Reinventing Waste Land as a Colonial Legal Fiction

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The term *terra nullius* was absent from the eighteenth and early nineteenth century accounts of the settlement of New Holland, although related phrases like "waste land" or "desert and uninhabited" were used at the time.[1] Paying attention to the language that was actually used reveals a great deal. The official instructions to Captain James Cook in 1768 urged him "with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain." If lands were found to be uninhabited, they may be possessed by "setting up proper marks and inscriptions, as first discoverers and possessors."[2] Cook did not seek the consent of Indigenous people, and instead he claimed a vast territory while being careful to exclude the discoveries "the honour of which belongs to the Dutch Navigators."[3] In short, he assumed a doctrine of discovery and breached his instructions in favour of vain ceremonies of possession.[4]

It would then be half a century before William Blackstone's simplistic taxonomy of colonies in *Commentaries on the Laws of England* (1766) became a touchstone for a legal question about the nature of settlement in New South Wales. Blackstone had envisaged essentially two kinds of colonial settlement—the American type where lands were taken by conquest or ceded by treaty, and a second type where occupation could proceed without force

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[1] See especially David Ritter, "The 'Rejection of Terra Nullius' in *Mabo*," *Sydney Law Review* 18.1 (1996): 5–33; Bain Attwood, *Empire and the Making of Native Title: Sovereignty, Property and Indigenous People* (Cambridge: Cambridge University Press, 2020), 14–25.

[2] For the full text of the instructions to Cook in 1768 from the Lords of the Admiralty, see www.foundingdocs.gov.au/resources/transcripts/nsw1_doc_1768.pdf.

[3] James Cook, *Journal of HMS Endeavour: 1768–1771*, National Library of Australia, facsimile for 22 August, 1770, at http://nla.gov.au/nla.obj-229063111; Watkin Tench, *A Narrative of the Expedition to Botany Bay* (London: J. Debrett, 1789), 67.

[4] Emer de Vattel had already in his *Law of Nations* (1758, XVIII, §208) poured scorn on the empty ceremonies of transient navigators who claimed possession in "desert countries," contrasting this fanciful notion of discovery with actual occupation.

because the land was largely uninhabited or uncultivated.[5] In 1819, Judge Barron Fields invoked Blackstone's authoritative *Commentaries* in order to suggest that New South Wales belonged to the second category of colony—not because Fields was concerned to silence Aboriginal people but because he was attempting to limit the powers of the Governor.[6] A relevant case in Jamaica had resolved, for example, that if that colony had been conquered, then the Crown had a right to levy taxes directly, but if it had not been conquered then taxation would require parliamentary legislation. The senior law officers in London agreed with Judge Fields.

> That the part of New South Wales possessed by His Majesty, not having been acquired by conquest or cession, but taken by him as desert and uninhabited, and subsequently colonized from this country, We apprehend His Majesty by his Royal Prerogative has not the right either by himself or thro' the Medium of his Governor to make laws for the levying of taxes in such Colony.[7]

In short, if the violence against Aboriginal people between 1788 and 1819 had been deemed "conquest" in law, then the Governor would have been free to levy taxes. Either way, Aboriginal customary laws were not deemed relevant to the foundation of the colony.

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[5] *Commentaries on the Laws of England, Book I: The Rights of Persons*, ed. David Lemmings (Oxford: Oxford University Press, [1765] 2016), 75–76. He also condemned the massacre of Indigenous people "merely because they differed from their invaders in language, in religion, in customs, in government, or in colour." *Commentaries on the Laws of England, Book II: Of the Rights of Things,* ed. Simon Stern (Oxford: Oxford University Press, [1766] 2016), 4.

[6] If the colony was not taken by conquest, then Governor Macquarie had no right to levy taxes in the way that he did. See Thomas H. Ford and Justin Clemens, *Barron Fields in New South Wales: The Poetics of Terra Nullius* (Melbourne: Melbourne University Press, 2023), ch.2.

[7] Frederick Watson, ed., *Historical Records of Australia IV: Legal Papers Section A Volume I, 1786–1827* (Sydney: Library Committee of the Commonwealth Parliament, 1922), 330. Larissa Behrendt (Gamillaroi / Euahleyai), "The Doctrine of Discovery in Australia," in *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies,* ed. Robert J. Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg (Oxford: Oxford University Press, 2010), 179, refers to this opinion issued by the Attorney-General in London, Samuel Shepherd, and the Solicitor General, Robert Gifford, as reflecting the concept of *terra nullius*.

However, the distinction between two types of colonies turns out to be a red herring, in some respects, because there was one ideology that underpinned all the British colonies, whether conquered or settled by occupation: the idea of waste land. In this paper, I will trace the genealogy of this idea from the seventeenth century until it appeared in the waste lands legislation of nineteenth-century Australia. The discussion will then focus on the history of Victoria, where some of the issues that concern us were recently discussed within the hearings of the Yoorrook Justice Commission.[8]

To begin with, one would need to note the two different meanings of "waste" land in the seventeenth century English sources.[9] The first referred to degraded country (e.g., in the numerous biblical refences to divinely punished territories), but the second is not found in the King James Version of the Bible. It refers to fruitful lands not yet developed by human labour. This second usage was adopted by John Milton in *Paradise Lost* when he poetically depicted the "waste wilderness" of the Garden of Eden.[10] In Milton's England, the common lands were often seen as waste and in need of enclosure in order to be used more effectively. The words "waste" and "common" became almost synonyms in debates about land reform, even in radical arguments that opposed the privatization of property.[11]

Edward Coke's legal exposition published in 1642 defined waste land in relation to a lord's landholding rather than to the Crown's jurisdiction: "It is called *vastus fundus*, waste

[8] Notably on 27 March, 2024, when hearing evidence from Professors Marcia Langton and Henry Reynolds. The full transcript is available at: yoorrookjusticecommission.org.au/wp-content/uploads/2024/04/YJC-TRANSCRIPT-DAY-3-%E2%80%93-27-MARCH-2024-FINAL.pdf.

[9] See the extensive study by Vittoria Di Palma, *Wasteland: A History* (New Haven: Yale University Press, 2014).

[10] Karen Edwards, "Eden Raised: Waste in Milton's Garden," in *Renaissance Ecology: Imagining Eden in Milton's England*, ed. Ken Hiltner (Pittsburgh: Duquesne University Press, 2008), 259–272.

[11] Edwards, "Eden Raised," 265. For arguments against privatized property, including biblical arguments, see especially Gerard Winstanley, *An Appeal to the House of Commons, Desiring their Answer: Whether the Common People shall have the quiet enjoyment of the* Commons *and* Waste Land*; Or whether they shall be under the will of the* Lords *of* Mannors *still* (London, 1649).

ground, because it lieth as waste with little or no profit to the Lord of the Mannor."[12] Two centuries later, the same terminology was used in the imperial *Sale of Waste Lands Act* (1842), where "waste lands" referred to land that the Crown had not yet alienated or reserved to itself.[13]

When viewed through lens of colonial imagination, the terminology of waste land was entirely compatible with official concern to protect Aboriginal rights on common lands—assuming the very narrow concept of Aboriginal rights handed down from Locke and Blackstone, rather than the Indigenous worldviews within which there was no such thing as waste land.[14]

This official, imperial concern is evident, for example, in the Aboriginal Protectorate system that was instituted in 1837, reflecting a humanitarian movement within the British Parliament.[15] The system was ostensibly designed to ameliorate the harms visited on Indigenous people in the course of colonization, while also delivering the assumed benefits of civilisation and Christianity.[16] Accordingly, the Secretary of State for War and the Colonies, Lord Glenelg, explained to the Governor of New South Wales in 1838 that the Protectors should defend "the rights and interests of the Natives," and guard against "any encroachment

[12] Edward Coke, *Second Part of the Institutes of the Laws of England* (London, [1642] 1669), 656 ("Of Tithes" 2.E.6.Cap.13), when distinguishing between barren, heath and waste ground.

[13] Maureen Teehan, "Australian Land Law," in *The Cambridge Legal History of Australia*, ed. Peter Cane, Lisa Ford and Mark Mcmillan (Cambridge: Cambridge University Press, 2022), 328–353, here 333. The sale of Crown land was a strategy for funding colonial expansions and designed to ensure a steady supply of labour, as is shown by the debates in the UK parliament in 1839. Hansard, "Waste Lands of The Colonies" Third series, Vol. 48 (25 June 1839); Jane Lydon, "'Mr Wakefield's Speaking Trumpets': Abolishing Slavery and Colonising Systematically," *The Journal of Imperial and Commonwealth History* 50 (2022): 81–112.

[14] Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Sydney: Allen & Unwin, 2011); Bruce Pascoe, *Dark Emu*, 2nd edn (Broome: Magabala Books, 2018).

[15] See, e.g., Zoë Laidlaw, "'Aunt Anna's Report': The Buxton Women and the Aborigines Select Committee, 1835–37," *Journal of Imperial and Commonwealth History* 32.2 (2004): 1–28.

[16] Hilary M. Carey, "Christian Colonisation and Its Critics," in *God's Empire: Religion and Colonialism in the British World, c.1801–1908* (Cambridge: Cambridge University Press, 2011), 322–330.

on their property, and from acts of Cruelty, of oppression or injustice."[17] Imperial theories generally sailed well ahead of colonial practices, but here we will be more specifically concerned to understand how humanitarian theory was thought to be compatible with the concept of waste land.

The influential philosophy of John Locke provides part of the answer, but not without some historical ironies. As we shall see, he could speak just as easily about the "waste of America" as later imperial legislators could speak of the "waste lands of the Crown" in New South Wales. English eyes could see waste lands at home and abroad, without needing to deny that Indigenous peoples in the colonies possessed certain limited rights. Both Locke and Blackstone were concerned to explain the nature of Indigenous rights, without of course enquiring whether their own views were actually compatible with the practice of ancestral law and custom in the colonies. Locke's views on property are well known, so here just a brief overview is offered in order to highlight his idea of the commons as waste land. More importantly, we will then show Locke's theory was more honored in the breach than in observance in Australian colonies. Locke's philosophy was, in some important respects, incompatible with the idea of "waste lands of the Crown."

John Locke on the Waste Places of America

Locke provided a comprehensive account of property in Book II of the *Two Treatises of Government* (1689) which included an argument for land enclosures.[18] With a nod to the

[17] Letter from Lord Glenelg to Governor Gipps, 31 January 1838, in Watson, *Historical Records of Australia* I, 19, 254. Glenelg's requirement that the Protectors to learn Aboriginal languages is reflected in R. Brough Smyth's summaries, *The Aborigines of Victoria* (Melbourne, 1878). See further Deborah Shuh Yi Tan, "Language Ideologies and Language Loss in 19th-Century Victoria: The Translations of William Thomas," *Journal of Australian Studies* 47 (2023): 398–413, doi:10.1080/14443058.2023.2180771.

[18] John Locke, *Two Treatises of Government* (London, 1824) is freely accessible online, and citations will refer to the section numbers in Book II.

biblical Adam and Noah, Locke argues that the earth was originally given to all humankind in common. When fruits are picked in the state of nature, they are marked off from the common world without seeking the "express consent" of all those who share the lands. Any systematic attempts to secure such consent would likely lead to starvation (§28). The "wild Indian" in the state of nature takes resources from common lands apparently without concern for any notion of enclosure, and without any need to seek consent. An animal hunted for food belongs to the person, "who hath bestowed his labour upon it, though before it was the common right of every one" (§30). There need be no disrespect for the interests of others, and no danger of quarrels, as long as the gathering of natural resources were kept within the bounds of day to day needs.

Having painted this picture of hunting and gathering on common lands, which applied to both England and the colonies, Locke moves on to the question of how one might come to own a parcel of land:

> But the *chief matter of property* being now not the fruits of the earth, and the beasts that subsist on it, but *the earth itself*; as that which takes in and carries with it all the rest; I think it is plain, that *property* in that too is acquired as the former [within the state of nature]. *As much land* as a man tills, plants, improves, cultivates, and can use the product of, so much is his *property*. He by his labour does, as it were, inclose it from the common. (§32)

The principle of first possession through agrarian labour was then applied to the areas of America that had not yet been subdued to the plough:

> And the same measure may be allowed still without prejudice to any body, as full as the world seems: for supposing a man, or family, in the state they were at first peopling of the world by the children of Adam, or Noah; let him plant in some inland, vacant places of America, we shall find that the possessions he could make himself, upon the measures

> we have given, would not be very large, nor, even to this day, prejudice the rest of mankind (§36).

In this way, a transition to agrarian property could be seen as peaceable, as long as the interests of others were not substantially impacted. As soon as conflicts of interest arose, then the need for express consent would be generated, and thus was born the idea of a social contract at the foundation of civil societies.[19]

While Locke's philosophical discourses are well known, it is equally interesting to observe how his biblical arguments build on the earlier Puritan traditions—especially when drawing warrants for colonial plantations from the book of Genesis. The peaceable example set by Abraham was ubiquitous in the seventeenth century, and not always defended with reference to exclusive divine mandates. For example, a leading clergyman in the Massachusetts Bay Colony, John Cotton, invoked the divine charters given to Adam and Noah, but he could also see in Genesis 21 that property rights were generated by Abraham's own "industry and culture" as a matter of natural law, rather than sanctioned solely by divine command.

> For his [Abraham's] right whereto he pleaded not his immediate calling from God, (for that would have seemed frivolous among the Heathen) but his owne industry and culture in digging the well, verse 30. Nor doth the King reject his plea, with what had he to doe to digge wells in their soyle? but admitteth it as a Principle in Nature, That in a vacant soyle, hee that taketh possession of it, and bestoweth culture and husbandry upon it, his Right it is.[20]

[19] This version of social contract theory, which excluded any need for a Crown, was underpinned by an anti-royalist interpretation of Genesis 1. See Mark G. Brett, *Indigenous Rights and the Legacies of the Bible: From Moses to Mabo* (Oxford: Oxford University Press, 2024), 65–66.

[20] John Cotton, *God's Promise to His Plantations* (London, 1634), 5.

In this line of argument, there is barely a difference to be observed between Cotton in 1634 and Locke in 1689. In *Two Treatises of Government*, Locke could also invoke Genesis as a spacious narrative world in which people could move freely about, claiming only the land that they actually used. In this connection, he repeated the old example of Abraham and Lot in Genesis 13 (§38).

Locke's philosophical attention to the nature of property comes to fruition, however, in a peculiar ethical argument for the efficiency of land enclosures. This is not so much a novel argument in its time, but one which is charged with a notable combination of self-interest and charity: "And therefore he that incloses land, and has a greater plenty of the conveniences of life from ten acres, than he could have from an hundred left to nature, may truly be said to give ninety acres to mankind." Accordingly, in addition to any divine warrant to subdue the earth, there is a charitable ethic that can inform colonial expansion into "the wild woods and uncultivated waste of America" (§37). The colonies apparently afforded boundless plains to share, and cultivated land was in fact a gift of efficiency. "Land that is left wholly to Nature, that hath no improvement of Pasturage, Tillage, or Planting, is called, as indeed it is, waste" (§42).

Given the widespread influence Locke's philosophical fancies, it is all the more remarkable to notice that William Blackstone made only selective use of them. The *Commentaries on the Laws of England* followed Locke in distinguishing between the fragile property rights of Indigenous peoples and more secure rights within civil societies,[21] but as noted above, Blackstone clarified that the American colonies were actually taken by conquest or ceded by treaty, not appropriated by means of agrarian labour. The same view was reiterated in American law in the 1820s and 1830s, when Locke's view of property was

[21] See further, Brett, *Indigenous Rights*, 63–76.

rejected by the Marshall Court.[22] Nevertheless, Locke's ideas made their way to New South Wales.

The Australian Colonies in Imperial Context

A key piece of legislation for land management in the Australian colonies was the imperial *Sale of Waste Lands Act* (1842). Section III of this Act incorporates an awareness of Indigenous rights among the variety of Her Majesty's interests: the sovereign would reserve land to herself for "public Roads or other internal Communications, whether by Land or Water, or for the Use or Benefit of the aboriginal Inhabitants of the Country, or for Purposes of Military Defence, or as the Sites of Places of public Worship, Schools, or other public Buildings, or as Places for the Interment of the Dead, or Places for the Recreation and Amusement of the Inhabitants." The use of land by Indigenous inhabitants was thus determined to be among the matters that the Crown would consider under its own legislation. This is a very weak formulation in comparison with legislation promulgated in South Australia just a few years earlier.

In 1834, the enabling legislation for the settlement of South Australia presumed that the lands in the new colony were "waste and unoccupied,"[23] but the royal Letters Patent in 1836 drew attention to the prior existence of Aboriginal rights, providing a rare moment of legal clarity in Australian history:[24]

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[22] Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford: Oxford University Press, 1996), 195–196, mentions Chief Justice Marshall's rejection of Locke in this regard.

[23] The topic of "waste land" is central to Edward Gibbon Wakefield, *Letter from Sydney, the Principal Town Of Australasia, Together With The Outline Of A System Of Colonisation*, ed. Robert Gouger (London: Cross, 1829), notably 151–163, where Wakefield offers a critique of the earlier and influential theory of colonial "waste" land provided by Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), "Causes of the Prosperity of New Colonies" (IV.7.2).

[24] Geoffrey Robertson, "Foreword," in *Coming to Terms: Aboriginal Title in South Australia*, ed. Shaun Berg (Kent Town: Wakefield Press, 2010), viii–xiii, here viii. The royal provision was incorporated into the *South Australia Amendment Act* of 1838. See further, Sean Brennan, "The

> PROVIDED ALWAYS that nothing in those our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their own Person or in the Persons of their Descendants of any Land therein now actually occupied or enjoyed by such Natives.

Similar instructions were issued in 1836, requiring evidence that Aboriginal land had been ceded by due process:

> You will see that no lands which the natives may possess in occupation or enjoyment be offered for sale until previously ceded by the natives to yourself. You will furnish the protector of the aborigines with evidence of the faithful fulfillment of the bargain or treaties which you may effect with the aborigines for the cession of lands.[25]

These requirements were clear enough as a matter of legal principle: no land could be sold to settlers unless it had first been ceded to the Crown.

This principle was inconsistent with the legislation in New South Wales around the same time,[26] but it was not a novel notion in the wider imperial context. It was consistent with the Royal Proclamation of 1763, which did not entirely usurp Indigenous rights in the North American colonies, but rather, claimed an exclusive right for the Crown to purchase land and make treaties.[27] The same principle was reasserted in the influential American case *Johnson v. M'Intosh* (1823), in which Chief Justice Marshall ruled against a private purchase of Indigenous land in favour of the federal government's exclusive right—the newly minted

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Disregard for Legal Protections of Aboriginal Land Rights in Early South Australia," in Berg, *Coming to Terms*, 90–121.

[25] Instructions from the imperial Colonization Commissioners to the Resident Commissioner of South Australia. Quoted in Brennan, "Disregard," 101.

[26] Aboriginal interests were not mentioned at all in the relevant NSW legislation: *An Act for protecting the Crown Lands of this Colony from Encroachment Intrusion and Trespass* [28th August, 1833], and *An Act to restrain the unauthorized occupation of Crown Lands* [29th July, 1836].

[27] See especially John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in *Aboriginal Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, ed. Michael Asch (Vancouver: UBC Press, 1997), 155–172.

USA having inherited the prerogatives of the British Crown.[28] An assumption shared by both the Royal Proclamation and *Johnson v. M'Intosh* was that Indigenous people maintained the right to sell or cede land, both before and after the assertion of imperial sovereignty. This same assumption was written into the colonial foundation of South Australia, but then watered down to "use" rights in the *Sale of Waste Lands Act* (1842).

For a number of complex reasons, Māori rights in Aotearoa New Zealand were recognized more effectively in the 1840s by the English colonial administration. The Governor of New South Wales still had jurisdiction over New Zealand in February 1840 when Te Tiriti O Waitangi was secured. The *Land Claims Act* of 1840 was therefore issued initially in New South Wales, empowering the Governor to appoint land commissioners in New Zealand who would assess all of the land transfers between Māori and settlers—whether by means of payments or gifts—before the date of the Treaty.[29] The *Land Claims Act* declared that although all the land titles before 1840 were "null and void" (s.1), Her Majesty was concerned to see that lands were transferred from the Aboriginal inhabitants on equitable terms (s.2). A peculiar provision in this law allowed for the land court to hear Māori testimony, beyond the narrowly religious demand that sworn testimony should embrace the authority of the Bible.[30] The validity the settler claims to particular areas were to be assessed (up to a limit of 2,560 acres) and then confirmed or denied by the commissioners.

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[28] For a close analysis of this landmark case in its historical context, see Lindsay G. Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of their Lands* (New York: Oxford University Press, 2005).

[29] *An Act to empower the Governor of New South Wales to appoint Commissioners with certain powers to examine and report on Claims to Grants of Land in New Zealand* [4thAugust, 1840]. The Act was replaced in June 1841 by the New Zealand Legislative Council with the *Land Claims Ordinance*, which reaffirmed the substance of the 1840 Act within the newly independent colony.

[30] *Land Claims Act* (NSW), s.8 and *Land Claims Ordinance* (NZ), s.9. See the discussion in Shaunnagh Dorsett, "'Destitute of the Knowledge of God': Māori Testimony Before the New Zealand Courts in the Early Crown Colony Period," in *Past Law, Present Histories*, ed. Diane Kirby (Canberra: ANU Press, 2012), 39–57; Brett, *Indigenous Rights*, 80–84.

The details of the individual assessments proved controversial on all sides, but here our focus falls on the legal process that was envisaged in the *Land Claims Ordinance* in Aotearoa New Zealand: the validity of colonial land titles arose via a statute that accorded a measure of recognition to pre-existing Indigenous rights in land. This was an imperfect application of the Treaty of Waitangi's affirmation that Indigenous property rights were not just rights to mere occupancy, as presumed in the Australian *Sale of Waste Lands Act* (1842).

Not surprisingly, the opponents of the Te Tiriti O Waitangi and the *Land Claims Ordinance* were legion. Among the many examples that could be cited is the opinion expressed within a House of Commons committee already in 1844 that the Treaty of Waitangi "was a part of a series of injudicious proceedings" with "injurious consequences" that included the recognition of Māori property in "wild lands."[31] The implication was that no genuine property could be held securely in wild or waste lands, and this view can be traced back to the classic distinction advanced by John Locke in the seventeenth century between transient property in the "state of nature" and secure property within civil societies. In spite of Locke's lack of influence in American law during the time of the Marshall Court, his ideas surged to the fore in the Australian colonies, even when it came to interpreting, ironically, the Crown's jurisdiction over land.

For example, in 1835, John Batman attempted to secure a treaty with traditional owners in the Port Phillip area, now known as Melbourne. But Batman had no authority from the Crown, and in this respect the case was analogous with the issues discussed in *Johnson v. McIntosh*, where a private company had entered into an agreement with Indigenous people.[32]

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[31] Quotations taken from David V. Williams, "Radical Title of the Crown and Aboriginal Title: North America 1763, New South Wales 1788, and New Zealand 1840," in *Common Law, Civil Law, and Colonial Law Essays in Comparative Legal History from the Twelfth to the Twentieth Centuries* (Cambridge: Cambridge University Press, 2021), 260–285, here 275–276.

[32] The complexities of the John Batman story are discussed in James Boyce, *1835: The Founding of Melbourne and the Conquest of Australia* (Melbourne: Black Inc, 2011); Attwood, *Empire and the Making of Native Title*, 43–64.

In the American case, Chief Justice Marshall had resolved that the US Government held an exclusive right of purchase, effectively reframing the Royal Proclamation of 1763. Batman was a businessman representing the Port Phillip Association, so his "treaty" could be struck down for essentially the same reasons.

If, on the other hand, his case had been presented to the colonial authorities as a contractual arrangement involving payments or gifts, then it arguably could have been treated in a way that was suggested by the legislation in Aotearoa New Zealand—where land dealings with Māori between 1815 and 1840 were considered retrospectively under the *Land Claims Ordinance*. It was conceivable at the time (even in the eyes of the very same imperial administration), that Batman had secured a legitimate purchase that recognized the authority of traditional owners over their own property. But in 1836, Lord Glenelg communicated his judgment to Governor Bourke that Batman's so-called treaty was not the most constructive way to secure Indigenous rights—by "recognising in them any right to alienate to private adventurers the land of the colony."[33] This meant that the Protectors and the legislature would need to find other ways to recognize Indigenous rights—eventually through the creation of reserves. In the meantime, the relationship between squatters and Aboriginal people could be characterized as lawless, even in official colonial reports of the day. This can be readily illustrated in the case of Victoria.

The Reinvention of Waste Land in Victoria

[33] Quoted in Attwood, *Empire and the Making of Native Title*, 62. This judgment confirmed Bourke's Proclamation on 26 August, 1835, that "vacant lands of the Crown" could not be secured "under the pretence of a treaty, bargain, or contract, for the purchase thereof, with the Aboriginal Natives." Published in the *New South Wales Government Gazette*, Issue 138 (2 September, 1835), 613.

When in 1883 the barrister John Quick published an overview of settlements in the Port Phillip District, he divided the history into four distinct periods. He admitted that the initial settlement "preceded government control in Australia; when land was selected and taken possession of by the first comer on the old principle of Roman Law, *quod nullius est occupanti conceditur*." [34] His Latin clause resonates intriguingly with the terminology of *terra nullius*, but the reference here is to private acquisitions, as in Roman law.[35] Quick is talking about illegal squatting, as considered through the lens of the colonial law at the time, but dignified here with a Latin phrase.

During the second phase of settlement, a crude administration attempted to restrain "the unlicensed occupation of waste lands, and proceeded to impose upon the occupants payment of a nominal rent, reserved upon a yearly license."[36] The limit of one year on these licenses was designed to prevent any "adverse possession" claims made against the Crown simply on the basis of squatter occupation.[37] The imperial *Sale of Waste Lands Act* arrived in 1842, and finally, the control of land was turned over to the separate colony of Victoria when it was created in 1851. An official review in 1855 could then conclude that the early system of squatting was conducted "in default of laws" and that landholders received—under the crude licensing system managed by Crown Lands Commissioners—only provisional rights to the areas that they claimed.[38]

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[34] John Quick, *The History of Land Tenure in the Colony of Victoria* (Sandhurst, Vic., 1883), 4.

[35] See especially, see Lauren Benton and Benjamin Straumann, "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28 (2010): 1–38.

[36] Quick, *History of Land Tenure*, 4, alluding to the NSW *Act to restrain the unauthorized occupation of Crown Lands* [29th July, 1836]. The first Crown Lands Commissioner under this Act in Port Phillip, Henry Fyshe Gisborne, was not appointed until 1839.

[37] Quick, *History of Land Tenure*, 5. Noted by Henry Reynolds, transcript of Yoorrook Commission hearing, 27 March, 2024, 11 and 20.

[38] Quick, *History of Land Tenure*, 5, quoting from a *Report of the Commission Appointed to Inquire into the Tenure of the Waste Lands, Victoria, 1854–5* (Melbourne, Government Printer, 1855), 7.

Even in the second phase of settlement as described by Quick (before the invention of leasehold tenure), the licensing system lacked integrity. It was a time of extreme violence. One survey suggests that around eleven percent of the Indigenous population died in massacres in the Port Philip District between 1836 and 1851, without any of the settler perpetrators being convicted.[39] Clearly, the Aboriginal Protectors failed in their obligations to defend Aboriginal people from "encroachment on their property, and from acts of Cruelty, of oppression or injustice," as stated in the original job description from Lord Glenelg in 1838.

When leases of Unsettled Land were created by an imperial Order in Council in 1847, the legal arrangements were not designed to exclude Aboriginal people from a pastoral run.[40] But the imperial intentions were not clearly expressed in law, with the exception of a clause that was inserted in some leases that protected Aboriginal access to "the trees and water thereon as will enable them to procure the Animals, Birds, Fish and other food on which they subsist."[41] It was the *Wik v. Queensland* judgement in 1996 that reconsidered the history of pastoral leases and resolved that they did not actually exclude native title. The Australian leasehold tenures were unlike the common law leases that did indeed provide exclusive rights in England.[42] After *Wik*, the historic technicalities uncovered within the colonial law then had to be considered within the painfully slow progress of each native title claim, also in Victoria.

The peculiarity of the Australian leases seems to embrace in some respects the view of John Locke that only land under the plough could secure exclusive rights.[43] The Chair of a

[39] Lyndal Ryan, "Settler Massacres on the Port Phillip Frontier, 1836–1851," *Journal of Australian Studies* 34/3 (2010): 257–273.

[40] Henry Reynolds and Jamie Dalziel, "Aborigines and Pastoral Leases – Imperial and Colonial Policy 1826-1855," *UNSW Law Journal* (1996): 315–377, especially 353–369.

[41] Reynolds and Dalziel, "Aborigines and Pastoral Leases," 367, referring to the "Report of the Select Committee of the New South Wales Legislative Council on Crown Lands," *Votes and Proceedings*, Legislative Council, 29 November 1854, vol II, 1137. A specific reference to Aboriginal rights was also included in an Order in Council on 19 June, 1850, relating to South Australia.

[42] Teehan, "Australian Land Law," 331.

[43] The distinction between cultivated and "unimproved" land was, for example, emphasized by Earl Grey in 1848, as noted by Reynolds and Dalziel, "Aborigines and Pastoral Leases," 358.

Victorian Select Committee in 1859 pointed to this issue: "The rapid settlement necessary upon the country being occupied by flocks and herds was more unfavorable to the Aborigines than if it had only been gradually taken up for agricultural purposes."[44] In this respect, Locke's theory of land enclosure had been honored in the breach: there was certainly no generous gift of "ninety percent" of uncultivated land to humanity. In effect, Locke's rhetorical ninety percent was stolen by the pastoral industry in Victoria. The peculiar non-exclusive pastoral leases had been deliberately created by humanitarian legal minds with the intention of preserving both Crown authority and Aboriginal rights in the Australian colonies. But the ambiguous provisions in law were generally ignored until they were rediscovered in the *Wik* judgment in the High Court.[45] A more overt provision for the "use or benefit of Aboriginal inhabitants" persisted in relation to Crown land, for example, in Section V of the Victorian *Sale and Occupation of Crown Lands Act* of 1862, which adopted the same phrase from the earlier waste lands legislation.

A Decorous Veil of Law

In 1839, the Anglican bureaucrat James Stephen could call the doctrine of discovery "the most decorous veil which legal ingenuity can weave," attributing it to the Marshall Court in the USA rather than to the Colonial Office in London.[46] The idea of discovery had different effects in the Australian colonies, but the *Sale of Waste Lands* legislation was no less of a decorous veil, and it was administered by the very humanitarians who highlighted the plight

[44] Thomas McCombie, *Report of the Select Committee of the Legislative Council on the Aborigines: Together with the Proceedings of Committee, Minutes of Evidence and Appendices 1858-9* (Melbourne: John Ferres, Government Printer, 1859), iv.

[45] Reynolds, transcript of Yoorrook Commission hearing, 27 March, 2024, 21.

[46] James Stephen, Under-Secretary at the Colonial Office 1836–1847, memorandum to Vernon Smith, 28 July, 1839. Quoted in Paul Knaplund, *James Stephen and the British Colonial System, 1813–1847* (Madison: University of Wisconsin Press, 1953), 89.

of Indigenous people, including James Stephen. It was Stephen who had confirmed in 1822 that New South Wales was occupied as "desert or uninhabited" colony,[47] thereby begging the question of how the Governor could exercise a power to grant land without the constraints of legislation.[48] That lacuna was patched by the *Australian Courts Act* in 1828,[49] and then by the land legislation in 1833 that did not mention Aboriginal rights.[50]

It might be imagined that only a woke historian from the twenty-first century could talk about land theft and invasion in nineteenth-century Victoria, and it is clear that after 1835 the regular pronouncements from the Colonial Office on Aboriginal rights were generally painted in muted tones. A less decorous example, however, was provided by Edward Wilson's article on the economics of dispossession in 1856, where he asserted that "this country has been shamelessly stolen from the blacks."[51] Having reviewed the public record of land sales, he estimated that the Crown had acquired around four and a half million pounds through sales of the "Blackfellow's land" (£4,445,386 more precisely) since Victoria separated from New South Wales in 1851. Upwards of thirty million pounds had been extracted through gold mining, in addition to the vast production arising from sheep and cattle. The history of illegality was covered over when many squatters eventually gained the right to purchase their ill-gotten pastoral lands. The "white man's" claims to providence were satirized by Wilson as nothing more than the cant of tyrants and swindlers. In reaching this

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[47] Stuart Banner, *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Cambridge, MA: Harvard University Press, 2007), 27, citing from Watson, ed., *Historical Records of Australia* IV, 1, 414.

[48] Governor Phillip's Instructions of 25 April 1787 included power to grant land. Watson, *Historical Records of Australia* I, 1, 7. The extent of a Governor's power to grant land with enduring reservations was still up for debate a century later in *Cooper v. Stuart* (1889) 14 App. Cas. 286, the famous case that reiterated the earlier invocations of Blackstone by Samuel Shepherd and Robert Gifford (1819) and James Stephen (1822).

[49] Teehan, "Australian Land Law," 334. Regarding some of the gaps in the land law, see Enid Campbell, "Conditional Land Grants by the Crown," *University of Tasmania Law Review* 25.1 (2006): 44–60.

[50] *An Act for protecting the Crown Lands of this Colony from Encroachment Intrusion and Trespass* [28th August, 1833].

[51] Edward Wilson, "The Aborigines." *The Argus*, 16 March (1856): 4–5.

conclusion, he did not have the benefit of reading, for example, Aileen Moreton-Robinson's, *The White Possessive*.[52] Apparently the public record was already available to those with eyes to see.

Although John Locke's approach to property was regularly invoked in the Australian colonies, a broader understanding of his arguments reveal striking inconsistencies with the development of Australian law. In Lockean dreaming, property in the soil would arise from the plough, not from pastoral runs or from waste lands pre-emptively claimed by the Crown. The burden of the *Two Treatises of Government* was to provide a contrast between the virtues of a social contract, on the one hand, and monarchic authority on the other. Locke contested the readings of Genesis 1, for example, that had found in the biblical text a sanction for the Crown's authority.[53] The early chapters of Genesis were located in the state of nature, according to his theory, where resources could be taken from the natural world without impacting on the interests of others. Legitimate government, if it existed as such, could only arise from express consent to a social contract—a consent that was never sought from Aboriginal and Torres Strait Islander people at the foundation of the Australian colonies. The Australian history of selling Crown land effectively turns Locke on his head.

Disciples of Locke (if they were blessed with consistency) should have been calling for treaties as soon as possible. The very idea of "wastelands of the Crown" was always a legal fiction, and the assertion of a feudal Crown in the Australian colonies was problematic even according to English law at the time.[54] Broadly speaking, there have been two competing cultures of landholding since 1788: Indigenous and non-Indigenous. In many

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[52] *The White Possessive: Property, Power, and Indigenous Sovereignty* (Minneapolis: University of Minnesota Press, 2015) reviews the multifarious ways in which legal possession has been asserted through racial hierarchies, through and beyond the recognition of native title.

[53] Brett, *Indigenous Rights*, 65–66, summarizes Locke's scathing attack on Robert Filmer's *Patriarcha; or, the Natural Power of Kings*.

[54] Samantha Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction," *Sydney Law Review* 27/1 (2005): 49–86, highlighting *The Tenures Abolition Act* of 1660 (s.4).

respects, the *Mabo* judgment in 1992 simply restated the historic problem of competing worldviews, and subsequent legislation has repeatedly undermined the substance of native title rights and interests.

It is difficult to see how this legal situation can be remedied without a new federalist approach to constitutional arrangements within which the First Nations can become genuinely self-determining.[55] Treaties are the most promising way to establish truthful social contracts that can embrace different concepts of sovereignty and different cultures of relationship with land and Country. The outcome of a new treaty process would ideally move beyond feudal title to create not just the joint management of national parks and Crown reserves (easily conceived under feudal tenure), but significant landholdings with the "full and beneficial ownership" that allows each of the First Nations to shape their own futures. This would not be a matter of the Crown achieving entirely new standards of justice, or of awarding new rights to Aboriginal people on the basis of race; it would be a matter of compensating the descendants of the First Nations who lawfully governed the lands now known as Victoria and who were forcibly dispossessed of their estates.

Conclusion

Against expectations, the history of waste lands legislation is more complex than it looks at first glance. The imperial *Sale of Waste Lands Act* of 1842 was obviously quite different from Te Tiriti O Waitangi / the Treaty of Waitangi of 1840, but these historic documents were

[55] Dylan Lino, "Towards Indigenous-Settler Federalism," *Public Law Review* 28 (2017): 118–137; Dominic O'Sullivan, "Makarrata, Truth and Treaties as Social Contracts," in *Sharing the Sovereign: Indigenous Peoples, Recognition, Treaties and the State* (Singapore: Palgrave MacMillan, 2021), 75–105; Brett, *Indigenous Rights*, 183–199.

auspiced by the same imperial administrators. The legal concern to set aside lands for "the Use or Benefit of the aboriginal Inhabitants of the Country" came from the same pens.

After 1851, the legal inequities in Victoria became even more pronounced. When the *State Aid to Religion Abolition Act* (1871) provided that church "Denominations may dispose of trust lands granted by the Crown and apply proceeds to denominational purposes" (s.3), the Aboriginal reserves might have been treated in the same way. The previous grants of church land became, via a simple process of registration, the property of ecclesial trusts. If equity had been the order of the day, Aboriginal reserves would similarly have become the property of First Nation trusts, managed in culturally appropriate ways. Instead, the reserves became the sites of notoriously tyrannical management, and after the amendment to the Victorian *Aboriginal Protection Act* in 1886, a weapon for breaking up families. Children of mixed ancestry were deemed white at the stroke of the legislative pen, and removed from the missions and reserves. The Aboriginal estate in Victoria was steadily diminished.

The time has now come to turn that tide, and at the very least, restore every acre ever designated for an Aboriginal reserve (or perhaps negotiated equivalences). The current treaty process has higher aspirations, no doubt. But if that minimal standard of restoration is achieved—before any of the more complex discussion of compensation begins—we can imagine that even some of imperial administrators from the 1840s would be cheering from their graves. Restoring all the reserve lands would resonate with a nineteenth century social conscience. Redress and compensation under the *UN Declaration on the Rights of Indigenous Peoples* (2007) presents a new and different set of challenges.