

**FRANCIS FORBES SOCIETY FOR AUSTRALIAN  
LEGAL HISTORY  
(ACN 099 158 620)  
AUSTRALIAN LEGAL HISTORY ESSAY COMPETITION  
2009**

**BACKGROUND RESEARCH PAPER No. 3**

***SNAPSHOTS IN THE MIRROR: Paradigms for  
Australia Day***

**By Geoff Lindsay S.C.**

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**“AUSTRALIA DAY” AND AUSTRALIAN LEGAL HISTORY**

Who owns this land, Australia? All of us? Some of us? The past? The present? The future? What is Australia if not a community celebrating, together, common bonds and diversity?

Australians now celebrate a public holiday on 26 January each year. Australian governments, of all political persuasions and at all levels, call it “Australia Day”. The Prime Minister of the day, as a duty of office, ritually announces the appointment of an “Australian of the Year”. The recipient of that award is selected by a committee. On the whole, the committee system of decision-making has served Australia well, and there is nothing more calculated to appeal to the national spirit than a committee decision.

In 2009 the Australian of the Year, Professor Mick Dodson, distinguished himself in much the same way as the young lad in the fairytale who declared that the King had no clothes. He invited Australians to begin a debate about whether “Australia Day” should be celebrated on a day other than 26 January. It is a question worthy of a serious, informed debate. As an Aboriginal Australian, Professor Dobson probably had in mind that some Australians of a similar background (and others of all backgrounds) call 26 January “Invasion Day” and wear sackcloth, ashes and black armbands in mourning for the lost utopia of Aboriginal Dreaming. He might also have had in mind that, in Australian history, 26 January is geographically tied to

Sydney and the State of New South Wales. It speaks, perhaps, of the “Foundation” of New South Wales, but says nothing of the foundation of other parts of the modern Australian polity. Perhaps it speaks to some most vividly of the anniversary of the Rum Rebellion in 1808, when the Governor of New South Wales (Governor Bligh of “Mutiny on the Bounty” fame) was “displaced” – euphemism is required here because, although mutinous, the “rebellion” was not quite a “coup”; it was carried out under pretence of lawful authority – by rogue elements of the military and elitist citizenry.<sup>1</sup> Modern day Republicans might be tempted by that thought, but their democratic sympathies and abhorrence of military coups and dictatorships would keep that in check.

Maybe, just maybe, the Australian of the Year had in mind that many Australians have little idea of the precise significance of 26 January in the Australian Story. They are more than untroubled by that imprecision in their knowledge. In the company of friends and family, they are faintly amused by it. They are proud of a laconic indifference to what seems, to them, to be an adjunct of British history. They know, but vaguely, that 26 January has something to do with the arrival of the British (now increasingly characterised as “Europeans”) in the land yet to be known as “Australia”. Aboriginal protestors remind them of that, at least. But they can never quite remember whether the anniversary marks the “discovery” of “Australia” by “Captain” Cook in 1770 or the arrival of the “First Fleet” in Botany Bay (or was it Port Jackson, Sydney Harbour?) in 1788. They are too busy celebrating their public holiday to care much about mere matters of detail. They are too busy lamenting the loss of the long weekend we all once enjoyed before some of Australia’s political leaders demanded, in the wake of the 1988 “Bicentenary”, that we follow US practice of celebrating “the National Day” on a specific calendar date. Maybe it was the influence of the US post-graduate education experienced by a new generation of Australian political leaders. Maybe it was the influence of “economic rationalism” prevalent at the time.

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<sup>1</sup> Geoff Lindsay, “The Rum Rebellion, 1808: A Lesson for Nation Building” (16 March 2007) Forbes Society website ([www.forbessociety.org.au](http://www.forbessociety.org.au)); H.V. Evatt, *Rum Rebellion* (Sydney, 1938); Ross Fitzgerald and Mark Hearne, *Bligh, Macarthur and the Rum Rebellion* (Sydney, 1988); JJ Spigelman, “Bicentenary of the Coup of 1808” (2008) 30 *Australian Bar Review* 129.

Australia's historical links with the US go back "before the beginning" of British settlement of "Botany Bay" through a suggestion made to the British Government by James Matra (an American colonist loyal to the Crown, and a member of James Cook's crew on *HMS Endeavour*) that the area be used to re-settle loyalists displaced by the "War of Independence" in America. We owe much to both the British and the Americans. They remain close friends. Our connections with them are not enough, though, to dictate how Australia should celebrate its own special community, its own special heritage. The USA's "Independence Day" (4 July 1776) has an indirect connection with the events of 26 January 1788, but the character of the anniversaries celebrated on those two dates is wholly different.

Australia's modern political leaders appear always to have appreciated, and to appreciate still, the social value of a long weekend associated with "Australia Day". An "Australia Day Weekend" has been, mostly, easy enough to deliver when 26 January has fallen on a Friday, Saturday, Sunday or Monday. The real test has been when it has fallen on a Tuesday, Wednesday or Thursday. Hard decisions must then be made.

Before 1988 a long weekend appears, routinely, to have been prized over calendar exactitude. For example, in 1982 Australia enjoyed a public holiday on Monday 1 February. In 1983, a holiday was declared on Monday 31 January. In 1984, it was Monday 30 January.

Then came the lead up to the Bicentenary, with a series of unchallenging years. Hard decisions did not have to be made. Public holidays were declared for Monday, 28 January 1985; Monday, 27 January 1986; and Monday, 26 January 1987. In each year, 26 January fell conveniently for the long weekenders.

The long weekend tradition was broken in the Bicentennial Year. "Australia Day" was celebrated on Tuesday, 26 January 1988.

Then our political leaders got the wobbles. Patriotic fervour and economic rationalism got the better of them. They began to break ranks. In 1989, NSW and

the ACT took their public holiday on Thursday 26 January; the rest of the country opted for Monday, 30 January. 1990 was politically easier, but still divisive: NSW, Qld, WA, the ACT and the Northern Territory opted for Friday, 26 January; Tasmania, Victoria and South Australia opted for Monday 29 January. 1991 was an easy year; everybody opted for Monday, 28 January. 1992 was also an easy year: Monday 27 January was the declared holiday. 1993 was a crunch year: NSW, Qld, WA, the ACT and the Northern Territory opted for Tuesday 26 January; Tasmania, Victoria and South Australia went with Monday 1 February. By 1994 the rot had set in. In that year everyone was a “calendar purist”. Wednesday 26 January was the national holiday. In 1995 calendar purity had become doctrinaire economic rationalism: 26 January fell on a Sunday, and the next day was a workday for everyone. 1996 was a relatively easy year: Friday 26 January was the appointed holiday. In 1997 Victoria got the wobbles; it stuck with economic rationalism, and everybody else took a public holiday on Monday 27 January. Since that time there appears to have been a consensus amongst political leaders to embrace something approaching calendar exactitude. That has been proven by the hard years, when 26 January has fallen on a Tuesday (1999), a Wednesday (2000 and 2005) or a Thursday (2006). Despite this, the general population appears to have become no better informed, and no more caring, about the historical significance of 26 January.

Whatever explanation might be offered for departures from the nation’s “Australia Day Weekend” tradition of pre-1988, Australians know, deep down, sadly, that a prime function of Australia Day is to mark a transition from Summer Holidays (the Beach, Cricket and Tennis) to the work-a-day year.

When everything is said and done, perhaps the big advantage for all Australians in retention of 26 January as Australia Day is the glorious ambiguity of it all, together with both calculated and unfeigned ignorance of all and sundry about government-sponsored national pride. It might yet save us from the nationalistic excesses into which, we know too well, our deepest emotions can be called.

It is not as if the event were held on “Anzac Day”, 25 April. We all know what that is about. That is a day for pride. We glory in its ambiguities, its contradictions, its celebration of the human spirit.

In celebrating a military defeat, courage of friends and foes alike, the birth of a national myth of mateship, reconciliation with old enemies, the futility of war, the need for eternal vigilance and gratitude for generations of men and women prepared to fight and perhaps to die for our freedoms, Australians take real pride in their country on Anzac Day. It is a Day for tingles down the spine (and faintly suppressed tears of respect, gratitude and empathy) beyond any experience of Australia Day. What a pity it is that Winston Churchill's folly did not see the Dardanelles Campaign launched on the last Monday in January back in 1915. That would have met the needs of Australian seasonal routine with much more convenience for everybody. We could then have justified the institutional imperatives of national pomp and ceremony in the context of a well justified long weekend.

A community must assess the utility of a "public holiday" according to whether, and to what extent, it serves the welfare of the people for whom it is declared. One of the measures of utility is how a holiday fits in with rhythmic, seasonal patterns. Australians celebrate their "summer holidays" in December-January. Northern hemisphere populations celebrate theirs in June-July. Community leaders charged with the responsibility of superintending our welfare must be mindful of the seasons. They must also take into account the social patterns of the people, including the determination of the people to celebrate religious festivals ("holy-days") and routine entertainment such as sporting competitions. Every community needs its "Bread and Circuses". Many countries experience four seasons in a year: summer, autumn, winter and spring. Many Australians enjoy only two, and are none the worse for that: the Cricket Season and the Football Season! The utility of a "public holiday" must be assessed in a context broader than the particular day. Does it provide relief from the work-a-day world, calibrated against work commitments and other leisure opportunities: weekends, rostered days off and other public holidays? Planning for a Year requires an exercise of judgment, a balancing of competing factors.

If we did not celebrate 26 January as "Australia Day", we might need another date around the same time for that purpose. We already have public holidays at Easter in March-April, on Anzac Day on 25 April, for the Queen's Birthday weekend in June, the Labour Day weekend in October, Christmas and New Year. Ironically, part of the

necessity for a date at or about the end of January is the need to mark the end of summer holidays that, by custom, the Australian community enjoys. If we were to pretend that we celebrate 26 January as “Australia Day” only because our “history” mandates it, we would become trapped – not emboldened or liberated – by our past. Our history, and society, are rich, strong and vibrant enough to allow us to choose a date for the celebration of community, not to have it forced upon us by outmoded anniversaries. When times changed, so did we in our abandonment of “Empire Day” (24 May) as a holiday. The need for a “public holiday” justifies selection of an historical association. No “historical fact” compels us to limit our celebration of community to a particular date. Within leeways of choice presented by the course of events, the study of history involves a selection of facts that serve a purpose.

A return of “Australia Day” celebrations to an “Australia Day Weekend” could serve a constructive purpose. On a “cost-benefit analysis”, such a move might be thought to produce substantial “benefit” at very little (if any) “cost”. By detaching our celebrations from a necessary connection with 26 January, we could give space to those who lament that date as “Invasion Day”, while allowing those who still feel a strong connection with 1788 to maintain that connection. Let everybody celebrate the Nation. In the language of our times, we could be “inclusive” and give practical expression to “reconciliation”. Why cause unnecessary offence? By loosening the grip of 26 January on our celebrations we could find room for everybody to grow in community.

On close examination, the selection of 26 January as the symbolic date for celebration of community in modern Australia appears to be arbitrary. The story of the arrival of Governor Arthur Phillip with the “First Fleet” in 1788 (if that is to be our paradigm) offers a range of dates, not a single one, for choice: 18-20 January, 26 January and 7 February are probably the principal ones, but a mischievous lawyer might even suggest 13 February or 6 October. Read on to find out why.

If we were to make the arrival of “Captain” Cook on our shores in 1770 (rather than Governor Phillip) our model, there is again a range of dates that could be selected: 19 April, 28 April and 22 August, for example. The mischievous lawyer, armed with a

copy of *Blackstone's Commentaries on the Laws of England*, might even insist on the theoretical necessity of 22 August as the Day of celebration. Read on to find out why.

For much the same reason, Australian “Constitutional Lawyers” – some generations removed from the writings of Sir William Blackstone – might opt for 1 January, 3 March or 17 September. Again, to find out why, read on.

Perhaps, if Australia were ever to decide to call itself a “Republic”, it might have an opportunity to “make history” in a manner compatible with our need for a public holiday at or about the end of January. Anybody with a keen eye on English history might then be tempted, in that context, to proclaim the birth of a new “Republic” on 30 January. In a perverse way, that might accommodate both Republicans and Monarchists alike. It is the date attributed to the execution of King Charles I in 1649.<sup>2</sup> Even today, a “Human Rights Lawyer” can find cause for celebration in the overthrow of absolute monarchy by due process of law<sup>3</sup>, and Anglican Royalists celebrate the life of “Charles the Martyr”.

A lesson to be drawn from all this is that “Australian history” is what we make it --- and “Australian Community” is what we make it as well.

Perhaps we will stick to our routine of “Australia Day” celebrations on 26 January for many years to come. Perhaps we won't. Either way, we should know why, and what, we celebrate.

### **The 1770 Paradigm: “Captain” James Cook’s instructions in Service of the Crown**

The 19<sup>th</sup> April could be a candidate for a public holiday because it was on that date, in 1770, that James Cook of *HMS Endeavour* “discovered” the east coast of “New

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<sup>2</sup> Charles was executed on 30 January 1649, according to the “Old Style”, Julian Calendar. By (1750) 24 *George II chapter 2 (entitled, by the Short Titles Act 1896 (UK), the Calendar (New Style) Act 1750)*, England adopted the “New Style”, Gregorian Calendar in 1752. There is, accordingly, a disparity between the date Charles knew as his fateful last and the date we know as 30 January. For practical purposes, the distinction is no more than an historical curiosity.

<sup>3</sup> Geoffrey Robertson, *The Tyrannicide Brief: The Story of the Man who sent Charles I to the Scaffold* (London, 2005).



Holland”, the very name of which betrays that it had been earlier “discovered” by the Dutch. Cook’s Journal<sup>4</sup> explains that, having mapped New Zealand with the benefit of the Dutchman Abel Tasman’s earlier work, he was sailing west in anticipation of further land in the vicinity of the territory named “Van Dieman’s Land” by Tasman. On 18 April 1770 he recorded the following: *“last night we saw a Port Egmont Hen and this morning two more, a Pintado bird, several Albatrosses and black sheerwaters. The first of these birds are certain signs of the nearest of land, indeed we cannot be far from it for by our Longitude we are a degree to the westward of the East side of Van Dieman Land according to Tasmans the first discovers Longitude of it, who could not err much in so short a run from this land to Newzeland and by our Latitude we could not be above 50 or 55 leagues to the northward of the place where he took his departure from.”*. This entry reflects the commonplace commonsense of the experienced navigator that was James Cook. His genius for life was wonderfully empirical. He was a great observer. He was not given to fears of the unknown. He did not pretend to map the unseen.

The “unseen” of mainland New Holland came into view the next day, 19 April 1770. Cook wrote in his Journal for that day:

*“The Southermost Point of land we had in sight ... I have Named ... Point Hicks, because Leuit Hicks was the first who discover’d this land.*

*To the Southward of this point we could see no land and yet it was very clear in that quarter and by our Longitude compared with that of Tasmans the body of Van Diemens land ought to have bore due south from us and from the soon falling of the Sea after the wind abated I had reason to think it did, but as we did not see it and finding this case to trend NE and SW or rather more to the westward makes me doubtfull whether they are one land or no: however every one who compares this Journal with that of Tasmans will be as good a judge [as] I am, but it is necessary to observe that I do not take the situation of Vandiemens from the prented Charts but from the extract of Tasmens Journal published by Dirk Rembrantse”.*

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<sup>4</sup> Beaglehole JC (ed), *The Journals of Captain James Cook on his Voyage of Discovery* (3 volumes, in four, Cambridge, 1955-1969) and *The Life of Captain James Cook* (Stanford, 1974) constitute the classic editions of Cook’s Journals and Cook biography respectively. An accessible collection of extracts from the Journals is published by Penguin Books: *The Journals of Captain Cook* (edited by Philip Edwards, London, 1999).

Again, we see, Cook's "discovery" of the east coast of New Holland was referenced back to the earlier work of Tasman. It wasn't until 1799, 11 years after the foundation of the First Settlement in Port Jackson, that the explorers Bass and Flinders established that Van Diemen's land was an island.

From "Point Hicks" (now known as "Cape Everard") the *Endeavour* turned north, hugging the coast as Cook mapped it. The ship landed at "Botany Bay" (initially named "Sting Ray's Harbour") on 28 April 1770. He remained there for a time before proceeding northward. He proceeded past "a Bay or Harbour wherein there apper'd to be safe anchorage which I call'd Port Jackson" and diverse other places. At this remove we have no need to dally there any more than did James Cook. We jump, instead, to his *Journal* entry for 22 August 1770, shortly after he had named "Cape York". That includes the following passage:

*"Having satisfied my self of the great Probability of a Passage, thro' which I intend going with the Ship, and therefore may land no more upon this Eastern coast of New Holland, and on the Western side I can make no new discovery the honour of which belongs to the Dutch Navigators; but the Eastern Coast from the Latitude of 38° South down to this place I am confident was never seen or viseted by any european before us, and Notwithstand I had in the Name of His Majesty taken possession of several places upon this coast, I now once more hoisted English Coulers and in the Name of His Majesty King George the Third took possession of the whole Eastern Coast from the above latitude down to this place by the name of New South Wales, together with all the Bays, Harbours, Rivers and Islands situate upon the said coast, after which we fired three volleys of small Arms which were Answered by the light number from the Ship ...".*

In taking "possession" of this land Cook was mindful that it was, literally, inhabited by people he described as "natives". His intermittent contact with them was recorded in his *Journal*. The land might have been sparsely populated, but it was populated. By what authority, then, did Cook purport to "take possession" of it?

The answer to that question must be found, in part, in Cook's "Instructions" from the Admiralty (that is, Britain's "Department of the Navy").

Australians can do greater justice to the memory of Captain Cook by viewing him as an intrepid explorer of the world than they can ever do by thinking of him as the “Discoverer” of the eastern coast of Australia. He first distinguished himself as a cartographer, in the service of the British Navy, at war with France in North America. He circumnavigated the world twice in search of the “Great South Land”. He died on his third voyage of circumnavigation, searching for a “north west passage” between the Atlantic and the Pacific oceans. He visited New Zealand twice; on his first voyage, to map it; on his second voyage, for refreshment. He visited Australia once, on his first voyage. Once was enough. He did not return. Nor did he circumnavigate the continent. He mapped the east coast. That was enough in a leaky boat. To be known to generations of his own society as the “Discoverer (of the east coast) of Australia” was, perhaps, glory enough for any one man to bear.

Cook’s first voyage occupied three years, between 25 August 1768, when he set sail from England and 12 July 1771, when HMS Endeavour returned to port.

When he left England in 1768 Lieutenant James Cook (as he then was) held two sets of written “Instructions”.<sup>5</sup> The first set instructed him to sail to Tahiti and, there, “to observe the Passage of the Planet Venus over the Disk of the Sun on the 3<sup>rd</sup> of June 1769.” The second set remained a secret, even to Cook, until the voyage was underway. Those instructions from “the Commissioners for executing the Office of Lord High Admiral of Great Britain & c” were in the following terms:

*“Whereas the making Discoverys of Countries hitherto unknown, and the Attaining a Knowledge of distant Parts which though formerly discover’d have yet been but imperfectly explored, will redound greatly to the Honour of this Nation as a Maritime Power, as well as to the Dignity of the Crown of Great Britain, and may tend greatly to the advancement of the Trade and Navigation thereof; and Whereas there is reason to imagine that a Continent or Land of great extent, may be found to the Southward of the Tract lately made by Capt<sup>m</sup> Wallis in His Majesty’s Ship the Dolphin (of which you will herewith receive a Copy) or of the Tract of any former Navigators in Pursuits of the like kind; You are therefore in Pursuance of His Majesty’s*

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<sup>5</sup> They are printed at pages CCLXXIX-CCLXXIV of volume 1 of JC Beaglehole’s edition of Cook’s Journals, entitled *The Journals of Captain James Cook on his Voyages of Discovery*. Volume 1, entitled *The Voyage of the Endeavour, 1768-1771*, was published at Cambridge in 1955.

*Pleasure hereby requir'd and directed to put to Sea with the Bark you Command [ie, HMS Endeavour] so soon as the Observation of the Transit of the Planet Venus shall be finished and observe the following Instructions.*

*You are to proceed to the southward in order to make discovery of the Continent abovementioned until you arrive in the Latitude of 40°, unless you sooner fall in with it. But not having discover'd it or any Evident signs of it in that Run, you are to proceed in search of it to the Westward between the Latitude before mentioned and the latitude of 35 ° until you discover it, or fall in with the Eastern side of the Land discover'd by Tasman and now called New Zeland.*

*If you discover the Continent above-mentioned either in your Run to the Southward or to the Westward as above directed, You are to employ yourself diligently in exploring as great an Extent of the Coast as you can; carefully observing the true situation thereof both in latitude and Longitude, the Variation of the Needle, bearings of Head Lands, Height, direction and Course of the Tides and Currents, Depths and Soundings of the Sea, Shoals, Rcoks, &c<sup>a</sup> and also surveying and making Charts, and taking Views of such Bays, Harbours and Parts of the Coast as may be useful to Navigation.*

*You are also carefully to observe the Nature of the Soil, and the Products thereof; the Beasts and Fowls that inhabit or frequent it, the fishes that are to be found in the Rivers or upon the Coast and in what Plenty; and in case you find any Mines, Minerals or valuable stones you are to bring home Specimens of each, as also such Specimens of the Seeds of the Tress, Fruits and Grains as you may be able to collect, and Transmit them to our Secretary that We may cause proper Examination and Experiments to be made of them.*

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

*You are also with the Consent of the Natives to take possession of Convenient Situations in the Country in the Name of the King of Great Britain; or, if you find the*

Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.

*But if you should fail of discovering the Continent before-mention'd, you will upon falling in with New Zeland carefully observe the Latitude and Longitude in which that Land is situated, and explore as much of the Coast as the Condition of the Bark, the health of her Crew, and the State of your Provisions will admit of, having always great Attention to reserve as much of the latter as will enable you to reach some known Port where you may procure a Sufficiency to carry you to England, either round the Cape of Good Hope, or Cape Horn, as from Circumstances you may judge the Most Eligible way of returning home.*

*You will also observe the accuracy the Situation of such Islands as you may discover in the Course of your Voyage that have not hitherto been discover'd by any Europeans, and take possession for His Majesty and make Surveys and Draughts of such of them as may appear to be of Consequence, without Suffering yourself however to be thereby diverted from the Object which you are always to have in View, the Discovery of the South Continent so often Mentioned.*

*But for as much as in an undertaking of this nature several Emergencies may Arise not be foreseen, and therefore not particularly to be provided for by Instruction before hand, you are in all such Cases, to proceed, as upon advice with your Officers you shall judge most advantageous of the Service on which you are employed.*

*You are to send by all proper Conveyances to the Secretary of the Royal Society Copys of the Observations you shall have made of the Transit of Venus; and you are at the same time to send to our Secretary, for our information, accounts of your Proceedings, and Copys of the Surveys and drawings you shall have made. And upon your Arrival in England you are immediately to repair to this office in order to lay before us a full account of your Proceedings in the whole Course of your Voyage, taking care before you leave the Vessel to demand from the Officers and Petty Officers the Log Books and Journals they may have Kept, and to seal them up for our inspection, and enjoyning them, and the whole Crew, not to divulge where they have been until they shall have Permission so to do [Emphasis Added].”*

*“Captain” Cook’s instructions are significant for several reasons beyond their particular content. They illustrate the following important facts about Australian*

*“legal” history: (a) First, “Australian” history has been marked from the outset by public officials acting under authority conferred, and directions given, in writing; (b) Second, this documentary trail has been necessary because of constraints of time and distance separating decision-makers from those required to act upon decisions of governments; (c) Third, documents of this character imply that limits on authority existed, and might be enforced by somebody, albeit with an allowance for the possibility that “due” performance of instructions might need to be tempered to accommodate conditions on the ground; and (d) Fourth, the ultimate source of authority has generally been expressed, or assumed, to be the Crown.*

A particular feature of James Cook’s instructions bears special notice in light of resurgent interest in the traditions and welfare of Aboriginal Australians. There appears to have been an almost subconscious ambiguity, or perhaps an inherent incompatibility, in how Cook was instructed to relate to Australian “Natives”. On the one hand, he was instructed to “endeavour by all proper means to cultivate a Friendship and Alliance with them ... , Shewing them every kind of Civility and Regard”, and his instructions “to take possession of Convenient Situations in the Country in the Name of the King of Great Britain” were qualified by a direction that he should do so “with the Consent of the Natives”. On the other hand he could have been left in no doubt that, by hook or by crook, Cook was required to take possession of the country in any event. The crew of *HMS Endeavour* would have known intuitively that it was necessary for Britain to take possession of new territory to forestall its European competitors, particularly its traditional enemy, France.

Imagine, dear Reader, that you were in Captain Cook’s place. What would you have done? The sensible thing to do would be just what Cook himself did: choose a few places along the coast to conduct a ceremony incomprehensible to the local population, report to your superiors on what you had done, and leave the rest for lawyers and politicians to work out for themselves.

**THE 1788 PARADIGM: Governor Arthur Phillip’s Powers as a Representative of the Crown**

In preparation for his departure from England, bound for Botany Bay with the “First Fleet” of British Settlers, Captain Arthur Phillip was empowered by the British Government to establish a colony. His powers were defined in three documents issued by, and in the name of, King George III: By a “Commission” dated 12 October 1786, he was appointed by the King “to be Governor of our territory called New South Wales” and given general instructions<sup>6</sup>; by a second “Commission” dated 2 April 1787, he was given supplementary instructions in greater detail, with an express conferral of specific powers<sup>7</sup>; and, by written “Instructions” dated 25 April 1787, the King communicated even more specific instructions to his Governor.<sup>8</sup> In large measure the Second Commission and the Instructions superseded the First Commission. The Second Commission and the Instructions were delivered to Phillip shortly before he set sail on 12 May 1787.<sup>9</sup>

The form of the Second Commission, and some extracts from it, serve to demonstrate legal assumptions of the British underlying the First Settlement:

*“Arthur Phillip Esqre  
Governor of New South Wales.*

*George the Third by the Grace of God King of Great Britain  
France and Ireland Defender of the Faith &c. to our right trusty and well-beloved  
Councillor Edward Lord Thurlow*

*Baron Thurlow our Chancellor of Great Britain greeting:-*

*WEE will command that under our Great Seal of Great Britain (remaining in your custody) you cause these our letters to be made forth patent in form following: George the Third by the Grace of God of Great Britain France and Ireland King Defender of the Faith &c.*

*Wee reposing especial trust and confidence in the prudence courage and loyalty of you the said Arthur Phillip of our especial grace certain knowledge and meer motion have thought fit to constitute and appoint you the said Phillip to be our Captain-General and Governor-in-Chief in and over our territory called New South Wales extending from the Northern Cape or extremity of the coast called Cape York in the latitude of ten*

<sup>6</sup> *Historical records of Australia*, series I, vol. 1, pages 1-2.

<sup>7</sup> *Historical records of Australia*, series I, vol. 1, pages 2-8.

<sup>8</sup> *Historical records of Australia*, series I, vol. 1, pages 9-16.

<sup>9</sup> M. Barnard Eldershaw, *Phillip of Australia* (Sydney, 1938), Proem, sections iv and vii.

*degrees thirty-seven minutes south to the southern extremity of the said territory of New South Wales or Sough Cape in the latitude of forty-three degrees thirty-nine minutes south and all of the country inland westward as far as the one hundred and thirty-fifth degree of east longitude reckoning from the meridian of Greenwich including all the islands adjacent in the Pacific Ocean within the latitudes aforesaid of ten degrees thirty-seven minutes south and forty-three degrees and thirty-seven minutes sought and forty-three degrees and thirty-nine minutes sought and of all towns garrisons castles forts and all other fortifications or other military works which may be hereafter erected upon the said territory or any of the said islands.*

*And Wee do hereby require and command you to do and execute all things in due manner that shall belong to your said command and trust Wee have reposed in you according to the several powers and directions granted or appointed you by this present Commission and the instructions and authorities herewith given to you or by such further powers instructions and authorities as shall at any time hereafter be granted or appointed you under our signet and sign manual or by our order in our Privy Council.*

*And our will and pleasure is that you the said Arthur Phillip after the publication of these our letters patent do in the first place take the oaths appointed to be taken ...*

*And likewise that you take the usual oath for the due execution of the office and trust of our Captain-General and Governor-in- Chief in and over our said territory and its dependencies for the due and impartial administration of justice.*

*And further that you take the oath required to be taken by Governors in the plantations to do their utmost that the several laws relating to trade and the plantations be duly observed ...*

*And Wee do hereby authorize and empower you to keep and use the public seal which will be herewith delivered to you or shall be hereafter sent to you for sealing all things whatsoever that shall pass the Great Seal of our said territory and its dependencies.*

*And we do hereby authorize and empower you to constitute and appoint justices of the peace coronors constables and other necessary officers and ministers in our said territory and its dependencies for the better administration of justice and putting the*



*law in execution and to administer or cause to be administered unto them such oath or oaths as are usually given for the execution and performance of offices and places.*

...

*And Wee do hereby likewise give and grant unto you full power and authority to agree for such lands tenements and hereditaments as shall be in our power to dispose of and them to grant to any person or persons upon such terms and under such moderage quit rents services and acknowledgements to be thereupon reserved unto us according to such instructions as shall be given to you under our sign manual which said grants are to pass and be sealed by our seal of our said territory and its dependencies and being entered upon record by such officer or officers as you shall appoint thereunto shall be good and effectual in law against us our heirs and successors.*

...

*And Wee do hereby declare ordain and appoint that you the said Arthur Phillip shall and may hold execute and enjoy the office and place of our Captain-General and Governor-in-Chief in and over our said territory and its dependencies together with all and singular the powers and authorities hereby granted unto you for and during our will and pleasure.*

*In witness &c.*

*Witness ourself at Westminster the second day of April in the twenty-seventh year of our reign.*

*By writ of Privy Seal.”*

One of the assumptions manifested by this Commission was that the “territory called New South Wales” belonged to the British Crown, and that it was within the gift of the Crown (via the agency of the Governor) to make grants of land.

This assumption was also reflected in Governor Phillip’s Instructions, as the following extracts testify:

*“INSTRUCTIONS for our trusty and well-beloved Arthur Phillip, Esq., our Captain-General and Governor-in-Chief in and over our territory of New South Wales and its dependencies, or to the Lieutenant-Governor or Commander-in-Chief of the said territory for the time being. Given at our Court at St. James’s, the 25<sup>th</sup> day of April, 1787, in the twenty-seventh year of our reign.*

*WITH these our instructions you will receive our commission under our Great Seal constituting and appointing you to be our Captain-General and Governor-in-Chief of our territory called New South Wales ... including all the islands adjacent in the Pacific Ocean, ... with directions to obey such orders and instructions as shall from time to time be given to you, under our signet and sign manual, or by our order in our Privy Council.*

*You are, therefore, to fit yourself with all convenient speed and to hold yourself in readiness to repair to your said command, and being arrived, to take upon you the execution of the trust we have reposed in you, as soon as conveniently may be, with all due solemnity to cause our said Commission under our Great Seal of Great Britain constituting you our Governor and Commander-in-Chief as aforesaid to be read and published. ...*

*According to the best information which we have obtained, Botany Bay appears to be the most eligible situation upon the said coast for the first establishment, possessing a commodious harbour and other advantages which no part of the coast hitherto discovered affords. It is therefore our will and pleasure that you do immediately upon your landing, after taking measures for securing yourself and the people who accompany you as much as possible from any attacks or interruptions of the natives of that country, as well as for the preservation and safety of the public stores, proceed to the cultivation of the land, distributing the convicts for that purpose in such manner, and under such inspectors or overseers, and under such regulations as may appear to you to be necessary and best calculated for procuring supplies of grain and ground provisions. ...*

*And whereas we are desirous that some further information should be obtained of the several ports or harbours upon the coast, and the islands contiguous thereto, within the limits of your government, you are, whenever the Sirius or the Supply, tender can conveniently be spared, to send one, or both of them, upon that service.*

*Norfolk Island, ... being represented as a spot which may hereafter become useful, you are, as soon as circumstances will admit of it, to send a small establishment thither to secure the same to us, and prevent it being occupied by the subjects of any other European powers ...*

*You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report your opinion to one of our Secretaries of State in what manner our intercourse with these people may be turned to the advantage of this colony. ...*

*And whereas, as from the general disproportion of female convicts to those of the males who are put under your superintendence, it appears advisable that a further number of the latter should be introduced into the new intended settlement, you are, whenever the Sirius or the tender shall touch at any of the islands in those seas, to instruct their commanders to take on board any of the women who may be disposed to accompany them to the said settlement. You will, however, take especial care that the offices who may happen to be employed upon this service do not, upon any account, exercise any compulsive measures, or make use of fallacious pretences, for bringing away any of the said women from the places of their present residence.*

*And whereas we have by our Commission, bearing date [2<sup>nd</sup> April] 1787, given and granted upon you full power and authority to emancipate and discharge from their servitude any of the convicts under your superintendence who shall, from their good conduct and a disposition to industry, be deserving of favour: It is our will and pleasure that in every such case you do issue your warrant to the Surveyor of Lands to make surveys of and mark out in lots such lands upon the said territory as may be necessary for their use; and when that shall be done, that you do pass grants thereof with all convenient speed to any of the said convicts so emancipated, in such proportions and under such conditions and acknowledgments as shall hereafter be specified, viz.: - To every male shall be granted 80 acres of land, and in case he shall be married, 20 acres more; and for every child who may be with them at the settlement at the time of making the said grant, a further quantity of 10 acres, free of all fees, taxes,*

*quit rents, or other acknowledgements whatsoever, for the space of ten years: Provided that the person to whom the said land shall have been granted shall reside within the same and proceed to the cultivation and improvement thereof; reserving only to us such timber as may be growing, or to grow hereafter, upon the said land which may be fit for naval purposes, and an annual quit rent of [blank] after the expiration of the term or time before mentioned. You will cause copies of such grants as may be passed to be preserved, and make a regular return of the said grants as may be passed to be preserved, and make a regular return of the said grants to the Commissioners of our Treasury and the Lords of the Committee of our Privy Council for Trade and Plantations.*

*And whereas it is likely to happen that the convicts who may after their emancipation, in consequence of this instruction, be put in possession of lands will not have the means of proceeding to their cultivation without the public aid: It is our will and pleasure that you do cause every such person you may so emancipate to be supplied with such a quantity of provisions as may be sufficient for the subsistence of himself, and also of his family, for twelve months, together with an assortment of tools and utensils, and such a proportion of seed-grain, cattle, sheep, hogs, &c., as may be proper, and can be spared from the general stock of the settlement.*

*And whereas many of our subjects employed upon military service at the said settlement, and others who may resort thither upon their private occupations, may hereafter be desirous of proceeding to the cultivation and improvement of the land, and as we are disposed to afford them every reasonable encouragement in such an undertaking: It is our will and pleasure that you do, with all convenient speed, transmit a report of the actual state and quality of the soil at and near the said intended settlement, the probable and most effectual means of improving and cultivating the same, and of the mode, and upon what terms and conditions, according to the best of your judgment, the said lands should be granted, that proper instructions and authorities may be given to you for that purpose. ...[Emphasis Added]"*

Phillip's Commission and his Instructions exhibited the same ambiguity, and the same inherent incompatibility, as did Cook's Instructions about dealings with Australian "Natives". A substantial difference, however, was that Governor Phillip was instructed to settle on the land, not simply to explore it, and he was authorised to grant property rights over lands within the "power" of the Crown. In short, he was required

to occupy the east coast of Australia with as little as fuss as possible, but to occupy it nevertheless. The institutional imperatives of “good government” in Britain demanded no less. The Crown’s American colonies had been lost, France remained a dangerous European rival, social and political unrest persisted in the “United Kingdom”, and the Gaols – including “Hulks” on the River Thames – overflowed with our forebears: criminals of all descriptions and political prisoners. Britain could not afford to keep these people in her own backyard. Something had to be done.

The First Fleet arrived at Botany Bay in two waves, the first on 18 January 1788 and the second two days later. Phillip quickly assessed the Bay as unsuitable for the purposes of his Settlement and, after recognisance, moved everybody under his charge to Port Jackson (Sydney Harbour). That process was briefly interrupted by the appearance of two French ships under the explorer La Perouse, but it was effected on 26 January 1788.

In the evening of that day the “First Settlers” gathered around the British flag (the “Union Jack”) at “Sydney Cove,”. The site of the settlement was named after Thomas Townshend, Viscount Sydney, Britain’s Secretary of State (i.e., Minister) for Home Affairs. Those who gathered around the flag witnessed a ceremony since re-enacted many times on “Australia Day”. The eye witness report of David Collins, as published in his *Account of the English Colony in New South Wales* (1798) is as follows:

*“In the evening of [26 January 1788 the Governor’s working party were all assembled] at the point where they had first landed in the morning, and on which a flagstaff had been purposely erected and a Union Jack displayed, when the marines fired several volleys, between which the Governor and the officers who accompanied him drank the health’s of his Majesty and the Royal Family, and success to the new colony. ...”*

There was no public holiday for anybody on this day. Indeed, nobody celebrated it as a day of special significance until many years had passed. Even after Federation ...even after World War I...the Australian States could not agree on a common celebration of “Australia Day”. Not until 1930 was 26 January known as “Australia

Day”. Before then it was known as “Foundation Day” or “Anniversary Day”.<sup>10</sup> In January 1935 the Australian Government of Prime Minister Joe Lyons decided that, for the first time, all Australians should celebrate “Australia Day” on 26 January that year.<sup>11</sup>

On the first “Australia Day” the bulk of the First Fleet – convicts – had yet to disembark. That process was not completed until 6 February 1788, when the women convicts disembarked. A night of celebrations followed. On the morning after, the new colony was placed on a more formal footing.

It was on 7 February 1788 that Governor Phillip, in the words of his Instructions, “with all due solemnity” caused his (Second) Commission to be read and published. In *A Narrative of the Expedition to Botany Bay* (1789), Watkin Tench offered this eye witness account:

“The reading of the commissions, and taking possession of the settlement in form, with an account of the courts of law, and mode of administering public justice in this country

*OWING to the multiplicity of pressing business necessary to be performed immediately after landing, it was found impossible to read the public commissions and take possession of the colony in form until the 7<sup>th</sup> of February. On that day all the officers of guard took post in the marine battalion which was drawn up and marched off the parade, with music playing and colours flying, to an adjoining ground which had been cleared for the occasion, whereon the convicts were assembled to hear His Majesty’s commission read, appointing His Excellency Arthur Phillip, Esq. governor and captain-general in and over the territory of New South Wales and its dependencies; together with the act of parliament for establishing trials by law within the same; and the patents under the Great Seal of Great Britain for holding the civil and criminal courts of judicature, by which all case of life and death, as well as matters of property, were to be decided.*

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<sup>10</sup> K S Inglis, *Sacred Places* (34d ed, Melbourne, 2008), pages 190-191.

<sup>11</sup> C M H Clark, *A History of Australia*, Volume VI (Melbourne, 1987), pages 204 and 477.

*When the judge advocate had finished reading, His Excellency addressed himself to the convicts in a pointed and judicious speech, informing them of his future intentions, which were invariably to cherish and render happy those who showed a disposition to amendment, and to let the rigour of the law take its course against such as might dare to transgress the bounds prescribed. At the close three volleys were fired in honour of the occasion and the battalion marched back to their parade, where they were reviewed by the governor, who was received with all the honours due to his rank. His Excellency was afterwards pleaded to thank them, in public orders, for their behaviour from the time of their embarkation; and to ask the officers to partake of a cold collation, at which it is scarce necessary to observe that many loyal and public toasts were drank in commemoration of the day.”<sup>12</sup>*

The legal formalities associated with the establishment of the Colony were not fully satisfied even by this ceremony. The public record shows that the four “Oaths of Office” that Governor Phillip’s (Second) Commission required him to take, were not taken until later.<sup>13</sup>

On 13 February 1788 he swore the “Oath of Abjuration” and the “Oath of Assurance”. On the same date, in accordance with his Commission and British legislation then in force, he also signed a formal Declaration that he did not believe that there was “any Transubstantiation in the Sacrament of the Lords’ Supper or in the Elements of Bread and Wine at or after the Consecration thereof by any Person whatsoever”. Those Oaths, and that Declaration, were directed towards confirmation by Phillip that he supported King George III’s title to the throne and disclaimed any allegiance to the Royal House of the Stuarts.

On 6 October 1788 Phillip conformed to the requirements of his Commission by swearing two additional, and more secular, Oaths pledging to perform his official duties in a proper manner. Phillip and his contemporaries might have thought that the transaction of this business placed the fledgling colony on a proper legal foundation. The next few decades would test whether it could survive, and whether the authority of the Crown was a sufficient legal foundation for Colonial government.

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<sup>12</sup> This passage is extracted in Watkin Tench, 1788: *Comprising A Narrative of the Expedition to Botany Bay* [1789] and *Complete Account of the Settlement at Port Jackson* [1793], edited and introduced by Tim Flannery (Melbourne, 1996), page 46.

## **HOW CAN YOU HAVE “AUSTRALIA DAY” UNLESS YOU FIRST HAVE “AUSTRALIA”?**

Governor Phillip and his contemporaries did not think in terms of a nation, or a place, called “Australia”. The colony of New South Wales of which they spoke was spread over the eastern half of what we now call “Australia”. In deference to the 17<sup>th</sup> century Dutch explorer Abel Tasman, they called Tasmania by the name he gave it (“Van Dieman’s Land”) and the mainland as a whole “New Holland”, *Terra Australis* (Latin for “South Land”) or “Great South Land”. That changed through the agitation of the explorer Matthew Flinders.<sup>14</sup>

With George Bass<sup>15</sup> he circumnavigated Van Diemens Land between 7 October 1798 and 12 January 1799, proving it to be an island. Between 1801-1803 he chartered the coast of the Australian mainland, before being taken as a prisoner of war of the French soon after the outbreak of the Napoleonic wars. He returned to England in 1810. In the four years left to him, in failing health, he wrote a book, *A Voyage to Terra Australis*. It was published by the Admiralty on 18 July 1814, the day before he died. The following extract from it evidences the emergence of the name “Australia”:

*“The vast regions to which this voyage was principally directed comprehend, in the western part, the early discoveries of the Dutch, under the name of New Holland, and in the east the coasts explored by British navigators, and named New South Wales. It has not, however, been unusual to apply the first appellation to both regions; but to continue this would be almost as great an injustice to the British nation, whose seamen have had so large a share in the discovery as it would be to the Dutch were New South Wales to be so extended. This appears to have been felt by a neighbouring, and even rival, nation; whose writers commonly speak of these countries under the general term of Terres Australes. In fact, the original name, used by the Dutch themselves until some time after Tasman’s second voyage in 1644, was Terra Australis, or ‘Great South Land;’ and, when it was displaced by ‘New Holland,’ the new term was applied only to*

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<sup>13</sup> *Historical Records of Australia*, series IV, volume 1, pages 19-21.

<sup>14</sup> *Australian Dictionary of Biography*, volume 1, pages 389-391; Ernest Scott, *The Life of Captain Mathew Flinders*, RM (Sydney, 1914); Miriam Estensen, *The Life of Matthew Flinders* (Sydney, 2002); Ernestine Hill, *My Love Must Wait: The Story of Matthew Flinders* (Sydney, 1941).

<sup>15</sup> *Australian Dictionary of Biography*, volume 1, pages 64-65.



*the parts lying westward of a meridian line passing through Arnhem's Land on the north, and near the isles of St Francis and St. Peter on the south; all to the eastward, including the shores of the Gulf of Carpentaria, still remained as Terra Australis. This appears from a chart published by Thevenot in 1663; which, he says 'was originally taken from that done in inlaid work upon the pavement of the new Stadt-House at Amsterdam.' The same thing is to be inferred from the notes of Burgomaster Witsen in 1705 of which there will be occasion to speak in the sequel.*

*"It is necessary, however, to geographical precision, that so soon as New Holland and New South Wales were known to form one land, there should be a general name applicable to the whole; and this essential point having been ascertained in the present voyage, with a degree of certainty sufficient to authorise the measure. I have, with the concurrence of opinions entitled to deference, ventured upon the adoption of the original Terra Australis; and of this term I shall hereafter make use when speaking of New Holland and New South Wales in a collective sense; and when using it in the most extensive signification, the adjacent isles, including that of Van Diemen, must be understood to be comprehended.*

*"There is no probability that any other detached body of land, of nearly equal extent, will ever be found in a more southern latitude; the name Terra Australis will, therefore, remain descriptive of the geographical importance of this country, and its situation on the globe, it has antiquity to recommend it; and, having no reference to either of the two claiming nations, appears to be less objectionable than any other which could have been selected [Emphasis Added]."*

To this passage in the book Flinders appended a footnote in the following terms:

*"Had I permitted myself any innovation upon the original term, it would have been to convert it into Australia; as being more agreeable to the ear, and an assimilation to the names of the other great portions of the earth [Emphasis Added]."*

"Australia" in this way entered the modern world as an explorer's "footnote": a general aside to readers who lingered long enough to stray from the text; a silent whisper in the year of an indifferent world, not a clanging cymbal in a military parade or a boastful, empty declaration of national pride. Grounded in the softly spoken humility of a "quiet achiever", this birth of a nation was no small gift bestowed by

Providence. It allowed a community to grow in (relative) peace, without more than the usual hubris of humanity. Flinders named “Australia” without living long enough to claim “bragging rights” or the status of a “Founding Father”.

He had used the word “Australia” as early as 25 August 1804, in a letter written to his brother Samuel: “*I call the whole island Australia, or Terra Australis. New Holland is properly that portion of it from 135° of longitude westward; and eastward is New South Wales, according to the Governor’s patterned*”.<sup>16</sup> Thereafter he repeatedly used the word “Australia” in his correspondence and other writings. After his publication of *A Voyage to Terra Australis*, the name came slowly into general use.

In the charts published in consequence of Flinders’ voyage reference was made to the word “Australia”. In a Despatch dated 4 April 1817 addressed to Lord Bathurst, the British Secretary for the Colonies, Governor Macquarie acknowledged receipt of copies of Flinders’ Chart and the accompanying Journal.<sup>17</sup> Thereafter, he became an advocate for the name. In a Despatch dated 21 December 1817 addressed to Under Secretary Goulburn he referred to “*the Continent of Australia*”, of which he expressed a hope that it would be “*the Name given to this Country in the future, instead of the very erroneous and misapplied name, hitherto given it, of ‘New Holland’, which properly speaking only applies to a part of this immense Continent.*”<sup>18</sup>

A note published in the *Historical Records of Australia* in 1917<sup>19</sup> traces use of the word “Australia” in and following the 17<sup>th</sup> Century. It concludes that the first writer to use the name “Australia”, in a printed book, as applied strictly to the island continent was in fact Dr George Shaw in his *Zoology of New Holland* (1794). Whether Flinders picked up the name from that source or reinvented it, he was, with Macquarie, an early and effective advocate. The word came into general use between the years 1820-1830. It acquired an ever lasting significance with enactment by the UK Parliament of the *Commonwealth of Australia Constitution Act* (63 & 64 Victoria, chapter 12).

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<sup>16</sup> Ernest Scott, *The Life of Captain Mathew Flinders RM* (Sydney, 1914), page 424.

<sup>17</sup> *Historical records of Australia*, Series I, volume IX, page 356 (paragraph 24).

<sup>18</sup> *Historical records of Australia*, Series I, volume IX, page 747.

## **AUSTRALIA COMES OF AGE?**

The Australian *Constitution* was, in substance, approved by referenda conducted in each of the Australian Colonies. That process was not quite complete – in that a Western Australian referendum was yet to be held – when a delegation of Colonial Parliamentarians attended upon their counterparts in London to lobby support for Federation. There they negotiated the passage of the *Constitution* through the Parliament of the United Kingdom.

Queen Victoria gave her assent to the *Commonwealth of Australia Constitution Act* (UK) on 9 July 1900, thereby bringing to an end the legislative phase of the enactment. Its commencement remained to be proclaimed by the Queen in accordance with its terms.

Upon being satisfied that “the people” of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia had “agreed” to be “united in a Federal Commonwealth under the name of the Commonwealth of Australia”, on 17 September 1900 the Queen published a Proclamation, the operative terms of which were as follows:

*“We [meaning the Queen] do hereby declare that on and after the First day of January One thousand nine hundred and one the people of New South Wales, Victoria, South Australia, Queensland, Tasmania, and Western Australia shall be united in a Federal Commonwealth under the name of the Commonwealth of Australia.”*

This “Royal Proclamation” was subsequently published on page 1 in the first issue of the Commonwealth’s *Gazette* on 1 January 1901. Sir Robert Garron (the first Solicitor General of the Commonwealth of Australia) told the story of events surrounding establishment of the Commonwealth on that date in his autobiography, *Prosper the Commonwealth* (Sydney, 1958), Chapter XI. There he recorded<sup>20</sup> that in the first few days after the formal ceremony held in Centennial Park in Sydney he was both “head and tail” of the Attorney General’s Department, of which he was

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<sup>19</sup> Series I, volume 9, pages 867-869.

<sup>20</sup> At pages 143-144.

Secretary. He was the only member of staff. As he remarked, “[it] takes more than a day to create a Commonwealth”.

In anticipation of that date, on 29 October 1900 Queen Victoria’s UK Ministers caused to be issued, in her name, Letters Patent constituting “the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia”, and a Commission to that office in favour of the Earl of Hopetoun as Australia’s first Governor General.<sup>21</sup>

On 1 January 1901 the person selected by Lord Hopetoun to be Australia’s first Prime Minister (Edmund Barton) caused to be published, in the name of the Governor General, a Proclamation reciting the Governor General’s appointment and declaring that “His Excellency” had taken the prescribed Oaths of Office and assumed his duties.<sup>22</sup> The Governor General’s Proclamation was accompanied by several “Notices” dated 1 January 1901 announcing the establishment of Cabinet Government for the Commonwealth of Australia.

All of these steps were taken in accordance with, and pursuant to, the *Commonwealth of Australia Constitution Act* (UK). The Preamble of that Act demonstrated the centrality, in the thought processes of Anglo-Australians at that time, of: (a) First, the Crown as the Head of State of the United Kingdom and Australia; (b) Second, the idea that Australia was a “possession” of the Crown; and (c) Third, the role of the Crown as a “constitutional monarch”, taking advice from Ministers elected to Parliament.<sup>23</sup> The Preamble was in the following terms:

*“WHEREAS the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in*

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<sup>21</sup> Commonwealth of Australia, *Gazette*, No 1 of 1901 (1 January 1901), pages 2 and 3.

<sup>22</sup> Op.cit. page 2.

<sup>23</sup> Until the passage of the *Australia Acts* in 1986, there was always scope for doubt about whether advice tendered to the Crown as Australia’s Head of State had to come from her British Ministers, rather than her Australian Ministers. Part of the evolutionary process that led to the *Australia Acts* was a gradual insistence by Australians that the Crown was bound to take advice from them, and not entitled to filter that advice through British Ministers or, indeed, to act upon the advice of British Ministers. See Anne Toomey, *The Chameleon Crown: The Queen and Her Australian Governments* (Sydney, 2006), including the Foreword by Michael McHugh, formerly a Justice of the High Court of Australia.

*one indissoluble Federal Commonwealth under the Crown of the United Kingdom of Great Britain and Ireland, and under the Constitution hereby established:*

*And whereas it is expedient to provide for the admission into the Commonwealth of other Australasian Colonies and possessions of the Queen:*

*Be it therefore enacted by Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present [UK] Parliament assembled, and by the authority of the same, as follows: ...[Emphasis Added]"*

The Commonwealth of Australia, as governed by the *Constitution*, was established on 1 January 1901. "Australia" was up and running. The "Australian Colonies" became the "Australian States". Nevertheless, as the Preamble of the covering Act made explicit, the idea of "possession" given application to Australia by James Cook's ceremony on 22 August 1770 remained alive. Australia was a self-governing Dominion "under the Crown of the United Kingdom" and as a "possession" of the Crown.

Sadly, Queen Victoria died on 22 January 1901. At this distance in time, an irreverent Australian observer might be tempted to attribute her death to the shock of being called upon to loosen her ties with Australia. Any such temptation should be resisted. Having learnt lessons from its loss of the United States in the 18<sup>th</sup> Century, Britain exercised a light touch on Australia. It knew that, to hold onto what it had, it had to be prepared to let go a little bit. The Queen's Australian "subjects" wallowed in grief at news of her death. "Extraordinary" issues of the *Commonwealth Gazette* issued on 23, 24, 28 and 31 January 1901 attest to that. Each one was bordered in black.

In that sequence of public documents was published a Proclamation dated 28 January 1901 (signed by the Governor General, Prime Minister Edmund Barton and Attorney-General Alfred Deakin) which acknowledged Australia's continuing loyalty to the British Crown. Its language also betrayed the persistence of a medieval mindset in acknowledging Queen Victoria's successor as "our only lawful and rightful Liege Lord". To a modern Australian mind, it reads like something out of Tolkien's *The Lord of the Rings*. Its text was in the following terms:

*“WHEREAS it hath pleased Almighty God to call to His mercy our late Sovereign Lady QUEEN VICTORIA, of blessed and glorious memory, by whose decease the Imperial Crown of the United Kingdom of Great Britain and Ireland, and all other Her late Majesty’s Dominions, is solely and rightfully come to the High and Mighty Prince ALBERT EDWARD: We, John Adrian Louis, Earl of Hopetoun, the Governor-General of the Commonwealth of Australia; Edmund Barton, Prime Minister and His Majesty’s Minister of State for External Affairs of the said Commonwealth; and Alfred Deakin, His Majesty’s Attorney General of the said Commonwealth, therefore do now hereby, and with one full voice and concert of tongue and heart, publish and proclaim that the High and Mighty Prince ALBERT EDWARD is now, by the death of our late Sovereign, of happy and glorious memory, become our only lawful and rightful Liege Lord EDWARD THE SEVENTH, by the Grace of God King of the United Kingdom of Great Britain and Ireland, Defender of the Faith, Emperor of India, Supreme Lord in and over the Commonwealth of Australia, to whom we do acknowledge all faith and constant obedience with all hearty and humble affection, beseeching God, by Whom Kings and Queens do reign, to bless the Royal Prince EDWARD THE SEVENTH with long and happy years to reign over us.”*

Even that Proclamation does not quite capture the times. An added dimension can be seen in a Public Notice which Prime Minister Barton caused to be published in the *Commonwealth Gazette* on 31 January 1901:

*“His Excellency the Governor-General directs the following additional notification to be made with respect to the periods of General Mourning for Her late Most Gracious Majesty Queen Victoria:-*

*His Majesty’s subjects in the Commonwealth will not be expected to wear Deep Mourning after the 6<sup>th</sup> day of March next, but it is requested that Half Mourning be worn thereafter until the 17<sup>th</sup> day of April next.”*

Modern day Australians need to reflect upon the nature and strength of the social and political conventions underlying a Public Notice of this character when, looking forward from 2009, they wonder why generations of Australians have been slow to take up the promise of a Republic. Culturally, “the Brits” are “Family” and “Friends” at the same time. Socially, we lampoon each other without mercy. In sporting

contests, we fight against each other mightily. In business, politics and religion, we often work in common. Historically, in War we have always been on the same side as Nations. We look out for them, and they look out for us ... that has been the pattern to date ... for better or worse.

In our most strident moods of nationalism we should remind ourselves to pay heed to a small voice of reason: We would do well to remember that throughout Australian history since the mid-19<sup>th</sup> century, the voices for an independent Australia have come as often from Britain as they ever have come from “Australia”.<sup>24</sup>

Nobody can take for granted how Australians will respond if, and when, they are next called upon to consider whether to become a “Republic”. Whatever we might decide, the future of Australia as a sovereign nation is now firmly in the hands of Australians. The *Australia Acts* of 1986 confirmed “in law” what was long before true “in fact”.

**Date: 16 April 2009 (Version 1)**

#### **NOTES:**

- 1. This Research Paper has been prepared for a specific purpose: To help participants in the 2009 Australian Legal History Essay Competition to enjoy a positive, constructive learning experience in an engagement with: (a) Australian law, history and society; and (b) the idea that, wherever possible, everybody should endeavour to base personal judgments upon empirical observation, an independent consideration of “primary evidence” and an appreciation of a variety of “secondary” materials.**
- 2. The paper is subject to amendment from time to time as further research is undertaken, and the comments of others are taken into account. Public comment is invited. Any comments should be addressed to the author, via email, at [secretary@forbessociety.org.au](mailto:secretary@forbessociety.org.au)**

**Any amendment of the paper will be marked, and dated, as a subsequent “version”.**

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<sup>24</sup> Frank Welsh, *Great Southern Land: A New History of Australia* (Penguin Book, London, 2005), page 90; J M Ward, *Earl Grey and the Australian Colonies, 1846-1857: A Study of Self-Government and Self-Interest* (Melbourne, 1958).