

## TERRA NULLIUS: THE EMPEROR'S NEW CLOTHES

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### INTRODUCTION

Britain, black and white Australia share a history, but not the same history. Colonisation was a vastly different experience for each participant. For Britain it was a safety valve, it bought relief from political pressures, social unrest and possible revolution. For white Australia, it became a triumph of freedom, self-determination and achievement. For black Australia, it brought death and lasting sorrow for the bitter loss of their country and their freedom. It is the differences of the experience that divide our nation. In our national process of reconciliation; truth and justice require official acts of recognition and acknowledgement of the differences and their consequences by Britain and Australia.

We live in the greatest country on earth. We consider we have been given a great gift. It was not a gift freely given. This land was plucked from the sea, plundered by the most powerful nation of the era, taken without recompense. This essay, a patchwork of quotes from Australian and British historians, seeks to tell a story and give grass-roots perspective to our history by looking at three aspects of that history.

**Firstly**, the 'why' of terra nullius; this unilateral declaration, which vested all land in the British Crown, violated the laws and customs of a Sovereign Nation. British Law, concomitant with that proclamation turned the indigenous peoples into criminals, deeming any resistance on their part to be a criminal act.

**Secondly**, the 'where from' of the Stolen Generations. Gender imbalance in the colony was structural; its foundations laid before the First Fleet sailed from England. The population ratio 75% male to 25% female remained more or less constant into the 1900's. Indigenous women bore the brunt of the disparity.

**Thirdly**, the 'where from' and 'why here' of the convicts. It was Britain's practice to sell the labour of its prisoners for profit. The North American trade ended abruptly with the commencement of the American War of Independence, exacerbating the overcrowding in English gaols. Considered also is the process of Enclosure which was, in part, responsible for turning dispossessed English rural labourers and the poor of Britain into criminals.

### HISTORY MATTERS

We need to examine our origins to appreciate the anguish and desolation caused by the arrival of our forebears. To claim that colonisation was a civilising event, the Aborigines advantaged by it, is as ignorant as it is spurious. We recognise similar destructive consequences of colonisation played out in other countries, yet we scarcely admit them into our own story. Fiji, the Solomon Islands, the Middle East, Ireland, Burma, Hong Kong, Sierra Leone, Zimbabwe, all current headline stories, each in large part the result of Britain's Empire-building.

'How moral was the Empire? In settler colonies, settlers simply seized the land and pushed aside the natives or killed them. In North America as in Australia, New Zealand, and South Africa, and then later in East Africa, the process was the same: acquire land by seizure or trickery, and then ignore the native, or shoot him if he acted, as he owned the place. What happened to the natives depended on their strength: the New Zealand Maoris got the best deal because they fought the British in a war and got some terms for themselves in the peace. The Tasmanian aborigines got the worst deal: they were exterminated in manhunts. When their countries had been stripped of natives, as one strips a country side of trees, just leaving a clump here and there, Canada, Australia and New Zealand then provided evidence for British moral leadership by becoming self-governing.' (Donald Horne, **God is an Englishman**, Penguin, 1970, p. 267.)

The 'why of terra nullius': On 22nd August, 1770 Captain James Cook raised the English flag and took possession of the entire eastern coast of Australia in the Name of the

Sovereign of Great Britain. The application of the terra nullius principle declared, as fundamental truth, the territory to be uninhabited. It deemed that the people who lived in the Great South Land did not exist. It allowed Britain, in international law, to base its laws on the assumption the land was settled not occupied. A very convenient strategy when one country seeks to acquire territory at no cost.

British incursion took place in the last decade of the eighteenth century when international law was established and much discussed. English philosophers, political theorists, judges and lawyers were well acquainted with the European Jurists including Hugo Grotius, upon whose writings modern international law is based. According to international law of the late eighteenth century, there were only three ways one country could take possession of another country.

- If inhabited: permission could be sought for use of the land, and treaty entered into.
- If inhabited: the country could be taken over by invasion, occupied by conquest. In this eventuality, international law required that the victorious country would have to respect the rights of the conquered people. It could not steal their land.
- If uninhabited: a country could take possession of the land, claim ownership for itself and share it out amongst its own people. An uninhabited territory was said to be capable of being settled and exploited.

How can Australia accept that the arrogance of the 'English Code' ever held legitimacy? That: 'The Law of England remained the birthright of English Subjects, which they carry with them when they quit their native land, to make settlements on waste, unoccupied territories.' (C.O. 201/195/351 FF)

'The single most important feature of the British expropriation of Aboriginal land was the belief that Australia in 1788 was a terra nullius, a land without owners. This enabled the settlers to convince themselves that they had a legal and moral right to the land because Australia had never actually become the property of the resident Aborigines. This idea had become accepted legal doctrine in the first generation of settlement and it has played a central role in relations between black and white Australians ever since.' (Henry Reynolds, ***Dispossession: Black Australians and White Invaders***, Allen and Unwin, 1989, p. 67.)

## **WHAT IS TERRA? WHAT IS NULLIUS?**

In the case of 'terra', a land, a country, a territory, a region and 'nullius' no one, nobody, not any, of no account, insignificant, trifling, worthless, 'desert and uncultivated'; 'practically unoccupied without settled inhabitants.' Legal opinion hinged on the interpretation of these words. Where is the legitimacy?

'The British could only claim sovereignty over N.S.W. as well as proprietorship of every inch of landed property, if indeed it was uninhabited. That is the reason why lawyers continued to babble about a desert or uninhabited when all informed observers knew that was nonsense.' (Henry Reynolds, ***The Law of the Land, Penguin***, 1992, p. 35.)

The facts of 'inhabited' versus 'uninhabited' as applied to the peoples of New Holland were known and well understood. In Britain the success of Cook's voyages were received with great pride. He wrote detailed journals of his explorations. His writings, along with those of botanist Sir Joseph Banks who had sailed on the Endeavour's scientific expedition, were circulated widely and excited much interest. The popularity of tattooing at the time is said to have sprung from these descriptive and evocative writings.

'From what I have seen in the Natives of New Holland they may appear to some to be the most wretched People upon Earth; but in reality they are far more happier than we Europeans, being wholly unacquainted not only with the superfluous, but with the necessary Conveniences so much sought after in Europe; they are happy in not knowing the use of them. They live in a Tranquility which is not disturbed by the inequality of things necessary for Life.

They covet not Magnificent Houses, Household stuff, etc; they live in a Warm and fine Climate, and enjoy every Wholesome Air, so that they seem to be fully sensible of [sic], for many to whom we gave 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 upon anything of their own nor any one Article we could offer them. This in my opinion Argues, that they think themselves provided with the necessarys of Life, and that they have no Superfluities'. (J. Cook, *Journal of the 'Endeavour, 1768-1771*, Facsimile Edition, South Australian Libraries Edition, Adelaide, 1968, p. 323.)

'Cultivated' versus 'uncultivated' Britain's decision to declare Australia vacuum domicilium (or terra nullius) favoured the opinion of one particular theorist, the Swiss-born Emer de Vattel. Many of Vattel's ideas were at odds with other jurist opinion such as Francisco Vittoria, a 16th Century Spanish Theologian and Jurist. Vittoria wrote extensively of the destructive effects of colonisation on indigenous peoples but his opinions were ignored. Vattel took a harder line on the rights of native peoples. He was influenced by John Locke, the seventeenth century English philosopher, who held that mans' labour gave value to land and property, however Vattel went further. He appears to have argued that a people could not claim an absolute right to a region. In his opinion the right to claim territory was contingent on the use made of that territory. His argument revolved around cultivation versus non-cultivation.

Vattel appears to have reasoned:

**Cultivation:** to herd and pen animals and raise crops in a fixed place; to obtain produce by the tilling of soil, planting of seed, harvesting, storing and guarding of the grain. These activities were seen as adding value and conferred proprietorship in land and property.

**Non-cultivation:** with essential seasonal movements; hunting animals, birds and insects, gathering seeds, collecting plants and medicinal herbs, harvesting wild fruits and vegetables, trapping fish, trawling and conferred propfoods. The produce obtained on a needs basis, for more or less immediate consumption, with no need to accumulate, store and guard. According to Vattel's theory, these activities were judged to be of no value and did not confer proprietorship in land and property.

'Vattel argues that a distinction should be made between "cultivated" and "uncultivated" lands in determining whether they could be obtained by conquest. He argued that international law recognised an obligation for people to cultivate the lands they used. So, in the case of wandering of tribes, so he contended, their failure to cultivate the lands they used meant that they had never taken real and lawful possession of these. Lands like this, so Vattel claimed, justifiably could be subject to European settlement by occupancy and not by conquest. Opinions like those of Vattel, interacting with the Laws of Empire, provided the foundations for the exercise of British colonial power in Australia'. (Alex C. Castles, *An Australian Legal History*, The Law Book Company Limited, 1982, p.16.).

Britain appears to have taken Vattel's ideas to the extreme in declaring the Great South Land vacant not only on the 'Emperor's New Clothes' theory, that there was no one here, but on the flawed presumption that no use was being made of the land.

On settlement, had Britain found a sea of waving wheat, fields of golden corn, grazing sheep and lowing cattle in sheltered keeps, presumably another of Vattel's opinions would have applied. In his book *The Law of Nations*, published in 1758, Vattel expressed this opinion 'whoever agrees that robbery is a crime, and that we are not allowed to take forcible possession of our neighbour's property will acknowledge, without any other proof, that no nation has a right to expel another people from the country they inhabit in order to settle in it herself.'

'As Vattel realized over two hundred years ago, to support the action of the settlers without criticism is to sanction the violent, the revolutionary expropriation of property by the State. Aboriginal land right would only be denied by applying quite different

standards to Aboriginal land ownership than would apply to anyone else. (Henry Reynolds, **The Law of the Land**, Penguin, p. 171.)

We need to look at the state of British law at the time of settlement. There was no systematic study of the common law, that unwritten law, which looks to ancient usage for its binding. Counsel opinion on the common law was cobbled together from precedent and the writings and commentaries of various jurists, judges and lawyers. Sir William Blackstone, 1723-1780 was the foremost commentator on the common law. His Commentaries on the Laws of England were prominent amongst writings from where opinions were gleaned. In the construction of an opinion, however it would not be too fanciful to say it was very much 'you pays your money and you takes your pick'.

The English write... down their laws as a mixture of statutes and precedents. This leaves them in a flexible situation in which they are always having to look up their written statutes and precedents, and when the statutes and precedents are found wanting add another precedent to them...' (Donald Horne, **God is an Englishman**, Penguin, 1970, p. 267.)

By way of illustration, an opinion given in 1740 by Counsel to the Board of Plantations:

'The common law of England is the common law of the plantations and all statutes in affirmance of the common law passed in England, antecedent to the settlement of the colony, are in force in that colony, unless there is some private Act to the contrary. Let an Englishman go where he will, he carries as much of the law and liberty with him as the nature of things will bear. (R.D. Lumb, **The Constitutions of the Australian States**, University of Queensland, Third Edition, 1972, p. 6.)

This may seem quaint even amusing, except in 1971 it was relied upon in a judgement of an Australian Court. The principle of terra nullius was upheld in that judgement because of a dusty black hole in the common law, two hundred and thirty one years deep, from Blackstone 1740 to Blackburn 1971.

'A recent application of this principle is the decision of Blackburn, J., of the Northern Territory Supreme Court, that on settlement right to land in the colony vested in the Crown and consequently the aborigines had no communal legal title in such lands: (**Milirrpum and ors. v. Nabalco Pty. Ltd. and the Commonwealth of Australia (1971)** 17 F.L.R. 141.' (Ibid., Note 15, P. 6.)

This judgement of the Gove Rights Case is important in our legal history. Although it upheld the application of terra nullius, it provided the platform for the first in-depth examination of the legal principle whereby English law accorded the Aborigines a natural but not a civil right to their own land.

The British declaration that the Great South Land was to be regarded as a terra nullius, a land without owners, allowed for occupation as if it were vacant territory. It was disaster for the Aborigines. In its name they were denied rights to ownership of their lands. They were denied their own laws and customs by which they had lived for over 40,000 years. Their law was completely replaced by British law. They became victim to that law which neither served them nor saved them.

Indigenous Australians waited until 1992 for the High Court of Australia, in the Mabo decision, to overturn terra nullius. The myth has had terrible consequences for the Aboriginal Peoples. Because of it they were denied their rights in war, to be treated as a conquered people defending their own countries. Consent was not sought. Permission was not granted. Treaty never entered into. This is unfinished business.

'The High Court rejected the concept of terra nullius because it was so out of harmony with contemporary opinion and concern for indigenous rights in both international law and the domestic law of comparable countries. While the abandonment of terra nullius has extracted Australian jurisprudence from one set of historico-legal problems, it is now in the midst of another one, the Anglo-Australian property law.' (Henry Reynolds, **The Law of the Land**, Penguin, 1992, p.195.)

## THE 'WHERE FROM' OF THE STOLEN GENERATIONS:

Terra nullius led to forced removal and dispersal of these hunter-gatherer peoples. Denied access to traditional foods, starvation left them prey to the evils of economic dependence. In what quickly developed into a case of 'white flour; white power'; the Aborigines were corralled and forced to work for subsistence, to exist on hand-outs of inadequate amounts of unfamiliar and extremely sub-standard rations.

It is this dependency brutally thrust upon them, that non-indigenous Australia so harshly criticises. It is the basis of many of our racist attitudes and racial resentments. Removal from Country, destruction of language and family groupings together with the inability, in face of dispersal, to maintain strict family and clan protocols entrenched the tragedy for these fiercely independent peoples who had lived in total self-reliance for at least 40,000 years.

We are currently debating in our communities and courts; the reality of the Stolen Generations. Children of mixed blood were removed from their families primarily because of their light skin colour. Many removals were carried out by force, others by subterfuge with promises not kept. The stated aim of this official Government policy was to breed out colour. To breed white. Its intended consequence was to have the Aboriginal race die out. The foundations of this gothic experiment were laid down in official British Government Orders. Its seeds are found in the statistics of the First and subsequent Transportation Fleets. The complement of the First Fleet:

- 586 male convicts
- 210 seamen of the Royal Navy
- 213 marines, 27 wives, 19 children
- 233 merchant seamen
- 20 officials
- 192 women convicts, 13 children

'The Colonial Population before 1826: Decisions of British Courts and Parliament meant that the early Australian population was predominantly male. In 1825 the aggregate female population was less than a quarter of the male equivalent.' (***Australian Historical Statistics***, Ed. Wray Vamplew, Fairfax Syme and Weldon Assoc., 1987, p.25.)

The census of September 1825 put the population at 25,304 males and 6,261 females. The total number of convicts disembarked during the period of transportation, excluding Western Australia, numbered 149,194 males and 24,568 females. The figures for Western Australia are revealing; 9,635 men and 0 women. The statistics for the early decades of expansion, 1811 to 1830 paint a stark picture; from 1811 to 1820; 15,400 male and 2,000 female; from 1821 to 1830; 28,700 male and 4,000 female.

The population curve shows convict immigration exceeding free settlement until the mid 1840's, when the population was approximately 200,000. A decade later in the early 1850's it had doubled to 400,000. The 1850 gold rushes saw a dramatic rise to 1,000,000 by the end of the 1850's with a surge in the male population during this period.

The published memoir of Joseph Holt, a political exile, referring to the period 1800-1806, describes the activity of a bell-ringer named Potter. His orders were to ring a bell to announce the arrival of ships from England. When the selection of goods and livestock was done, "then anyone who wanted or wished could take any of those unfortunate women and nothing to do but go and give her name and he gave an order for her... it was the Governor's [King] orders and after that there was no repeal. ... So, in a few days, perhaps that fellow in his drunken schemes would sell his interest to some other fellow."

'A widespread perception exists that the role of women in the early colony was to provide a sexual outlet for the male convicts in what amounted to organised and unofficially sanctioned rape.' (Michael Flynn, ***The Second Fleet, Britain's Grim Convict Armada of 1790***, Library of Australian History, Sydney 1993, pp. 99, 100.)

As explorers penetrated the hinterlands and settlement spread to the interior, the indigenous women bore the brutality of the gender imbalance. Once outside the fixed 'limits of location' i.e. the official boundaries of a settlement, the settlers were beyond the effective reach of the law and could murder and rape with impunity and many did.

There is much speculation as to how children of mixed indigenous and non-indigenous blood were received into and treated by black communities. In some cases treatment may have rested with the circumstances of conception. Pregnancy resulting from acts of rape and violence may not have been well received, either personally or in the communal group. No need for speculation as to how these, commonly labelled 'half-caste', children were received in white communities. There was no place for them. They were disowned.

'Sexual relations of whatever kind took place in a context where white men had considerable power, often of life and death, over Aborigines. ...While there is mention of half-caste children from the earliest times, some presumably fathered by overlanders or having come from the earlier invaded areas, there is virtually no discussion of their origins or fate. ...There was no question of the white half being considered sufficient reason for claiming them into the racial category of white. Their status seems to have been of an inferior kind of black.' (Gillian Cowlishaw, ***Black, White or Brindle***, Cambridge University Press, 1988, pp. 38, 39.)

It was some time before anyone showed interest in these children. They pricked the collective conscience of Christian Religious, who found their mission in rural areas. Pressed by them, the Government came up with the solution of considering the white part of a child.

The conditions under which the children lived were evaluated and found to be unsuitable for the white part of a mixed blood child. The Government response was to instigate a policy of removing 'half-caste' children from their families and placing them into welfare institutions.

The white view of the Stolen Generations is that of benign social engineering, carried out in the interest of the child. The black view is that it was genocide. Removal of children, the deliberate destruction of the family, so central to Aboriginal spiritual and cultural life, were unjust acts lasting well into the living memory of a large percentage of our population.

Its legacy; generation after generation of motherless mothers; with no memory of their own mothering to retrieve. With nothing to mimic, they had precious little on which to build their own families. In addition Aboriginal men were effectively removed as the authority figure of the family and cast adrift, lost without their traditional role with its specific obligations and responsibilities. Natural justice and national equality require we take a long hard look at the origins of the Stolen Generations. Justice will never be achieved while we continue to blame the victims and ignore the perpetrators.

'To believe that Britain can forget its history is to believe that the Russians should not discuss the crimes of Stalin or the Germans the crimes of Nazism. There is not yet in Britain any institutional reminder of the guilts of Empire: the builders of the Empire are still the great men of the history texts, and monuments to the 'natives' out of whom they constructed their pride? There is a need for a re-writing of history, for the purging of some guilt by its contemplation.' (Donald Horne, ***God is an Englishman***, Penguin 1970, and p. 267.)

## THE 'WHERE FROM' AND 'WHY HERE' OF THE CONVICTS:

Settlement of Australia was unlike any other British Colony. Not a haven from religious persecution; unsuitable for commerce in exotic goods - silks, teas and spices, its function was to be a place of extreme punishment. It was to be the ultimate prison from where there would be neither escape nor return. Britain's practice of exiling its prisoners and selling their labour dated from 1619. It has its own dark and savage history.

In Britain, an increasing population created the need to consolidate land for the more efficient cultivation and greater production. By 1770 half of all arable land was enclosed. The process, known as Enclosure, caused a gradual depopulation of the countryside. Traditionally, in rural Britain, entire families lived within the one parish, village or town. Many were born and buried within the sound of a single church bell. A stable, if somewhat circumscribed life, its foundations lay in centuries of co-existence and co-operation.

'The land on which the backbone of England, the peasantry lived was traditionally a "shared commodity". The common land itself was divided into hundreds of little strips each of an acre or half an acre. ... Each strip was a separate holding, a unit of proprietorship as well as agriculture.' (George M. Trevelyan, ***A Shortened History of England***, Pelican, 1959, p. 135.)

The retreat from the concept of land as a 'shared commodity', to that of land as speculatively desirable, dated from the Reformation and confiscation of monastic lands.

'A vast mass of land which had been held by ecclesiastical corporations for centuries was put on the market for sale, and much of it changed hands several times in a few years. For the first time in our history land became a commodity for speculation. It was bought, not as a means of subsistence, but as a source of profit. Syndicates of London Financiers bought large tracts of land cheaply in order to sell again in small lots at high prices. The ultimate owners had a strong incentive, therefore, to exploit their lands and tenants, commercially. This was equally true of the larger landowners.' (Briggs and Jordan, ***Economic History of England***, University Tutorial Press, 1960, p. 103.)

Between 1750 and 1830 Parliament passed more than four thousand Enclosure Acts, enclosing approximately 6.8 million acres across the country. It was said at the time, 19 out of 20 Enclosure Bills benefited the wealthy and injured the poor. The poor became small change; the dross left over from the process.

Enclosure was not simple. The term is used now without thought, as partial explanation for the sickening, brutal poverty of those times. However, certain of its phases are enlightening when examined in terms of what occurred to the Aborigines.

'The term enclosure presents difficulties because it was applied to several distinct processes - the consolidation of scattered holdings, the concentration of holdings, the conversion of arable land to pastures, and the enclosure of the wastes. ...Perhaps the major cause of the agrarian problems in its wider aspects, not only the sixteenth, but in the seventeenth and eighteenth centuries was the failure of the State to give to the mass of the peasants a clear legal title to their land.' (Ibid, pp. 104, 107.)

Over centuries, rural dwellers lived a hard but sufficient life by exercising implied, traditional rights over the common and wastelands. Enclosure of fens, heaths, woodlands, rivers, ponds and streams, together with the loss of communal rights, had the deepest and most devastating effect on traditional communities.

'In the first place the common was not, in fact, the land of no master: it belonged legally to the lord of the manor, who retained something of his original rights over the whole territory of the parish...although small value was set on the common...more than one advantage accrued from it for the peasants.' (Paul Mantoux, ***The Industrial Revolution of the Eighteenth Century***, Menthéun 1966, p. 148.)

Paul Mantoux, in enumerating the advantages of communal rights, paints a picture of peaceful pastoral life, where peasant family and rural worker enjoyed the freedom of the countryside:

- the common of sheepwalk- the right to pasture beasts - geese, a pig, a cow, a sheep
- the common of piscary- the right to fish in river and pond
- the common of turbary- the right to cut wood and peat for repairs and heating
- the common of estovers- the right to set up a stile to breach walls and fences

More than general enclosure, removal of these rights struck at the heart of English rural life. It deprived the peasant, living on the margin of subsistence, of the means necessary to adequately support himself and his family. Enclosure led to rural depopulation and drift to the large towns and cities. There they were condemned, by Poor Laws and the Settlement Act, to the no-mans land of economic dependence and moral degradation; forced by hunger and dislocation to vice, larceny and viciousness. Enclosure filled the cruel, miserable workhouses with orphans and the destitute; the prisons with the poor and dispossessed.

The greedy acquisition of property and the obsessive need to protect that property, punished the peasant for exercising what, from birth, he had considered to be his right. The punitive game laws and the brutal enforcement of ever-increasing and wide-ranging property laws, created an underclass.

'England was on the brink of an era of prosperity and greatness unrivalled in her whole history. ... At the same time, she was entering upon a period of remarkable social distress and unrest, of economic crisis and political change. Her new wealth and her world supremacy rested on foundations of harsh sweated labour, appalling slum conditions in her new towns, and immense human misery. ...Progress and the enlightenment...coincided with conditions of cut-throat competition and inhuman exploitation: and much of her subsequent history has been the story of successive but not always successful efforts to reconcile her ideals of political democracy and universal happiness and the realities of economic distress and oppression.' (David Thomson, ***England in the Nineteenth Century***, Penguin, 1950,. p. 35.)

The law turned the poor into criminals. Penalties for offences increased; by 1750 nearly 200 crimes could be punished by death, many hundreds more where the penalty was flogging, the pillory, imprisonment and transportation. The judicial system was considered corrupt, the hearsay nature of evidence so suspect, many capital sentences considered unsafe were commuted to transportation.

The absorption of Australia into the British Empire, by the proclamation of terra nullius, gathered our indigenous peoples into Britain's eighteenth century reality of 'inhuman exploitation, immense human misery, economic distress and oppression.' It forced them into the brutal, punitive British penal system and for many in the Australia of the twenty-first century this remains the reality.

## **WHY AUSTRALIA?**

Transportation had been used as punishment since 1619. From that time Britain sold its convicted felons as indentured labour, mainly to the West Indies and the North American Colonies. In the transaction, on acceptance by the sheriff of the agreed price per head, the authorities washed their collective hands; took no further responsibility for the prisoner and of utmost importance to the administration, incurred no further costs. The property, that is the labour of the convict, passed to the contractor. He became responsible for and met the cost of upkeep and transportation of the prisoner to the selected colony. Once there the contractor on-sold the prisoner, or rather his labour, to

the colonist. The prisoner, left without an avenue of recourse, was abandoned and swallowed up by this most savage and vicious trade.

In the West Indies the prisoners died like flies from cruelty, tropical disease and neglect. In the North American Colonies, they worked the cotton fields, the sugar and tobacco plantations of Virginia, Maryland and Carolina with very little hope of returning home at the end of their seven or fourteen year exile. In the 1670's Maryland and Virginia, under Quaker influence, passed laws prohibiting this vile commerce. It survived, as an illicit trade, in these Southern Colonies but remained legal in the remainder of the Colony.

Britain, desperate to rid itself of its felons, broadened and regularised the transportation system by an Act of 1718. As the trade in black African slaves increased and supplied a cheaper product, the Government was forced to offer a subsidy of three English pounds per head. Transportation at once became more profitable for the merchant and uglier for the prisoner. The transaction remained cost effective for the Government.

The American avenue of this trade in flesh-for-profit, ceased in 1775 with the commencement of the American Revolution when, against all odds, the colonies fought and won independence from Britain. The trade had begun to dwindle, as lower priced black African slaves became available to the colonists. As the backlog of convicts began to build the gaols became increasingly overcrowded. Now the majority of prisoners were required to be housed at home, the costs escalated and conditions deteriorated. Every year hundreds of prisoners died from smallpox, consumption and typhus fever. The prison reformer John Howard wrote 'many more prisoners were destroyed by gaol-fever than all the public executions in the Kingdom.'

In 1776 Parliament passed the Hulks Act allowing for the confinement of male prisoners in floating prisons. The legislation specifically excluded females from these vessels. The hulks, some old warships, many unseaworthy merchantmen were anchored in the foggy damp of the Thames and its estuaries, moored in harbours and rivers along the coast of England.

'Ten thousand, five hundred helpless prisoners died of disease and putrid food in the stinking British hulks. ...The prisoners died like rats, of disease and hunger. In the summertime, they suffered from suffocation and being without covering, froze to death or died of pneumonia in winter. With little food and scanty water, the health of the prisoners was quickly undermined, which left them no power of resistance to the mass attack of dysentery, typhoid fever, smallpox, yellow fever, tuberculosis and contagious diseases of all kinds.'

This description fits well the disease-infested hulks of the Thames; it refers however to the British hulks used to house prisoners-of-war during the American War of Independence. They were anchored in New York Harbour, at Charlestown in South Carolina and at Savannah. Charles Burr Todd in his History of the City of New York put the death toll at 'no less than ten thousand six hundred and forty-four American prisoners perished in the Jersey [hulk] during the war.'

British Archives have supplied the American Government with an incomplete list of the American prisoners on the Jersey numbering 8,000. It is known that the Jersey, a converted 64-gun vessel and the largest of the prison hulks, had an estimated death rate of 85%. More Americans died in British warships in New York Harbour than all the battles of the war. As we seek accountability from Britain for our indigenous peoples, we may well have to line up behind the Americans as they pursue their own investigations into the astonishingly high death-rate of defenceless prisoners-of-war, the majority young men in their twenties and thirties.

In England disease so rife in mainland gaols became epidemic in the hulks. There was great concern plague would develop, or at the very least, typhus escape into the general population. Fear of disease, coupled with escalating costs, drove the search by Parliament to find 'a remedy for the evils likely to result from the late alarming and numerous increase of felons in this country, and most particularly in the metropolis'.

This was the Georgian Age, the Age of Elegance. A time of separation; of them and us. There developed amongst Britons an almost compulsive need for those of enlightenment and elegance to distance themselves from the mob; to rid themselves of those 'too evil, too brutish to remain on English soil, breathing English air'.

This distancing was the main reason the fun-o-the-fair public hangings were removed from Tyburn Hill to inside the walls of Newgate and other prisons. The late decades of the eighteenth century were a time of war, mutiny, poverty, hunger, food riots, religious and social bigotry. The convicts had their origin in this simmering cauldron of political agitation and widespread community struggle. In Britain much of everyday life was defined in terms of class.

There was the powerful establishment with its coterie of 'friends': the aristocracy, wealthy landowners, the highest echelons of government and civil service. There were the people: those with a sense of place, duty, obedience and deference; described by Lord Macaulay as the 'vast masses of property and intelligence'. There were the others: those most feared; the foreigners, gypsies, dissenters, rioters, Jews, vagrants, drunkards, prostitutes, the lewd and immoral, criminals, footpads, peddlers, beggars, paupers. The convicts were drawn from this 'rabble'.

On 26 January, 1788 in the name of the Crown, Britain invaded, settled, colonised, it makes no difference how viewed in retrospect, the facts remain. The first wave of Anglo-Celts, the official criminal class of Britain, arrived here in chains. These were the felons who were sanctioned by British law to oust the indigenous people from their land. Pauper, dissenter or criminal, they were desperate people who had escaped the gallows, but were rejected and discarded by their own tribe. Banished with stunning spitefulness as far as physically possible from their homeland.

'I hope your fate will be a warning to others. You will leave the country, all of you: you will see your friends no more; for though you will be transported for seven years only, it is not likely that at the expiration of that term you will find yourselves in a situation to return.

You will be in a distant land at the expiration of your sentence. The land which you have disgraced will see you no more: the friends with whom you are connected will be parted from you forever in this world.' (Mr. Justice Alerson sentencing machine-breakers to transportation at Salisbury on 2 January, 1831. Published in the *Time* January 1831 cited in G. Rude, Essay, ***The Long March of Everyman***, ed. T. Barker, Andre Deutch, 1975, p. 98.)

The consequences of colonisation here were a resounding echo of Britain's agrarian reforms. It had happened before, with chillingly similar results. The Aborigines in turn became dispossessed, dispersed, destitute and dependent. They were herded onto Government reserves and deprived of all self-determination. Made criminal, they were bound in chains and kept in festering gaols by the 'failure of the State to give clear title to their land'. It was, in the case of the Aborigines, the failure to recognise, in the face of clearly understood and documented evidence; the indigenous people held clear proprietary interest in the land.

Sir William Deane Governor-General of Australia, quoting William Faulkner in the inaugural Vincent Lingari Lecture: 'The past is never fully gone. It is absorbed into the present and the future. It stays to shape what we are and what we do.' There is no simple or infallible method of unravelling the past. There is only the certainty it is entwined with our present and bound into our future. The challenge is to subject the past to honest scrutiny.

Modern Australia is a nation of enormous ethnic diversity. In the past 60 years we have been a haven from violence and distress. Refugees from cold and hot wars, migrants from no war, seeking only a place in the sun. Those forced from their homelands should understand the position of indigenous Australians. They know the loss of familiar landscape and the sadness of lost tradition. They see their elders grieve for the old ways, their young struggle for identity.

It is predominately the descendants of the Anglo-Celtic core now 7 and 8 generations removed, both bond and free, who cling with arrogant pride to the success of the white man in this timeless land. Light years from the circumstances of their kin, there is little recognition amongst many of these, who have gained the most, that the undoubted success of their forebears was built upon the dispossession and destruction of others. There has been some recognition of that dispossession and destruction; it is belittled as the 'black-arm band' view of our history.

'No real allowance has been made for the extreme violence of the treatment of the Aboriginal: for the facts are easily enough established that homicide, rape, cruelty have been commonplace over wide areas and long periods. (C.D. Rowley, ***The Destruction of Aboriginal Society***, Penguin, 1972, P. 20.)

On 6 November 1999 Australia voted in Referendum to remain a Constitutional Monarchy. The result is said to reflect more the model than the concept. No matter the reason, in the mysterious way of nationhood, we took a curious but critical decision. In essence we tightened ties and avowed the history we share with Britain. The result makes it impossible and inappropriate to leave Britain out of the loop of recognition, acknowledgement and responsibility for the harm done in her name. There is unfinished business between Australia and Britain.

We are not looking for a scapegoat nor seeking an alibi, but rather a more realistic assessment of the harsh actions and attitudes that resulted in the social and economic chasm that divides our nation. There is guilt for us, not for the very distant past, but for the present and the more recent past. Britain bequeathed an unjust, unfair ethos. We perpetuated and built upon it.

The people of Australia need to make a transition from where we are now, still playing out another country's history, to a position of true independence by facing up to the differences in the experience of our history. It is up to us to bring about change in the inherited mind-set of superiority that pervades sections of our society. From this mind-set and its prejudices, we continue to marginalise our indigenous people. Without knowledge, without thought, we blame them for their poor health, inadequate housing, high unemployment rate, economic dependence and over-representation in the penal system. Each are the well-understood consequences when one nation conquers another in war. It has happened all over the world. It happened here, but we continue to deny that it did. Our greatest need is to face up to our history, accept it and move into the future as one inclusive nation of truly independent thought.

In 2001 we celebrate the centenary of our Federation; white Australia has much to celebrate, black Australia very little. The success of white multi-cultural Australia with its acceptance of imported mores, firstly British and later European and Asian, exacerbates the unjust treatment meted out to the indigenous people. For 7 and 8 generations they have endured an ugly conflict not of their making. It has caused deep scars and bitterness on both sides and feeds another of our national issues, the country-city divide.

During our Federation Year the British years; 1788 to Nationhood in 1901, require critical public scrutiny. Dispossession at the point of a gun, violence sanctioned by law, destruction of spiritual and cultural life and decimation from introduced diseases, were the weapons used to bring about near-extinction of the Aborigines. It is imperative Britain answer for her actions in the formation of European Australia.

A Truth and Reconciliation Council similar to that instituted in South Africa would bring some measure of accountability by examining the reasoning behind the self-serving decisions that resulted in the dispossession and demonising of our indigenous peoples. Since 1788 they have been forced to live without honour in their own land. We have accepted, without much question, except to blame, their parlous, dependent state and fail to recognise it for what it is, the evil that flows directly from colonisation. The past can't be undone; but it must be faced and dealt with honestly, here and in Britain. To do otherwise will see both nations diminished.

'The progress of the Aborigine from tribesman to inmate has been a special feature of colonial administration and of white settlement in Australia. ...There was a kind of inevitability in this progress, from first contact to violence; from destruction of native food supply, or the incentives to hunt and gather it...then came the rapid decline in numbers through new diseases, often exacerbated by malnutrition. The loss of freedom to move and of control of sacred places seriously affected in the realm of man's work, which was intimately involved with places and the spirits and in turn affected the processes of socialisation and the attitude to children.' (C.D. Rowley, ***The Destruction of Aboriginal Society***, Penguin, 1972, p. 79.)

## **CONCLUSION**

2001 has provided us with a frame of reference, within which we can look back over the first one hundred years of nationhood. We have a great need to recognise how much of the old colonial mindset still grips our thinking and influences our actions. At present we are a divided nation black and white. We will remain so, while we continue to quarantine the primary cause of the division - colonisation; from its effects - economic, social and racial injustice.

Justice is the only sound basis for reconciliation. In May, June and December of 2000, we the people took the first steps towards bringing our will to bear on this critical issue. Australians of all the colours of our diverse background took to the streets. The bridge-walks in towns and cities demonstrated a deep desire within us, to live up to our rhetoric, to truly become the nation of the fair go. This issue of our national equality should have transcended politics. The attitude of the present Government makes that impossible. It has been left to us to make our own moral judgement and set the agenda for justice at the people's level.

The complexity of Australia's mix: the deeply spiritual nature of Aboriginality, belonging to the land; a land and its people, a seamless garment. Settlement: by those who refused to accept the judgement of worthlessness, the sentence of oppression and degradation; who fought for their freedom some by fair means, some by foul. Migration: by refugees squeezed from countries filled with turmoil born of economic, ethnic and religious bitterness. These are the ingredients of great nationhood and provide a unique canvas. What we choose to lay upon it will decide the future of our nation.

Indigenous Australians, here from the beginning, non-indigenous Australians, all from other lands. Together we have been touched by the spirit of this land. We can become a great and just nation, worthy of the land of the dreaming.

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