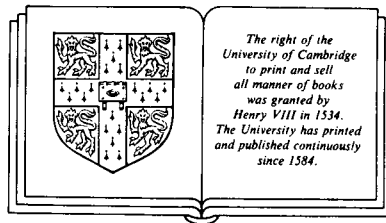


THE INVISIBLE STATE

The Formation of the Australian State 1788–1901

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1



PRIVATE VICES BECOME PUBLIC BENEFITS

"The child is father of the man . . .": The governors as manufacturers of Australians

Arthur Phillip watched approvingly while the first white inhabitants of Australia produced order from "tumult and confusion". He found few things more pleasing than watching the "savage coast" transformed as large spaces were opened up in the "perplexed growing" of trees; as plans were formed, lines marked out and "future regularity discerned".¹ At first it was a desperate battle as natural and human chaos threatened to engulf the "settlement of civilised people" but gradually the latter got the upper hand as they established their ever-more complex city with its fortified ramparts. The battle was variously called "cultivating the soil", "reforming humanity", "civilising the uncivilised" and "educating the youth". It was called by myriad names and fought on many fronts, but its unifying theme was the production of order from chaos; and then, even more importantly, its reproduction as order. This production of order from chaos was the formation of the Australian State.

Had Arthur Phillip read Mandeville he might have thought of "the bustle of various hands busily employed", which so gratified him, as a swarm of bees. Initially there was a vast confusion and apparent disorder like that which exists when the first lines of the hive are discerned and before its purpose and system emerges.² Yet these were no bees, as Aristotle had long before pointed out, because each could imagine before they started on any of their constructions a picture in their mind of what their creation could be like at the end.³ The order they brought from chaos was given direction by the goals they set and the present construction always dictated by the future when there would be cultivation, reformation, civilisation and education. The completed product made sense of all their work processes.

Perhaps what really gratified Arthur Phillip was that it apparently was his construction; his imagination and his goals had dictated all that productive activity. As His Majesty George III's personal representative on "our Continent and Islands", he owned the labour of practically all the men, women and children he saw toiling around him.⁴ The rest were military men under his command. They would all do what he told them to do and so it was

to be with his successors for nearly fifty years, when the grandchildren of the waifs and strays of London had become currency lads and lassies playing hookey from school.

Practically all the serious commentators, whether contemporaries of the early governors or historians of that epoch, agree that the governors' power was despotic, or autocratic.⁵ The governors and their contemporaries preferred to see themselves as patriarchs ruling over an unruly family. The first Chief Justice of New South Wales, Francis Forbes, looking back over the first forty years, summed up the latter view in these pithy words:

A great deal of the present anomalous system of government in New South Wales may be placed to the account of the manner in which the colony was at first peopled; the first emigrants from England were a body of convicts, with as many marines as were necessary to guard them; the first government of the colony was that of a gaol, and the first law little more than prison discipline. In a new country such as this was at the landing of the expedition under Governor Philip, the second object after providing for the care and correction of the prisoners, was that of procuring sustenance; everything necessarily centred in the governor as the *primum mobile* of the machine; the police; the roads; the market, the importation of supplies, the cultivation of provisions, and even the price of every article of daily consumption, were regulated by the orders of the governor; these phirmands entered into some of the minutest matters of domestic life, and gradually became so familiar to the inhabitants, that instances are to be found of domestic quarrels being referred to the fountainhead of authority, and there settled with all the form and sanction of legal supremacy. This was a very natural order of things; a government, situated like that of New South Wales, necessarily became patriarchal . . .⁶

Forbes not only revealed through the malicious use of "phirman", a Montesquieuan category, that the society was despotic, but also unwittingly, by indicating that there was no private realm, that it was one of the earliest attempts in history to create a totalitarian society. A totalitarian society is a familiar notion today after the experiences of this century. Measured as it was by the scholars of the twentieth-century phenomenon from the point of view of the ruler, it comprised a monopoly of all armed force in the society; the imposition of an ideology through terror and suasion or propaganda; and an efficient apparatus for the imposition of such coercion. If we omit those technological requirements which arose as a result of the large-scale semi-modern societies to which it has been applied in this century, all these characteristics were present in early Australia. Measured from the point of view of the citizen, as the same scholars did when they saw that, once past its initial stage, it relied less on terror than on indoctrination and administration, its main characteristic was the elimination of the private realm, or the coterminous nature of power and society. This too was the case in an early Australia, where domestic disputes were resolved in Government House.⁷

This despotic power directed to total regulation was quite legal from the point of view of the British authorities who had sent the First Fleet to settle New South Wales. By an act (1787 Geo III c. 2) the British Parliament had simply authorised the king—familarly known as "Farmer George"—to transport Britons who had been temporarily stripped of most of their civil rights to what they regarded as a void. This was in their power to do. It is probable that for many Australia was regarded as no more than the latest memory hole for those who were not hanged out of hand. Jeremy Bentham certainly thought so.⁸ Once that authority had been given the ruling class no longer had legal power over either the transported men and women or their gaolers because legally, according to the laws they themselves created, all colonies fell under the prerogative of the monarch. The monarch had then instructed Arthur Phillip, and would do the same with every succeeding Governor until 1825, to rule for him according to the rules in his (second) commission (2 April 1787) or "further powers, instructions and authorities as shall from time to time hereafter be granted or appointed you under our signet

manual or by our Privy Council". Since there were neither express nor implied directions in these commissions to abide by any law whatsoever, the Governor himself had at least the powers left to the monarch himself under his prerogative until instructed otherwise except for the few guidelines in the act.⁹

The monarch was still notionally the sovereign, or embodiment of ultimate legal power in the British State, although real power had been nibbled away over centuries since the Magna Carta (1215) in a process which forced him to subordinate all his actions to law. By 1689 it had been finally decided that the law emanated from the parliament. The brief way of describing this was to say that the sovereign was thereafter the monarch-in-parliament. In fact although his original power to rule had nearly all its substance removed, like a gigantic gruyère cheese, some parts remained like the rind. These parts were matters falling under his prerogative. On such matters, in the words of the great eighteenth-century common lawyer, Blackstone: "no crime or misconduct can ever be imputed to the monarch". In other words, even though it was recognised that he might act unjustly or unlawfully, there would be no attempt to control him through law.¹⁰

In a colony the "constitution and parliament" left it to his discretion what he would do. The leading case of *Campbell v Hall* (1774) stated what this might mean:

It is left by the constitution to the king's authority to grant or refuse a capitulation. If he refuses, and puts the inhabitants to the sword, or exterminates them, all the lands belong to him; and, if he plants a colony, the new settlers share the land between them, subject to the prerogative of the conqueror. If he receives the inhabitants under his protection and grants them their property he has the power to fix such terms and conditions as he thinks proper. He is entrusted with making peace at his discretion; and he may retain the conquest, or yield it up, on such conditions as he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or the political form of government of a conquered nation.¹¹

Such untrammelled power of life and death did have some restrictions on it. As soon as he had indicated formally which option he would exercise, all British or conceded laws started to run. Practically, there was seldom a situation in which there was not a treaty establishing which laws of a conquered people would continue and which would be replaced at what time. For example, this had been done with the French-Canadians in 1763. The one situation where the right to despotism accorded by law might coincide with practice was where the colony was in "uninhabited" territory before the arrival of *free* British citizens. In such a place during such a period the most that could be said was that his power might be limited by an obligation to observe "fundamental principles" which could not be established *a priori*.

It thus was of overwhelming importance to the development of the Australian State that when George III commissioned the naval captain Arthur Phillip to take a fleet of ships and set up a convict settlement in New South Wales, vesting him with this full prerogative, the land was regarded as belonging to no one (*terra nullius*). As Governor, Phillip could rule as he thought fit, assisted as "the occasion may require" by a court of seven of his fellow officers. Since this court was authorised to "proceed in a more summary way than is used in this realm", it is arguable that he was expressly empowered by parliament to ignore the law of England. It is certain that when the monarch issued the relevant commission and instructions to him he was not enjoined to observe any system of law at all. So even before the convicts arrived in New South Wales it had been decided that power in the English gaol in the Antipodes would be despotic. At best the act authorising the transportation of Australia's first white inhabitants intimated that it might be necessary to set up a colony and civil government there in some distant future.¹²

The Governor could, therefore, make the social world he wanted in his “portion of England”. Not even the strictures drawn from the experience of 1776 and French-Canadian resistance about taking into account popular wishes affected him, though he was advised to win the affection of the natives.¹³

It would be deceitful to suggest that this meant that the governors were free to construct whatever utopias tickled their fancies; either along the lines of Rétif de la Bretonne or, more blackly, those of the Marquis de Sade’s Tamoe and Butua.¹⁴ Their choice of orientation in fact depended less on their personal phlegm and imagination than on what structured that imagination; and, more so, the raw materials on which it worked. Their imagination varied from the reforming generosity of Phillip; to the brutal and mindless tyranny of William Bligh; to the authoritarian paternalism of Lachlan Macquarie; to the élitist efficiency of Ralph Darling.

They were all faced with a harsh and barbarous country where even the seasons were reversed and animals laid eggs. On its intractability they had to impose the modes of production of civilised people. They knew no other way of living and defining themselves as civilised in the face of the chaos of nature. Indeed, John Locke—whose work several of the governors knew passingly well—had made clear that society rested on rights which rested on property which rested on tilling the soil.¹⁵ They were wise to engage in this as soon as they did since, from the point of view of civilised people, their very right to the land they stood on rested on their doing so. In 1758 Emmerich de Vattel had extended the views in the English texts to the international law of nations proclaiming that:

Of all the arts tillage or agriculture is without doubt the most useful and the most necessary. It is the chief source from which the State is nourished . . . The sovereign should do all in his power to have the lands under his control as well cultivated as possible. He must not permit either communities or private persons to acquire great tracts of land which will be left uncultivated. Those rights of *common* which deprive an owner of the free use of his lands and prevent him from inclosing and cultivating them to best advantage, those rights I repeat, are contrary to the welfare of the State and ought to be suppressed, or restricted within just limits. The right of private ownership on the part of the citizens does not deprive the Nation of the right to take effective measures to make the entire country produce as large and advantageous returns as possible.¹⁶

The original inhabitants of Australia were mystified as they gazed at the futile first efforts of the ghostly white figures, which would ultimately destroy the ecological cycles on which they relied for life. They might have felt more hostility had they understood the implication for them of the next proposition:

Every Nation is therefore bound by natural law to cultivate the land which has fallen to its share . . . There are those who, in order to avoid labour, seek to live upon their flocks and the fruits of the chase. This might well enough be done in the first age of the world, when the earth produced more than enough, without cultivation, for the small number of its inhabitants. But now that the human race has multiplied so greatly, it could not subsist if every people wished to live after that fashion.¹⁷

Such people could not complain if others “too confined at home” (an unwitting pun) “shall come and occupy part of their land”. Vattel went on that in international law it followed that sovereignty over such territories would only be recognised if those who claimed them occupied them by using them. This was not to be understood to give legal possession to “wandering tribes whose small numbers cannot populate the whole country”. Use meant cultivation.

It was a difficult mandate for the first New South Wales governors to fulfil, though expressed in their instructions quite clearly.¹⁸ Initial favourable impressions gave way quickly to recognition that “Of the soil . . . a spot eminently fruitful has never been discovered” and the shortage of water compelled the inhabitants to live near the coast. While the trees were easily cleared, starting the process that would see Australia denuded of its forests and of its native grass species by the end of the century, cultivation proceeded slowly. Yet the difficult nature of the land itself proved an asset to gubernatorial power.

It confined the entire population wherever they went to small areas for an entire generation. This was because, as Tench said, “Every part of the country is a forest” and beyond the narrow coastal strip nothing but “precipices, wilds and deserts” were to be seen.¹⁹ At first the hardy and the foolish nurtured ideas of escaping from the cleared space and going across country to India or China, or, like one hapless Negro convict, of joining the people who had only skin colour in common with him, but they quickly discovered that the forest hemmed them in.²⁰ The Aborigines were hostile and there was no food or water which they could find. Tales of horrible death grew quickly and few convicts ever escaped to the interior, preferring to head to the ports and the sea where the few successful escapes were made.²¹ Men like William Buckley were so exceptional that they were sought out as valuable oddities who could communicate with the natives.²²

This confining of the population to a limited area around the towns of Sydney and Hobart, and a very few country centres, lasted until the late 1820s, that is, until the children of the first generation of transportees were adults, frequently with their own children. Fig. 1.1 is a careful reconstruction of the real limits of settlement in 1825, made by T.M. Perry.

As we can see, settlement does extend about a hundred miles north–south of Sydney, and fifty miles inland by that date. However, what the map does not disclose is that it was limited almost entirely to the Cumberland Plain in 1800 and only spilled over when the Blue Mountains were crossed in 1813. Moreover, even in 1825 the population was concentrated around the new centres, Bathurst (1815), Moreton Bay (1824) and Boydtown (1828). In 1810, 58.9 per cent of the population lived in Sydney itself and, in 1820, 50.5 per cent. Although that proportion fell to 26.9 per cent in 1828 and 25.6 per cent in 1836, this was because of new towns being established, rather than because of the dispersion of the population. The pattern was paralleled as these settlements were established, despite the later dates. A third of the Van Diemen’s Land population lived in Hobart in 1836 and 4000 of the 10,291 Port Phillip residents were still in Melbourne in 1840, where a third continued to live in 1850. Moreover, after a hiatus of about fifteen years, there was a drift back to the metropolis after 1860, the percentage in Sydney rising again to 35.9 per cent and those in Melbourne to 41.12 per cent in 1901.²³

The constraints of the forests, the “hostile natives” and the wild precipices, not to mention the problems of water and food, dwindled each year after 1788. A crucial factor allowing escape from nature’s prison was the crossing of the Blue Mountains and the construction of a road which allowed access to the plains beyond (1815).²⁴ On the other hand, despite the great areas opened up after 1815, since the sole basis in “natural law” which gave “right” in international law to the continent was that it was cultivated, the governors continued to grant land only in small plots to those who could cultivate it. A very typical grant was under a hundred acres and subject to the obligation to clear and cultivate it. Governor Macquarie’s instructions of 1809 illustrate this:

it is our Will and Pleasure that in every case you do issue your Warrant to the Surveyor of Lands to make surveys of, and mark out in lots, such lands upon the said Territory as may be necessary

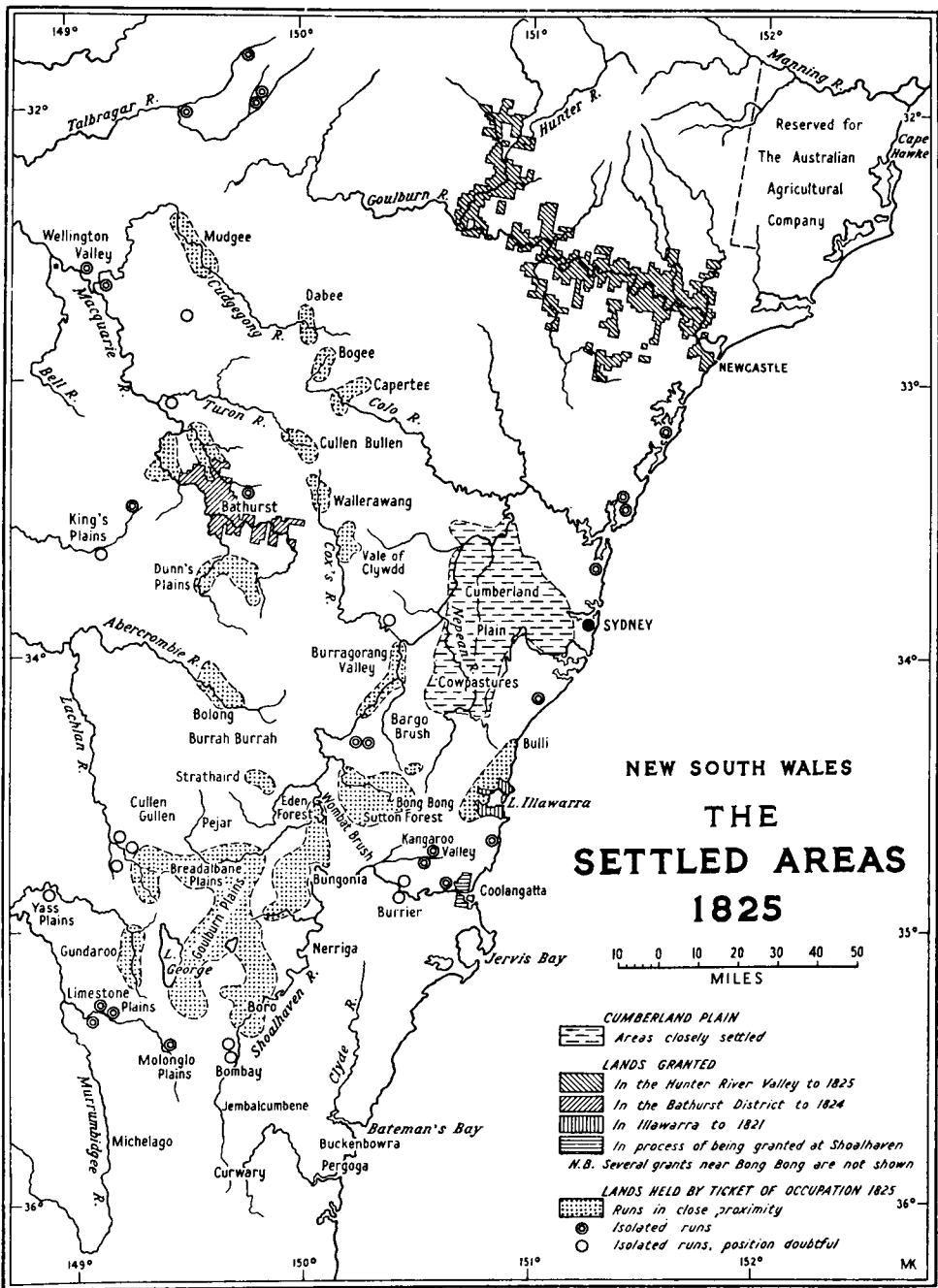


Fig. 1.1 New South Wales: the settled areas 1825

Source: Perry, T.M., *Australia's First Frontier* (Melbourne 1963).

for their use; and when that shall be done, that you do pass Grants thereof, with all convenient speed, to any of the said Convicts so emancipated, in such proportions and under such conditions and acknowledgements as shall hereafter be specified; viz.

To every male shall be granted 30 acres of land, and in case he shall be married, 20 acres more; and for every child who may be with them at the settlement, at the time of making the said Grant, a further quantity of ten acres, free of all fees, taxes, quit rents, or other acknowledgements whatsoever, for the space of ten years; provided that the person to whom the said land should have been granted *shall reside within the space, and proceed to the cultivation and improvement thereof*. . . [emphasis added] . . . whereas it is likely to happen, that the Convicts who may . . . be put in possession of lands, will not have the means of proceeding to their cultivation without the public aid, it is our Will and pleasure, that you do cause every such person you may so emancipate, to be supplied with such a quantity of provisions as may be sufficient for the subsistence of himself, and also of his family, until such time as their joint labour may reasonably be expected to enable them to provide for themselves, together with an assortment of tools and utensils, and such a proportion of seed, grain, cattle, sheep, hogs etc. as may be proper and can be spared from the general stock of the Settlement.²⁵

Except for a very few people, most landholders thus remained in areas of intense settlement even at the end of the 1820s, although the population in the Cumberland Plain dropped from 93.6 per cent (1821) to 83.6 per cent (1825) to 68.7 per cent (1828) (see Fig. 1.2).

While State aid began from 1788 (since Phillip's instructions were not materially different), it was not sufficient even given hard labour to make the small plots viable. Only a quarter of land granted under Macquarie was cleared and half or less of that cultivated. Each year, Mr Oxley reported in 1819, the farmers went further into debt and the tendency was to sell out to others who consolidated the holdings. Thus, in 1823 in reporting on the state of agriculture and trade in New South Wales and Van Diemen's Land, Thomas Bigge suggested that big capitalists should be encouraged to invest and take up land. The British Government was loth to do this and, therefore, kept the policy of closer settlement going in the 1820s and 1830s, while gradually accepting that larger landholders might buy in and obtain the extensive tracts of uncultivated land which Vattel had warned were not sufficient to justify sovereignty.²⁶ Moreover, they accepted from 1825 that a few hardy spirits would go beyond the surveyed areas and simply squat on the land. They therefore brought in a system of "tickets of occupancy", a sort of *ex post facto* licence with an interest. However, in the 1820s, they limited by order such land occupation to the so-called Nineteen Counties (Fig. 1.3). Anyone who moved beyond such limits would lose the land and its improvements.²⁷

The leading historical geographer of this period reminds us that the change which started after 1825 did not mark an official departure from the policy of accommodating the small farmer as an owner. That policy continued within an overall land-use policy whose thrust was revealed by the instructions to Governor Darling in 1829 both that he could grant up to 9600 acres and that he should favour small owners.²⁸ Moreover, in the context of the decision that henceforth land should be sold rather than granted, embodied in the Ripon Regulations of 1831, governors were still encouraged to favour the purchases of lots smaller than the minimum 640 acres set by the regulations. In samples taken from land sales in 1835 and 1838, 210 of 742 properties advertised for sale were small properties, mostly under a hundred acres.²⁹

Throughout Australian history this system of great numbers of small properties, above all close to towns, persisted, despite the few graziers who occupied the greatest area of the continent. We merely note—to be taken up again in another context—that, in 1914, 44.7 per cent of all Australian holdings were under a hundred acres (excluding Queensland) and 44 per cent between 101 and 1000 with an average of 392.5 acres, leaving just over 10 per cent large holdings. In New South Wales, the percentage of small holdings was 52 per cent.

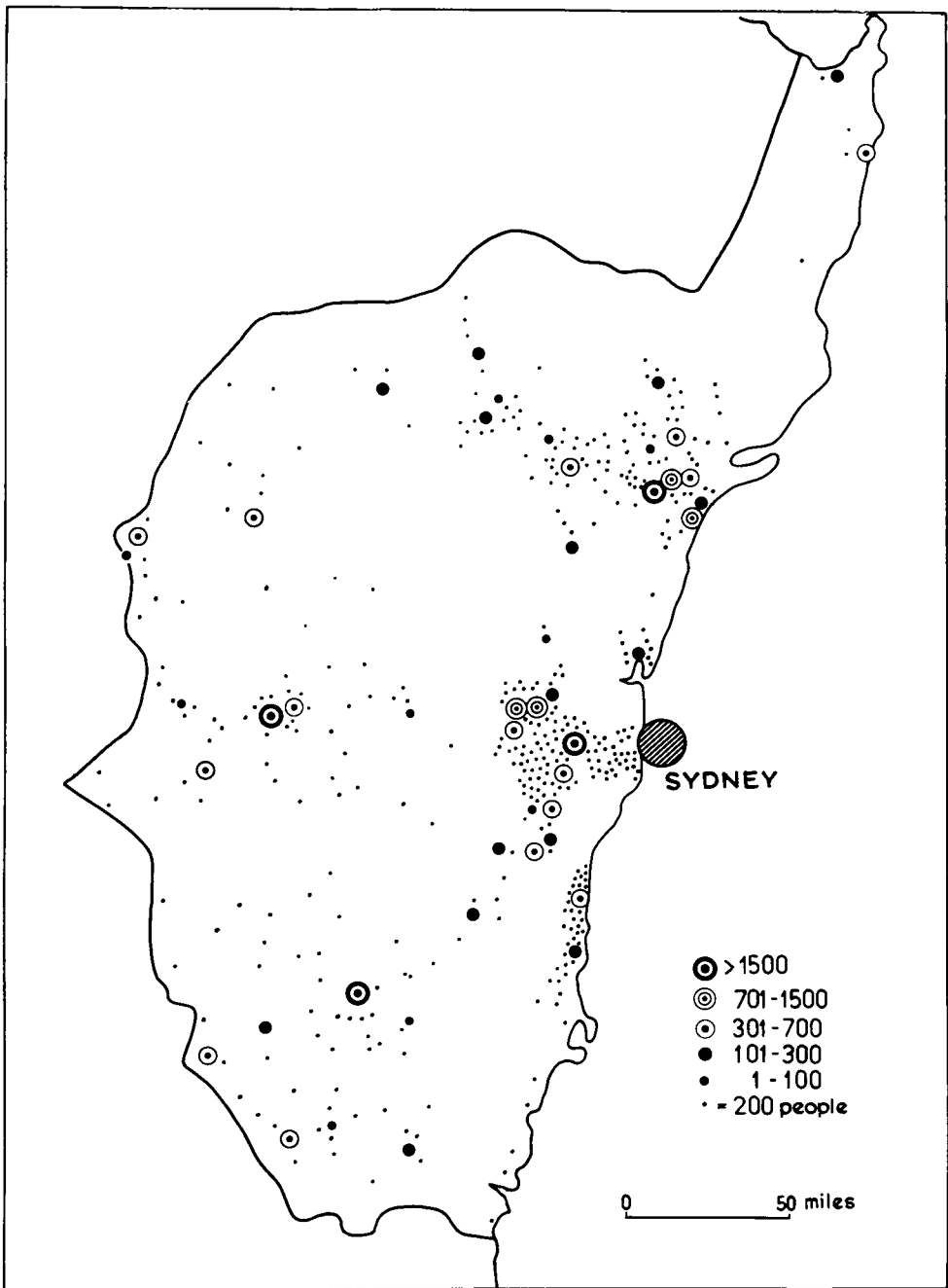


Fig. 1.2 Towns and the distribution of population in the settled districts in 1846. There were concentrations in Cumberland and in the agricultural districts of the Lower Hunter and Illawarra.

Source: *Census of the Colony, 1846*. (Reproduced in *Historical Geography of N.S.W.* by D. Jeans).

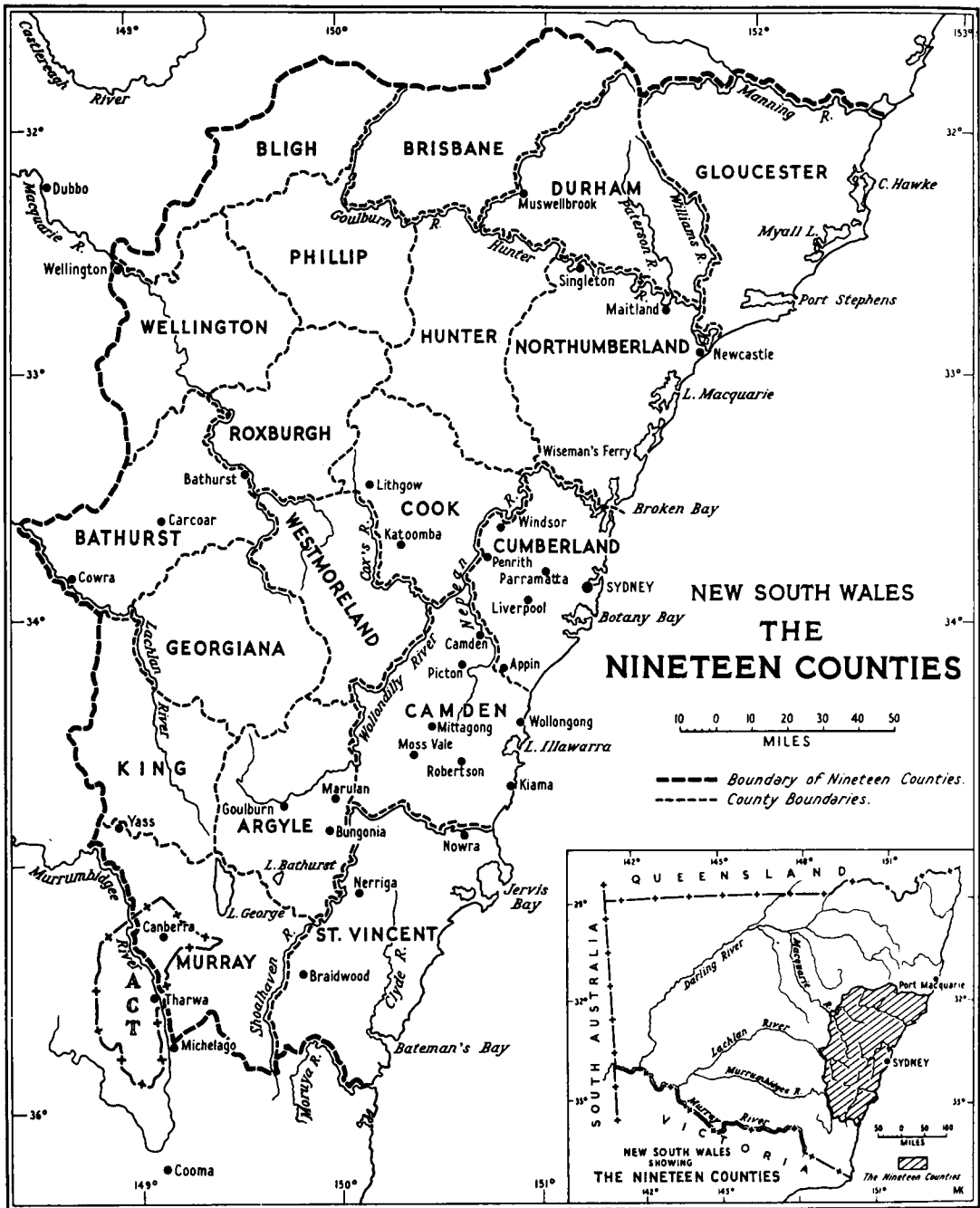


Fig. 1.3 New South Wales: the nineteen counties

Source: Perry, T.M., *Australia's First Frontier* (Melbourne 1963).

Together the 45 per cent under a hundred acres covered only 2.3 per cent of all land.³⁰

It is incontrovertible, however, that after 1825 the governors could not prevent the further dispersion of settlement and gave it up entirely when Governor George Gipps uttered these dramatic words in 1840:

As well might it be attempted to confine the Arabs of the desert within a circle, traced upon their sands, as to confine the Graziers or Woolgrowers of New South Wales within any bounds that can possibly be assigned to them: and as certainly as the Arabs would be starved, so also would the flocks and herds of New South Wales, if they were so confined, and the prosperity of the country would be at an end.³¹

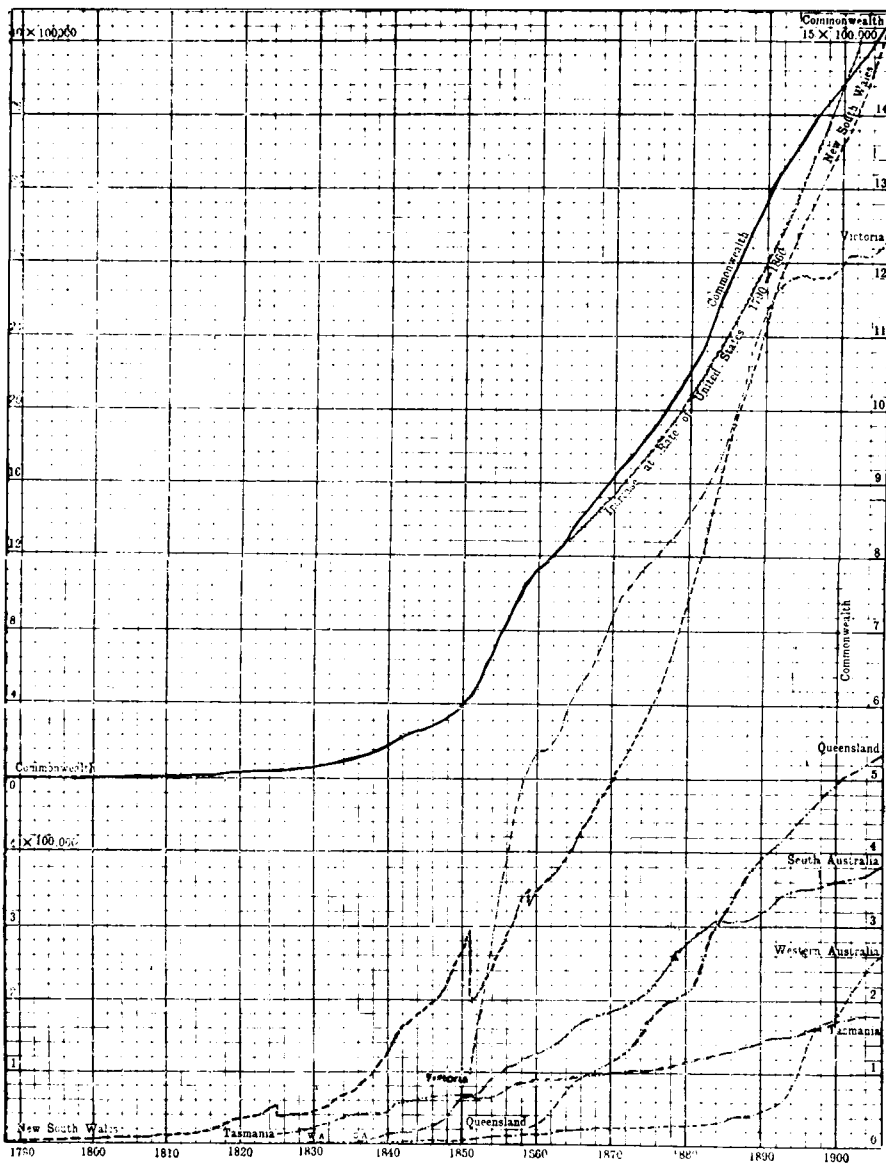
The end of an effective policy of keeping the population within limits of settlement coincided with a surge in its numbers (see Table 1.1), which changed it from a tiny community to something larger. Until Macquarie's departure it was the size of a small country town and confined until 1840 almost entirely to the two colonies of New South Wales and Van Diemen's Land. At the latter date Western Australia (1829–) and South Australia (1836–) had 2354 and 14,610 inhabitants respectively (see Fig. 1.4). Their exiguous numbers meant that the only significant histories in Australia until 1850, when Victoria was separated from New South Wales, were those of New South Wales, and when in 1825 Van Diemen's Land was created a colony, the southern island.

Table 1.1 New South Wales population growth, 1788–1848

<i>Year</i>	<i>Population</i>
1788	1,035
1798	4,588
1808	10,236
1818	25,859
1828	58,197
1838	151,868
1848	332,238

Source: Year Book of the Commonwealth of Australia (1908), p. 149.

Until 1830 this densely settled group was almost entirely convict in origin. In 1821 there were 1558 free adults with 878 children, as against 7556 convicts with 5859 children.³² The bulk of the rest of the free population were emancipists, although there was a minority of guards. This homogeneity can be explained by a deliberate policy of excluding free immigrants until after Macquarie's departure. Even in 1826 a person wishing to emigrate to New South Wales had to make a special approach to the British Government for permission to do so. Permission was effectively granted only to the wealthy. Even if it could be proved to the authorities' satisfaction that the applicant possessed sufficient capital to justify the grant of land to be purchased, he had also to satisfy them that he had the capacity and intention to expend capital equal to half the value of that land on the cultivation of it.³³ Except for the determined few, Australia thus was too far and too expensive. Free migration grew slowly, only 5175 free immigrants arriving in 1825–30.³⁴ In Van Diemen's Land convicts still arrived in greater numbers (16,587) than free settlers (14,115) throughout the 1830s.



EXPLANATION OF GRAPHS. The base of each small square represents two years' interval, for both States and Commonwealth; and the vertical height 80,000 persons for Commonwealth or 20,000 for States. The zero line for the States is the bottom line; for the Commonwealth it is the line marked "Commonwealth," with 0 written below. The scale on the right and that below the Commonwealth zero line on the left relate to the States, that above the Commonwealth zero line on the left relates to the Commonwealth.

Fig. 1.4 Graphs of total population of the Commonwealth of Australia and each State, 1788-1906

Source: *Official Yearbook of the Commonwealth* 1908, p. 57; La Trobe Library.