

## THE TRUTH ABOUT 26 JANUARY

Contention continues to swirl around Australia Day. It rises to a climax in January and then slowly subsides during the run-down of the year. But it never disappears and will certainly emerge again in the New Year. Marches and demonstrations held to counter public celebrations swell in size and begin to match official parades. The most striking feature of 26 January is, then, the rift in national consciousness, not collective voices of a community united in commemoration. Municipal governments in many states debate their attitude to Australia Day and increasing numbers are deciding to boycott official celebrations. Enraged conservative politicians threaten to take away their customary role in citizenship ceremonies. Their supporters in the media decry the presumed lack of loyalty both to the nation and our British heritage. Both sides dig in, and the problem of how and when to celebrate our national life and achievements becomes a focal point for the ongoing culture wars.

But for all that the contention should not evoke surprise. The problematic nature of 26 January has been apparent for a long time. It was clearly displayed in 1938 when Sydney commemorated the sesquicentenary of the arrival of the First

Fleet. While the crowds watched a replay of the British arrival, the leaders of the Aboriginal communities in Victoria and New South Wales held a Day of Mourning. Jack Patten and William Ferguson declared in a powerful pamphlet:

The 26th of January, 1938, is not a day of rejoicing for Australia's Aborigines; it is a day of mourning. This festival of 150 years' so-called 'progress' in Australia commemorates also 150 years of misery and degradation imposed upon the original native inhabitants by the white invaders of this country ... You have almost exterminated our people, but there are enough of us remaining to expose the humbug of your claim, as white Australians, to be a civilised, progressive, kindly and humane nation.<sup>1</sup>

Fifty years later, Sydney was again immersed in celebration, this time for the bicentenary of the founding of white Australia. As before, the rift was inescapable. As crowds looked seaward, awaiting the arrival of a fleet of tall ships on a harbour cluttered with boats of all shapes and sizes, a huge procession, of what was calculated to be over 40 000 Aboriginal people, 'coming from all points of the southern sky', and their mainstream allies, stormed along Elizabeth Street for a rally in Hyde Park. They carried banners and wore badges that read: 'White Australia Has a Black History – Don't Celebrate 1988' and '1988 – What's to Celebrate?'. The overwhelming theme of both march and meeting was for the return of Indigenous land and reparation for two centuries of brutality and injustice. Like any good political slogan, 'White Australia Has a Black

History' used few words to encapsulate a complex freight of ideas. But concern about 26 January spreads far beyond the First Nations and their allies voicing vicarious engagement.

Opinion polls on the subject are clear about a number of things. A large majority of people want to have an occasion to commemorate our history and celebrate our way of life. This does not necessarily mean they are wedded to the present day. Nor is there evidence to suggest that those who would prefer a change of date are opposed to the idea of a distinctive national day. They are not in any meaningful sense unpatriotic, nor are they hostile to 'Australian values', the two avenues of attack by prominent defenders of the status quo. This assessment is borne out by the widespread confusion as to why 26 January was chosen in the first place. A national survey reported in *The Age* in March 2017 found that while more than seven out of ten respondents declared that Australia Day was important to them, many did not know which event it commemorated. The survey provided six alternative historical events to choose from. Only 43 per cent correctly identified the first arrival of a First Fleet ship at Sydney Cove. One in five chose the arrival of Cook on the east coast. One in six picked the anniversary of federation. Seven per cent thought the national day marked the signing of a treaty with the First Nations. Almost as many thought it was the date that commemorated the occasion when Australia ceased to be a British colony. Two per cent thought it marked an important battle during the First World War.<sup>2</sup>

There is a degree of perversity on display among the passionate defenders of 26 January. It made sense in the past for those who wanted to commemorate the founding of Sydney.



That was when the decision was made to move the whole expedition from Botany Bay to Sydney Harbour. It makes less sense as a day of national commemoration. There are two other dates that would be more appropriate. The first is the 20th of the month, when all the ships had arrived in Botany Bay. It was the successful conclusion of a remarkable expedition, bringing a fleet of eleven ships and over a thousand men and women from the other side of the world. It was a significant achievement of logistics and seamanship, but one of British imperial rather than Australian history. The second date is 7 February, when the formal ceremony of annexation was conducted before the whole population. The public commissions were read and, as Watkin Tench explained, the British took 'possession of the colony in form'. The marine battalion was drawn up and marched off 'with music playing and colours flying, to an adjoining ground which had been cleared for the occasion'. Once the documents had been read the officers joined Governor Arthur Phillip 'to partake of a cold collation', at which 'many loyal and public toasts were drank in commemoration of the day'.<sup>3</sup>

As the officers toasted the formal establishment of New South Wales, the future of relations with the local Aboriginal bands appeared propitious. The governor had good intentions and his instructions suggested he 'conciliate their affections' and enjoin 'all our subjects to live in amity and kindness with them'.<sup>4</sup> Tench observed that:

The Indians for a little while after our arrival paid us frequent visits, but in a few days they were observed to be

more shy of our company. From what cause their distaste arose we could never trace, as we had made it our study, on these occasions, to treat them with kindness, and load them with presents. No quarrel had happened, and we had flattered ourselves, from Governor Phillip's first reception among them, that such a connection might be established as would tend to the interest of both parties.<sup>5</sup>

Things did not turn out the way Tench expected. That had become quite clear by the time he left the colony in December 1791. A disastrous smallpox epidemic ravaged the local bands in April and May 1789 and then spread outward across much of south-eastern Australia. Violence increased around the fringes of settlement until (as mentioned in chapter 2), in December 1790, the governor ordered Tench to lead Australia's first punitive expedition towards Botany Bay and use terror to bring resistance to an end.

Viral epidemic was far more dramatic in its impact than skirmishing on the edges of settlement, but it only affected one generation. Frontier conflict became a permanent feature of Australian life for 150 years. Disease was unpredictable. Fighting was not. It was predetermined by the fateful decisions made in London before the First Fleet set sail. The documents read on 7 February did two things. They concerned sovereignty and property, as we have seen above. The imperial government asserted sovereignty over the eastern half of the continent. It was a vast and audacious claim that, as we have already seen, would have been found illegitimate in international law. And there were already clearly understood



protocols among the European nations about the extension of sovereignty.

What provided the British with a thin cloak of legitimacy was the assumption that no prior sovereignty existed. The First Nations had been judged from afar to have neither government nor laws and customs. And so the British officials turned their back on the tradition of treaty-making that had been alive in North America for 150 years. It is simply not possible that educated officials were unaware of already deeply entrenched policies concerning the Native Americans. The decision to regard New South Wales as a *terra nullius* was not the result of forgetfulness or inattention. The likely consequences were understood at the time. Without any means or machinery for negotiation, violence would stalk the land. It would follow the steps of frontier settlers wherever they went. Jeremy Bentham, one of the most influential thinkers of the time, recognised what was wrong with the legal foundations of the new colony. In a pamphlet that made many criticisms of official plans, he observed that there had been no negotiations with the First Nations and no treaties had been negotiated. He believed this would create enduring problems: "The flaw is an incurable one."<sup>6</sup>

An even more egregious decision was made in relation to property. In one apocalyptic moment, all the real estate over half the continent became the property of the Crown. It was an appropriation confirmed in Australian courts for 200 years. It became so central to national life that it was rarely questioned. And it cannot be distinguished from the foundation of British Australia and the commemorations of 26 January.

The mollifying thought that British behaviour was quite normal, even acceptable, in the late 18th century provides little in the way of defence. No justification can be found in the international law of the period or in currently accepted behaviour of nation states. The scale of the expropriation was without precedent, and once again only made sense if it was accepted that the First Nations had never been in actual possession of their homelands and that over vast stretches of land there were no settled inhabitants and that there was neither land law nor tenure.

Everything changed in 1992 when the High Court handed down its judgment in the *Mabo* case. The judges overthrew 200 years of legal precedent, deciding that before the arrival of the British invaders the First Nations had both settled inhabitants and land law. They were the legitimate owners of their ancestral homelands. As Justice Brennan declared in the imperishable words, the Meriam people were 'entitled against the whole world to possession, occupation, use and enjoyment' of their traditional land.<sup>7</sup>

The implication was inescapable. The British had expropriated the land without compensation. It was a land grab almost without precedent. And by its very nature revolutionary in the same way as was the Bolshevik's abolition of private property in 1917. How this expropriation could have happened under the aegis of the common law is hard to explain. Because at the same moment and by the same legal instruments the land was expropriated, the Aboriginal peoples all over New South Wales became British subjects, so-called beneficiaries of the King's peace. Australian judges have often dated the



assumption of ownership from either 1786 when Phillip received his first commission or from the formal annexation on 7 February 1788. Is that when the incorporation occurred? Both at the same time? Or did one precede the other? These seemingly arcane questions matter because they bring us to the much broader question of the sanctity bestowed on private property by the common law.

The right to private property was central both to British political philosophy and law. The pivotal thinker John Locke argued that there were three natural rights – to life, liberty and property. He defined power as the ‘right of making laws, with penalties of death, and consequently all less penalties, for the regulating and preserving of property’. He believed that men entered society in the first place in order to protect their possessions, explaining that ‘the great and chief end of men entering into commonwealths’ was ‘the preservation of their property’. What is more, no government could ‘take from any man any part of his property without his consent’. The state could legitimately take a man’s life but it could not confiscate his estate. The proposition that anyone could actually lose their property as a result of entering society was ‘too gross an absurdity for any man to own’.<sup>8</sup> The relevance of these sentiments for the Aboriginal peoples needs little accentuation.

One of the central themes in the history of the common law was the centuries-long struggle to defend the property of the subject from appropriation by the Crown. Statutes of the 13th and 14th centuries were designed to restrain the arbitrary power of kings to confiscate the property of their subjects. And the fight against prerogative power persisted. The common

law had for centuries built up powerful barriers around the property of the subject. Indeed, it was ‘not more solicitous of anything than “to preserve the property of the subject from the inundation of the prerogative”’.<sup>9</sup> The 17th-century jurist Sir Christopher Yelverton explained ‘that no man’s property can be legally taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject ... is *jus indigenae*, an old home-born right, declared to be law by divers statutes of the realm’.<sup>10</sup>

It is important to remember that New South Wales was regarded as a colony of settlement. British law arrived with the First Fleet. Early legal and administrative decisions made it clear that the prerogative power of the Crown was no more extensive in Sydney than in Britain itself.<sup>11</sup> So how had the Crown acquired the landed property of First Nations across vast stretches of territory without their permission and without providing compensation? It had been stolen from people who were subjects within the King’s peace. And how and why was this outstanding anomaly allowed to determine what happened to tens of thousands of men, women and children for 200 years? So much of the violence on the frontier was occasioned by settlers enforcing the expropriation of tribal land that had the sanction of the law. Colonial life was brutal at times, but the moral responsibility belongs to the British officials who determined the conditions resulting from the plans they developed for the annexation of the country. And ultimately, it was the responsibility of the British Crown, which made no attempt to protect the First Nations from the inundation of the prerogative. And so the ‘tide of settlement’ advanced ‘along an



ever widening line, breaking the tribes with its first waves and overwhelming their wrecks with its flood'.<sup>12</sup>

Another astonishing anomaly that the proponents of 26 January as our national day often assert is that the First Fleet brought with it the rule of law. It is less than obvious how such a claim can be sustained. In 1788 the law was profoundly subverted. Hundreds of years of tradition were overturned. For anyone to lose their property as a result of being incorporated into British society was, as Locke had insisted, too gross an absurdity for any man to own. Do the flag-wavers have any idea what they are urging us to commemorate? Do they not know? Do they care?

And then there is the question of hypocrisy. Many nations find it difficult to avoid when they commemorate their past. One of the best known examples is the United States and the Declaration of Independence, with its famous assertion that all men are born equal and endowed with inalienable rights to life, liberty and the pursuit of happiness. Of the fifty-six men who signed the document forty-six either were, or had been, slave owners. George Washington owned 300, Jefferson a mere 100. Australians have given little thought to their own comparable problem. But if Australia had a founding principle, it was the sanctity of private property. The imperial government had a number of motives when it decided to plant a settlement on the east coast of Australia, but punishment for crimes against property was central to the whole operation. The convicts were wrenched from homeland, community and family, in most cases for theft. Their punishment was designed as a deterrent against future transgression. The story is well

known. And the full force of laws against theft was imposed from the moment the expedition arrived in Sydney. At the end of February 1788, five men were convicted of theft and condemned to death, illustrating that property was more sacrosanct than life itself. The sentences were carried out at public hangings, which the whole convict population was forced to watch. Just three weeks before, half a continent had been declared Crown land in one of the most remarkable acts of plunder in modern times. It may well be argued that the British thought the land belonged to no one. But that was not an explanation that was taken very seriously if convicts tried the same excuse when they came face to face with the magistrates.

There are so many reasons not to commemorate the nation on 26 January. Aboriginal and Torres Strait Islander people have made their feelings plain since at least 1938 and continue to do so. It is surely extraordinary that their opposition has been disregarded. And it is not as if they didn't have a strong case. The arrival in January 1788 did not merely presage disasters that were to follow. It was the precise moment when the tragedy began relentlessly to unfold. And once the British claimed both the sovereignty and all the property, there was no turning back. The dark seeds of disaster had been sown. Like people everywhere who have suffered from deep, collective tragedies, it is pointless and gratuitous to tell Indigenous Australians to get over it and to look to the future. John Locke understood the pain felt by the dispossessed and their right to struggle for reparation. He thought that



the inhabitants of any country, who are descended, and derive a title to their estates from those who are subdued, and had a government forced upon them against their free consents, retain a right to the possessions of their ancestors ... [they] have always a right to ... free themselves from the usurpation or tyranny which the sword hath brought in upon them.

The struggle to regain land unjustly taken might well proceed generation upon generation. 'If it be objected', Locke declared, 'this would cause endless trouble; I answer, no more than justice does, where she lies open to all that appeal to her.'<sup>13</sup>

An argument frequently heard in the testy debate about Australia Day is that what happened to the Aboriginal peoples resulted from what was regarded as acceptable behaviour at the time. That is just what happened in the 18th century, the argument runs, and it is pointless now to make judgments using the ideas and sensibility of contemporary times. It is anachronistic at best and 'virtue signalling' at worst. But as previous discussions have illustrated, British behaviour in Australia in the late 18th and early 19th centuries had little support from the writing of international jurists, nor did it follow well-trodden paths of precedent long laid down in North America. And while modern human rights discourse emerged well after 1788, the right to property was, by then, deeply embedded in British law and politics.

But the judgments we make today can't eschew contemporary ideas and sensibility. On any measure, the First Nations suffered grievously as a result of the British annexation. They

were the victims of profound injustice. The early ethnographers Fison and Howitt saw it as it was. 'The advance of settlement', they wrote in 1880, 'upon the frontier at least' was 'marked by a line of blood'.<sup>14</sup> Peace of a kind arrived everywhere sooner or later, but the suffering persisted. Demographic recovery took over a century in many places. Death frequently came early for survivors of the wars, and few children were born or survived their early years. Poverty and despair were found everywhere.

Even now, many Australians find it hard to accept that white Australia does, indeed, have a black history. Their desire to commemorate 26 January arises from the felt need to focus on both our British heritage and the ongoing story of successful nation-building. John Howard was fond of saying that our history had a few blemishes. Scott Morrison remarked recently that colonisation did produce 'a few scars from some mistakes and things that [we] could have done better'.<sup>15</sup> These comments may have been made in passing, but they are symptomatic of problems that are much more than skin deep.

How are we to explain this singular failure of empathy? Why is the profound injustice visited upon the First Nations not treated with the appropriate gravity? Why continue to commemorate a day that takes the nation back to where it all began? And, for that matter, why identify so completely with the imperial invaders? Why have Australian leaders never asked for an apology from the British government or from the Queen herself in the manner pursued by the Māori? And why not suggest that some form of reparation would be appropriate for a land seizure completely at odds with the common law? The apostles of our current Australia Day expect

Aboriginal and Torres Strait Islander people to be loyal members of the Australian state and would react strongly against any hint of separatism. But do they really think they are part of the nation? Are they white Australians' countrymen and -women? If so, why can't all Australians identify with them and feel their pain?