abandoned colony at Australind in the south-west of Western Australia in 1841. The major figures behind the venture had been associated with the founding of South Australia, and included E.G. Wakefield, the spiritual father of the colony. In contrast to the plans of 1833-35 which ignored the presence of the Aborigines the new colony was to proceed with full recognition accorded to native title. Wakefield made contact with prominent Aboriginal Protection Society member, Thomas Hodgkin, and told him that he intended to appoint a commissioner, to be selected by the Society, who would travel to Western Australia and ‘inquire into the state of the natives, and on the spot devise the details of a better system of treatment to be adopted towards them’. There was a clear appreciation of Colonial Office concern for indigenous rights while Hodgkin understood that ‘very influential individuals in some degree connected with the Western Australian enterprise, had insisted on justice to the natives being made an essential condition of their adhesion to it’.  

The directors of the Company and a delegation from the Society met and drew up a joint proposal to be put to the Government which included, as the first of three measures, provision for, an arrangement with the natives for the extinction of their title to the crown lands of the colony, and the security to these natives of a portion of land adequate to supply the means of their peaceful existence.  

The joint Company/Society petition to the Colonial Office embodied plans to send an officer to make an inspection of local conditions. In his letter to Russell, the Society secretary sought not just ‘sanction and support’ for the venture but also a commitment that the Government ‘so far recognizes the principle of aboriginal claims as to insure the adoption of any really practical measures which may be devised’. Russell agreed with the proposals and presumably accepted the principles implicit in them. An officer was appointed and plans made to send him to the Colony. But by then the Company was in deep financial trouble. Investors withdrew their money and the Company’s bank collapsed. The Company severely pruned expenditure and refused to pay for the expedition to Western Australia. The whole scheme was in jeopardy and only a few colonists actually set sail for the Antipodes.

Pastoral Land at Port Phillip

The Port Phillip Protectorate was the principal means chosen by the imperial authorities to implement in Australia the recommendations of Buxton’s Select Committee. His strong commitment to indigenous land rights and desire to discover the ‘most judicious modes of securing to them some portion of their own land’ were apparent in plans which were put in place in many parts of the Empire in the late 1830s and early 1840s. His original idea was to appoint Protectors to defend Aboriginal property ‘that they may not be cheated out of their land’. In the Select Committee Report the outline of the duties of the Protectors included the following recommendation.

Especially they should claim for the maintenance of the Aborigines such lands as may be necessary for their support. So long as agriculture shall be distasteful to them, they should be provided with the means of pursuing the chase without molestation.

When it came to appointing officers for Port Phillip and drawing up specific instructions Glenelg turned to George Arthur then on leave in London after completing a twelve-year term in Tasmania. Arthur believed that recognition of native title was vital in order to avoid the bloodshed experienced in Tasmania. He was also aware of the contemporary legal view that native title was entrenched in the common law, and had a copy of the legal opinion of Burge, Follet and Pemberton in his private papers. In the instructions he drew up for the Protectors Arthur made two references to Aboriginal property. The Protector was to encourage the Aborigines to ‘engage in the cultivation of their grounds’ to watch over ‘their rights and interests’, and to protect them by his personal exertions and
influence ‘from any encroachment on their property’. Whatever else Arthur may have planned for Port Phillip Aborigines he clearly assumed that they would have some land to call their own, that they wouldn’t ‘want for land’. The reference to ‘rights and interests’ suggested an expectation of some form of compensation from the settlers.

This was certainly the way that the Chief Protector, G.A. Robinson, interpreted his task, referring again and again to his belief that the Aborigines should be allowed ‘a reasonable share in the soil of their fatherhood’. From his arrival in Port Phillip Robinson was shocked by the way in which the Aborigines were being swept aside by the tide of pastoral settlement. He noted in his journal in May 1839 that he had just had a long conversation with the Surveyor General who,

showed me a Map of the Country — marked off into allotments comprising an Extent of I think fully 30 miles square — and not a single reserve for the blacks ... I said that if a similar map was Exhibited to the people of England they would at once, see the way the natives are treated. Their land sold from them and no provision made for their maintenance and this by the Govt which are bound to protect them — There is a complete system of expulsion and Extermination for first the Purchaser of their lands drive them on to other Purchased lands and then on ad infinitum.32

Robinson’s solution was like Gawler’s — to create reserves within the traditional boundaries of the Aborigines’ own land. ‘It would appear but an act of common justice’, he wrote in 1839, that the local clans ‘should be permitted to select in their own districts small portions of land’. He was still arguing the case nine years later. In his annual report for 1848 he quoted Arthur’s original instructions and then added,

I have not failed from a sense of duty, and from a conviction that reserves are essential to the welfare of the natives, to bring this matter under notice ... It is but just and reasonable the natives should have spots to call their own, and land whereon to settle.34

Robinson’s advocacy eventually evoked a response from the Colonial Office. In his 1846 report he explained that the situation was getting worse for the local Aborigines. The imperial Government had instituted a system of leases for pastoral land occupied by the squatters. Colonial legal opinion was that the Aborigines were trespassers on land held under lease or license.35 Unless action was taken soon ‘every acre of their Native soil [would] shortly be so leased and occupied as to leave them, in a legal view, no place for the sole of their feet’. The Colonial Office responded directly to the situation which Robinson outlined. In February 1848 the Secretary of State, Earl Grey, informed Governor Fitzroy that pastoral leases were ‘not intended to deprive the natives of their former right to hunt’ over Australian land or to,

wander over them in search of subsistence, in the manner in which they have been heretofore accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose.36

Grey embodied the provisions in an Order of Council under the Australian Waste Land Act passed in the imperial Parliament in 1846. In February 1850 Grey underlined his view of the matter, informing Fitzroy that it was illegal to force the Aborigines off cattle runs and that they had ‘every right to the protection of the law from such aggressions’.37

Grey thought the matter ‘one of very great importance’.38

1. Colonial Office action was a clear and demonstrable recognition of native title: the right to use and occupy land held under traditional title.
2. The imperial authorities believed that the Aborigines had rights. They said so a number of times, both in public and private. Grey explained in his despatch that grants of pastoral leases were not intended to deprive the Aborigines ‘of their former right’ to hunt and gather. In an internal Colonial Office memo, Gordon Gairdner, the senior official in charge of Australian affairs, explained that the object of Grey’s proposals was ‘the reservation in leases of Pasturage Land of
the rights of the Natives', the 'conveyancing to the Natives the continuance of their rights'. The Colonial Office had not created these rights. It had recognized their existence. It intended to provide for their continuance. The rights did not derive from statute law, they were embodied in the common law and stemmed from the Aboriginal prior occupation of the continent.

3. On all but enclosed and cultivated land the Aborigines could, as of right, continue to make use of the land as they had done since time immemorial. They could come and go as they pleased, hunt, fish, gather, reside. They had what were known as usufructuary rights. Such rights were an 'interest' in the land, a form of property, which could be passed on by inheritance like any other form of property. The owner of such an interest would expect compensation if it was extinguished by the Crown.

4. Aboriginal customary rights were to continue on land leased to pastoralists. The conclusion is irresistible that they also continued to exist on Crown land all over the continent and where there were no Europeans their rights were unimpaired. Whether those rights have ever subsequently been extinguished is a question which will be addressed shortly.

Australian historians and jurists have seriously misunderstood the importance of the Colonial Office's recognition of Aboriginal rights of occupancy, principally because the decision was made when imperial responsibility for Aboriginal Affairs was almost at an end (except in Western Australia) and because settlers, governments and courts ignored land rights in defiance of the law. Later writers adopted the colonial rather than the imperial version of the story. While British officials wrote of preserving Aboriginal rights, their colonial counterparts referred to 'this privilege' granted to the Aborigines. The gulf between the two positions was obvious. A modern historian of Aboriginal policy thought that what the Colonial Office had conceded was no more than a 'right to limited trespass'. In his Gove Land Rights judgement of 1971 Blackburn argued that Grey's initiative was entirely consistent with the whole pattern of non-recognition of communal native title in Australian law. It seems to me that this assessment was entirely consistent with Blackburn's flawed interpretation of colonial history.

Compensation

Reserves in settled districts and usufructuary rights elsewhere were two ways in which the imperial government gave substance to its commitment to native title in Australia. The third way was financial compensation. The need to provide an 'equivalent' was widely accepted, as was the obligation to pay for the education, conversion and 'civilization' of the displaced tribes. The question was tackled in the Imperial Crown Land Sale Act (1842) which gave the Crown discretion to use the proceeds of land sales. Two years earlier the Colonial Office had decided that 15 per cent of land revenue should be spent on the indigenees in all new colonies. In a despatch of August 1840 Russell told Governor Gipps that in his opinion 15 per cent of the land fund should be used for the Aborigines. The Australian governors were informed in September 1842 that they were to use an amount 'not exceeding in the whole 15 per cent of the gross proceeds of land sales for the benefit, civilization and protection of the Aborigines'. This was meant to be taken seriously. In 1848 Earl Grey proposed the setting up of schools for both children and adults all over the colonies. 'The expense attending any measures of that nature', he wrote, 'should constitute the very first charge upon the Land Revenue, a principle which Parliament has recognized in the Australian Land Sales Act'.

A New Era

By the end of 1848 when Earl Grey's despatch reached Australia with suggestions for the creation of more reserves, Aboriginal schools, and recognition of usufructuary rights on Crown land, the humanitarian movement had long since passed its zenith. James Stephen had just left the Colonial Office after an