Introduction

Over the course of many years, numerous colleagues, students, friends and relatives in New Zealand, Australia and elsewhere in the Anglophone world have asked me why New Zealand has a historic treaty – the famous Treaty of Waitangi – and Australia does not. I have assumed that what they are really asking is why the British government negotiated with the indigenous people of New Zealand (Māori) for the cession of sovereignty and title to land yet treated Australia’s Aboriginal people as though they were neither sovereign nor the owners of the land. In order to answer this question satisfactorily, I have come to conclude that a particular historical approach is required. This approach has several dimensions.

Rather than being preoccupied with particular moments or events – such as James Cook’s claiming possession of New Holland in 1770 or the signing of the Treaty of Waitangi in New Zealand in 1840 – that are said to have determined the foundations of Australia and New Zealand in respect of sovereignty and title to land, we must examine the treatment of these two matters over a relatively long period of time. Further, we need to pay attention to processes that were deeply historical in nature. This is so in two senses. First, the treatment of sovereignty and native title at one point in time profoundly influenced what happened later. Second, much of what took place was highly contingent and so could have been very different.

In considering these histories we must examine, especially in the New Zealand case, the role that was played by a multiplicity of players – not only government officials and the indigenous peoples themselves, but missionaries, traders, entrepreneurs, settlers, missionary societies and colonisation companies – as well as the relationships between these players. Likewise, attention must be paid to both the imperial and the colonial theatres of action, and to the ongoing exchanges between them.

In seeking to answer the question at the heart of this book, a comparative approach – and one that focuses on the colonies, rather than the nations that supplanted them – has been of fundamental importance. By pinpointing the differences as well as the similarities between
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Britain’s colonies in Australasia, \(^1\) or what became Australia and New Zealand, we are better able to explain why sovereignty and rights in land were treated in the ways they were. This is so primarily because historical comparison enables us to isolate the important causal factors from the merely incidental ones. \(^2\) The practice of comparative history can also provoke new questions. Most significantly perhaps, we can ask why the relevant historical sources or traces are slender for New South Wales (if not for all the Australian colonies), and vast for New Zealand, and what this reveals about the past. The provenance of many of the most important historical traces for New Zealand is similarly telling: they exist not only in their original manuscript form (in the imperial government’s records) but also in print (in Britain’s parliamentary papers), just as there is a plethora of pertinent material in the newspapers of the day. This draws our attention to the fact that both sovereignty and native title were the subject of enormous political debate in the New Zealand context, whereas in the Australian colonies this was seldom the case.

To understand the way that sovereignty and native title were treated in Britain’s Australasian colonies, it is imperative that we pay a great deal of attention to claim-making, especially that of the principal British players. In so doing, we must acknowledge that claims are inherently legal or moral in nature: they are never merely a request or a demand but involve instead an appeal to some sort of imagined right or standard of justice. Moreover, they are always made with reference to somebody else and so tend to involve counterclaims and contestation, which means that making claims entails politics as individuals and groups articulate, negotiate and seek to enforce them. Finally, claim-making often requires a willingness to back up one’s appeals to reason and the like with some sort of action or threat of action, and so we need to consider the power that competing parties were able to wield. \(^3\)

Taken together, these observations make clear that in order to truly understand claims about sovereignty and property we must attend to the complex interplay that always exists between the abstract and the

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\(^1\) I am using Australasia loosely as a shorthand for Britain’s colonies in what became Australia and New Zealand. Strictly speaking, in the nineteenth century the term Australasia tended to stand for all of Britain’s colonies in the South Pacific. See Donald Denoon, ‘Re-Membering Australasia: A Repressed Memory’, *Australian Historical Studies*, vol. 34, no. 122, 2003, pp. 290–304.


concrete, thought and practice, beliefs and ambition, principle and expediency. Consequently, we need to set aside any notion that the treatment of sovereignty and native rights in land was determined by particular norms, whether they be intellectual, legal, political or moral in nature, though there can be no doubt that norms of this kind played an important role in the making of claims. For example, in deciding to treat with the native chiefs at Waitangi for the cession of sovereignty it is apparent that British officials were familiar with legal concepts about sovereignty that were expressed in the law of nations, but it would be simplistic as well as naïve to conclude that their course of action was dictated by those legal considerations.

Attending to claim-making requires us to pay serious attention not only to politics but to the nature of the language or languages that the principal players used in the conduct of politics. This point has several dimensions. At any one time, a number of ideas and arguments are available to political players, from which they can try to fashion a political language to do the necessary work of persuasion. In the period I examine, languages such as protection were especially important in this regard but so too was a particular kind of rights talk.

Another aspect of language concerns the words that the principal players used in referring to indigenous people, namely natives and savages (rather than Māori or Aboriginal people). These terms are writ large in the historical record. I in turn mostly use the word native in order to draw attention to the fact that the principal British players, especially those at the metropolitan centre, tended to perceive and portray indigenous peoples at the imperial periphery as though they belonged to a single, abstract or generic category of people. Indeed, most of these British players had little interest in the precise characteristics of these native peoples or in distinguishing between them on the basis of who they really were. (They were much more interested in themselves.) Yet there are instances in which the very real subjectivity of indigenous peoples must be registered by the historian if we are to make sense of what took place. In those moments, I use Māori and Aboriginal people as well as terms that denote 4

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4 For some time, a good deal of the relevant scholarship was characterised by this weakness, for example Anthony Pagden’s Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c. 1800 (Yale University Press, New Haven, CT, 1995). This tendency persists, especially but not only in work by intellectual historians, despite their claims to the contrary. See, for example, Andrew Fitzmaurice, Sovereignty, Property and Empire, 1500–2000, Cambridge University Press, Cambridge, 2014. This is not to suggest that ideas were unimportant, but the ideas that played the greatest role were those we might call lowercase ‘I’ ideas – that is, the kind of beliefs held by all manner of historical actors and expressed or embodied in action, rather than uppercase ‘T’ ideas – the arguments of a relatively small group of sophisticated theorists.
particular tribal groups and polities. (At the time the latter terms were used much more commonly than the former ones by these peoples.)

In considering the nature of the language that the principal political players used, special attention must be paid to rhetoric. The words they commonly uttered were highly functional in nature, since their speech acts were invariably designed to have consequences, namely the accomplishment of their purposes. Thus, while the principal players tended to have a variety of views about sovereignty and native title, the ones they emphasised usually depended on their assessment of what would be most useful strategically or tactically at any given moment.

Furthermore, in seeking to understand how the British actually treated sovereignty and native title, we are best to rely on historical traces rather than historical sources. A historical trace is a relic of the past that was forged as part of day-to-day life, whereas a historical source is something that was intended by its creator to stand as an account of contemporary acts and events. Traces provide a more reliable foundation for historical knowledge. They tend to be found in historical relics, such as personal correspondence and minutes on official papers, that were never intended by their creators to be made public in any shape or form.

It is also critical that we attend in a comprehensive manner to the particular historical contexts in which actions and statements in regard to sovereignty and rights of property in land were taken or made. In large part, this means scrutinising actions and statements in their logical place in a chronological sequence, not least because they tended to be the product of (ever-shifting) relations between political players. The kind of contextualisation I have in mind requires us to ask what actions and processes generated the traces of the past, and who created them, when and why. Indeed, we cannot hope to know what the statement of any particular historical actor meant unless we clarify what precisely they were doing (or trying to do) at any given moment. This emphasis on thorough-going contextualisation also means that a very detailed historical narrative of events has to be provided.\footnote{In regard to these as well as many of the points I have made so far, my approach has many similarities with what has been called the ‘high politics’ school of history. For an account of this body of historical scholarship, see Richard Brent, ‘Butterfield’s Tories: “High Politics”’}

\footnote{For an example of what I call a ‘historical source’, see the memorandum penned by the Permanent Under-Secretary in the Colonial Office, James Stephen, in November 1839, which I discuss on pp. 163–64.}
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As much of my discussion so far has implied, we must pay attention to the role played by individual men (and it was always men), especially but not only those who held political office. This is all the more the case because the early to mid-nineteenth century was a period when the Colonial Office (the department of government primarily responsible for overseeing the British Empire) and the colonial administrations were very small, and there were many changes among those in charge of colonial affairs at the imperial centre as well as the colonial peripheries. Furthermore, in considering the part that particular men played, we must consider not only their ideas, beliefs, values and language but also their mental states and thus the psychological forces that influenced how they felt and behaved. The political battles that took place between the most important British parties were bitterly fought largely because they aroused powerful emotions.

Finally, it is vital that we overcome the problems produced by tunnel history, that is, where a particular sub-discipline of history is allowed to dictate what counts as a historical phenomenon, as a trace or source, and as an explanation, thereby eliminating large tracts of the past from our field of vision. Here, I have sought to draw upon and integrate a number of approaches found in cross-cultural, economic, intellectual, legal and political history.

By adopting the particular historical approach that I have been describing, the historian is able to provide an explanation of the British treatment of sovereignty and native title in the Australasian colonies that is both more plausible and more reliable than the accounts currently available. Moreover, the historian can recapture much about the past that is largely unknown and hence surprising, even astounding. This enables readers to grasp that the horizon of the present is not the only horizon available to us in contemplating both the past and the future.

In this book I argue that native title was made – or not made – in the context of British colonisation. The indigenous peoples had their own ways of understanding authority and ownership of land, but legal notions and the Writing of Modern British Political History’, *The Historical Journal*, vol. 30, no. 4, 1987, pp. 943–54.

9 I realise that many readers familiar with Australia’s recent past might find my use of native title confusing because it has such a strong contemporary valence and because it had a very different meaning in the early to mid-nineteenth century than it does now. But native title is the term that was commonly used in regard to the Australian or more especially the New Zealand colonies in the 1830s and 1840s.

of sovereignty and title in land did not predate colonisation. They only came into being in the course of it. This means that it is a mistake to formulate the question at the heart of this study as ‘why was the sovereignty and rights in land of indigenous peoples recognised, or not recognised, by the British government’, given that the word recognised implies that these phenomena existed in the first place.

I argue, moreover, that sovereignty and rights of property in land were made – or not made – historically, in that they came into being only as the result of deeply historical processes, which were rarely linear in nature but halting, contingent and ultimately reliant on a large degree of chance. Hence, the story I tell in this book is largely one of unexpected events and unintended consequences. Furthermore, the historical processes involved forces that were invariably complex, occasionally incoherent, sometimes mundane, frequently base and seldom constant. As I have already suggested, central to many of those processes was the making of claims and thus contestation and conflict, not least among the principal British players, and hence a struggle for power and authority. At certain points, threats of one kind or another, including that of force, performed a crucial role in this regard. Philosophical ideas and legal concepts played a part but more often than not they are best understood as a resource that was drawn upon by actors in the political battles that took place. Similarly, moral principles played a role in what happened but invariably they were conjoined with practical considerations.

The story of how native title was made, or not made, in Britain’s Australasian colonies or at least in the New Zealand case is best told in terms of several overlapping phases.

I

In the first phase, several claims of possession were made by a British agent, James Cook, in New Holland (what was largely to become New South Wales) and the islands of New Zealand in 1769–70. These claims were relatively unimportant for how sovereignty, let alone the native people’s title in land, would be treated by the British government once it decided to annex parts of these territories. While Cook unilaterally claimed possession in both places, on the basis of legal doctrines (such

11 My debt to E.P. Thompson’s contention that meaning tends to be made in the course of lived experience will be evident to readers familiar with his work.
12 This argument, as much in my approach, owes a good deal to the work on ‘legal politics’ by socio-legal historians, especially Lauren Benton – see, for example, her ‘Beyond Anachronism: Histories of International Law and Global Legal Politics’, *Journal of the History of International Law*, vol. 21, no. 1, 2019, pp. 1–34.
as discovery), his doing so did not dictate the terms upon which the British Crown assumed sovereignty later. In the case of New Zealand, the British government disclaimed its right to dominion in the early nineteenth century and decided to negotiate cession of sovereignty with the native chiefs a few decades later, rather than assert sovereignty on the basis of Cook’s claim of possession, as it did in New Holland.

II

The different ways the British government treated sovereignty in both New Holland and the islands of New Zealand are best explained by the events that took place between Cook’s claiming of possession and the moment the British Crown assumed sovereignty. One factor is especially important in this regard, namely whether any informal colonisation occurred in the meantime. In the New Zealand case, beginning in the 1800s small parties of Europeans established a considerable presence – most significantly at the Bay of Islands in the far north – and entered into relationships with the local people. These relationships included treating with the natives for land.  

The purchases (as the Europeans understood the arrangements) effectively created a notion of native title, and the Europeans who were party to these transactions in the following three decades, which included politically powerful metropolitan British players as well as Māori chiefs, would later make claims for land title on the basis of them.  

Nothing of this kind occurred in the case of the Australian colonies. Just as importantly, a relationship was forged in these years between Māori chiefs and representatives of the British Crown in northern New Zealand, Sydney and even London. At the heart of this relationship were ambiguous claims of protection, which comprised calls for protection as


14 Stuart Banner advances a similar argument in his Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska, Harvard University Press, Cambridge, MA, 2007, 5, 43–46, 318, but he makes no reference to the role played by metropolitan forces in this claim-making and thereby overlooks the political dimensions of this matter.
well as promises of protection. These were made by several players, most importantly a churchman in Sydney seeking to found missions in northern New Zealand, governors of New South Wales, the imperial government and the chiefs themselves. They led the British government to adopt several measures in which it treated New Zealand and its native inhabitants as though they were sovereign, and this generated something like an alliance between the Crown and the Māori chiefs. This development did not occur by design. Indeed, like much of what happened, it was the result of improvisation. Nevertheless, it had profound implications for how the British government would treat the matter of sovereignty in the islands of New Zealand at the point it decided to annex New Zealand. Nothing of this kind took place in the Australian colonies or at least in the case of New South Wales.

At the point in time that the British government decided to annex New Holland and part of the islands of New Zealand, the very different histories I have just described exerted considerable influence on its decision as to whether it could, should or would seek to persuade the native people to cede sovereignty to the British Crown. In essence, imperial governments were more likely to treat with native peoples for cession of sovereignty when they realised that third parties of one kind or another were present in the territory in question or likely to be in the foreseeable future. In the case of New Holland, the British government believed there were no other such parties. Consequently, it issued the first governor of New South Wales with instructions that made no reference to the Aboriginal people other than one to conciliate them and enjoin British subjects to treat them kindly. This meant that the colony’s first governor proceeded as though there was no other source of sovereignty in New South Wales than that of the British Crown. In the case of the islands of New Zealand, there were third parties that the British government believed it had to take into consideration. They included not only missionary societies and a colonisation company based in London – the New Zealand Association or what was to become the New Zealand Company – but also other foreign powers, France and the United States. For this reason, as well as others, the government instructed its agent to treat with the natives for a cession of sovereignty.

The way in which rights of property in land was approached by the British government at the moment it decided to annex New Holland and part of the islands of New Zealand was influenced by many of the same historical factors that impinged on its consideration of sovereignty. In the case of New Zealand, this meant it had no doubt that it had to proceed on the basis that the natives had at least some rights in land. In the case of
New South Wales, the imperial government, or least the man it appointed to be its first governor, Arthur Phillip, was unsure how to proceed.

III

In the third phase – the moment at which the colonial governments set about trying to assert their authority and acquire land – the ways in which the imperial government had treated the matter of sovereignty did not dictate how they would deal with rights of property in land in any precise sense. This means that the fact that the British government opted to make a treaty in New Zealand but not in New South Wales might be regarded as immaterial. What happened during this phase was nonetheless crucial, at least for New South Wales and the rest of the Australian colonies, but this was so for a different reason.

In the case of New South Wales, Governor Phillip concluded soon after the colony was founded that there was no need to negotiate with the local people in order to acquire land. This was so because he formed the opinion that the Aboriginal people did not have the means to resist British armed might. Just as importantly, there were no other powerful forces that might have compelled him to negotiate with the Aboriginal people for land. This meant that a property regime was created in New South Wales that made no reference to the Aboriginal people’s interests in land. Consequently, neither political nor legal questions about the Aboriginal people’s rights of property in land ever arose in any substantive sense in the early decades of the colony. The same was true of the colonies that the British government planted in the early 1800s in Van Diemen’s Land (Tasmania) and Western Australia. By the mid-1830s questions were raised about Aboriginal people’s rights of property in land, most pointedly in the case of a treaty made with local people in the colony’s Port Phillip District by Van Diemonian entrepreneurs (known as Batman’s treaty) but also in the context of a new colony being founded (South Australia).

By this time, however, the British government had been granting land to settlers for nearly fifty years on the basis that the Crown was the only source of title. This arrangement would have been very difficult to

overturn (though as it happened there were no British players, either at the imperial centre or the colonial periphery, who really had the wish, the will and the power to do so). Consequently, it became the law of the land. The only uncertainty that remained in New South Wales and the other Australian colonies concerned the precise legal grounds upon which the British Crown had assumed sovereignty and become the only source of title in land. The fact that the government had little need to enunciate the basis of its claim of possession at the moment it began to plant colonies in New Holland meant there were very few if any reliable historical traces to enable it to answer this question. In this context, the legal argument that the British government as well as settlers tended to prefer in order to legitimise their claims was not *terra nullius* or any doctrine that resembled it (such as *occupation*) but a historical claim the Crown had assumed sovereignty and title to all the land many years earlier, in 1788.

In the case of the islands of New Zealand, the British government instructed its agent, William Hobson, to make a treaty with the native chiefs so that the Crown could both assume sovereignty and acquire the right of pre-emption in regard to land (that is, the right to be the only purchaser of land from the natives). Yet this did not dictate the ways in which it treated sovereignty or property in subsequent years. Indeed, the treaty soon lost most of its significance, especially but not only in the eyes of the imperial government. Within a few months of it being signed, Hobson (unexpectedly) proclaimed British sovereignty over a good part of New Zealand on the grounds of Cook’s claim of possession rather than the treaty alone, and several months later the imperial government confirmed Britain’s claim to sovereignty on this basis. Moreover, an acrimonious political and legal fight about sovereignty and title to land broke out in Britain in 1839–40, once the government had decided to assume sovereignty by negotiating its cession with the native chiefs. The same occurred in New South Wales (under whose jurisdiction New Zealand first came) in 1840, after the treaty had been made. In these battles, the nature of native title – in the sense of the extent of the rights of property in land that the native people were deemed to have – was seldom a major consideration.

**IV**

In the next phase, which only occurred in the islands of New Zealand, several of the principal British players expected that the Crown and settlers would readily acquire possession of large amounts of land. This expectation, however, was confounded, not least because of native resistance to the New Zealand Company’s land claims, plunging the colony...