourteen years, or a female half-caste, to be upon any house, ship, boat, or premises in his occupation or under his control, shall be guilty of an offence against this Act.

Penalty for unlawfully employing or harbouring aborigines.

See Q., 1897, No. 17, s. 14; and Q., 1902, No. 1, s. 4.

Agreements.
See 50 Vict., No. 25,
s. 18, and Q., 1897,
No. 17, s. 15.

22. (1.) No agreement with an aboriginal, or with a male half-caste under the age of sixteen years, or with a female half-caste, for any service or employment, shall be of any force or validity as against such aboriginal or half-caste unless such agreement—

- (a.) Is witnessed and truly dated by a justice of the peace, a protector, a police officer, or other person authorised by the Minister to attest agreements.
- (b.) Is indorsed by such witness with a certificate that the agreement was fully explained by him to the aboriginal or half-caste, and that he appeared fully to understand the same, to be a free and voluntary agent, and physically fit for the work specified;
- (c.) Is signed or marked by the employer and by the aboriginal or half-caste;
- (d.) Specifies the nature of the service or employment, the period of the service, and conforms in every respect with the particulars specified in the permit;
- (e.) Stipulates for the supply by the employer to the aboriginal or half-caste of substantial, good, and sufficient rations, clothing, and blankets, and also medicines and medical attendance when practicable and necessary; and
- (f.) When the employment is on or in connection with any ship or boat, stipulates that before the expiration of the service agreed upon, the employer shall convey the aboriginal or half-caste, or cause him to be conveyed, to the place or district to which he belongs, which shall be specified in the agreement.

(2.) Where an aboriginal or half-caste proposing to become party to such agreement has, within twelve months of the date of the agreement, been engaged in the pearl-shell fishery, or in any industry which necessitates the conveyance of the aboriginal or half-caste by sea to the scene of such industry, the witness shall satisfy himself, before attesting the agreement, that, during the currency of the engagement of such aboriginal or half-caste, the person who last employed him conveyed him back to the place or district to which he belonged.

Duplicate of agreement to be sent to protector.

23. Every agreement under this Act shall be made and indorsed in duplicate, and one of the duplicates shall be filed in the office of the protector. If a justice of the peace or police officer is the attesting witness, he shall forthwith forward one of the duplicates to the protector.

Penalty for false attestation.
See 50 Vict., No. 25, s. 18.

24. Any justice of the peace, protector, or police officer who attests any agreement to which any aboriginal or half-caste purports to be a party contrary to the provisions of this Act, or untruly dates

any such agreement, or indorses thereon any such certificate as aforesaid contrary to the fact, shall forfeit and pay the sum of fifty pounds, together with full costs of suit, to any person who shall first sue for the same in any court of competent jurisdiction.

25. Any aboriginal who, without reasonable cause, shall neglect or refuse to enter upon or commence his service, or shall absent himself from his service, or shall refuse or neglect to work in the capacity in which he has been engaged, or shall desert or quit his work without the consent of his employer, or shall commit any other breach of his agreement, shall be guilty of an offence against this Act.

Penalty for breach of agreement by aboriginal.
55 Vict., No. 25, s. 2.

26. Any employer of an aboriginal who shall commit any breach of an agreement under this Act shall be guilty of an offence against this Act.

Penalty for breach of agreement by employer.

27. Every aboriginal, every male half-caste under the age of sixteen years, and every female half-caste, employed by any person shall be under the supervision of a protector or police officer.

Aborigines in employment to be subject to supervision.
See Q., 1897, No. 17, s. 16.

28. Every employer shall—

- (1.) Produce to a protector or police officer, on demand, the permit, or permit and agreement as the case may be, under which any aboriginal or half-caste is employed; and
- (2.) Allow a protector or police officer to have access to any aboriginal or half-caste employed, or to any house, ship, boat, or premises where such aboriginal or half-caste may happen to be, at all reasonable times, for such inspection and inquiry as he may deem necessary.

Permit to be produced and access to be given.
See Q., 1897, No. 17, s. 16.

29. An agreement may be cancelled at any time by a protector; and such cancellation shall not entitle an employer to claim or recover compensation for the loss of service of the aboriginal or half-caste, or to maintain any action in respect of any loss or damage occasioned thereby.

Agreements may be cancelled.

30. The employer of any aboriginal or half-caste engaged under an agreement made under this Act shall grant to the aboriginal or half-caste, at his request, at some time during the term of service, leave to absent himself from his work or service under such agreement—

Leave of absence.
50 Vict., No. 25, s. 22.

- (1.) For not less than fourteen days, if the agreement is for a term of three months and not exceeding six months;
- (2.) For not less than thirty days, if the agreement is for a term exceeding six months.

Penalty for neglect to convey aboriginal back to place agreed upon.

See 50 Vict., No. 25, s. 9.

31. Any master of a ship or vessel or other person who shall neglect or refuse to convey or cause to be conveyed any aboriginal or half-caste who has been party to any agreement with him back, before the expiration of such agreement, to the place or district to which such aboriginal or half-caste belongs, shall be guilty of an offence against this Act.

51 Vict., No. 18, s. 4.

Any person convicted of such offence may be ordered, at his own expense, to convey such aboriginal or half-caste back to the place or district to which he belongs, by such route as to the justices shall seem fit, or may be required to pay such sum as to the justices shall seem fit for the purpose of paying for the conveyance of such aboriginal or half-caste, and such sum shall, for all purposes, be and be deemed to be added to the fine imposed so as to become a part thereof.

Death of employed aborigines.

See Q., 1902, No. 1, s. 11.

32. If an aboriginal or half-caste dies during the period of his employment, the employer, forthwith after the death, or if the deceased was employed on board of any ship, vessel, or boat, forthwith after the arrival of such ship, vessel, or boat at any port in Western Australia, shall transmit to the Chief Protector notice in writing of such death under the hand of the employer, and containing such particulars as will enable the deceased to be identified.

Protector to manage property of aborigines.

Q. 1902, No. 1, s. 13.

33. The Chief Protector may undertake the general care, protection, and management of the property of any aboriginal or half-caste, and may—

- (1.) Take possession of, retain, sell, or dispose of any such property, whether real or personal;
- (2.) In his own name sue for, recover, or receive any money or other property due or belonging to or held in trust for the benefit of an aboriginal or half-caste, or damages for any conversion of or injury to any such property;
- (3.) Exercise in the name of an aboriginal or half-caste any power which the aboriginal or half-caste might exercise for his own benefit;
- (4.) In the name and on behalf of an aboriginal or half-caste, appoint any person to act as attorney or agent for any purpose connected with the property of the aboriginal or half-caste:

Provided that the powers conferred by this section shall not be exercised without the consent of the aboriginal or half-caste, except so far as may be necessary to provide for the due preservation of such property.

The Chief Protector shall keep proper records and accounts of all moneys and other property, and the proceeds thereof received or

dealt with by him under the provisions of this section, and shall, for such purpose, be deemed to be a public accountant within the meaning of the Audit Act, 1904.

34. (1.) Whenever a half-caste child whose age does not exceed fourteen years is being maintained in an aboriginal institution or at the cost of the Government, a protector may, with the approval of the Minister, apply to a justice of the peace for a summons to be served on the alleged father of such child for the purpose of obtaining contribution to the support of the child.

Father liable to contribute to support of half-caste child.
See Q., 1902, No. 1, s. 13.

(2.) On the return of such summons, any two justices of the peace shall proceed to hear the matter of the complaint, and if the paternity of the defendant and his ability to contribute to the support of such child are proved to the satisfaction of the justices, they may order the defendant to pay such weekly sum (not exceeding ten shillings) for the maintenance of the child as such justices think fit:

Provided that no man shall be taken to be the father of any such child upon the oath of the mother only.

(3.) Any two justices of the peace, on the complaint of any such father or of a protector, while the first or any subsequent order continues in force, may make further inquiry into such father's ability to contribute as aforesaid, and may remit or lessen the amount of the weekly payment that has been adjudged by the last preceding order, or may increase the same, if they see cause so to do, so that the amount shall not in any case exceed the weekly sum hereinbefore mentioned.

(4.) Whenever, after the making of any such order as aforesaid, it is made to appear to any justice of the peace, by a complaint in writing and upon oath, that any weekly sum to be paid in pursuance thereof has not been paid, or that any father named in such order is about to leave Western Australia, or remove from his usual place of residence, without having first notified his intention to the clerk of petty sessions at the court where the order was made, or without having made due provision for the payment of such weekly sum, such justice may, by warrant, cause such father to be brought before him or some other justice to answer the complaint.

(5.) On the return of such warrant the justice of the peace shall proceed to hear the matter of the complaint, and if the same is proved to be true, shall proceed to levy or enforce payment of the said weekly sums by distress or imprisonment for any period not exceeding three months.

(6.) All contributions and enforced payments under this section towards the support of a half-caste child shall be paid and expended as the Colonial Treasurer may direct.

35. (1.) Any aboriginal in custody under sentence of imprisonment may, by order of the Governor, be employed outside the limits of a prison in such suitable labour in the service of the

Aboriginal prisoners may be employed outside prison.

Deconstructing Australian genocide

1905, No. 14.]

Aborigines.

[5 Edw. VII.]

See 50 Vict., No. 25,
s. 32. State as the Governor may direct; but no such prisoner who has not been sentenced to hard labour shall be set to any labour which is severe.

See 50 Vict., No. 25,
s. 33. (2.) Any aboriginal, or any male half-caste under the age of sixteen years, or any female half-caste, in custody under sentence of imprisonment may, by order of the Governor, be placed under custody of any officer or servant of the State, who shall be responsible for the safe custody of such prisoner, and he shall thereupon, for all purposes, be deemed in legal custody, wherever he may be employed or detained.

See 50 Vict., No. 25,
s. 34. (3.) The gaoler having the charge of the prison wherein such prisoner may be sentenced to imprisonment shall not be responsible for the safe custody of any such prisoner during the time he may be removed, under order as aforesaid, from such prison.

Persons prohibited
from frequenting
camps.
Q., 1902, No. 1, s. 16. **36.** It shall not be lawful for any person, other than a superintendent or protector, or a person acting under the direction of a superintendent, or under a written permit of a protector, without lawful excuse, to enter or remain or be within or upon any place where aborigines or female half-castes are camped.

Any person, save as aforesaid, who, without lawful excuse, the proof whereof shall lie upon him, is found in or within five chains of any such camp shall be guilty of an offence against this Act; but no person shall be prosecuted for an offence under this section except by the direction of a protector.

Removal of camps
near townships.
See Q., 1902, No. 1,
s. 17. **37.** If at any time he thinks it necessary so to do, a protector may cause any aborigines or half-castes who are camped or are about to camp within or near the limits of any town or municipal district to remove their camp, or proposed camp, at such distance from such town or municipality as he may direct; and all police officers shall assist the protector in carrying out the provisions of this section.

Any aboriginal or half-caste neglecting or refusing to obey such order shall be guilty of an offence against this Act.

Justices may order
aborigines out of
town.
50 Vict., No. 25,
s. 43. **38.** Any justice of the peace or police officer may order any aboriginal found loitering in any town or municipal district, or being therein and not decently clothed, forthwith to leave such town or municipal district.

Any aboriginal neglecting or refusing to obey such order shall be guilty of an offence against this Act.

Prohibited areas. **39.** The Governor may, by proclamation, whenever in the interest of the aborigines he thinks fit, declare any municipal district or town or any other place to be an area in which it shall be unlawful for aborigines or half-castes, not in lawful employment, to be or remain:

and every such aboriginal or half-caste who, after warning, enters or is found within such area without the permission, in writing, of a protector or police officer, shall be guilty of an offence against this Act.

40. Any female aboriginal who, between sunset and sunrise, is found within two miles of any creek or inlet used by the boats of pearl-ers or other sea boats shall be guilty of an offence against this Act.

Females not to remain after sunset at creeks used by pearl-ers.

41. Any aboriginal who, being the parent or having the custody of any female child apparently under the age of sixteen years, allows that child to be within two miles of any creek or inlet used by the boats of pearl-ers or other sea boats shall be guilty of an offence against this Act.

Forbidding children to be brought to creeks used by pearl-ers.

42. No marriage of a female aboriginal with any person other than an aboriginal shall be celebrated without the permission, in writing, of the Chief Protector.

Marriage of female aborigines. Q., 1902, No. 1, s. 9.

43. Every person other than an aboriginal who habitually lives with aborigines, and every male person other than an aboriginal who cohabits with any female aboriginal, not being his wife, shall be guilty of an offence against this Act.

Offence of cohabiting with aborigines.

Every male person, not being an aboriginal, who travels accompanied by a female aboriginal, shall be presumed, in the absence of proof to the contrary, to be cohabiting with her, and it shall be presumed, in the absence of proof to the contrary, that she is not his wife.

44. Any person who entices or persuades an aboriginal or half-caste girl under the age of sixteen years to leave any school or aboriginal institution without the consent of a protector, or to leave any lawful service without the like consent, shall be guilty of an offence against this Act.

Enticing girls from school or service. See 8 Vict., No. 6, s. 1.

45. Any person who supplies, or causes or permits to be supplied, to an aboriginal or half-caste any fermented or spirituous liquor or opium shall be guilty of an offence against this Act, and shall be liable, on conviction, to a penalty of twenty pounds.

Penalty for supplying liquor to aborigines. See Q., 1897, No. 17, s. 19; and Q., 1902, No. 1, s. 8.

46. All blankets, bedding, clothing, and other articles issued or distributed to the aborigines by or by the direction of the department shall remain the property of His Majesty; and it shall not be lawful for an aboriginal receiving such bedding, clothing, or other articles to sell or otherwise dispose of the same to any person other than an aboriginal, without the sanction of a protector.

Prohibition against disposal of articles issued to aborigines. 50 Vict., No. 25, ss. 40, 41.

Any person, not being an aboriginal, who, without such sanction, takes, whether by purchase or otherwise, or is found in possession of any goods or chattels issued or distributed to an aboriginal by or by the direction of the department shall be guilty of an offence against this Act.

Prohibition of use of guns by aboriginals without license.

47. Every aboriginal who uses or carries a gun without having in force a license, in writing, in the prescribed form granted to him by a protector shall be guilty of an offence against this Act.

Any justice of the peace may make such order as to the forfeiture or disposal of any gun found in the possession of an aboriginal contrary to this section as to such justice may seem fit.

In this and the four next following sections the term "gun" includes any firearm from which any shot, bullet, or other missile can be discharged.

License to be produced on demand.

48. It shall be lawful for any protector or police officer to demand from any aboriginal using or carrying a gun the production of his license.

If such aboriginal upon whom the demand is made shall not produce a license duly granted to him under this Act, and in force, and permit the protector or police officer demanding the production thereof to read such license, such aboriginal shall be guilty of an offence against this Act.

Power to take guns from aborigines.

49. It shall be lawful for any protector or police officer to take from any aboriginal any gun found in his possession, if such aboriginal shall not, on demand, produce a license duly granted to him, and in force, to carry such gun.

Prohibition of sale or delivery of guns to unlicensed aboriginals.

50. It shall be unlawful to sell or deliver a gun to any aboriginal unless at the time of the sale or delivery such aboriginal has in force a license granted to him by a protector permitting such aboriginal to carry a gun.

Any person who, contrary to this section, sells or delivers a gun to an aboriginal shall be guilty of an offence against this Act.

Proof of license on accused.

51. In any prosecution under sections forty-seven or fifty, the burden of proof that the aboriginal held a license in force to carry a gun shall lie on the defendant, and until the contrary is proved it shall be presumed that the aboriginal did not hold such license.

Presumption of person being an aboriginal.

52. In every prosecution for an offence against this Act or the regulations, the averment in the complaint that any person referred to therein is an aboriginal or half-caste shall be deemed to be proved in the absence of proof to the contrary.

53. At the hearing of any prosecution under this Act, the justices may decide, upon their own view and judgment, whether any aboriginal or half-caste child before them has attained any specified age; but nothing herein shall be construed so as to prevent the age of such aboriginal or half-caste child being proved.

Facilitating proof of age.

54. All actions and other proceedings against any person for the recovery of wages due to an aboriginal or half-caste who is, or has been, employed by such person, or for any breach of an agreement made with an aboriginal or half-caste, may be instituted and carried on by, or in the name of, a protector, or any other person authorised by the Minister.

Actions for recovery of wages may be brought in name of protector.

55. It shall be lawful to arrest without warrant any aboriginal or half-caste who offends against any of the provisions of this Act.

Arrest without warrant.

56. Any resident magistrate or, in his absence, any two justices of the peace may hear and determine any complaint for any offence against the provisions of this Act or the regulations thereunder, at any place within the State where the offender may be, or where any ship or boat connected with such offence may be found, or at any place appointed for the holding of courts of petty sessions, and may make orders for the detention of such ship, vessel, or boat as they think fit.

Jurisdiction of justices, etc.
See Q., 1902, No. 1, s. 18.

If any person appears to a protector, police officer, or other person acting under the authority of a protector, to have committed any such offence, the protector, police officer, or other person as aforesaid may, by written order under his hand, direct the offender, and if necessary the ship or boat to which he belongs, and the master and crew thereof, to proceed to the nearest convenient place at which a court of petty sessions is held, and the resident magistrate or justices may hear and determine the matter in a summary way. The protector may order the detention of such ship or boat until the alleged offence has been adjudicated upon.

Any person who disobeys any order made under the provisions of this section shall be guilty of an offence against this Act.

57. It shall not be obligatory upon any police officer to serve any summons, or execute any warrant of arrest against an aboriginal in respect of any offence against this Act, beyond a distance of fifty miles from the place where such summons or warrant was issued, except when specially directed by a resident magistrate.

Service of summons and execution of warrant limited.
See 55 Vict., No. 25, s. 4.

58. Every person convicted of an offence against this Act shall, except as is herein otherwise provided, be liable to imprisonment, with or without hard labour, for not exceeding six months, or to a fine not exceeding fifty pounds.

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Offences to be prosecuted summarily.

59. (1.) All offences against this Act or the regulations may be prosecuted in a summary way before any resident magistrate or, in his absence, any two justices of the peace.

(2.) At the hearing of any prosecution under this Act against an aboriginal the resident magistrate or justices may permit any person to address him or them, and examine and cross-examine witnesses, on behalf of such aboriginal.

Regulations.
See Q. 1897, No. 17,
s. 31.

60. The Governor may make regulations for all or any of the matters following (that is to say) :—

- (a.) Prescribing the duties of protectors and superintendents and any other persons employed to carry the provisions of this Act into effect:
- (b.) For the control of the receipt and payment of money, classification of accounts, authorisation of expenditure, and all matters pertaining to the management of the accounts of the department.
- (c.) Providing for the care, custody, and education of the children of aborigines and half-castes:
- (d.) Enabling any aboriginal or half-caste child to be sent to and detained in an aboriginal institution, industrial school, or orphanage:
- (e.) For the control, care, and education of aborigines and half-castes in aboriginal institutions, and for the supervision of aboriginal institutions:
- (f.) Prescribing the conditions on which any aboriginal or half-caste children may be apprenticed to or placed in service with suitable persons:
- (g.) Prescribing the conditions on which any aboriginal or half-caste prisoner may be placed under the custody of any officer or servant of the State.
- (h.) Regulating the payment of wages payable under agreements:
- (i.) Providing for the control of aborigines and half-castes residing upon a reserve, and for the inspection of aborigines and half-castes employed under the provisions of this Act; and
- (j.) For the maintenance of discipline and good order upon a reserve:
- (k.) Authorising entry upon a reserve by specified persons or classes of persons for specified objects, and the conditions under which such persons may enter or remain upon a reserve, and providing for the revocation of such authority in any case:
- (l.) For all other purposes relating to the administration of this Act.

61. All such regulations shall be published in the *Government Gazette*, and thereupon shall have the force of law; and shall be laid before both Houses of Parliament within fourteen days after such publication, if Parliament is then in session, and if not, within fourteen days after the commencement of the next ensuing session.

Publication of regulations.

62. Such regulations may impose, for any breach hereof, a fine not exceeding twenty pounds, or imprisonment for any period not exceeding one month.

Penalties.

63. The Minister may issue to any aboriginal or half-caste who, in his opinion, ought not to be subject to this Act, a certificate in writing under his hand that such aboriginal or half-caste is exempt from the provisions of this Act, and from and after the issue of such certificate such aboriginal or half-caste shall be so exempt accordingly:

Power to exempt certain half-castes from Act.
See Q., 1897, No. 17, s. 33.
Q., 1902, No. 1, s. 6.

But any such certificate may be revoked at any time by the Minister, and thereupon this Act shall apply to such aboriginal or half-caste as if no such certificate had been issued.

64. (1.) A separate account of the moneys placed at the disposal of the department shall be opened and kept at the Treasury as a trust account.

Accounts and audit.

The Colonial Treasurer shall, at the commencement of each financial year, pay into such trust account so much of the annual grant as shall be necessary for the requirements of the department, and thereafter from time to time during the said year such further sums as may be required, until the whole of the grant has been paid to the credit of such account.

(2.) The Chief Protector or such other officers as the Minister may appoint shall operate upon the trust account as in the case of an ordinary banking account.

(3.) The Minister shall cause accounts to be kept of all moneys received and expended by, and all assets and liabilities of, the department.

(4.) Within sixty days after the close of each financial year the Minister shall cause a balance-sheet for the year to be prepared, together with a statement of income and expenditure account, and such other statements as he may direct.

Such balance-sheet, income and expenditure account, and other statements shall be prepared to show fully the financial position of the department and the financial result of its operations for the year.

(5.) Within eighty days after the close of each financial year the Minister shall cause the balance-sheet, income and expenditure account, and other statements in connection with the accounts for

year to be submitted to the Audit Office for audit, and when so audited and reported upon by the Auditor General the same shall be published in the *Government Gazette*.

(6.) The balance sheet, income and expenditure account, and other statements as aforesaid, duly audited, together with a report by the Chief Protector on the condition and welfare of the aborigines, and of the transactions of the department for the year, shall be laid before both Houses of Parliament within fourteen days after the audit is completed, if Parliament is then in session, and if not, then within fourteen days after the commencement of the next ensuing session.

(7.) The Auditor General shall have all the powers conferred upon him by the Audit Act, 1904, and any amendment thereof, with respect to the audit of the accounts of the department.

Validation of appointments made and acts and things done under 61 Vict., No. 5.

65. Whereas a Bill intituled "An Act to further amend the Constitution Act of 1889, and for the better protection of the Aboriginal Race of Western Australia" having been duly passed by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia was, on the eleventh day of December, One thousand eight hundred and ninety-seven, reserved by the Governor for the signification of the pleasure of Her late Majesty thereon, and received the assent of Her late Majesty in Council on the third day of February, One thousand eight hundred and ninety-eight, and was proclaimed in Western Australia on the first day of April, One thousand eight hundred and ninety-eight, but the Royal assent was not signified by such proclamation as required by the Statute made and passed in the fifth and sixth years of the reign of Her late Majesty, and intituled "An Act for the Government of New South Wales and Van Diemen's Land":

And whereas the said Bill appears in the Statute Book of Western Australia as of the sixty-first year of Her late Majesty Queen Victoria, and purports to repeal the Act and parts of Acts mentioned in the First Schedule hereto, and to provide *inter alia* for the abolition of the Aborigines Protection Board, and for the establishment of the Aborigines Department, which should discharge the duties of the said Board so purported to be abolished, and for the annual appropriation of Five thousand pounds to be applied to the purposes of the said Department: And whereas, after the Proclamation in Western Australia of the said Bill (hereinafter called an Act) as a Statute, the said Aborigines Protection Board was in fact abolished, and the said Department was established: And whereas it is desirable to validate such abolition of the said Aborigines Protection Board and the establishment of the said Department and such repeal: Be it therefore further enacted as follows:—

The Act and parts of Acts mentioned in the First Schedule shall be deemed to have been repealed, the Aborigines Protection

Board shall be deemed to have been abolished, and the Aborigines Department shall be deemed to have been lawfully established on and from the date upon which the said Act intituled "An Act to further amend the Constitution Act of 1889, and for the better protection of the Aboriginal Race of Western Australia" was proclaimed as aforesaid; and all appointments made, and all acts and things done or purporting to have been done by the apparent sanction of the said Act by the Governor, the Minister appointed to administer the same, the Colonial Treasurer, the Aborigines Department, Protectors of Aborigines, and other officers respectively, are hereby validated and confirmed for all purposes whatsoever.

66. The Acts mentioned in the Second Schedule are hereby ^{Repeal.} repealed to the extent and in the manner therein stated.

1905, No. 14.]

Aborigines.

[5 EDW. VII.]

Section 65.

The First Schedule.

Date.	Title.	Extent of Repeal.
50 Vict., No. 25	The Aborigines Protection Act, 1886 ...	Part I.
52 Vict., No. 23	The Constitution Act, 1889	Section 70.
52 Vict., No. 24	The Aborigines Act, 1889	The whole.

Section 66.

The Second Schedule.

Date.	Title.	Extent of Repeal.
8 Vict., No. 6	An Act to prevent the enticing away the Girls of the Aboriginal Race from School, or from any service in which they are employed	The whole.
37 Vict., No. 11	The Pearl Shell Fishery Regulation Act, 1873	The whole, except sections 11 and 12.
39 Vict., No. 13	The Pearl Shell Fishery Regulation Act, 1875	Section 5.
50 Vict., No. 25	The Aborigines Protection Act, 1886	Parts II., III., IV., and V.
51 Vict., No. 18	The Pearl Shell Fishery Regulation Acts Amendment Act, 1887	The whole, except section 5.
55 Vict., No. 25	The Aborigines Protection Act (Amendment), 1892	The whole.
61 Vict., No. 5	The Aborigines Act, 1897	The whole.

Postscript

*'The past is a foreign country: they do things differently there.'*²⁵⁶

Or do they?

Britain gave Aboriginals the nominal status of subjects under the Crown, which allowed British Law to discriminate against them as a group on the basis of their race; yet they were not protected by that same Law.²⁵⁷

Extermination was made legal, justified if there was any resistance to the process of displacive occupation. Aboriginal witness testimony to acts of targeted genocide was disallowed.

Australia did not grant Aboriginals full and equal citizenship rights until a 1967 referendum; but the referendum did not end Aboriginal discrimination on other civil matters, for example, wages, which were handled through a mire of industrial relations processes and a mix of state and federal awards. The right to vote in federal elections was legislated in 1962,²⁵⁸ and the right to vote in all state elections in 1965.

The main result of the 1967 referendum was to confirm the Federal Government's constitutional head-of-power over the states, giving them a mandate to implement policies to reduce Aboriginal disadvantage, and potentially to end discrimination against Aboriginals by state governments, particularly Queensland and Western Australia. Queensland delayed the Aboriginal right to vote in State elections until 1965. However, it was not until a federal referendum in 1967 that Aboriginals were formally recognized as Australian citizens, and therefore with the right to vote in all elections, the right to be counted in a census, and the right to be proportionally represented.

²⁵⁶ From the haunting 1970 Joseph Losey directed film, *'The Go Between'* based on the novel of the same name by the British author L. P. Hartley (1895 – 1972) – a pensive recollection of late Victorian society and the nature of memory and myth, one rewriting the other.

²⁵⁷ For instance, British law in principle conferred the legal right not to be murdered, or segregated, or starved, or incarcerated and so on, irrespective of race, a principle which was comprehensively ignored in the British occupation of Australia.

²⁵⁸ [http://en.wikipedia.org/wiki/Australian_referendum,_1967_\(Aboriginals\)](http://en.wikipedia.org/wiki/Australian_referendum,_1967_(Aboriginals)) has a valuable exposition on the context and outcome of the 1967 referendum; also John Pilger, *A Secret Country*, 1990, p. 46.].

Technically the referendum was a vote on the *Constitution Alteration (Aboriginals) 1967*, to amend section 51 (xxvi) of the Constitution, which stated that the Federal Government had the power to make laws with respect to ‘*the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws*’. This was known as ‘the race power’ and referred to the constitutional ability of the states to manage Aboriginal affairs without federal oversight.

The referendum required a vote to remove the phrase ‘*other than the Aboriginals in any State*’, giving the Commonwealth the power to make laws specifically in relation to Aboriginal people. The referendum was also a vote to change Section 127, which said: ‘*In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal natives shall not be counted*’. The referendum deleted this section from the Constitution. The section related to calculating the population of the states and territories for the purpose of allocating seats in Parliament and per capita Commonwealth grants. This section was highly racist, as it prevented the large Aboriginal populations in Queensland and Western Australia from gaining proportional representation in senate legislative bodies, either state or federal, and prevented the allocation of discretionary funds based on population data targeted towards redressing Aboriginal disadvantage.

However, the discrimination continues. Indeed, we could argue, and will in other documents,²⁵⁹ that Aboriginals *as a group* still remain second class citizens living in third world conditions in a country generally recognized as belonging to the ‘developed’ world.

*

Although Aboriginals were nominally ‘British subjects’ since first settlement, and therefore subject to British law, they were not made nominal ‘citizens’ until 1948, which in principle allowed them various civil rights, including the right to vote in federal and state and council elections, unless that right was abrogated by the states. And it was, except for South Australia.

Theoretically, the Constitution of 1900 gave all Aboriginals the right to vote in state and federal elections, but it had a different legal interpretation prior to 1949, and the right was suppressed through politically endorsed racism. Aboriginals got the formal right to vote in Western Australian state elections in 1962, and Queensland state elections in 1965.

²⁵⁹ For example, Ray Gibbons (2017), *Deconstructing Tasmanian Genocide the extermination of the Palawa*

The 1967 referendum gave the Commonwealth the power to override state laws, but the Federal Government did not use its powers for a further five years. Aboriginal people from Queensland and Western Australia gained the right to vote in Federal elections in 1962. The Commonwealth Act in 1949 confirmed that right in all states, but some state governments refused to allow the right to be exercised.

Before 1961, many Aboriginals could not marry without the permission of Government authorities; after 1961, an Aboriginal might qualify for an exemption card, but the state director of Aboriginal Affairs could revoke the card at any time.

Enquiry	Date	Result
Aboriginal deaths in custody enquiry	1991	https://www.creativespirits.info/aboriginalculture/law/royal-commission-into-aboriginal-deaths-in-custody http://theconversation.com/deaths-in-custody-25-years-after-the-royal-commission-weve-gone-backwards-57109
Forced removal of children enquiry	1997	https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/submissions_un_hr_committee/6_stolen_generations.pdf
Report of the Council for Aboriginal reconciliation	2000	http://www.50yearjourney.aiatsis.gov.au/stage7/item1.htm
Closing the gap enquiry	2008	https://www.humanrights.gov.au/publications/closing-gap-national-indigenous-health-equality-targets-2008
Closing the Gap Prime Ministers' Report	2017	http://closingthegap.pmc.gov.au/ <i>Indigenous Australians don't live as long as other Australians. Their children are more likely to die as infants. And their health, education and employment outcomes are worse than non-Indigenous people. Australia has promised to close this gap on health, education and employment. But a new report card finds we are failing on six out of seven key measures.²⁶⁰</i>

Figure 7 Enquiries into Aboriginal disadvantage

Little has changed since the 1967 referendum, with a succession of expensive investigations, enquiries and reports failing to address the ongoing Aboriginal disadvantage. The modest

²⁶⁰ <http://www.abc.net.au/news/2017-02-14/closing-the-gap-report-card-failing/8268450> Also see Peter Sutton (2011), *The Politics of Suffering* for a raw, impassioned account of continuing Aboriginal mistreatment, where decades of liberal consensus on Aboriginal issues has comprehensively failed to address deeply embedded Aboriginal community suffering and grief, both in policy and practice.

attempts at redressing the racial inequality, so urgently pressed by Faith Bandler and others, are like ripples on the wind of economic determinism.

*Bringing Them Home*²⁶¹ was a ground breaking report, commissioned by the Attorney-General at the time (Michael Lavarch) into the 'stolen generation', which chronicled continuing Aboriginal disadvantage and mistreatment.²⁶² Indeed, the Productivity Commission's November 2014 report '*Closing the Gap*', shows the problems are getting much worse.

Yet little is done. Commonwealth Government funding to 'close the gap' on Aboriginal disadvantage is being scaled back. The Commonwealth says it is a State problem, to deflect accountability, and the States return fire. Seventeen years after the Lavarch report was issued, there is still scant progress in addressing the problems. The despair, poverty and alienation, which the detailed reports identify, has morphed into high levels of suicide, disproportionately excessive incarceration, and wide spread drug abuse, particularly for regional and rural areas.

Aboriginal communities are consistent on what they want: Constitutional recognition; economic self-determination; adequate infrastructure and services; mining rights; and the protection of land, language and culture.²⁶³ They are consistently ignored or told 'not yet'.

*

Our Federal Government continues to erode remote Aboriginal basic rights with excessive regulation, work for the dole schemes, sequestered pensions, and the push for 99 year leases over Aboriginal land. It is yet another wave of imposed Government subjugation, for which it is unsurprising that Aboriginals remain chronically disadvantaged.

Aboriginals continue to be among the most deprived groups within the developed economies, with preventable disease on a par with third world nations. Aboriginal rates of suicide and incarceration are abnormally high. Indigenous people in remote communities may not have access to running water, or routine health services. Alienation leads to domestic violence and substance abuse. Many are living in a period of end stage Lemkinian genocide with

²⁶¹ Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997

²⁶² <https://www.humanrights.gov.au/publications/bringing-them-home-stolen-children-report-1997>

²⁶³ Joe Morrison, CEO, Northern Land Council, Press Club Address, February 2015.

symptomatic mental harm and family disintegration.²⁶⁴ The case for intervention can always invite a societal backlash with the argument: why them and not me? It is a form of downward envy.

*

Today Aboriginal massacres would be unthinkable to most Australians, but pervasive Aboriginal disadvantage continues, with many resulting deaths. There is a cynical form of pervasive Government mistreatment and neglect. It leads to high levels of punitive incarceration, systemic poverty, malnourishment, excessive policing, and alienation for many Aboriginals, particularly those living in remote camps and reserves with generally poor housing, sanitation, food and water supplies. In Australia, being black amounts to a crime, with gaol, prevailing disadvantage and preventable disease the punishment. That is, there is an officially sanctioned policy across all levels of Government of massacre by another name: the toleration of early and avoidable Aboriginal deaths. This has been the case for the last one hundred years and followed the process of colonisation and closer settlement in an extended war for the land.

There is increasing evidence that the many Aboriginal problems of alcoholism, petrol sniffing, youth suicide, domestic violence, malnourishment, trachoma, diabetes, kidney disease and so on, may be symptoms of an epidemiological problem. It could be characterised as a collective, persistent and heritable post-traumatic stress disorder, where Aboriginals as a marginalised group continuously and helplessly relive the 'killing times', the 'stolen generations', and violent dispossession, effecting a sense of numbness, apathy and hopelessness.

Aboriginals, like the unfortunate transportees of yesterday, remain excessively condemned by social disadvantage into abject poverty, ill health and punitive incarceration. Unlike the transportees, for Aboriginals, there is as yet no hopeful sign of a 'ticket of leave', particularly for those living in remote communities. They want to get on with their life, and quietly manage their hurt, but continuing racism holds them back in relative social disadvantage. To our nation's shame, the proud descendants of Australia's First people persist in

²⁶⁴ Ray Gibbons (2016), *The Political Uses of Australian Genocide*

Deconstructing Australian genocide

unconscionably large numbers as victims of repressive Government policies that perpetuate the cycle of disengagement and despair.

Aboriginals remain disadvantaged today, and for much the same policy-shaped behaviours and economic reasons as professed by colonial Australia. Racism, a sense of racial superiority, of profound trans-generational marginalization, of chronic imposed disadvantage, of an ongoing failure to recognize Aboriginal rights through a treaty arrangement, of a Rubicon stricture that Aboriginals ‘did nothing with the land, so it was perfectly reasonable to remove them’, still leads our society to criminalise systemic Aboriginal poverty by incarcerating them in disproportionately large numbers.

No, we – as a society - are still the aggressors and Aboriginals are still being victimised for the act of their existence.²⁶⁵

²⁶⁵ In 1987, because of the large number of Aboriginal deaths in custody, the Hawke Government held a Royal Commission to make recommendations on reducing the death rate. The key finding of the Royal Commission was that *‘the deaths were due to the combination of police and prisons failing their duty of care, and the high numbers of Indigenous people being arrested and incarcerated.* Twenty nine years later, the problem of Aboriginal social disadvantage and imprisonment has become far worse. The rate of Aboriginal incarceration has *‘doubled as a proportion of the prison population from 14% to become 28%, while making up only 2% of the general population...[..]. In June 2015, Indigenous people were 15.5 times more likely to be incarcerated than non-Indigenous people. A startling 54% of juvenile detainees are Indigenous, making Indigenous youths 26 times more likely to be in detention.’*

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