

**Q150 Constitutional Conference 2009**

**150<sup>th</sup> Anniversary of establishment of the Colony of  
Queensland**

**Queensland Constitution at 150: Origins and Evolution**

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Brisbane**

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**Queensland's Constitutional Inheritance  
from New South Wales**

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**ABSTRACT**

The paper will examine the Constitutional development of the Colony of New South Wales, with particular emphasis on the movement from autocratic power to civil colonial government in 1823, to the first representative government in 1842 and, through the social and political forces of the 1840s and 1850s, to responsible government in 1855. The paper will examine how these developments also led to the political movement for separation of northern New South Wales and the creation of responsible government for not only New South Wales, but the other colonies on the continent, including Queensland in 1859.

I am honoured to be asked by the organising committee to speak at this important conference and to contribute to this important occasion celebrating the 150<sup>th</sup> anniversary of the formation of Queensland and of its receipt, at formation, of responsible government. I am doubly honoured to share the first session with the Hon Dr Bruce McPherson. When Dr Michael White told me of this, I felt (after 37 years) the same concern as having an essay or tutorial paper submitted to

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\* President of the New South Wales Court of Appeal

Professor John Ward at Sydney University. I was privileged to be taught history by Professor Ward; I am privileged to share this session and participation in this conference with Dr McPherson.

I have been asked to address the New South Wales Constitution of 1855. This is a necessary task for anyone seeking to understand the Constitutional structure of Queensland, because the New South Wales Constitution of 1855 was the foundation of Queensland's constitutional arrangements at the time of its creation on 10 December 1859.

To understand the constitutional structures given to New South Wales in 1855 and to Queensland in 1859 two tasks are necessary, in addition to gaining an appreciation of the text of the relevant instruments of 1855. First, one needs to appreciate the governmental and constitutional steps leading up to 1855. Secondly, and very much bound up with that first task, one needs to appreciate the historical forces and pressures (local, Imperial, European and international) that brought the politicians, businessmen, pastoralists, artisans, labourers and bureaucrats, in Australia and in England, to the position they found themselves in 1855. To a significant extent, the task is historical as well as legal. The historical aspect of the task is not merely an exercise in giving proper context to the written text of the statutes in question, it is also part of understanding the legal and constitutional step that occurred by the coming into force of the statutes embodying the Constitution. This is so because so much was not written into the relevant texts, but left to convention and contemporary understanding, and thus, now, historical understanding.

The necessary confines of the paper have required me to focus upon the development of the structures of government in New South Wales in respect of executive and legislative power. I have not sought to survey the development of an independent judiciary, though, of course, such development is fundamental to the developing civil societies of all the colonies. My review of the historical forces is not original and owes much to the true scholars in the field.<sup>1</sup> What I have

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<sup>1</sup> E Sweetman *Australian Constitutional Development* (Melbourne University Press 1925); A C V Melbourne and R B Joyce *Early Constitutional Development in Australia* (UQP 1963); E Jenks A

sought to do is to give content to so much that was unstated, yet present, in the 1855 New South Wales Constitution, when responsible government was wrested from London. It is not possible to appreciate the contemporary constitutional reality of what was effected in 1855 without appreciating the struggle, conflicts and tensions between colonials and London over self-government. People at the time understood that struggle, which was about power – Imperial and colonial, and how, if they could, the two types of power could co-exist within the Empire.

I should also say at the outset that this is a white man's story. It should not be forgotten that the history of New South Wales, Queensland and Australian Aboriginal history of the 19<sup>th</sup> century remains to be told fully. The absence of the indigenous inhabitants from what I am about to say, otherwise that as an aspect of background (though, at times, mentioned in instructions and despatches from London seeking their protection) speaks volumes as to their exclusion from the constitutional and political developments of the day. Reading of the heated political debates over “waste lands” and unalienated “empty” Crown land one conjures up a silent scream. This is not said by way of historical judgement on others of another age, or by way of contemporary political comment. Rather, the absence of indigenous participation in the political and constitutional development of the 19<sup>th</sup> century is itself a constitutional fact and a feature of our respective States' and our nation's constitutional, political and social history, which we inherit, and with which we must deal.

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*History of the Australasian Colonies* (Cambridge 1896); K R Cramp *The State and Federal Constitutions of Australia* (Sydney 1914); C M H Clark *History of Australia* (Melbourne University Press) Vols 3 and 4; P Cochrane *Colonial Ambition: Foundations of Australian Democracy* (Melbourne University Press 2006); J Quick and R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney 1901); A Castles *An Australian Legal History* (LBC 1982); J M Ward *Earl Grey and the Australian Colonies 1846-1857* (Melbourne University Press 1958) (“Ward Earl Grey”); J M Ward *Colonial Self-Government: The British Experience 1759-1856* (CUP 1976) (“Ward Colonial Self-Government”); W G McMinn *A Constitutional History of Australia* (OUP 1979); G Carney *The Constitutional Systems of the Australian States and Territories* (Cambridge 2006)

## Early autocratic rule

The early governmental structure from 1788 to 1823 was essentially autocratic rule of the Governor. This conformed with the penal aims and purposes of the first occupation; though as time passed, the political pressures of a growing civil society brought change.<sup>2</sup>

In 1770, Cook took possession of the eastern coast on behalf of the Crown.<sup>3</sup> The loss of the American colonies sparked an idea that colonisation of New South Wales might give an asylum to British loyalists from the lost colonies.<sup>4</sup> When Lord Sydney took over the Home Office in a new government in 1786, New South Wales was decided upon for transportation.<sup>5</sup> By Imperial Act of 1784<sup>6</sup>, the King in Council had been given power to declare places to which convicts might be transported. New South Wales was so declared in 1786.<sup>7</sup>

Captain Phillip's first commission (a military one) by letters patent dated 12 October 1786 appointed him Governor of the territory of New South Wales from latitudes 10° 37' S to 43° 39' S and west as far as longitude 135° E, including all adjacent islands.<sup>8</sup>

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<sup>2</sup> See generally, McMinn *op cit* ch 1

<sup>3</sup> This was an act of state not open to municipal judicial challenge: *Coe v Commonwealth* [1979] HCA 68; 53 ALJR 403 and *Mabo v State of Queensland (No 2)* [1992] HCA 23; 175 CLR 1 at 31, 32, 69, 78, 81, 95 and 121.

<sup>4</sup> Suggestion of James Matra to the Fox-North government in 1783: Evatt "The Legal Foundations of New South Wales" (1939) 11 *ALJ* 409.

<sup>5</sup> Evatt *op cit* p 409

<sup>6</sup> 24 Geo III c 56

<sup>7</sup> McMinn *op cit* p 1

<sup>8</sup> Historical Records of Australia, Series 1 Vol 1 p 1; The phrase "adjacent islands" was one of considerable breadth in the 19<sup>th</sup> century including Norfolk Island, New Zealand, Tasmania and other: *Wacando v Commonwealth* [1981] HCA 60; 148 CLR 1 at 8 (Gibbs CJ), though compare Cramp *op cit* note 2 above p 4; Carney *op cit* p 37.

Phillip's second commission (a civil one) by letters patent dated 2 April 1787 (the First Charter of Justice) appointed him "Captain-General and Governor in Chief" and dealt more fully with such matters as a public seal, establishing courts of civil and criminal jurisdiction, appointing justices and officers of the law, pardon and reprieve, levying armed forces and the proclamation of martial law, controlling finances, the granting of land and controlling of commerce.<sup>9</sup>

In 1787, an Act of Parliament was passed<sup>10</sup> providing some statutory authority for the foundation of civil government in New South Wales, the recitals of which included reference to the establishment of a "colony and a civil government" and a court of criminal jurisdiction with authority to proceed in a summary way.

Phillip also received instructions from the King-in-Council on 25 April 1789. These concerned emancipation and land grants.

These constituting instruments provided for the autocratic rule of the Governor.<sup>11</sup> It was, after all, a penal settlement – an open prison. Phillip, according to his first commission, was to be obeyed "according to the rules and discipline of war."<sup>12</sup> Relying on royal prerogative and Imperial law, the Governor legislated, governed and adjudicated: issuing proclamations, appointing civil servants, handing out land, maintaining an armed force and taking appeals from the Judge Advocate and after 1814, the Supreme Court. It has been described as "despotic government", and, as such, to be distinguished from a colony.<sup>13</sup> It is unnecessary here to discuss some of the constitutional doubts and difficulties of the early colonial administration.<sup>14</sup> It is also well to recall that although it is

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<sup>9</sup> Carney *op cit* p 37

<sup>10</sup> 27 Geo III c 2

<sup>11</sup> Quick and Garran *op cit* p 36; W J V Windeyer *Lectures on Legal History* (2<sup>nd</sup> Ed Sydney 1957) p 305; Cramp *op cit* note pp 6-8; McMinn *op cit* ch 1

<sup>12</sup> See Phillip's first Commission: Historical Records of Australia Series 1 Vol 1 p 1

<sup>13</sup> E Jenks *The Government of Victoria* (London 1891) p 11; and Evatt *op cit*; Quick and Garran *op cit* p 36

<sup>14</sup> See generally, W J V Windeyer "A Birthright and Inheritance: the Establishment of the Rule of Law in Australia" (1962) 1 *Tas ULR* 635; Evatt *op cit*; R E Else-Mitchell "The Foundation of New

legitimate to emphasise the personal or autocratic authority of the Governor, the essential rule of law persisted, though without contemporary or modern day constitutional safeguards for sophisticated civil societies. English governors were held responsible for unlawful acts.<sup>15</sup>

During much of this period (up to 1815) Britain was engaged in the worldwide struggle with Revolutionary and Napoleonic France. British rule in Ireland was also a focus of discontent and a source of many convicts. These considerations, as well as the running of a young, and at times brutal, penal settlement, justified such autocratic power.

Thereafter, in times of peace, tension with autocratic rule began to grow as the society in New South Wales began to expand and as its free and emancipist population grew. The establishment in 1814, under the Second Charter of Justice, of a Supreme Court, led to some tension, from time to time, between the judges and the Governor as to the latter's will being law.<sup>16</sup> As early as 1818, debate existed as to the continued legitimacy of the authority of the Governor without some form of representative assembly.<sup>17</sup>

William Charles Wentworth, the illegitimate son of a convict woman and the surgeon to the Second Fleet, D'Arcy Wentworth, was to play a central role in the political developments culminating in the New South Wales Constitution of 1855. As early as 1819, while in London reading for the Bar, Wentworth published a

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South Wales and the Inheritance of the Common Law" (1963) 49 *RAHSJ* 5; E Campbell "Prerogative Rule in New South Wales 1788-1823" (1964) 50 *RAHSJ* 181; E Campbell "The Royal Prerogative to Create Colonial Courts" (1964) 4 *Syd LR* 343; Carney *op cit* p 38; McMinn *op cit* ch 1; Ward *Colonial Self Government* pp 130-136

<sup>15</sup> W J V Windeyer "Responsible Government – Highlights, Sidelights and Reflections" (1957) 42 *RAHSJ* 257 at 263-266 and footnote 6 p 309

<sup>16</sup> Charters of Justice created courts in 1787 and 1814, in the latter year a "Supreme Court". The legal status of these charters was doubtful in the absence of legislation: J M Bennett *A History of the Supreme Court of New South Wales* (LBC 1974); Castles *op cit* chs 6 and 7; and see Cramp *op cit* note pp 9-10

<sup>17</sup> R D Lumb *The Constitutions of the Australian States* (UQP) 4<sup>th</sup> Ed pp 9-10

pamphlet of 100,000 words about the colony<sup>18</sup> which revealed an ambitious and energetic political zeal.<sup>19</sup> The theme of his pamphlet was a desire to push for political rights for the colony. He advocated a bicameral legislature with an elected assembly.<sup>20</sup> The pamphlet can be seen as the commencement of Wentworth's personal political ambition and life-long campaign for rights of self-government for the Colony within the Empire. Such ambition and vision was not (especially in later years) necessarily fully democratic, nor was it secessionary; rather, it was very much based on the views of Edmund Burke, who, speaking of the American colonists, referred to "ties which, though light as air, are as strong as iron".<sup>21</sup> This reflected a contemporary view of many colonial expatriates that self-government by a representative assembly was a right but could take place within the structure of the Empire.<sup>22</sup>

It is also to be recognised that during the political debates in the 19<sup>th</sup> century the historical and contemporary colonial development elsewhere in the Empire was known in New South Wales. In 1783, Nova Scotia and New Brunswick had received representative assemblies, as had various slave based colonies in the Caribbean in the 18<sup>th</sup> century; in 1791, Upper and Lower Canada had received the same. The Colonial Office, however, saw its disparate colonies, often dominated by powerful cliques, as necessarily ultimately subject to control by London for the good of the whole Empire.<sup>23</sup>

### **The end of autocracy**

By the early 1820s, the growing number of free and emancipated citizens in New South Wales, and their calls for some local legislature, led to an enquiry into the

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<sup>18</sup> *A Statistical, Historical and Political Description of The Colony of New South Wales and its Dependent Settlements in Van Dieman's Land*

<sup>19</sup> Cochrane *op cit* p 6 ff

<sup>20</sup> Carney *op cit* p 39

<sup>21</sup> Cochrane *op cit* pp 8-11

<sup>22</sup> Windeyer *op cit* note 15 pp 266-267

<sup>23</sup> Cochrane *op cit* pp 21-22

state of the Colony under John Bigge (a former Chief Justice of Trinidad)<sup>24</sup> whose recommendations influenced into the Act of 1823<sup>25</sup>, whereby New South Wales attained the status of a full colony.<sup>26</sup>

Under the Act of 1823, no assembly or representative body was established, but a Council was. It was to be comprised of between five and seven appointees. The Governor, acting on the advice of the Council, was to make laws for the “peace, welfare and good government” of the Colony, provided such were not repugnant to the 1823 Act, Charters, Letters Patent, Orders in Council or the laws of England “consistent with such Laws, so far as the circumstances of the said Colony will admit”.<sup>27</sup> Only the Governor could initiate bills. A majority of the Council could defeat a bill, unless the Governor was convinced that the law was essential and extreme injury would be caused to the Colony if rejected, in which case the support of only one member was required.<sup>28</sup> A form of judicial review was introduced, with the requirement for each bill or ordinance to be laid before the Chief Justice of the newly formed Supreme Court for an opinion as to lack of repugnancy to the laws of England.<sup>29</sup> Pursuant to the 1823 Act, Letters Patent (the Third Charter of Justice) established the Supreme Court of New South Wales and of Van Diemen’s Land. Overall supervision by London was ensured by provisions relating to disallowance and laying of laws and ordinances before the Parliament at Westminster.<sup>30</sup>

The first Executive Council was created by a new Commission and Instructions issued to Governor Darling on 17 July 1825, in which the Lieutenant–Governor

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<sup>24</sup> Carney *op cit* p 38; Melbourne and Joyce *op cit* pp 74-87; McMinn *op cit* pp 11-18

<sup>25</sup> 4 Geo IV c 96

<sup>26</sup> The 1823 Act had a conformity with the Quebec Act of 1774: see Cramp *op cit* note 1 p 11; see also McMinn *op cit* ch 2; and Ward *Colonial Self-Government* pp 136-139.

<sup>27</sup> 4 Geo IV c 96, s 24

<sup>28</sup> 4 Geo IV c 96, s 24

<sup>29</sup> 4 Geo IV c 96, s 29

<sup>30</sup> 4 Geo IV c 96, ss 30 and 31

(the senior military officer), the Chief Justice, the Archdeacon and the Colonial Secretary were appointed as founding members. The Governor sat with the Council.<sup>31</sup>

The 1823 Act was temporary, an experiment.<sup>32</sup> It lasted in terms until the end of the next session of Parliament after 1827.<sup>33</sup> It removed autocratic power, but was not representative, let alone responsible, government. Nevertheless, the changes brought about by and under the 1823 Act were of great significance. The Supreme Court (as presently existing) was established under it. The Act ended autocratic and doubtfully founded governmental authority, replacing it with non-autocratic (though non-representative) law making.<sup>34</sup>

Under the authority of the 1823 Act<sup>35</sup> the Commission to Darling also withdrew Van Diemen's Land from the jurisdiction of the Governor of New South Wales creating a new colony with a similar constitutional system.<sup>36</sup>

At the expiry of the 1823 Act, the Imperial Parliament passed an Act of 1828,<sup>37</sup> which later became known as the Australian Courts Act. The Bill was drafted by the first Chief Justice, Sir Frances Forbes, with amendments being made by Imperial authorities.<sup>38</sup> No representative assembly was created, but important changes were made to the operation of the courts and the judiciary and also to

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<sup>31</sup> Lumb *op cit* p 12; for the distinction between the Executive Council set up by the Commission and Instructions and the Council (or Legislative Council) set up under the 1823 Act see Cramp *op cit* note 1 pp 14-15.

<sup>32</sup> It was kept in operation by successive enactments. See for example the Act of 1839, 2 & 3 Vict c 70; and see Sweetman *op cit* p 74; Lumb *op cit* pp 13-14.

<sup>33</sup> 4 Geo IV c 96, s 45; see Melbourne and Joyce *op cit* 140-151 regarding the political discussion that followed its passing, especially as to the need for a representative body; and see Ward *Colonial Self-Government* pp 139-145.

<sup>34</sup> McMinn *op cit* p 22; Quick and Garran *op cit* pp 36-41

<sup>35</sup> 4 Geo IV c 96, s 44

<sup>36</sup> Melbourne and Joyce *op cit* pp 107-108 and Carney *op cit* p 48. The colony was renamed Tasmania on 1 January 1856.

<sup>37</sup> 9 Geo IV c 83; see Ward *Colonial Self-Government* pp 146-148

<sup>38</sup> Else-Mitchell *op cit* p 20; Lumb *op cit* p 12

the Council and its authority. First, the Council was expanded in number: between 10 and 15 (rather than five to seven), to be appointed by the Crown.<sup>39</sup> A quorum was two thirds of the members.<sup>40</sup> The Governor and Council were given power to legislate for the peace, welfare and good government of the colonies such laws and ordinances not being repugnant to the 1828 Act, or to any Charters or Letters Patent or to the laws of England.<sup>41</sup> The Governor required a majority of members to support his proposals; his residual power in extreme need under the 1823 Act was abolished.<sup>42</sup> Members were permitted to suggest bills. If the Governor refused to put such a law to the Council for consideration, he was required to table his reasons and any objections of members were noted.<sup>43</sup> The supervisory judicial power was modified: every law or ordinance was to be enrolled in the Supreme Court within seven days of enactment. The judges of the Court could declare the law repugnant to the 1828 Act or to the laws of England. This would suspend the law requiring its resubmittal to the Council. If passed again, it was law until the pleasure of the Crown was known.<sup>44</sup>

By 1823 and 1828, the nature of New South Wales as a colony, rather than as a penal settlement, was important for the extent of reception of English law. The 1828 Act provided that the laws of England (statute and common law) in force in England in 1828 **so far as they were applicable** were to be in force in New South Wales.<sup>45</sup> As Sir Harry Gibbs said in *Dugan v Mirror Newspapers Limited*<sup>46</sup>:

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<sup>39</sup> 9 Geo IV c 83, s 20

<sup>40</sup> 9 Geo IV c 83, s 21

<sup>41</sup> *ibid*

<sup>42</sup> *ibid*

<sup>43</sup> *ibid*

<sup>44</sup> 9 Geo IV c 83, s 22

<sup>45</sup> 9 Geo IV c 83, s 24. See generally E Campbell “Colonial Legislation and the Laws of England” (1965) 2 *Tas ULR* 148; Windeyer *op cit* note 14 pp 667-669; Windeyer *op cit* note 11 ch 37; G A Castles “The Reception and Status of English Law in Australia” (1963) 2 *Adel L R* 1

<sup>46</sup> [1978] HCA 54; 142 CLR 583 at 590

“It would indeed be a poor birthright if the common law inherited by the settlers of New South Wales was only that applicable to the conditions of persons living in an open penitentiary.”

### **The development of representative government**

In 1829, the Swan River Colony (renamed Western Australia on 6 February 1832) was proclaimed.<sup>47</sup> The eastern boundary of Western Australia was longitude 129° E, which was the revised western boundary of New South Wales after it had been extended by 6° of longitude in the Commission of Governor Darling in order to incorporate into the colony a military and trading post set up on the north coast of Australia on Melville Island, called Fort Dundas (just north of present day Darwin).<sup>48</sup>

Overshadowing and inhibiting any move to representative government was the continuation of transportation. Transportation was vital to the early economic development of the colony by the provision of cheap labour. Its continuation and its social and economic costs and benefits became central to the politics of the 1840s. The perceived need by pastoralists for the benefit of cheap labour was one reason for the push for separation of a northern colony, which became Queensland.

One early manifestation of the desire of removal from the effects of transportation and convict labour was the practical expression of the colonisation theories of Edward Gibbon Wakefield and the establishment of the province of South Australia in 1836.<sup>49</sup> By the late 1830s, free immigration was bringing many to the colony of New South Wales as the ideas of Wakefield and other proponents of systematic colonisation became influential.<sup>50</sup> Industrialisation in England was giving rise to surplus labour and to the political forces of democracy and

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<sup>47</sup> Sweetman *op cit* pp 78 and 337

<sup>48</sup> Melbourne and Joyce *op cit* p 107

<sup>49</sup> Pursuant to 4 & 5 Wm IV c 95, and proclaimed on 28 December 1836; Sweetman *op cit* pp 306 ff; Clark *op cit* vol 3 ch 3; Ward *Colonial Self-Government* pp 225-241.

<sup>50</sup> Cochrane *op cit* p 20; Melbourne and Joyce *op cit* pp 222 ff

Chartism.<sup>51</sup> Emigration and colonial settlement were seen as essential safety valves.<sup>52</sup> These emigrants were bringing with them some of the political baggage from England: ideas of Catholic emancipation, parliamentary reform, franchise extension and Chartism.<sup>53</sup> These emigrants came primarily to Sydney, where, by the late 1830s, there was a radical press.<sup>54</sup>

In August 1838, a committee of the House of Commons, chaired by Sir William Molesworth, influenced by Wakefield's ideas recommended the end of transportation and the replacement of convicts by free emigrants.<sup>55</sup> The intention to end transportation was announced in the Colony in 1839. The Order in Council of 22 May 1840 effected its end.<sup>56</sup> This marked the treatment of New South Wales as a settlement, rather than a convict station.<sup>57</sup>

Meanwhile, in 1837, French-speaking Quebecois in Lower Canada and pro-Americans in Upper Canada revolted.<sup>58</sup> Their complaint was that their Assembly was merely advisory and could be ignored by the Governor and London. This political agitation in Canada caused fear in London that Canada too might be lost like the American colonies had been only half a century before. The Earl of Durham was sent to Canada to investigate and report. He spent 6 months there. His report recommended responsible government, that is an executive responsible to a local legislature.<sup>59</sup> It was an unwelcome message to an Imperial government intent on central control.<sup>60</sup> Nevertheless, the Durham Report

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<sup>51</sup> D Thomson, *England in the Nineteenth Century* (Pelican 1950 Reprint 1975) pp 83 ff

<sup>52</sup> Cochrane *op cit* p 21

<sup>53</sup> Cochrane *op cit* p 25

<sup>54</sup> Cochrane *op cit* p 29

<sup>55</sup> Melbourne and Joyce *op cit* p 245; Carney *op cit* p 40

<sup>56</sup> Clark *op cit* vol 3 p 179

<sup>57</sup> Melbourne and Joyce *op cit* p 246

<sup>58</sup> Ward *Colonial Self-Government* ch 3

<sup>59</sup> Cochrane *op cit* p 19; Ward *Colonial Self-Government* pp 75 ff

<sup>60</sup> The two views of Empire reflected the immanent centrifugal and centripetal political forces of "Imperium et Libertas": Cramp *op cit* note 1 above pp 1 ff. See also Windeyer *op cit* note 15 pp

became well-known, not only in English political circles, but also in the colonies, including New South Wales. It typified an important strand of the thinking of one group of politicians and bureaucrats in England as to the necessary treatment of colonies within the Empire. It was thinking later reflected in the actions of the Colonial Office in the 1850s under Sir John Pakington and the Duke of Newcastle.

In 1840, the Colonial Land and Emigration Board was established to oversee the sale of Crown land in New South Wales to subsidise mass migration.<sup>61</sup> This policy saw the land of the colonies as held in trust for Imperial policies, rather than solely for the benefit of the local colonists. This conflicted with the New South Wales landed gentry's interests of land grants, control of the land and cheap convict labour. The representatives of this group, such as Wentworth and the Macarthurs had a vision of pastoral holdings, landed conservative political control (including control of the land and its benefits) and responsible government (with political power firmly held by landed interests) in an equal constituent polity of the Empire.

By 1840, the Colonial Secretary, Lord John Russell, had numerous colonial concerns, including immigrant and pastoralist expectations in New South Wales, troubles in Ireland, Jamaica and Canada, the question of what to do with New Zealand and the ending of transportation to New South Wales.<sup>62</sup>

Further, by the late 1830s, another important element emerged that was relevant to the politics in New South Wales in the coming two decades. There was a recognition in the Imperial Government that the development of European settlement over the large areas of the Australia (by now completely claimed as a continent by Great Britain) required the sub-division of the vast settled colony of New South Wales, which stretched from Port Phillip to Cape York and across

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267-271 for a discussion of these two themes in British policy; and see generally Ward *Colonial Self-Government*.

<sup>61</sup> Ward *Colonial Self-Government* p 240

<sup>62</sup> Cochrane *op cit* p 30

what is now the Northern Territory to the colony of Western Australia. The instructions to Governor Gipps on 22 May 1839 informed him that New South Wales was to be divided into 3 districts: Northern, Central and Southern. Lord John Russell's despatch to him 9 days later (31 May 1839) gave more detail, including the border of the Central and Southern Districts along the Murray and Murrumbidgee Rivers.<sup>63</sup>

An Act of 1840<sup>64</sup> renewed the 1828 Act and made provision for detachment of dependent islands (directed at New Zealand).<sup>65</sup> In the original Bills for the 1840 Act,<sup>66</sup> however, provision was made<sup>67</sup> for the division of New South Wales and the detachment of territory for one or more colonies, though not detaching any of the 19 counties proclaimed in 1829.<sup>68</sup> These provisions were objected to by the Macarthurs, and Sir Robert Peel agreed to oppose them.<sup>69</sup> The offending clauses were removed and replaced with the clause referred to above.

Once known in the Colony, the proposals for division of the Colony which appeared in the Bills for the Act of 1840, were the subject of opposition, including by the Legislative Council.<sup>70</sup> A petition was sent to London.<sup>71</sup> Politically, this opposition united the landed conservatives such as Wentworth and the Macarthurs, and the emancipists.<sup>72</sup> In 1841, counter petitions were raised both in the north and the south of the Colony on the question of separation.<sup>73</sup> The

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<sup>63</sup> Sweetman *op cit* pp 162-163

<sup>64</sup> 3 & 4 Vict c 62

<sup>65</sup> Sweetman *op cit* p 166. By letters patent of 1840, the colony of New Zealand was proclaimed.

<sup>66</sup> The 1828 Act requiring continuation.

<sup>67</sup> In cll 30 and 31 and cll 51 and 52 of the two continuance bills, respectively

<sup>68</sup> Sweetman *op cit* p 165

<sup>69</sup> *ibid*

<sup>70</sup> Melbourne and Joyce *op cit* p 259; Sweetman *op cit* pp 166-168

<sup>71</sup> Sweetman *op cit* pp 168-169

<sup>72</sup> Sweetman *op cit* p 170

<sup>73</sup> Melbourne and Joyce *op cit* p 260

opposition from the Legislative Council appeared to be successful, with the withdrawal of the dismemberment scheme on 21 August 1841.<sup>74</sup>

Nevertheless, two years later, when the 1842 Act was passed, s 51 provided for the power in Her Majesty by letters patent, to erect new colonies or territories within the limits of New South Wales, provided that no territory south of latitude 26° South (about Gympie's latitude) could be detached.

### **Representative government: the Act of 1842**

In 1842, the Imperial Parliament enacted "An Act for the Government of New South Wales and Van Diemen's Land".<sup>75</sup> The Act became known as the Australian Constitutions Act (No 1). It introduced the first representative government in New South Wales. A Legislative Council was established, consisting of 36 members holding office for 5 years, 24 were elected and 12 were appointed by the Crown.<sup>76</sup> The property qualifications for election was freehold of £2000 or an annual value of £100.<sup>77</sup> The franchise for electors was freehold of £200 or annual value of £20.<sup>78</sup> There was power in the Governor and Council to increase the size of the Council, but only by keeping the same proportions of elected and appointed members: that being 2:1.<sup>79</sup> Importantly, the Governor was not part of the Council. He could only transmit Bills for consideration. Both the Governor and the Council could initiate bills.<sup>80</sup> Bills were presented to the Governor for assent. Certain classes of bills were reserved for Royal assent.<sup>81</sup> Bills assented to by the Governor could be annulled by the Crown within 2

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<sup>74</sup> *ibid*

<sup>75</sup> 5 & 6 Vict, c 76. The Act in fact applied only in New South Wales, see 7 & 8 Vict c 74 s 6.

<sup>76</sup> 5 & 6 Vict c 76, s 1; appointment was by the Governor, subject to Royal assent.

<sup>77</sup> 5 & 6 Vict c 76, s 8

<sup>78</sup> 5 & 6 Vict c 76, s 5

<sup>79</sup> 5 & 6 Vict c 76, s 4

<sup>80</sup> 5 & 6 Vict c 76, s 30

<sup>81</sup> 5 & 6 Vict c 76, s 31

years.<sup>82</sup> The power of the Council to control the revenue of the colony was subject to severe limitations.<sup>83</sup> Revenue derived from rates and taxes on the inhabitants was subject to legislative appropriation, but only after a recommendation of the Governor.<sup>84</sup> Other revenue (most importantly, that derived from Crown land) was not within the power of the Council.<sup>85</sup> Provisions were made for a Civil List<sup>86</sup>. The Governor appointed all officials in accordance with instructions from London.<sup>87</sup> District Councils with local government powers were created.<sup>88</sup> The local raising of revenue (unassisted by revenue from land) was expected to support police and gaols.<sup>89</sup> The 1828 Act was made permanent.<sup>90</sup> Provision was also made for the creation of new colonies north of latitude 26° S.<sup>91</sup>

The Governor was not responsible to the Council. Salaried officers of the executive were debarred from accepting elective seats in the Council. The Governor held significant financial power and assent to legislation was discretionary and ultimately under the control of London. Thus, the 1842 Act can be seen as the commencement of representative government in the colony, but not responsible government.<sup>92</sup>

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<sup>82</sup> 5 & 6 Vict c 76, s 32

<sup>83</sup> Lumb *op cit* p 15; Melbourne and Joyce *op cit* pp 269-271

<sup>84</sup> 5 & 6 Vict c 76, s 34

<sup>85</sup> Melbourne and Joyce *op cit* p 271

<sup>86</sup> 5 & 6 Vict c 76, s 37

<sup>87</sup> Carney *op cit* p 41

<sup>88</sup> 5 & 6 Vict c 76, s 41

<sup>89</sup> Carney *op cit* p 41

<sup>90</sup> 5 & 6 Vict c 76, s 53

<sup>91</sup> 5 & 6 Vict c 76, ss 51 and 52

<sup>92</sup> Lumb *op cit* p 15

The first elections in the colony took place in 1843 when the 1842 Act was proclaimed. The existing Council, in a special session after the arrival of a copy of the Act, ensured that representation in the new Council was apportioned on the basis of one quarter elected representatives from towns and the rest from country districts.<sup>93</sup> The elections then returned members drawn largely from the upper ranks of colonial society: the land, professions and merchants.<sup>94</sup>

There was considerable tension in the operation of the constitutional structure under the 1842 Act. It disappointed radicals, liberals and conservatives alike, though for different reasons.<sup>95</sup> The Waste Lands Act of 1842<sup>96</sup>, being complementary legislation to the 1842 Act<sup>97</sup>, put the sale and disposition of Crown land in the control of the Governor, with this source of revenue unavailable to support the high cost of the Civil List, police and gaols which was to be borne by local taxation. Endless controversy and acrimony flowed from disputes over the Civil List and appropriations.<sup>98</sup> Attempts were made to reduce salaries of government officials, in bitter, often petty, examination of expenditures.<sup>99</sup> The Council tried to pass bills seeking to limit those who could sit in the Council and to audit the colony's accounts. The District Councils (which turned out to be a failure) were intended to have taxing powers to cover police and gaols. This was resented as an attempt to undermine the financial responsibility of the Legislative Council.<sup>100</sup>

The Legislative Council was often bitterly opposed to the stiff and prickly Governor Gipps, such conflict being driven by the cost of the Civil List and the

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<sup>93</sup> Melbourne and Joyce *op cit* p 282

<sup>94</sup> Cochrane *op cit* p 35

<sup>95</sup> Cochrane *op cit* p 31

<sup>96</sup> 5 & 6 Vict c 36

<sup>97</sup> Melbourne and Joyce *op cit* p 273

<sup>98</sup> Melbourne and Joyce *op cit* pp 290 ff

<sup>99</sup> Cochrane *op cit* pp 39 ff

<sup>100</sup> Cochrane *op cit* p 32; K R Cramp *A Struggle for a Constitution: New South Wales 1848-1853* pp 3-4

growing economic depression in the colony in the 1840s.<sup>101</sup> Whilst often not constructive, this concerted political opposition created a sense of political direction and entitlement focussed on colonial, against Imperial, interests. The Council was asserting its political will in an attempt to influence or control the Governor. The conflict saw the rise of a number of significant political figures: Wentworth, Richard Windeyer, the Rev John Dunmore Lang and Robert Lowe amongst them.<sup>102</sup>

Other political forces were developing. Radical shopkeepers and artisans such as William Duncan and the young toymaker Henry Parkes looked to responsible government with a popular franchise.<sup>103</sup>

For Wentworth and many in the colony, the struggle for control of the land was central and vital. The agitation for it was public and outspoken.<sup>104</sup> It has been said that the period of the 1840s and 1850s was the struggle for independence which could have led to secession or revolt.<sup>105</sup> The vehemence of the politics in New South Wales that began in these struggles with Gipps in the 1840s and the stridency of the expression of opposition to a stubborn Earl Grey a decade or so later in the 1850s justify that view.

The question of control of land had been an issue since the 1820s. In 1829, the “limits of location” were proclaimed, beyond which an occupier had no rights.<sup>106</sup> This did not prevent the existence of squatters going beyond these limits. A local Act was passed in 1836<sup>107</sup> that recognised the squatters and sought to bring

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<sup>101</sup> Cochrane *op cit* p 35 Melbourne and Joyce *op cit* p 263

<sup>102</sup> Cochrane *op cit* p 41

<sup>103</sup> Cochrane *op cit* 54-57; as to the elements in local opinion, see Windeyer *op cit* note 15 pp 275-278

<sup>104</sup> Cochrane *op cit* 81-83

<sup>105</sup> A Twomey *The Constitution of New South Wales* (Federation Press 2004) p 4

<sup>106</sup> Melbourne and Joyce *op cit* p 296

<sup>107</sup> 7 Wm IV, No 4

them under control by the issuing of licences.<sup>108</sup> In 1844 Gipps attempted a permanent settlement of the problem by opposing their claims for tenure and issuing regulations requiring licence fees for every 20 square miles of run. This met great opposition, especially in the Legislative Council.<sup>109</sup>

These grievances and resentments led, in 1844, to a petition being sent by a Select Committee of the Council to London seeking local control of Crown lands and revenue. It was dismissed by London in a manner<sup>110</sup> that caused significant resentment. A second Select Committee of the Council reported to London in late 1844 seeking, amongst other things, local control of revenue and taxation and **responsible** government. Again these requests were rejected.<sup>111</sup>

Meanwhile, residents of the Port Phillip District advocated separate government for the District. In 1840, the District had been placed under the administration of a Superintendent. Under the 1842 Act, it was to return five members, plus one from the town of Melbourne.<sup>112</sup>

At this point, it is necessary to return to the issue of transportation and to identify its place in the politics of the day, including the movement for a separation of territory from northern New South Wales for the creation of a separate colony. The issue of transportation and the interests of many pastoralists in its continuation in some form played an important part in New South Wales politics of the 1840s and in the background to the creation of Queensland. New South Wales was closed to convicts in 1840. The continuation of transportation to Van Diemen's land stopped the parallel constitutional development of Van Diemen's Land with New South Wales that had occurred since 1825, with the 1842 Act

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<sup>108</sup> Melbourne and Joyce *op cit* p 296

<sup>109</sup> Melbourne and Joyce *op cit* pp 297-302

<sup>110</sup> "so improbable a contingency" Lord Stanley said in his reply in 1845: see Sweetman *op cit* p 187.

<sup>111</sup> Sweetman *op cit* pp 187 ff

<sup>112</sup> Though because of distance, their representatives were generally residents of Sydney: G Taylor *The Constitution of Victoria* (Federation Press 2006) p 24

applying only to New South Wales.<sup>113</sup> It became clear, in a short time after 1840, that Van Diemen's Land could not absorb all the supply of English criminals. Lord Stanley considered re-opening New South Wales to transportation, at least of the "better class" of "exile", using Launceston as a clearing house.<sup>114</sup>

Gladstone succeeded to the Colonial Office in December 1845 and in his short time there (seven months)<sup>115</sup> he revived the controversy about renewed transportation and detachment of a new colony. In February 1846, he separated the territory north of latitude 26° S proclaiming the colony of "North Australia", which was intended to be a new convict settlement.<sup>116</sup> This was accompanied by a despatch suggesting the renewal of transportation. The establishment of the new colony was revoked by Earl Grey in April 1847 and the territory was reincorporated into New South Wales.<sup>117</sup> The reversal of the creation of the new colony saw the return to England of its Lieutenant-Governor Colonel Barney and his staff. What could not be reversed, however, was the movement in the north for separation. By July 1850, a committee was formed in Brisbane to secure separation.<sup>118</sup>

The exclusive landed conservatives who controlled the Legislative Council, had, in 1839 and 1840, opposed the ending of transportation (and thus the supply of cheap labour). Petitions of Macarthur and others in the Council had sought its renewal, or, in its place, labour from India.<sup>119</sup> Gipps had not sent these on to London, because there were also petitions from others in the colony, wage

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<sup>113</sup> Carney *op cit* p 48

<sup>114</sup> Melbourne and Joyce *op cit* p 357

<sup>115</sup> Melbourne and Joyce *op cit* p 357

<sup>116</sup> Melbourne and Joyce *op cit* pp 357-358

<sup>117</sup> Sweetman *op cit* p 331

<sup>118</sup> Sweetman *op cit* pp 331-332

<sup>119</sup> Melbourne and Joyce *op cit* pp 357-358

earners and emancipists, strongly opposed to both.<sup>120</sup> Transportation was dividing the politics of the colony sharply.

The suggestion of Gladstone for renewed transportation won the qualified support of a Select Committee of the Legislative Council in 1846.<sup>121</sup> It failed, however, to win the support of the Legislative Council as a whole in 1847.<sup>122</sup>

In this period of anti-transportation ferment, Earl Grey in 1847 came to the Colonial Office in the new Whig government. Earl Grey, having received the Select Committee's views in favour of renewal of transportation, went ahead with his deliberations and then announced in a despatch<sup>123</sup> his intentions to renew transportation. Opposition in the colony was immediate, public and intense.<sup>124</sup> This debate reflected the growing sense of political will in the colonial community as a whole. There was a self-perception of a civil society, a desire for responsible government and a belief that it was possible. These views were shared by many in the community. The presence of convicts and the use of the society as a penal settlement was anathema to such ambitions.<sup>125</sup>

One of the fears of the elected members of the Legislative Council was that Earl Grey would impose more general constitutional change on the colony in an unsatisfactory manner, without consultation. This manifested itself in December 1847 with the arrival of a despatch from Earl Grey. He proposed the separation of Victoria; a new bicameral Parliament and enhanced local government, the lower house of the Parliament being made up of representatives of the local governments, indirectly elected; and the creation of a national or central authority

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<sup>120</sup> Melbourne and Joyce *op cit* pp 358-359

<sup>121</sup> Melbourne and Joyce *op cit* p 359

<sup>122</sup> Melbourne and Joyce *op cit* p 360

<sup>123</sup> Melbourne and Joyce *op cit* pp 360-361

<sup>124</sup> Cochrane *op cit* pp 203-207

<sup>125</sup> Cochrane *op cit* ch 7

to deal with matters of common interest.<sup>126</sup> The indirect election of assembly members was avowedly done to curb the perceived power of the Legislative Council.<sup>127</sup>

The despatch of Earl Grey provoked passionate outrage in public meetings across the colony.<sup>128</sup> Robert Lowe, a Legislative Councillor, called it “damning proof of Colonial Office tyranny”.<sup>129</sup> Wentworth, also rejected the proposal in harsh terms. The proposal was seen as a retreat from any development of responsibility of the executive to the Legislative Council. The language of the political debate was becoming strident. Mass meetings such as at Royal Victoria Theatre on 19 January 1848 saw Earl Grey denounced in the strongest terms.<sup>130</sup> The resolutions contained in the petitions from these meetings included calls for responsible government.<sup>131</sup>

Elections took place in New South Wales in 1848, which saw a maturing polity contesting three main issues – (i) transportation, (ii) responsible government and franchise and (iii) land.<sup>132</sup> The three issues being related and part of a larger question of the type of society to be forged: a pastoral economy with convict labour and entrenched landed power or a liberal society with an urban focus with a wide franchise. The transportation issue drove a clear wedge between exclusive landed and pastoralist interests and radical, liberal, wage earner and town interests.<sup>133</sup> The divide between town and country was becoming clearer. Free immigration was bringing thousands to the colony who regarded transportation as a direct threat to their prosperity and wages. By 1848, the town

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<sup>126</sup> Sweetman *op cit* pp 217-218

<sup>127</sup> Cramp *op cit* note 100 p 4

<sup>128</sup> Cramp *op cit* note 100 p 5; Sweetman *op cit* pp 218-219

<sup>129</sup> Sweetman *op cit* p 219; Twomey *op cit* p 5

<sup>130</sup> Cochrane *op cit* p 162-166; Cramp *op cit* note 100 pp 8 ff.

<sup>131</sup> Sweetman *op cit* pp 219-220

<sup>132</sup> Cochrane *op cit* p 172

<sup>133</sup> Melbourne and Joyce *op cit* pp 361-362

and wage earners' influence was sufficient in the Legislative Council to see the opposition to transportation expressed by it. This was not just occurring in Sydney, but also in Melbourne and in small towns throughout the colony.<sup>134</sup>

Views in Brisbane were different, though not completely divergent. In June 1849, a meeting of magistrates and stockholders of Moreton Bay, the Darling Downs and Burnett Districts asked for ticket of leave men, not convicts. The pastoralists, including, and perhaps especially, those in the north were in favour of convicts. They needed labour.<sup>135</sup>

It is to be recalled that 1848 was a year of revolution across Europe in which issues of franchise, privilege and democracy were being addressed.<sup>136</sup> The ferment of Europe in 1848 was not lost on those in colonial New South Wales (nor, one suspects, the Colonial Office).<sup>137</sup> To a significant degree, the election of 1848 saw the victory of liberals and radicals in the electorates of Sydney.<sup>138</sup>

This political self-assertion rose again in the opposition to the announcement in 1848 by Grey of the renewal of transportation and in early 1849 after the arrival of the transportation ship, "Hashemy".<sup>139</sup> The intense opposition to transportation in Sydney and Melbourne, especially, saw Earl Grey, by November 1849, succumb to the will of the Colony with an expression of intention to send no more convicts.<sup>140</sup>

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<sup>134</sup> Melbourne and Joyce *op cit* p 363

<sup>135</sup> Melbourne and Joyce *op cit* p 363

<sup>136</sup> Cochrane *op cit* ch 10

<sup>137</sup> *ibid*

<sup>138</sup> *ibid*

<sup>139</sup> Cochrane *op cit* ch 11

<sup>140</sup> Melbourne and Joyce *op cit* p 364

## **Representative government and an Australia-wide colonial settlement: the Act of 1850**

In a despatch of July 1848, Earl Grey had indicated a willingness for the colonies to draw up their own constitutions, subject to Imperial approval.<sup>141</sup> In 1849, he sought the advice of a committee of the Privy Council dealing with Trade and Plantations (over which he presided). In May 1849, this committee reported on the Australian colonies and their constitutional position. Their report was the basis of the Act of 1850 which became known as the Australian Constitutions Act (No 2).<sup>142</sup> The committee recommended the separation of southern colony to be named Victoria and a general constitutional arrangement for the whole of Australia with a common form of government. Initial uniformity was to be achieved by conferring the New South Wales Constitution on the other colonies, and then granting each colony power to amend its own constitution. This would leave it to each colony to decide upon the form of any changes. The Committee also suggested a central authority dealing with matters of intercolonial interest, with one Governor to be a Governor-General who would have power to convene a General Assembly which would have power to legislate on topics of general interest to the Australian colonies.<sup>143</sup> A “General Supreme Court” was also envisaged. At the level of local government the committee recommended voluntary local councils at the request of inhabitants in place of the unpopular and compulsory system of 1842.<sup>144</sup>

The Bill introduced into the House of Commons was along the lines of the committee’s report and provided for separation of Port Phillip district and the creation of a colony of Victoria, with a form of government similar to New South Wales. Provision was made for similar constitutional change in South Australia,

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<sup>141</sup> Melbourne and Joyce *op cit* pp 344 and 353; Carney *op cit* p 42

<sup>142</sup> 13 & 14 Vict c 59

<sup>143</sup> post; roads, canals and railways; beacons and lighthouses; shipping dues; a General Supreme Court and its details; weights and measures; laws of common interest requested by the legislatures; appropriation of money for the above.

<sup>144</sup> Sweetman *op cit* pp 222-223

Van Diemen's Land and Western Australia. All new legislatures were to have power to change the franchise, electoral boundaries and create bicameral legislatures. The Bill included provision for a "General Assembly of Australia", a Governor-General and House of Delegates comprised of persons elected from the Legislative Councils. The House was to have defined powers capable of overriding colonial legislatures. These provisions had been subjected to criticism in New South Wales and in particular strong opposition from South Australia and Van Diemen's Land when the Privy Council Committee's Report was discussed in the Colonies.<sup>145</sup>

The Bill was before the Parliament from June 1849 to 30 July 1850 when it passed both Houses. It was the subject of criticism by former prominent barrister and politician in Sydney, Robert Lowe (now a member of the Commons) for its failure to advance responsible government.<sup>146</sup> The debate involved the foremost statesmen of the day: Stanley, Russell, Grey, Molesworth, Gladstone, Disraeli and Adderley.<sup>147</sup> The questions in debate as to the nature of the colonial parliaments and their possible federal union were seen as matters of important Imperial interest. There was strong opposition in the House of Lords to the idea of a federal union. This, together with local opposition, saw these aspects dropped from the Bill before it was passed.<sup>148</sup>

The supporters of New South Wales' interests in the Parliament, especially Sir William Molesworth and Robert Lowe argued strongly for independence through responsible government on all local matters, leaving Westminster responsible only for matters of Imperial interest. These suggestions were rejected.<sup>149</sup> The Act made no real change for New South Wales, other than making the failed local government system of the 1842 Act non-compulsory.

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<sup>145</sup> Sweetman *op cit* pp 225-227; Twomey *op cit* p 7; Melbourne and Joyce *op cit* p 374-375

<sup>146</sup> Sweetman *op cit* p 231

<sup>147</sup> Sweetman *op cit* p 232

<sup>148</sup> Sweetman *op cit* p 234

<sup>149</sup> Twomey *op cit* p 7

Pressure from the northern districts saw the inclusion in the Act<sup>150</sup> of a provision for detachment of territory of New South Wales north of latitude 30°S (between Coffs Harbour and Yamba) upon petition of the inhabitants.<sup>151</sup> Those in the north had always complained about the unrepresentative Legislative Council with the dominance of Sydney and the central landholders.<sup>152</sup> New England and the north coast of present day New South Wales supported northern squatter claims for convicts and put themselves forward as more closely related to Moreton Bay than Sydney, with Brisbane seen as likely to become a great commercial centre.<sup>153</sup>

The 1850 Act disappointed political forces in the Legislative Council and Sydney. It did not modify the relationship between the legislature and the executive; fixed civil service appropriations continued; and, most importantly, land revenue continued to be excluded from legislative appropriation. The franchise was reduced to freehold of £100 or occupancy of a dwelling house of £10, which pleased liberals, but not conservatives. Uncontroversially by now, the 1850 Act separated Port Phillip District from New South Wales, the new colony of Victoria being proclaimed on 1 July 1851. The 1850 Act empowered the existing legislatures of South Australia and Van Diemen's Land to admit elected members at the same ratio as New South Wales and Victoria (2:1, elected to non-elected). Provision was also made for the establishment of a legislature in Western Australia. The franchises of all parliaments were brought into line with that of New South Wales.

### **The reaction in New South Wales to the Act of 1850**

Those in the other colonies were pleased – a mechanism for constitutional reform had been given to them. Those in northern New South Wales were pleased – separation was recognised again and possibly at a border taking some of the

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<sup>150</sup> 13 & 14 Vict c 59

<sup>151</sup> 13 & 14 Vict c 59, s 34

<sup>152</sup> Melbourne and Joyce *op cit* p 372

<sup>153</sup> Melbourne and Joyce *op cit* pp 372-373

richest land in the country, in New England and the northern rivers into the new colony. Some in Sydney, such as Parkes, saw it as a step along the way to responsible government.<sup>154</sup> The dissatisfaction of others in New South Wales, such as Wentworth, was strong. The local interests had failed in respect of control of land, revenue, patronage and local legislative authority. Further, local landed interests saw the franchise widened. The power of responsible government had not been given and the politically enfranchised classes were widening. Further, the potential for northern separation was real.

On May 1851, the Legislative Council, expressing the views of the landed conservatives, especially Wentworth, issued a “declaration, protest and remonstrance” which pressed its political claims disappointed by the 1850 Act. It sought amongst other things:<sup>155</sup>

“plenary powers of Legislation ... and no Bills should be reserved for the signification of Her Majesty’s Pleasure, unless they affect the prerogatives of the Crown or the general interests of the Empire.”

The Council was then dissolved and fresh elections took place under a new Electoral Act 1851 that had been passed shortly after the 1850 Act took effect and that had skewed boundaries in favour of rural electorates,<sup>156</sup> although in Sydney the new franchise saw Wentworth almost defeated.<sup>157</sup> A further petition was sent by the new Legislative Council supporting the Remonstrance. Speakers in support, especially Wentworth, laid bare the threat of revolt.<sup>158</sup> Governor Fitzroy sent the petition on explaining clearly that these were the views of the most “loyal, respectable and influential” members of the community.

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<sup>154</sup> Cochrane *op cit* p 257

<sup>155</sup> Twomey *op cit* p 8; Sweetman *op cit* pp 256-257; McMinn *op cit* pp 48 ff

<sup>156</sup> Cochrane *op cit* ch 15

<sup>157</sup> Melbourne and Joyce *op cit* p 381

<sup>158</sup> Twomey *op cit* p 8; Sweetman *op cit* pp 259-260

Earl Grey rejected the Remonstrance in a long and argumentative despatch.<sup>159</sup> This rejection did not dampen the enthusiasm of the newly elected Legislative Council. On 10 August 1852, it reiterated its views in stronger terms in another resolution, this time addressed to the new Colonial Secretary, Sir John Pakington. The disallowance of many Acts was described as “an intolerable grievance”.<sup>160</sup> The resolution contained reference to the development of colonies in America and the “mischievous principle of intermeddling” which had caused the loss of those colonies.<sup>161</sup> A further demand for plenary legislative power was made. There was even a proposal (defeated in the Legislative Council) to refuse to consider estimates for the following year, that is, to stop supply.<sup>162</sup> There was agreement, however, to prepare a new Constitution given the invitation for change in the 1850 Act.

Meanwhile, other forces were operating – the discovery of gold in early 1851 and the subsequent influx of people, and the development of steam maritime navigation bringing the colony closer to the outside world and its politics, began to change the colony’s economic and social foundations.<sup>163</sup>

The push for the renewal of transportation was continuing to play its part in pastoralist and northern politics. The succumbing of Earl Grey to the southern town anti-transportation interests after the “Hashemy” incident in 1849, spurred talk of separation in the northern districts. The squatters of the Darling Downs told Fitzroy in 1850 that they could take 15,000 “exiles” per year.<sup>164</sup> This had encouraged the placement in the 1850 Act of the section dealing with the possible detachment of New England north of latitude 30° S. The northern

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<sup>159</sup> Cramp *op cit* note 100 p 8; Sweetman *op cit* p 261

<sup>160</sup> Twomey *op cit* p 9; Cramp *op cit* note 100 p 19

<sup>161</sup> Twomey *op cit* p 9

<sup>162</sup> Melbourne and Joyce *op cit* pp 381-391

<sup>163</sup> Cochrane *op cit* ch 17

<sup>164</sup> Melbourne and Joyce *op cit* p 364

pastoralist enthusiasm for the renewal of transportation spurred Grey to suggest in 1851 to Fitzroy that:<sup>165</sup>

“the northern districts should avail themselves of their power of asking to be separated from New South Wales, for the purpose of being formed into a district colony in which the colonists would enjoy a supply of cheap labour by means of convicts and free settlers sent out by means of funds voted by Parliament for free emigration to the colonies which receive convicts.”

This equivocation by Grey – ending transportation to New South Wales, but suggesting northern detachment to facilitate its renewal – led to resentment in Sydney.<sup>166</sup>

Public opposition to transportation was evident in Sydney, Melbourne, Van Diemen’s Land and many towns. This bolstered support for democratic candidates and those promoting republican principles in the 1851 elections.<sup>167</sup> An Anti-Transportation Association was formed. The Legislative Council, even with its heavy influence of landed representation, recognised the strength of the opinion and opposed transportation.

A different view was, however, held by many in the north. The expansion of the pastoral industry into what was to become Queensland gave rise to a demand for cheap labour. The discovery of gold put further pressure on this labour market. Some brought in Chinese labour; others wanted exiles or convicts. Separation to obtain the renewal of transportation was the obvious answer for many.<sup>168</sup> A petition from pastoralists in the Darling Downs in 1850 complained of scarcity of labour, the need for convicts or Indian or Chinese labour and the lack of representation of their interests in the Legislative Council. They suggested separation at latitude 32° S, which would take in New England.<sup>169</sup> This gained

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<sup>165</sup> Melbourne and Joyce *op cit* p 365

<sup>166</sup> Melbourne and Joyce *op cit* p 400

<sup>167</sup> *ibid*

<sup>168</sup> Melbourne and Joyce *op cit* p 407

<sup>169</sup> *ibid*

the support of squatters in Moreton Bay and New England.<sup>170</sup> This petition, which was submitted to Grey, brought strong opposing representations from the Legislative Council.<sup>171</sup>

News of the passing of the 1850 Act and the contents of s 34 dealing with the possibility of separation above latitude 30° S inspired further agitation in the north for separation. The supporters of separation were in two groups: the pastoralists who favoured a modified form of transportation, and those in towns, in particular Brisbane who strenuously opposed it. They were, however, agreed on separation.<sup>172</sup> Meetings were held and the Crown was petitioned in support of separation.<sup>173</sup> Counter pressure, however, came from the Legislative Council in Sydney and Governor Fitzroy.<sup>174</sup> This opposition was sufficient to cause Earl Grey in December 1851 to shelve the questions of separation and transportation. There they lay when Pakington took over the Colonial Office.<sup>175</sup> Pakington had no stomach for transportation, whether to New South Wales, Victoria or any new colony in the north. Further he expressed a disinclination to separate out a northern colony.<sup>176</sup>

### **Pakington and the “Great Crisis”**

The complaints of the Legislative Council, on the other hand, fared better. The petition of complaint over the 1850 Act was presented to the Commons in June 1852. It was viewed as a matter of the utmost importance. In Parliament, Earl Grey warned of an “utterly unbalanced democracy”; others warned of the loss of

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<sup>170</sup> Melbourne and Joyce *op cit* p 408

<sup>171</sup> *ibid*

<sup>172</sup> Sweetman *op cit* p 332; Melbourne and Joyce *op cit* pp 408-409

<sup>173</sup> *ibid*

<sup>174</sup> *ibid*

<sup>175</sup> Cramp *op cit* note 100 pp 19-20

<sup>176</sup> Melbourne and Joyce *op cit* p 410

the colony unless a measure of colonial self-rule was ceded.<sup>177</sup> For instance, “The Times” referred to the management of colonial lands and revenues being “wrested from us by tumult and violence” unless gracefully conceded.<sup>178</sup> Pakington called it a “great crisis”. By now, gold was bringing miners from all round the world, including the United States, and it was providing a financial basis to make very real the threats of independence.<sup>179</sup> In December 1852, Pakington responded to the petition of December 1851 by conceding much to the Legislative Council in respect of its demands for independence. His despatch to Fitzroy of 15 December 1852 admitted the urgency of “placing full powers of self government in the hands of a people thus advanced in wealth and prosperity”.<sup>180</sup> He agreed to transfer Crown land administration to the colonies.

Pakington agreed to a new constitution of an elected Assembly and nominated Council and he tactfully agreed to consider any practical proposal of restricting disallowance.<sup>181</sup> His reply was an invitation to the Legislative Council to draw up a constitution.<sup>182</sup> This was the turning point in the coming of responsible government to the Australian colonies. The views of Lord Durham, as to the best way to manage an Empire, had prevailed.

By late 1852, the extent of gold mining in New South Wales and Victoria persuaded the Colonial Office that transportation should end – convicts should not be transported to a place of such potential for the gaining of wealth by the criminal and unskilled.<sup>183</sup> In early 1853, Pakington was replaced by the Duke of Newcastle, who supported Pakington’s position.<sup>184</sup> The way then lay ahead for

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<sup>177</sup> Sweetman *op cit* p 267

<sup>178</sup> Sweetman *op cit* p 267

<sup>179</sup> To which Pakington referred as “new and unforeseen features to their political and social condition”: Clark *op cit* vol 4 p 34

<sup>180</sup> Cramp *op cit* note 100 p 20; Sweetman *op cit* pp 268-270

<sup>181</sup> Twomey *op cit* pp 10-11

<sup>182</sup> Cochrane *op cit* ch 20; Cramp *op cit* note 100 p 20

<sup>183</sup> Clark *op cit* vol 4 pp 31-32

<sup>184</sup> *ibid*

the Legislative Council to engage in the task of constitutional change envisaged by the 1850 Act.

### **Constitution drafting in New South Wales**

The first body of work of constitution drafting had already been done by a Select Committee from June to September 1852 after Earl Grey's response to the Council's Remonstrance was received. One aspect that concerned the Committee was the drafting of a document which kept the "democratic element" in check. The various views as to the composition of an upper house reflected this: Justice Dickinson suggested a baronetage from which members would be selected; and Chief Justice Stephen suggested a mixture of nominated, ex officio and elected members. Others, to varying degrees, wished to see the upper house elected. The issue divided the Council. The proposal adopted was a chamber with two thirds nominated for life from persons who had previously been elected members and one third nominated and holding office at the pleasure of the Crown.<sup>185</sup> The Committee's aim was responsible government equivalent to that enjoyed in the United Kingdom.<sup>186</sup> It recognised that the mechanism provided by the 1850 Act was inadequate to achieve this and a separate Imperial Act was sought. The Constitution Bill drafted by the 1852 Committee drew a central distinction between Imperial and local issues, the former being defined as concerning allegiance, naturalisation of aliens, treaties, political relations with foreign powers, defence and high treason.<sup>187</sup> In local matters, it gave complete legislative independence to the local legislature, the Governor being a constitutional ruler regulated by advice from his responsible ministers in the Colony.<sup>188</sup>

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<sup>185</sup> Twomey *op cit* p 12; Cochrane *op cit* pp 332 ff

<sup>186</sup> Something not achieved until the Balfour declaration, and the Australia Acts 1986.

<sup>187</sup> Twomey *op cit* p 12

<sup>188</sup> Melbourne and Joyce *op cit* p 395

The tabling in the Legislative Council on 10 May 1853 of Pakington's despatches with their conciliatory attitude and those from his successor, the Duke of Newcastle, revived interest in drafting a Constitution. Another Select Committee was appointed on 20 May 1853, which reported on 28 July 1853.<sup>189</sup>

The 1853 draft constitution was brought forward in July 1853 and was similar to the former draft bill, with an important exception: the upper house. This was to be modelled on that in Canada – an appointed house. The Committee's view was avowedly one to dampen any "future democracy".<sup>190</sup> There was a recommendation for the creation of local hereditary titles (labelled the Bunyip Aristocracy in later public debate) forming the basis of the upper house and an electoral college to choose the balance. The Committee suggested, however, a large extension to the franchise for electing the lower house: salary of £100 per year, or the payment of £40 per annum board and lodging, or £10 for lodging only, which the Committee viewed as a close approximation to universal suffrage.<sup>191</sup> This widening of the franchise was balanced by the constitution of the upper house, and the entrenching provisions of special majorities. This reflected Wentworth's views of a balance of interests in society.<sup>192</sup>

Both drafts had a two thirds entrenching provision for changes to electoral boundaries and electoral laws. As to a change to the Constitution itself, the 1852 Bill saw such referred to the Royal Assent and the United Kingdom Parliament. The 1853 Bill retained that, but required also a two thirds majority in the local Parliament.<sup>193</sup>

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<sup>189</sup> Cochrane *op cit* ch 21; Sweetman *op cit* pp 273-274

<sup>190</sup> Twomey *op cit* p 13; Sweetman *op cit* p 275; Melbourne and Joyce *op cit* p 401

<sup>191</sup> Melbourne and Joyce *op cit* p 402

<sup>192</sup> Clark *op cit* vol 4 pp 36-37

<sup>193</sup> Twomey *op cit* p 14

The 1853 Committee supported a General Assembly for the making of laws in relation to inter-colonial subjects and the creation of a Court of Appeal from colonial courts.<sup>194</sup>

The drafters also sought to block the separation movement by including in the drafts of 1852 and 1853 provisions designed to prevent detachment from the colony of any territory lying to the south of latitude 26° S (thus keeping New England and Moreton Bay in New South Wales). By this stage, even the landed elements of New South Wales recognised that agitation for renewal of transportation would only cause a separation of northern land and a weakening of New South Wales and its revenue base.<sup>195</sup> Thus the Legislative Council (including its landed elements) by this time was firmly against transportation.

The 1853 draft Constitution as drawn up by the Select Committee was debated before the Legislative Council from August to September.<sup>196</sup> The debates reflected a struggle between landed conservatism and mercantile interests, on the one hand and radical democracy, on the other.<sup>197</sup> Wentworth said (to loud and prolonged cheers)<sup>198</sup>

“a constitution that will be a lasting one – a conservative one - a British, not a Yankee constitution.”

This embodied his two aims – a British constitution and a conservative one to keep the dangers of democratic control at bay.<sup>199</sup>

Others were of more radical hue. They had a fear of a landed oligarchy.<sup>200</sup>

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<sup>194</sup> *ibid*

<sup>195</sup> Melbourne and Joyce *op cit* p 410

<sup>196</sup> See the speeches in Silvester *The Speeches of the Legislative Council of New South Wales on the Second Reading of The Bill for Framing a new Constitution For the Colony* (Sydney 1853)

<sup>197</sup> Cochrane *op cit* ch 21

<sup>198</sup> Silvester *op cit* p 34

<sup>199</sup> Clark *op cit* vol 4 p 36

<sup>200</sup> Cramp *op cit* note 100 p 23; Clark *op cit* vol 4 pp 36-39

Public debate then took place. Some provisions provoked intense opposition. Petitions and newspaper articles carried alternative proposals.<sup>201</sup> Most objectionable and the source of much public mockery was the proposal for hereditary titles; objection was also taken, to the entrenchment provisions concerning constitutional amendment and the manner in which seats were to be distributed favouring country over city.<sup>202</sup>

The apparent abandonment of separation by Pakington along with the rejection of the renewal of transportation was resented in the north. In Brisbane an additional complaint was that the two issues were linked. Brisbane wanted separation, but not transportation. Those in the north also deeply resented the Legislative Council's attempts to block separation in the 1852 and 1853 Bills. The Legislative Council was petitioned accordingly.<sup>203</sup> Public meetings were held reflecting a democratic (non-squatter) movement for separation, based in Brisbane in particular.

The Constitution Bill went to a Legislative Council Committee in December 1853. The proposal for hereditary titles was dropped. The upper house was to be fully nominated, at first for five years (to permit assessment of the system) and then the government would nominate members for life. The Bill was then passed in the Legislative Council over liberal and more democratic opposition.<sup>204</sup>

The Constitution Bill was reserved for Royal assent and was sent to London, where it was received on 31 May 1854, shortly after other bills from Victoria and South Australia.<sup>205</sup>

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<sup>201</sup> Twomey *op cit* p 15

<sup>202</sup> Twomey *op cit* p 15

<sup>203</sup> Melbourne and Joyce *op cit* p 411

<sup>204</sup> Cochrane *op cit* ch 23 & 24

<sup>205</sup> Melbourne and Joyce *op cit* p 417

## **The amendment of the New South Wales Constitution Bill by the Colonial Office**

Important changes were made to the Constitution Bill by Crown Law Officers before it was laid before Parliament in the form of a schedule to a Bill in the Parliament. Imperial interests were not to be sacrificed. Balance was important – not radical political democracy and not a colony in the thrall of landed interests. Most of all, Imperial control was necessary.<sup>206</sup> The Colonial Office viewed responsible government as government administered by officers commanding the support of the legislature, thus meaning that executive officers would henceforth be appointed in accordance with the wishes of the local legislature. They did not view it as meaning independence from London's authority on so-called local issues. Thus, provisions giving plenary power to the colony over local matters were removed. These were seen as a virtual declaration of independence.<sup>207</sup> The provisions dealing with assent, reservation and disallowance were removed, leaving full power to the Crown to disallow colonial Acts. Also, the provision requiring the consent of the colonial legislature for the loss of any part of its territory was removed.<sup>208</sup>

### **The amended reserved Bill in Parliament**

The Bill introduced into the House of Commons on 17 May 1855 comprised an enabling Bill containing the various changes required by the Colonial Office, with the amended reserved Bill placed as an annexed schedule. Robert Lowe spoke strongly against the Colonial Office's changes, against the nominated upper house and against the two thirds entrenching clauses.<sup>209</sup> A power to amend the Constitution in the amended reserved Bill was placed in the enabling Bill. This was a mechanism with the effect of overcoming the entrenching provisions.

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<sup>206</sup> Cochrane *op cit* p 400

<sup>207</sup> Melbourne and Joyce *op cit* pp 418-419; Twomey *op cit* p 17

<sup>208</sup> Twomey *op cit* p 18

<sup>209</sup> Melbourne and Joyce *op cit* pp 420-421; Clark *op cit* Vol 4 p 44

Wentworth, in England to assist the passage of the Bill, denounced the changes by the Colonial Office. The removal of local autonomy represented a withdrawal from the position earlier promised by Pakington.<sup>210</sup> Wentworth also recognised that the power of amendment in the enabling Bill would be available to repeal the two thirds entrenching provisions in the scheduled amended reserved Bill. Wentworth saw this as the removal of the method of forestalling democratic constitutional change.<sup>211</sup>

Meanwhile, the shelving by Earl Grey of the issue of separation and Pakington's lack of enthusiasm in late 1852 and early 1853 had not halted the separation movement in the north.<sup>212</sup> Petitions continued to be sent to the Colonial Office.<sup>213</sup> By 1853, the petitions from the north no longer pressed for transportation. The main arguments pressed were a lack of community feeling between the northern and southern parts of New South Wales, the financial sufficiency of the north to support a government and inadequate representation 500 miles away in Sydney (one petition said, "a mockery and a delusion").<sup>214</sup>

By May 1855, the Colonial Office and Parliament were faced with a Constitutional Bill and powerful agitation for northern separation from northern pastoralists and from Brisbane. It was recognised by the Colonial Office that the essential problem was one that had been recognised in the 1830s – the colony was too big to be governed from Sydney. Merivale recognised the injustice felt by those in the northern districts being, as he said (in terms to warm a Queenslander's heart today):<sup>215</sup>

"governed by a knot of townfolk living 600 or 700 miles off."

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<sup>210</sup> Cochrane *op cit* pp 409-410

<sup>211</sup> Cochrane *op cit* pp 411-412

<sup>212</sup> Sweetman *op cit* p 333

<sup>213</sup> By August 1853, six had been sent: Sweetman *op cit* p 333

<sup>214</sup> Sweetman *op cit* p 333

<sup>215</sup> Melbourne and Joyce *op cit* p 412

When the Constitution Bill was brought to the House of Commons the petitions and counter petitions about separation were so strong and conflicting that Lord John Russell, now Colonial Secretary again, called for a report from Governor-General Denison. The separation issue was recognised as real and necessary to be dealt with, but because of the need for a report, this was not possible in the consideration of the 1855 Bill in Parliament.

### **The Imperial Constitution Statute 1855 and the Constitution Act 1855**

The Constitution Statute 1855 (UK)<sup>216</sup> was described as an Act to enable Her Majesty to assent to a Bill, as amended, of the Legislature of New South Wales, which was annexed thereto “to confer a constitution on New South Wales, and to grant a Civil List to Her Majesty”. Before saying something about the provisions of the Constitution Statute 1855 and its schedules, something should be said about its structure.<sup>217</sup> The 1853 Bill, passed by the Legislative Council<sup>218</sup>, was reserved for Royal Assent. In the 1855 Imperial Act, it was referred to as a “reserved Bill”, not an “Act”. The Bill approved by the Legislative Council and sent to London was different to the Bill assented to by the Queen and recorded as a Schedule to the Constitution Statute 1855.<sup>219</sup> There had been removed the provisions that had offended the Colonial Office. Also, the Imperial Parliament did not enact the New South Wales Constitution Bill, but recorded its form, as amended, in a schedule, and gave legislative approval for Her Majesty to sign it.<sup>220</sup>

In the Commons debate, Robert Lowe said that the mechanism being used might create a nullity, because, he said, the New South Wales Bill was repugnant to

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<sup>216</sup> 18 & 19 Vict c 54 (the equivalent statute for Victoria was 18 & 19 Vict c 55)

<sup>217</sup> I am indebted as to the analysis which follows to the scholarly work of Twomey *op cit* pp 18-23.

<sup>218</sup> 17 Vict No 41

<sup>219</sup> 18 & 19 Vict c 54

<sup>220</sup> See Priestley JA in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 690-692 and see also *Armstrong v Budd* (1969) 71 SR (NSW) 386.

earlier Imperial legislation<sup>221</sup>, and, he said, the permission of Parliament to the Queen to assent to a variation did not cure that. This was sought to be cured by the insertion, into what became s 8 of the Imperial Act of the words “the reserved bill ... shall take effect in the said Colony from the Day of such Proclamation [by the Governor of New South Wales].”

Apart from anything else, this structure leads to difficulty with citation.<sup>222</sup> I will refer to the Imperial Act as the Constitution Statute 1855 and the attached reserved Bill, as amended, to which Royal assent was given under the authority of the Constitution Statute 1855, as the Constitution Act 1855. More importantly, it is unclear whether the source of the operation of the Constitution Act 1855 was as a New South Wales Act (a modified Bill assented to by Her Majesty) or by reason of s 8 of the Imperial Act. Anne Twomey concludes, with the apparent support of Lords Hanworth and Atkin *arguendo* in the hearing of the appeal in *Trethowan's Case*<sup>223</sup>, of Deane J in *Smith v R*<sup>224</sup> and of Menzies J in *Clayton v Heffron*<sup>225</sup>, that the Constitution Act 1855 Act (of New South Wales) appears to have been given the authority of a British statute, but with power in the New South Wales Parliament to amend it, by force of the terms of s 4 of the Imperial Act.<sup>226</sup>

The recitals to the Constitution Statute 1855 describe how the reserved Bill<sup>227</sup> came about, the necessity for Parliamentary authority to assent to it and the omission of certain parts of it. The amended Bill is identified as Schedule 1.

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<sup>221</sup> It was always thought to go beyond what had been authorised by the 1850 Imperial Act. See also in this respect Sir Henry Jenkyns *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press 1902) p 280 discussed by Twomey *op cit* at 22.

<sup>222</sup> Twomey *op cit* at 22.

<sup>223</sup> [1932] AC 526 and [1932] UKPCHCA 1; 47 CLR 97 (PC)

<sup>224</sup> [1994] HCA 60; 181 CLR 338 at 350

<sup>225</sup> [1960] HCA 92; 105 CLR 214 at 270-271

<sup>226</sup> See generally Twomey *op cit* p 21 footnote 124 referring to the transcript of the hearing in *Trethowan's Case* before the Privy Council where the matter was discussed.

<sup>227</sup> 17 Vict No 41

Section 1 of the Constitution Statute 1855 made it lawful for Her Majesty in Council to assent to the reserved Bill, as amended and contained in Schedule 1.

Section 2 provided, upon proclamation of the Imperial Act in New South Wales, for the repeal of various previous statutes repugnant to the reserved Bill, as amended; and for the entire management and control of the waste lands belonging to the Crown and appropriation of all revenues (including from said land) to be vested in the legislature of New South Wales.

Section 3 preserved the operation of the provisions of the 1842 Act and the 1850 Act in so far as they related to the giving and withholding of Her Majesty's consent to Bills, the reservation of bills for the signification of Her Majesty's pleasure and for instructions to be conveyed to governors for their guidance, and the disallowance of Bills.<sup>228</sup>

Section 4 made it lawful for the New South Wales legislature to make laws to alter or repeal all or any of the provisions of the reserved Bill "in the same manner as any other Laws for the good Government of the said Colony". This was subject to the "Conditions imposed by the .... Reserved Bill on the Alteration of

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<sup>228</sup> The provisions of the 1842 Act dealing with giving or withholding assent bills, disallowance of bills assented to and assent to bills reserved were sections 31, 32 and 33. By section 31, every bill passed by the Legislative Council and every law proposed by the Governor passed by the Council was to be presented for Her Majesty's assent to the Governor and the Governor shall declare according to his discretion, but subject to the Act and to such instructions as may from time to time be given by Her Majesty, that he assents to such bill or that he reserves such bill for the signification of Her Majesty's pleasure. All bills altering or affecting the divisions and extent of the several districts and towns represented in the Council or establishing new and other divisions of the same kind or altering the number of members of the Council to be chosen by the districts and towns or increasing the whole number of the Legislative Council or altering the salaries of the Governor, superintendent or judges, or any of them, and also all bills altering or affecting the duties of customs upon goods imported or exported shall in every case be reserved for the signification of Her Majesty's pleasure with the exception of temporary laws expressly declared to be necessary and pressing. Section 32 provided for a copy of any bill assented to by the Governor being transmitted to one of Her Majesty's principal Secretaries of State; and it was lawful within two years after the bill had been so received for Her Majesty by Order in Council to declare her disallowance and such disallowance would take effect from the date of such signification. Section 33 provided that no bill which shall be reserved for the signification of Her Majesty's pleasure shall have any force or authority within the Colony until the Governor shall signify either by speech or message to the Legislative Council or by proclamation that such bill has been laid before Her Majesty in Council and Her Majesty has assented to the same. Under the 1850 Act, section 32 provided that the provisions of the 1842 Act concerning bills reserved for the signification of Her Majesty's pleasure shall be applicable to every bill reserved under the 1850 Act.

the Provisions thereof in certain Particulars” (ie the two thirds majorities) but only “until and unless said conditions shall be repealed or altered by the Authority of the said Legislature” (ie implicitly by simple majority). The effectiveness of the power of simple majority amendment was soon seen with the repeal in 1857 of the special majority clauses in s 36 of the reserved Bill which became the Constitution Act 1855<sup>229</sup>, with the removal in 1858 of disqualification of ministers of religion elected to parliament<sup>230</sup> and with the move in 1858 to universal male suffrage.<sup>231</sup>

Section 5 settled the boundary between New South Wales and Victoria.

Section 6 dealt with the effect on electoral boundaries in New South Wales, if a northern colony were to be formed.

Section 7 authorised Her Majesty, by Letters Patent, to erect a new colony or colonies from any territory separated from New South Wales and in such Letters Patent or Order in Council to make provision for the government of such colonies and for the establishment of a legislature therein in manner as nearly resembling the form of government and legislature at such time established in New South Wales as the circumstances of the new colony would allow, with power in such Letters Patent or Order to be given to the legislature to make further provision in that behalf.

Section 8 provided for the commencement of the Constitution Statute 1855 and the reserved Bill, as amended to take effect in the colony from the day of their proclamation.

Section 9 dealt with interpretation.

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<sup>229</sup> 20 Vict No 12

<sup>230</sup> 20 Vict No 20

<sup>231</sup> 20 Vict No 20

The Constitution Act 1855 had recitals and 58 sections. It is of utility to survey its provisions, if for no other reason than to recognise that there was no signification of the introduction, or the content, of responsible government.

Section 1, replaced the Legislative Council with a bicameral legislature, a Legislative Council and Legislative Assembly. It provided for the making of laws for the peace, welfare and good government of the colony with the advice and consent of the Council and Assembly; money bills were to originate in the Assembly.

Sections 2-8 dealt with the Legislative Council. Section 2 dealt with the appointment and composition of the Council, which was to have not fewer than 21 members. Section 3 dealt with the initial tenure of five years, with all future members appointed by the Governor on the advice of the Executive Council for life. Sections 4, 5 and 6 dealt with resignation, vacating a seat and the trial of questions of vacancy of seats. Section 7 dealt with the appointment of the President of the Council. Section 8 dealt with quorum, division, and casting of votes.

Sections 9-27 dealt with the Legislative Assembly. Section 9 provided for the summoning and calling together of an Assembly. Section 10 provided for 54 members. Section 11 dealt with qualification for electors being natural born or naturalised subject of Her Majesty or legally a Denizen of New South Wales and having a freehold estate in possession of the clear value of £100 or being a householder occupying premises of the clear annual value of £10 or having a leasehold estate in possession of the value of £10 or holding a licence from the government to depasture lands within the district or having a salary of £100 a year or being the occupant of any room or lodging and paying for board and lodging of £40 a year or lodging only of £10 a year. Section 13 dealt with the division of the Colony into electoral districts and the number of members returned by each. Section 15 made it lawful for the legislature to alter the divisions and extent of the boundaries represented in the Legislative Assembly and to establish new divisions and apportionment of representation. This provision was subject to an entrenching proviso that before presentation of any Bill to the Governor for

assent, any Bill by which the number or apportionment of representatives in the Legislative Assembly may be altered, the second and third readings of such Bill in the Legislative Council and Legislative Assembly shall have passed with the concurrence of a majority of the members of the Council and two thirds of the members of the Assembly. Section 16 dealt with qualification of the members of the Assembly. Section 17 prevented a member of the Council being a member of the Assembly. Section 18 dealt with disqualification of persons holding any office of profit under the Crown or receiving a pension from the Crown from being a member of the Assembly, unless a member of the government being the Colonial Secretary, Colonial Treasurer, Auditor-General, Attorney-General, Solicitor-General or such additional office of not being more than five as the Governor with the advice of the Executive Council may from time to time declare. Sections 19 and 20 further dealt with disqualification of members. Section 21 provided for five year terms of the Assembly. Section 22 dealt with the election of speaker. Section 23 dealt with quorum, division of casting vote. Sections 24 to 27 dealt with various procedural matters concerning the Assembly.

Sections 28 and 29 dealt with disqualification of contractors or other persons interested in contracts from being members of either House.

Section 30 dealt with the place and time of holding Parliament.

Section 31 provided that there be a session of the Legislative Council and Assembly at least once in every year.

Section 32 provided for the first calling of Parliament within six months from the proclamation of the Act.

Sections 33 and 34 provided for the taking of the oath of allegiance.

Section 35 provided for standing orders.

Section 36 provided for the legislature being empowered to alter provisions or laws concerning the Legislative Council and to provide for the nomination or

election of another Legislative Council. This provision was subject to an entrenching proviso that such a bill could not be presented to the Governor for assent unless the second and third readings of such bill had been passed with the concurrence of two thirds of the members of the Council and Legislative Assembly respectively and that every bill so passed was to be reserved for the signification of Her Majesty's pleasure and a copy of such bill laid before both Houses of the Imperial Parliament for 30 days.

Section 37 provided for appointment to officers under the government of the colony to be vested in the Governor. Though a brief provision, it is an oblique reference to responsible government.<sup>232</sup> The appointment to all public offices under the government whether salaried or not was vested in the Governor with the advice of the Executive Council, with the exception of the appointments of the officers liable to retire from office "on political grounds" which appointments were vested in the Governor alone (other than minor appointments).

Sections 38 to 40 dealt with the continuation of the judiciary, their removal upon address of both Houses and continuation of their salaries.

Section 41 dealt with the saving of existing law.

Section 42 dealt with the continuation of courts of civil and criminal jurisdiction.

Section 43 dealt with the regulation, sale and disposal of wastelands.

Section 44 and 45 dealt with duties.

Section 46 dealt with boundaries of the colony. The important proviso for the purposes of detachment of territory was that nothing in the Act was deemed to prevent Her Majesty from altering the boundary of the Colony of New South Wales on the north in such manner as to Her Majesty may seem fit nor from

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<sup>232</sup> *Egan v Chadwick* [1999] NSWCA 176; 46 NSWLR 563 at 569 [28]; and see *Toy v Musgrove* (1888) 14 VLR 349 at 372

detaching from the Colony that portion which lies between the western boundary of South Australia and longitude 129° E being the eastern boundary of Western Australia.<sup>233</sup>

Section 47 dealt with duties and revenues forming part of consolidated revenue.

Section 48 provided that the consolidated revenue be permanently charged with costs, charges and expenses.

Sections 49 and 50 dealt with the Civil List.

Section 51 dealt with pensions.

Section 52 dealt with superannuation pensions.

Section 53 dealt with consolidated revenue being appropriated by an act of Parliament.

Sections 54 to 58 dealt with money bills, revenue, proclamation, interpretation and commencement.

### **The form of government created in 1855**

It has been accepted that the 1855 Constitution brought in “responsible government”.<sup>234</sup> That phrase, however, is not amenable to precise definition. It is a phrase open to considerable debate.<sup>235</sup> As Chief Justice Gleeson said in *Egan v Willis and Cahill*<sup>236</sup> responsible government is:

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<sup>233</sup> For a clear explanation of the boundaries of all the colonies from 1786 to after 1861 see the official year Book of the Commonwealth of Australia 1901-1907 pp 55-56. See also M McLelland “Colonial and State Boundaries in Australia” (1971) 45 *ALJ* 671.

<sup>234</sup> *Egan v Willis and Cahill* (1996) 40 NSWLR 650 and [1998] HCA 71; 195 CLR 424

<sup>235</sup> G Lindell “Responsible Government” in P Finn (Ed) *Essays on Law and Government* (LBC 1995) Vol 1 p 75

<sup>236</sup> 40 NSWLR 650 at 660

“... a concept based upon a combination of law, convention and political practice. The way in which that concept manifests itself is not immutable.”

To similar effect were in the observations in the High Court on appeal in the joint judgment of Gaudron J, Gummow and Hayne JJ<sup>237</sup> where their Honours said:

“It should not be assumed that the characteristics of a system of responsible government are fixed or that principles of ministerial responsibility which developed in New South Wales after 1855 necessarily reflected closely those from time to time accepted at Westminster.”

It is a notable feature of the Constitution Statute 1855 and the Constitution Act 1855 (and of the other Australian colonial constitutions passed in Westminster around this time: Tasmanian, Victorian and South Australian) that there was an absence of reference to responsible government and its principles. Importantly, there were no changes to the Governor’s Commission or Royal Instructions to reflect any new operative governmental principles.<sup>238</sup> It can also be said that the principles of responsible government were not fixed, or even well understood, in the United Kingdom.<sup>239</sup>

Yet the phrase was one which had been in current popular use in New South Wales since the 1840s and in the discourse concerning the growing dissatisfaction with the blended Legislative Council and representative government since 1842. Lord John Russell in his despatch of 20 July 1855 to the Victorian Governor spoke of the “introduction of responsible government.”<sup>240</sup> Governor Denison in his despatches was under no illusion as to the importance of the change between Governor and legislature.<sup>241</sup> Denison’s first address to the legislature recognised the importance of the change<sup>242</sup>:

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<sup>237</sup> [1998] HCA 71; 195 CLR 424 at 451 [41]

<sup>238</sup> Melbourne and Joyce *op cit* pp 429-430; Carney *op cit* p 45

<sup>239</sup> Carney *op cit* p 45; Taylor *op cit* pp 34-36; Jenks *op cit* note 1 p 244

<sup>240</sup> *Commonwealth v Kreglinger & Fernau Ltd* [1926] HCA 8; 37 CLR 393 at 413

<sup>241</sup> Windeyer *op cit* note 15 pp 285-287 and 300

“I address you for the first time as the Legislature constituted under the provision of an enactment framed for the purpose of adopting, so far as circumstances will permit, the principles characteristic of the British constitution.”

The immediate practice after 1855 also reflected a true contemporary understanding of the responsibility of the executive to the legislature.<sup>243</sup>

A number of elements can be seen as relevant to the conception of responsible government in the 1850s. First, was the control of land and all revenues by the local legislature. This was the key to control of power in the Colony, and the control of the executive, that is of the Governor. That control (or responsibility) was what was absent in the 1840s with the struggle by the Legislative Council to influence the Governor. Bound up with this question of control and responsibility was legislative independence or sovereignty on local matters that was sought by those in the Colony. The division of power between colonial and Imperial interests suggested by the New South Wales drafters in 1853 was an aspect of **independence** and, in that respect, a feature of a type of responsible government. This was not granted, leaving the local parliament potentially subordinate to at least Imperial legislative authority. Responsible government connotes a relationship between the executive and the legislature.<sup>244</sup> That, focussed on control of land, was one essential demand of the 1850s. It became a reality after 1855.

The absence of a sovereign legislature in the colonies carried a difficulty under strict Austinian theory, but was a practical constitutional resolution of demands for power.<sup>245</sup>

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<sup>242</sup> Windeyer *op cit* note 15 p 299

<sup>243</sup> Windeyer *op cit* note 15 pp 288-297

<sup>244</sup> Windeyer *op cit* note 15 p 271

<sup>245</sup> Windeyer *op cit* note 15 pp 272-274

The scope of responsible government given in 1855 was debated in the Victorian case of *Toy v Musgrove* in the context of the scope of the prerogative and thus the government's executive power. A majority found that the Governor did not have power from the Royal prerogative, but only those powers conferred by statute or Her Majesty. Higinbotham CJ in a lucid and powerful judgment dissented. In his view, the wide legislative powers conferred required commensurate conferral of executive power.<sup>246</sup> In *Sue v Hill*<sup>247</sup> Gleeson CJ, Gummow and Hayne JJ observed that the grant of responsible government in 1855 carried the vesting of only some prerogative powers.

The vagueness of the terms of the colonial constitutions of the 1850s as to central operative principles of power was discussed by Higinbotham CJ in *Toy v Musgrove*.<sup>248</sup> He succinctly stated the central difficulty:<sup>249</sup>

“to put into written words the unwritten law of the English Constitution.”

Higinbotham CJ described the approach used as follows:<sup>250</sup>

“[The framers] adopted the curious and very hazardous expedient of attempting to enact in a written law, by means of allusions suggesting inferences rather than by express enacting words, the provisions not only unwritten but unrecognised by English law, which regulate and determine the formation and action and the conditions of existence of government in England.”

In the Constitution Statute 1855 and the Constitution Act 1855 mention is frequently made of the “Executive Council”, though nothing is said as to its constitution. The words “responsible officers” are not used. Section 37 refers to “retiring on political grounds”. The preamble contains no object of creating responsible government. The nature, or extent of application, of responsible

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<sup>246</sup> 14 VLR 349 at 390 ff; Carney *op cit* pp 46-47

<sup>247</sup> [1999] HCA 30; 199 CLR 462 at 499 -500 [88]-[89]

<sup>248</sup> (1888) 14 VLR 349 at 390-395

<sup>249</sup> 14 VLR 349 at 391

<sup>250</sup> *ibid*

government is not described. These are considerations which make the history which I have discussed more than contextual. It is subtly, but truly, substantive, because as Higinbotham CJ (though in dissent) said about Victoria in *Toy v Musgrove*<sup>251</sup>:

“That it was the intention of the Legislative Council to establish by law a complete system of responsible government as an essential organic part of the self-governing scheme of the Victorian Constitution is a fact about which **an historic doubt** cannot be entertained.” (emphasis added)

Though Higinbotham CJ was in dissent in *Toy v Musgrove*, the above statement can be accepted at least to the extent that it recognised that the constitutional act embodied in the statutes of 1855 did create a scheme of intended responsible government, in the sense of responsibility of the executive to parliament.

Some elements of modern notions of responsible government were recognised in the 1850s, but not accepted. In the drafting of the New South Wales Constitution Bill discussions took place as to notions of collective responsibility of Cabinet and associated concepts of political parties.<sup>252</sup>

The concept of “responsible government”, in part through what Lord Watson in *Cooper v Stuart*<sup>253</sup> described as “the silent operation of constitutional principles”, plays its part in the conception of the Sovereign in right of a designated territory as the people of that territory considered as a political organism.<sup>254</sup> As Isaacs J said in *Horne v Barber*<sup>255</sup> responsible government is the “keystone of our political system”, as it was of the constitutional system set up in New South Wales in 1855. In the *Woolcombers Case*<sup>256</sup> Isaacs J said:

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<sup>251</sup> 14 VLR 349 at 392

<sup>252</sup> Ward *Colonial Self-Government* pp 317 and 318 ff; Taylor *op cit* pp 35-36

<sup>253</sup> (1889) 14 App Cas 286 at 293

<sup>254</sup> *Amalgamated Society of Engineer v Adelaide Steamship Co Ltd* [1920] HCA 54; 28 CLR 129 at 146-147 per Knox CJ, Isaacs, Rich and Starke JJ

<sup>255</sup> [1920] HCA 33; 27 CLR 494 at 500

<sup>256</sup> *Commonwealth v Colonial Spinning and Weaving Co Ltd* [1922] HCA 62; 31 CLR 421 at 446

“[T]he written words of the Commonwealth Constitution have to take into account the circumstances of the moment and the extent of constitutional development. The doctrine of responsible government, for instance, is invisibly but none the less inextricably and powerfully interwoven with the texture of the written word ....”

As Melbourne said<sup>257</sup>, responsible government was to be made effective on the basis of understanding or convention. The legal instruments, being the Constitution Statute 1855, the Constitution Act 1855 and the Commissions and Instructions of the new Governors after 1855 imposed few restrictions on the Governor and did not delineate the notion of responsible government. Nevertheless, all that had passed left people at the time in no doubt that an executive government responsible to a local parliament had been created, even if the local parliament was ultimately under the authority of the Imperial Parliament. To that extent, the local colonial notion of responsible government lacked a sovereign Parliament, but it always had done so, even under a Durham or Wentworth model. But, importantly, no power, including that in s 37 of the Constitution Act 1855, could be exercised without receiving the advice of the government responsible to the legislature.<sup>258</sup>

In this way, responsible government suitable for a subordinate colonial Parliament was now in place for New South Wales in 1855. No longer was the Governor a mere agent of the Crown wholly under the direction of the Colonial Office.

Uncertainty soon arose in the colonies as to the legislative authority that had been conferred on the local colonial legislatures. In South Australia, between 1859 and 1865, Boothby J in the Supreme Court handed down a number of decisions finding South Australian legislation invalid for being inconsistent with or repugnant to United Kingdom statutes, Royal instructions and the common law of

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<sup>257</sup> Melbourne and Joyce *op cit* p 430

<sup>258</sup> *Toy v Musgrove* 14 VLR 349 at 393; see also the judgment of Spigelman CJ in *Egan v Chadwick* [1999] NSWCA 176 46 NSWLR 563 at 568-573

England.<sup>259</sup> This led to the passing of the Colonial Laws Validity Act 1865 (Imp)<sup>260</sup> to remove any such doubts. Colonial legislatures had full power to pass legislation; repugnancy was limited to Imperial statutes which applied to the colony by express words or necessary intendment.<sup>261</sup> The Act also conferred power to establish courts of judicature and to make laws respecting the constitution, powers and procedure of colonial legislatures.<sup>262</sup>

## Separation of the North

In the first Legislative Assembly of New South Wales the district of Moreton Bay returned nine members from eight districts. But what of separation? In October 1855, Denison forwarded the report that had been requested by Lord John Russell. He advised against separation. He saw the northern region as not sufficiently economically mature for separate government. Notwithstanding these views, in July 1856, Lord John Russell and the Colonial Office came to the view that separation should occur. They accepted Denison's concerns as to a possible lack of economic maturity of the northern territories, but were more concerned at ill feeling becoming more intense as time went on.<sup>263</sup> Further, Parliament in both the 1850 Act and the 1855 Constitution Act had provided for the possibility of separation. Once this decision was made, the question arose as to the southern boundary of the new colony. Sydney's claim to the Richmond and Clarence River districts was supported by the people of those areas, which appeared to be decisive as to the fate of these areas and New England.<sup>264</sup>

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<sup>259</sup> Carney *op cit* p 47; see also the reasons of Isaacs and Rich JJ in *McCawley v The King* [1918] HCA 55; 26 CLR 9 at 48-50 and the reasons of the Privy Council reversing this on appeal (1920) 28 CLR 106 at 120-121; and *Keith's Responsible Government in the Dominion* Vol 1 pp 408 ff

<sup>260</sup> 28 & 29 Vict c 63; as to the effect of which see *McCawley v The King* [1918] HCA 55; 26 CLR 9; reversed on appeal (1920) 28 CLR 106.

<sup>261</sup> 28 & 29 Vict c 63, ss 1-4

<sup>262</sup> 28 & 29 Vict c 63

<sup>263</sup> Sweetman *op cit* p 334

<sup>264</sup> Sweetman *op cit* p 335

By Letters Patent dated 6 June 1859, proclaimed on, and taking effect from, 10 December 1859, the northern districts of New South Wales were severed and the Colony of Queensland was erected. The boundary was fixed at 28° 8' S, on the coast at Point Danger and 29° S further inland. Sir George Ferguson Bowen was appointed the new Governor. An Order in Council, also dated 6 June 1859, constituted a Legislative Council and Legislative Assembly<sup>265</sup> gave a Constitution identical to that of New South Wales described in the Schedule to the Imperial Act of 1855 and declared to be in force until altered by the Queensland Legislature.<sup>266</sup>

By the same Order in Council, Denison was authorised to divide the new colony into electoral districts,<sup>267</sup> to arrange lists of voters in accordance with the laws of New South Wales,<sup>268</sup> to nominate a Legislative Council who were to hold office for 5 years<sup>269</sup> and to issue writs for the election of members and to summon the Legislative Assembly.<sup>270</sup>

The Governor of Queensland, in the first instance, filled the offices of Colonial Secretary, Colonial Treasurer and Attorney General and so constituted a temporary Executive Council.<sup>271</sup> Writs for the first elections were issued. The first Legislative Council was appointed by proclamation dated 1 May 1860. The first Legislative Assembly was summoned on 22 May 1860.<sup>272</sup>

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<sup>265</sup> Order in Council, s 1

<sup>266</sup> Melbourne and Joyce *op cit* p 445; Order in Council, s 8

<sup>267</sup> Order in Council, s 6

<sup>268</sup> Order in Council, ss 5 and 6

<sup>269</sup> Subsequent nomination by the Governor of Queensland would be for life.

<sup>270</sup> Order in Council, s 6

<sup>271</sup> Melbourne and Joyce *op cit* p 445; Sweetman *op cit* pp 335-336

<sup>272</sup> Melbourne and Joyce *op cit* p 446

In 1861, an Imperial Act<sup>273</sup> was passed to validate the Order in Council of 1859 and all actions done under its authority.<sup>274</sup> New South Wales had introduced manhood suffrage and amended accordingly the qualifications for sitting in its Legislative Assembly before 1859.<sup>275</sup> The qualifications for the Queensland Legislative Assembly and the suffrage were drawn up on a property basis in accordance with the 1855 New South Wales Constitution. Because of doubts as to the validity of this provision and the qualification of members of the two legislatures not being the same, the Imperial Parliament passed the Act of 1861. Dr Macpherson deals with this in detail.

Queensland's last territorial demand on New South Wales occurred in 1862 when a strip of land between longitudes 138° and 141°E above South Australia was detached from New South Wales.<sup>276</sup> No other change was made to the Queensland Constitution until 1867 when the Queensland Parliament, pursuant to the power conferred upon it by the order in Council<sup>277</sup>, passed "an Act to consolidate the laws relating to the Constitution of the Colony of Queensland".<sup>278</sup> This Act brought into one Act some provisions of the Constitution Act 1855, the Constitution Statute 1855,<sup>279</sup> the Letters Patent and Order of Council of 1859 and the Imperial Act of 1861.

The struggle for colonial power to be wrested from Imperial control was in large part a New South Wales struggle, unsubtly materialistic in many respects, intense, often strident and combative in tone and, at times, expressly threatening of Imperial authority. Queensland's struggle was for separation, directed primarily against control from Sydney, with Imperial authority as its, sometimes

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<sup>273</sup> 24 & 25 Vic c 44

<sup>274</sup> Melbourne and Joyce *op cit* at p 446

<sup>275</sup> 22 Vic No 20, ss 8 and 9

<sup>276</sup> Carney *op cit* p 55. A strip of land of New South Wales between longitudes 129°E and 132°E, north to latitude 26° S had been given to South Australia in 1861.

<sup>277</sup> Order in Council, s 22

<sup>278</sup> 31 Vict No 38

<sup>279</sup> 18 & 19 Vict c 54

less than staunch, ally. The ripples and echoes of these struggles have, or at least have had in the not so distant past, some resonance.

Brisbane

29 May 2009