

views about God, or may be dull of wit. For discovery applies to those things which belong to no one.<sup>1</sup> Clearly Cook and the whole ship's company knew that the entire long coastline was occupied by the Aboriginal people, even if their actual contact with them was limited.

This brings us to an even more contested question. Did Cook's claim of possession dispossess the resident Indigenous nations? Many commentators have believed that it did. Cook's secret instructions of 30 July 1768 are frequently referred to. They included the following injunction: 'You are also with the consent of the Natives to take Possession of Convenient Situations in the name of the King of Great Britain; or, if you find the Country uninhabited take Possession for His Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.'<sup>2</sup>

The two parts of these instructions are quite different. Many commentators have argued that Cook wilfully disobeyed the injunction to gain the consent of the natives. But he nowhere attempted to take possession of convenient situations with an eye on future settlement, which was not being considered at the time. But the second part of the instructions opens up an array of problems. Did Cook wilfully behave as though eastern Australia was uninhabited when he knew full well that it wasn't? If so, it was a serious dereliction of duty with little basis in either international law at the time or widely accepted morality. The most pertinent illustration of contemporary standards can be found in the material presented to him by James Douglas, the 14th Earl of Morton, on behalf of the Royal Society, which had sponsored the voyage

## THE FIRST SOVEREIGN NATIONS

into the southern seas. Writing about the Indigenous people that the voyagers would encounter, Morton observed that they should be seen as 'the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit' and that even conquest of 'such a people can give no just title'.<sup>3</sup>

But much of the discussion relating to Cook's claim of possession proceeds without a clear understanding about what such assertions meant at the time. By the late 18th century, the purpose of claims based on 'discovery' were well understood, and many of the European maritime powers employed them as a means to stake out spheres of influence in other parts of the world and thereby seek to avoid perpetual conflict. Cook's claim was directed at Britain's European rivals, not at the First Nations living along the east coast. There is an intimation of this proposition in the fact that he referred to the bays, harbours and rivers while making no mention as to how far inland the claim reached. The American jurists, not surprisingly, provided the clearest definition of how a claim based on 'discovery' related to Indigenous peoples. Chief Justice John Marshall of the American Supreme Court determined in a famous case, *Worcester v Georgia*, in 1832 that such claims 'asserted a title against Europeans only and were considered as blank pages so far as the rights of the natives were concerned'.<sup>4</sup> In his study *Commentaries on the Constitution of the United States*, Marshall's colleague Joseph Story observed that the accepted rule was that discovery might 'properly govern all the nations, which recognized its obligation; but it could have no authority over the aborigines of America, whether gathered into civilized communities, or scattered in hunting tribes over the wilderness'.<sup>5</sup>