



Discovery, Possession and Terra nullius

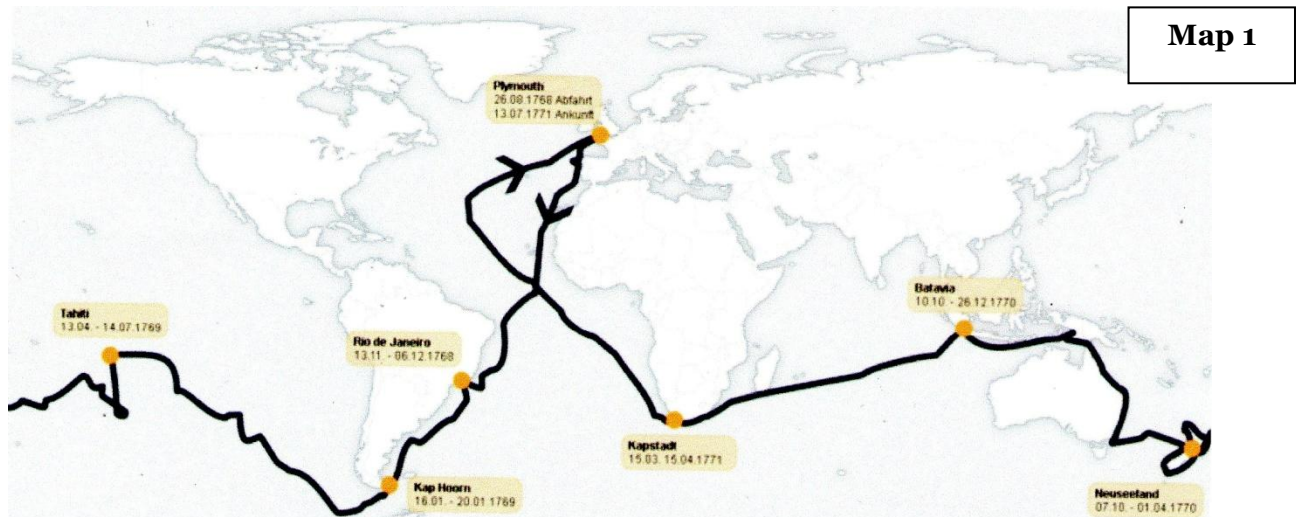
JEFF LAMBERT

Discovery, Possession and Terra Nullius

Terre Australis --- New Holland --- Australia

Discovery and Possession

Captain James Cook made his possession proclamation involving New Holland only over its east coast.



The Dutch had explored the west coast, the bight we know as the Great Australia Bight in the south and into the Gulf of Carpentaria in the north. Cook in his Journal of his 1st Endeavour voyage had stated that, because of the Dutch discovery and exploration, territory to the west of Cape York, belonged to the Dutch to claim. A reference in Cook's log that has been crossed out either by Cook or others not agreeing with his comment or not in favour of supporting Dutch rights to claim.

Given Cook's opinion, he claimed, on behalf of His Majesty King George the Third, only the east coast of New Holland and gave no western boundary to define a firm possession delineation. His eastern extent, however did include all Islands east of New Holland situate upon the said coast between the stated latitudes. The transcript from Cook's log on the day of proclamation is shown below:

August 22 1770.

Having satisfied myself of the great Probabillity of a Passage, thro' which I intend going with the Ship and there^{for} may land no more upon this ~~Western~~ Eastern coast of New Holland and on the Western side I can make no new discovery the honour of which belongs to the Dutch Navigators ~~and as such they may lay claim to it as their property~~ but the Eastern Coast from the Latitude of 38° South down to this place I am confident was never seen or viseted by any European before ^{us and} ~~therefore by the same Rule belongs to great Brittan~~ Notwithstand I had in the Name of his Majesty taken posession of several places upon this coast I now once more hoisted English Coulers and in the Name of His Majesty King George the Third took posession of the whole Eastern Coast from the above Latitude down to this place by the Name of New South ^{Wales} together with all the Bays, Harbours Rivers and Islands situate upon the ~~same~~ ^{said} coast after which we fired three Volleys of small Arms which were Answerd by the like number ~~by~~ ^{from} the Ship this done we set out for the Ship but were some time in geting on board on accout of a very rappid Ebb Tide which set ^{ANE} out of the Passage ~~away to the NE~~ ever sence we came in among the Shoals this last time we have found a Moderate Tide the

Flood seting to the NW and Ebb to the SE. at this place it is High-water at the Full and Change of the Moon about 1 or 2 o'Clock and riseth and falls upon a perpendicular about 10 or 12 feet. We saw on all the Adjacent Lands and Islands a great number of smooks a certain sign that they are Inhabited and we have dayly seen smooks on every part of the coast we have lately been upon — Between 7 and 8 o'Clock in the Morning we saw several naked people, all or most of them women, down upon the beach picking ^{up} Shells, &C^a they had not a single rag of any kind of Cloathing upon them and both these and those we saw yesterday were in every respect the Same sort of people we have seen every where upon the Coast; two or three of the Men we saw Yesterday had on pretty large breast plates which we supposed were made of Pearl Oysters Shells this was a thing as well as the Bow and Arrows we had not seen before —

It appears obvious that Cook may have been uncertain as to just how much of New Holland his discovery (as he terms it) and exploration of the east coast would justify his claim in its western dimension. Indeed, as mentioned, at the tip of Cape York, which he named after the Duke of York, he states that further to the west of his present position, belonged to the Dutch navigators to claim under the rights of discovery and possibly became his reason for not acting alone in proclaiming a western boundary.

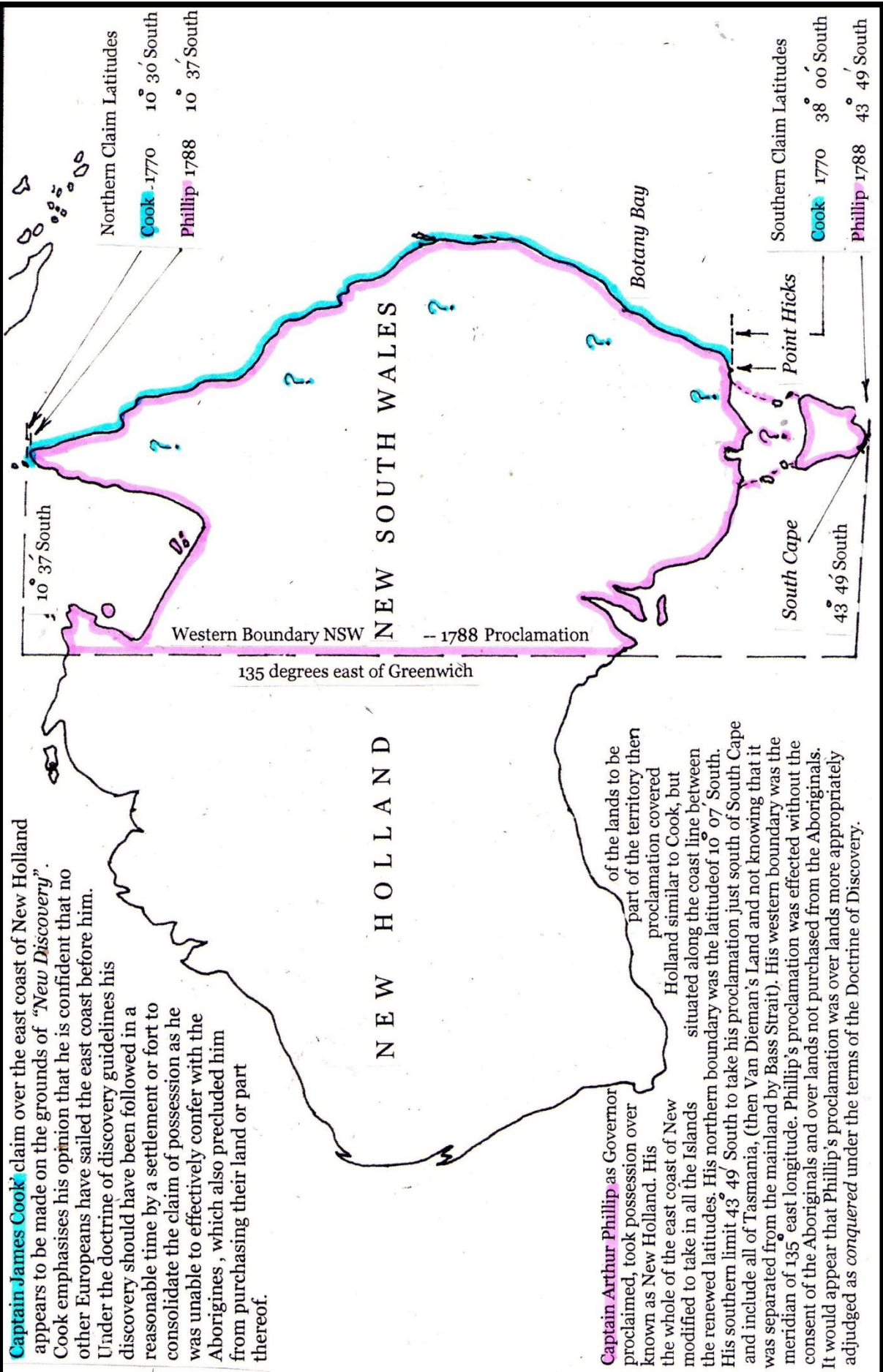
Map No 2 shows Possession Island, the northernmost point of his possession claim and also Point Hicks (named after his lieutenant who had first sight of the Great South Land.) It also shows the extent of his journey up the east coast of New Holland or otherwise known as Terre Australis. Cook appears to have been meticulous in taking possession only over that part of the continent relative to his journey at first sighting, (Point Hicks), north to Possession Island. This eliminated all latitude south of Melbourne including, Port Phillip, Bass Strait and Tasmania from the ambit of the proclamation.

It is sometimes said that Cook's proclamation was based upon terra nullius or that he acted as though terra nullius was relevant, however Cook's emphasis that he was confident that no other European had sailed his journey along the east coast before him (see log transcript above) would indicate that he had based his possession claim on *New Discovery*. Also his transcript above states that he can make no *new discoveries* to the west of Possession Island as discoveries there are for the previous Dutch navigators to claim.

Early revelations of possible Portuguese discovery of the east coast of New Holland, two centuries before Cook came along, have been, in the past and to the present day, some threat to the British acceptance that Cook discovered the east coast of New Holland. Although there have been several alleged sightings in the past of what were presumed to be Spanish, or more likely Portuguese ships wrecked on the east coast shores, subsequent investigations in the modern era, have found no trace and although these investigations are still the object of historical interest and investigation, the proof must lie in the unearthing of such wrecks, or the discovery of a relevant ancient map of the era.

There remains also the fact that New Holland was occupied and that the forebears of the existing population, who walked across the land bridge from New Guinea via Java during the ice age, at least 40 000 and possibly 60 000 years ago, should be accorded the honour of discovery. This aspect, if held in any sense of legality, would also have annulled any Dutch or for that matter any other European discovery claims.

There was however another European discovery claim that has not been discussed here and that is the Spanish South Pacific claim arising after the Treaty of Tordesillas of 1494 and its revision Treaty of Zaragoza. The treaty was used to support a possession claim over part of the Great South Land taken out by Pedro Fernandez de Quiros in 1606. The western limit of



this claim was shown on the 1761 map of the Spanish Empire by Vicente de Memije. The claim's western boundary reached to the then anti-meridian of the original Tordesillas treaty.

The above treaty was an arrangement between Spain and Portugal, where they sought to divide the world into two hemispheres where discovery would allow for land acquisition of non-Christian lands to Spain for anything to the west of the chosen meridian in the Atlantic and to Portugal for the same to the east of the meridian. However the anti-meridian on the other side of the world to determine the Pacific hemisphere division limits became a problem, because of the lack of technology in determining longitude at the time.

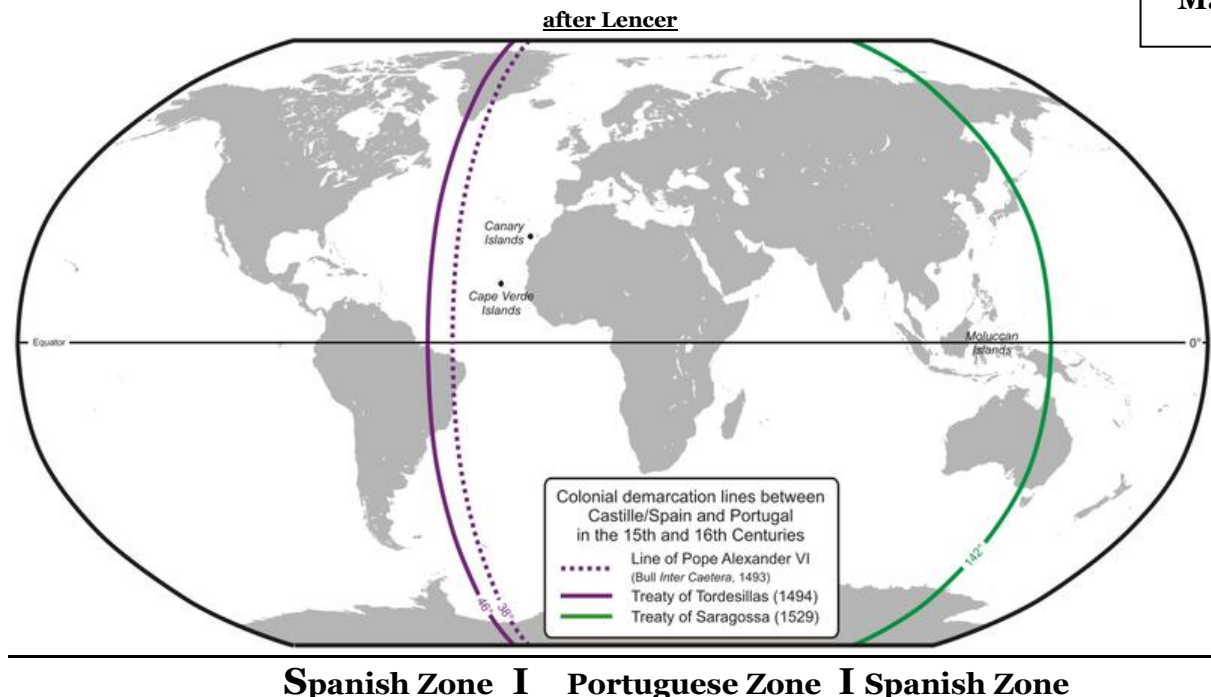
Navigators in earlier exploration times found longitude determinations, away from the known European settled areas, virtually reliant on distance travelled away from a known point subjected to bearing adjustments for latitudes and departures. At best it could be described as *dead reckoning* and this method was subject to unacceptable cumulative error. Cook, on his first voyage, used observations of the moon deploying the *lunar distance* method, which however involved complicated calculations and yielded only approximate results. However for discovery purposes his longitude was reasonably good. As knowledge and equipment advanced, longitude determinations by the time of Cook, (2nd Voyage) depended upon accurate time carried with them on the vessel. The time recorded west of Greenwich was effected by a bank of chronometers which were operated by spring recoil.

The most accurate interval of the spring recoil was in the middle of the spring action. In other words if the spring was allowed to run down too far the corresponding time accuracy suffered. Similarly if the spring was wound too much the upper end of the recoil likewise gave lesser accuracy. Consequently the chronometers were wound a certain amount of turns at the same time each day to keep the recoil at the desired equilibrium. The later invention of the balance wheel took care of other problems relating to this method. Time was longitude and the winding of the chronometers was very important in ensuring the successful plotting of the journey which may be of duration of several years out from ports having reliable recalibration. Mathew Flinders reportedly sent his brother in law packing back to England in disgrace after he had one day, neglected to wind the chronometers.

Spanish and Portuguese Navigators in 1494, although accepting the two hemisphere philosophy and the commencing meridian running through the east of Brazil, could not determine longitude and so the inevitable overlap occurred with each side claiming longitudinal possession of right. The zone of longitude contention gave rise to argument over what was then known as "*The cradle of spice*", specifically the Moluccas Islands. Spice for both culinary, but more so medical use, was then worth its weight in gold.

Both countries sent cartographers, mathematicians and officials to the Moluccas to endeavour to resolve the dispute to no avail. Finally after payment of a hefty sum to Spain by Portugal, Spain agreed to alter their boundary at the anti-meridian to an offset meridian nominally at what we now designate 142 degrees east longitude. This meridian runs through western Cape York, western New South Wales and western Victoria. The agreement was known as the Saragossa Treaty. **See Map No 3**

Map **No 4**, was first displayed by Johannes Blaeu depicting the charting of Abel Tasman and other Dutch navigators. So proud of their maritime efforts at the time, the Dutch had the map inlaid in the floor of the Amsterdam Town Hall. It thus became open to other nations to view and copy. The map displayed, seen as a faithful copy of Blaeu's work, is attributed to the French cartographer Melchisedech Thevenot. Thevenot modified the Dutch map to show the western boundary of the Spanish/ Portuguese Treaty of Tordesillas as first agreed.



Later this meridian was altered to suit the Treaty of Saragossa as mentioned above and moved approximately to the Greenwich meridian 142 degrees east. Thevenot however, apparently took his boundary from a 1761 map of the Spanish Empire mentioned above. The boundary is shown by a meridian staff at approximately what is now the Greenwich meridian of 135 degrees east longitude. Although the full extent of east New Holland was not known at the time, it may be seen in **map no 2** that the 135 meridian just about divides the later defined Australian continent into two equal portions.

Thevenot also used the above divisional meridian to divide the naming of the south land into two separately named lands. To the west he retained the name Hollandia Nova (New Holland) and to the east Terre Australis (the South Land) Although such a wide appropriation of lands under the Tordesillas Treaty may have been seen by other sea faring nations as non-binding other than to Spain and Portugal, the line becomes of importance to the possession proclamation put into effect by Captain Arthur Phillip.

This demarcation was later repeated on Emanuel Bowen's Complete Map of the Southern Continent. To the British it formed a fortuitous alternative to the Dutch maps which designated the whole of the south land -- New Holland. Here was a map, originally submitted by a non-British entity, which clearly showed the land east of the meridian (approximating the 135 degree east Greenwich longitude) to be named other than New Holland. Watkin Tench in his "A narrative of the Expedition to Botany Bay" in reference to this demarcation *"It may be fairly assumed that every source of future litigation between the Dutch and us will be forever cut off as the discoveries of English navigators only are comprised in this territory."* He was referring to the country east of the longitude 135 degrees east.

Tench was not entirely correct as the territory east of the said meridian as it relates to the north of New Holland was the subject of Dutch exploration and charting from Arnhem Land to Cape York, including all of the Gulf of Carpentaria. Nevertheless the British government

must have bargained that the Dutch would not litigate over a territory that they themselves found to be inhospitable both from the point of view of sustainability and its inhabitants.

After the American War of Independence, Britain's transport of convicts to work the cotton fields and other labour intensive work projects in America was terminated by their former colonists. No more British convicts to the America's soon became the American policy and Britain was left with a dilemma. After turning down several suggestions to establish penal settlements in Africa, it wasn't long before the new colony of New South Wales became of interest in resolving the problems of the subsequent overcrowding of Her Majesty's prisons and prison hulks anchored throughout convenient ports around the country.

Cook's proclamation must have left some doubt and concern in the British hierarchy as to the actual land claimed, more particularly in its western definition and to what may have been missed to the south of Point Hicks. However his orders from a government not knowing what the discovery might uncover were to take possession at locations that may be appropriate and with the sanction of the indigenous population, or if not inhabited, to take possession under terra nullius. In taking possession at Possession Island Cook refers to previous possession claims along the coast. "*Notwithstanding I had in the Name of his Majesty taken possession of several places upon this coast I now once more hoisted English Coulers and in the Name of His Majesty King George the Third -----*" Like his home government, Cook was in the same situation of not knowing what lay ahead and on seeing that Cape York did not join with New Guinea as per the Blaeu/Thevenot map, and that Torres was correct, decided to take possession of the whole east coast as far as he had charted it.

It would be another seventeen years before the possession proclamation was to be consolidated by way of British settlement on the claimed area. Before we come to the myth of *terra nullius*, we must look to the next possession claim proclamation for Australia, for as per conditions of the Doctrine of Discovery covered below, it may well have been decided by the other contributors to the Doctrine, that seventeen years was too long a period from discovery to consolidation of the discovery by establishing a fort or settlement. (See element 2 of the Doctrine below) Apart from that, the concerns mentioned above as to western boundary definition and further southern acquisition had to be met.

Having decided that New South Wales was to be the recipient of transportation of convicts, Captain Phillip on arrival with the first fleet containing convicts and soldiers was given orders that on arrival he was to take possession of the land once again with the above concern criteria catered for. However whereas Cook was given specific instructions, heavily influenced by the Royal Society, to treat the natives with dignity and respect, Phillip's 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.

The change in attitude may be attributed somewhat to the differing circumstances of the two expeditions. Cook was on a voyage of discovery and could sail away from confrontation at his discretion. Phillip was on a mission of designated settlement, under a large fleet and with responsibility of the health, safety, sustenance and protection of a large number of people. It was also a journey that for most was a one way ticket. The indigenous people had to move over or take the consequences and Aborigines looked upon it, as no less than invasion.

Phillip's proclamation, like Cook's, does not mention terra nullius. However to satisfy the concerns mentioned above, the proclamation dealt with the east coast in like manner to Cook, modified to take in Islands between the renewed latitudes, however the west alignment was taken as the degree of longitude 135 east of Greenwich therefore coinciding approximately with the western boundary of the 1606 claim by Pedro Fernandez de Quiros, in the name of god and to the gain of Spain and as displayed by the Thevenot line of demarcation separating New Holland from Terra Australis.

File:Thevenot - Hollandia Nova detecta 1644.png

From Wikipedia, the free encyclopedia



In the southern demarcation, the latitude of 43 degrees 49 minutes south was adopted to cover to the south of South Cape and encompass all of Tasmania which at that time was considered as part of the mainland. In the north, Cook's latitude of 10 degrees 30 minutes south was modified to 10 degrees 37 minutes south and why, becomes a puzzle. Maybe it was to eliminate any of the islands that such first latitude may have included that were the subject of the Dutch navigations. It is of interest to see that Cook, in his journal, referred to the east coast as that of New Holland, rather than a coast of Terre Australis as per Thevenot's map.

In the non Christian world, as Europeans called mostly all outside the settled areas of the European domains, various arguments arose from time to time as to the definition of discovery and the subsequent procedures that established consolidation of discovery of lands by occupation thereof. Following on the Papal Bull of Pope Nicholas v of January 1455, sanctifying the seizure of non Christian lands and encouraging the enslavement of the natives, Pope Alexander the VI, issued a further Bull in 1493 dividing the new world up between the Portuguese and the Spanish and called for the subjugation of the indigenous people so as to advance the Christian Empire and its doctrines. However other nations subsequently formed a common European agreement that was called, **The Doctrine of Discovery**. It is perhaps fitting to include the elements of the doctrine here as it refers both to discovery and treatment of indigenous peoples as occupants of the discovered lands and the aspect of terra nullius, if not occupied.

Perhaps we should then look to the doctrine provisions as outlined by Professor Robert J Miller of the Lewis and Clark Law School, Portland, Oregon. Miller identifies ten elements of the Doctrine of Discovery which afford justification and authority to Discovery rights, through from terra nullius in its rightful terminology, to invasion and conquest. These elements provided justification and authority to European nations bent on their utilisation, in staking legal claims to lands and property rights of the indigenous peoples. Its origins were based upon European and American religious, cultural and racial ideas of superiority over non- Euro-American peoples. It contained provisions that, for example, enabled claimants to obviate the true meaning of terra nullius but at the same time effectively use the phrase in wording the reasons for their claim. In general the provisions were born out of greed and arrogance.

From Miller's book --*Native America, Discovered And Conquered*: Although the book is aimed at the American scenario, the Doctrine was not confined to America but was universally available and applied where applicable. The reasoning behind Australia's possession by the British, may well find it's accountability, partly sanctioned under the Doctrine, but also partly in violation of its elements.

- 1 **First Discovery** The first European country to "discover" new lands unknown to other Europeans gained property and sovereign rights over the lands. First discovery alone without a taking of physical possession, was often considered to create a claim of title to the newly found lands but it was usually considered to be only an incomplete title.
- 2 **Actual occupancy and current possession.** To turn a "first discovery" claim into a complete title, a European country had to actually occupy and possess the newly found lands. This was usually done by building forts or settlements and leaving soldiers or settlers on the land. This physical possession had to be accomplished within a reasonable amount of time after the first discovery to create a complete title.
- 3 **Pre-emption/European title** The discovering European country gained the power of pre-emption, that is, the sole right to buy the land from the native people. This is a valuable property right similar to an exclusive option on land. The government that held the Discovery power of pre-emption prevented or pre-empted any other European or American government or individual from buying the land from the native owners.
- 4 **Indian Title** After first discovery, Indian Nations were considered by European and American legal systems to have lost the full property rights and ownership of their lands. They only retained rights to occupy and use their lands. Nevertheless these rights could last forever if the native people never consented to sell. But if they did choose to sell, they could only sell to the government that held the power of pre-emption over their lands. Thus Indian title was and is today, a limited ownership right.
- 5 **Tribal Limited sovereign and commercial rights** After first discovery, Indian nations and native peoples were also considered to have lost some of their inherent sovereign powers and the rights of free trade and international diplomatic relations. Thereafter, they could only deal with the Euro American government that had first discovered them.
- 6 **Contiguity** This element provided that Europeans had a claim to a significant amount of land contiguous to and surrounding their actual settlements in the New World. Contiguity became very important when different European countries had settlements somewhat close together. In that situation, each country held rights over the unoccupied lands between their settlements to a point halfway between their actual settlements. Moreover contiguity held that the discovery of the mouth of a river gave the discovering country a claim over all the lands drained by that river; even if that was thousands of miles of territory. Notice the shapes of the Louisiana

Territory and the Oregon Country: They are the drainage systems of the Mississippi and Columbia Rivers.

- 7 **Terra Nullius** This phrase literally means a land or earth that is null or void or empty. This element stated that if lands were not possessed or occupied by any person or nation, or even if they were occupied by non-Europeans but were not being used in a fashion that European legal and property systems approved then the lands were considered to be empty and available for discovery claims. Europeans and Americans were very liberal in applying this element. Euro- Americans often considered lands that were actually owned, occupied and actively being utilised by indigenous people to be vacant and available for discovery claims because they were not being “properly used” according to Euro- American law and culture.
- 8 **Christianity** Religion was a significant aspect of the Doctrine of Discovery and of Manifest Destiny. Under discovery, non- Christian people were not deemed to have the same rights to land sovereignty and self determination as Christians.
- 9 **Civilization** The Euro - American definition of civilization was an important part of Discovery and of ideas of superiority. Euro–Americans thought that God had directed them to bring civilized ways and education and religion to indigenous people and to exercise paternalism and guardianship powers over them.
- 10 **Conquest** This element has two meanings as described in the US Supreme Court case *Johnson v M’Intosh*. The Court defined it first as a means to acquire Indian title by military victories in just and necessary wars. But conquest was also used as a term of art” under discovery to describe the property rights Europeans gained automatically over Indian Nations just by showing up and making a “first discovery.”

It will be noticed that Miller makes reference to Manifest Destiny in element 8 above. After Britain had used the discovery doctrine in the settlement of America, at least in the eastern provinces, the subsequent expansion by the American settlers after the War of Independence against Britain was to lands that had already been discovered. Manifest Destiny, according to Miller, arose out of the Discovery Doctrine and gave sanction to the belief by Americans that they had divine right to the territories of Mexico, such as Texas and California and to negate the claim by Britain over Oregon. Thus Euro-Americans expanded to the Pacific and in the process swept the Indian nations from their traditional lands.

Terra Nullius

During his journey and at several landings along the east coast, Cook sighted several groups of indigenous people. His very few instances of excursions inland were however only of a very limited distance (a few miles) within the coastal zone. Certainly it would have given him **no** idea of the population inland and his estimates of the coastal population (as merely a few coastal dwellers dependent upon the coastal fringe for sustainability), was reckoned only on those he had observed.

A great many more, wary of this huge *canoe with sails* and strange men with white faces and dressed in hot sweaty clothing, may have witnessed his arrival from obscurity, than Cook had the opportunity to observe. Cook frequently makes reference to the many *smooks* (smoke from Aboriginal fires) he observed along the east coast and the Islands within the Torres Strait and although Cook does not mention possession due to terra nullius, and could under no circumstances have declared terra nullius in its true meaning, he does dwell enough on the paucity of the apparent inhabitants which may have contributed to and influenced the later adoption of terra nullius.

Sir Joseph Banks, accompanying Cook, lent even more argument to the later persuasion that terra nullius was relevant, by incredulously stating that there would be no inland occupation as the natives existed only on coastal fish and shell fish etc and that even so the coastal natives were very few and nomadic in nature.

Any claim to new discovery where the lands were in fact the subject of terra nullius, that is vacant or unoccupied, the claim over such lands was relatively straight forward. With suitable establishment of a fort, village or town to consolidate the possession claim, the land was there for the taking and the Doctrine of Discovery principles were there for other European nations to accept the discovery nation's possession.

However no matter how much Cook and Banks' reckoning may have downgraded the true population of the east coast and hinterland natives, the term terra nullius in the **true sense** of the word, could not have applied to New Holland and both learned gentlemen would have been well aware of that.

So we must go to the provisions of the Doctrine to further understand the procedures that would have been acceptable at the time. Cook obviously took possession under the rights of discovery. However the doctrine as well as the advice from the Royal Society and the Government of the day was to have the acquiescence of the natives to establish a fort or settlement on their land that would consolidate the claim under elements 1 and 2 of the Doctrine mentioned above. Both the absence of native sanction to a settlement and sale of land by the natives to the British, would cast doubt on the validity of Cook's claim as it was not only counter to the Doctrine but also to the instructions of both his co-sponsors of his journey, The Royal Society and the Government of the day.

However Cook, as stated in the log, could not make viable contact with the natives except to receive actions and gestures that they were emphatically **not** entertaining of strangers infringing on their land. There was certainly no welcome mat. Not able to converse either because of the above hostility or if so, due to the language barrier, Cook had no opportunity to consult with the natives as to negotiate permission for future settlements on their land or even part of their land.

For Cook then, fulfilment of that part of his orders was unsuccessful. Such inability to make meaningful contact also negated the 4th element of the Doctrine, that of purchasing the land for settlement. Cook took all sorts of trinkets etc to extend his greetings to the natives and even left them in their recently vacated gunyas. But the Aborigines saw nothing to benefit them from such objects and left them untouched. Material things interested them not and Cook must have wondered by what means he could possibly transact sale of land even if they were willing to sell.

The failure of amenable contact to discuss the above elements meant that consideration of the remainder of the elements of the Doctrine were then not applicable and Cook sailed on to leave such negotiations to another day, or to someone else. It was to take seventeen years before that someone else arrived on the scene.

As commander of the first fleet bringing the first convicts to Australia, Captain Arthur Phillip arrived in Botany Bay to establish a penal settlement there, based largely on the favourable advice of Cook's report and that of Banks'. However the Bay, although investigated relatively thoroughly, proved unsuitable for a site of what was contemplated to become a large prison establishment. Additionally during easterly wind, rollers entered into the bay causing anchorage problems. In the main the soil was mostly sandy and fresh water limited.

Phillip then sailed north to investigate an entrance that Cook had named Port Jackson but into which he had not sailed. To Phillip's delight he came across one of the best and most beautiful harbours in the world and his investigation led him to a deep water cove fed by a significant fresh water spring. He named the cove after the Home Secretary, Lord Sydney, (who had selected him as the first Governor of New South Wales) and returned to Botany Bay to lead the rest of the fleet into this magnificent natural harbour.

On landing on the 26th January 1788, Phillip raised the flag and with those with him at the time, drank to the health of King George the Third, no doubt in thanksgiving that the journey was successfully completed. The proclamation of possession however was not put into effect until the 7th of February, when practically the whole complement of the fleet was present.

The British government, used occupation under terra nullius to resolve subsequent disputes relating to land issues. There were some who asserted that terra nullius implied that unoccupied land was not the only meaning of the phrase and that it could also be interpreted as an absence of civilised society. This philosophy of course fell into the hands of the European society who looked upon most non-European societies as inferior and in some cases bordering on barbarism.

Of course the same states comprising the European nations had only just raised themselves above the practice of barbaric actions such as beheading and displaying the bloody head upon a pike in public space for all to see and lament or cheer. Or in the case of such scientific minds, daring to say that the sun and stars did **not** revolve around the earth, thus labelled heretics and suffered the absolute indignity, pain and torture, of being hung, drawn and quartered, before death came as a merciful end, hopefully for the victim, sooner rather than later.

In the instance of the Aborigines one has not detected such punishment other than banishment from the tribe, or a spear through the leg to remind the offender that the probable limp he developed was because of his serious violation of clan rules.

Nevertheless the British establishment of the time elected to run with terra nullius. It was of course obvious that the country was occupied and therefore we must look at British reasons for maintaining the terra nullius argument justifying occupation. From element 7 of the Discovery Doctrine above:

- (a) This element stated that if lands were not possessed or occupied by any person or nation, or even if they were occupied by non-Europeans but were not being used in a fashion that European legal and property systems approved then the lands were considered to be empty and available for discovery claims
- (b) Europeans and Americans were very liberal in applying this element. Euro-Americans often considered lands that were actually owned, occupied and actively being utilised by indigenous people to be vacant and available for discovery claims because they were not being “properly used” according to Euro- American law and culture.

In Europe the invention of the plough, saw fields utilised to grow produce that required protection from people and grazing animals and so fences came into being. Land became the property of sole persons or families and so the nomadic grazing of cattle over large land forms with collective rights to grazing became more and more limited. It heralded the individual ownership of land and individual title thereto. The British deemed the activities of Aborigines over their lands were not in accord with the European law and culture. Accordingly the lands were not deemed as being properly used and therefore the Aborigines were not entitled to land claims. To their assessment, terra nullius was relevant.

In keeping with the element 4 of the protocols of the Doctrine of Discovery however, no effort, under either possession proclamation, was made to purchase land from the Aborigines. Cook had explained away that opportunity as far as he was concerned as finding suitable contact with the natives impossible. It must be remembered however that Cooks visitation was limited in time and not being therefore in a position to get to understand the Aborigine culture and land use laws which prevailed.

By the time of Phillip it would appear that the option of terra nullius could have been decided upon under the terms of (a) and (b) above, however no attempts at purchasing land as the British and other European nations had done for two centuries prior in America, and (after Phillip) the British in New Zealand as well. Based upon both Cooks and Banks' reports that the occupants were few and far between, and bore no evidence of civilisation acceptable to Europeans, the British, by the time of Phillip, saw no compulsion to purchase their lands.

Under the terms of the Doctrine the occupation, although elements 7,8 and 9, were probably attitudinally relevant, it is the second part of element 10 of the Doctrine (c below) that is probably more applicable to Phillip's proclamation as far as Australia is concerned. Even so, as victors, Britain had the responsibility of respecting the rights of Aboriginal people.

- (c) **Conquest** This element has two meanings as described in the US Supreme Court case *Johnson v M'Intosh*. The Court defined it first as a means to acquire Indian title by military victories in just and necessary wars. But conquest was also used as a "term of art" under discovery to describe the property rights Europeans gained automatically over Indian Nations just by showing up and making a "first discovery."

Whether terra nullius was viable under element 10 above is debatable, however terra nullius ruled as justification for occupation of Australia until 1827, when the first test to the notion of terra nullius occurred and was followed by other court cases throwing doubts on government and settlers alike on the viability of their land tenures under terra nullius.

It was in this environment that John Batman decided to form a treaty with the Dutigulla tribe to buy land at the present site of Melbourne. He called the treaty the *Batman Treaty* and called the area after himself – *Batmania*. Batman had a history in Tasmania of killing a great many native Tasmanians to the extent that the Governor of Tasmania, George Arthur, observed of Batman "*He has much slaughter to account for.*"

However Governor Bourke opined that the crown was the rightful owner of the land - not the Aborigines, thus nullifying any agreement. His proclamation of the 10th of October 1835 confirmed the British occupation under terra nullius and further declared that all people found occupying land without the authority of government would be considered legal trespassers.

It also stated that the land belonged to no one before the British crown took possession. Aborigines under this proclamation could not sell or assign the land and likewise no person could acquire it other than through the Crown. So there it was – terra nullius out in the open and reinforcing the notion that nobody owned the land before British possession and that British possession was based upon terra nullius. As mentioned beforehand terra nullius could arguably be arrived at through the elements mentioned above even though the land was occupied. Definition of which element and why was not countenanced by Governor Bourke.

Aborigines demonstrated their affinity with the land in sustainability, cultural and spiritual terms in like manner to other indigenous people outside the "advanced" nations of Europe more so than those within. But affinity to the land was not recognised by Europeans because it did not conform with the manner and procedure of land ownership recording in Europe.

Map No 7 below, originates from the Australian Institute of Aboriginal and Torres Strait Islander Studies. Some further debate precludes it from being comprehensively exact, however the divisions shown are language divisions only. Within these boundaries lie tribal boundaries and within them, extended family or clan boundaries leading to a very complex web of occupation.

The tribal and clan boundaries were strictly controlled in terms of boundary limits and although not fenced, committed to paper in deeds, or written agreement, each tribe and clan knew exactly where their boundaries lay. In other words that designated area was the clan's title to land within recognised boundaries, and for others to trespass within another clan's designated area was strictly taboo. Further the land was passed down from one generation to another. An unwritten, but recognised and guaranteed family or clan inheritance. However all of a sudden, their lands became the subject of laws of another country that was oblivious, at the time, of both the distribution of land entitlement of each clan under tribal law, as well as the duration over thousands of years of such entitlement.

Even in spiritual concept the land featured significantly. Aboriginal myths such as the indentations of serpents travelling over the land forming the rivers and many, many other stories in mythology featuring prominent mountains, rivers and significant land forms remain in Aboriginal mythology, passed down to the present day.

The Bourke proclamation and its principles was to remain in vogue for 142 years before it was again challenged in 1982. The resultant High Court Case, which became known as the Eddie Mabo Case, lasting 10 years (until completion in 1992) was instrumental in rejecting terra nullius. The Eddie Mabo Case saw the High Court of Australia agree on the following points as summarised by the Wikipedia encyclopedia.

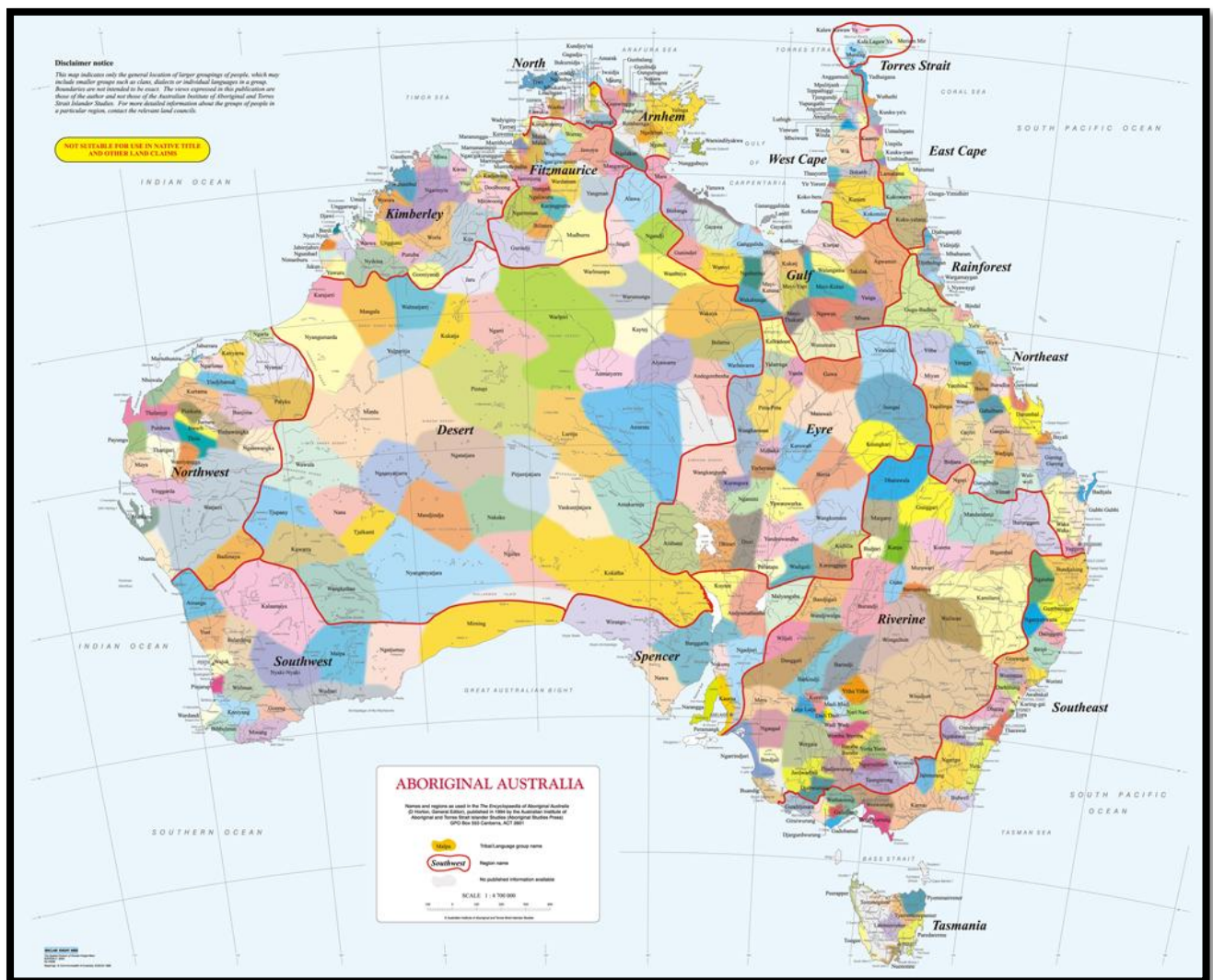
([http://en.wikipedia.org/wiki/Mabo_v_Queensland_\(No_2\)](http://en.wikipedia.org/wiki/Mabo_v_Queensland_(No_2)).)

The decision

Five judgments were delivered in the High Court, by (1) Justice Brennan, (2) Justice Deane and Justice Gaudron, (3) Justice Toohey, (4) Justice Dawson, and (5) Chief Justice Mason and Justice McHugh.

The decision was based on the findings of fact made by Justice Moynihan of the Supreme Court of Queensland: that the Murray Islanders had a strong sense of relationship to the islands and regarded the land as theirs. All of the judges, except Justice Dawson, agreed that:

- there was a concept of native title at common law;
- the source of native title was the traditional connection to or occupation of the land;
- the nature and content of native title was determined by the character of the connection or occupation under traditional laws or customs; and
- native title could be extinguished by the valid exercise of governmental powers provided a clear and plain intention to do so was manifest.
- **Rejection of *terra nullius*:** The decision recognised that the indigenous population had a pre-existing system of law, which, along with all rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action. The Court purported to achieve all this without altering the traditional assumption that the Australian land mass was "settled". Instead, the rules for a "settled" colony were said to be assimilated to the rules for a "conquered" colony.
- **Repudiation of absolute beneficial title of all lands:** The majority in *Mabo* also rejected the proposition that immediately upon the acquisition of sovereignty, absolute beneficial ownership of all the lands of the Colony vested in the Crown. The majority rejected the traditional feudal development of the doctrine of tenure as inappropriate for Australia, and rather saw that upon acquisition of sovereignty the Crown acquired not an absolute but a radical title, and that title would be subject to native title rights where those rights had not been validly extinguished. Thus the court accepted that a modified doctrine of tenure operated in Australia, and that the law of tenure (as a product of the common law) could co-exist with the law of native title (as a product of customary laws and traditions), though where there had been a valid grant of fee simple by the Crown the latter title would be extinguished.
- **Fragmentation of proprietary interests:** Justice Toohey made the argument that common law possessory title could form the basis for native title claims by indigenous Australians. This has not subsequently been pursued.



Map Source: Australian Institute of Aboriginal and Torres Strait Islander Studies.

Aboriginal Australia --- Terra Nullius ???

This map indicates the general location of larger language groupings of people which may include smaller groups such as clans, dialects or individual languages in a group. Boundaries are not therefore comprehensively exact.

Sir Joseph Banks' prediction that no Aborigines would be found in the interior of the continent, because they only lived on fish and shellfish, but rather a few nomadic peoples along the coast line, may have influenced the British government's decision to declare Terra Nullius. However by the time of the declaration of terra nullius by Governor Bourke in 1835, Britain would have been aware that the Bank's statement was grossly incorrect.

The proclamation delivered an injustice to the Aboriginal nation that took over 200 years to legally reject Terra Nullius, albeit under certain conditions.

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