

The myth of terra nullius, examined in the spirit of nullius in verba

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first published: May 2021
under the title of "Re-imagining terra nullius"
revised: September 2021

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Ziggy Ramo: “I am just giving my truth”

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Gather round people and I'll tell you a story:
Two hundred years of history that's falsified,
British invaders we remember as heroes.
Are you ready to tell the other side?

We start the story in 1493
With a piece of paper called the doctrine of discovery
Invoked by Pope Alexander VI.
Without this good Christian, our story don't exist.

From little things big things grow
From little things big things grow

Captain James Cook, he boarded a fleet,
And he was armed with the doctrine of discovery.
The same tactics were used by Columbus.
It's how today Australia claims terra nullius.

And on that paper the pope did write,
“You are only human if you've been saved by Christ”.
And if there are no Christians in sight in sight
The land that you stumble on becomes your God-given right.

From little things big things grow
From little things big things grow

¹ written by Ziggy Ramo and Kev Carmody, inspired by “From little things big things grow” by Paul Kelly
<https://fb.watch/5TFokMtKV-/>

Introduction

Henry Reynolds has been described as one of the most influential historians in the world. He persuaded his friend Eddie Mabo to battle in the courts for the land rights of the Meriam people, and he provided specialist support for the case. Here is what he said about the term terra nullius:

“The term [terra nullius] was almost unknown in Australia because it did not seem to have any local relevance... The terms [territorium nullius and terra nullius] only became relevant – and entered circulation – when the question of Aboriginal land rights emerged in the 1960s. It made sense to refer only to ‘terra nullius’. And that is what Australian historians and jurists did, because it was a convenient term and none other existed.”²

According to Bain Attwood, a professor of History at Monash University:

... the contention that the British government claimed possession of much of this continent in 1770 or 1788 on the basis of the doctrine of terra nullius is anachronistic. Quite simply, there was neither a doctrine bearing this name nor any historical record of it being used by imperial powers in any systematic fashion until the mid to late nineteenth century.³

I have been unable to find any evidence of the use of the term terra nullius that predates 1885, and even then it appeared in an article published in the Adelaide Post about Bismarck’s Realpolitik.⁴

As we will see below, the term terra nullius is not only a relatively recent invention, but it is problematic in other ways as well. In the words of Indigenous Australian researcher, Eualeyai and Kamillaroi woman Larissa Behrandt:

While Australian history often describes the assertion of the authority of the British on the basis of terra nullius ... this oversimplifies the original interaction between the colonizing power and those being colonized.⁵

Many, if not most custodians of our history, however, have embraced the notion that terra nullius was, from the time of Cook’s first visit, our foundational myth, that is, the basis upon which sovereignty was claimed. According to an information sheet that was published on the National Library of Australia (NLA) website:

Terra nullius—meaning land belonging to no-one—was the legal concept used by the British government to justify the settlement of Australia. Focusing on the work of Bruce Pascoe, this theme explores evidence of Indigenous agriculture and settlement in pre-colonial Australia—information that challenges the *terra nullius* claim.⁶

A school syllabus sets the following tasks for students:

Using the words or the synonyms of the words from the Speed Dating activity, write a 1 page letter to Captain Cook outlining why he illegally claimed Australia under the law of Terra Nullius and denied Aboriginals native title.⁷

² Henry Reynolds, “A New Historical Landscape?” *The Monthly*, Books, May 2006, para 11
<https://www.themonthly.com.au/books-henry-reynolds-new-historical-landscape-responce-michael-connor039s-039the-invention-terra-nul#mtr>, accessed 24 August 2021

³ Bain Attwood, “On Possession Island”, *Inside Story* 4 August 2020, para 25
<https://insidestory.org.au/on-possession-island/>, accessed 24 August 2021

⁴ —, “Germany”, *South Australian Register*, 28 February 1885, p6, in Trove
(<https://trove.nla.gov.au/newspaper/article/44545993>, accessed 24 August 2021)

⁵ Robert J Miller et al., *Discovering Indigenous lands, the doctrine of discovery in the English colonies*, Oxford Publications, Oxford, 2010

⁶ —, “Challenging Terra Nullius”, *National Library of Australia*
<https://www.nla.gov.au/digital-classroom/senior-secondary/cook-and-pacific/cook-legend-and-legacy/challenging-terra>, accessed 7 September 2021

⁷ I have elected not to embarrass the school by identifying it.

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A private curriculum provider created the Grade 4 worksheet from which the following extract is taken?

1 Watch the BTN⁸ clip about Terra nullius

During his voyage along the East coast of Australia in 1770, Captain Cook saw and even met Aboriginal and Torres Strait Islander Peoples. In his journal, he commented that they seemed '*far more happier than we Europeans*'. Despite this, he still claimed that the land was Terra nullius, a land belonging to no one.⁹:

Here is what the presenter on the ABC *Behind the News* children's education program said:

In 1788 the British then employed the doctrine of terra nullius which means that nobody essentially lived in Australia when the British arrived, which we now know today as untrue.¹⁰

The common theme here then is that Cook and/or the British Government claimed Australia on the basis of terra nullius. And it is a theme that has been implanted in the popular consciousness with all the authority of some of our most venerable institutions.

There have been suggestions that the term terra nullius was used in Roman times, and that it relates to laws about wild creatures that are not owned by anybody. If so, this would loan credence to the mainstream view that the notion of terra nullius was employed by early explorers and settlers to justify colonisation because Roman law has informed the European legal system for two millennia. Despite its Latin appearance, however, there seems to be no evidence that terra nullius was a term in currency in ancient Rome either. Benton and Straumann opine:

... *terra nullius* was merely derived from the Roman concept of *res nullius* by analogy. It also turns out to be somewhat misleading to ... conflate either term with rationale for imperial claims based on *vacuum domicilium* (vacancy).¹¹

And later:

Debates have arisen among historians about whether the term should be used to characterize rationales for late eighteenth-century and early nineteenth-century for imperial expansion when the term itself was rarely—if ever—cited before the late nineteenth century.¹²

There have also been suggestions that Pope Urban II issued a papal bull called Terra Nullius in 1095 when he was rallying Catholic nations to recapture the Holy Land. However, no copies of this bull appear to have survived, and arguments that the claim is false are persuasive.¹³

All this begs the question: did the early explorers employ *concepts* underpinning terra nullius without actually employing the term terra nullius?

Lauren Behrandt thinks so:

The concept of terra nullius was employed in practice many years before it formally became part of the Australian legal system.¹⁴

⁸ ABC TV children's education program *Behind the News*

⁹ Again, I don't want to embarrass this organisation by identifying it. I emailed and asked what evidence they had that Cook used the words terra nullius. A director replied to me by email (26 February 2021), saying: "I believe we could tweak our wording to make it clear that James Cook himself did not actually state the words but as it says in the accompanying ABC video: 'The British employed the doctrine of Terra Nullius'... Thank you for your attention to detail".

¹⁰ —, "Native Title", *Behind the News*, ABC TV, 3 June 2014, cue at 1.50
<https://www.abc.net.au/btn/classroom/native-title/10528268>, accessed 24 August 2021

¹¹ Lauren Benton and Benjamin Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice", *American Society for legal History*, Vol 28 No 1, February 2010, p2
www.jstor.org/stable/40646121, accessed 25 August 2021

¹² *Ibid.*, p6

¹³ "Did Pope Urban II Issue the papal bull 'terra nullius' in 1095?", Stack Exchange blogsite, thread commenced September 2019
<https://history.stackexchange.com/questions/54121/did-pope-urban-ii-issue-the-papal-bull-terra-nullius-in-1095>, accessed 25 August 2021

¹⁴ Larrissa Behrandt, in Miller et al., 2010, op. cit., p232

Behrendt cites two legal opinions (or rulings) in 1819 and 1823, respectively, that clearly imply Australia was a “desert or uninhabited land” at the time of European settlement. As well as these two examples, Governor Bourke’s 1835 proclamation refers to “vacant land”, which I have argued elsewhere reads as “unallotted land”¹⁵. And finally, an 1889 Privy Council ruling referred to New South Wales in 1788 as “practically unoccupied without settled inhabitants”.¹⁶ David Hornby, an expert in property law, explains the implications of this Privy Council ruling in this way:

This distinction [settled colonies and land being desert and uncultivated] had originally been confirmed by the British Privy Council in *Cooper v Stuart* (1889) 14 App 286 at 291 where it was pointed out that NSW had been regarded as a ‘tract of territory, practically unoccupied, without settled inhabitants or settled land, at the time when it was peacefully annexed to the British dominions’. What this meant, of course, was that Aboriginal tribal law and land rights could be conveniently disregarded. Murphy J of the High Court had scant respect for the *settled colonies* theory.¹⁷

We will see below that these statements do carry weight. However, the earliest of all of them was made *half a century after* Cook arrived, and three decades *after* the First Fleet arrived, even though there is little doubt, as Behrendt implies, that they reflected an earlier mindset, at least on the part of some settlers and officials.

What is quite clear is that there is no sense of terra nullius in Cook’s log on 22 August — the day that he claimed possession of New South Wales for Britain on “Possession Island” in the Torres Strait (known as Bedanug by its traditional owners, the Kaurareg people). His log entry that day reads:

... before and after we ~~landed~~ Anchor’d we saw a number of People upon this Island arm’d in the same — manner as all the others we have seen except one man who had a bow and a bundle of Arrows the first we have seen on this coast. from the appearance of these People we expected they would have opposed our landing but as we approached the Shore they all made off and left us in peaceable possession of as much of the Island as served our purpose... Having satisfied myself of the great Probability of a Passage, thro’ which I intend going with the Ship and therefor 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 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 took possession 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 Ship¹⁸

I have found no evidence that Cook ever used the term terra nullius, nor that he used related terms like “uninhabited lands”, either in connection with Australia or other inhabited places that he visited.

As well as the problem with the apparently late nineteenth origins of the term terra nullius and the post-modern reinvention of it, there is also a problem with a common assumption that invasion, massacres, genocide, blatant racism, exploitation and the like *prove* that terra nullius was our foundational myth.

They do not.

Great evils happened in conquered regions where there was no question of terra nullius, such as within Britain itself.

The danger here appears to be clutching at whatever pieces of “evidence” we can find in order to convince others of the outrageous and hypocritical wickedness of colonialism,¹⁹ which is a very Manichaeian way to view our history. The so-called Flora and Fauna Act is another such example.

¹⁵ Robbo Bennetts, “History Establishment is on terra infirma”, Wipeout Publications, April 2021 www.wipeout.com.au/the-colonisation-of-australia/history-establishment-on-terra-firma.html, accessed 25 August 2021

¹⁶ Garth Nettheim, “Cooper v Stuart”, webpage, in *Mabo the native title revolution* <https://www.mabonativetitle.com/info/cooperVsStuart.htm>, accessed 25 August 2021

¹⁷ David Hornby, “Terra Nullius and the Settled Colonies Theory”, *Handbook of Real Estate, Property and Evaluation*, Cavrep <http://cavrep.com.au/T/TERRANULLIUS.html>, accessed 25 August 2021

¹⁸ James Cook, journal entry, 22 August 1770, Cook’s Journal, August 1770, *National Museum of Australia*

<https://www.nma.gov.au/exhibitions/endeavour-voyage/cooks-journal/august-1770>, accessed 25 August 2021

¹⁹ This has a corollary in the discredited claim that Aboriginal people were treated as less than human in the “Flora and Fauna Act”.

What I aim to demonstrate in this article is **that the doctrines of discovery and terra nullius were both myths, but only one of them was the foundational myth of “modern Australia”**.

Dispossession

Whatever justification was used to settle Australia nothing alters the fact that the land was stolen from its traditional owners. As Henry Reynolds points out:

The distinctive feature of Australian settlement was that the British recognised neither Aboriginal sovereignty nor land ownership ...²⁰

Aboriginal Australians had prior ownership. They were entitled to life, liberty, and property.

Hypothetically, the British could have traded without subjugating the nations they traded with; they could have sought consent to set up trading posts. They could have reformed their own legal system which saw thousands of convicts crammed into prison hulks on the Thames for decades and/or dumped on penal colonies in distant countries.

Australia was taken by force. On one frontier after another, this force was either brute force or implied, sanctioned or unsanctioned, pre-emptive or retaliatory, covert or overt, blatantly racist or paternalistic. Of course not all colonists were inhumane or impervious to the suffering of Indigenous Australians. Quantifying the ratio of settlers who inflicted pain, who were indifferent to pain, who tried to make amends, or a combination of the above, would be a complex and separate study in its own right, one which would not loan itself to reductionist conclusions.

Australia was invaded. But it was no classical military invasion. It took Hannibal only 16 days to walk his elephants from Iberia across the Alps into Italy. But it took the First Fleet 16 times as long to complete *three* ocean crossings before arriving at Botany Bay. When Xerxes invaded Greece, he is believed to have had an army of one million men under his command. Only 245 marines arrived with the First Fleet, and their primary role was to guard the often recalcitrant convicts who outnumbered them three to one.

Most of the problems faced by the early European settlers have been well-documented. Key amongst these was famine:

Within two years of settlement the colony faced the prospect of famine and starvation on land that had supported Aboriginal communities for thousands of years.²¹

The first wave of invaders was followed two and a half years later by a second, smaller wave. Of the six Second Fleet vessels that departed the “Mother Country”, only five arrived in NSW. One — the escort ship — had been struck by an iceberg and was eventually shipwrecked. The company which owned three of the ships in this fleet — Camden, Calvert & King — also transported slaves across the Atlantic. And as in the case of the trans-Atlantic slave trade, these private contractors were paid for the human cargo loaded onto their ships, not the human cargo that was unloaded. Consequently, 40% of the convicts on the Second Fleet died *en route* to the Antipodes. Donald Trail, the sea captain who commanded the Neptune, was characterised as “a perfect sea-monster” by passenger, Elizabeth Macarthur.²²

²⁰ Henry Reynolds, *op. cit.*, para 10
<https://www.themonthly.com.au/books-henry-reynolds-new-historical-landscape-responce-michael-connor039s-039the-invention-terra-nul>, accessed 25 August 2021

²¹ Jacqui Newling, “Phillip’s Table Food in the early Sydney settlement”, section: Facing famine, *The Dictionary of Sydney*, 2018
https://dictionaryofsydney.org/entry/phillips_table_food_in_the_early_sydney_settlement, accessed 27 August 2021

²² Elizabeth Macarthur, letter to her mother dated 20 April 1790 in *Some Early Records of the Macarthurs of Camden*, edited by Sibella Macarthur Onslow (Sydney: Angus & Robertson, 1914), 17, cited in Penny Edwell, “Neptune”, *The Dictionary of Sydney*, 2016, para 4

<http://dictionaryofsydney.org/entry/neptune>, accessed 27 August 2021

This is how the Reverend Richard Johnson described disembarkation of the “reinforcements” from the Second Fleet at Port Jackson:

I beheld a sight truly shocking to the feelings of humanity, a great number of them laying, some half, others nearly quite naked, without either bed or bedding, unable to turn or help themselves.

Spoke to them as I passed along, but the smell was so offensive that I could scarcely bear it.... The landing of these people was truly affecting and shocking; great numbers were not able to walk, nor to move hand or foot; such were slung over the ship side in the same manner as they would a cask, a box, or anything of that nature.

Upon their being brought up to the open air some fainted, some died upon deck, and others in the boat before they reached the shore. Some crept upon their hands and knees, and some were carried upon the backs of others.²³

So the invasion began ingloriously. Yet somehow the invaders managed to survive, and the boats kept coming.

Despite the difficulty that the colonists experienced in coming to terms with such an alien land, and despite the sustained Indigenous resistance to colonialism, occupation of Australia was ultimately guaranteed by both the weight of numbers of the new arrivals, by their germs and by their technology.

Most of those who made the perilous voyage to Australia, of course, came involuntarily. Many were transported for trifling offences. Others were political prisoners:

at least 300 and probably more than 600 United Irishmen were transported to the infant thief colony for their part in the disastrous rebellion of 1798.²⁴

Among these Irish rebels was Philip Cunningham, a leader of the 1804 Castle Hill Rebellion. Irish nationalism was in fact evident throughout nineteenth century Australia, most significantly in events like the Eureka Stockade and the Kelly Outbreak.

Convicts were sometimes either enticed or pressed into participating in actions against Aboriginal people, such as during the infamous Black Line in Tasmania. Some, perhaps many convicts in the early days of settlement were prone to make trouble for Aboriginal people, and often became victims of swift reprisal. Others — typically runaways like William Buckley — lived among Aboriginal people. A few even fought alongside Aboriginal warriors against the Redcoats.²⁵

No doubt many settlers were terrified of “wild blacks”, but their terror would have paled in significance compared to the terror felt by the old Aboriginal men and the women and children when they heard the sound of hooves thundering into their camp at the break of day.

Black Resistance

Australia is said to be the only country not to have signed a treaty with its Indigenous inhabitants. It seems that treaties were more likely to be made when the Indigenous inhabitants were perceived to be politically and militarily formidable. There was certainly brave resistance to invasion in Australia. Those resisting, though, were at a serious disadvantage. Mobile clan groups had to both avoid lighting visible fires and spend time every day foraging or stealing food. In many cases they fought against professional soldiers or well-armed civilians who often had military experience. Aboriginal people were not just fighting an enemy they could see, but they were also fighting the ravages of deadly diseases which sometimes killed them before they even laid eyes on a white man.

²³ LJ Charleston, “Australia’s tragic beginnings: The grotesque story of The Second fleet”, *News Limited* website, 3 December 2018 <https://www.news.com.au/national/nsw-act/news/australias-tragic-beginnings-the-grotesque-story-of-the-second-fleet/news-story/0ad2523ddc1053ebab3d54c636ecd9ee>, accessed 27 August 2021

²⁴ Andrew Moore, “Phil Cunningham: A Forgotten Irish-Australian Rebel”, text of a presentation delivered at *Remembering Vinegar Hill* seminar, Blacktown City Council, Sydney, 7 March 2004. <https://www.labourhistory.org.au/hummer/vol-4-no-2/cunningham/>, accessed 27 August 2021

²⁵ Fergus Robinson and Barry York, *Black Resistance*, Widescope International, Melbourne, 1977, p130

I am immensely proud of my contribution of a chapter to *Black Resistance*²⁶, a symposium edited by Fergus Robison and Barry York, and published in 1977. As far as I know, it was the first history published in Australia that focused exclusively on massacres and resistance to colonisation around Australia. In his preface to *Black Resistance*, Humphrey McQueen talked about the way that the old history “where Aborigines were put aside” was being re-written. He stated:

This book, much more than the dozens of other contributions to the re-evaluation of Aboriginal history which have appeared since C. D. Rowley's *The Destruction of Aboriginal Society* in 1970, is the direct consequence of altered political facts.²⁷

By altered political facts, McQueen specified the Black Power movement in the US, decolonisation in Africa and a renewed upsurge of the Aboriginal struggle here. The collective of radical young La Trobe University History graduates who contributed to *Black Resistance* all fought on the streets against social injustice. We reached out to the Australian Black Panther Party, and we marched against colonialism. Some students were jailed for their political activities, and many were bashed by police, but our actions have since been fully vindicated by present-day understandings of the local and world events of those heady days.

Black Resistance demonstrates that Aboriginal people did not acquiesce to dispossession. They did not simply vanish. They were not assimilated. They have continued their struggle against colonialism and its legacy until the present day. It appears to be generally, if not universally accepted now that sustained resistance has taken place in Australia, so there is little need to re-make the case again here.

Resistance took many forms, ranging from continuing to speak language and practise culture, armed resistance, passive resistance, walk-outs, petitions, delegations, protest music and art, formation of Indigenous organisations, and public demonstrations. Armed resistance began on the shifting frontiers soon after settlement. In Tasmania, a war of resistance raged for three decades after the establishment of British settlements at Hobart and Launceston. A hundred years later, in Arnhem Land, anthropologist Donald Thomson played a decisive role in averting the shedding of blood the early 1930s.²⁸

Some tribes had a reputation for ferocity, such as the Kalkadoons in the Queensland Gulf Country. Some Aboriginal leaders achieved great fame/notoriety, such as Pemulwuy in the first decades of the settlement of NSW and Jandamurra in the Kimberley in the 1890s. Their feats were comparable to those of the Kellys. Aboriginal people fought courageously and resourcefully, as illustrated by an account of Aboriginal women and children running between the legs of the squatter's horses to retrieve their warrior's spears during a battle in north-eastern Victoria in the very early days of settlement there.²⁹

Sustained armed resistance suggests that there was a war, or really series of wars, and therefore that Australia was invaded, not peacefully occupied. However, just like questions to do with population density and Aboriginal economies, the nature and degree of resistance makes no difference at all to the moral or legal dimensions of British colonisation of Australia.

²⁶ Robbo Bennetts, “Tasmania”, chapter in Robison & York, op. cit. <https://www.wipeout.com.au/articles-images/history/2-uncategorised/174-the-black-resistance-chapter-3-tasmania-1977.html>, accessed 27 August 2021

²⁷ Robison & York, op. cit., first page of Preface.

²⁸ Howard Morphy, “Thomson, Donald Finlay Fergusson (1901–1970)”, *Australian Dictionary of Biography*, National Centre of Biography, ANU, 2006

<https://adb.anu.edu.au/biography/thomson-donald-finlay-fergusson-11851>, accessed 27 August 2021

²⁹ George Faithfull, letter to Victorian Governor La Trobe, dated 8 September 1853, quoted in Thomas Francis Bride (ed) *Letters from Victorian Pioneers*, Heinemann, Melbourne, 1969

The popular definitions of terra nullius

The definitions of terra nullius that seem to be in greatest currency are that Australia was claimed as:

- 1 an empty, uninhabited land, which interprets the term terra nullius literally;
- 2 a sparsely inhabited land, which interprets the term terra nullius liberally; and
- 3 a land in its “natural” state, that is, land not farmed or otherwise modified, managed or “improved”.

Given the nature of these definitions, it seems worth considering what early explorers and settlers actually believed about Aboriginal population densities and economies. Let’s examine the issue of population density first. The literal definition seems to be the definition that is most accepted by the public in general and activists in particular. In the words of Luke Pearson from IndigenousX, for example:

As Terra Nullius translates into ‘land belonging to no one’ it is effectively a debate about whether Indigenous people existed before 1788, and whether what happened to Indigenous people during and after 1788 actually matters... or not.³⁰

It is also the easiest version to disprove, given there is no evidence that early explorers or settlers ever claimed Australia was uninhabited when they arrived.

The historical record suggests that Aboriginal people were as likely to stay out of view as reveal themselves. For example, Tasman and his men did not encounter Aboriginal people in Tasmania. When they found steps cut into giant trees, they assumed that the distance between the steps indicated that the steps were cut by giants.

Women and children understandably were even less likely to reveal themselves than were the men. Moreover, for various reasons, no early explorers or settlers ventured very far inland, therefore their estimates of population densities were often based on observations of fires along the coast or deserted huts that they found. Banks speculated about the population density of the hinterland:

The number of inhabitants in this country appears to be very small in proportion to its extent. We never saw so many as thirty of them together but once, and that was at Botany Bay ... there is an immense tract of country wholly unexplored; but there is great reason to believe that this immense tract is either wholly desolate, or at least still more thinly inhabited than the parts we visited.³¹

Population densities were higher in coastal areas than they were in the more arid parts of the continent. Recent research suggests that the ancestors of Aboriginal Australians had colonised the whole continent within 5,000 years of their arrival. According to the researchers’ computer modelling, the population of what is now the Australian continent was as high as 3,000,000 people when the Europeans arrived.³² (This is much higher than any other estimate I have seen.)

The authors of this research estimated that the population density of Australia before 1788 was **34 people per 100km²**. By way of contrast, in 1801, the population of the British Isles was 16 million. The

³⁰ Luke Pearson, “The Changes to the National Curriculum have Nothing to do with Education”, Indigenousx, 20 September 2015, para 3

<https://indigenousx.com.au/the-changes-to-the-national-curriculum-have-nothing-to-do-with-education/>, accessed 3 September 2021

³¹ John Hawkesworth, *A new voyage, around the world, in the years 1768, 1769, 1770, and 1771*, University of Michigan, Digital Collections, page as per URL

<https://quod.lib.umich.edu/e/evans/n10511.0001.001/432:10?page=root;print=1;size=100;view=text>, accessed 7 September 2021

Note that White attributes this quote to Cook, but Cook scholar Ian Boreham from the Captain Cook Society informed me by email (24 June 2021) that the quote was written by John Hawkesworth, based on a passage that appears in Joseph Banks’s journal.

³² Corey JA Bradshaw et al., “The First Australians grew to a population of millions, much more than previous estimates”, *The Conversation*, April 30, 2021, para 4

<https://theconversation.com/the-first-australians-grew-to-a-population-of-millions-much-more-than-previous-estimates-142371>, accessed 28 August 2021

area of the British Isles is 315,000 km², which translates as a population density of 50 people per square kilometre, or **500 per 100km²**. This means that the population density of Britain was 147 times greater than that of Australia, based on the given figures.³³ (I stand to be corrected on my calculations.) **Three million** people is a very significant number in absolute terms, but only a fraction of the total world population of **one billion** people in 1800.³⁴

Given that the a key European point of reference was likely to be population density in their own homeland, Australia would of course have been sparsely populated in their perception, despite them encountering large groups of “natives” from time to time.

Sparsely populated. But not empty. According to British researcher Peter Kilroy:

Contrary to a common reading of terra nullius as ‘empty’ or no-one’s land, Cook and his advisers were eminently aware that ‘Australia’ was not empty.³⁵

Likewise Watkin Tench, described Governor Phillip being unable to claim possession by safely planting the British flag near a large group of unwelcoming Indigenous people:

We found the natives [at Botany Bay] tolerably numerous ... we had reason to conclude the country more populated than Mr Cook thought it. For on the *Supply*’s arrival in the bay on the 18th of the month they were assembled on the beach at the south shore in the number of not less than forty persons, shouting and making many uncouth signs and gestures... but as prudence forbade a few people to venture wantonly among so great a number, and a party of only six men were observed on the north shore, the governor immediately proceeded to land on that side in order to take possession of his new territory and bring about an intercourse between its old and new masters.³⁶

There are many accounts by early settlers about meeting “numerous blacks”, who as often as not happened to be “hostile”. But I have never seen any evidence that any eighteenth century explorers or settlers thought that the coastal regions of mainland Australia were uninhabited.³⁷

On the question of Aboriginal economies, since Europeans first started coming to these shores, I think that there has been a genuine and widely-held belief amongst the great majority of explorers and settlers, as well as amongst virtually all scholars since — until recently, that is — that Aboriginal people did not farm. The views of some leading academics of course changed when they read well-crafted descriptions of tilled fields, grain storage and so forth in *Dark Emu*.

Whether an economic activity can be properly classified as farming depends on our definition of farming. The accepted definition of farming is the domestication of plants and animals for human consumption. In turn, domestication means:

... the process of adapting wild plants and animals for human use. Domestic species are raised for food, work, clothing, medicine, and many other uses. Domesticated plants and animals must be raised and cared for by humans. Domesticated species are not wild.³⁸

³³ By way of contrast, it is estimated that there were **15 million** Native Americans in what was an equivalent area in pre-Columbian America. See: Anthony Peirson Xavier Bothwell, “We Live on Their Land: Implications of Long-Ago Takings of Native American Indian Property”, *Annual Survey of International & Comparative Law*, Vol 6, Issue 1, Article 9. 2000, p176, para 1 <https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1053&context=annlsurvey>, accessed 28 August 2021

³⁴ Max Roser, Hannah Ritchie and Ortiz Ospina, “World Population Growth”, *Our World in Data*, May 2019 <https://ourworldindata.org/world-population-growth>, accessed 28 August 2021

³⁵ Peter Kilroy, “Discovery, settlement or invasion? The power of language in Australia’s historical narrative”, *The Conversation*, 1 April 2016 <https://theconversation.com/discovery-settlement-or-invasion-the-power-of-language-in-australias-historical-narrative-57097>, accessed 28 August 2021

³⁶ Watkin Tench, 1778, *The Text Publishing Company*, Melbourne, 2012, p40. “Old and new masters” is wording that suggests that Watkins recognised a degree of prior ownership.

³⁷ Parts of Australia were in fact “terra nullius”, such as islands like Kangaroo Island and Rottneest Island.

³⁸ —, “Domestication”, *National Geographic*, online encyclopedia, post undated <http://www.nationalgeographic.org/encyclopedia/domestication/>, accessed 29 August 2021

Domestication differs from natural selection in that it normally involves selective breeding which over time results in human-selected evolutionary changes, and explains why modern varieties of apples, for example, only vaguely resemble the bitter crab apples from which they originate, and why modern varieties of cattle only vaguely resemble their ancient auroch forebears.

That sets a high bar because it excludes activities — as sophisticated and ingenious as they often were — which are associated with economies that may have been in transition to farming. Such activities include trapping wild eels which spawned thousand kilometres away in the ocean, and managing land by “firestick farming”.³⁹

In my view, there are serious flaws in the case that Rupert Gerritsen and Bruce Pascoe have made that Aboriginal people were farmers. Leaving aside issues about their scholarship, the weight of evidence suggests that the *early* British explorers and settlers, at least, did not see anything that they recognised as farming.

Cook reputedly wrote in relation to the question of farming:

It is certain, that we did not see one foot of ground in a state of cultivation in the whole country ...⁴⁰

He was equally definite in relation to settlements:

They appeared to have no fixed inhabitations, for we saw nothing like a town or village in the whole country.⁴¹

According to Tench:

To cultivation of the ground they are utter strangers, and wholly depend for food on the few fruits they gather, the roots they dig up in the swamps, and the fish they pick up along shore or contrive to strike from their canoes with spears. Fishing, indeed, seems to engross nearly the whole of their time ...⁴²

We know that Aboriginal Australians placed a high value on meat in their diets. Kerin O’Dea, who researches traditional Aboriginal diets, argues that:

Available data suggest that they [Aboriginal Australians living traditionally] were physically fit and lean, and consumed a varied diet in which animal foods were a major component⁴³

In 2002 a multi-disciplinary and multinational research group:

... analyzed the 13 known quantitative dietary studies of HG [hunter gatherers around the world] and demonstrated that animal food actually provided the dominant (65%) energy source, while gathered plant foods comprised the remainder (35%).⁴⁴

Aboriginal Australians didn’t domesticate animals for food consumption. In order to supply the animal food that optimally and typically comprised most of their diet, they had to hunt or fish. Based on their calorie needs and intake, whatever other they procured food, they were always hunters or fishers. If they lived in

³⁹ Rhys Jones, “Fire-Stick Farming”, *Fire Ecology*, 8, 3–8, 2012

<https://doi.org/10.1007/BF03400623>, accessed 29 August 2021. Jones asserts that “A study of Australian ethnographic literature will show that bushfires were systematically and universally lit by the Aborigines all over the continent.”

⁴⁰ James Cook, Joseph Banks and John Hawkeswoorth, *The Three Voyages of Captain Cook around the World*, Cambridge University Press, Cambridge, 2015, p142

https://textbooks.zookal.com.au/products/the-three-voyages-of-captain-james-cook-round-the-world-9781108084765?variant=39389669490820&gclid=EAlalQobChMlv9beq4HV8glVEYJLBR08ZQ47EAQYASABEgJV8_D_BwE, accessed 29 August 2021

⁴¹ *Ibid.*, p144

⁴² 1978, *op. cit.*, p53

⁴³ K O’Dea, “Traditional diet and food preferences of Australian aboriginal hunter-gatherers”, *Philosophical Transactions of the Royal Society of London*, Biological Science, November 1991, discussion, pp 240-1

<https://pubmed.ncbi.nlm.nih.gov/1685581/>, accessed 29 August 2021

⁴⁴ L Cordain, et al., “The paradoxical nature of hunter-gatherer diets: meat-based, yet nonatherogenic”, *European Journal of Clinical Nutrition*, 56, S42–S52, 2002, abstract, para 2
<https://doi.org/10.1038/sj.ejcn.1601353>, accessed 29 August 2021

an area of perpetual abundance of animals or fish, they were more likely to be more sedentary. If or when the numbers of animals or fish were seriously depleted, they would have needed to move.

Further, a clear inference that can be drawn from Jared Diamond's article, "The worst mistake of the human race" is that Aboriginal Australians living traditionally did not fit the physiological or epidemiological profile of early farmers.⁴⁵

It seems that there were diminished returns from hunting over time as a result of factors such as the disappearance of megafauna, the shrinkage in the average size of mid-sized terrestrial mammals⁴⁶, the loss of hunting grounds due to rising sea levels, and competition from dingoes after their introduction about 4,000 years. When populations increased as Australia emerged from the mid-Holocene Warm Period, there would have been a need to procure food in ever more sophisticated ways.

In sum, it is apparent that there was a well-founded perception among early explorers and settlers that Australia was sparsely populated and that Aboriginal people were not farmers. However, neither of these factors best explain why the British thought they had a divine right to colonise Australia.

The origins of the doctrine of discovery

Robert Miller is an expert in American Indians and international law. He describes the doctrine of discovery as the international law that regulated nearly six hundred years of European colonisation. The doctrine of discovery seems to have its distant origins in the rivalry between the Christian and Islamic worlds. The "Moors" had invaded the Iberian Peninsula in 711, occupying up to two-thirds of it for centuries, and holding on to their last toe-hold, Granada until 1492, which was the year that Columbus sailed to the West Indies. Despite Islam making incalculable contributions to Western culture, Christians across Europe united behind the rallying cries of successive popes, not only in order to frustrate the advance of Islam in Europe, but also to recover the Holy Land. As Miller suggests, they wanted a legal justification to seize lands that were controlled by the "infidels":

Historians and legal scholars trace the development of the Doctrine [of Discovery] to early medieval times and in particular to the Crusades to the Holy Lands in 1096-1271. In justifying the Crusades, the Church established the idea of a worldwide papal jurisdiction which vested a legal responsibility in the pope to realize the vision of the universal Christian commonwealth. This papal responsibility and power led to the idea of justified holy wars by Christians against Infidels.⁴⁷

... and further:

In justifying the invasion of non-Christian countries, Innocent borrowed from the writings on holy war by St. Augustine. Augustine claimed that Christians had the right to wage war on nations that practiced cannibalism, sodomy, idolatry, and human sacrifice, for example, as being a defense of Christianity and a work of justice.⁴⁸

It is important to remember that the doctrine of discovery was a *Christian* doctrine. The doctrine was articulated during a period when the Church had unprecedented authority. Almost all Western Europeans were Catholic. Christians had a fear and hatred of Islam. The Pope was regarded as an infallible messenger from God and controlled knowledge. The Church collected massive tithes but paid no tax

⁴⁵ Jared Diamond, "The Invention of Agriculture: The Worst Mistake in the History of the Human Race", *Discover*, 1987 http://delong.typepad.com/teaching_spring_2006/2008/01/jared-diamond-t.html, accessed 29 August 2021

⁴⁶ See Tim Flannery, "Pleistocene Faunal Loss: Implications of the Aftershock for Australia's Past and Future", *Archaeology in Oceania* Vol. 25, No. 2, 1990, pp50-51

https://www-jstor-org.ez.library.latrobe.edu.au/stable/40386845?seq=9#metadata_info_tab_contents, accessed 29 August 2021

⁴⁷ Robert J Miller, "The International Law of Colonialism: A Comparative Analysis", *Researchgate*, 2011, p10

https://www.researchgate.net/publication/228168439_The_International_Law_of_Colonialism_A_Comparative_Analysis

⁴⁸ *Ibid.*, p11

(enabling it to construct places of worship which took 250-300 years to build). And the Pope was also a “secular” ruler with a sizeable army at his command.

Pope Alexander VI articulated the doctrine of discovery in 1493 in the Papal Bull *Inter Caetera*. It was the year following Columbus’s voyage to the “New World”, and it was designed to facilitate the division of the Western hemisphere between Spain and Portugal. It stated that the Holy See:

... of our own accord, not at your instance nor the request of anyone else in your regard, but of our own sole largess and certain knowledge and out of the fullness of our apostolic power, by the authority of Almighty God conferred upon us in blessed Peter and of the vicarship of Jesus Christ, which we hold on earth, do by tenor of these presents, should any of said islands have been found by your envoys and captains, give, grant, and assign to you and your heirs and successors, kings of Castile and Leon, forever, together with all their dominions, cities, camps, places, and villages, and all rights, jurisdictions, and appurtenances, all islands and mainlands found and to be found, **discovered and to be discovered** towards the west and south, by drawing and establishing a line from the Arctic pole, namely the north, to the Antarctic pole, namely the south, no matter whether the said mainlands and islands are found and to be found in the direction of India or towards any other quarter⁴⁹ [My bold]

The doctrine of discovery meant that Christian princes had the right to seize any land occupied by heathens of all hues, so long as the land had not already been “discovered” by some other Christian prince.

As Miller puts it:

The Doctrine [of Discovery] is one of the earliest examples of international law, that is, the accepted legal norms and principles that control the conduct of states versus other states. Discovery was specifically developed to control European actions and conflicts regarding exploration, trade, and colonization of non-European countries, and was used to justify the domination of non-Christian, non-European peoples. It was developed in Europe over many centuries by the Church and England, Spain, Portugal, and France. Europeans rationalized that the Discovery Doctrine was permitted under the authority of the Christian God and the ethnocentric idea that Europeans had the right to claim the lands and sovereign and commercial rights of Indigenous peoples around the world.⁵⁰

In 1517, Martin Luther nailed his 95 *Theses* on a church door in Wittenberg, Saxony, heralding a series of major rifts within the Church and triggering the erosion of papal authority foreshadowed above. Even after the split in the Church, however:

... Protestant monarchs complied with the emerging secular international law of Discovery even though they did not fear excommunication and the papal bulls.⁵¹

The doctrine of discovery was always a Christian doctrine that legitimised Christian proselytism, but over the centuries, its meaning did subtly shift. When it was applied by the British, French and American states in the nineteenth century, it had come to mean saving Indigenous people from their own “backwardness”, which was often defined in terms of a crude form of social Darwinism. It justified stamping out all those cultural practices — described in some detail by settlers and missionaries — that offended “civilised” sensibilities.

In the context of the British “civilising mission”, Pax Britannica was gradually imposed on “warring tribes” in settled areas across Australia. Missionaries both converted *and* taught their “flock”. Assimilation was encouraged or enforced in order to make “civilising” easier. Children were taken away in order to protect them from perceived risks emanating from their own “backward” culture.

“Who could be more backward than primitive Aboriginals?” rang a familiar refrain that still rings within in our nation’s bigoted recesses. “No clothes. No wheels. No metal tools. No alphabet. Thank God for the benefits of the British legal system, and thank the Founding Fathers for liberal democracy!”

⁴⁹ J Bufolinus, A de Mucciarellis, A Santoseverino and L Podcatharus, “Inter Caetera, Division of the undiscovered world between Spain and Portugal”, *Papal Encyclicals on-line*, undated

<https://www.papalencyclicals.net/alex06/alex06inter.htm>, accessed 6 September 2021

⁵⁰ Robert J Miller, 2011, op. cit., p9

https://www.researchgate.net/publication/228168439_The_International_Law_of_Colonialism_A_Comparative_Analysis

⁵¹ *Ibid.*; pp20-21

Human voyages of discovery

Cook's "first discovery" took place tens of thousands of years after Australia was actually discovered. What came before his arrival though was a long history of epic human sea voyages.

Human sea crossings in different parts of the world go well back into deep time. There is evidence, for example, that as early as 200,000 years ago, Neanderthals made their way on watercraft 40 kilometres across the sea to the island of Crete.⁵² In our part of the world — presumably before modern humans had left Africa — a group of early humans (*Homo floresiensis*) travelled across a body of water about 9km wide to reach their new home on the island of Flores in the Indonesian archipelago. If, as suggested by palaeontologist Nick Longreach, they died at the hands of other humans, the hands that killed them also must have guided watercraft to the island.⁵³

The first humans who came to Sahul are believed to have crossed a body of water about 100km wide. Making a sea crossing of that kind presumably required developed language, ingenuity and courage, as well as a sophisticated knowledge of the natural world. Once reaching Sahul, one branch of those ancestral explorers split away and moved south, colonising the Australian continent on foot.⁵⁴

Research by geographers, Tim Cohen and his colleagues reveals that:

... before about 50,000 years ago, much of Australia's interior was a very different place to the scatter of salt-crust lakes and sand ridges seen today. By analysing ancient shorelines fringing Lake Eyre and Lake Frome, two of Australia's largest inland lakes, we found evidence of a "time of plenty", when perennial inland rivers fed huge, permanent mega-lakes.

The scene probably featured more vegetation than today, large herbivores and diverse aquatic ecosystems spanning hundreds of kilometres of teeming estuaries and rivers. Lake Eyre itself stood 25 m deep and with a volume of some 380 cubic kilometres (roughly 700 Sydney Harbours).⁵⁵

So having established themselves in a continent that seems to have been significantly moister and more forested than today and where an amazing array of strange, naïve megafauna could be easily hunted, those first Australians had no further need of long-distance open-seaworthy watercraft.

Rising sea levels 8,000-10,000 years ago and mega-droughts during the mid-Holocene seem to have sparked much longer sea journeys in *other* parts of the world. Paradigm-shifting research by the Max Planck Institute in 2010 suggests that a group of Palaeolithic South Asians migrated by sea to Australia around 4,000 years ago, presumably bringing dingoes with them. That conclusion has been challenged, but there are a "slew of studies" which support it, and these studies make interesting reading.⁵⁶

Perhaps a millennium later, Neolithic mariners began to fan out primarily from Taiwan in a southerly direction. In one of the greatest stories of human exploration, the Lapita sailed vast distances across two oceans spanning half the globe. They eventually colonised Madagascar and most of the Pacific islands, most likely reaching the shores of South America. They took with them domesticated plants like taro, bananas and coconuts, and animals like dogs, pigs and chickens. About 700 years ago, their

⁵² George Ferentinos, et al., "Early seafaring activity in the southern Ionian Islands, Mediterranean Sea", *Journal of Archeological Science*, Volume 39, Issue 7, July 2012, pp2167-76
<https://doi.org/10.1016/j.jas.2012.01.032>, accessed 30 August 2021

⁵³ Nicholas R Longrich, "Were other humans the first victims of the sixth mass extinction?", *The Conversation*, 22 November 2019, paras 1-19

<https://theconversation.com/were-other-humans-the-first-victims-of-the-sixth-mass-extinction-126638>, accessed 30 August 2012

⁵⁴ Michael I Bird, et al., "Early human settlement of Sahul was not an accident", *National Centre for Biotechnology Information*, 9:8220, 17 June 2019, abstract
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6579762/>, accessed 30 August 2021

⁵⁵ Tim Cohen, et al., "Drying inland seas probably helped kill Australia's megafauna", *The Conversation*, 26 February 2015, paras 4-5
<https://theconversation.com/drying-inland-seas-probably-helped-kill-australias-megafauna-37527>, accessed 30 August 2021

⁵⁶ Kumud Merani, "The Story Untold – The links between Australian and Aboriginal and Indian tribes, Part 1, SBS, updated 10 September 2019, para 17

<https://www.sbs.com.au/language/english/audio/the-story-untold-the-links-between-australian-aboriginal-and-indian-tribes>, accessed 30 August 2021

descendants colonised Aotearoa (New Zealand) which was the last major habitable land mass on the planet. Given the proximity of their routes to mainland Australia, the Lapita may well have also visited our shores.

The Mongols were best known as horse archers from the Central Asian Steppe. Improbably, under Kublai Khan, they suddenly found themselves in control of a great navy when they captured 146 Song Dynasty warships. This good fortune gave them a decisive edge in their campaign to unify China under their rule. After establishing the Yuan Dynasty, Kublai Khan demanded tribute from other Asian states. Refusals to pay the tribute led to a series of (unsuccessful) punitive naval invasions, including an invasion of Java in 1293.

Although this fleet that invaded comprised 1,000 warships, the defeat in a land battle and the consequent retreat of the Mongol-commanded forces heralded the establishment of the great Indonesian Majapahit sea empire. This empire at its peak controlled most of the Indonesian archipelago.⁵⁷ It was Indianised and Hindu, and cosmopolitan and sophisticated. Nevertheless, its influence slowly waned and it had become fragmented by the time the Portuguese arrived at the turn of the sixteenth century.

It was traditionally assumed that Europe was much more “advanced” than the rest of the world, and that other civilisations were backward by contrast. Israeli historian Yuval Harari, however, adopts a less Euro-triumphalist point of view:

Not long before Cook’s expedition, the British Isles and Western Europe in general were but distant backwaters of the Mediterranean world. Little of importance ever happened there... Only at the end of the fifteenth century did Europe become a hothouse of important military, political, economic and cultural developments. Between 1500 and 1750, western Europe gained momentum and became master of the ‘Outer World’, meaning the two American continents and the oceans. Yet even then, Europe was no match for the great powers of Asia. Europeans managed to conquer America and gain supremacy at sea mainly because the Asiatic powers showed little interest in them. The early modern era was a golden age for the Ottoman Empire in the Mediterranean, the Safavid Empire in Persia, the Mughal of India, and the Chinese Ming and Qing dynasties. They expanded their territories significantly and enjoyed unprecedented demographic and economic growth. In 1773 Asia accounted for 80 per cent of the world economy.⁵⁸

A measure of the scale of the Chinese overseas trade missions during the fourteenth and fifteenth centuries was the deforestation that occurred largely as a result of the demand for timber to build ships during the Yuan (Mongol) Dynasty between 1279 and 1368.⁵⁹

Nearly a century before Da Gama had rounded the Cape of Good Hope, the great Ming dynasty general Zheng He embarked on seven historic westward trade missions, sailing to India, Arabia and Africa. The sheer size of both his fleets and the Chinese “treasure ships” must have been a breath-taking sight for those who witnessed them. The larger junks were four times as long as Cook’s Resolution:

The first voyage [in 1405] comprised 312 ships, with some vessels carrying treasure (silks, porcelains) as gifts measuring 440 feet by 186.2 feet and held nine masts. This can be compared to Columbus’ ships on his first voyage to the New World with three vessels, the decked *Santa Maria* measuring 117feet long, and the two caravels ... each measuring 50 feet long. And the Chinese fleet seems enormous when compared to Captain Cook’s two vessels ... in 1788, each measuring about 100 x 29 feet... This 1405 expedition was undertaken with 62 huge vessels and 255 smaller craft with 27,870 men who, on the return leg of this first voyage, subdued the pirate Ch’en Tsu-i in the Straits of Malacca, enlarging the reputation and fame of Cheng Ho, and raising China’s prestige all over Southeast Asia.⁶⁰

⁵⁷ Benjamin Armstrong, “Kublai Khan’s Mongol Navy”, *Historynet*, date posted unknown, originally published in the November 2013 issue of *Armchair General*
<https://www.historynet.com/kublai-khans-mongol-navy.htm>, accessed 30 August 2021

⁵⁸ Yuval Noah Harari, *Sapiens, a brief history of mankind*, Vintage, London (2015), pp311-2.

⁵⁹ Sally K Church, “Zheng He: An Investigation into the Plausibility of 450-foot Treasure Ships”, *Monumenta Serica*, Vol. 53, 2005, pp.1-43
<https://www-jstor-org.ez.library.latrobe.edu.au/stable/40727457>, accessed 31 August 2021

⁶⁰ Barbara Bennett Peterson, “The Ming Voyages of Cheng Ho (Zheng He), 1371-1433”, in the journal: *The Great Circle*, Australian Association for Maritime History, Vol. 16, No. 1, 1994, p44, para 2
<https://www.jstor.org/stable/41562881>, accessed 31 August 2021

While Zheng Le's voyages were not without conflict, the Ming dynasty showed no interest in colonising the lands that they visited. Perhaps one reason why Zheng was reputedly welcomed back to countries that he visited was because he had a reputation of giving more than he received.⁶¹

Zheng Le wrote:

We have traversed more than 100,000 li [c50,000km] immense water spaces and have beheld in the ocean huge waves like mountains rising in the sky. And we have set eyes on barbarian regions far away hidden in a blue transparency of light vapors, while our sails, loftily unfurled like clouds day and night, continued their course [as rapidly] as a star, traversing those savage waves ...⁶²

European voyages of discovery began tentatively, early in the fifteenth century when the Portuguese crept down the west coast of Africa, fighting "Saracens", taking control of harbours and building forts on the way. The Black Death (1346-1353) had killed 25 million people in Europe (i.e. at least a third of the population).⁶³ Apart from the human toll, this resulted in chronic labour shortages and disastrous currency inflation. The attraction of West Africa lay in it being a source of cheap labour, ivory and gold.

When I studied African History in the '70s, I learned that there was relative parity of political and economic power between European and African states in the Late Middle Ages. Consider, for example, that Mansa Musa, who ruled Mali (1312–1337) was arguably the richest person who ever lived. On a pilgrimage to Mecca:

Traveling from his capital ... making his way to Cairo, Mansa Mūsā was accompanied by an impressive caravan consisting of 60,000 men including a personal retinue of 12,000 enslaved persons, all clad in brocade and Persian silk. The emperor himself rode on horseback and was directly preceded by 500 enslaved persons, each carrying a gold-adorned staff. In addition, Mansa Mūsā had a baggage train of 80 camels, each carrying 300 pounds of gold.⁶⁴

The Egyptian economy apparently collapsed as a result of the gold that Mansa Musa gave away.⁶⁵ He only became Mali's ruler after his older brother sailed off over the Atlantic horizon with a fleet of 2,000 ships and many thousands of "men, women and slaves", never to return.⁶⁶ (There is speculation that this fleet reached Brazil.⁶⁷)

By the end of the fifteenth century, the Portuguese had established a sea route to India, too late as previously mentioned, to encounter the great Chinese fleets. About a century later, Columbus also sailed across the Atlantic Ocean in search of a faster route to India, and then three decades later survivors of Magellan's crew completed the first-known circumnavigation of the globe in 1522.

These voyages opened the door to a scramble for colonies by the European colonial powers, a scramble which continued right up into the twentieth century with the exploration of the Antarctic.

The perils of those early sea voyages are well-known. Rewards and risks were great for the entrepreneurs. Rewards for the sailors were few, but the risks were far greater. Only 18 of Magellan's 270

⁶¹ Citation needed. (Meaning: I read it somewhere but cannot find the reference!)

⁶² Erik Nilsson, "Ancient travels offer historical treasure", *China Daily*, updated 2015-12-07

https://www.chinadaily.com.cn/china/discoveringjiangsu/2015-12/07/content_22644385.htm, accessed 31 August 2021

⁶³ Kathryn A Glatter and Paul Finkelman, *History of the Plague: An Ancient Pandemic for the Age of Covid*, *Elsevier Public Health Emergency Collection*, published online 24 September 2020, introduction

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7513766/>, accessed 31 August 2021

⁶⁴ John Coleman de Graft Johnson, "Musa I of Mali, emperor of Mali", *Britannica*, updated 3 February 2021, para 2

<https://www.britannica.com/biography/Musa-I-of-Mali>, accessed 31 August 2021

⁶⁵ Naima Mohamud, "Is Mansa Musa the richest man who ever lived?", *BBC Africa*, 10 March 2019, sub-heading: The Cairo gold crash

<https://www.bbc.com/news/world-africa-47379458>, accessed 31 August 2021

⁶⁶ *Ibid.*, para 2

⁶⁷ Clyde Winters, "The Brazil Tablet: Dropped in the Jungle by Early Transatlantic Explorers?", *Ancient Origins*, updated 25 April 2019, see whole article

<https://www.ancient-origins.net/artifacts-other-artifacts/did-early-transatlantic-explorers-drop-mysterious-tablet-brazilian-jungle-021497?>, accessed 31 August 2012

original crew, for instance, returned to Spain from their epic voyage. Magellan himself died in a battle in the Philippines.

Shipwrecks were common. Ships could hit icebergs, or whales, or submerged reefs. They could be tossed about in open water, battling fierce gales and high seas; or they could be becalmed for days on end (famously in the Doldrums). There was the chance of being boarded by enemy warships, or being attacked by pirates. Even dropping anchor to replenish rations of food and water, or to repair broken masts or sails, could result in unexpected and sometimes fatal attacks from the locals.

Sailors were deeply superstitious. They were often press-ganged into service. They were often away from home for years at a time. Mutinies were not unknown and discipline was harsh. Diseases were rife, scurvy killing **more than two million sailors** between Columbus's trans-Atlantic voyage and the middle of the nineteenth century.⁶⁸ Its symptoms began with extreme fatigue, swelling of the arms and legs, aching joints and bruising at the slightest touch. According to an unknown but afflicted English surgeon in the sixteenth century, as the disease progressed:

It rotted all my gums, which gave out a black and putrid blood. My thighs and lower legs were black and gangrenous, and I was forced to use my knife each day to cut into the flesh in order to release this black and foul blood. I also used my knife on my gums, which were livid and growing over my teeth. . . . When I had cut away this dead flesh and caused much black blood to flow, I rinsed my mouth and teeth with my urine . . . Many of our people died of it every day, and we saw bodies thrown into the sea constantly, three or four at a time.⁶⁹

Cook is credited with helping ameliorate the problem of scurvy:

The proportion of cases of scurvy was very much smaller than in other similar ships, and none of those afflicted had died. This was a great credit to the passionate determination of Cook to provide a varied diet, with as much greenstuff as was possible. Nothing can detract from this success despite the fact that he lost many men, thirty-one in fact, from dysentery and from malaria contracted in Batavia on his journey home.⁷⁰

The following account graphically describes the dangers of simply working on sailing ships in those days:

While underway a sailor's work held some real challenges, especially climbing the shroud lines up to the yards and standing on foot-ropes working thirty to fifty feet above the deck. Sails could be furled (rolling the sail up and securing it to the yard), reefed (shortening the sail to a length appropriate to the strength of the wind). A fall from the yard was almost always fatal, whether the sailor fell into the sea or onto the deck. If he fell into the sea he usually drowned before the ship could rescue him. Normally there was little if any effort made to rescue, especially if the water was very cold as he would live only minutes. Often hazardous work needed to be done at night in the midst of a howling storm when the sails needed to be reefed or furled to compensate for the strong wind. This meant that the sailors had to know the rigging well enough to work in total darkness with fingers numb from the cold. Work on the deck during a storm was almost as dangerous due to the chance of being washed overboard as the sea spilled onto the deck.⁷¹

Most of us have not had the kind of lived experience that would enable us to relate to such challenges at any visceral level. Suffice it to say, sea travel then was both hazardous and unpredictable.

Aboriginal Australians who lived along the coast were very connected to the sea as a part of Dreamtime stories, and a source of a wide range of food and changing weather as well as a boundary limiting their movement beyond the land's edge to canoeing or swimming and diving. From an Aboriginal perspective, the appearance of the Tall Ships along the Australian coastline triggered a range of emotions in those watching from the shore. A descendant of the Dharawal people who watched Cook sail into Botany Bay said:

When our old people saw the Endeavour coming through, they actually thought it was a low-lying cloud because all they could see was whiteness.

⁶⁸ Catherine Price, "The Age of Scurvy", *Science History Institute*, 14 August 2017, para 4 <https://www.sciencehistory.org/distillations/the-age-of-scurvy>, accessed 31 August 2021.

⁶⁹ Price op. cit., para 6

⁷⁰ Egon H Kodicek and Frank G Young, "Captain Cook and Scurvy", 1969, p51 https://www.mv.helsinki.fi/home/hemila/history/Kodicek_1969.pdf, accessed 7 September 2021

⁷¹ Roger M McCoy, "Life at sea in the 16th century", *Explorers' Tales* blog, 26 June 2016, part 1, para 9 <https://www.newworldexploration.com/explorers-tales-blog/life-at-sea-in-the-16th-century>, accessed 1 September 2021

The myth of terra nullius, examined in the spirit of nullius in verba

In Dharawal culture, that low-lying cloud means the spirits of the dead have returned to their country and so they saw almost ghosts.

So when the two men opposed the landing, they were protecting the country in a spiritual way, from ghosts.⁷²

Hundreds of Macassans began to arrive here in their praus each wet season after the Portuguese colonised Indonesia. They continued to come until 1906-07. Although they only travelled relatively short distances in familiar waters, these Muslim traders could be confronted with serious dangers such as tropical cyclones and tsunamis. The most frightening tsunami in recorded history was triggered by the eruption of Krakatoa on 27 August 1883 when the Macassans were likely to have just started making preparations to sail here. This eruption:

... triggered a series of tsunamis, or seismic sea waves, recorded as far away as South America and Hawaii. The greatest wave, which reached a height of 120 feet (37 metres) and took some 36,000 lives in nearby coastal towns of Java and Sumatra, occurred just after the climactic explosion.⁷³

The Macassans brought with them canoes, sails, hooks, fishing lines, beads and metals, and took back dried trepang (destined for China) and pearl shells, beeswax and ironwood.⁷⁴

They also took back adventurous locals. According to Clark and May:

Dozens, if not hundreds, of Aboriginal sojourners are said to have sailed on the return voyage to Makassar, settling there and beginning families with local women.⁷⁵

There is evidence of Macassan influence on the culture of the coastal communities with which they interacted. There are Malay words in Top End languages, such as the word “balanda”, which is still used widely to describe Europeans in the Top End, a corruption of the word Hollander. It has been suggested that some of the cultural practices of the Yolngu can be traced to Islamic rituals⁷⁶:

One example of this is a figure called Walitha'walitha, which is worshipped by a clan of the Yolngu people on Elcho Island, off the northern coast of Arnhem Land. The name derives from the Arabic phrase "Allah ta'ala", meaning "God, the exalted". Walitha'walitha is closely associated with funeral rituals, which can include other Islamic elements like facing west during prayers - roughly the direction of Mecca - and ritual prostration reminiscent of the Muslim sujood.⁷⁶

The Macassans, though, did not seem to practise the proselytising form of Islam that was evident elsewhere. As a mark of fond historical memories, Aboriginal people have recently travelled to Sulawesi in order to re-establish the pre-federation cultural connection.⁷⁷ While relations between the two sides were not always smooth, Richard Trudgeon beautifully describes in *Why warriors lie down and die* the ways in which predictability, fair dealing and cooperation were mutually beneficial.

These various voyages of discovery brought to an end the isolation of Aboriginal Australians from the rest of the world. They helped make European colonial expansion possible.

⁷² Isabella Higgins and Sarah Collard, “Captain James Cook’s landing and the Indigenous first words contested by Aboriginal leaders”, *ABC News*, updated 29 April 2021, paras 13-15
<https://www.abc.net.au/news/2020-04-29/captain-cook-landing-indigenous-people-first-words-contested/12195148>, accessed 1 September 2021

⁷³ —, “Krakatoa”, *Encyclopaedia Britannica*, 16 January 2020, para 6
<https://www.britannica.com/place/Krakatoa>, accessed 1 September 2021

⁷⁴ Marshall Clark and Sally K May, “Understanding the Macassans: A regional approach”, *Macassan History and Heritage*, ANU, p3, para 3
<https://press-files.anu.edu.au/downloads/press/p241301/html/ch01.xhtml?referer=294&page=3>, accessed 1 September 2021

⁷⁵ *Ibid.*

⁷⁶ —, “When Islam came to Australia”, *BBC News*, magazine, 24 June 2014, para 13
<https://www.bbc.com/news/magazine-27260027>, accessed 1 September 2021

⁷⁷ —, “Makassar–Yirrkala: An artist exchange taking pre-European contact into the future”, *The Australia-Indonesia Centre*, 14 February 2019

<https://australiaindonesiacentre.org/culture/indigenous/makassar-yirrkala-a-symposium-and-artist-exchange-taking-pre-european-contact-into-the-future/>, accessed 1 September 2021

The *European Age of Discovery* has been a standard part of the school curriculum for at least as long as living memory. However, mainstream History has become much less Eurocentric in recent decades. As a History teacher back in the 1980s, in one of Victoria's biggest secondary schools, my colleagues and I taught the Age of Discovery to our Year 9 Australian History students. The History text we used framed things in this way:

Who discovered Australia? The Aboriginal people discovered Australia more than 40,000 years ago. Because Australia was settled by people from Europe in 1788, another question is important too: *Who were the first Europeans to discover Australia?*⁷⁸

Australian schoolchildren have long been taught that the Portuguese, the Dutch and at least one Englishman came here before Cook, but in the 1980s, my colleagues and I also taught there were:

Indonesian fishermen [who] visited Australia hundreds of years ago. They came to collect sea slugs ... from the northern beaches. We know that the aboriginals were trading with these people several hundred years before white people came to Australia.⁷⁹

Intriguingly, it appears likely that, well before Europeans appeared in Asian waters, the Yuan and Ming Dynasties of China, and the Majapahit Empire in the Indonesian archipelago all had the knowledge and means to invade and colonise the northern coastal areas of Australia, but do not seem have been sufficiently motivated to do so.

Symbolic possession

Cook remains one of the world's most celebrated explorers, and yet one of the most vilified. In his own day, he was so widely admired that he was given right of passage on the high seas by Britain's enemies:

While Cook's journeys took place during a time when Britain was variously at war with the United States, Spain and France, his reputation as a pioneering explorer allowed him to travel the seas with relative impunity. In July 1772, a squadron of Spanish vessels briefly detained [one of] his ships, only to release them after they realized Cook in command [of the other ship]. Likewise, when Cook's third voyage set sail during the American Revolution, Benjamin Franklin wrote a memo to colonial ship captains instructing them to treat the British vessels as "common friends to mankind" if they encountered them at sea.^{80 81}

However, as various milestone anniversaries of Cook's first voyage to Australia have been reached, he has been increasingly seen as a surrogate for all of the wicked things that happened long after he was killed in Hawaii:

Cook, the usher of the colonial land grab—the doorman for British invasion in 1788, for dispossession and for all of the shootings, massacres, poisonings and stolen children that followed colonisation—is an understandable theme of much modern Australian Indigenous art (and that sympathetic to Aboriginal sentiment).⁸²

The accusations range from him being syphilitic — even though his wife became pregnant each time he returned to England and miraculously lived to the ripe old age of 93 — through to lesser charges such as him disobeying his secret orders. The relevant part of those orders reads:

You are likewise to observe the Genius, Temper, Disposition and Number of the Natives, if there be any and endeavour by all proper means to cultivate a Friendship and Alliance with them, making them presents of such Trifles as they may Value inviting them to Traffick, and Shewing them every kind of Civility and Regard; taking Care however not to suffer yourself to be

⁷⁸ Sheena Couple and Mary Andrews, *Their ghosts may be heard*, Longman Cheshire, Melbourne, 1984, pp36-37

⁷⁹ *Ibid*, p25.

⁸⁰ Evan Andrews, "Ten Things You May Not Know About Captain James Cook", *History*, updated 22 August 2018, point 6 <https://www.history.com/news/10-things-you-may-not-know-about-captain-james-cook>, accessed 1 September 2021

⁸¹ Benjamin Franklin, "Passport of James Cook", American Philosophical Society, date posted unknown See also the "passport" that Franklin wrote for Cook: <https://www.amphilsoc.org/item-detail/passport-captain-james-cook>, accessed 7 September 2021

⁸² Paul Daley, "On Cook", *Meanjin Quarterly*, Summer 2019, para 14 <https://meanjin.com.au/essays/on-cook/>, accessed 1 September 2021

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surprized by them, but to be always upon your guard against any Accidents. You are also **with the Consent of the Natives** to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.⁸³ (My bold)

Aboriginal Australians were never asked and they never consented. If they had been asked, they would not have consented anyway because Aboriginal culture is based on a sacred connection with “country”, which is where all Dreamtime stories originate. Country is obviously much more than territory, but defending territory was a full-time concern. Significantly, there was no common language between these two branches of the human race which had been separated for up to 100,000 years. Nor was there any other means of communicating European notions of property. Even Cook’s Tahitian travelling companion Tupia was unable to communicate with Aboriginal people. So there was no ready, obvious or reliable means of negotiating consent, and little point in trying. Still and all, it must have been quite obvious to Cook that those Indigenous people he encountered would not willingly give up their land.

Rather than being admonished by the Admiralty for disobeying orders, on his return to Britain, Cook was introduced to the King at St James Palace, and promoted from the rank of Lieutenant. He was commissioned to undertake a second voyage and given command of two ships, including the *Resolution*, which he described as “the ship of my choice” and “the fittest for service of any I have seen”.⁸⁴ After his second voyage, he was promoted to the rank of Post-Captain.

There is little doubt that, as far as he was able, Cook followed the Admiralty’s instructions dutifully. Certainly, he did have some discretion in the execution of his orders. However, he was an officer in the British Navy, not a free agent.

If the Admiralty was Cook’s master in everything naval; the Royal Society was his master in everything scientific. Cook has also been criticised for disregarding “hints” offered to him by Earl Morton, the President of the Royal Society. Here are those hints:

To check the petulance of the Sailors, and restrain the wanton use of Fire Arms.

To have it still in view that shedding the blood of those people is a crime of the highest nature:—They are human creatures, the work of the same omnipotent Author, equally under his care with the most polished European; perhaps being less offensive, more entitled to his favor.

They are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit.

No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent. Conquest over such people can give no just title; because they could never be the Aggressors.⁸⁵

Morton’s views about Indigenous sovereignty were inconsistent with the doctrine of discovery, and the doctrine of discovery took precedence. Cook did not come to settle or conquer, but he clearly shed blood, as restrained as that shedding of blood arguably was.

Notwithstanding his remarkable rise in the British Navy, Cook was an explorer in the same tradition as the other European explorers who came before him. Elizabeth I, for example, had:

⁸³ —, “Secret Instructions to Lieutenant Cook”, *The Museum of Australian Democracy*, paras 3&4 https://www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf, accessed 1 September 2021

⁸⁴ Doug Gibson, “Resolution”, *Captain Cook Society*, 2018, para 4 <https://www.captaincooksociety.com/home/detail/resolution>, accessed 1 September 2021

⁸⁵ —, “Hints offered to the consideration of Captain Cook”, National Library of Australia, date posted unknown, para 8 <https://www.nla.gov.au/digital-classroom/senior-secondary/cook-and-pacific/indigenous-responses-cook-and-his-voyage/hints>, accessed 1 September 2021

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directed Sir Walter Raleigh, for example, —to discover . . . remote, heathen and barbarous lands, countries, and territories, not actually possessed by any Christian Prince, nor inhabited by Christian People.⁸⁶

Cook's duty was also to "discover" and to claim any "undiscovered" lands for Great Britain, at least those which may have had potential economic value. As a result of his first voyage, Britain would ultimately lay claim to the whole continent of Australia, meaning that most of the inhabitants would have a common language and a common heritage which in turn would pave the way to federation of the colonies into a single country.

In the words of Miller:

It also appears correct to state that England used first discovery to claim the continent of Australia and the lands that became modern day Canada. Even though Captain James Cook was not the first European or even the first Englishman to land in Australia, he did claim the east coast of the continent for England and England thereafter asserted its ownership of the land based on Cook's discovery.⁸⁷

Discovery was demonstrated by way of the symbolism of planting flags, building rock cairns and the like. In 1616, Dirk Hartog nailed a pewter plate to a post on the WA coast. In 1642, Tasman's ship's carpenter swam through dangerous surf to plant the Dutch flag on "Van Diemen's Land" soil. Miller again:

Portugal, Spain, and England also sometimes claimed that performing symbolic acts of possession and certain ceremonies on newly discovered lands established their possession and ownership of the land under international law. Other European governments and the United States also engaged in acts of symbolic possession and claimed ownership of lands that they were not yet able to actually occupy. The Spanish, Portuguese, and English Crowns expressly ordered explorers to perform these kinds of acts to prove where they had traveled and to establish claims of ownership. Portuguese explorers, for example were ordered to erect stone monuments, padraos, along the west coast of Africa to mark their discoveries and —as emblem[s] of Portuguese sovereignty. The Portuguese also used other procedures to claim new lands such as erecting crosses, celebrating mass in new lands, and bringing home symbolic items, commonly a handful of dirt, to present to the king.⁸⁸

These symbolic acts assumed great deal of importance in the minds of the colonising powers. A single act did not always suffice. Cook, for example, planted the British flag in Botany Bay and carved the details of his arrival into a tree; then he planted another flag on Possession Island.

Discovery meant discovery by a *European*, and marks of symbolic possession were proof of that discovery. Any prior discovery by non-Europeans simply did not matter. What mattered to the British Government was that the rest of Europe knew Cook had "discovered" the eastern coast of Australia so that rival claims to sovereignty could not be easily asserted by other European nations.

From the time of Pope Alexander's 1493 Inter Caetera papal bull, wherever European explorers ventured to "new" lands, it was always thus. The ways in which colonisers plundered and destroyed and oppressed the lands and peoples in distant lands may have had parallels in other places and times, but it was essentially a Christian legacy.

There is no plausible case to be made for Australian exceptionalism, regardless of the fact that many of those new lands were sparsely populated and occupied by hunters and gatherers, while others were densely populated and intensively farmed, or gardened like the Torres Strait Islands. The doctrine of discovery cast its dark shadow over the whole world.

⁸⁶ Miller et al., 2010, op. cit., p20

⁸⁷ Miller, 2011, op. cit., p28

⁸⁸ Ibid. p33

Yet another definition of terra nullius

The most common definitions of terra nullius were discussed above. However, there is another definition, which actually can be found on the first page of this article in the NLA information sheet, namely “land belonging to no-one”. I raise it here because it is a qualitatively better fit with the doctrine of discovery despite the inherent semantic problems of the term terra nullius. Terra nullius, according to this definition, could have been unoccupied land, or sparsely occupied land, or unfarmed land; but was not necessarily any of those things. Rather, it was *unowned* land.

To the colonial powers unowned land meant land unowned *by other Europeans* by virtue of having not been discovered by them, *or* discovered but not subject to any claims of discovery. Once sovereignty was claimed by a European power, nominal ownership and legal and administrative control of the land were automatically assumed by virtue of first discovery and consummated by occupation within a reasonable time. In the view of Aditi Agarwal, from India’s National University of Advanced Legal Studies:

Terra nullius is a Latin expression used in international law to describe territory which has never been subject to the sovereignty of any state, or over which any prior sovereign has expressly or implicitly relinquished sovereignty.⁸⁹

Agarwal’s view is supported by native title expert Stuart Banner:

The British treated Australia as *terra nullius*—unowned land. Under British colonial law, aboriginal Australians had no property rights in the land, and colonization accordingly vested ownership of the entire continent in the British government.⁹⁰

So what was the relationship between the doctrines of discovery and terra nullius (in the sense of unowned land)? According to Larissa Behrendt:

The Doctrine of Discovery was employed by the British in their assertion of sovereignty over Australia but it was the doctrine of terra nullius that would be used to continue to support the legitimacy of the actions of the British Crown in claiming the continent.⁹¹

Robert Miller describes terra nullius as one of the ten elements of discovery:

This phrase literally means a land that is void or empty. This element meant that if lands were not possessed or occupied by any person, or even if they were occupied, but were not being used in a fashion European legal systems recognized or approved, then the lands were —empty and available for Discovery claims.⁹²

Schematic explanations of a thing do not necessarily mean that thing itself is schematic. As British researcher Peter Kilroy said:

Terra nullius was never an established, written doctrine explicitly laid out and followed by “settlers” or enshrined within law. It was a complex mix of philosophical ideas (going back to Hobbes, Locke and others) – loose cultural perceptions and shifting legal practices that were often not explicitly named. This makes it difficult to establish both what it was and how it might have been challenged.⁹³

⁸⁹ Aditi Agarwal, “Sovereign State Territory”, *Academike Explainer*, 2 September 2014, para 20 <https://www.lawctopus.com/academike/sovereign-state-territory/>, accessed 7 September 2021

⁹⁰ S Banner, “Why *terra nullius*? Anthropology and Property Law in Early Australia”, *Law and History Review*, Volume 23, No 1, American Society for Legal History, 2005, p95, opening sentence <https://www.jstor.org/stable/30042845?seq=1>, accessed

⁹¹ Miller et al., 2010, op. cit., p244

⁹² Robert J Miller, “The Doctrine of Discovery: The International Law of Colonialism”, *The Indigenous Peoples’ Journal of Law, Culture & Resistance*, 5(1), UCLA, 2019, p8 <https://escholarship.org/content/qt3cj6w4mj/qt3cj6w4mj.pdf?t=po79hi,%20accessed%20%20September%202021>, accessed 2 September 2012

⁹³ Peter Kilroy, op. cit., para 11

Indeed, it is not a simple process to arrive at a clear understanding of men's thinking — I won't blame women for either doctrine — during a chaotic epoch when European nations were creating vast empires around the world. The face of the world was constantly and violently changing as one locus of humanity attempted to force the rest of humanity into different versions of itself.

Recent divergence of opinions about our foundational myths further complicates the process. For example, native title expert, David Lavery writes that 21 years before Mabo the NT Supreme Court ruled that Australia was founded on the doctrine of backward peoples, not terra nullius:

The terra nullius doctrine is commonly asserted to be the basis upon which Great Britain claimed territorial sovereignty over eastern New Holland in 1788 and, subsequently, the remainder of the Australian continent. However, in *Milirrpum v Nabalco* ... in which **the only comprehensive account in the Anglo-Australian jurisprudence to examine this issue prior to the 1992 Mabo (No 2) decision**, it was not terra nullius which was declared to be the foundation but the Doctrine of Backward Peoples, which posits that a territory inhabited by 'uncivilized inhabitants in a primitive state of society' can be dispossessed by 'more advanced peoples'.⁹⁴ [My bold]

The historians and jurists who supported the Mabo case must have known that the presiding judge in this earlier case, Judge Blackburn, had ruled that the doctrine of backward peoples was Australia's foundation doctrine. Yet they seem to have ignored his ruling and instead resuscitated a late nineteenth century term that literally meant a land devoid of people in order to support their case. Perhaps they thought that making the debate one about "backwardness" would be just too hurtful for Aboriginal Australians?

My view is that neither terra nullius nor the doctrine of backward peoples were foundational myths because neither were the source of sovereignty. However, the "doctrine of backward peoples", despite its demeaning connotations, seems a far more apposite descriptor of "uncivilised inhabitants in a primitive state of society" than the term terra nullius. It in fact equates to the third definition of terra nullius described above. Its significance — and concomitantly the weight carried by notions underpinning the third definition of terra nullius — seem to lie mainly in its effect on the way that the colonisers went about occupying the new territory.

In Governor Arthur's instructions (dated: 25 April 1787) there is some indication about how dispossession of Aboriginal Australians might proceed:

You will endeavour to procure an account of the Numbers inhabiting the Neighbourhood of the intended settlement and report your opinion to one of our Secretaries of State in what manner Our Intercourse with these people may be turned to the advantage of this country.⁹⁵

Further, the following passage gives the impression that there was never any intention to purchase or rent Indigenous land:

It is our Will and Pleasure that ... 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 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 ... 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 10 Acres, free of all Fees, Taxes, Quit Rents, or, for the space of Ten years, provided that the person to whom the said Land shall be been granted, shall reside within the same, and proceed to the cultivation and improvement thereof.⁹⁶

⁹⁴ Daniel Lavery, "Not purely of law – The doctrine of Backward Peoples in *Milirrpum*", *James Cook University Law Review*, 2017, p53

<http://www5.austlii.edu.au/au/journals/JCULawRw/2017/16.pdf>, accessed 2 September 2021

⁹⁵ —, "Governor Phillip's Instructions 25 April 1787", *Museum of Australian Democracy*, transcripts, p6

https://www.foundingdocs.gov.au/resources/transcripts/nsw2_doc_1787.pdf, accessed 3 September 2021

⁹⁶ *ibid.*, p9

Prior ownership was barely recognised. Traditional laws seem to have been more tolerated, but only when they were applied to Indigenous people. Inga Clendinnen, for example, notes NSW's first chief legal officer David Collins speaking "admiringly" of a customary ordeal by spears which he observed.⁹⁷

Arguably, legal and property rights of traditional owners around the world were more likely to have been respected, at least by the British, French and Americans from the middle of the 18th century, if they perceived that the following criteria applied:

- The traditional owners were established mainstream Christians (unlike, say, the Copts).
- There was an existing state apparatus, which resembled the European model, namely one that had a titular lea and clear chain of command, that made laws and provided various forms of administration and infrastructure.
- The country or region colonised was highly populated and sedentised into cities and towns.
- Land was privately owned and existing agreed legal title could be demonstrated by reference to local signs, fences, documents or authorities.
- Intensive agriculture resembling the European model was practised.

At the other extreme, if there was no history of Christianity, no state, no cities, a mobile sparse population, communal "ownership" of land and no farming in the European sense, those colonising powers would have been more likely to dismiss or greatly limit the legal and property rights of traditional owners and no doubt less likely to sign treaties.

The degree to which denial of native title was premeditated or just happened is not clear to me. However, probably none of those six criteria listed above would have been regarded as applying to any part of mainland Australia by any colonial officials or settlers. Most of the settlers appeared to simply assume that the land could be occupied without either consent by or meaningful compensation being paid to the traditional owners. Many in fact occupied land without even the consent of colonial authorities.

The official response to Batman's treaty gives us a window into the mindset of colonial officials, albeit nearly half a century after the arrival of the First Fleet.

According to Marguerita Stephens:

By the mid 1830s, the colonial government of New South Wales was under enormous pressure to unlock the lush grasslands of the Port Phillip District. In June 1835 John Batman and the Port Phillip Association laid claim to around 240,000 hectares (600,000 acres) of land, as 'beautiful' and 'as rich ... as I ever saw', with 'grass of the best description', wrote a jubilant Batman.⁹⁸

Batman was a currency lad who had been rewarded materially for leading murderous roving parties in Tasmania. Later, through aegis of the Port Phillip Association, Batman drew up a treaty to formalise his supposed purchase of 240,000 hectares of prime farming land from the Wurundjeri people. The elders who made their marks on the document are unlikely to have understood that he was planned to dispossess them of their land in return for tools and trinkets. Batman himself was not confident of the legality of his purchase, so he consulted George Arthur, the Governor of Van Diemen's Land (even though the Port Phillip District was still a part of New South Wales). Arthur was sympathetic, but referred the matter to London.

⁹⁷ Inga Clendinnen, *Dancing with strangers*, Text Publishing, Melbourne, 2017, p255

⁹⁸ Marguerita Stephens, "Infanticide at Port Phillip: Protector William Thomas and the Witnessing of Things Unseen", *Aboriginal History*, vol. 38, 2014, pp. 109–130, P112, para 2
www.jstor.org/stable/43687006, accessed 3 Sept. 2021

Before a ruling was made in London, NSW's Governor Bourke issued his own proclamation, declaring that no unauthorised settlers had the power to make any agreements involving purchase of land from Aboriginal people. He asserted the Crown's ownership and control of all land within NSW, but offered no explanation of where that right came from.⁹⁹

Some six decades later, historian Charles White, wrote:

The case was ... referred for opinion to eminent counsel in England. The replies received were distinctly unfavourable, that from the British Government being to the effect that **the wandering aborigines could not be regarded as having any property in land which they had never cultivated or settled on.**¹⁰⁰ [My bold]

Batman and the Port Phillip Association, therefore, were unable to legally purchase the land from its traditional owners, but the association would be given another chance to secure the vast tract of land that they wanted:

Whatever the true meaning of the agreement for the Kulin [i.e. the alliance to which the Wurundjeri belonged] , it was invalidated in London in January 1836 on the grounds of **prior claim to the territory by the British crown.** But in their judgment, Justices Burge, Follett and Pemberton invited the Port Phillip Association to avoid being 'ousted' from their new estate by making application to government laying out 'every ... circumstance connected with the acquisition'.¹⁰¹ [My bold]

But what rationalisation for their land claim could the Port Phillip Association conjure that would be acceptable to the powerbrokers in London? Stephens again:

Those circumstances, as publicised by George Mercer, the Association's advocate in Britain, gave finely tuned prominence to the Association's 'philanthropic' and evangelical motives, and to the 'understanding' of agreed terms that Batman had been advised by Sir George Arthur (Lieutenant Governor at Van Diemen's Land) to secure with the Aborigines of Port Phillip. Mercer was able to report in April 1836 that:

'Buxton [a reformist English member of parliament], unsolicited ... by me, has, on perusing the documents tendered his advocacy in the House, in support of the system we have adopted in reference to the natives, declaring that he will never acknowledge a right to deprive them of the lands, without compensation, protection, food, &c'

Arthur (who had long-standing connections with Buxton and with Lord Glenelg and James Stephen at the Colonial Office), Batman, Mercer and the British judges had rightly wagered that Buxton's concern for the territorial rights of the colonised would be tempered by the offer of compensation as laid out in the treaty, but more so by the Association's plan to send missionaries to proselytise amongst the Aborigines at Port Phillip. Despite the formal invalidation of the treaty, Batman's venture at Port Phillip was assured of continuation when, in June 1836, Buxton and the secretaries of Britain's most prominent mission societies jointly laid out, before the Aborigines Committee, a calculus of imperial humanitarianism in which the transmission of **Christianity was measured as both 'fair and adequate compensation' for the appropriation of Aboriginal lands,** and, happily, 'as the only compensation we can afford'.¹⁰² [My bold]

Within the halls of power, then, there was recognition at some low level of the "territorial rights of the colonised". This probably just meant that any right of occupation could be removed if there was "appropriate" compensation. In the event, the pitch made by the Port Phillip Association representative in London rather cynically appealed to liberal powerbrokers on the basis of what can be reasonably reduced to the very Christian discovery principle, namely: "They give us the land and we give them the Bible". Miller sums it up in the following way:

In one instance, however, the government claimed a type of preemption right when it denied an Australian citizen's attempt to buy land directly from Aboriginal people. In 1835, John Batman purchased land in the southeastern part of the continent ... directly from Aborigines. He signed what he called a treaty with eight representatives of an Aboriginal nation. Batman then

⁹⁹ —, "Governor Bourke's Proclamation 26 August 1835 (NSW)", *Museum of Australian Democracy*, transcripts https://www.foundingdocs.gov.au/resources/transcripts/nsw7_doc_1835.pdf, accessed 3 September 2021

¹⁰⁰ Charles White, *The story of the Blacks: The Aborigines of Australia*, Google Books, chapter VIII: Troubles in Port Phillip, para 8 (originally published in serialised form by the *Bathurst Free press and Mining Journal*, commencing 14 September 1889) https://books.google.com.au/books/about/The_Story_of_the_Blacks.html?id=d9-ttgAACAAJ&redir_esc=y, accessed 7 September 2021

¹⁰¹ Stephens, op. cit., p113, para 3

¹⁰² *Ibid.*, pp112-13

attempted to get the British authorities to recognize this transaction. Instead, the colonial government issued a proclamation asserting the full force of British sovereignty and, in reality, the power of preemption when it stated: —any bargain or contract made with the Aboriginal natives of New Holland . . . will be held to be null and void as against the rights of the Crown. The proclamation asserted —the right of the Crown of England to the Territory in question and the absolute nullity of any grant . . . made by any other party. In sum, there is no question that these nine countries [with a colonialist past] applied, and still apply today, the Discovery element of preemption. The actual means and methods of applying the element differed somewhat due to the circumstances each country encountered.

It seems reasonable to infer that the Crown implicitly asserted its sovereignty over the land on the basis of first discovery, and dismissed native title rights because “wandering aborigines could not be regarded as having any property in land which they had never cultivated or settled on”. One hundred and fifty years later this notion would be associated with the term *terra* in one or other of its senses. Some may struggle to see all the connections, but essentially, sovereignty was signified by first discovery which in turn was the key to all other policies and practices, particularly those to do with native title traditional law.

Although “first discovery” established sovereignty in the eyes of the colonial powers, what came next varied greatly. Cortes and Pizarro, for example destroyed great empires, Cortes razing Tenochtitlan, which was one of the world’s largest metropolises at that time. In India, the British allowed the maharajas to retain much of their power; in Southern Africa, they turned proud warriors into houseboys; and in Tasmania, within 85 years of settlement, the last person who solely had Indigenous ancestry died (her name was Old Suke¹⁰³) This makes Tasmania one of the most “successful” cases of genocide in recorded history, certainly in this part of the world.

It is a great shame that some historians and jurists chose to resurrected the term *terra nullius* “because it was a convenient term and none other existed”. It would have been simpler, more logical, more truthful and just as useful in court to recognise that the doctrine of discovery was Australia’s foundational myth, just as it had been the foundational myth employed by every other European power to lay claim to their colonies around the world for hundreds of years.

Conclusion

I have seen no evidence that any early settlers or explorers expressed a view that Australia was a *terra nullius* in the literal sense of the term. Nor have I seen evidence that any early explorers or settlers expressed a view that the British claimed sovereignty of Australia on the basis of the land being unpopulated, sparsely populated or not farmed.

As dire as the consequences were more often than not — both for the planet and for other humans — the epic journeys of discovery and colonisation of pre-modern times were a part of the human story that began when humans first left Africa. The impulses to explore the unknown and conquer new territory were present in most human societies and not just something limited to the European Age of Discovery.

Sovereignty over Australia — and in all, or virtually all, other “new” lands — was claimed on the basis of “first discovery” by every European colonising nation. First discovery was signified by symbolic discovery and consummated by occupation within a reasonable time. Colonising nations believed first discovery bestowed on them a God-given right to dispossess traditional owners and make laws how they saw fit. If there was no state, no cities, no farming in the European sense, a mobile sparse population and communal ownership of land, native title and traditional laws were more likely to be disregarded.

¹⁰³ —, “Abstract of Proceedings 1938”, *The Royal Society of Tasmania* (?), University of Tasmania, p232, last paragraph <https://eprints.utas.edu.au> > 1938-abstract-proceedings, accessed 4 September 2021

Sovereignty meant that the nominal control of the land was seen to immediately and automatically pass to the colonising nation as soon as it was claimed. Undiscovered or newly discovered land was “land that was legally vacant or unowned”, which is a less problematic definition of terra nullius, though the term terra nullius itself so inherently problematic it should be discarded by historians and teachers when explaining rationalisations for British settlement of Australia.

The centuries-old worldwide-applied Christian doctrine of discovery was intrinsically racist because it regarded non-white peoples who had not embraced Christianity as lesser beings, and it trampled the rights of others whose cultures were just as complex as Western culture. The British invasion of Australia does not accord with modern values. No real or perceived benefits since the invasion began can atone for the crimes committed against Aboriginal Australians, including the theft of land, the theft of culture and the theft of loved ones. Indigenous Australians resisted and continue to resist these crimes and their legacy in various ways over a sustained period.

There is *neither need* to base any arguments for a treaty, a voice in parliament, changing the date of Australia Day or compensation for past crimes on assertions that are not only demonstrably wrong, but could engender hate or disrespect for those who have common origins with early settlers. Nor is there any point in doing so. These arguments take the focus off the role of traditional Christianity in creating and maintaining a doctrine (i.e. discovery) that palpably led to so much misery around the world over so many centuries.

The only argument that we really need in relation to the moral and legal dimensions of the colonisation of Australia is that Britain, like all the other colonial powers almost everywhere else, arrogated to itself the right to steal Aboriginal land solely on the basis of the doctrine of first discovery, and that the human consequences were appalling.

Postscript

I did not participate in the so-called History Wars that were ignited years ago, and I did not have strong opinions about terra nullius for a long time. In fact, right through upper primary school to university where I completed a double History degree in the 1970s — and later as a History teacher in the 1980s and early 1990s — I had never heard the term. I did know from general knowledge, however, that early explorers and settlers had not pretended that Australia was unpopulated. In the curriculum history book that I published in October 2020 — *The colonisation of Australia, as told by a nine-year-old in 1960* — I made the almost casual remark that:

On the question of *Terra Nullius*, Europeans have known full well since the voyages of discovery that Australia was already inhabited. It may have suited the purposes of the Great Powers to reinvent the notion a hundreds [sic] years after European settlement, but suggesting that successive generations of teachers in Australia taught that Australia was uninhabited when Cook arrived is one of those conspiracy theories that is too far-fetched to be credible.¹⁰⁴

When my assertion was challenged by a member of the History Establishment, I decided to explore the subject in more depth in order to interrogate my own assumptions. I chose to seek out primary sources and the opinions of those who had no apparent ideological baggage. I wanted to develop an original, open-minded view formulated on the basis of “seeking truth from facts”. This is the result.

¹⁰⁴ Robbo Bennetts, *The colonisation of Australia, as told by a nine-year-old in 1960*, Wipeout Publications, Melbourne, 2020, p60. There was a typographical error in this passage: “a hundreds” should have read “a hundred”.

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Acknowledgement

Sincere thanks to Ian Boreham, Cook scholar and member of the Captain Cook Society for checking all references to Cook and making corrections or clarifications where necessary.