

THE ILLEGAL INVASION

From reports of the Dutch contacts with our people in the 17th century, it is reasonable to assume that the British were quite aware of the position of this land and the conditions that pertained.

On 30 July 1768, Captain James Cook, as an official representative of the Crown of Britain, was given *legally binding* orders from his superiors, the British Admiralty.

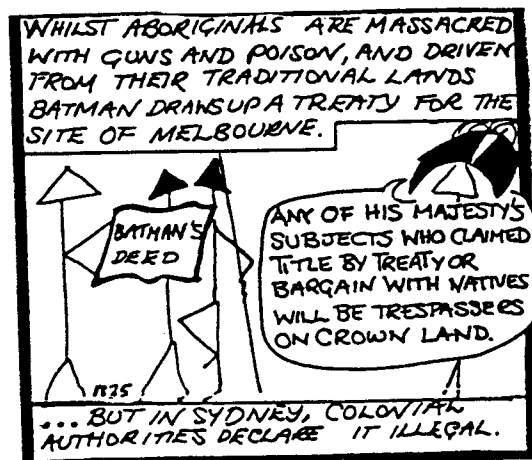
The Admiralty Orders carried not only the most precise and unequivocal terminology of legal recognition of our Aboriginal Estate, but also binding direction to act given two legal scenarios:

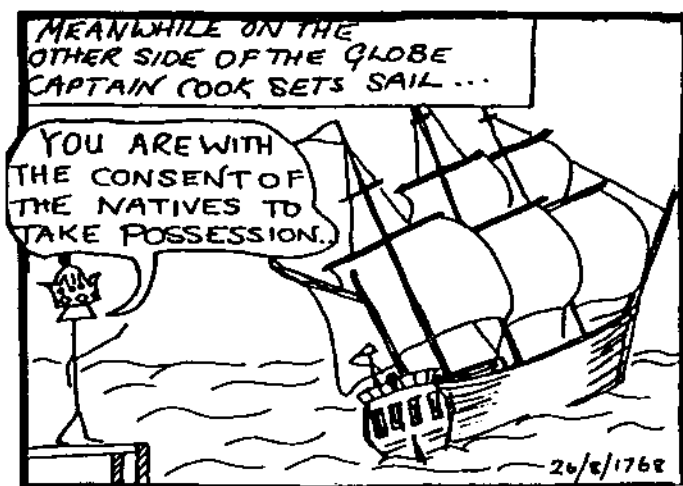
The first article was: 'You are with the consent of the natives to take possession of convenient situations in the country in the name of the King of England...' and the second article was: 'Or, if you find the country *uninhabited*, take possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.' (38)

The second article, emphasising the *uninhabited* and therefore vacant estate, allowed of no vagaries or sophistries of assumption to preclude any indigenous title, nor deprive any usage therein. In the precise implication contained in the Orders, 'uninhabited' meant literally and legally 'uninhabited'. The precise direction of it negates any implication of 'wasteland' and *terra nullius*. As an instrument of establishment of sovereignty that instrument must be clear precise, accountable and unequivocal.

The obvious minimal conclusions to be drawn from the precise Orders to Cook are that Britain was aware of the natural, inherent rights of indigenous people to land rights, land entitlement, usufructuary and cultural rights and that the Instruction was so made as to protect and encompass those rights in a unilateral framework of legality within the Crown.

This is confirmed by an article written by Lord Morton, President of the Royal Society in London,





and delivered to Captain Cook shortly before his departure:

Hints offered to the consideration of Captain Cooke, Mr. Bankes, Doctor Solander, and the other Gentlemen who go upon the Expedition on Board the Endeavour...

To exercise the utmost patience and forbearance with respect to the Natives of the several Lands where the Ships may touch. 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. They may naturally and justly attempt to repell intruders, whom they may apprehend are come to disturb them in the quiet possession of their country, whether that apprehension be well or ill founded. Therefore should they in a hostile manner oppose a landing, and kill some men in the attempt, even this would hardly justify firing among them, 'till every other gentle method has been tried.' (39)

That our land was indeed inhabited and that our presence, land management, economy and derived benefits were immediately apparent to Cook, can be gathered from his testimony in his journals in which he describes the eastern coast with soils 'capable of producing any kind of grain', and as having fine

meadows 'as ever seen'.(40)

In fact meadows or, in this case grasslands, occurring in naturally afforested areas are phenomena reflecting the manipulation of nature by the land management of people over an extended period of time. Cook's attestation of inhabitancy was couched in terms, not only recognising presence, but also inviting speculation upon the subsistence economy, the social order and government of the group. He wrote of the Aboriginal Possessors:

...in no way inclined to cruelty, as appeared from their treatment of one of our people ... they may appear to some to be the most wretched People on Earth; but in reality they are far happier than we Europeans They live in a tranquility which is not disturbed by the Inequality of Condition. The Earth and sea of their own accord furnished them with all the things necessary for life...(41)



Cook also admits that attempts to formally purchase the land with trinkets were unsuccessful:

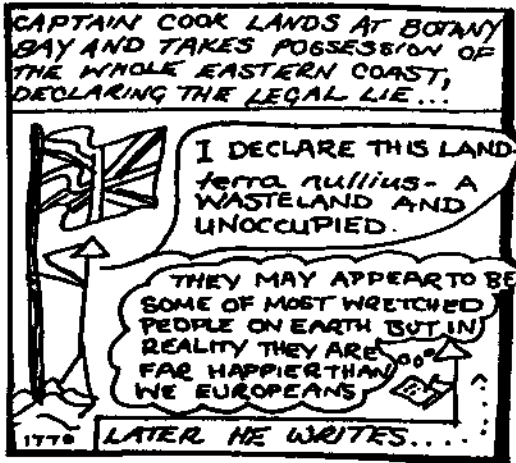
... they have very little need of Clothing ... many to whom we gave the cloth, etc, left it carelessly upon the Sea beach and in the woods as a thing they had no manner of use for; in short they seemed to set no value on any thing we gave them, nor would they part with any thing of their own for any one article we could offer them. This, in my opinion, argues that they think themselves provided with all the necessaries of Life and that they have no superfluities. (42)

Thus, these our lands were recognisably inhabited; such manner of habitation carried no manner of legal impediment; such lands were indeed in the possession of the inhabitants, even to the point where Captain Cook was encumbered to imply terror and force by the discharge of weaponry to hold the Possessors at bay.(43)

Despite this first hand knowledge of our existence Cook failed to formally obtain cession of our land by

treaty or formal purchase and instead claimed possession by discovery. On 22 August 1770 he wrote: 'I now once more hoisted English colours, and in the name of His Majesty King George the Third, took possession of the whole Eastern Coast.'(44)

He thus implied that our land was uninhabited, *terra nullius*, land belonging to no-one, so that its root title could be acquired by first discovery.



There are four possible explanations for this incongruous act. As the Accredited Agent and Official Representative of the Crown of Britain, Captain Cook either:

1. fraudulently took possession holding his orders in contempt, or
2. was involved in the conspiracy between the Colonial Secretary of Britain and the British Admiralty to fraudulently acquire sovereignty and deprive Aboriginal inhabitants of their natural legal right, or
3. committed a misapprehension, an error of fact, in interpreting his orders, or
4. acted in good faith intending that a remedy, the official negotiation and ratification of cession or formal purchase, would be pursued in a profoundly more formal and legitimate capacity by his superiors at a later date.

In fact, in the subsequent manifestation of territorial assertion, Governor Phillip was instructed, in April 1787, to: '... endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections ...'

can be rightly interpreted as that intercourse necessary to bring about the negotiation and 'consent' to Possession. The fact that no such intercourse nor 'consent' to Possession ever happened between Aborigines and Britain's formal Representatives renders Britain's claim to Sovereignty of this land to be reduced to absurdity.

Long before Cook claimed 'discovery' of Australia, England was fully aware, through its involvements in North America, of the lawful occupation and sovereign possession of indigenous peoples. England challenged Spanish claims in North America

using the principle that, to satisfy the requirements of international law for establishing sovereignty, discovery of a land (territory), the first arrival, does not establish sovereignty until the land is settled and controlled. Discovery must be followed by effective occupation.

The leading jurist, Vitoria, confirmed: '... the aborigines in question had true dominion before the Spaniards arrived.' (45)

England disputed the Spanish claims to sovereignty through discovery and occupation by stating that they had: '... no claim to property there except that they had established a few settlements and named rivers and capes. ... Prescription without possession is not valid.' (46)

In 1928 the Permanent Court of Arbitration in the Hague ruled on the international law of discovery in a dispute between the United States and Netherlands: 'The title of discovery ... would, under the most favorable and most extensive interpretation, exist only as an inchoate title, as a claim to establish sovereignty by effective occupation.' (47)

In 1832, in the US Supreme Court, Justice Marshall applied this principle:

It regulated the right given by discovery among the European discoverers, but could not affect the rights of those already in possession, either as aboriginal occupants (or through earlier discovery). ... The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the minds of any man. ... (T)hese grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of natives were concerned. (48)

In the reference to 'blank paper' Marshall inferred that Aboriginal entitlements were intended to be thereon enshrined in order to effect a legitimate ceding of portions of territories and exchange of powers between indigenous people and colonists.

The application of these leading authoritative interpretations of international law to Australia, means that the simple act of Cook's landing on the east coast and claiming possession in the Name of the King of England did not establish sovereignty for England over these OUR lands.

Even IF treaties had been made with Aborigines on the east coast, all the wide lands, still occupied and in possession of Aboriginal people today, are not occupied by nor in the possession of non-Aboriginals.

These interpretations will apply until the illegal claim of *terra nullius*, peaceful settlement and the illegal implication of British (now Australian) Sovereignty has been removed or made to conform to the Law of England at that time extant and to the Principle of the Law of Nations. Indeed, the Law of

Nations must be adhered to and result in legally rectifying those ills and defects at law, which are capable

of remedy by means of a valid Treaty under the Vienna Convention on the Law of Treaties.

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