

## **British rights and liberties in Australia**

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In 1950 Robert Menzies anglophile par excellence planned an attack on British rights and liberties. To counter the threat of communism, he proposed that communists could be declared such by executive act; the onus of proof was to be reversed so that the declared person had to prove that they were not communists and the decision on whether they were communists was not to be made by a jury.

The Labor opposition, though under suspicion because of its connections to communists in the trade unions, had an easy task in opposing Menzies: they denounced the un-British nature of his measures and trumpeted the principles British justice. Doctor Evatt, shadow attorney general, declared that a bill of this character would not get a moment's consideration from the mother of parliaments.

The bill passed the parliament but the measure was declared unconstitutional by the High Court. Menzies then held a constitutional referendum to give the Commonwealth the necessary power to ban the Communist party. Evatt led the movement for a No vote. In the literature prepared for the campaign the Labor Party proclaimed that it stood for British justice and as the protector of Magna Carta and the rule of law.

Whatever Magna Carta's real position in Australian law, it was still a potent symbol of British rights and liberties. It played a bit part in the undoing of Menzies' attempt to ban the communist party

Evatt's win in the No case was the high point in his career even though he has other claims to fame as historian, jurist and a founder of the United Nations. When he was a judge on the High Court in the 1930s he published his most influential book *Rum Rebellion*, an account of the overthrow of Governor Bligh in 1808. Previously Bligh had been regarded as a tyrant; Evatt wanted to overturn that view and persuade his readers the governor was using his powers properly to stamp out the monopoly of the military officers in the trade in rum and support the small farmers who were the victims of the officers' stranglehold on the colony

The introduction to the book began with the words used by John Macarthur, the leader of the rebellion, in writing to his wife after the rebellion was successfully accomplished:

*I have been deeply engaged all this day contending for the liberties of this unhappy Colony and I am happy to say I have succeeded beyond what I expected...The Tyrant is now no doubt gnashing his Teeth with vexation at his overthrow.*

The purpose of Evatt's book was to show how false and self-serving those words were. The introduction proceeded to castigate all the historians who had been gulled by Macarthur. Evatt was particularly savage on Roderick Flanagan who had published his History of New South Wales in 1862. Flanagan concluded that this rebellion against Bligh had some similarity to the rebellion that gave England Magna Carta or at all events if Bligh did not occupy a position similar to that of King John, Macarthur, the officers and their adherents occupied a situation similar to that of the barons. On that interpretation Evatt heaped all the scorn at his command.

The battle between Bligh and his opponents was fought out in the courts where the officers constituted the juries. Evatt used his legal skills to support his thesis that 'vested economic interests successfully defied the... governors because they had the monopoly not only of wealth and violence, but also of justice'. The American scholar Hartley Grattan in his foreword to the book drew out the full implications of Evatt's argument in Marxist terms: the officer monopolists were the dominant class; the law is a superstructure of society raised on economic foundations, which inevitably precipitate social struggles.

In the 1940s 50s 60s when Marxist interpretations were strong in the academy Evatt's book was hugely influential. Angus and Robertson reprinted it six times. I was introduced to it in the Adelaide history department in 1962.

The Evatt thesis has since been demolished; first by Roger Hainsworth who showed that the officers' monopoly had long since passed with the arrival of emancipist and free emigrants into the commercial world. Then by Alan Atkinson who showed that there was wide dismay among the townsfolk of Sydney at Bligh's determination to knock down houses and make Sydney conform to Governor Phillip's plan for it. That gave the leaders of the rebellion a popular following. Finally that talented pair Richard Waterhouse and Grace Karskens see Bligh setting himself against all the freedoms and securities, the opportunities and enterprise of a thriving commercial colony and wanting to take it back to a self-sufficient peasantry of the original plan.

Evatt deals with Bligh's plans for Sydney. He sees virtue in Bligh conforming to Phillip's plans and nothing wrong in removing houses when there was no good title to them. It is true that townsfolk occupied their sites informally or on a lease held at the will of the Governor, but they might still have thought their home was their castle. This does not occur to Evatt. He does not see that a governor declaring a house must be destroyed could seem as arbitrary as the Australian government declaring a person a communist.

So Macarthur's boast to his wife that he had preserved the liberties of the colony no longer seems as self-serving as it did to Evatt. Undoubtedly the colonists, convicts included, thought of themselves as possessing rights and liberties which had nothing to do with the current form that the government of the colony took. The absence of a parliament or a representative Assembly did not take everything else away. The rule of law more or less operated in New South Wales. Everyone charged before a court was innocent until proved guilty and in the higher courts convictions came from juries albeit composed of the officers.

Sadly this was not known to the designers of the monument to Magna Carta that was unveiled in Canberra in 2001. One of the panels on the monument declared that ‘The early colonial settlements, founded mostly on convict labour, also imposed a system of justice at odds with the rights and liberties expressed in Magna Carta’. This for a society where convicts could own property and defend it at law and could not be punished except by order of a court. The government was civil not military. The historians who have given us a new view of the colony the British government planned at Botany Bay—Alan Frost, Alan Atkinson, and Andrew Tink—they have laboured in vain. Those words still stand on the monument.

Geoffrey Blainey who first made his mark on the academic scene in the 1960s was an economic historian but by no means a Marxist. He was not interested in the play of economic interests for he is strangely uninterested in politics and the state; his interest is in the creation and effects of economic processes. He is particularly interested in invention and technology. In his first big book *The Rush that never ended* published in 1963 he offered a new interpretation of Australia’s other rebellion, that of the diggers at Ballarat in 1854.

By 1854 mining at Ballarat meant deep sinking, not shallow holes but shafts of over a hundred feet or as Blainey says with his homely, helpful comparisons, as deep as an eighteen storey lift well. These took often five months sometimes nine months to dig—and still gold might not be found. This deep sinking he believed ‘was the key to understanding the armed rebellion of the Ballarat miners in 1854’. Everywhere the collecting of licence fees was an annoyance, but it was infuriating on the deep leads. Men had to come up from the depths to show their licences and licences had to be paid for longer before it could be determined that the digging was worthwhile.

It was an attractive thesis and seemed to bring more depth to the account of the rebellion. Fifteen years later Weston Bate published his history of Ballarat *Lucky City*. His chapter on Eureka, which I think is still the best thing on that subject, begins with a refutation of Blainey. Deep sinking since it began at Ballarat in 1852 had been associated with peace not strife. The largest protest against the licence fee was at Bendigo in 1853 where the sinking was shallow. Ballarat stayed quiet while the Bendigo protest forced the government into a reduction of the licence.

Bate’s account of Eureka invokes the traditional stories of licence hunts, the corruption of the officials, the arrogance of the gold field commissioners and the particular episodes that inflamed feelings—allowing Bentley the hotel proprietor to escape punishment for the murder of the miner Scobie, the harassing by the police of the servant to the Catholic priest. But this account is extended by highlighting how un-English the administration of the goldfields was: the heavy handed collection of tax, the magistrates not being independent gentlemen JPs but the official commissioners who were hearing cases on their own licence system. The commissioner system began in New South Wales but there fields were smaller and the commissioners more attuned to colonial ways, and not as in Victoria aristocratic puppies fresh off the boat.

Bate's account draws on and gives new credibility to the contemporary reports by the travellers William Howitt and William Kelly whose books were published in the 1850s. With Howitt we hear the diggers' voices. Here is their response to the police dragging off a respectable storekeeper because they suspected his horse was stolen. 'Is this a Christian country?' asked one digger. 'Is this an English colony,' asked another. 'No,' said a third. 'It's Rooshia.' That's the comparison that Howitt drew himself: not an English government but a Russian despotism which a high spirited free born people could not accept.

The diggers' protests sometimes broadened into demands for the vote or for access to land but what fuelled the whole movement was the feeling that the goldfields administration entailed a denial of traditional rights and liberties. During the Bendigo protest in 1853 the tents of the diggers refusing to pay the licence carried the placard 'No chains for free Englishmen'--a reference to the police chaining offenders to trees until the court met. Shades of the British government in the late eighteenth century deciding that they could not work convicts in chains on the roads because the public would not stand for it.

The accounts of the goldfields by William Howitt and William Kelly were drawn on by Henry Handel Richardson for the opening section of her novel *The Fortunes of Richard Mahony*. Like Howitt himself Mahony, the well-educated doctor, is disgusted at Germans and Americans thrusting themselves forward to lead the diggers protests and wanting to give them an anti-English republican direction. Mahony takes the platform at a protest meeting but this fastidious gentleman is shouted down as he tries to evoke enthusiasm for Britain's flag and its generosity to foreigners. His young friend Purdy follows him, still with the mud clinging to his clothes. Mahony now realises why he did not wash and change. This is Purdy's speech which is an elaboration of one William Kelly recorded in outline: Richardson follows Kelly exactly in the opening words: Brother Diggers.

*Brother Diggers! We are not met here to throw mud at our dear old country's flag! Nor will we have a word said against her most gracious Majesty, the Queen. Not us! We're men first whose business it is to stand up for the gallant little woman, and diggers with a grievance afterwards. Are you with me, boys?—Very well, then—Now we didn't come here tonight to confab about getting votes, or having a hand in public affairs—much as want 'em both and mean to have 'em, when the time comes. No, tonight there's only one thing that matters to us, and that's the repeal of the accursed tax. (a tempest of applause) Yes, I say it again, the instant repeal! When that's been done, this curse taken off us, then it will be time to parlez-vous about the colour of the flag we mean to have, and about going shares in the Government. But let me make one thing clear to you. We're neither traitors to the Crown, nor common rebels. We're true-blue Britons, who have been goaded to rebellion by one of the vilest pieces of tyranny that ever saw the light.*

Fighting against tyranny is part of our story of the goldfields; true-blue Britons fighting tyranny: that's the element that's often forgotten.

There is a strained attempt in popular history in schools and on TV to link the diggers protest and Eureka to the coming of a democracy. But no sustained democratic movement emerged

from the diggings. Victoria would have adopted manhood suffrage without Eureka, just as South Australia and New South Wales did.

Bate helps us understand the lack of a sustained democratic movement. Once the licence and goldfields commission were swept away the basic loyalty and work centredness of the goldfields community reasserted itself. Ballarat did not become a hot-bed of radicalism. For tourism purposes it might now fly the rebel flag, but in the nineteenth century it was the most loyal of cities. When it finally erected a memorial to the diggers who died at Eureka it included the names of the dead soldiers as well.

In the last couple of decades the historical profession has not been much interested in the gold fields and democracy; it is the goldfields and racism that has come to centre stage. The anti-Chinese movement that began on the goldfields forms part of Australia's sorry record as a racist nation which culminated in the adoption of a racist national identity: White Australia.

Racism is an evil, but it is not a fixed and certain entity. This is commonly not recognised: commonly you are a racist or you are not. Once you are uncovered as a racist then your racism is as virulent and wicked as everyone else's. The historian of racism cannot proceed in this way; racism grows and declines, though it might not disappear; its strength varies; it takes different forms and targets different objects, it is subject to a variety of constraints, personal and institutional.

There are commentators who declare Australia is still a racist nation--there are undoubtedly some racists and some racism here but Australian racism cannot be as strong as it was in 1901 when Asian immigration was prohibited. Australian racism cannot now be as strong as Germany's where until recently you had to possess German blood to become a citizen; or as strong as Japan's where its no-immigration principle is only now being questioned.

Comparisons are helpful in taking the measure of racism. In 1979 when the uncovering of racism in Australia's past was in full swing, Andrew Markus published a book comparing the treatment of the Chinese in California and Australia. Markus reports American gold diggers were accustomed to a racial hierarchy; before they arrived in California they knew whites were superior to negroes. So from the jump they treated the non-white Chinese as inferiors too. In Australia at first there was little hostility to the Chinese; they were regarded as a civilised people and there was a deal of curiosity about their customs. But hadn't racism already got a firm hold in Australia because of the destruction of the Aborigines? Markus found that no-one thought of Aborigines and Chinese together as belonging to inferior races. By 1900 that link was made but not in the 1850s. The hostility to the Chinese grew in the particular circumstances of the goldfields: with the Chinese keeping themselves apart and gold becoming harder to get.

In Australia as distinct from California the rule of law extended to the Chinese. They were allowed to give evidence in court taking the oath in their own way. In magistrates courts they were treated fairly. In jury trials not so well. On occasions, not very often, the European diggers drove the Chinese off the fields. Colonial officials in these cases worked to reinstate them. Here the goldfield commissioners played an heroic part. At Tambaroora the

commissioner confronted o an anti-Chinese mob and declared ‘I will stand to be shot before I allow a Chinaman to be touched’.

As a result of the diggers’ hostility to the Chinese colonial governments severely restricted the flow of Chinese immigrants. Once the borders were secure, concerted moves against the Chinese on the goldfields ceased. They lived on in declining numbers. At Bendigo they held an honoured place for they put on a parade with dragons every Easter as they still do. Bendigonians nevertheless came with everyone else to believe in the white Australia policy. In a recent PhD Amanda Rasmussen puzzles over the relationship between local and national attitudes to the Chinese in Bendigo. She tells of Councillor Carolin, an Australian- born progressive reformer , who wanted to clean up and dignify Bendigo. He called for the houses in the Chinese camps to be destroyed; one group of these was not tucked away but at the end of the main street. It looked like he might get his way but he never did. The council stalled; it asked for reports from police and health officials. They found some unhealthy buildings but not too much worse than some low class European buildings. The smell so much complained of at the town camp came not from the Chinese but the manure depot the council had located in their midst. Some of the Chinese dwellings had European landlords who would not spend on repairs. Destroying houses is a serious step. One of Carolin’s opponents on the council declared the King himself had no power to interfere with the freehold or residence titles held by the Chinese.

On this matter and in other aspects of Bendigo’s life Rasmussen finds that Europeans thought that the Chinese should have fair play. They were more likely to believe that because not all the Chinese lived in the camps; some lived among the rest of the population and were in regular work or owned businesses.

Fair play is an English term that comes from sport. The English believed that sport was a preparation for life and attitudes formed there should be applied to life generally. English sport came to Australia and with it the notion of fair play. Fair play is the origin of the Australian term fair go. In one of Evatt’s speeches against the Communist Party Dissolution Bill, he used fair play, fair go and the principles of British justice interchangeably.

I have been demonstrating the strength of the appeal to British rights and liberties in Australia. And now I am pointing to a British origin of the Australian fair go. This goes against the nationalist tendency to see Australian society moving away from Britain and becoming more distinctive. Much better to see Britishness embedded within Australia. Much better to think of British culture being reinterpreted in Australia, which is Weston Bate’s formulation. Or better to read David Malouf’s wonderful essay on Australia entitled ‘Made in England’. But this is a message I don’t have to underline to those prepared to gather in Sydney to celebrate the anniversary of Magna Carta.