

**FRANCIS FORBES SOCIETY FOR AUSTRALIAN
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2009**

BACKGROUND RESEARCH PAPER No. 4

***BY YOUR DEEDS BE KNOWN: Episodes in
Australasian Legal History*
By Geoff Lindsay S.C.**

INDEX

INTRODUCTION

THE HISTORICAL ORIGINS, AND ROLE, OF DEEDS

- Definition of a Deed
- The History of Deeds
- Traditional Terminology Relating to Deeds

JOHN BATMAN'S DEEDS, 1835

- Speaking of "Deeds" and "Treaties"
- Bush Lawyers and English Law on the Australian Frontier
- The Text of Batman's Deeds
- Government Repudiates Batman, by Public Proclamation
- Orthodox Legal Opinion at the Time
- Imperial Chaos: Adventurers, Overlanders, Boat People and Frontier Violence

THE TREATY OF WAITANGI, 1840

- A Contrast with Batman
- A Government Declaration and an Official Treaty
- Significant Differences in Legal Form

ROBERT RICHARD TORRENS' SYSTEM, 1858

- Torrens the Man: Biographically Details
- "Old System" Conveyancing
- "Torrens System" Conveyancing
- The Mechanics of Torrens System Legislation

WATTIE CREEK (DAGURAGU), 1975

- Historical Context
- A Watershed Deed
- Fact Becomes Legend
- A Blend of Cultures: Law in Service of Community

AUSTRALIA AT THE CROSSROADS: IN OUR OWN IMAGE?

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INTRODUCTION

The three, apparently disparate topics referred to in the 2009 Essay Question can be tied together by stories about (a) the historical origins and legal nature of deeds, distinctions between legal concepts of “contract” and “property,” and the relevance of “purposes served by a law” to development of the law; (b) John Batman’s attempted “purchase” of land at Port Phillip from Aborigines (by deeds executed on 6 June 1835), regarded by contemporary English legal opinion as a transaction of doubtful validity and disapproved by both Colonial and Imperial Governments; (c) the making of the “Treaty of Waitangi” between Maori Chiefs and the British Crown on 6 February 1840; (d) Robert Richard Torrens’ innovative legislation of 1858, which initially failed to define the effect of registration of land dealings by reference to the legal effect of a deed, but, upon amendment, did so; (e) the ceremony at Wattie Creek (Daguragu) in the Northern Territory on 16 August 1975, by which Prime Minister Gough Whitlam handed over Deeds of Lease to Vincent Lingiari, as a representative of the Gurindji People, adopting (at the suggestion of Dr “Nugget” Coombs) a symbolic reversal of the ceremony (livery of seisin) adopted by Batman in purported compliance with English land law as received in Colonial Australia; and (f) perceived necessities for a reassessment of fundamental relationships inherent in the *Australia Acts* of 1986, the *Mabo* litigation (especially the High Court of Australia’s judgment of 3 June 1992) and debates about Australia as a “republic”. Discussion of these stories highlight the availability of different perspectives on questions about “Land Ownership, Power and Sovereignty”.

Drawing these various threads together invites conclusions that: (a) a function of the law is to serve, and to protect, “the People” as the ultimate source of legal authority in Australia as a modern democratic state; and (b) the interaction of law and society is such that “new law” and “old” often blend together in ways that are imperceptible to a casual observer.

In law, society and life many small streams make their contribution as a mighty river flows to the sea. When Gough Whitlam took up earth to pour into the hand of Vincent Lingiari in 1975, many might naturally have believed that ceremony to be an ancient Aboriginal rite. Without specific instruction, few would have identified its origins in the Norman Conquest of England in 1066, or its association with old Anglo-Australian law governing Deeds for the Conveyance of land. So strong was the symbolism of the event that many might prefer, even today, to embrace an inspirational myth rather than historical fact. Our tendency to do so colours perceptions of “historical fact” – past, present and future.

THE HISTORICAL ORIGINS, AND ROLE, OF DEEDS

Definition of a Deed

A Deed is a formal legal document, often (but not necessarily) expressly labelled as a “deed” and expressed to have been “signed, sealed and delivered” for the purpose of recording a solemn (that is, a very deliberate) promise, acknowledgement, statement of intention or a grant of property. The form of a deed is prescribed by law, and may vary over time and from place to place: *Manton v Parabolic Pty Ltd* [1985] 2 NSWLR 361 at 366E-369G.¹

The History of Deeds

The concept of a “deed” as a formal legal instrument is more enduring than particular requirements for the validity of a deed. In *Manton v Parabolic Pty Ltd* Mr Justice Young, of the Supreme Court of NSW, discussed the history, form and modern usage of “deeds”. In the course of doing so he made the following observations:

¹ A classic legal text on the law of deeds is R F Norton, *A Treatise on Deeds* (second edition, London, 1928, by J A Morrison and H J Goolden).

“It seems to be a feature of every legal system that there must be some particular ritual, act or instrument by which a person can notify the community that he most solemnly means what he is doing as being binding on him....

...[The] substantial requirement of a deed is that it [as the memorial of a solemn act] be intended by the party who [makes] it to be the most solemn indication to the community that he really means to do what he is doing.

...So then, a deed is the most solemn act that a person can perform with respect to a particular property or contract involved, and the form of that deed is laid down by the law from time to time.

With Old System land [that is, land not registered under a Torrens System of land title registration], the solemn act required for a conveyance had to be a feoffment with livery of seisen recorded in a deed...or one of other particular ways which the law allowed....With Torrens System land, the solemn act required is different. It is the proper completion of the prescribed form and the registration of that dealing on the Register....[By] completing the appropriate form and having it registered, the conveyor does the most solemn thing possible in order to divest himself of his estate, and accordingly, so far as substantial requirements are concerned, one would think the document by which this was done was a deed.

...[There] is very little [legal] authority on the substantial requirements of a deed, but what there is supports the above analysis. In Spelman’s Glossary, a deed is defined as ‘Scriptum Solemne Quo Firmatur Donum, Concessio, Pactum, Contractus, et Hususmodi’ which very freely translated means a solemn writing which confirms a gift, a concession, a pact, a contract and things of this mode. Other ancient law dictionaries give similar definitions.

...The history of solemn deeds [and the legal authorities referred to in this judgment] make it plain that the essential element of a deed is that it be the most solemn act that a person can perform with respect to a particular piece of property or other right....”²

The concept has its origins in the growing use of writing, in the years following the Norman Conquest, in the form of a “charter” bearing the (wax) seals of parties to it as evidence of a transaction relating to land.³ Before that time, it seems to have been sufficient for an effective conveyance of land that, with an intention to transfer the

² (1985) 2 NSWLR at 367A-B, 367F-368D and 369C.

³ Sir William Holdsworth, *A History of English Law* (5th ed, London 1942), volume 3, pages 219-234.

land to another, the transferor delivered possession of the land to the transferee in a public ceremony known as “livery of seisin” – “livery” meaning “delivery”; “seisin” meaning “lawful possession”. Historically, the types of transactions routinely recorded in a deed were seen as associated with a grant, gift or exchange of property. In more recent times some of those transactions have been seen more readily in terms of a “contract” or “agreement”. A “deed” can accommodate either perspective.

As the use of land charters became more common they took on the form of what became known as a “deed”, they came to be seen as embodying a transaction rather than simply evidencing it, and their usage extended beyond land transactions to other forms of business that could be facilitated by legal formality. The word “deed” derives from the Latin verb, *do*, meaning “I grant, give, handover, deliver, etc.”. This connection with the word “deed” is more obvious in the Latin form of the past tense of the verb, *dedi*, meaning “I granted, etc.” Use of the past tense here is consistent with the original evidentiary function of a deed. It was originally thought of as evidence of something “done”, rather than as a step in the “doing” of that something.

There is, in modern times, a persistent idea that an instrument must be “signed, sealed and delivered” in order to be legally effective as a “deed”. This idea owes something to the historical origins of deeds. In ancient times, a party’s adoption of a deed was evidenced by affixation of a wax seal in the presence of witnesses. In time, that requirement has generally given way to less complex forms of execution, mostly involving affixing of a signature (unaccompanied by a seal) in the presence of one or more witnesses. This has been done through the enactment of legislation. However, a deed is still generally required to be “delivered” in order to become effective. That is because the parties to a deed are presumed to have intended that to be so in choosing to record their intentions in the form of a deed.

Traditional Terminology Relating to Deeds

Traditionally, a deed generally consisted of the following parts: (1) “the premises”, comprising all parts of a deed before the “habendum”, and usually including any recitals explaining the context or purpose of the deed, a statement of any consideration for promises or a grant of rights recorded in the deed and acknowledgement of a receipt of consideration; (2) the “habendum”, taking its name from the Latin, “to have”, and in a Deed of Conveyance of land indicating the Estate

to be taken by the grantee of land; (3) the “tenendum”, taking its name from the Latin, “to hold”, indicating the tenure by which the grantee was to hold the land; (4) the “reddendum”, taking its name from the Latin, “to give back”, originally describing the services to be rendered to the grantor or the lord of land the subject of a grant by deed, but more generally comprising a stipulation or reservation of rights in favour of the grantor or, in a Deed of Lease, the rental to be paid by the lessee to the lessor upon grant of the lease; (5) the “conditions”, comprising a statement of circumstances in which the existence of a right recorded by the deed is dependent upon the happening of an event, “a condition precedent” marking the beginning of the right or a “condition subsequent” marking the termination of the right; and (6) the “covenants” or “warranties”, setting out the terms of any agreement, promise or obligation recorded by the deed.

The “premises” might include a statement that the “instrument” (document) was a deed, made on a stated date, between identified parties. Some or all of that information might, however, appear at the end of a deed, immediately preceding an execution clause, recording that the deed was “signed, sealed and delivered” in the presence of one or more witnesses. The practice of affixing a wax seal has generally, by statute, been dispensed with. It is generally enough that parties formally record their intention that their document is to take effect as a deed. A deed which is delivered subject to a condition required to be fulfilled before it comes into effect is said to be held “in escrow” pending occurrence of the condition.

The Latin expression *habendum et tenendum* (to have and to hold), often found in old Deeds for the conveyance of land, declaring that the transferee (usually a purchaser but sometimes the donee of a gift) was to “have and hold”, reflects the doctrines of “tenure” and “estates” which have underpinned the English (and, derivatively, Australian) law of real property from feudal times. It is, perhaps, more familiar to many people because of its integration in the oaths exchanged by bride and groom in a traditional marriage ceremony (eg, *Anglican Book of Common Prayer*). In modern thought a marriage is generally more likely to be viewed as a contract (a legally enforceable agreement) between consenting adults who agree to share their lives and, perhaps, their property. In former times, a “marriage contract” was more likely to be viewed as a mutual exchange of “property” in the form, at least, of solemn vows (promises before God). This difference of thought mirrors thought patterns broader

than those relating only to marriage. “Contracts” were once more readily thought about in terms of a “grant” or “exchange” of “property” than in terms of “agreements” or “promises” unrelated to property.

The following extract from Sir William Holdsworth’s *A History of English Law*⁴ demonstrates how ordinary, basic human behaviour can become embedded in language and legal formality:

“In modern times we divide deeds into deeds poll and indentures. The deed poll is a deed to which there is only one party. The indenture is a deed to which two or more persons are parties. The latter’s name is due to the old precautions taken against fraud. If several persons were parties to a deed as many copies to it were made as there were parties on one sheet of parchment, and the parchment was then cut into parts in an indented fashion across some word such as ‘Chirograph’. It was thus very difficult to substitute a forged deed for the real one without risk of detection. Such precautions were not considered necessary in the case of a deed to which there was only one party; it therefore had a ‘polled’ or smooth top.”

In modern times, a person might execute a deed poll (and register it in a public register maintained by government) in order to make a public declaration of a change in name. Registration of a deed poll is not necessary to effect a change in the name of a “natural person” as distinct from, say, a corporation. As a general proposition, an individual can use whatever names he or she might wish. The purpose of registration of a deed poll in the case of a change of name is not to give legal effect to the change, but to provide cogent evidence of it.

The public character of a deed is illustrated by the tendency in old deeds, and in a deed poll even today, to commence with a formula such as “Know all persons by these presents [meaning written provisions presented to the public] that ...”.

JOHN BATMAN’S DEEDS, 1835

Speaking of “Deeds” and “Treaties”

For good or ill, the colonisation of Melbourne (in the “Port Phillip” region of what was then New South Wales and is now Victoria) is firmly associated in the public mind with a half-hearted attempt by a group of adventurers – represented by John

⁴ 5th ed, London, 1942; volume 3, page 277.

Batman⁵ – to purchase land from local Aborigines. The transaction took the form of two deeds (completed in triplicate) dated 6 June 1835. The transaction is sometimes described as a “purchase”, sometimes as a “treaty”. The legal form of a “deed” was consistent with either description.

The word “treaty” is generally these days reserved as a description for an agreement between the governments of two or more States or, perhaps, sovereign peoples. It was once used as commonly to describe a private agreement or negotiations leading up to the making of a private agreement. Whether Batman’s transaction is described as a “purchase” or a “treaty” or as no more than a political statement having no particular legal effect, the legal form of a “deed” was calculated to lend an appearance of legality to it. The fact that no government official (in the Australian colonies or in Britain) was fooled by that, and Batman himself may not have believed that his transaction had any legal effect – does not detract from the significance of the form in which it was clothed. Even in the remoteness of a frontier land, the common law of England played a role in the thinking of adventurers intent on expanding the boundaries of Britain’s Empire.

Bush Lawyers and English Law on the Australian Frontier

The deeds which Batman caused to be executed in 1835 were prepared for him by an English-trained lawyer who had, for a time, served controversially as the Attorney General of Van Deiman’s Land (Tasmania) who was then practising at the Bar in that Colony: Joseph Tice Gellibrand (1786-1837).⁶ He was one of Batman’s fellow-adventurers in the “Port Phillip Association”. Critics of the Association’s activities might find something of “poetic justice” in the fact that he disappeared on an expedition to explore the outer reaches of Port Phillip in 1837. He died at the hands of Aborigines near Geelong.

The ceremony attending execution of the deeds made on 6 June 1835 was straight out of the Practice Books of an English Conveyancer of the times. The deeds were “signed, sealed and delivered” in the presence of witnesses in a ceremony that included a formal “livery of seisin”.

⁵ *Australian Dictionary of Biography*, Volume 1, pages 67-70 (cited as 1 ADB67); James Bonwick, *John Batman: The Founder of Victoria* (Melbourne, 1867), edited by C.E. Sayers (Melbourne, 1973); C.P. Billot, *John Batman and the Founding of Melbourne* (Melbourne, 1979).

⁶ *Australian Dictionary of Biography*, Volume 1, pages 437-438 (cited as 1 ADB 437).

In a letter dated 25 June 1835 addressed to the Governor of Van Dieman's Land, Sir Arthur George, Batman reported his actions in the following terms:

"I have the honour of reporting to your Excellency for the information of His Majesty's Government the result of an expedition undertaken by myself at the expense of and in conjunction with several gentlemen, inhabitants of Van Dieman's Land, to Port Phillip, on the south-western point of New Holland, for the purpose of forming an extensive pastoral establishment, and combining therewith the civilisation of the native tribes who are living in that part of the country.

Before I enter into the details, I deem it necessary to state, for the information of His Majesty's Government, that I am a native of New South Wales, and that, for the last six years, I have been most actively employed in endeavouring to civilize the aboriginal natives of Van Dieman's Land; and, in order to enable the local Government of this colony to carry that important object into full effect, I procured from New South Wales eleven original natives of New Holland, who were, under my guidance, mainly instrumental in carrying into effect the humane object of his Government towards the Aborigines of this island.

I also deem it necessary to state, that I have been for many years impressed with the opinion, that a most advantageous settlement might be formed at Westernport, or Port Phillip; and that in 1827, Mr J T Gallibrand and myself addressed a joint letter to the Colonial Government of New South Wales, soliciting permission to occupy land at Port Phillip....

This application was not granted by the Sydney Government, because the land was beyond the limits of that territory, and the occupation of Westernport had been altogether been abandoned.

It occurred to myself, and some of the gentlemen who are associated with me, that, inasmuch as the Sydney natives who were living with me, had become acquainted with the English language and manners, and had acquired habits of industry in agricultural pursuits, they might, therefore, be considered, civilised, and as the available lands in this colony were occupied by flocks of sheep and fully stocked, it would be a favourable opportunity of opening a direct friendly intercourse with the tribes in the neighbourhood of Port Phillip, and by obtaining from them a grant of a portion of that territory upon equitable principles, not only might the resources of this colony be considerable extended, but the object of civilisation be established, in which, in process of time, would lead to the civilisation of a large portion of the aborigines of that extensive country.

In pursuance of arrangements based upon these principles I proceeded on the 12th day of May, 1835 in a vessel from Launceston, accompanied by seven Sydney natives, and proceeded to Port Phillip, on the south-western extremity of New Holland, where I landed on the 26th day of May.

On the evening of our arrival at Port Phillip, we saw the native fires at a distance of about five miles. I then made my arrangements for the purpose of opening an intercourse with the natives by means of those under my charge....

[By deliberate steps over the course of ensuing days they progressively engaged the local Aborigines]...I fully explained to them that the object of my visit was to purchase from them a tract of their country; that I intended to settle amongst them with my wife and seven daughters; and that I intended to bring to the country sheep and cattle. I also explained my wish to protect them in every way, to employ them the same as my own natives, and also to clothe and feed them; and I also proposed to pay them an annual tribute in necessaries as a compensation for the enjoyment of the land.

The chiefs appeared most fully to comprehend my proposals, and much delighted with the prospect of having me to live amongst them. I then explained to them the boundaries of the land I wished to purchase, and which defined by hills, to which they have affixed native names; and the limits of land purchased by me are defined in the chart which I have the honour of transmitting, taken from personal survey.

On the next day [after I had explained my purpose to the local Aborigines] the chiefs proceeded with me to the boundaries, and they marked with their own native marks the trees which were at the corners of the boundaries, and they also gave me their own private mark, which is kept sacred by them, even so much so that the women are not allowed to see it.

After the boundaries had been thus marked and described, I filled up as accurately as I could define it, the land agreed to purchased by me from the chiefs; and the deed [sic] when thus filled up was most carefully read over and explained to them by the two interpreters, so that they most fully comprehended its purport and effect. I then filled two other parts of the deed [sic] so as to make it in triplicate, and the three principal chiefs and five of the subordinate chiefs then executed each of the deeds, each part being separately read over, and they each delivered to me a piece of the soil for the purpose of putting me in possession thereof, and understanding that it was a form by which delivered to me the tract of land.

I have the honour of enclosing herewith a copy of each of the deeds executed by the natives to me, which I confidently trust will most clearly manifest that I have proceeded upon an equitable principle; that my object has not been possession and expulsion, or, what is worse, extermination, but possession and civilisation; - and the reservation of the annual tribute to those who are the real owners of the soil will afford evidence of the sincerity of my professions in wishing to protect and civilise these tribes of the benighted but intelligent people: And I confidently trust that the British Government will duly appreciate the treaty which I have made with these tribes, and will not in any manner molest the arrangements which I have made, but that I shall receive the support and encouragement of not only the local Government, but that of the British Government, in carrying the objects into effect....”⁷

Batman’s journal entry for “Saturday, June 6, 1835” is to the same effect as his report to Governor Arthur, although it suggests that Batman’s “full explanation” to his prospective vendors occurred in the space of the one day, not (as suggested in the report to the Governor) over two days. It reads as follows:

“The wind blew hard all night, with some rain. We started this morning at eight A.M. to find the natives. We travelled over as good country as I yet met with, and, if possible, richer land, thinly timbered. The grass was mostly three and four feet high, and as thick as it could lie on the ground. The land quite black. We walked about eight mile when we fell in with the tracks of the natives, and shortly after came up with a family – one chief, his wife, and three children. I gave him a pair of blankets, handkerchiefs, beads, and three knives. He then went on with us, and crossed a fresh-water creek. The land on each side excellent. He took us on, saying he would take us to the tribe, and mentioned the names of chiefs. We walked about eight miles, when, to our great surprise, we heard several voices calling after us. On looking back we saw eight men all armed with spears, etc. When we stopped they threw aside their weapons and came very friendly up to us. After shaking hands, and my giving them tomahawks, knives, etc, they took us with them about a mile back, where we found huts, women, and children. After some time, and full explanation, I found eight chiefs amongst them, who possessed the whole of the country near Port Phillip. Three brothers, all of the same name, are the principal chiefs, and two of them of six feet high, and very good-looking; the other not so tall, but stouter. The other five chiefs were fine men. After a full explanation of what my object was, I purchased two large tracts of land from them – about 600,000 acres, more or less – and delivered over to them blankets, knives, looking-glasses, tomahawks, beads, scissors,

⁷ *Historical records of Victoria, Foundation Series* (Melbourne, 1981), Volume 1, pages 5-10.

*flour, etc, as payment for the land, and also agreed to give them a tribute, or rent, yearly. The parchment the eight chiefs signed this afternoon, delivering to me some of the soil of each of them, as giving me full possession of the tracts of land.”*⁸

The Text of Bateman’s Deeds

There were two deeds. The first was entitled “Grant of the Territory called DUTIGALLA”; this was the “Melbourne Treaty”, covering 500,000 acres. The second deed was in substantially similar terms, but for the description of the area (100,000 acres) in the vicinity of Geelong. With emphasis added and signatures or “marks” omitted, the following is the text of the “Melbourne Treaty” as published in James Bonwick, *John Batman, The Founder of Victoria* (1868; 1973 edition by C E Sayers, Melbourne):⁹

“Know all persons, that we, three brothers, Jagajaga, Jagajaga, Jagajaga, being the principal chiefs and also Cooloolock Bungarie, Yanyan Moohip, and Monmarmalar, also being the chiefs of a certain native tribe called Dutigallar, situate and near Port Phillip, called by us the abovementioned chiefs Tramoo, being possessed of the tract of land hereinafter mentioned, for, and in consideration of, twenty pair blankets, thirty tomahawks, one hundred knives, fifty pair of scissors, thirty looking-glasses, two hundred handkerchiefs and one hundred pounds of flour and six shirts, delivered to us by John Batman, residing in Van Dieman’s Land, Esquire, but at present sojourning with us and our tribe, do, for ourselves, our heirs and successors, give, grant and enfeoff, and confirm unto the said John Batman, his heirs and assigns, all that tract of country situate and being in Port Phillip, running from the branch of the river at the top of the port, about seven miles from the mouth of the river, forty miles north-east, and from thence west forty miles across Tramoo Downs or Plains, and from thence south-south-west across Mount Viliumarnatar to Geelong Harbour, at the head of the same, and containing about 500,000, more or less acres, as the same hath been before the execution of these presents delineated and marked out by us, according to the custom of our tribe, by certain marks made upon the trees growing along the boundaries of the said tract of land, to hold the said tract of land, with all advantages belonging thereto, unto and to the use of the said John Batman, his heirs and assigns forever, to the intent that the said John Batman, his heirs and assigns, may occupy and possess the said tract of land and place thereon sheep and cattle,

⁸ C P Billot, *John Batman: The Story of John Batman and the Founding of Melbourne* (Melbourne, 1979), pages 96-97.

⁹ The Melbourne Treaty can also be found in J.M. Bennett and A.C. Castles, *A Source Book of Australian Legal History* (Sydney, 1979), pages 258-259.

yielding and delivering unto us, our heirs and successors, the yearly rent or tribute of one hundred pair blankets, one hundred knives, one hundred tomahawks, fifty suits of clothing, fifty looking-glasses, fifty pair scissors and five tons of flour. IN WITNESS whereof, we Jagajaga, Jagajaga, Jagajaga the above-mentioned principal chiefs, and Cooloolock, Bungarie, Yanyan, Moowhip, and Monmarmarlar, the chiefs of the said tribe, have hereunto affixed our seals to these presents, and have signed the same. Dated according to the Christian era, this sixth day of June, one thousand eight hundred thirty five.

Signed, Sealed, and Delivered, in the presence of us, the same having been fully and properly interpreted and explained to the said chiefs. ...

Be it remembered, that on the day and year within written, possession and delivery of the tract within mentioned, was made by the within named Jagajaga, Jagajaga, Jagajaga, Coolooloc, Bungarie, Yanyan, Moowhip, and Monmarmarlar, chiefs of the tribes of native called Dutigallar-Geelong, to the within named John Batman, by the said chiefs taking up part of the soil, and delivering the same to the said John Batman in the name of the whole. ...

The “Geelong Treaty” was in substantially the same terms, and was signed by substantially the same people, as the “Melbourne Treaty”, except that the land the subject of the Deed was differently described. The land was described as a “tract of country situate and being in the Bay of Phillip, known by the named Indented Head, but called by us [the Aboriginal “vendors”] Geelong, extending across from Geelong harbour about due south for ten miles, more or less, to the head of Port Phillip...”.

Government Repudiates Batman, by Public Proclamation

The response of the colonial authorities, in their repudiation of Batman’s “legal claims”, was as swift as could be expected in a frontier society. On 9 September 1835 the NSW *Government Gazette* published a “Proclamation” (dated 26 August 1835) by Sir Richard Bourke, “Commanding His Majesty’s Forces, Captain General and Governor in Chief of the Territory of New South Wales and its Dependencies, and Vice Admiral of the same, & c. & c. & c.” With emphasis added, the text of the Proclamation was in the following terms:

“WHEREAS it has been represented to me, that divers of His Majesty’s subjects have taken possession of vacant lands of the Crown, within the limits of this Colony, under the pretence of a treaty, bargain, or contract, for the purchase thereof, with the

Aboriginal Natives; Now therefore, I the Governor in virtue and in exercise of the power and authority in me vested, do hereby proclaim and notify to all His Majesty's subjects and others whom it may concern, that every such treaty, bargain, and contract with the Aboriginal Natives as aforesaid, for the possession, title, or claim to any Lands lying and being within the limits of the Government of the Colony of New South Wales, as the same are laid down and defined by His Majesty's Commission; that is to say, extending from the Northern Cape or extremity of the coast called Cape York, in the latitude of ten degrees thirty-seven minutes south, to the southern extremity of the said Territory of New South Wales, or Wilson's Promontory, in the latitude of 30-9 degrees twelve minutes south, and embracing all the country inland to the westward, as far as the one hundred and twenty-ninth degree of east longitude, reckoning from the meridian of Greenwich, including the Islands adjacent in the Pacific Ocean within the latitude aforesaid, and including also Norfolk Island, is void and of no effect against the rights of the Crown; and that all persons who shall be found in possession of any such Lands as aforesaid, without the licence or authority of His Majesty's Government for such purpose, first had and obtained, will be considered as trespassers, and liable to be dealt with in like manner as other intruders upon the vacant lands of the Crown within the said Colony.

Given under my Hand and Sealed, at Government House, Sydney, this twenty-sixth Day of August, one thousand eight hundred and thirty-five...."¹⁰

A careful reading of the Proclamation demonstrates that Batman's Deeds were not pronounced to be "void and no effect" against all persons and for all purposes. That might have been their practical, legal effect. However, a narrower, more legalistic approach was taken. The Deeds were declared to be "void and of no effect against the rights of the Crown." That language, in theory, left open the possibility that they might have been enforced against Batman's Aboriginal "vendors" if one were to treat them in the same manner as would have been an Englishman living in London. To the legal mind, it was apparently prudent for the Proclamation to be made; to be made in terms that were wholly defensible in the eyes of English law; and to go no further than was necessary to achieve the Imperial Government's purposes.

Orthodox Legal Opinion at the Time

That Bourke's Proclamation represented orthodox, English legal opinion at the time is confirmed by the terms of a legal opinion obtained, on Batman's behalf, from an

English barrister, William Burge MP. The instructions given to Burge in a “Case for Opinion”, and his formal Opinion on that “Case”, are published in an appendix to William Westgarth’s book, *Australia Felix* (Edinburgh, 1838):¹¹

“CASE FOR OPINION. *The accompanying Report No. 1, gives a detailed account of the occupation by Mr Batman of certain tracts of land situated at the south-eastern extremity of New Holland, and in the vicinity of a port marked upon the English charts as Port Phillip. The documents Nos. 2 and 3 are copies of deeds of feoffment in favour of Mr Batman, executed by the chiefs of the native tribe living at and contiguous to Port Phillip. The document No. 4 is the copy of a letter addressed by members of the [Port Phillip] Association for forming a settlement upon the tracts of land in question to the Secretary of State for the Colonies, soliciting a confirmation on the part of the Crown of the tracts of land granted by the deeds Nos. 2 and 3. This letter has not yet been delivered to the Colonial Secretary. The tracts of country in question are within the limits of Australia as defined in the maps, of which the line extends from the Australian Bight to the Gulf of Carpentaria; but they are situated some hundred miles from New South Wales, which is only a part of Australia. Port Phillip was named after Governor Phillip, the first governor of New South Wales who formed a temporary settlement there, which was immediately abandoned, and no act of ownership has since been exercised by the Crown. The natives are, as appears by the Report, and intelligent set of men, and the grants were obtained upon equitable principles, of which the reservation of the tribute is strong evidence, and the purport of the deeds was fully comprehended by them. The gentlemen composing the Association have possessed themselves of the tracts of country in question, and have flocks and other property there of the value of at least 30,000 pounds. The following documents are added, as tending to illustrate the present situation of the colonists, as well as their views and intentions: No. 5. Copy Answer returned through the office of the Colonial Secretary of Van Dieman’s Land to Mr Batman’s Report, addressed to the Lieutenant Governor. No. 6. Map of the Ceded Territory. No. 7. Copy Indenture made by John Batman, Charles Swanston, and others, for defining the objects of the parties who propose to establish a settlement on the Ceded Territories. No. 8. Copy Conveyance of the Ceded Territories made by Mr Batman, and relative Declaration of Trust. Your Opinion is requested, 1. Whether the grants obtained by the Association are valid? 2. Whether the right of soil is or is not vested in the Crown? 3. Whether the Crown can legally oust the Association from their possessions? 4. What line of conduct or stipulations would you advise the*

¹⁰ *Historical Records of Australia, Foundation Series* (Melbourne, 1981), Volume 1, pages 12-14; J.M. Bennett and A.C. Castles, *A Source Book of Australian Legal History* (Sydney, 1979), page 260.

Association to pursue and make with the British Government; in particular, ought they to offer Government any specific terms, or ought the whole of the documents now laid before you to be at once communicated to Government, or ought such communication to embrace only part of them, and if so, what part?"

OPINION 1. and 2. I am of the opinion, that, as against the Crown, the grants obtained by the Association are not valid, and that, as between Great Britain and her own subjects, as well as the subjects of foreign states, the right to the soil is vested in the Crown. It has been a principle adopted by Great Britain, as well as by the other European states, in relation to their settlements on the continent of America, that the title which discovery conferred on the Government, by whose authority or by whose subjects the discovery was made, was that of the ultimate dominion in, and sovereignty over, the soil, even whilst it continued in possession of the aborigines. Vattel, b.ii.c.18.¹² This principle was reconciled with humanity and justice toward the aborigines, because the dominion was qualified by allowing them to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied. It was essential that the power of alienation should be restricted. To have allowed them to sell their lands to the subjects of a foreign state would have been inconsistent with the right of the state, by the title of discovery, to exclude all other states from the discovered territory. To have allowed them to sell to her own subjects would have been inconsistent with their relation of subjects. The restriction imposed on their power of alienation consisted in the right of pre-emption of these lands by that state, and in not permitting its own subjects or foreigners to acquire a title by purchase from them without its consent. Therein consists the sovereignty of a dominion or right to the soil, asserted and exercised by the European Government against the aborigines, even whilst it continued in their possession. The commission granted by England by Cabot, the charter to Sir Humphrey Gilbert in 1578, and which was afterwards renewed to Sir Walter Raleigh, the charter to Sir Thomas Gates and others in 1606, and to the Duke of Lennox and others in 1620, the grants to Lord Clarendon in 1663, and to the Duke of York in 1664, recognise the right to take possession on the part of the Crown, and to hold in absolute property, notwithstanding the occupancy of the natives. The cession of 'all Nova Scotia or Arcadia, with its ancient boundaries,' made by France to Great Britain by the 12th article of the Treaty of Utrecht in 1703, and the cession of other lands in America, made at the peace of 1763, comprised a great extent of territory which was in the actual occupation of the Indians. Great Britain, on the latter occasion, surrendered

¹¹ Pages 157 and 393-397.

¹² This is a reference to the pioneering legal text on international law, *The Law of Nations* (1758; English edition, 1760) written by the jurist Emerich de Vattel (1714-1767).

to France all of her pretensions to the country west of the Mississippi, although she was not in possession of a foot of land in the district thus ceded. But that which Great Britain really surrendered was her sovereignty, or the exclusive right of acquiring, and controlling the acquisition by others of lands in the occupation of the Indians. On the cession by Spain to France of Florida, and by France to Spain of Louisiana, and on the subsequent retrocession of Louisiana by Spain to France, and the subsequent purchase of it by the United States from France, these powers were transferring and receiving territories, the principal parts of which were occupied by the Indians. The history of American colonisation furnishes instances of purchase of land from the native Indians by individuals. The most memorable is the purchase by William Penn. It has, however, been observed by Chief Justice Marshall, in the case of Johnson v McIntosh, No. 8 Wheaton's Report 570, that this purchase was not deemed to have added to the strength of his title. Previously to this purchase the land was called Pennsylvania, and which comprised those subsequently purchased by him, had been granted by the Crown to him and his heirs in absolute property, by a charter in 1681, and he held a title derived from James II when Duke of York. He was, in fact, as a proprietary governor, invested with all the rights of the Crown, except those which were specially reserved. Another instance is the purchase from the Narraghanset Indians of the lands which form the colonies of Rhode Island and Providence. They were made by persons whose religious dissensions had driven them from Massachusetts. The state of England might account for this transaction having escaped the attention of the Government. It is evident, however, that the settlers were not satisfied with the title acquired by this purchase; for, on the restoration of Charles II, they solicited and obtained from the Crown a charter, by which Providence was incorporated with Rhode Island. The grant is made to them 'of our Island called Rhode Island', and of the soil as well as the powers of Government. The judgment of Lord Hardwicke, in the case of Penn v Lord Baltimore, 1. Ves. 454, is not inconsistent with, but in many respects supports, this view of the rights of the Crown and its grantees. In all the colonies which now constitute the United States, the Crown either granted to individuals the right in the soil, although occupied by the Indians, as was the case in most of the proprietary governments or the right was retained by the Crown, or vested in the Colonial Government. The United States, at the termination of the Revolution, acquired the right to the soil which had been previously originally vested in the Crown, for Great Britain by treaty relinquished all claim 'to the proprietary and territorial rights of the United States'. The validity of titles acquired by purchase from the Indians has been on several occasions the subject of decision in the courts of the United States. The judgment of Chief Justice Marshall, in the case of Johnson v McIntosh, contains the elaborate opinion of the

Supreme Court, that the Indian title was subordinate to the absolute ultimate title of the Government, and that the purchase made otherwise than the authority of the Government was not valid. A similar decision was given by the same Court in the case of *Worcester v The State of Georgia* in January 1832. (3. Kent's Com. 382, and the case referred in the note, P. 385.) 3. I am of opinion that the Crown can legally oust the Association from their possession. The enterprise manifested by the expedition, the respectability of the parties engaged in it, and the equitable and judicious manner in which they conducted the intercourse with the native tribes, and made their purchase, afford a strong ground for anticipating that the Crown would, in conformity with its practice on other occasions, on a proper application, give its sanction to and confirm the purchase which the Association has made. Lord Hardwicke, in the case which has been referred to, expressed a very strong opinion, that the possession of persons making these settlement ought to receive the fullest protection. There is no ground for considering that the lands comprised in this purchase are affected by the Act erecting South Australia into a Province, 4 and 5 W.IV.c75. They are clearly not within the boundaries assigned to the territory, which is the subject of the Act, and therefore the Crown is not precluded from confirming the purchase. 4 I am of opinion that the Association should make an application to the Government for a confirmation of the above purchase, and accompany it with a full communication, not only of all the documents now laid before me, but of every other circumstance connected with the acquisition. WILLIAM BURGE, LINC. IN, 16th Jan. 1836".

Australia Felix sets out at the foot of Burge's Opinion an endorsement by two other English barristers, Thomas Pemberton and Sir William Follett, a former Attorney General. That endorsement was in the following terms: "We have perused the extremely able and elaborate opinion of Mr Burge, and entirely concur in the conclusions at which he has arrived upon each of the queries submitted to us. – THOMAS PEMBERTON, W W FOLLETT, Jan. 21, 1836".

Imperial Chaos: Adventurers, Overlanders, Boat People and Frontier Violence

So spoke the lawyers, and government proceeded in accordance with the views they expressed. Perceiving themselves to be unable militarily to restrain the Settlers, the Imperial and Colonial Governments acquiesced in the Settlement of the Port Phillip region. There followed a large influx of Settlers, sheep and cattle.

However one chooses to describe this influx, it must have seemed to the Aboriginal inhabitants to have all the hallmarks of an invasion. Little wonder, then, that the

whole area erupted in a violence. Whether one chooses, or not, to describe violence of that time as “war”, or perhaps as a “frontier war”, tells us something of the historiography of Australia we favour.

“Europeans” of the nineteenth century experienced an insatiable urge for expansion. It was driven, in part, by poor conditions at home (where people experienced war, revolution, political and social unrest, unemployment as a bi-product of industrialisation and hunger). It was also driven, in part, by visions of opportunity and land for the taking in a “New World”. It was sometimes assisted by government, sometimes not. The human impulses unleashed by the American War of Independence, followed closely by the French Revolution and the Napoleonic Wars could not easily have been contained, even if government had been predisposed to contain them. On the whole, though, European governments went with the flow. In time, opportunities for trade and new learning gave way to colonial rivalries and an arms race that culminated in World War I (1914-1918), followed by unresolved problems that resulted in World War II (1939-1945). Future historians, looking back, might view the whole process as part of a continual upheaval marking a transition from a World of unconnected societies into a single World community of interdependent societies. Who can know the future?

In waiting for the future to unfold, some lessons for the present might be suggested from the past: (a) First, War, pestilence and violent upheaval of any kind in one part of the world resulting in the displacement of settled populations may profoundly affect the welfare of other parts; (b) Second, a people brutalised by a hard life at home may not readily break their mould when abroad (bullied at home, they might be bullies abroad) and they might accordingly need special rehabilitation treatment or years of settling down before they can live life in harmony with others; Third, peace and prosperity for all depends upon the development of a genuine sense of community, tolerance for divergent views and respect for the rule of law as an alternative to self help and vigilantism; and (d) Fourth, when fundamental human impulses are engaged, all the resources of government might be hard pressed to contain them in the short run.

The writings of Professor Stuart Banner draw attention to a need to allow for local factors in explaining the course of European expansion in the nineteenth century:¹³ the events in and around Port Phillip in 1835, and following years provide a case study of “local conditions” in a global environment.

Further Reading: The texts of Batman’s Deeds, accounts of the ceremony attending them and the reactions of Government and lawyers to them can be found in: C E Sayers’ 1973 (Melbourne) edition of James Bonwick’s *John Batman, The Founder of Victoria* (first published in Melbourne in 1868), especially at about pages 84-87; C P Billot, *John Batman: The Story of John Batman and the Founding of Melbourne* (Melbourne, 1979) at about pages 96-98; and William Westgarth, *Australia Felix* (Edinburgh, 1848) at pages 150-172 and 392-397. The historical setting is also described by reference to primary records in *Historical Records of Victoria* (Melbourne, 1981), Vol. 1, pages xiii-xv and 3-34.

THE TREATY OF WAITANGI, 1840

A Contrast with Bateman

John Batman’s “private enterprise” colonisation of Port Phillip in 1835 provided a backdrop to what occurred in the colonization of New Zealand over the following five years. There a principal player, as a purchaser of land, was W C Wentworth of NSW fame: Roger Therry, *Reminiscences of Thirty Years’ Residence in New South Wales and Victoria* (London, 1863; reprint, Sydney, 1974), chapter 17, especially page 303; Alex C Castles, *An Australian Legal History* (Sydney, 1982), pages 15 and 519; Claudia Orange, *The Treaty of Waitangi* (Wellington, 1987), chapters 1-5, especially pages 94-97. A complicating factor for the British authorities – which might serve to distinguish Australian and New Zealand legal history – was that on and following 28 October 1835 the British Government acquiesced in a “Declaration of the Independence of New Zealand” by Maori leaders meeting at Waitangi in the North Island of New Zealand. That led, in time, to a perceived need for a treaty with the Maori. The Treaty of Waitangi was made on 6 February 1840. The fact that it did not, in terms, apply to the South Island of New Zealand did not prevent the British from proclaiming their authority over the South Island on 21 May 1840. The texts of

¹³ Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Harvard, 2007) and *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard, 2007).

the Declaration of Independence and the Treaty of Waitangi are reproduced in Orange, *The Treaty of Waitangi* at pages 255-259.

A Government Declaration and An Official Treaty

The Declaration of Independence and the Treaty of Waitangi were prepared in the Maori language, with an English translation. That, in itself, distinguishes the documents from Batman's Port Phillip Deeds. The existence of two versions of the documentation has not, however, guaranteed agreement about the proper interpretation of what was agreed. Both versions are reproduced in Orange's text. These are the English versions:

"A Declaration of the Independence of New Zealand

1. *We the hereditary chiefs and heads of the tribes of the northern parts of New Zealand, being assembled at Waitangi, in the Bay of Islands, this 28th October, 1835, declare the Independence of our country, which is hereby constituted and declared to be an Independent State, under the designation of The United Tribes of New Zealand.*
2. *All sovereign power and authority within the territories of the United Tribes of New Zealand is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity, who also declare that they will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.*
3. *The hereditary chiefs and heads of tribes agree to meet in Congress at Waitangi in the autumn of each year, for the purpose of framing laws for the dispensation of justice, the preservation of peace and good order, and the regulation of trade; and they cordially invite the Southern tribes to lay aside their private animosities and to consult the safety and welfare of our common country, by joining the Confederation of the United Tribes.*
4. *They also agree to send a copy of this Declaration to His Majesty the King of England, to thank him for his acknowledgment of their flag; and in return for*

the friendship and protection that they have shown, and are prepared to show, to such of his subjects as has settled in their country, or resorted to its shores, for the purposes of trade, they entreat that he will continue to be the parent of their infant State, and that he will become its Protector from all attempts upon its independence.

Agreed to unanimously on this 28th day of October, 1835, in the presence of His Britannic Majesty's Resident.

[Here follows the signatures or marks of 35 Hereditary Chiefs or Heads of tribes, which form a fair representation of the tribes of New Zealand from the North Cape to the latitude of the River Thames.]

[English witness – (signed) Henry Williams, Missionary, C.M.S.; George Clarke, C.M.S.; James C. Clendon, Merchant; Hilbert Mair, Merchant.]

I certify that the above is a correct copy of the Declaration of the Chiefs, according to the translation of Missionaries who have resided ten years and upwards in the country; and it is transmitted to His Most Gracious Majesty the King of England, at the unanimous request of the chiefs. (signed) James Busby, British Resident at New Zealand.

The Treaty of Waitangi

Her Majesty Victoria Queen of the United Kingdom of Great Britain and Ireland regarding with Her Royal Favour the Native Chiefs and Tribes of New Zealand and anxious to protect their just Rights and Property and to secure to them the enjoyment of Peace and Good Order has deemed it necessary in consequence of the great number of Her Majesty's Subjects have already settled in New Zealand and the rapid extension of Emigration both from Europe and Australia which is still in progress to constitute and appoint a functionary properly to treat with the Aborigines of New Zealand for the recognition of Her Majesty's sovereignty over the whole or any part of those islands – Her Majesty therefore being desirous to establish a settled form of Civil Government with a view to avert the evil consequence which must result from the absence of the necessary Laws and Institutions alike to the native population and to Her Subjects has been graciously pleased to empower and to authorise me William Hobson a Captain in Her Majesty's Royal Navy Consul and Lieutenant Governor of such parts of New Zealand as may be or hereafter shall be ceded to Her Majesty to invite the

confederated and independent Chiefs of New Zealand to concur in the following Articles and Conditions.

Article the First.

The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Article the Second.

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Article the Third.

In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal Protection and imparts to them all the Rights and Privileges of British Subjects.

(Signed) W Hobson Lieutenant Governor

Now therefore We the Chiefs of the Confederation of the United Tribes of New Zealand being assembled in Congress at Victoria in Waitangi and We the Separate and Independent Chiefs of New Zealand claiming authority over the Tribes and Territories which are specified after our respective names, having been made fully to understand the Provisions of the foregoing Treaty, accept and

enter into the same in the full spirit and meaning thereof in witness whereof we have attached our signatures or marks at the places and the dates respectively specified.

Done at Waitangi this Sixth day of February in the year of Our Lord one thousand eight hundred and forty.

[The Maori text of the Treaty was signed at Waitangi on 6 February 1840, and thereafter in the north and at Auckland. The English text was signed at Waikato Heads in March or April 1840 and at Manukau on 26 April 1840 by 39 Chiefs only. It became the 'official' version.]”

Significant Differences in Legal Form

Whatever its strengths or weaknesses, this documentation is different in form and substance from Batman’s Port Phillip Deeds in a number of respects, including the following: First, the New Zealand documentation had a representative of the British Crown as a party to it, whereas Batman’s Deeds do not; Second, the New Zealand documentation appealed to notions of “public law”, whereas Batman’s Deeds took only the form of private transactions; Third, the New Zealand documentation was signed by indigenous peoples in a text expressed in their own language, whereas Batman’s Deeds were presented only in an English text.

ROBERT RICHARD TORRENS’ SYSTEM, 1858

Torrens the Man: Biographical Details

Accessible accounts of the Torrens story generally are found in the *Australian Dictionary of Biography*;¹⁴ Dr Greg Taylor’s *A Great and Glorious Reformation: Six Early South Australian Legal Innovations* (Adelaide, 2005), chapter 2; and R.M. Hague, *Hague’s History of the Law in South Australia, 1837-1867* (Adelaide, 2005), Volume 2, Chapter 12. A more recent account of the same story, with a Canadian perspective, is Dr Taylor’s *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto, 2008), chapters 1-2. Professor Ros Croucher’s 2008 Forbes Lecture, “150 Years of Torrens – Too Much, Too Little, Too Soon”, (2009) 31 *Australian Bar Review* 245 adds colour to the Australian Story.

¹⁴ Volume 6, pages 292-293 (cited as 6ADB 292)

“Old System” Conveyancing

Torren’s system of land title registration changed the conceptual foundations for land ownership, and land dealings, in Anglo-Australian law.

Under the general Common Law (the “Old System” of conveyancing) Deeds and Contracts were at the core of both the theory and practice of land transactions. A purchase of land was effected by a contract, the performance of which took the form of a “Deed of Conveyance” in which the vendor conveyed (transferred) title to the land to the purchaser and covenanted (promised) that he, she or it was legally and beneficially entitled to the land. The purchaser’s title was dependent upon the correctness of the vendor’s “covenant of title”. As evidence of ownership, an “owner” of land held either a “Crown Grant” in his, her or its favour (evidencing a grant of the land, by or on behalf of the Crown as the ultimate source of title, to a landowner) or a series of Deeds (evidencing transfers of title) able to be traced back to a “Crown Grant”. In searching a vendor’s title to land before paying over an agreed price for it, a prospective purchaser needed to insist upon production by the vendor of a “chain” of title deeds going back, theoretically, to a Crown Grant. The vendor’s title was no stronger than the weakest link in the chain. A latent “defect” in title could be fatal to proof of ownership.

For administrative convenience in the conduct of business, legislation was enacted in the nineteenth century: (a) to protect the title of a purchaser who traced title back to an apparently “good root of title” twenty years or so distant; (b) to enable copies of Deeds (certified to be true copies) to be registered in a public register (a “Deeds Register”) as searchable evidence of particular transactions; and (c) to provide that registered Deeds took effect in law in the order of their registration, with earlier registered Deeds having “priority” over later registered Deeds. If a vendor purported to sell the same land twice, the Deed of Conveyance registered first in time was the one afforded priority.

Despite these administrative reforms, this “Old System” of conveyancing was cumbersome, and susceptible to fraud or mismanagement, as proof of land ownership still depended upon a growing mass of “title deeds” held in safe custody or, at least, proof of lost or missing Deeds. A mortgage of land generally took the form of a series of Deeds or the like: By a “Deed of Mortgage” a mortgagor (borrower)

conveyed title to the land to the mortgagee (lender) as security for a loan, not absolutely; upon repayment of the loan the land was transferred back to the mortgagor by a “Deed of Reconveyance”. A Lease of land might take the form of a “Deed of Lease” in which a lessor (landlord) allowed a lessee (tenant) to have “exclusive possession” of the land for an agreed time (“the lease term”) on agreed “terms”, including a term for the payment of rent. In both types of transaction, the person generally thought by lay people to have remained the “owner” of the land (usually the person entitled to an “estate in fee simple” in the land) had to retain a heap of “title deeds” to be able to prove the existence, ebb and flow of title. Possession of title deeds was a practical necessity for proof of title.

“Torrens System” Conveyancing

The Torrens System works quite differently. Contracts are still made for the sale of land, or other dealings in land, but the necessity for a chain of title deeds to prove title has been dispensed with. Title to land is recorded in a public register (a “Register of Land Titles”) maintained by a public servant whose official designation is something like, “The Registrar of Land Titles”. Before the age of computers the “Register” was literally a book (“The Register Book”) with a separate page (“folio”) allocated to each defined parcel of land: title to land was described by reference to a “Volume” number and a “Folio” number in the Register Book. Since the advent of computers, the Register has become a computer record in the nature of a “virtual book”, with a separate reference number for each defined parcel of land.

As evidence of ownership of land “under Torrens Title”, a landowner’s name and property interest are recorded (“entered” or “registered”) on the Folio of the Register – sometimes described as a “Certificate of Title” – referable to the land. Anybody dealing with the land is generally entitled to treat the Register as conclusive evidence of title to it: The owner of an interest in the land is generally called “the Registered Proprietor (or Owner)” of that interest. If several people have an interest in the land (e.g., as the owner of the fee simple, as a mortgagee or as a lessee) their respective interests are recorded on the one Certificate of Title, and their relationships are defined and regulated by the legislation that governs maintenance of the Torrens Title Register. There is no need to hold, or search for, a chain of title deeds. When there is a change to be made in the Register to give legal effect to a land dealing, the parties execute a prescribed form (e.g., a “Transfer”, a “Mortgage”, a “Discharge of

Mortgage” or a “Lease”) which is lodged with the Registrar for registration. The Register is the best evidence of title, though a Registered Proprietor will generally hold an official (“duplicate”) copy of the “Certificate of Title” as prima facie evidence of ownership.

Even though there is generally only one Duplicate Certificate of Title in circulation for each parcel of land at any one time, people not uncommonly mean to refer to it when they speak of “the title deeds” to particular land. That is a linguistic throwback to the Old System of conveyancing. Our customary language has not kept pace with legal forms in this instance.

If a fraudster manages to defraud a Registered Proprietor of Torres Title land by wrongfully causing the name of the Proprietor to be removed from the Register, the wronged, former Registered Proprietor can obtain compensation from an insurance fund administered by the Registrar, leaving the Registrar to recover compensation from the fraudster. The commercial sanctity of the Register is thus underwritten by the public.

The Mechanics of Torrens System Legislation

A standard provision in modern Australian Torrens legislation is that, *upon registration*, a dealing in land is taken to have “the effect of a deed duly executed by the parties who signed it”: *Real Property Act* 1900 (NSW), *section* 36(11); *Transfer of Land Act* 1958 (Vic), *section* 40(2); *Real Property Act* 1861 (Qld), *section* 35; *Real Property Act* 1886 (SA), *section* 57; *Transfer of Land Act* 1893 (WA), *section* 85; and *Land Titles Act* 1980 (Tas), *section* 48(7). This provision, which ties the “new” system of Torrens land titles registration to the “Old System” of Conveyancing (with its attendant reliance upon a “chain of title [deeds]” to prove title to land) under the general law, did not appear in the first Torrens statute, the *Real Property Act* 1858 (SA). The Act commenced operation on 1 July 1858. Contrast *sections* 31, 33 and Schedules B and H of it with its modern counterparts. The now standard provision explicitly adopting the analogy of a deed made its first appearance as *section* 19 of the *Real Property Law Amendment Act* 1858 (SA). That Act received Royal Assent on 24 December 1858. *Section* 2 of the Act (No. 16 of 1858) repealed *sections* 31 and 33 of the first Act (No. 15 of 1858), dealing with topics covered by *section* 19 (and *section* 20) of the later Act. *Section* 31 referred, not to a “deed”, but more generally

to “instruments”. This legislative history, in combination with current law, suggests that attempts to define “new law” are sometimes compelled to acknowledge a need for continuity with ideas embodied in the “old”.

WATTIE CREEK (DAGURAGU), 1975

Historical Context

A close study of the history of the struggle of Aboriginal Australians to have Australian law recognise their communal rights to land can be traced back many years before 1975. Nevertheless, 1975 was a watershed year. That is largely because the then Prime Minister of Australia, Mr E G Whitlam QC, took a symbolic, but material step towards a grant of “land rights” to an Aboriginal community.

That step followed in the wake of a succession of other developments: (a) in a long-running industrial dispute that commenced at Wave Hill cattle station in the Northern Territory of Australia in 1966 and was led by Vincent Lingiari, Aboriginal stockmen of the Gurindji People insisted upon the payment of a fair wage and, when denied wage justice, converted their campaign to one for the return of their traditional land at a site near Wattie Creek; (b) at the end of an epic trial, Justice Richard Blackburn held, in a judgment published as *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 Federal Law Reports 141, that the general law of Australia recognised no title in Aborigines holding land under traditional tenure and that the doctrine of communal native title had no place in Australian law except under express statutory provisions; (c) on 19 July 1973 and 3 May 1974 another judge, Justice (later Sir) Edward Woodward, published Reports of his official inquiry into Aboriginal land rights in the Northern Territory of Australia, in the second of which he recommended that title to land on Aboriginal Reserves should be held by indigenous communities in a form that was communal, inalienable and in fee simple¹⁵; (d) on 2 July 1974 the Australian Government accepted in principle Justice Woodward’s recommendations and authorised the drafting of what was perceived to be the legislation necessary to give effect to them.

A Watershed Deed

¹⁵ Woodward’s autobiography, *One Brief Interval: A Memoir* (Melbourne, 2005) provides personal and legal insights into the movement for Aboriginal Land Rights.

Because of the likelihood that Native Title legislation could not be enacted without significant further delays, the Whitlam Government opted to make a practical gesture in favour of Aboriginal land rights by means of an executive act. It did that by granting a lease (in the form of a deed) to an Aboriginal community, the Gurindji people.

In Mr Whitlam's autobiographical work, *The Whitlam Government, 1972-1975* (Melbourne, 1985),¹⁶ he explained the events of 16 August 1975:

"On 16 August 1975...I flew ... to Wattie Creek, now bearing its historic name, Daguragu. [Dr 'Nugget' Coombes] recalled to me that on the site of Melbourne in 1834 [sic] a local Aboriginal chief had picked up some earth and poured into the hand of John Batman. He suggested I do the same to the chief of the Daguragu, Vincent Lingiari. To accompany livery of seisin he gave me this speech:

'On this great day, I, Prime Minister of Australia, speak to you on behalf of the people of Australia – all Australians who honour and love this land we live in.

For them I want:

First to congratulate you and those who have shared your struggle on the victory you have won in that fight for justice begun 9 years ago when in protest you walked off Wave Hill Station;

Secondly, to acknowledge that we Australians have still much to do to redress the injustice and oppression that has for so long been the lot of black Australians;

Thirdly, to promise you that this act of restitution which we perform today will not stand alone – your fight was not for yourselves alone and we are determined that Aboriginal Australians everywhere will be helped by it;

Fourthly, to promise that, through their Government, the people of Australia will help you in your plans to use this land fruitfully for the Gurindji;

Finally, to give back to you formally in Aboriginal and Australian law ownership of this land of your fathers.

¹⁶ Pages 470-471.

Vincent Lingiari I solemnly hand to you these deeds as proof, in Australian law, that these lands belong to the Gurindji people and I put into your hands this piece of the earth itself as a sign that we restore them to you and your children forever.’”

Vincent Lingiari’s reply to the Prime Minister was worthy of the occasion. After speaking in the Gurindji language of the importance of law, and turning to Mr Whitlam, he famously declared: “*We be mates now*”. This was a display of simple dignity, a declaration of Australian community.

Fact Becomes Legend

The struggle at the Gurindji People at Wattie Creek was later immortalised in song by Kev Carmody, in a ballad written by him and Paul Kelly called *From Little Things Big Things Grow*.¹⁷

A children’s book of the same name, written by Paul Kelly and Kev Carmody, was published in 2008.¹⁸ It follows the words of their ballad, and contains a Gurindji interpretation of the story which (in English translation) concludes with the following paragraph:

*“This isn’t just a story about Vincent,
This is an important story (literally, law).
When a man has strong law, nothing will change him.
Law stays in that one place forever.
From something small, it grew and spread everywhere.”*

A Blend of Cultures: Law in Service of Community

For those engaged in a struggle for Native Title, the ceremony at Wattie Creek on 16 August 1975 was an important step, but only one step in a continuing campaign. The road ahead was uncharted and, if paved at all, paved with rocks and other obstacles. Hopes and disappointments remained. The next big watershed event was the High Court of Australia’s *Mabo* decision of 1992.

For the present, however, lawyers and historians alike might reflect on the persistency of ideas that underpinned the ceremony of 16 August 1975. Those ideas reached back to feudal England in the days of William the Conqueror. They were given legal

¹⁷ The song was performed by Kev Carmody on his CD, *Blood Lines*, marketed by Festival Records in 1993.

form in the character of a Deed. That Deed embodied the grant of a “leasehold estate”, a conceptual residue of feudal England and a commonplace legal form of 20th century Australia. An ancient legal ritual – livery of seisin – bonded together old England and new Australia. Livery of seisin had long since ceased to be a necessity for the conveyance of land in Anglo-Australian law.¹⁹ It was a curiosity to everybody in 20th century Australia, but it nevertheless provided a vehicle for unity of thought. It had modern-day social significance beyond its technical legal history.

Further Reading: The story of the struggle of the Gurindji People for a fair go – from a perspective pre-dating the Whitlam speech – was told by Frank Hardy in *The Unlucky Australians*, first published in 1968. The “Gold Star Edition” published by Nelson (Melbourne) in 1972 has a Foreword by Donald Horne and a preliminary “Author’s Note” that includes a useful chronology. A tribute was paid to the Aboriginal leader, Vincent Lingiari, by the “Member for Lingiari” (Warren Snowdon MP), in the House of Representatives of the Australian Parliament, on 20 March 2002.

AUSTRALIA AT THE CROSSROADS: IN OUR OWN IMAGE?

In the final two decades of the 20th century, as the culmination of pressures for change and as harbingers of change to come, there were four legal developments that might be thought to have fundamental implications. The first was the establishment of the High Court of Australia as the nation’s ultimate appellate court, free for the first time from entanglements arising from the jurisdiction of the Privy Council in London to hear appeals from Courts in Australia. The second was the proclamation of the *Australia Acts* of the Parliaments of Australia, and Great Britain on 3 March 1986. The third was the decision of the High Court in *Mabo (No 2) v Queensland* (1992) 175 CLR 1 to recognise Native Title. The fourth was the failure on 6 November 1999 of a Referendum on the question whether Australia should be a “Republic”, amidst a widespread belief in some quarters that there was something inevitable about the emergence of a “Republic”.

¹⁸ ISBN9780975770887.

¹⁹ Eg, The requirement of “livery of seisin” to give legal effect to a conveyance of land was effectively “abolished” by section 20 of the *Registration Act*, 1842 (NSW), now re-enacted as section 31 of the *Conveyancing and Law of Property Act*, 1898 (NSW). Reflecting the continuity of legal thought, and the substantive function of “livery of seisin”, the “abolition” took the form of a legislative statement that registration of a “deed of feoffment” (that is, a deed of conveyance) in a public register was to be taken as the “equivalent” of livery of seisin.

Whatever the outcome of any future referendum on proposals for constitutional amendments, these four events reflected, and continue to facilitate, a change in how Australians think of themselves, and their community.

Further Reading: For a discussion of the profound implications of the *Australia Acts* of 1986, see Anne Twomey's essay, "The Making of the Australia Acts 1986", chapter 10 in George Winterton, *State Constitutional Landmarks* (Sydney, 2006); and chapter 12 (entitled "Popular Sovereignty and the True Foundation of the Australian Constitution") in Michael Kirby's *Through the World's Eye* (Sydney, 2000). For discussion of the role of the Crown in modern government (including republicanism), see Anne Twomey, *The Chameleon Crown: The Queen and Her Australian Governors* (Sydney, 2006); chapter 14 ("The States and a Republic") in Twomey's *The Constitution of New South Wales* (Sydney, 2004); and Peter Boyce, *The Queen's Other Realms: The Crown and Its Legacy in Australia, Canada and New Zealand* (Sydney, 2008). For discussion of the *Mabo* litigation and its implications, see Frank Brennan, *One Land, One Nation: Mabo – Towards 2001* (Brisbane, 1995); Nonie Sharp, *No Ordinary Judgment: Mabo, The Murray Islanders' Land Case* (Canberra, 1996); N Peterson and W Sanders (ed.), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Cambridge, 1998); P H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (Sydney, 2006); E Johnston, M Hinton and D Rigney (ed), *Indigenous Australians and the Law* (2nd ed, London, 2008); and the writings of Henry Reynolds, including the *Law of the Land* (1st ed. 1992; 3rd ed, 2008) and *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Sydney, 1996). An alternative view (hotly contested by supporters of Henry Reynolds) is Michael Connor's *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Sydney, 2005). For a geographically broader view of indigenous land rights, see Stuart Banner, *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Harvard, 2007); it develops themes also found in Banner's *How the Indians Lost their Land* (Harvard, 2005). A text that predates *Mabo*, but examines jurisprudential concepts underpinning it, is Kent McNeil, *Common Law Aboriginal Title* (Oxford, 1989). Touted as a successor to McNeil's book is Simon Young's *The Trouble with Tradition: Native Title and Cultural Change* (Sydney, 2008).

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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

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