

AUSTRALIA DAY



**Celebrating Australia's First Prison?
OR
Commemorating the Foundation Day
of Nationhood?**

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Australia Day

There has been a lot of discussion lately of the merits, or not, of the 26th January as Australia Day. Authorities have promoted it so as being the day that Governor Phillip took possession of Australia, marking British sovereignty over that part of the continent under the possession claim. However Phillip only took possession of that part of New Holland east of the meridian 135 degrees east of Greenwich.

That meridian extends from near Castlereagh Bay in Arnhem Land in the north of Australia to Anxious Bay in the Great Australian Bight in the south. Approximately half of Australia was excluded from the possession claim including Darwin, Tenant Creek, Alice Springs, Ceduna and Perth. Approximately two thirds of the Northern Territory, half of South Australia and all of our biggest state, Western Australia, were excluded from the claim.

Prior possession claims were made by Lieutenant James Cook in the name of King George III of England. Cook took possession at several places along the east coast, however the revelation to him of the fact that New Holland did not join New Guinea (discovered by Torres approx 170 years before Cook) prompted Cook to take possession of the whole east coast of New Holland that he had charted. (Cook's Log --- 22nd August 1770)

That possession claim extended from Point Hicks in the south where he first sighted New Holland, to Possession Island in the North. It included the adjacent islands and extended in parallel terms from approximately 38 degrees south, in the south, to 10 degrees 30 minutes south, in the north. It excluded the latitudes to the south of approximately the city of Melbourne and left any western boundary in indeterminate measure of delineation.

His sponsors for the voyage were the English Government and the Royal Society. The latter stipulated that the indigenous peoples be treated with dignity and to take possession at appropriate places with the sanction of the indigenous population, or if not inhabited to take possession under Terra nullius. Cook, by his log, does not declare possession under Terra nullius, rather the wording of his log that he is "*confident that he was the first to discover and chart the east coast*" tends to endorse a possession claim based upon First Discovery rather than Terra nullius.

He was well aware that New Holland (as he charted it) was inhabited, however he describes attempts to come into contact with the indigenous peoples as unsuccessful as they either threatened hostilities if he landed or made themselves absent from his approaches. He does mention that he sighted many *smooks* from time to time. (indigenous fires). Cook was also cognisant of the previous Dutch explorers and their rights to claim that part of New Holland west of Cape York. (stated in his log)

Seventeen years elapsed between the two possession claims (that of Cook and that of Phillip) exposing Cook's possession claim to lapse and therefore termination under the Doctrine of Discovery accepted principles. So, in practical terms, the possession taken by Phillip had to override that of Cook. Phillip's possession also included that part excluded under Cook --- Port Phillip to South Cape taking in the south of Victoria and the whole of Tasmania.

See appendix 1 --- Map delineating both possession boundaries.

As mentioned Cook's instructions were to treat the natives with dignity and respect and being on exploration mode he could sail away from any hostilities. Phillip however was on a one way mission. His instruction was to make settlement --- till the land--- to treat the natives with dignity and respect, but also to take care of any interference from the indigenous people. But there was no declaration under what terms of the Doctrine of Discovery he justified his claim.

At this time the death penalty had been abolished in England except for murder, attempted murder, or treason and transportation became then the primary method of major punishment other than as mentioned above. However a *bunch of rebels* led (amongst others) by George Washington, had succeeded (by gorilla tactics) in defeating their colonial masters in America (the birth of the United States of America) and subsequently declared that they would no longer be the recipients of Britain's felons. So Britain had to look elsewhere and although there were other British colonies taking transportee's, Australia emerged as the main contender in relieving Britain of its overcrowded prisons and prison hulks anchored around the various estuaries of the home country.

Not only were convictions current at the time considered, but also those, who had served their time in English penitentiaries and were nearing completion of sentence, were also sent to Australia for final assessment and granted ticket of leave or were otherwise conditionally pardoned. The latter were termed exiles and this term, in practice but not declared, extended to the former transportees as well, who, on expiration of sentence, were not considered for return to the homeland unless under the few instances of absolute pardon. England thus relieved itself of responsibility of repatriation of pardoned prisoners (deemed emancipation) and also any problems of re-offence in the homeland. The consequences of transportation were not just confined to judicial sentence.

Prominent among the transportees were political prisoners as well. (more notably Irish dissidents)

Recently some have advocated that the occasion of the 26th January 1788 was in fact, a victorious day for the nation.

So let us take another look at January 26th 1788.

1. Possession was taken without agreement or the permission or regard of the indigenous people.

2. Possession was taken without clarification of the possession justification. (Such justification was not in consideration of the indigenous people, rather in consideration of other European nations subject to the mutually agreed but loosely held Doctrine of Discovery).
3. Possession was taken over New South Wales, not Australia. The area claimed constituted approximately one half of the continent then known as New Holland.
4. The use of the name Australia was not in use until Mathew Flinders had his submission approved (second attempt to do so) as late as 1824, that the name Australia be adopted.
5. There were no treaties or land purchases enacted with the natives.
6. The Aborigines looked upon the landing and possession of their land as invasion.
7. The settlement in 1788 was not a free settlement. It was a prison establishment.
8. The prison life was harsh with punishment of 50 to 100 lashes inflicted for the slightest misdemeanour.

So what is victorious or indeed, celebratory about any of the aspects relating to our summary above?

Or have I forgotten something? --- something beneficial? Perhaps to the Prison Authorities in England --- yes. --- Perhaps to the English Government of the day --- yes as well.

But to those who occupied the below decks in chains for stealing a loaf of bread to feed a starving family or the likes, bundled in with some of the worst criminals of England's underworld, or for those political prisoners (many questionably convicted of sedition or libel) most of whom were separated from their families in their homeland (and as in most cases, this was forever) the event must have been the most horrendous experience that anyone could dare to contemplate. Dispatched in chains to a far away land, alien to European climate, custom and living environment, from which, for the great majority, there was to be no return to their homeland.

So it was for the Europeans, but what of the peoples occupying the land? Amongst the first to endeavour to buy land from the aborigines was John Batman, a notorious figure who was credited with commencing the settlement that is now the grand city of Melbourne. *"This would be a good place for a village!"* (If I remember rightly). But Batman, it is said, was also credited with the murder of a great number of Tasmanian indigenous to the extent that that Colony's Governor Arthur, was given to comment *"He (Batman), has a great deal of slaughter to account for."*

So it was probably a wise move that saw Batman arrive on the mainland. There he endeavoured to purchase land from the aborigines, using tomahawks and knives as collateral. The settlement's intended name was to be Batmania --- certainly not Melbourne. However the authorities were having none of that. Such a precedent could prove costly to those who just helped themselves to land for practically nothing. However if Batman's actions did one thing, it forced the Colonial Office back in England (in negating his proposal) to commit to the details of the possession as well therefore, its justification for same.

Through Governor Bourke in 1835, the proclamation stated that possession was proclaimed under the justification that the land was Terra nullius; that the land, before the coming of the British, was not owned by anyone and that therefore Terra nullius was validated. By proclamation of possession rights the land then became vested in the British Crown who then had the sole rights to sell, lease, or dispense the land in a manner the crown saw fit. This declaration precluded any Aborigine claims over land ownership, or rights to the land. Thus ended Batman's realty visions, but more particularly (to a people dependant almost entirely on the land for culture and sustenance) to Indigenous Australia --- it proved disastrous.

However the term Terra nullius in its correct interpretation had become a thorn in the side. To obviate the real meaning (land null and void or empty of humans, or not owned or occupied by anyone) the British and certain European nations gave it other qualifications:

- (1) If the land was inhabited by non-Christians, then the provisions of Terra nullius also related to land occupied by them as they were not adjudged to have the same rights to land sovereignty as Christians.
- (2) That Terra Nullius could be interpreted as the lack of a civilised society. That of course played into the hands of European societies who had their own ideas of civilisation. Although they had short memories on the era from which they had just emerged (torture on the rack; death by being hung drawn and quartered; severed heads displayed on pikes in public place for all to see; the choice of the sword or axe to deliver one's severed head to the sawdust bin; and not guaranteed of a clean section, even though the victim was obliged to pay his executioner for his troubles.) Nothing --- no nothing --- comparable or equal existed in the non-civilised world of Indigenous Australia.
- (3) That land tenure not registered or recorded in the manner and form used in European countries was not considered valid. Of course this aspect affected most of the world outside Europe itself. In Aboriginal Australia, land was in essence, allocated or ceded to clans under tribal distribution. Not recorded in any register, volume or folio, such as in the European manner, however each clan knew exactly the bounds of their particular hunting and gathering domain. A mountain here to a prominent tree there; following the river there to a prominent feature here etc. They knew every part of their allocation intimately and other clans violated those lands for intrusive hunting and gathering, at their peril.

There were other convenient presumptions of the term Terra nullius, however they were all "coined" to suit the use of the word to European advantage due to the varying but confronting circumstances prevailing.

It took approximately 142 years for "Bourke's" Terra nullius proclamation to be successfully challenged. In what became known as the Eddie Mabo case, the High Court of Australia overturned

the Terra nullius justification. Instead, the Court determined that settlement of the country was deemed to be assimilated to the rules for a “conquered” colony; that there was, before the arrival of the British, a pre-existing system of law.

The High Court decision put an end to the official determination of Terra nullius that eventuated between the Royal Society instruction to Cook (use Terra nullius if the land not occupied) to the proclamation by Governor Bourke (land, although obviously occupied, not owned by any anybody and therefore Terra nullius was relevant)

So I must ask again --- What is so victorious and celebratory about the foregoing?

What does the 26th of January 1788 have to offer in victory and celebration and indeed national pride, apart from the safe arrival of the transportee's and their prison administrators and guards?

To my mind, which I must admit does not thrive on arch-conservatism, a far better day to call Australia Day is --- Federation Day --- The Day Australia Became A Nation. The day it threw off the cloak of colonialism and became a nation in its own right --- with states instead of colonies, and a National Government replacing the Colonial Office, run by an imperial government, steeped in paternalism and its own interests and based in a land 22,000 kilometres away. A nation, now with its own constitution and therefore enabled to create a national pathway for present and future Australians and to enact and enforce its own laws; a nation that embraces all of its citizens under its own order of self government.

The day it cut the apron strings and stood on its own as a nation. Not just one half of the continent addressed in colonial terms as the Colony of New South Wales, but the whole of the new nation then called Australia at federation. That, to my mind, is what Australia Day should be all about.

However the constitution did not include its oldest inhabitants. The one's, who with the aid of some brilliant technology now surpassing the limitations of carbon dating, may be found to have occupied this country for at least 60,000 years. The one's who put our own ancient history of Cleopatra times, (approximately 4,000 years ago) into yesterday's basket in their own timeline. The one's who, 22,000 years ago, when the sites of great cities of today such as New York, Moscow, Paris, London and yes Dublin City, were gripped in the great freeze of the last glacial maximum, had already occupied this *Great South Land*, Australia, for (what recent finds may determine in highly probable potential) 38, 000 years.

So it seems that Terra nullius was still alive in 1901. How could we possibly have the audacity to declare that Terra nullius, in its true meaning, (and considering an indigenous occupancy time era that has amazed the anthropological world) was relevant in 1788 or indeed in 1901? Further, how can we accept that the first Australians (who had successful custody of this land for such an epic era in human terms) should not be included in the constitution relevant to the people of that same land?

Well at last moves are afoot to include the indigenous people of this land in the constitution. But already there have been some arch-conservative objections --- recently voiced. Let us hope that the present Government puts the legislation in a form that will satisfy the nation (including the indigenous peoples) in a manner that will expedite and not delay the procedures and therefore the inclusion. Perhaps at that time we may look to consideration of planning to altering Australia day, to when Australia became a nation --- Federation Day --- or a day appropriate and relative to that event. It would also be a day more acceptable to the indigenous people, (the first Australians), who consider the 26th of January as invasion day.

Jeff Lambert --- Traveston ---- 26th January 2014.

Cover by Anne Duffy --- (of my gifted progeny) --- anne@wildfireweb.com.au

For more detail on ***Discovery, Possession and Terra nullius***, go to that title at www.pathwaystogold.com

Attached: 1. Addendum ---- 2. Appendix 1 (possession delineation map)

Addendum --- to the essay --- Australia Day (dated 26th January 2014)

My essay has sought an enquiry from a friend as to, on which day of the year such a modified Australia Day should fall.

The new Federation of Australian States commenced as from the 1st January 1901. This is of course New Years Day, a day celebrated in the Gregorian calendar by most western nations. It is a day when we see the old year out and the new in. Goodbye to the past years trials and tribulations, its failures and successes and to welcome in the new year in good resolve, intentions, and hopefully prosperity in the coming year. No --- New Years Day is important and deserves to stay unencumbered from other celebrations.

There are of course, precedents to offsetting important dates to more suitable times. Take for instance the Queen's Birthday. In actuality it is the 21st April each year. Officially, for most of Australia, it stands at the second Monday in June. This is to correspond with a much earlier decision in the northern hemisphere allowing the official holiday for same to occur at a time when the prospect of fine weather was most favourable. --- the northern summer. But the official day varies in some countries and in Western Australia due to other commitments. However, a substitute day for referral to federation day can be much more appropriately allocated than the example shown above. That day is the ninth day of May. My reasons are as follows;

- (1) the first Sitting of the first Federal Parliament of Australia was held in Melbourne on the ninth day of May 1901.
- (2) The first Federal Parliament of Australia was declared open by Prince George, Duke of Cornwall and York and later to become King George V, in Melbourne at noon on the ninth day of May 1901.
- (3) The Federal Parliament was moved into new premises at the newly formed Capital Territory, upon which the new National Capital of Canberra was built. The move was officially declared by the Duke and Dutches of York, later to become King George VI and Queen Elizabeth (the Queen Mum) on the ninth day of May 1927.
- (4) The Federal Parliament moved into permanent residence in Canberra when the present Queen, Queen Elizabeth II, opened the new Parliament House, on the ninth day of May 1988.

Collectively the ninth day of May is prominent. Although the primary aim for that date revolves more directly around the first and second sub paragraphs above, the events relating to the third and forth paragraphs, although they may be looked upon in federation terms, as merely ancillary in support, are nevertheless, important events in the history of our Federal Parliament.

In view of the foregoing I would therefore recommend that Federation Day be celebrated on the ninth day of May.

Further to my essay and in accord with its revelations, I would respectfully recommend to my fellow Australians and to our Representatives, that Federation Day be marked as Australia Day and celebrated therefore on the ninth day of May, in thankful reverence to the endeavours of our forefathers in ----

Delivering Nationhood to the people of this land we call home ---Australia.

Jeff Lambert --- Traveston, Queensland --- 8th February 2014.

Appendix.1.

