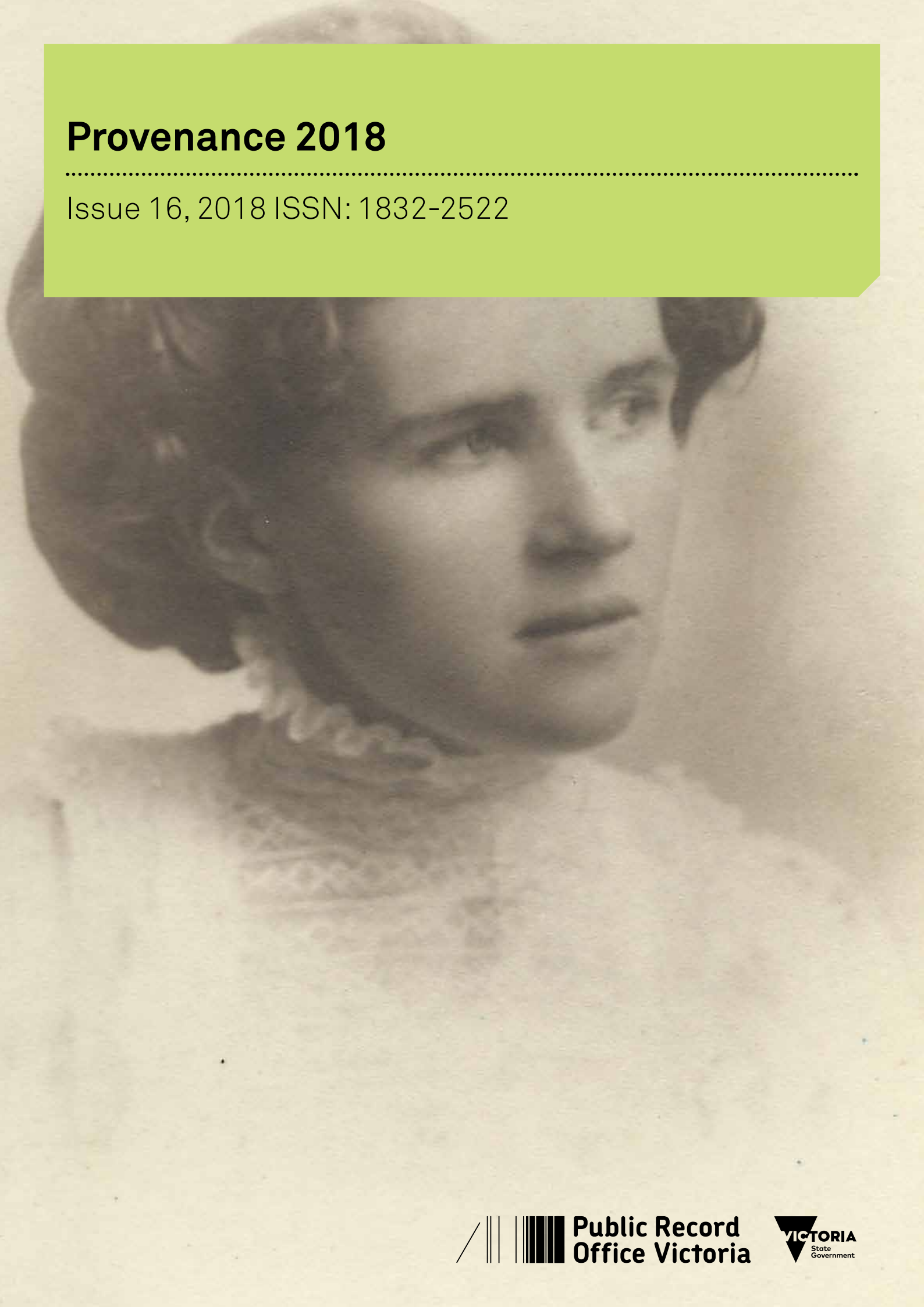
Provenance 2018

Issue 16, 2018 ISSN: 1832-2522



Public Record Office Victoria

VICTORIA State Government

Index

About Provenance

The journal of Public Record Office Victoria

Provenance is a free journal published online by Public Record Office Victoria. The journal features peer reviewed articles, as well as other written contributions, that contain research drawing on records in the state archives holdings.

Provenance is availe online at **www.prov.vic.gov.au**

The purpose of *Provenance* is to foster access to PROV's archival holdings and broaden its relevance to the wider Victorian community.

The records held by PROV contain a wealth of information regarding Victorian people, places, communities, events, policies, institutions, infrastructure, governance and law. Provenance provides a forum for scholarly publication drawing on the full diversity of these records.

Contact the Editor

Please direct any queries, comments and submissions regarding *Provenance* to the editor, who can be contacted by email at provenance@prov.vic.gov.au or by telephone on (03) 9348 5600, or post to:

The Editor, Provenance
Public Record Office Victoria
PO Box 2100
North Melbourne Victoria 3051
Australia

Provenance journal publishes peer reviewed articles, as well as other written contributions, that contain research drawing on records in PROV's holdings.

Editorial Board

The editorial board includes representatives of:

- Public Record Office Victoria access services;
- the peak bodies of PROV's major user and stakeholder groups;
- and the archives, records and information management professions.

An editor is appointed to the board to co-ordinate production of the journal and the activities of the editorial board. All board members are appointed to the board by the PROV Director and Keeper of Public Records for a period of two years.

- Tsari Anderson, Editor, Provenance; Coordinator, Koorie Records Unit, Public Record Office Victoria
- Dr David 'Fred' Cahir, Associate Professor of Aboriginal History, Federation University Australia
- Dr Sebastian Gurciullo, Assistant Editor, Provenance; Community Archives Officer, Public Record Office Victoria
- Dr Adrian Jones OAM, Associate Professor of History, La Trobe University
- Mike Jones, Consultant Research Archivist, The University of Melbourne
- Dr Antonina Lewis, Research Fellow, Centre for Organisational and Social Informatics, Monash University
- Dr Seamus O'Hanlon, Associate Professor of History, Monash University
- Dr Dianne Reilly AM, FRHSV, Secretary, La Trobe Society
- Katherine Sheedy, Professional Historians Association (Vic) Inc.
- Dr Judith Smart, Adjunct Professor, RMIT University; Principal Fellow, The University of Melbourne
- Dr Rachel Standfield, Lecturer, Monash Indigenous Studies Centre, Monash University

Assessment of submitted articles

Assessment of all submitted articles is overseen by the editor in consultation with the editorial board. All articles intended for the peer reviewed section of the journal undergo double-blind peer review by at least two referees with expertise relevant to the submitted article. The editorial board also makes recommendations regarding the publication of informal articles in the Forum Section. For guidelines and information for authors interested in submitting an article to Provenance, see the Author Guidelines.

Available at **www.prov.vic.gov.au/explore-collection/provenance-journal/author-guidelines**

Open access policy

Provenance is an Open Access journal which means that all content is freely available without charge to the user or his/her institution. Users are allowed to read, download, copy, distribute, print, search, or link to the full texts of the articles, or use them for any other lawful purpose, without asking prior permission from the publisher or the author. This is in accordance with the Budapest Open Access Initiative (BOAI) definition of Open Access.

Archiving of journal

Provenance is archived regularly in PANDORA, Australia's Web Archive, which is a growing collection of Australian online publications, established initially by the National Library of Australia in 1996, and now built in collaboration with nine other Australian libraries and cultural collecting organisations.

The name, PANDORA, is an acronym that encapsulates the web archive's mission: Preserving and Accessing Networked Documentary Resources of Australia.

Since 2015, the journal has been aggregated and indexed as full text on the Informit Humanities and Social Science database.

Copyright

The authors who contribute to Provenance must clear any copyright for material and images in their articles before their articles are published. It is the responsibility of the author to supply copies of images or other material that will be published in the article.

Copyright in each article remains with the author of the relevant article. Authors have the right to publish their articles elsewhere subject to acknowledgment of prior publication in Provenance.

Users of the Provenance website may have rights to reproduce material from this site under provisions of the Commonwealth of Australia's Copyright Act 1968. In addition to any such rights, unless there is a statement to the contrary, the author of each article has given permission for physical or electronic copies of the text and graphics in that article to be made for classroom or research use, provided:

- Copies are distributed at or below cost;
- The author and Provenance are attributed on each copy;
- Notice of relevant copyright ownership is attached to each copy; and
- The Editor, Provenance, is notified of the use within one calendar month of use.

Editorial

Welcome to the 2018 issue of *Provenance*. The four peer reviewed and four forum articles in this issue demonstrate the scope of material available to researchers and writers utilising Victorian archival collections to inform original research. A feature of the issue is the use of detailed case studies that bring to light new insights into broader trends and present new understandings about the history of Victoria. There is a focus on nineteenth-century research, covering a range of records produced by the colonial and Victorian state governments, which highlights how the records of our state can illuminate and inform studies of our past and present. The articles in this issue show the various ways in which the intersection of private interests, legislation and the decision-making of government came together in areas of land management and ownership, public health policy and the law to affect the lived experiences of Victorian people.

In the peer reviewed section, three articles utilise case studies from the goldfields region of Victoria to highlight aspects of health, legal and land use history during the nineteenth century.

Smallpox was a significant public health issue facing the colony of Victoria, and particular challenges were presented by the burgeoning populations of the goldfields region. Victoria led the way in introducing compulsory vaccination for smallpox in Australia, and it was successfully implemented due to the combined effort of the medical profession, public vaccinators and the central and local boards of health. Nicola Cousen's article, 'The smallpox on Ballarat', shows how the development of this policy and its implementation played out in the unique environment of the Ballarat goldfields during the 1850s.

Peter Davies, Karen Twigg and Susan Lawrence researched the extensive collection of Crown land records at Public Record Office Victoria (PROV) for their case study of the Inglewood Gold Field Common, established in 1861 as part of a broader commons system introduced in nineteenth-century Victoria. A little known aspect of the administration of public land in the mid-nineteenth century, gold fields commons provided a public resource for small-scale settlement around centres of mining activity. The common is revealed as a contested space, where competing interests and conflicts over land ownership and rights led to large portions being taken up through selection from the 1870s, while other land remains in public ownership to this day.

In 'The Big Hill murder and the colonial death penalty', John Waugh sheds new light on the administration of justice in colonial Victoria through the case of a well-publicised murder at Big Hill near Bendigo, for which George Nial was sentenced to death in 1860. Executive Council and other records for this time period held at PROV are a valuable resource, revealing details of confidential debates about decisions to commute death sentences and the use of the prerogative of mercy by the governor of Victoria, who had the ultimate power to decide whether a death penalty given by a jury would be carried out.

The sole twentieth-century article in this year's issue, Giorgio Marfella's study of 'ICI House and the birth of discretionary tall building control in Melbourne (1945–1968)', examines the decisions that led to the construction in the late 1950s of what is considered to be Melbourne's first skyscraper. Marfella argues that ICI House is symbolic of a change in the way that the building regulations were interpreted and implemented by the City of Melbourne to allow taller buildings than had previously been allowed. This involved a move from approvals for buildings based on traditional height limits to a culture of case-by-case decision-making based on a number of trade-offs between private interests and public benefit, thereby shaping the nature of the contemporary central business district (CBD).

The forum section is similarly diverse, with authors demonstrating the various ways in which original research can help to inform our knowledge of our built environment, make personal connections with our family history, and answer questions about the experience of those settling on and working the land in the nineteenth century.

Barbara Minchinton and Sarah Hayes' article, 'Dating Melbourne's cesspits: digging through the archives', discusses how the discovery of Melbourne City Council records at PROV have helped archaeologists working in the 'Little Lon' area of the Melbourne CBD to understand the waste management history of the site during the latter half of the nineteenth century. Being able to date the operation and closure of cesspits in the area, alongside other evidence, such as artefacts found in the cesspits, can provide a richer picture of the people who lived in Little Lon at that time.

Lauren Murphy presents an entertaining tale of 'The notorious Michael O'Grady: Big Mick in early Melbourne'. Big Mick was a colourful character whose petty criminality and Irish 'larrikinism' were frequently exploited for entertainment in the newspapers of the 1840s and 1850s. For Murphy, these light-hearted newspaper accounts, as well as letters from Big Mick himself (located in the records of the superintendent of the Port Philip District at PROV), are a glimpse into the kind of behaviour that helped to provide the basis for the emerging Australian character.

Records can contain personal details about the lives of ancestors. For Kath McKay, locating a detailed criminal trial record of the rape of her grandmother Ethel as a nine-year-old in 1895 was difficult. The way in which the trial was conducted highlights many of the difficulties faced by women and girls who made formal complaints against sexual assault. The case was significant in other ways; for example, it was the first time a woman doctor gave evidence in a Supreme Court trial. This doctor went on to be involved in the establishment of medical services specifically for women and children in inner Melbourne.

In 'The Best Land Act: hope and despair at Merton', Jennifer McNeice uses land selection files to construct case studies of the experiences of selectors in the Merton district, located in north-eastern Victoria, in the late nineteenth century. She examines the difficulties experienced by landholders under the Land Act 1884 that made reform necessary, and the subsequent impact on these landholders following the introduction of new land Act in 1898. These records show that, despite the optimism for change inspired by the minister for land Robert Best's consultative approach, these reforms did not always deliver on the hope they promised.

I would like to express my thanks to the members of the Provenance editorial board who play a significant role in providing oversight and advice for each issue:

- Dr Fred Cahir, Associate Professor of Aboriginal History, Federation University Australia
- Dr Sebastian Gurciullo, Assistant Editor, Provenance; Collection Management Project Officer, Public Record Office Victoria
- Dr Adrian Jones OAM, Associate Professor of History, La Trobe University
- Mike Jones, Consultant Research Archivist, The University of Melbourne (since January 2018)
- Dr Antonina Lewis, Research Fellow, Centre for Organisational and Social Informatics, Monash University
- Dr Seamus O'Hanlon, Associate Professor of History, Monash University
- Dr Dianne Reilly AM, FRHSV, Secretary, La Trobe Society
- Katherine Sheedy, Professional Historians Association (Vic) Inc.
- Dr Judith Smart, Adjunct Professor, RMIT University; Principal Fellow, The University of Melbourne
- Dr Rachel Standfield, Lecturer, Monash Indigenous Studies Centre, Monash University

I would also like to thank PROV colleagues: Carly Godden who provided editorial support for the forum section of this issue, Andrew Joyce for digitisation and online support, and Natasha Cantwell and Kate Follington for support with communications and online engagement. Rani Kerin brought her copyediting and proofreading expertise to the preparation of this issue of the journal for publication.

Tsari Anderson
Editor, *Provenance*

Refereed articles

The Big Hill murder and the colonial death penalty

'The Big Hill murder and the colonial death penalty', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

This is a peer reviewed article.

Dr John Waugh is a senior fellow in the Melbourne Law School, University of Melbourne.

Author email: j.waugh@unimelb.edu.au

Abstract

Capital punishment in colonial Victoria had a secretive, penultimate stage that has received comparatively little attention from historians. After a judge sentenced a prisoner to death, the governor of Victoria, advised by government ministers assembled as the Executive Council, decided whether, and when, the sentence would be carried out. The governor had the power to commute the sentence to a term of imprisonment, or even to grant a free pardon and release the prisoner. In reaching their decision, the governor and ministers had few constraints. They followed whatever procedure they chose, and relied on whatever grounds seemed appropriate to them. Their proceedings were confidential, ministers being bound by an oath of secrecy.

The minutes of the Executive Council are a source for the exercise of the prerogative of mercy that has had little systematic use by historians. In some cases, particularly in the 1850s and 1860s, the minutes record revealing details of confidential debates about whether to commute particular death sentences.

This article is a case study of the way the decision to commute a death sentence was reached. The Big Hill murder attracted intense public interest in 1860 and generated extensive records. These document the processes by which the governor and ministers decided to exercise the prerogative of mercy and commute the death sentence of a convicted murderer; they also record the prisoner's later attempts to clear his name. The case shows how commutation of a death sentence was influenced by official perceptions of the degree of certainty with which guilt was established, and illustrates the processes that authorities used to reach, and reassess, that conclusion.

Capital punishment in colonial Victoria had a secretive, penultimate stage that has received comparatively little attention from historians. After a judge sentenced a prisoner to death, the governor of Victoria, advised by government ministers assembled as the Executive Council, decided whether, and when, the sentence would be carried out. Their meetings were separate from meetings of cabinet. Exercising the royal prerogative of mercy, the governor had the power to commute the sentence to a term of imprisonment, or even to grant a free pardon and release the prisoner. In reaching their decision, the governor and ministers had few constraints. Aside from receiving a report from the judge who presided at the prisoner's trial, they followed whatever procedure they chose and relied on whatever grounds seemed appropriate to them. Their proceedings were confidential, ministers being bound by an oath of secrecy; however, the minutes of Executive Council meetings, particularly in the 1850s and 1860s, record revealing details of some of their debates about whether to commute particular death sentences.

Recent studies that have considered the prerogative of mercy in colonial New South Wales, Queensland and Tasmania have investigated the flexible nature of the process that was followed in administering the prerogative and the patterns that emerged in its outcomes, such as lower rates of execution of women prisoners.[1] A South Australian study highlights the severity with which former convicts were punished.[2] Other authors discuss the prerogative as part of legal and constitutional history, outlining controversies concerning the governor's role in its administration.[3] The main historical study of the prerogative in Victoria is a statistical analysis that considers the death penalty in the context of modern debates about sentencing policy. It shows that the proportion of prisoners executed declined steadily during the period of capital punishment, and points out the failings of the process followed in administering the prerogative of mercy when measured against standards of due process.[4]

The Big Hill murder attracted intense public interest in 1860 and generated extensive records, now at Public Record Office Victoria, that document the process by which the governor and ministers decided to exercise the prerogative of mercy and commute the death sentence of the man convicted of the murder, George Nial. The paper trail does not end with his imprisonment. Commutation of his death sentence prolonged the generation of official records, as Nial protested his innocence and tried from prison to have his case reviewed. By contrast, a hanging usually terminated official interest in a capital case.

The Big Hill murder

In 1860, work was under way to link Melbourne to Sandhurst (as Bendigo was then called) by railway. The Sandhurst line was both a construction site and a temporary home for the hundreds of workers building the track, many of whom lived in tents and huts nearby. In February 1860, one such worker was William Bronson, a timekeeper, whose task was to tabulate the number of workers building the track near Big Hill, not far from Sandhurst. He was about 27 years old and had been married to his wife Jane for only six months.

On the night of 21 February, Jane and William were in their tent when they heard a noise outside. William went to investigate. Jane immediately heard a gunshot. She rushed out and found, to her horror, that her husband had been shot and killed. She stated: 'I ... looked about to see if I could see anybody. There was nobody in view ... I then raised a fearful cry of murder, over and over again, no one came to me.'[5] The murderer had escaped, leaving behind no traces other than some fragments of paper wadding that were found near and underneath Bronson's body, evidently fired from the gun that killed him. Rumours that Jane Bronson was the wife of another man led the police to arrest her on suspicion of the murder. The rumours soon proved to be false, and Jane was released with an apology from the coroner, small consolation for what she had undergone.[6]

The police also arrested George William Nial, a 30-year-old Irishman who had served in the British army during the Crimean War before migrating to Victoria. He was working for the railway builders as a carter and lived about 9 kilometres from the Bronsons' tent.[7] Nial had fallen out with Bronson, who had wanted his job as timekeeper. When the police asked Nial about Bronson, his answers were vague and contradictory. He stated that he had been out shooting birds at the time of the murder. John McArthur, who lived between Nial's tent and the Bronsons', testified that he had been approached by a bearded man with an Irish accent who asked for a drink of water on the night of the murder. He picked Nial out of a police line-up as a man resembling the one who had approached him, but he could not swear that Nial was the man.[8]

Other than this inconclusive evidence, there was nothing to link Nial to the crime. The police were about to release him when they took the precaution of unloading two revolvers they had found among the eight firearms in Nial's tent. Police Sergeant James Babington testified that the wadding from the revolvers consisted of fragments of newspaper. After days spent piecing the fragments together and searching newspaper archives, Babington and his colleagues found that the wadding came from the same newspaper articles as the fragments of paper found at the scene of the crime. What was more, a fragment of paper from one of Nial's revolvers joined up exactly with a piece of gun-wadding found under Bronson's body by the surgeon who had examined the corpse at the scene.[9]

Nial was rearrested and put on trial at Sandhurst for murder. As one of the detectives observed, the paper wadding was 'the strongest portion of the evidence' against him.[10] To rely on technical evidence of this kind in 1860 was unusual, but it was not unique. The standard English legal text on circumstantial evidence gave several examples in which the matching up of torn paper provided crucial evidence.[11] Some of these examples were cited by the judge at Nial's first trial. Also, as Judith Flanders has observed, 'identification of a murderer by gun-wadding had a long pedigree in literature'.[12] The solution of a murder by matching up fragments of paper wadding had featured in novels by Elizabeth Gaskell (Mary Barton, 1848) and Charles Dickens (Bleak House, 1852–1853).

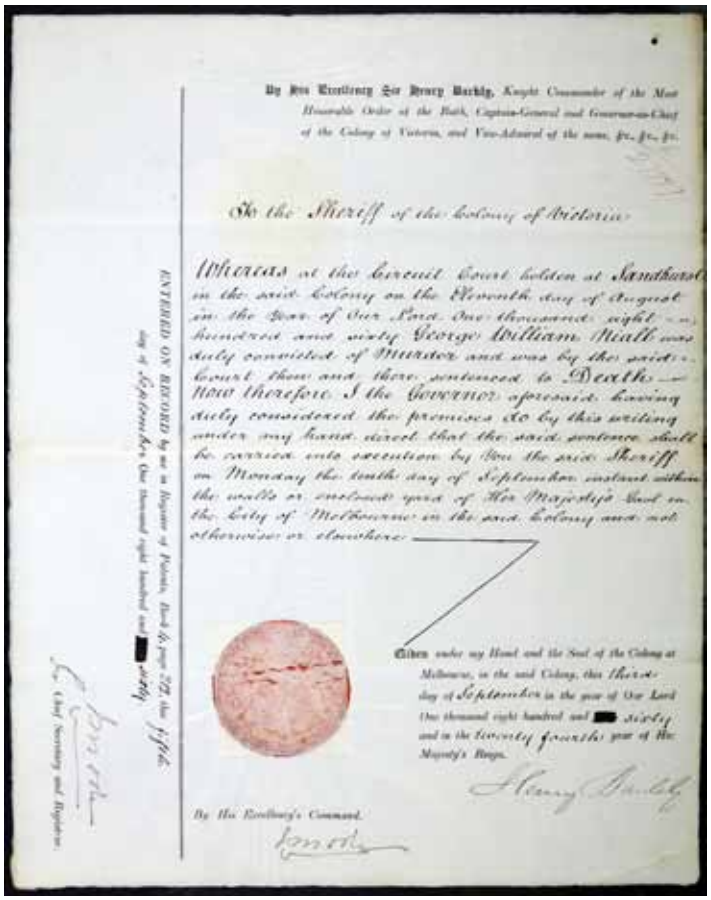
At Nial's first trial, the jury failed to agree on a verdict after one of its members 'stated that he could not "conscientiously convict, as it was all supposition against the prisoner, as given by his Honor and the crown lawyer", but that he (the juryman) "supposed the prisoner was guilty, but could not swear to it"'.[13] At a second trial, the jury found Nial guilty but recommended mercy 'on the ground of the Evidence being Circumstantial'. However, the jury added that: 'In our own consciences, we feel him Guilty.'[14] Nial received the mandatory death sentence.

Before Governor Sir Henry Barkly met with the Executive Council to consider Nial's case, the doubts surrounding his conviction grew. On 13 August 1860, two days after Nial was convicted, a Sandhurst baker named George Jackson signed a statement contradicting the police evidence about the newspaper fragments. He stated that had helped Babington take the wadding out of Nial's guns three or four days after the murder and that the wadding was plain paper, not the newspaper described by the police. Jackson also claimed that Babington had boasted about the money he could get 'if he "could make a good job of it"'.[15] Babington and two other police officers did indeed later share a government reward of £100 for Nial's apprehension, although (as the police pointed out) no reward had yet been offered when Jackson said he saw Babington.[16] William Wood, Jackson's employee, signed a statement relating a conversation he had had with Jackson in which Jackson described meeting Babington and seeing the plain wadding.[17]

When, on 3 September, the Executive Council considered Nial's case, Attorney-General John Dennistoun Wood brought the newspaper fragments to the meeting. Members examined them for themselves, although without the presence of any of the witnesses who could identify the fragments and say where they were found. The council's minutes recorded that the match between the pieces of newspaper was 'so conclusively ascertained, as to leave no doubt on [sic] the minds of His Excellency & the Council of this material link in the chain of circumstantial evidence, having been fully established'.[18] The council also considered George Jackson's statutory declaration, along with police reports questioning details in Jackson's statement, and letters from Edward Hunt, the surgeon who examined the body, ruling out the possibility that the newspaper pieces he found had been tampered with.[19]

In reaching their decision, members of the Executive Council had the assistance of the judge who presided at Nial's trial, acting Supreme Court judge Robert Pohlman. In accordance with British government instructions to colonial governors, the trial judge in a capital case reported to the governor before a decision was made to carry out or commute the sentence.[20] Pohlman attended the Executive Council when it first considered Nial's case. He commented 'at great length' on the evidence and concluded that 'he thought the prisoner was guilty, but on general principles had considerable doubt about expressing his opinion as to whether the recommendation of the Jury should or should not be acquiesced in by the Executive'.[21] The minutes of the meeting did not explain Pohlman's doubts about endorsing or rejecting the jury's recommendation; he may have believed that it was inconsistent with judicial independence for him to advise the governor how to exercise his power to commute a death sentence, as distinct from providing information about the case. The roles of governors and judges in capital cases became controversial in the 1870s and 1880s, with the result that the British instructions to Australian governors were changed.[22]

Persuaded by the evidence of the paper fragments, the Executive Council unanimously advised Barkly that Nial's death sentence should be carried out. Barkly agreed. On 3 September, he signed Nial's death warrant. It still survives, directing that the sentence of death 'shall be carried into execution' by the sheriff (the official responsible for carrying out the orders of the Supreme Court) a week later (see Figure 1).[23]



By His Excellency Sir Henry Barkly, Knight Commander of the Most Honorable Order of the Bath, Captain-General and Governor-in-Chief of the Colony of Victoria, and Vice-Admiral of the same, &c. &c. &c.

To the Sheriff of the Colony of Victoria.

Whereas at the Circuit Court holden at Sandhurst in the said Colony on the Eleventh day of August in the Year of Our Lord One thousand eight hundred and sixty George William Neall was duly convicted of Murder and was by the said Court then and there sentenced to Death — Now therefore I the Governor aforesaid having duly considered the premises do by this writing under my hand direct that the said sentence shall be carried into execution by You the said Sheriff on Monday the tenth day of September instant within the walls or enclosed yard of Her Majesty's Gaol in the City of Melbourne in the said Colony and not otherwise or elsewhere —

Given under my Hand and the Seal of the Colony at Melbourne, in the said Colony, this third day of September in the year of Our Lord One thousand eight hundred and sixty and in the twenty fourth year of Her Majesty's Reign.

Henry Barkly

By His Excellency's Command.

ENTERED ON RECORD by me in Register of Patents, Book &c. page 272 the fifth day of September One thousand eight hundred and sixty

Figure 1: Nial's death warrant, addressed to the sheriff of the colony of Victoria, 3 September 1860, VPRS 1189/P0, Unit 702, Item 60/7997.

The details of Jackson's statement had been widely reported, and the subsequent confirmation of Nial's death sentence led to protests in Sandhurst. Regarding the case against Nial, the *Bendigo Advertiser* observed that 'the taking away of a man's life on such evidence as this, is no better than murder'.[24] On 7 September, Jackson appeared at a public meeting said to have been attended by 1,500 people, at which he reaffirmed his statement, 'adding amidst extraordinary sensation that he had not been communicated with by Government'.[25]

Civil rights and the due administration of justice were taken up by other speakers, indignant that the state was about to take the life of a man seemingly without proper investigation of new evidence. Wesleyan clergyman James Bickford told the meeting: 'Let them send down a monster memorial to show that as subjects of the British Empire in this country, they protested against such an infringement of their rights and liberties. (Applause, and a voice, "No Lynch law in this country.").'[26] The meeting adopted a resolution—forwarded to the premier in a telegram—expressing 'utmost astonishment' that Nial's execution had been ordered without what it called the 'necessary & promised enquiry'.[27] A deputation left for Melbourne to see the governor, and a petition calling for an investigation of Jackson's statement was signed by 15 members of the juries at Nial's two trials, as well as hundreds of other citizens.[28]

In response, Governor Barkly ordered a reprieve for Nial to allow further investigation of Jackson's statement. The Executive Council could have summoned Jackson and heard from him in person. In two cases in 1853, the council examined a number of witnesses in person, to establish whether prisoners under sentence of death were insane.[29] However, these time-consuming proceedings had fallen into disuse. Barkly 'was adverse to making use of the Executive Council for such investigation' and, on 10 September, he and his ministers decided 'that the investigation into Jackson's statement should be made by the Law Officers, the Government Shorthand writer being present and that Prisoner's counsel should be allowed to watch the enquiry and to suggest questions'.[30]

It was not unusual for the law officers (the attorney-general and the solicitor-general) to investigate a capital case for the Executive Council; however, to keep a shorthand record of the investigation and allow the prisoner's barrister to participate, even if only by suggesting questions, was exceptional. Moreover, reporters were allowed to watch proceedings, and the transcript of the investigation was released to the newspapers, probably with a view to placating public concern about Nial's case.

The inquiry began on 12 September. The attorney-general and the solicitor-general were present, along with Chief Commissioner of Police Frederick Standish, Nial's government-appointed barrister, Joseph Helm, and the member for Sandhurst in the Legislative Assembly, Robert Howard, who was part of the delegation sent from Sandhurst to Melbourne to seek an inquiry into Jackson's statement.[31]

Jackson confirmed and amplified his statement, while Hunt and Babington reaffirmed the evidence they had given in court, Babington adding that Jackson had called at his quarters while he was sorting (but not extracting) the wadding from Nial's revolvers. Concerning the place where the guns were first unloaded, the nature of the wadding, and the date and substance of Babington's conversation with Jackson, their testimony was flatly contradictory.

William Wood again recounted his conversation with Jackson, although he now said that it had occurred closer to the date of the murder. An auctioneer, Joseph Aarons, called Jackson's honesty into question by testifying that Jackson had tried to use a forged receipt to reduce a debt he owed. Jackson denied the allegation.

There were other witnesses who had not yet been questioned, the most important being Detective Simon O'Neil. He testified at Nial's committal hearing that he saw Babington unload Nial's guns and that the wadding consisted of pieces of printed paper; as to both the place and the date, his evidence was consistent with that of Babington. Illness kept O'Neil from attending the inquiry until it resumed in October, when he confirmed his earlier evidence.

Barkly wanted a decision. 'Long delays in carrying out Capital Punishment are very undesirable', he wrote.[32] On 14 September, the Executive Council considered Nial's case again. No written report summarised the findings of the inquiry, although the law officers informed the Executive Council of their (unrecorded) impressions of the evidence. The transcript of the inquiry was available for ministers to read. The council also had before it a petition from eight of the 12 members of the jury who had found Nial guilty, saying that they would not have done so if they had known about Jackson's statement. Five members of the deadlocked jury at Nial's first trial also signed.[33]

Premier William Nicholson prejudged the outcome of the inquiry by telling parliament on 7 September that the court and the executive would prove to have been right.[34] His comment is a sign of the conservative bias inherent in the administration of the prerogative of mercy, in the sense that governors and ministers were more likely to affirm than commute sentences of death, although, in Nicholson's favour, it might be said that he spoke only after considering the evidence given at the trial and Jackson's written statement. By contrast, the attorney-general took nothing for granted, as is shown by his detailed instructions for investigations into the case.

The Executive Council decided that the evidence was 'not sufficient for them to recommend that the capital sentence should be carried into execution'.[35] Barkly agreed. Nial's sentence was commuted to life in prison with hard labour, the first three years in irons. Nial later wrote that this was 'a sentence infinitely worse than the first'.[36] He was not the only prisoner to say that a life sentence was worse than hanging.[37]

Most details of the murder were little debated after Nial was found guilty. Public comment on his fate centred on Jackson's statement and the government's response, rather than the events of the night of Bronson's death or Nial's background and movements. Journalists and correspondents debated the weight given to circumstantial evidence, contrasted with the testimony of eyewitnesses. The *Bendigo Advertiser* and the Melbourne Age sparred over the details of the evidence concerning the newspaper fragments. According to the *Age*, Jackson's statement could 'only be received with caution and suspicion'—it regarded the evidence on both sides as 'most singularly and lamentably unsatisfactory'.[38] The *Advertiser* retorted that it was enough that Jackson's statement threw more doubt on the evidence against Nial, although—like the jury—it did not argue that Nial was innocent: 'Public opinion almost immediately recognised the inconclusive nature of the evidence, and although there was a general opinion that Nial was the murderer, there was also a general opinion that the evidence had failed to show this.'[39] The handling of the case was regarded as yet another blunder by the Nicholson ministry, of which the *Advertiser* was a long-standing critic: 'the very soul and essence of good Government is disappearing, and the people have to govern themselves'.[40]

The theme of this and much other comment was the doubt created by Jackson's evidence, rather than an alternative account of what had happened to the newspaper fragments or of how Bronson met his death. Such doubt was, after all, sufficient to undermine the jury's verdict.

If an explanation for the undisputed match between the various paper fragments was implied, it was that Babington had taken some of the fragments found at the scene and falsely presented them as wadding from Nial's revolvers. Newspapers criticised the carelessness of the police in not securing the guns and paper fragments in such a way as to exclude the possibility of tampering. However, if the evidence of Dr Hunt and Detective O'Neil was correct, Babington never had sole custody of both the guns and the fragments before the various pieces of paper were matched up at Nial's committal hearing, and had no opportunity to take the pieces found at the scene and link them with the guns.

The *Argus* highlighted the apparent contradiction involved in imposing a life sentence on the grounds that the evidence against the prisoner was doubtful: 'The commutation of Nial's punishment is a palpable absurdity. It is acknowledging that, in the opinion of His Excellency's legal advisors, the man might have been acquitted, and this opinion procures him the boon of a life-long imprisonment, instead of death.'[41] The *Argus* argued that Nial should have been granted a new trial; however, that was beyond the governor's powers.

Yet, the Executive Council did not, in fact, conclude that Nial might have been acquitted. They acted on an unstated principle that evidence of guilt could be clear enough to support imprisonment and yet not sufficient for execution. Nial's jurors made the same assumption when they found him guilty but recommended mercy on the grounds that the evidence was circumstantial. This recommendation, too, was criticised. The *Bendigo Advertiser* argued that doubts about the evidence should have influenced the jury's verdict rather than the sentence.[42] For the jurors, as for the Executive Council, if there was conceivable doubt about guilt, the punishment should be imprisonment instead of death.

Imprisonment and release

Nial began his life sentence at Pentridge Prison in September 1860. Prisoners spent the first part of their sentences under the 'separate system', in silence and isolation, forced to wear hoods whenever they left their cells.[43] Nial kept his spirits up, at least for some of the time; he was reprimanded for whistling and dancing. Such behaviour broke prison rules, as did singing, talking and using his own name instead of his prison number (see Figure 2).[44]

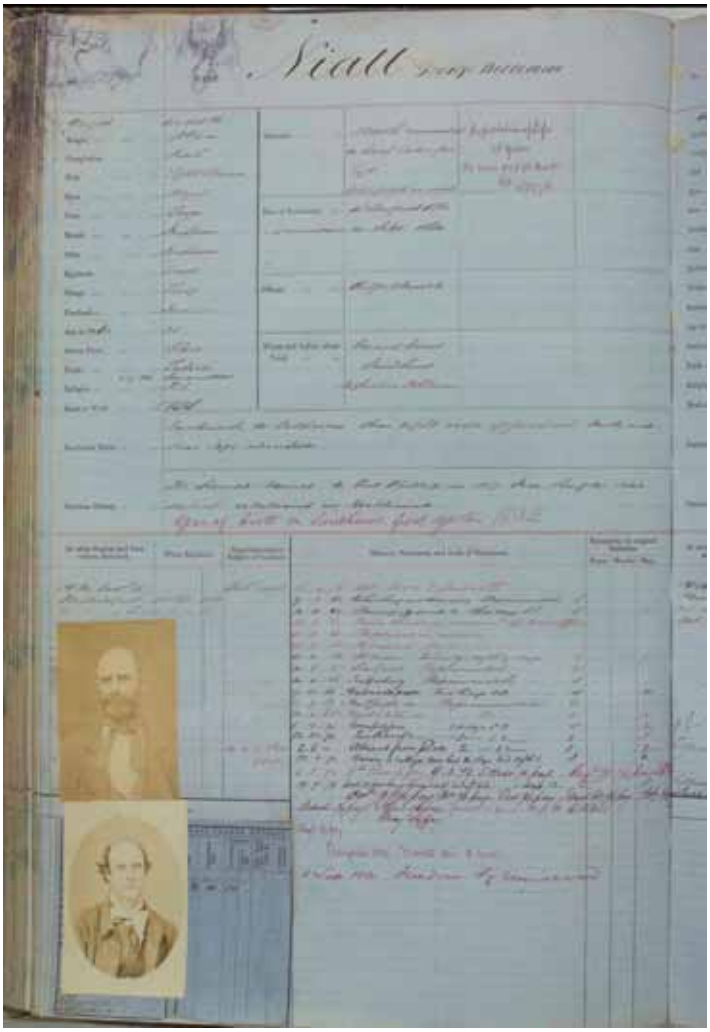


Figure 2: George William Niall's prison register entry, VPRS 515/P0, Unit 8, No 5275 GW Niall.

Public debate about the Big Hill murder largely ceased when Nial's sentence was commuted. However, in private, petitions written by Nial, or on his behalf, called for a review of his case. Their contents suggest that he wrote without legal advice and, at least initially, without access to newspapers or other records. Two Irish Roman Catholic laymen, Hugh O'Loghlen of Smythesdale, near Ballarat, and James B Hickie of St Kilda, signed petitions on his behalf, indicating that Nial, who was said to have a sister in the colony, drew on networks of Irish migrants in Victoria.

A letter from Nial to Henry England, Roman Catholic chaplain at Pentridge, began: 'It is five years since I was convicted of a crime I never committed, and believe my treatment to have no parallel in the history of British jurisprudence.'[45] In Nial's accounts of the Executive Council inquiry, Jackson conclusively disproved the evidence against him in the presence of the governor or a bench of judges, and a member of the jury declared that Nial would not have been found guilty if Jackson's evidence had been presented. Nial claimed that the evidence of the newspaper fragments was unreliable, even absurd: 'That bits of newspaper should be taken as evidence sufficient to take away a man's life in a British Court of Justice!!!'[46] Nial sought a new trial, a new verdict from the jury taking into account Jackson's evidence, a reduction of sentence, or freedom.

In 1871, Nial drew together his grounds for review in a 19-page statement sent to the premier.[47] The dates and details cited there suggest that he now had access to some newspaper reports of his case. As appeals based on Jackson's statement had had no effect, he ranged more widely, attempting to answer the prosecution case point by point. However, without new evidence, he had little chance of persuading the authorities to take action.

Nial's widowed mother, Johanna Nihill, petitioned both the governor of Victoria and the queen on her son's behalf.[48] Written from Ireland, her petitions used the same grounds, and some of the same language, as petitions written for him in Victoria, with the addition of an account of his service in the British army. To bolster Nial's case, she asked former governor Sir Henry Barkly for a certificate endorsing her summary of the events leading to the commutation of Nial's sentence. Barkly replied that he remembered the circumstances of the case, 'which though by no means establishing the Prisoner's innocence were sufficient to raise doubts as to some portion of the evidence given at the Trial'. He referred her petition to the current governor of Victoria.[49] Nihill's petition to the queen also reached the governor in Melbourne, referred by the secretary of state for the colonies with a request for a report. The result was an examination of the case by Archibald Michie, minister of justice since 1863.

In a memorandum for the governor, Michie emphasised, indeed exaggerated, the strength of the evidence against Nial:

> The prosecution was entirely supported by circumstantial evidence, but of so conclusive a character, and so entirely excluding any reasonable theory of the deceased having met his death by any other means, than at the hands of the Prisoner Niall [sic], that no ground can be suggested for questioning the propriety of the Verdict of Guilty, at which the Jury arrived.[50]

Michie stated the murderer had been described as resembling Nial, but he was mistaken; there was no description of the murderer, only of the man who asked for a drink of water between the scene of the crime and Nial's tent. However, his summary of the evidence concerning the pieces of wadding was accurate.

Despite weaknesses in details, Nial's petitions had one fundamental strength. The inquiry into Jackson's statement had resulted in the commutation of Nial's death sentence. As Nial himself wrote, in an awkward but pointed reference to the reason for his escape from hanging: 'Doubt, the ground of the reprieve, proved.'[51] This outcome implied that Jackson's evidence had some weight, and that the case against Nial was not as strong as it had seemed immediately after his trial. If the wadding evidence had been undermined, what basis remained for his conviction? The other evidence against Nial was hardly enough to support a guilty verdict. Michie dealt with this dilemma by disagreeing with the decision of the Executive Council, in effect rejecting Jackson's evidence outright. According to him, the death sentence should have been carried out.[52]

Michie's report became the reference point for official responses to petitions on Nial's behalf. Attorney-General George Higinbotham responded to Barkly's letter with a copy of Michie's report, adding:

> It is possible that the prisoner may be innocent, but it is only barely possible. And, seeing that the Executive has more than once done all that it could to sift the evidence on which the prisoner was convicted, & that no new evidence is stated to exist which might establish his innocence, the Attorney General submits that the sentence of the law should be carried into effect.[53]

The secretary of state was also sent a copy of Michie's report. It convinced one of the Colonial Office staff who reviewed the case in London that 'not only was the man most properly convicted, but that he ought to have been hung'.[54] All of Nial's petitions were rejected.

As a prisoner serving a life sentence, Nial could hope for release only through a fresh decision on clemency by the governor. Life prisoners, imprisoned with little hope of release, attracted the attention of maverick MP Dr LL Smith, who took up a recommendation by a royal commission that the government should consider their situation. In 1877, there were 25 prisoners serving life sentences. All had been sentenced to death and received commutations. Smith lobbied in parliament for something to be done to provide for their release. Urged on by his repeated questioning, the government responded at the end of 1877. A death sentence commuted to life imprisonment was now to be for a term equivalent to the life expectancy of the prisoner at the time of conviction, up to a maximum of 20 years, with reductions for good behaviour.[55]

Nial's life expectancy was judged to be 35 years from conviction, and he served the regulation 20 years. On his release in 1880 he wrote to the premier, Graham Berry. The sense of outrage and the heightened rhetoric of his earlier letters had faded. He now interested himself in prison reform and the policies of the inspector-general of penal establishments, George Duncan:

> I have been discharged from the penal department Pentridge after a service of twenty years. Mine was considered the doubtful case amongst the life prisoners. I am sorry to trespass on your time and patience, but I must venture to send you my heartfelt thanks together with those of the other prisoners whose life sentences have been commuted through your kindness and liberality in the face of much difficulty. Some in the conservative camp have been so cruel as to assert that it would make very little difference if we were scuttled in Hobson's Bay. I admit the truth of this, but it was a sign that there was no mercy to be expected from that quarter. Heaven grant that those who have shown such cruelty have themselves a clean defaulter sheet.
>
> If you wish I shall send you an account of the moral development of prisoners in the Department, and also its economical phase which may be useful to a statesman. There are great abuses going on which it is not possible for the public to know except from the pen of an old resident. Mr Duncan is doing no more than throwing sand in the eyes of the public, when he says that the Department is self-supporting.
>
> I left the Department on the 8th and I have been rather sickly ever since from the greatness of the change, but I am recovering fast. According to the rules of the Department I had earned £8, but Mr Duncan had £2 stopped for giving me a suit of clothes. I have great doubts as to whether the order from you to give the three first liberated life prisoners, namely, Leonard, Smith, and Jordan, has been countermanded for me [sic].
>
> With the deepest respect,
>
> I have the honor to be
>
> Sir
>
> your most obedient and humble servant
>
> George Nial.[56]

Berry sent no reply. With this last letter, Nial disappeared from the official record. Where he went and what he did are unknown.

James Babington remained in the police force until his death in 1881.[57] The later history of George Jackson was more eventful. He lived on in Sandhurst, where, in 1893, he gave evidence at an inquest into the sudden death of his wife, Jane, who died from the delayed effects of a blow to the head. Witnesses testified both to Jane's heavy drinking and to Jackson's aggravated violence towards her over a long period. Jackson's emphatic rejection of these accusations led the coroner to tell the jury, in unusually blunt terms, that he could not be believed as a witness: 'The evidence of Jackson, he pointed out, was entirely worthless. They could attach no importance to what Jackson had said because he had been guilty of the grossest perjury in endeavoring to shield himself.'[58] The jury returned an open verdict, unable to determine how the fatal blows or falls had been caused, but Jackson was charged with perjury. It emerged that he had urged his employees not to tell the truth about his violence, and dismissed one of them for testifying against him. Given the strength of the evidence against him, Jackson was fortunate to be acquitted on a legal technicality.

Conclusion

After a decision on a capital case had been reached, the Executive Council would occasionally note later information that confirmed their decision (or, exceptionally, information that led them to revisit a case and release a prisoner). In 1893, Nial's case was too far in the past for the council to notice the events following the death of Jackson's wife; however, had they shown an interest, they might have seen the coroner's assessment of Jackson's honesty as an indication that they had made the right decision.

In studying how the fate of condemned criminals was decided, historians have emphasised, in varying ways, the freewheeling nature of the process that led to commutation or execution, its outcomes influenced by conceptions of justice, moral judgements, cultural assumptions and policies of deterrence. In many cases, the governor and ministers weighed the gravity of the crime and the social utility of punishment, taking into account motive, premeditation, the backgrounds of perpetrators and victims, and the likely effects of their decisions.

Nial's case highlights a different aspect of the prerogative of mercy—the question of whether the prisoner was guilty and, if so, how clearly that guilt was established. The Executive Council concentrated, to the exclusion of most other questions, on whether the evidence against Nial was strong enough to support his conviction and the imposition of the death sentence.

The governor and ministers could form their own judgement on that question, independently of the jury's verdict. Influenced by public pressure, the unusual nature of the evidence and Governor Barkly's sense of appropriate procedure, in this case they ordered a public enquiry, conducted in the presence of Nial's barrister and reporters, in place of the usual confidential investigations into doubtful questions of fact. Nial's character, the events of the night of the murder and the deterrent purpose of capital punishment were pushed into the background by increasingly single-minded attention to the evidence of the paper fragments, on the part of both the authorities and the public.

Newspapers criticised the idea that Nial should be punished less severely if the jury or the Executive Council saw reason to doubt the evidence that he was guilty; however, that principle pervaded arguments that Nial should be spared from death, but not necessarily released from prison. Campaigning for Nial ceased when his death sentence was commuted. Public opinion seemed to be satisfied with the decision that he would be imprisoned rather than hanged, although his case was sometimes half remembered, with much confusion, as a miscarriage of justice.[59] It stands as an example of the way commutation of a death sentence was influenced by official perceptions of the degree of certainty with which guilt was established, and of the processes used by the authorities to reach, and reassess, their conclusions.

Endnotes

[1] Carolyn Strange, 'Discretionary justice: political culture and the death penalty in New South Wales and Ontario, 1890–1920', in Carolyn Strange (ed.), *Qualities of mercy: justice, punishment, and discretion*, UBC Press, Vancouver, 1996, p. 130; David Plater & Penny Crofts, 'Bushrangers, the exercise of mercy and the "last penalty of the law" in New South Wales and Tasmania 1824–1856', *University of Tasmania Law Review*, vol. 32, no. 2, 2013, pp. 295–343; David Plater & Sue Milne, '"All that's good and virtuous or depraved and abandoned in the extreme"? Capital punishment and mercy for female offenders in colonial Australia, 1824 to 1865', University of Tasmania Law Review, vol. 33, no. 1, 2014, pp. 83–140; HC Tait, 'Convictism to codification: the prerogative of mercy in colonial Queensland', *Australian Bar Review*, vol. 38, no. 3, 2014, pp. 319–331.

[2] Steven Anderson & Paul Sendziuk, 'Hang the convicts: capital punishment and the reaffirmation of South Australia's foundation principles', *Journal of Australian Colonial History*, vol. 16, 2014, pp. 93–110.

[3] See JM Bennett, 'The royal prerogative of mercy—putting in the boots', *Australian Law Journal*, vol. 81, no. 1, 2007, pp. 35–47.

[4] R Douglas & K Laster, 'A matter of life and death: the Victorian executive and the decision to execute 1842–1967', *Australian and New Zealand Journal of Criminology*, vol. 24, no. 2, 1991, pp. 144–160.

[5] PROV, VPRS 30/P0 Criminal Trial Briefs, Unit 137, 3-347-23, deposition of Jane Bronson, 25 February 1860.

[6] 'The murder at the Big Hill', *Bendigo Advertiser*, 27 February 1860, p. 2.

[7] The National Archives of the UK (TNA): CO 309/76, folio 559, petition of Johanna Nihill; PROV, VPRS 30/P0, Unit 137, 3-347-23, deposition of James Thorneloe Smith, 5 April 1860.

[8] PROV, VPRS 30/P0, Unit 137, 3-347-23, depositions of James Babington and John McArthur, 9 March 1860, and George Nial to JT Smith (undated).

[9] PROV, VPRS 30/P0, Unit 137, 3-347-23, deposition of James Babington, 5 April 1860; PROV, VPRS 266/P0 Inward Registered Correspondence, Unit 274, 74/6002, judge's notes of evidence, pp. 1–3, 9–10, 29–31.

[10] PROV, VPRS 30/P0, Unit 137, 3-347-23, report from Detective Simon O'Neil to Superintendent Charles Nicolson, 14 July 1860.

[11] William Wills, *An essay on the principles of circumstantial evidence*, illustrated by numerous cases, 3rd edn, Butterworth, London, 1850, pp. 97, 129–130, 139–141.

[12] Judith Flanders, 'The hanky-panky way', *Times Literary Supplement*, 18 June 2010, p. 14.

[13] 'Sandhurst Circuit Court', *Bendigo Advertiser*, 10 August 1860, p. 3.

[14] PROV, VPRS 266/P0, Unit 274, 74/6002, judge's notes of evidence, p. 41. Jurors said later that only three of them recommended mercy: 'The Big Hill murder', *Bendigo Advertiser*, 14 August 1860, p. 2.

[15] PROV, VPRS 266/P0, Unit 274, 74/6002, statutory declaration by George Jackson, 13 August 1860.

[16] PROV, VPRS 937/P0 Inward Registered Correspondence, Unit 437, bundle 2, S3341, memorandum from Frederick Standish to Superintendent of Detectives, 15 March 1861.

[17] PROV, VPRS 266/P0, Unit 274, 74/6002, statement by William H Wood, 13 August 1860.

[18] PROV, VPRS 1080/P0, Unit 6, p. 50.

[19] PROV, VPRS 266/P0, Unit 274, 74/6002, letters from Edward Hunt to Attorney-General, 30 August and 1 September 1860.

[20] Victoria, 'Governor's Commission and Instructions', *Votes and Proceedings of the Legislative Council*, Government Printer, Melbourne, 1855–1856, no. C 4, p. 4.

[21] PROV, VPRS 1080/P0, Unit 6, p. 50.

[22] See Bennett, 'The royal prerogative of mercy', pp. 36–47.

[23] PROV, VPRS 1189/P0 Inward Registered Correspondence I, Unit 702, 60/Q7997, death warrant, 3 September 1860.

[24] 'The police and circumstantial evidence', *Bendigo Advertiser*, 17 August 1860, p. 2.

[25] PROV, VPRS 1189/P0, Unit 702, 60/7997, telegram from JF Sullivan to Chief Secretary, 7 September 1860.

[26] 'Public meeting in Nial's case', *Bendigo Advertiser*, 8 September 1860, p. 2.

[27] Telegram from JF Sullivan to chief secretary, 7 September 1860.

[28] PROV, VPRS 266/P0, Unit 274, 74/6002, petition from Sandhurst and district.

[29] PROV, VPRS 1080/P0, Unit 1, pp. 238–240, 282. The prisoners were George Whitfield Pinkerton and John Goldman.

[30] PROV, VPRS 1080/P0, Unit 6, p. 60.

[31] 'The case of Nial, convicted of the Big Hill murder', *Argus*, 14 September 1860, p. 7; 'The Big Hill Murder', *Argus*, 18 October 1860, p. 5.

[32] PROV, VPRS 266/P0, Unit 274, 74/6002, minute by Sir Henry Barkly, 31 August 1860.

[33] PROV, VPRS 266/P0, Unit 274, 74/6002, undated petition from jury members.

[34] Victoria, *Victorian Hansard*, vol. 6, p. 1803.

[35] PROV, VPRS 1080/P0, Unit 6, p. 64.

[36] PROV, VPRS 266/P0, Unit 274, 74/6002, George Nial to Reverend Henry England, 18 August 1865.

[37] For example, 'The Russell Street tragedy', *Argus*, 24 August 1882, p. 9; 'The United Devonshire murder', *Argus*, 8 May 1890, p. 9.

[38] [Leading article], *Age*, 17 September 1860, p. 4.

[39] 'The Big Hill murder case', *Bendigo Advertiser*, 6 September 1860, p. 2.

[40] 'The public meeting in Nial's case', *Bendigo Advertiser*, 8 September 1860, p. 2.

[41] [Leading article], *Argus*, 18 September 1860, p. 4.

[42] 'The Big Hill murder', *Bendigo Advertiser*, 13 August 1860, p. 2.

[43] 'The Pentridge stockade', *Argus*, 6 January 1860, p. 5.

[44] PROV, VPRS 515/P0 Central Register of Male Prisoners, Unit 8, no. 5275; PROV, VPRS 3991/P0 Inward Registered Correspondence II, Unit 770, Regulations, 'A' Division, Penal Establishment, Pentridge, 1865.

[45] Nial to England, 18 August 1865.

[46] PROV, VPRS 266/P0, Unit 274, 74/6002, undated statement of facts on behalf of George W Nial.

[47] PROV, VPRS 266/P0, Unit 274, 74/6002, statement by George Nial, 4 September 1871.

[48] PROV, VPRS 1096/P0 Inwards Registered Correspondence, Unit 21, N/666, petition of Johanna Nihill; TNA: CO 309/76, folio 559, petition of Johanna Nihill.

[49] PROV, VPRS 1096/P0, Unit 21, N/666, copy of letter from Sir Henry Barkly to Johanna Nihill, 7 June 1866.

[50] TNA: CO 309/73, folio 208, memorandum by Archibald Michie, 23 August 1865.

[51] PROV, VPRS 266/P0, Unit 274, 74/6002, petition of George Nial to Viscount Canterbury, 15 April 1871.

[52] TNA: CO 309/73, folio 208, memorandum by Archibald Michie, 23 August 1865.

[53] PROV, VPRS 1096/P0, Unit 21, N/666, memorandum by George Higinbotham, 19 September 1866.

[54] TNA: CO 309/73, folio 206, minute by Charles Cox, 24 October 1865.

[55] Victoria, Parliamentary Debates, vol. 26, pp. 588–589; Victoria, Parliamentary Debates, vol. 27, p. 1921; Victoria, 'Life-sentenced prisoners', *Votes and Proceedings of the Legislative Assembly*, Government Printer, Melbourne, 1877, no. C2.

[56] PROV, VPRS 3991/P0, Unit 1178, 80/T9506, letter from George Nial to Graham Berry, 23 September 1880.

[57] 'News of the Day', *Age*, 16 June 1881, p. 2.

[58] 'The mysterious death at Golden-Square', *Bendigo Advertiser*, 15 May 1893, p. 3.

[59] 'The value of circumstantial evidence', *Bendigo Advertiser*, 8 September 1877, p. 1; 'The Big Hill murder', *Bendigo Advertiser*, 15 September 1877, p. 3.

ICI House and the birth of discretionary tall building control in Melbourne (1945–1965)

'ICI House and the birth of discretionary tall building control in Melbourne (1945–1965)', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

This is a peer reviewed article.

Giorgio Marfella is a graduate of the University of Florence (Italy), a registered architect in the State of Victoria and a lecturer in construction management and architecture in the Melbourne School of Design, University of Melbourne. As a full-time academic, he is engaged in research, teaching and industry engagement activities associated with tall buildings. For his doctoral thesis at the University of Melbourne, he completed a retrospective study on the evolution of tall office buildings in Melbourne and America during the second half of the twentieth century. Giorgio is a member of the Society of Architectural Historians, Australia and New Zealand and is active in the University of Melbourne's research centre ACAHUC (Australian Centre for Architectural History, Urban and Cultural Heritage), in which he participates with specific focus, expertise and interest in tall building design, technology and construction history.

Author email: giorgio.marfella@unimelb.edu.au

Abstract

In Melbourne, the modernist landmark of ICI House, a tall office building completed in 1958, is symbolic of urban development trends that, after World War II, dissolved building regulations based on height limits. Six decades later, ICI House—the iconic slab of glass and aluminium designed by Bates, Smart & McCutcheon—still represents the point of transition that transformed Melbourne into the tall building city of the present—a city in which architects and builders continue to challenge regulations and propose new ones on a project-specific basis. Documents held at Public Record Office Victoria provide important insights into the events that led to ICI House being approved.

The story of ICI House is the culmination of a public debate on regulations that began in Melbourne in the 1920s. In 1945, Uniform Building Regulations were released that confirmed a traditional building height limit set by fire-ladder lengths. Yet, these regulations left the door open for ad hoc modifications to be assessed on a project-by-project basis. Applications for amendments could be lodged by owners and architects and justified on several grounds, including preventing interference with the course of business. This regulatory ambiguity was the terrain on which a systematic approach of public–private negotiation flowed between architects (as the voices of developer–clients) and public authorities.

Public authorities did not take a passive role. To the contrary, discussions regarding the introduction of new principles of built form controls were initiated by the City of Melbourne in the late 1940s, well before the notorious height limit breaking deal of ICI House.

Private interests and building applications accelerated the process of urban transformation and, eventually, in 1964, led authorities to release new built form controls based on plot ratios. However, private interests coincided significantly with public ones. The positions taken by planning authorities were a fundamental element of causation and encouragement beneath the deregulated explosion of tall building activity that began in Melbourne in the mid-1950s and continues today.

Introduction

ICI House, a tall office building completed in 1958, is symbolic of a moment of change in the history of Melbourne. A modernist landmark, its construction marks the moment when prescriptive building height limits dissolved and a culture of discretionary assessment for high-rise projects began. The 60th anniversary of the completion of ICI House is a timely opportunity to revisit the events that led to the erection of a building that was much taller than what regulations of the time prescribed. Details of discussions and negotiations between the architects, the client and city planners are in documents held at Public Record Office Victoria. The planning commentaries of ICI House and other tall office building projects of the same period in Melbourne provide insight into a critical moment in the city's history and shed new light on the dynamics between private and public interests that spurred the beginning of modern high-rises in Melbourne and Australia.

Located at 1 Nicholson Street, East Melbourne, ICI House is an undisputed icon of modern architecture. Completed in 1958 to house the headquarters of the Imperial Chemical Industries of Australia and New Zealand (ICIANZ), the building was included on the Australian National Heritage List in 2005[1] and classified as highly significant by the National Trust of Australia (Victoria) as early as 1980[2]—during times when unsympathetic views about modern architecture were dominant. For the National Trust, the legacy of ICI House derives from it being a 'one of a kind' example of commercial architecture that anticipated 'the idea of trade-offs between height and public amenity in Australian cities' (see Figure 1).[3]

Figure 1: ICI House, 1–4 Nicholson Street, Melbourne, external view from Spring Street, PROV, VPRS 8609/P37, Unit 47, Item MISC G; aerial view showing height of ICI House relative to the rest of the city,1961, PROV, VPRS 8357/P1, Unit 4, Item 1–14.

Soon after its completion, ICI House was celebrated as one of the first skyscrapers in Australia and as an exemplar of orthodox ideas of modern architecture borrowed from the United States of America.[4] At the same time, the building was acclaimed as an Australian-made success of the postwar boom, above all by influential architect and critic Robin Boyd, who enthusiastically welcomed its 'non-featurist' philosophy of design.[5]

In addition to its architectural qualities, technological innovations and aspects of monumental significance (which have been discussed by Philip Goad[6]), ICI House is emblematic of a moment of change in Australian urban history. Thanks to a rule-breaking deal, the iconic tower was built higher than Victorian regulations permitted. Thus, ICI House embodies the birth of discretionary control in Melbourne and signals the beginning of the modern urban spurt of the twentieth century in Australian capital cities.

The history of inner city planning, building and development in Australian city centres after World War II (WWII) has been examined at a national level by Susan Marsden[7] and Miles Lewis has looked at the same processes at work in Melbourne.[8] However, the events that favoured the emergence of a new culture of planning control about building height after WWII have been only partially analysed; for example, there are studies of this nature that focus on Sydney[9] and Perth,[10] but the research on this topic for Melbourne in incomplete. A seminal contribution is the Master of Arts thesis completed at Monash University by Peter Mills in 1997 that focuses on the height limit regime of the first half of the twentieth century in Melbourne, which effectively tamed unregulated tall building activity.[11]

The completion of ICI House might be taken as a watershed in signifying the emergence of new ideas for the regulation of commercial developments in Melbourne's inner city. As Ben Schrader suggested, the image of metropolitan development that inspired Melburnians before WWII was that of Beaux-Art cities with uniform skylines such as Paris and Washington.[12] For most of the first half of the century, that urban vision—restrained by rigid height limits—appealed to authorities more than American high-rise metropolises such as New York, San Francisco and Chicago. However, after 1958, the latter vision for the inner city took over, as urban planners began to confront the problems of unprecedented metropolitan growth. Within this context, the approval of new height limits for ICI House uncovers the factors that contributed to that epochal shift in Melbourne, explaining why a single private commercial building was erected in apparent defiance of a well-established culture of public control and civic development that endorsed building height limits.

As this article focuses on a single building typology—tall office buildings—it cannot exhaust all aspects of enquiry for this crucial time of transition. Instead, the changes in building regulations in Melbourne after WWII are analysed using a bottom-up approach—that is, evidence is built up from a single project. Precedence is given, wherever possible, to information from Public Record Office Victoria (PROV) archives. Commentaries from other relevant sources, such as professional journals and newspapers, are used for reference; however, for reasons of brevity, these have not be treated exhaustively.

PROV and Melbourne's post-WWII tall buildings

From the late 1940s until the mid-1960s, there were several active City of Melbourne committees that oversaw town planning and building activity in the city, assessing private applications and making recommendations to the building surveyor. From 1945, the office of the building surveyor was the local authority responsible for verifying compliance with the Uniform Building Regulations (UBR) of Victoria.[13] The UBR was a statewide code that controlled building activity. In the absence of a comprehensive town planning scheme (which Melbourne did not adopt until the mid-1960s[14]), the UBR also controlled matters such as building height and setbacks in Melbourne's inner city. The committees responsible for liaising with the building surveyors on UBR-related matters at the City of Melbourne changed names over time. The 'Town Planning Special Committee' was active from 1947 to 1951,[15] the 'Traffic and Building Regulations Committee' was active from 1952 to 1955, [16] and the 'Building and Town Planning Committee' was active from 1955 to 1976.[17] Notes and actions from meetings of these and other committees were recorded in the form of minutes, including project information and statements of endorsement, rejection or amendment of building proposals.

Details of the approval of private commercial buildings of the post-WWII period in Melbourne, like ICI House, are recorded in the minutes of these various planning and building committees. The minutes contain the commentary of councillors in response to building applications received, discussed and recorded for assessment. These contain valuable information about the events associated with the approval of major private buildings in Melbourne,[18] give the perspective of planners, and provide insight into discussions between private and public stakeholders. Information from these sources has been complemented by other City of Melbourne archival collections also held at PROV, including Building Application Files,[19] the Town Clerk's Correspondence Files[20] and Rate Books Cards, which document historic real estate transactions and building values in the city.[21]

From the 1940s to the early 1960s, the minutes of the various building and planning committees are predominantly factual and procedural in tone. They rarely present personal opinions expressed by individual councillors, staff or other attendees involved in specific projects. However, occasionally—as the case presented here demonstrates —some minutes could expand considerably, at times taking a discursive character. The minutes consulted in this study do not record—but, nor do they exclude—direct evidence of political influence exercised by individuals or arising from pressures of parties or influential networks.

A chronological account based on archival records such as those consulted here is informative because it unveils the environment in which a discretionary culture of building control in the City of Melbourne originated. By revisiting the regulatory shift of ICI House, this paper examines some of the implications for the public assessment and control of tall buildings, including the challenges of fire safety, building density, innovation, public amenity and the quest for flexible, yet not arbitrarily deregulated, building controls.

A new building for Imperial Chemical Industries of Australia and New Zealand

From the mid-1950s to the early 1960s, Melbourne's skyline changed radically due to the rise of a new generation of multistorey office buildings. This was the first of several waves of modern office building activity that, for the rest of the twentieth century, turned the central business district (CBD) into the high-rise city of the present. Initially, office building construction was prompted mainly by corporations willing to create modern headquarters for owner occupation; although, in the same period, speculative and government projects also gave considerable impetus to CBD renewal. New construction converged in the city centre—the Hoddle Grid[22] and along Collins and Queen streets, the traditional addresses for offices in the city. The renewal also spread westwards, converting industrial zones into white-collar hubs along Bourke, William and Lonsdale streets.

In the mid-1950s, the predominant approach to development was modest interventions on small parcels of land. In the most densely occupied streetscapes, new office blocks rose to replace older ones, often aligning with existing parapets established since the 'Marvellous Melbourne' age of the late 1800s.[23] However, by the end of the 1950s, a trend to amalgamate several parcels of land into larger ones emerged. This amplified during the 1960s. Some of the earliest land consolidations for multistorey office buildings did not occur within the Hoddle Grid; rather, they occurred in the inner fringes of the city centre—in South Melbourne, along St Kilda Road and in East Melbourne. In this context of broader urban transformation, ICIANZ selected the corner of Nicholson and Albert streets in East Melbourne to build its Victorian headquarters. Occupying 25,000 square feet, the site comprised several parcels along Nicholson Street, Albert Street and Evelyn Place that ICIANZ had purchased

separately in 1952. The lot was elevated from the city blocks nearby and emerged as a focal point at the eastern end of Lonsdale Street. The prospect of better vehicle access convinced ICIANZ to locate on the eastern fringe of the CBD, rather than in the more congested Hoddle Grid.[24]

Local architects Bates, Smart & McCutcheon (BSM) were commissioned to design the building (see Figure 2). Office accommodation was in 17 levels served by eight lifts located in the side core. After completion, the top 12 floors were directly occupied by ICIANZ, with the remainder available for rent. The ground floor, surrounded by a landscaped entry, comprised a bank tenancy and a theatrette. The highest habitable level housed communal areas—a staff kitchen, canteen and cafeteria, as well as a caretaker's flat. The basement housed a car park and part of the mechanical plant. The rest of the mechanical plant was located on a 'penthouse' set back from the parapet on top of the roof.[25]

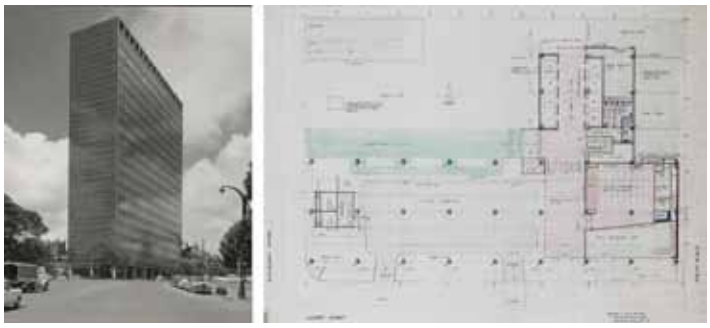


Figure 2: Bates, Smart & McCutcheon, ICI House, external view, 1958, photograph by W. Sievers;[26] ground floor plan, dated 20 April 1956, PROV, VPRS 11200/P0007, Unit 1342, Building Application no. 30056, Sheet no. P230, Amendment C, 4 October 1956.

ICI House introduced new benchmarks of office space and rental price in Melbourne. With a new record-breaking height of 265 feet (80 metres), the bar was set high for panoramic views that could demand premium rents, but height was not all that mattered. Quality office space was a matter of prestige also expressed by floor plate shape, layout and size as well as modern communal spaces, such as the high-rise staff canteen and the semipublic areas at ground floor. Maximising the opportunities given by a large consolidated site, the slab had a plan of 190 feet by 54 feet, which provided a total area about twice the size of any other contemporary major office blocks in the city (see Figure 3). In comparison to other buildings in Melbourne at that time, ICI House was a giant, not only regarding height, but also for its typical floor area of 10,000 square feet. It also had another record-breaking feature—180,000 square feet total floor space provided in a single building.

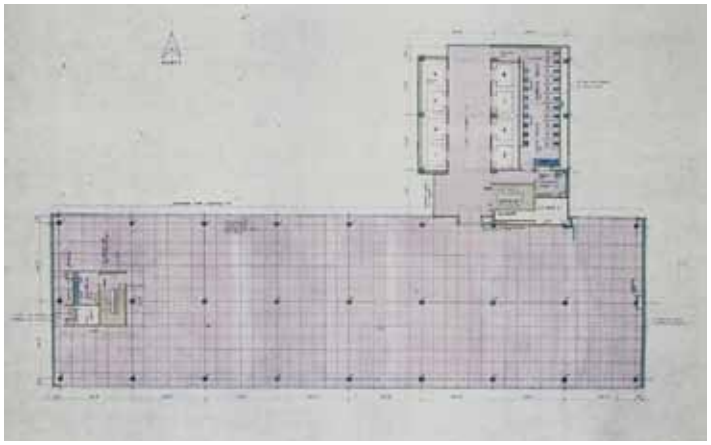


Figure 3: Bates, Smart & McCutcheon, ICI House, typical floor plan, dated 19 June 1956, PROV, VPRS11200/P0001, Unit 1718, Building Application no. 30056, Sheet no. P329, amendment C, 4 October 1956.

ICI House was undoubtedly a remarkable achievement for the 1950s, but it was not an isolated accomplishment. During the same period, owner-occupied tall commercial buildings flourished in Melbourne, and such building activity went hand in hand with a debate between developers, architects and authorities about high-rise building regulations. Discussions originated mainly from concerns about inner city congestion and fire safety. Several stakeholders shared the view that commercial buildings in Melbourne should have been allowed to be taller. However, building taller meant defying the latest building regulations—the 1945 UBR—which controlled building height to a limit of 132 feet (40 metres), a height limit established by city authorities in 1916.[27]

Business abhors a vacuum

The idea that the revenue of property would increase in proportion to the number of floors built upon a site was exploited quite early in the history of Melbourne, with discussions about the issue of high-rise regulations occurring from the early 1900s.[28] During the late 1800s, Melbourne had experienced a significant boom in multistorey construction; however, this was followed by a steep downturn and fall in land prices.[29]

In the mid-1920s, at a time when the city was at the beginning of another building boom driven by economic prosperity and population growth, a case for building taller was advocated by Marcus Barlow, an influential local architect. Barlow is renowned for the design of Art Deco–inspired multistorey office buildings in the Melbourne CBD, including the Manchester Unity Building (91–107 Swanston Street, 1932) and the Century Building (125–133 Swanston Street, 1940).[30]

In 1925, advocating for the erection of taller buildings in Melbourne, Barlow delivered a speech at the Royal Victorian Institute of Architects (RVIA) that drew inspiration from, and referred to, New York, Chicago and San Francisco.[31] The architect's proposal implied a review of building controls, which he saw as an impediment to the best course of 'business': 'It is still necessary to build cities, and the requirements of commerce render it imperative that our cities shall not be wasteful of space. Business "abhors a vacuum".'[32] The main item of contention was the regulatory control imposing a set height limit of 132 feet, first introduced in the 1910s in response to public concerns for health and safety after a fire in an eight-storey building killed five people in Sydney in 1901.[33] According to Barlow, such limits were obsolete and should be replaced by a new height limit of 300 feet for the main streets of the city.[34]

Members of the RVIA discussed Barlow's idea in the presence of Harrie B Lee, chief officer of the Melbourne Metropolitan Fire Brigade (MMFB). Opposition to the proposal came from some architects who were concerned about prospects of urban congestion and accused Barlow of placing too much importance on private financial matters and not enough on those of public interest.[35] By contrast, Lee opened the door for further discussion. In response to Barlow's question regarding the maximum length of fire ladders available in Melbourne—which the architect claimed was instrumental for setting the building height limit at 132 feet—Lee noted that the MMFB had firefighting equipment that was 'equal to anything in the world'.[36] Rather than resting on firefighting equipment, Lee proposed that the problem of building taller depended on appropriate methods of construction, which, in his view, seemed to be lacking in Melbourne. Some of the construction methods that Lee identified as desirable included water towers on roofs, fire resisting compartments and, most of all, the use of fire-resistant structural construction. Lee concluded that any required height could be built safely, once adequate provisions for fire safety were made.

The debate on building taller in Melbourne was reignited in 1931, with Barlow claiming that the current outdated regulations were constraining the prospects of growth for the city.[37] In the same year, the Building Industry Congress of Victoria appointed a Building Regulations Committee with the task of reorganising into one set of norms the heterogeneous construction-related by-laws of the several municipal councils of Victoria. In 1938, the committee completed a draft of the regulation, initially known as 'The Model Building By-Laws'.[38] The draft was the first step towards the creation of a standardised code of building for the whole of Victoria. In 1945, the committee's model by-laws were converted into the new code, the UBR.

Regulations and the course of business

The UBR administered building construction, design, activity and processes of approval throughout Victoria, including in the City of Melbourne. Matters that were regulated by the UBR included building height, built form controls and fire-safe construction. Prescriptive measures for 'Fire Resisting Construction', also called 'Type 1' construction,[39] required internal structural columns and other structural elements to have a minimum fire resistance of four hours, and external structures to have a minimum fire resistance of three hours. The UBR also regulated building design and light access, with measures that affected built form. For example, building height was controlled by several restrictive instructions. The most important of these stated that:

> The maximum building height in respect to any allotment of land shall be a horizontal plan at a height above the permanent footpath level at the centre of the frontage of the allotment equal to one and one-third times the width of the street to which the allotment has a frontage.[40]

In effect, the UBR reaffirmed the traditional ladder-height limitations of 132 feet, apparently ignoring proposals for reform advocated 20 years earlier by architects such as Barlow. According to the UBR, as the main streets of the Hoddle Grid were 99 feet wide, the maximum building height allowed in Melbourne was equal to 99 feet + 33 feet = 132 feet (see Figure 4). The limit of 132 feet was absolute. Paragraph (d) of clause 901 further clarified that 'the amount by which the width of any street exceeds 99 feet shall not be taken into account in computing the maximum building height'.[41] Some exceptions were granted for decorative features and for mechanical equipment, which the UBR prescribed should not exceed an additional height of 3 feet 6 inches.[42]

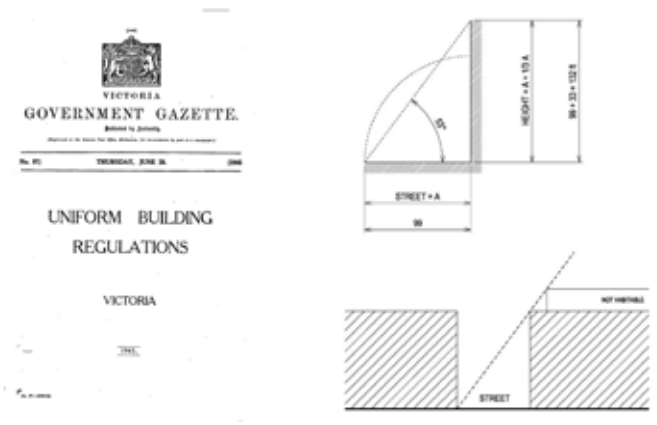


Figure 4: Uniform Building Regulations of Victoria, 1945, building height limit diagram based on clause 901, drawn by author.

Notwithstanding restrictions for building height, the 1945 regulations had an embedded mechanism of general amendment, which allowed that any of its prescriptions could be modified. Amendments could be implemented ad hoc and, as stated by the UBR, 'in the case of any particular building'.[43] The process of change could be initiated by the owner, builder or architect of a building proposal. Requests for amendment were subject to consideration and subsequent approval or refusal by a governmental committee of referees based at the Victorian State Public Works Department, known as the Building Regulations Committee. The UBR also stipulated the motivations in support of the process of amendment; regulations could be amended on a case by case basis whenever provisions might 'needlessly affect with injury the course and operation of business' or 'defeat the object' of the regulations.[44]

The principle of site density

In an ambivalent context of prescriptive regulation on the one hand, and opportunities to modify the regulations on an ad hoc basis on the other, discussion about building height limits began at meetings of the Town Planning Special Committee of the City of Melbourne soon after the release of the UBR in 1945. Such discussion was prompted by plans to redevelop a public block of land in the area bounded by Collins Street, Market Street, Flinders Lane and William Street, known as the Western Market site.

In 1947, following a request of the RVIA, the City of Melbourne launched a competition to appoint an architect for the redevelopment of the site.[45] In August that year, the RVIA asked whether a principle of development based on 'site density' could be considered instead of the height limit stipulated in the UBR. The suggestion was aimed at allowing a tall building proposal for the site, but the Town Planning Special Committee rejected the proposal.[46]

At around the same time, an internal report prepared by the engineer of the City of Melbourne reached the Town Planning Special Committee, recommending consideration of a planning principle based on site density for the entire inner city. According to the principle, new buildings in the Hoddle Grid would be exempted from the UBR height limit of 132 feet on the condition that they would be set back from main streets, thus providing more light, public space and amenity at ground level, and without exceeding the floor area of an equivalent building designed with the maximum height allowed by the UBR.[47]

The architectural competition to develop the Western Market site was awarded in 1949 to a scheme comprising five buildings, of which the City of Melbourne committed to building only one as a 'height limit' block along Collins Street. The Western Market project, subsequently renamed Hume Square, was delayed for several years due to financial problems caused by rising building costs.[48]

The project was still on hold in 1955 when the 'question of increased building heights for Hume Square' resurfaced. Some members of the Building and Town Planning Committee supported consideration of a new 'shaft' type of building for the project in line with the report of the city engineer. However, seeking to avoid a reimbursement penalty of £50,000 for the winners of the design competition, the committee decided against adopting such a change. Yet, the committee also stated that 'nothing should be committed to paper' and recommended that 'the City Architect should draw a rough sketch for the development of the building having in mind a shaft type building for the remaining portion of the project'.[49] In the meantime, the RVIA and the Institute of Engineers, most likely unaware of the City Council's internal cogitations about Hume Square, continued to exercise pressure, writing to the Building and Town Planning Committee with proposals to override the height limits imposed by the UBR.[50]

A more 'scientific' approach

The question of height controls in the UBR resurfaced in response to private interests. In May 1955, the Traffic and Building Regulations Committee of the City of Melbourne received a request from the state's UBR referees—the Building Regulations Committee—to consider and comment on a proposal to amend the height provisions of

the regulations.[51] The submission included a schematic design for a new office building with a height of 230 feet. The building proposal, with its related request of amendment, was submitted by BSM and ICIANZ (see Figure 5).

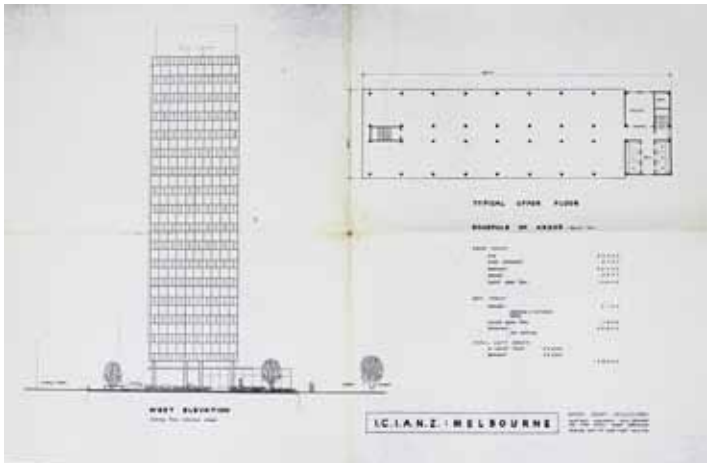


Figure 5: Bates, Smart & McCutcheon, ICI House, early scheme submitted to the Building Regulations Committee, State Public Works Department, for the proposal of amendment of the UBR, clause 901. Drawing dated 20 August 1954, submitted to the Building Regulations Committee in February 1955, PROV, VPRS 3183, Unit 12 Item 55/3047.

BSM justified the requested amendment of the UBR on the basis of the benefits that would derive from conforming with modern principles of design, thus achieving a higher standard of accommodation for their client. The design exceeded the prescribed height limitations, but used only two-thirds of the density allowed by the regulations, providing car parking and gardens on site (see Figure 6). The architects stated that adherence to the UBR height provisions would affect 'with injury the course and operation' of ICIANZ's business. In support of their case, BSM listed a few buildings and structures that already exceeded the height limit of 132 feet in Melbourne, including the offices of the Police Headquarters Building in Russell Street (150 feet, completed in 1940) and the Australian Building in Elizabeth Street (150 feet, completed in 1889).[52]

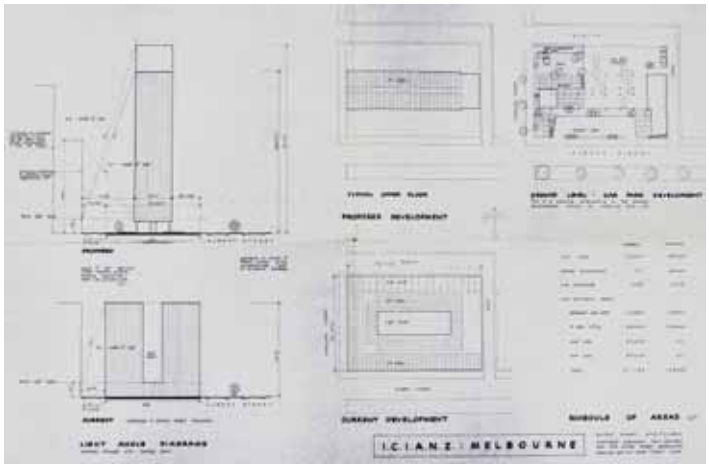


Figure 6: Bates, Smart & McCutcheon, ICI House, comparative diagrams between non-conforming ('proposed') and conforming developments ('current') with UBR building height prescriptions. Drawing dated 1 September 1954, submitted to the Building Regulations Committee in February 1955, PROV, VPRS 3183, Unit 12 Item 55/3047.

In response, the Traffic and Building Regulations Committee stated that it was:

> Generally in favour of the application being granted and [they agreed] to review the height without allowing any increase in density,[53] having regard to the more scientific approach to this matter that has evolved of recent years of which the proposed building under review could be regarded as an example.[54]

However, before granting final approval, the Building Regulations Committee (that is, the state's UBR referees) sought further advice from the Traffic and Building Regulations Committee, as well as the City of Melbourne and the building surveyor. A series of internal discussions followed, after which the proposal was discussed by the town clerk, the MMFB and the Melbourne and Metropolitan Board of Works (MMBW). Supported by a letter signed by Edwin Borrie, chief planner of the MMBW, the City of Melbourne eventually approved 'in principle' and 'in general' the construction of buildings in the city above the height limitations prescribed by the UBR.[55]

The ICI House proposal was not the first to amend the building height provisions of the UBR. Architects' and owners' desires to bypass height restrictions had been tested earlier by other office building applications. For example, in 1955, permission to build at 77 feet, instead of the 66 feet prescribed by the UBR for the 'Little' streets of the Hoddle Grid was granted for an office building at 533–543 Little Collins Street.[56] A year earlier, the building surveyor and the Building Regulations Committee approved a request to erect machinery, plant rooms, ventilation equipment and tanks exceeding the prescribed height limit by 26 feet for the new Alliance Insurance building at 408–410 Collins Street.[57] Similar permission had earlier been granted to Gilbert Court, at 100 Collins Street.[58] Moreover, at 200 Little Collins Street, Sydney-based architect Harry Seidler proposed a ten-storey office block with car park podium as tall as 99 feet—double the height limit prescribed by the UBR on that street. The City of Melbourne's building surveyor endorsed the innovative proposal, but the project never went ahead.[59]

The modification to the UBR proposed by ICIANZ and BSM had more substantial repercussions than these earlier examples. BSM and ICIANZ requested approval to build rentable area—not just ancillary space—well above the height limit. Some members of the Traffic and Building Regulations Committee felt that 'any increase in the height limit should be allowed only after a basis of density or floor space index [for the entire inner city] has been established'.[60] Concerns were prompted by media reports that implied that the UBR referees of the state's Public Works Department had, in effect, bypassed the City of Melbourne's authority by endorsing the modification of the UBR for ICI House.[61] Some members of the Traffic and Building Regulations Committee said that the UBR referees had been given excessive powers to approve modifications of the regulations, as 'under the "modification" provision of the Regulations, the granting of approval for this building was a major departure from the Regulations which could hardly be covered by the term "modification"'.[62] In late June 1955, despite public news announcing the approval of Melbourne's 'first skyscraper',[63] significant reservations still remained at the City of Melbourne about ICI House, leaving the provision of adequate fire-safe methods of construction as the most substantial hurdle to be overcome before the final approval of the building surveyor.[64]

Special provisions

On 6 July 1955, architect and design director of BSM, Osborn McCutcheon, and two representatives of ICIANZ, attended the Building Regulations Committee in person to respond to fire safety concerns. McCutcheon stated that, contrary to the position of the chief officer of the MMFB, authorities in other parts of the world had different opinions about the fire safety of buildings taller than ladder-reachable height. He cited the example of the Empire State Building which 'was hit by an aircraft at approximately the 40th floor [and] when 400 gallons of petrol exploded ... the resultant fire was confined'.[65] McCutcheon proceeded to illustrate the fire control devices planned for ICI House, including an electro-thermal alarm system connected via radio to the MMFB, water storage and sprinklers in the basement, two booster pumps and fire-protected steel frame construction. The provision of a general sprinkler system throughout the building was also contemplated by the architect, but it was not included in the final design and sprinklers were only installed in those floors higher than ladder-reachable height.[66]

Despite the concerns of the MMFB, ICI House set a precedent that other projects followed. It led to the development of a practice of addressing fire safety by installing sprinklers on floors above the ladder-reachable height of 132 feet. However, this approach was seen as risky; in other parts of the world, the provision of sprinklers on all floors in tall buildings was not unusual.[67] In 1958, fire authorities attempted to correct this hybrid approach, proposing, without success, to enforce the installation of sprinklers for all floors in buildings taller than 100 feet.[68]

When facing requests for alternatives about fire safety provisions, authorities were less accommodating than they were on matters of building height alone. At ICI House, building regulation authorities ultimately allowed increased height, but did not concede a reduction of safeguards for fireproof construction. Extensive detailing was documented by BSM for the fire protection of the building's steel structure, which was protected with custom-moulded encasings of gypsum plaster. Several detailing iterations for the fireproofing of spandrels of the all-glass curtain walls were prepared by the architects and submitted for approval to the building surveyor. After considering alternatives with terracotta and lightweight stud walls—contemplated by American standards, but not by the UBR—the project was finally built with the conservative provision of concrete parapets behind the curtain wall, acting as a measure to prevent the spread of fire between floors through the facade (see Figure 7).[69]

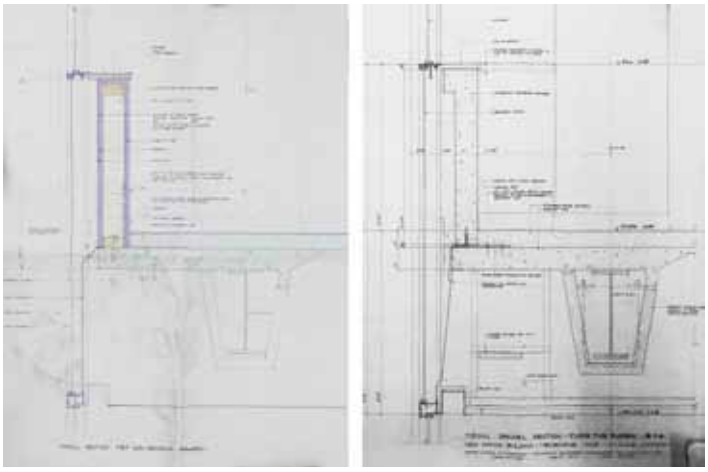


Figure 7: Bates, Smart & McCutcheon, ICI House, typical spandrel details showing alternative methods of fire-resistant construction. Left: light-weight stud wall detail, preliminary, dated 27 May 1957. Right: precast concrete upstand detail, as built, dated 29 July 1957. PROV, VPRS11200/P0007, Units 1350 and 1351, Building Application no. 30056.

Subsequently, and notwithstanding these concerns, the process to request a dispensation from the 132 feet height limit became a norm for building applications in the Melbourne CBD. Applications for modification of the UBR multiplied and extended from building height matters to prescriptions about fire safety.

Methods of fireproof construction were a recurrent object of negotiation between architects and authorities, with the requirement to have three hours of fire rating protection on external walls a common source of contention. In 1958, Buchan, Laird & Buchan, local architects who worked in joint venture with American architects Skidmore Owings Merrill on the Shell Corner project—a modern office block that was demolished in 1991 at the corner of Bourke and William streets (see Figure 8, right)—insisted that authorities lower external wall fireproofing requirements from three to two hours. The request was motivated by the innovative method of fireproofing proposed, which specified sprayed asbestos in place of the more common gypsum plaster.[70] Similarly, in 1960, Bernard Evans & Partners, the architect of the Conzinc Riotinto of Australia office building in Collins Street (see Figure 8, left), sought—without success—to reduce the fire rating of spandrels as prescribed by the UBR by proposing to install asbestos-backed panels.[71]

Figure 8: Left: aerial view of Collins Street in 1962 with Conzinc Riotinto of Australia Building in prominence (Bernard Evans and Partners, completed in 1961 and demolished in 1987), photograph by Wolfgang Sievers.[72] Right: Shell Corner, 147–157 William Street (Skidmore Owings Merrill in association with Buchan Laird and Buchan, completed in 1960 and demolished in 1990), photograph by Wolfgang Sievers.[73]

Private value and public benefit

The rule-breaking deal of ICI House was granted on a principle of exchange between building height in return for public benefits, namely open space at ground floor and parking facilities, but without lowering fire safety performance in construction. The building set an important precedent and anticipated a wave of further applications on the same basis. Two projects worthy of mention that followed are the National Mutual Life Centre (1961–1965) erected on the site of the former Western Market project (see Figure 9, right), and the Colonial Mutual Life Centre at 308–334 Collins Street (1959–1963) (see Figure 9, left), which transplanted the side core typology of ICI House in the heart of the Hoddle Grid. In the face of ongoing requests for amendment of the regulations, public authorities in Melbourne took the opportunity to use negotiations on height controls to gain public benefits, trading approvals in exchange for civic amenities that would help to decongest the CBD, such as open space at ground level and car park facilities.[74]

Figure 9: Left: Colonial Mutual Life Building, 308–334 Collins Street, 1970 (Stephenson and Turner, completed in 1963), photograph by W Sievers. [75] Right: National Mutual Life Centre, 435–455 Collins Street, 1966 (Godfrey and Spowers, Hughes Mewton and Lobb, completed in 1965, demolished in 2016), photograph by W Sievers.[76]

A more tacit, but no less significant, public benefit brought by tall buildings was the opportunity to multiply by many times the income from council rates. Public revenue increased in particular with more efficient modern buildings, which attracted higher council rates. In Melbourne, rates were based on an 'improved' land rating system that targeted the value of the net lettable area of developments as taxable, and not the cost of land. [77] With a taxation system based on capital improved values, a prestigious modern office development on a consolidated block of land provided an extraordinary surge of income for the City of Melbourne.

The revenue implications brought by modern tall buildings through this method of taxation are evident in the City of Melbourne's rate cards related to ICI House. Before ICIANZ consolidated the properties at the corner of Albert and Nicholson streets, the city earned annual rates totalling £363 for all of the parcels on the block. Five years after the completion of ICI House, the same property had multiplied in value and, therefore, in annual rates, by more than 50 times (see Table 1).

Properties before consolidation in 1952 [78]	**Site area (sq ft)**	**Annual value**	**Annual rates (1955–1956)**
510–518 Albert Street	6,969	£700	£103
530 Albert Street	2,520	£180	£26
2 Nicholson Street	4,212	£500	£72
4 Nicholson Street	3,550	£900	£131
1 Evelyn Place	3,550	£130	£18
3 Evelyn Place	2,397	£94	£13
TOTAL	20,678	£2,504	£363
Total adjusted to 1960–1961 [79]		£2,897	£420
Property consolidated by ICIANZ [80]			Annual Rates (1960)
1 Nicholson Street	25,232	£150,000	£21,250

Table 1: Comparison of City of Melbourne annual rate revenues of the land parcels occupied by ICI House before and after the land consolidation required for the project.

These figures confirm the critical importance of the events that led to the approval of that single tall building. However, they also reveal a picture that extends beyond the significance of a one of a kind monument of architecture.

The request submitted in 1955 by BSM and ICIANZ to amend the UBR height controls found fertile ground among city planning authorities who were already aiming to change controls in line with that request. Further, the ICIANZ request stemmed from a mechanism of ad hoc modification that was in keeping with the regulations; indeed, discretionary flexibility was embedded in the statewide code of the UBR.

In the case of the approval of ICI House, the role taken by city planning authorities, as local custodians of the regulations, was not merely passive. To the contrary, the minutes of meetings of the Melbourne City Council show that authorities initiated discussions to introduce a new planning instrument of control based on 'site density', or plot ratio, in line with what had been adopted by other cities (Sydney, London and New York) as early as 1947. The instrument envisaged the prescription of a gross floor area allowance to be directly proportional to the site area, thus superseding the built form and light angle guidelines set by height limits. The review of the controls was accelerated, perhaps incidentally, by the private interests of corporations, such as ICIANZ, and the design inputs of architects, such as BSM. The City of Melbourne endorsed the proposal, thus setting a precedent for a new approach to city planning, which, in the end, was conceded less on grounds of fireproofing and more on sought after explanations from the architects that, through innovative provisions in their design, public safety would not be compromised.

With the release of the first inner city planning scheme in 1964, the City of Melbourne addressed the question of built form control in less ambiguous terms than those of the UBR, regulating building height in the Hoddle Grid by the planning instruments of zoning and plot ratio.[81] The 1964 scheme both decreed the success of a New York–inspired high-rise vision for the future of Melbourne[82] and sanctioned the departure of the Beaux-Arts 'city beautiful' design, which had had considerable influence among city planners until the 1930s.[83] However, the seed for the rise of that new vision was planted well before ICI House was proposed—at least 30 years earlier, as the polemics sparked by architect Marcus Barlow during the 1920s confirm.

After WWII, pressures to modify the prescriptions of the Victorian building regulations amplified, following the need to test modern ideas of workspace design with communal spaces for staff, flexibility with modular coordination and column-free open space. The implementation of these spatial concepts relied on development rights in land parcels of adequate size and quality. Ideally, developments on prime real estate needed to be free from public encumbrances that created 'vacuums'—that is, the inefficient use of the land.

Even once the built form controls of the UBR were overridden in 1964, the City of Melbourne continued to administer tall building activity with a project-based culture of assessment. Using seminal projects to test the transformation of the CBD, authorities set the stage for the development of a hub of prestigious corporate employment in Australia, while negotiating public benefits in return. Similar episodes of rule bending with tall buildings continued until the 1990s, albeit with less historiographical fortune than ICI House, and with circumstances other than building height as the item of negotiation.[84]

Conclusion

In Melbourne, a city where public and private opportunities for prosperity have often converged, the inclination of local developers and designers to challenge prescriptive regulations and propose alternative solutions has deep roots. The city developed a culture of ad hoc assessment for tall building projects that originated as early as the 1940s and continues in the twenty-first century. Commercial tall building activity was the agent that first established the principle that the building code should not interfere with the building owner's best interests for the 'operation of business'.[85] However, authorities maintained that preserving the course of business did not mean a compromise in design and construction standards.

Tracking the roots of such a culture is significant, not least because, in many respects, the discretionary approach that emerged after WWII continues in Melbourne today. Arguably, after six decades, that discretionary culture may have gone too far. The original intent of innovative trade-offs in the public interest seems lost, while the present building industry has reached a point of 'poor culture of compliance' with regulations, including fire safety provisions, which a public enquiry recently identified as a problematic trait of recent high-rise projects.[86]

The vicissitudes of ICI House are a powerful reminder of the instrumental role that tall buildings have played in the development of regulatory controls in some cities. Arguably more than other building types, skyscrapers seem to trigger the breaking of rigid prescriptive frameworks, such as those about height, fire safety and building form. Yet, as the history of ICI House shows, there are opportunities in which tall buildings may be allowed to prosper in exchange for design innovation and benefits to the public sphere. Such benefits may take the form of economic growth and gain, including tax revenue, as well as architectural amenity, technological progress and long-term significance for the city at large.

Acknowledgments

The findings presented in this article derive, in part, from a doctoral research project supported by an Australian Government Research Training Program Scholarship. The author wishes to express his gratitude to two unknown peer reviewers for making their knowledge about Melbourne's urban history available through in-depth commentary, and to the editors for their overall assistance and for sharing and pointing to additional sources of information that turned out to be essential during the preparation of the article.

Endnotes

[1] Heritage Council Victoria, Victorian Heritage Database, 'ICI House', available at <http://vhd.heritagecouncil.vic.gov.au/places/391>, accessed 29 January 2019.

[2] PROV, VPRS 8945/P2, Unit 215, Building Application no. C.M. 3413, 26 September 1980.

[3] Australian Government, Department of the Environment and Energy, 'National Heritage Places: Orica House (formerly the ICI Building)', available at <http://www.environment.gov.au/heritage/places/national/ici-building>, accessed 15 July 2017.

[4] 'Melbourne's first skyscraper!', *Architecture and Arts*, vol. 43, May 1957, p. 26. See also 'ICI House, Melbourne's first skyscraper', *Architecture and Arts*, vol. 61, November 1958, p. 26; 'Australia's first skyscraper: ICI House, Melbourne', *Architecture Today*, vol. 1, no. 2, December 1958.

[5] Robin Boyd, *The Australian ugliness*, Cheshire, Melbourne, 1961, pp. 107–108. See also *The puzzle of architecture*, Melbourne University Press, Melbourne, 1965, pp. 15-16.

[6] Philip Goad, 'ICI House, Melbourne', in Jennifer Taylor (ed.), *Tall buildings, Australian business going up: 1945–1970*, Craftsman House, Sydney, 2001, pp. 175, 178–179. See also Philip Goad, *Bates smart, 150 years of Australian architecture*, Thames and Hudson, Fishermans Bend, 2004, pp. 167–180.

[7] Susan Marsden, *Urban heritage: the rise and postwar development of Australia's capital city centres*, Australian Council of National Trusts and Australian Heritage Commission, Canberra, 2000.

[8] Miles Lewis, 'The new image: 1930–1956' and 'The urban spurt' in *Melbourne: the city's history and development*, City of Melbourne, Melbourne, 1995, pp. 106–127 and pp. 127–139.

[9] John Punter, 'Urban design in central Sydney 1945–2002: laissez-faire and discretionary traditions in the accidental city,' *Progress in Planning*, vol. 63, 2005, pp. 11–160. See also Elizabeth M Farrelly, 'Tall tales', in Ann Stephen, Philip Goad & Andrew McNamara (eds), *Modern times: the untold story of modernism in Australia*, Melbourne University Publishing, Carlton, 2008, pp. 86–97.

[10] Jenny Gregory, 'Development pressures and heritage in the Perth central business district, 1950–90', *Australian Economic History Review*, vol. 49, no. 1, March 2009, pp. 34–51.

[11] Peter Mills, The limited city: building height regulations in the City of Melbourne, 1890–1955, Master of Arts thesis, Monash University, 1997.

[12] Ben Schrader, 'Paris or New York? Contesting Melbourne's skyline, 1880–1958', *Journal of Urban History*, vol. 36, no. 6, 2010, pp. 814–830.

[13] Victoria, 'Uniform Building Regulations' (UBR), *Victoria Government Gazette*, 28 June 1945.

[15] PROV, VPRS 8945/P2, Unit 28.

[16] PROV, VPRS 8945/P2, Units 137–138.

[17] PROV, VPRS 8945/P2, Units 191–207.

[18] The minutes of the committees analysed for this study do not cover government projects, which were subject to a different process of approval than private ones.

[19] PROV, VPRS 11200 and 11201, City of Melbourne Building Plans and Permits (1916–1960).

[20] PROV, VPRS 3183/P5 Melbourne City Council Town Clerk's Correspondence Files, MCC Series 120 (1910–1985)

[21] PROV, VPRS 5708, City of Melbourne Rate Books (1855–1963).

[22] Melbourne's Hoddle Grid was named after the surveyor Robert Hoddle who marked it out for the first formal settlement plan of the city in 1837–1838. It is generally identified as the part of the inner central district bounded by Flinders Street, Spring Street, La Trobe Street and Spencer Street.

[23] David AL Saunders, 'Office blocks in Melbourne', *Architecture in Australia*, vol. 48, no. 2, June 1959, p. 91.

[24] 'Australia's first skyscraper: ICI House, Melbourne', p. 31.

[25] PROV, VPRS 11200, Building application plans and files no.30056, 10 May 1956.

[26] Wolfgang Sievers collection, State Library of Victoria, H2003.100/194, available at <http://handle.slv.vic.gov.au/10381/284846>, accessed 11 May 2018.

[27] Lewis, *Melbourne*, p. 95.

[28] Schrader, 'Paris or New York?', pp. 815-824.

[29] Michael Cannon, *The land boomers*, Melbourne University Press, Carlton, 1966; Graeme Davison, *The rise and fall of Marvellous Melbourne*, Melbourne University Press, Carlton, 2004.

[30] Victorian Heritage Database, 'Manchester Unity Building', available at <http://vhd.heritagecouncil.vic.gov.au/places/728>, and 'Century Building', available at <http://vhd.heritagecouncil.vic.gov.au/places/2966>, accessed 29 January 2018.

[31] Marcus R Barlow (with additional commentary by PA Oakley, KA Henderson, RB Hamilton & Harrie B Lee), 'Discussion on "taller buildings for Melbourne"', *Journal of Proceedings of the Royal Victorian Institute of Architects*, vol., 23, no. 5, September 1925, pp. 98–107.

[32] Ibid, p. 98.

[33] The Anthony Horderns Palace Warehouse in Sydney's Haymarket was destroyed by a fire on 10 July 1901, prompting a prolonged review of building regulations, which the City of Sydney eventually adopted in 1912. The City of Melbourne followed suit in February 1916. See Schrader, 'Paris or New York?', pp. 817–818. See also Sydney Architecture, Anthony Horderns Palace Warehouse, available at <http://sydneyarchitecture.com/GON/GON057.htm>, accessed 10 May 2018.

[34] Barlow suggested 'slightly higher' limits for corner lots, and 'no limits at all' for isolated sites and those facing parks, but did not mention anything about lanes and Little streets. Barlow, 'Discussion', p. 101.

[35] KA Henderson, quoted in Barlow, 'Discussion', p. 102.

[36] Barlow, 'Discussion', p. 17.

[37] Marcus R Barlow, 'Building regulations and the desirability of increasing the heights of buildings in Melbourne', *Journal of the Royal Victorian Institute of Architects*, vol. 29, no. 1, March 1931, p. 17.

[38] 'Standard building regulations: the new model', *Journal of the Royal Victorian Institute of Architects*, vol. 36, no. 4, September–October 1938, pp. 113–114.

[39] UBR, clause 705, 'Type 1—Framed Fire Resisting Construction'.

[40] UBR, clause 901, 'Maximum Building Height'.

[41] UBR, clause 901.

[42] UBR, clause 904, 'Decorative Features & c.'.

[43] UBR, clause 214, 'Power to Modify Regulations'.

[44] UBR, clause 214.

[45] PROV, VPRS 8945/P2, Unit 28, City of Melbourne Town Planning Special Committee, Meeting Minutes, 3 March 1947, minute no. 3, 1.

[46] PROV, VPRS 8945/P2, Unit 28, minute no. 47/3088, 8 [1947].

[47] PROV, VPRS 8945/P2, Unit 28, minute no. 47/3011, 8 [1947].

[48] PROV, VPRS 8945/P2, Unit 28, City of Melbourne memorandum of the Town Planning Special Committee, 'Development of Western Market Site', [c. 1950–1951].

[49] PROV, VPRS 8945/P2, Unit 191, City of Melbourne Building and Town Planning Committee, 5 July 1955, minute no. 2, 44. The site was eventually developed in the early 1960s with a freestanding slab project, the National Mutual Life Centre (1961–1965, demolished in 2016).

[50] PROV, VPRS 8945/P2, Unit 191, minute 55/4856, 114 [1955].

[51] PROV, VPRS 3183/P5, Unit 12, City of Melbourne Town Clerk correspondence files, J Firth, chairman of the State Building Regulations Committee, to town clerk, 4 May 1955.

[52] PROV, VPRS 3183/P5, Unit 12, Item 55/3047, Bates Smart & McCutcheon to secretary, Building Regulations Committee, 21 February 1955.

[53] ICI House occupied only about 40 per cent of the site with total a gross floor area of 236,400 square feet. It was approved with a plot ratio of 9:1.

[54] PROV, VPRS 8945/P2, Unit 138, City of Melbourne Traffic and Building Regulations Committee, minute 55/2116, p. 160 [1955].

[55] PROV, VPRS 3183/P5, Unit 12, City of Melbourne, Town Clerk correspondence files, letter to the property manager of ICIANZ, 23 June 1955.

[56] PROV, VPRS 8945/P2, Unit 138, City of Melbourne Traffic and Building Regulations Committee, minute 55/423, p. 90A [1954–1955].

[57] PROV, VPRS/P2, Unit 138, minute no. 54/4254, p. 22A.

[58] PROV, VPRS/P2, Unit 138, minute no. 54/1824, p. 350.

[59] PROV, VPRS 8945/P2, Unit 191, Building and Town Planning Committee, minute no. 55/4176.

[60] PROV, VPRS 8945/P2, Unit 191, minute no. 55/2116, p. 197.

[61] PROV, VPRS 3183/P5, Unit 12, internal memorandum of the Town Clerk's Office to the chairman and members of the Traffic and Building Regulations Committee, 22 June 1955.

[62] PROV, VPRS 8945/P2, Unit 191, minute no. 55/2116, p. 197

[63] 'Approval given for Melbourne's first "Skyscraper"', *Age*, 24 June 1955, p. 1.

[64] PROV, VPRS 8945/P2, Unit 138, minute no. 55/2116, p. 197.

[65] PROV, VPRS 8945/P2, Unit 138, minute no. 55/3047, p. 206.

[66] Rico Bonaldi, project architect of ICI House formerly of Bates, Smart & McCutcheon, in conversation with the author, 1 September 2014. The provision of sprinklers installed only 'above a certain height' is confirmed indirectly also by the facade contractor, John P Halfey, 'The curtain wall', *Architecture Today*, December 1958, p. 25. The 'special provision' of sprinklers only 'in floors above 132-foot limit' was suggested in the first instance by the MMBW as a condition for the approval of ICI House above the height limit. See PROV, VPRS 3183/P5, Unit 12, EF Borrie to town clerk, 24 June 1955.

[67] Rico Bonaldi in conversation with the author.

[68] PROV, VPRS 11201/P/0001, Unit 000409, City of Melbourne Building Application File no. 32144, Metropolitan Fire Brigade, 'Report relative to the new building for Shell Co. of Australia, 27 February 1958'.

[69] PROV, VPRS 11200/0007, Building Application no. 30056, Units 1341, 1350 and 1351.

[70] PROV, 11201/P/0001, Unit 000409, City of Melbourne Building Application File 32144, Buchan Laird and Buchan to secretary, Building Regulations Committee, 25 March 1958.

[71] Bernard Evans and Partners to building surveyor, 15 June 1960.

[72] Wolfgang Sievers photographic archive, National Library of Australia, nla.obj-160773294, available at <https://trove.nla.gov.au/version/8594671>, accessed 11 May 2018.

[73] Wolfgang Sievers collection, State Library of Victoria, H2016.35/14, available at <http://handle.slv.vic.gov.au/10381/386628>, accessed 11 May 2018.

[74] Edwin Fullerton Borrie, *Report on a planning scheme for the Central Business Area of the City Melbourne*, City of Melbourne, Melbourne, 1964, p. 22

[75] Wolfgang Sievers collection, State Library of Victoria, H98.30/211, available at <http://handle.slv.vic.gov.au/10381/310451>, accessed 11 May 2018.

[76] Wolfgang Sievers collection, State Library of Victoria, H99.50/83, available at <http://handle.slv.vic.gov.au/10381/91566> accessed 11 May 2018.

[77] Saunders, 'Office blocks in Melbourne', p. 91.

[78] PROV, VPRS 5708, City of Melbourne Rate Books, 1955–56, Latrobe Ward, nos. 2393–2410, 2481–2487, 2440–2450.

[79] Adjustment factor based on annual average from Australian Bureau of Statistics, 'Consumer Price Index' (6401.0) Canberra, 1997 (Period from 1949/50 to 1996/97).

[80] PROV, VPRS 5708, City of Melbourne, Rate Books, 1960–1961, Latrobe Ward, nos. 2451–2454.

[81] Borrie, *Report on a planning scheme*, pp. 60–64.

[82] Schrader, 'Paris or New York?', pp. 824–827.

[83] Lewis, 'The city beautiful: 1900–1929', in *Melbourne*, pp. 93–95.

[84] Historical records that cover matters of negotiations for prominent tall buildings until the late 1980s are contained in PROV, VPRS 8945/P2. For example, for BHP House (130–148 William Street), see Unit 198, Building and Town Planning Committee, 1967–1968, minute 67/5526/173, 68/1920/298, 68/4260/300 [1968]; for Collins Place (17–65 Collins Street), see Unit 201, Building and Town Planning Committee, minutes 71/4765/330, [1971–72]; and for 101 Collins Street (89–105 Collins Street), see Unit 240, Development Approvals Committee, 1988.

[85] UBR, clause 214.

[86] Victorian Cladding Taskforce, *Victorian cladding taskforce interim report: November 2017*, Department of Environment, Land, Water and Planning, Melbourne, 2017, p. 4, available at <https://www.planning.vic.gov.au/__data/assets/pdf_file/0016/90412/Victorian-Cladding-Taskforce-Interim-Report-November-2017.pdf>, accessed 29 January 2018.

Common to all miners

The Inglewood Gold Field Common

'Common to all miners: the Inglewood Gold Field Common', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

This is a peer reviewed article.

Peter Davies is a research fellow in the archaeology program at La Trobe University where he is part of the multi-disciplinary ARC-funded 'Rivers of Gold' project. This research combines archaeological, geomorphological and geochemical analysis to understand changes to Victorian waterways as a result of mining activity in the nineteenth century.

Author email: peter.davies@latrobe.edu.au

Karen Twigg is a PhD candidate at La Trobe University, where she is researching the environmental history of a farming community in the Victorian Mallee. Prior to commencing her PhD, Karen worked as a public historian and is a member of the historical consultancy group, Living Histories.

Author email: k.twigg@latrobe.edu.au

Susan Lawrence is head of the Department of Archaeology and History at La Trobe University. Her research interest include goldfields archaeology, material culture studies, gender and urban archaeology. She is a fellow of the Australian Academy of the Humanities and the Society of Antiquaries in London.

Author email: s.lawrence@latrobe.edu.au

Abstract

Goldfields commons were established in numerous locations in nineteenth-century Victoria. These large parcels of Crown land provided accessible grazing for gold miners and kept land around the goldfields in the public domain. In addition to the 80 or so goldfields commons declared, there were several hundred town and farmers' commons as well, covering in total more than 1 million acres of the Victorian countryside. The Inglewood Gold Field Common was broadly typical of this wider pattern. Established in January 1861, it initially encompassed more than 50,000 acres of mallee woodlands, grasslands and auriferous outcrops. Correspondence preserved in Public Record Office Victoria reveals the many ways that miners and local residents utilised the common, and how managers and users tried to negotiate and resolve the problems they encountered. These ranged from complaints by local squatters about loss of their land to claims by selectors, plagues of rabbits and the important role of Chinese market gardeners. The Inglewood Gold Field Common was officially abolished in 1898, but much of the land remains in public hands today.

Introduction

Land appropriation was a defining feature of European settler colonialism in the eighteenth and nineteenth century. Historian John C Weaver has called this the 'great land rush' that brought British colonists to the United States, Canada, the Cape Colony in South Africa, Australia and New Zealand.[1] The new arrivals drove off Indigenous inhabitants, seized a billion acres for grazing their flocks and herds and reshaped property rights to satisfy their hunger for land. Open range and common lands were an important part of this process. The commons served as a stepping stone, or intermediate stage, between the assertion of Crown ownership and public domain on the one hand, and private property rights on the other.

In the wake of the gold rush, goldfields commons (GFCs) were established on numerous parcels of public land across Victoria. They were intended to provide pasture and grazing for holders of miner's rights on the goldfields while maintaining the Crown's possession of the land. There were more than 80 GFCs established, which typically ranged in size from 1,000 to 10,000 acres—although, occasionally, much larger commons were declared. Town commons and farmers' commons were established for similar purposes. The commons drew

on traditional notions of rights of access to land and its resources that were well known from England. However, in Victoria, the idea was adapted to the unusual social and economic conditions of the time and the rapidly evolving character of rural land tenure.[2] Although, over time, the commons were whittled away, sold off and eventually abolished, much of the land originally reserved around the goldfields remains as public land today.

Geographer JM Powell drew attention to GFCs within the context of historical European settlement and land alienation in nineteenth-century Victoria.[3] Ray Wright later identified how bureaucrats accommodated the commons in relation to land issues and the public interest.[4] In this paper, we draw on the rich archival sources of Public Record Office Victoria (PROV) to examine the Inglewood GFC. The Inglewood case study provides a valuable lens through which to explore the role of commons as a resource for various users, as well as the issues confronted by managers and users of goldfield commons, and how they negotiated responses and solutions. Typical problems included stocking rates, squatters' complaints, boundary maintenance, selection pressures, weeds, rabbits, mining activity and the role of Chinese market gardeners. The Inglewood GFC operated from 1861 to 1898—a longer time period than most GFCs; nevertheless, the correspondence preserved in PROV sheds important light on the management of both this extensive public space and others like it.

Historical context

The English land use tradition was established over centuries and provided a complex network of rights and obligations to natural resources, defined by rights of common. Commons included fields, meadows, pastures, marshes, heaths and woods, which were open only to the proprietors or 'commoners'. Typical rights of common included pasture for grazing animals; wood for fuel; peat for roofing and fuel; fish; and, in some circumstances, minerals, including sand, gravel and stone. The owners of common lands also had rights, including the right to extract minerals, hunt and graze animals, and the right to plant and cut trees. The land provided individuals, families and communities with resources crucial to their survival.[5] To some extent, commoners lived outside the market economy, subsisting in part on the 'invisible earnings' of grazing and gathering.[6] Living off the commons encouraged frugality while also requiring negotiation and enforcement of penalties to make the commons work. In English mining districts, miners were free to enter upon 'common' or 'wastrel' lands, stake out a claim, build a house and use timber, fuel and water.[7]

The enclosure movement of the seventeenth to nineteenth centuries took away common rights and destroyed an ancient part of English society, economy and landscape. Historian JM Neeson's study of two Northamptonshire villages from this period offers a detailed analysis of shared land use and how rural people were deprived of their traditional rights to common fields.[8] Historian EP Thompson called this process 'a plain enough case of class robbery'.[9] Long after enclosure had denied peasants access to their traditional commons, there remained a deep hunger for rural land that was met, in part, by migration to the New World of North America, and Australasia. Nonetheless, despite the historical loss of so much common land, there was still more than 1 million acres of commons in England in the 1960s and 450,000 acres in Wales.[10] Many towns also had commons (although these have often succumbed to suburban expansion).[11]

The notion of the commons was exported to British colonies around the world; however, it was rarely as important in the new colonial domains. In these settings, the commons were mainly intended for grazing. Further, they were intended to be of limited duration, as the old idea of full rights in common was inconsistent with contemporary beliefs in exclusive private property and the pursuit of individual economic advantage.[12] Public land was generally regarded as a resource to be sold off by governments to fund the needs of settlers. One of the earliest expressions of the commons in Australia was in 1803 when Governor King set aside large areas of common land adjacent to farming centres where settlers could run their livestock.[13]

In 1811, Governor Macquarie provided land for 'Good Tradesmen and Mechanics' settling at Liverpool to enjoy 'a large and contiguous Common for grazing Cattle'.[14] In the Port Phillip District in 1847, orders-in-council entitled those who purchased land in settled districts to pasture their stock, free of charge, on vacant Crown land adjoining their property. This permission was recognised as a 'commonage right'.[15] In 1855, the Eureka Commission of Enquiry called for land around the goldfields that was suitable only for grazing to be set aside 'as commonage until otherwise required'.[16] The Land Convention that met in Melbourne in 1857 called for diggers and farmers to have access to commonage for small-scale grazing.[17]

GFCs were part of a broader response to the issue of land settlement following the discovery of payable gold in 1851. These responses included miner's rights, cultivation licences and the various land acts of the 1860s and 1870s that promoted access to land by small farmers and supported the 'yeoman' ideal. Many of those who flooded into Victoria during this period and tried their hand at gold mining soon sought a more settled way of life and the independence that came with farming. They established homes and families on and around the goldfields, combining seasonal agriculture with small-scale mining.[18] One of the strongest messages to come out of the Eureka Commission of Enquiry was dissatisfaction with current land tenures and the extent of good land held under the grip of squatter–pastoralists.[19]

The *Sale of Crown Lands Act 1860* was the first in a series of land acts designed to promote small-scale settlement in Victoria.[20] It included provision to establish three categories of commons. *Town commons* were to be declared in the vicinity of any town, with all inhabitants allowed to depasture their cattle and horses. *Farmers commons* could be proclaimed anywhere within 5 miles of purchased land on the petition of at least 10 farmers holding at least 500 acres of adjacent land.[21] Around 150 of these were declared by April 1862.[22] *Gold fields commons* were to be established on 'any Crown lands in the vicinity of any gold field' for the use of all holders of miner's rights, business and carrier's licences and other residents. These commons included land on which mining leases had already been taken out and holders of miner's rights had already settled[23]; however, they excluded alienated land and land held under pre-emptive rights. Rules and regulations for managing each GFC were established by the Mining Board of the Mining District in which the commons lay.

The Sale of Crown Lands Act also provided for the occupation of Crown land in mining districts under residence and cultivation licences. Such licences permitted the holder to use the land for a residence, agriculture and grazing, thereby overlapping with some of the provisions of the miner's right; however, residence and cultivation licences were more expensive, with up to 20 acres available for annual rent of almost £15.[24] More than 300 residence and cultivation licences had been taken out on the goldfields by October 1861, covering 6,440 acres of land in total.[25] A few years later, the licences became a pathway to land selection under *The Amending Land Act 1865*.[26] Used in combination, miner's rights and cultivation licences could be employed strategically with GFCs to maximise access to land for farming and grazing without the expense of freehold purchase.

Gold fields commons in colonial Victoria

The majority of GFCs were located in central Victoria, with 31 established in the Maryborough Mining District and 14 in the Ballarat Mining District (Figure 1). The smallest, covering just 345 acres, was at Yea, and the largest, covering 83,702 acres (130 square miles), was at Bendigo. The average size was a little over 7,000 acres. Altogether, land reserved as town, farmers' and goldfields commons in the 1860s amounted to 1.65 million acres or almost 3 per cent of Victoria's land area.[27] The boundaries of commons only rarely followed natural features such as creeks or rivers. More typically, they were simple squares or rectangles imposed on the landscape, with gold workings and towns roughly in the centre. Some commons were created on basic multiples of 640 acres (1 square mile). GFCs were fluid spatial entities, subject to a constant process of expansion, contraction, amalgamation and abolition. In several cases, such as Inglewood/Kingower and Dunolly/Burnt Creek, GFCs abutted each other and expanded the area available for grazing and other activities. In the north-east, the Eldorado, Woolshed, Beechworth, Bowman's Forest and Snake Valley (Stanley) commons were also contiguous, forming a combined area of almost 26,000 acres. Some commons were joined with farmers' commons into a 'united' common, while others were converted into graziers' commons. *The Sale and Occupation of Crown Lands Act 1862* provided that each common should be administered by a board of three managers. These were elected annually by the municipal council or by the Mining Board of Ballarat, Beechworth, Sandhurst, Maryborough, Castlemaine and Ararat, respectively. As councils and mining boards were themselves democratically elected, the managers of commons were ultimately answerable to local voters. Managers were responsible for dealing with problems as they arose, which often involved local squatters.

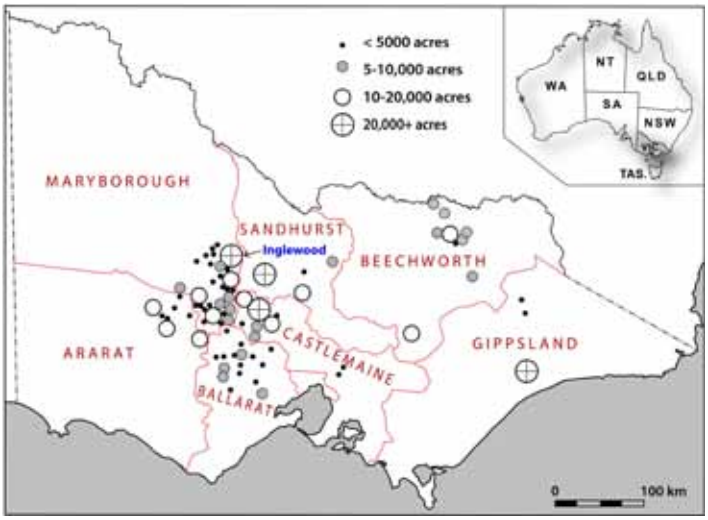


Figure 1: Map of Victoria showing boundaries of mining districts and locations of goldfield commons, drawn by P Davies.

Establishing commons was generally a source of great irritation to squatters, many of whom had, by 1860 or so, already endured the rush of thousands of gold diggers to their land. Some had profited by selling meat to the diggers; however, others had watched in frustration as miners gouged the flats, creeks and hills of their runs, cut down trees, used up and polluted waterholes and drove away their stock. For example, in 1862, a Select Committee heard that thousands of acres of George Barclay Hines's run at Redbank in the Wimmera had been ruined for grazing purposes by the destructive activities of more than 8,000 miners.[28] GFCs were imposed on Crown land that very often overlapped with large acreages occupied by squatters. Many squatters lost some of their runs (and, in two cases, all of their runs) following the establishment of GFCs, but only a few received any compensation.[29] Incensed squatters used their money and political influence to try to have the boundaries of commons reduced or modified to their advantage; failing that, some sought financial compensation. These problems and others find detailed and sometimes poignant expression in the records of the Inglewood GFC.

Inglewood Gold Field Common

The Inglewood area lies at an elevation of 150 metres and has a long-term average annual rainfall of 463 millimetres.[30] The landscape today is a mix of gently undulating open farm country, regrowth Box–Ironbark forest and mallee shrublands.[31] Gold was discovered in November 1859—later than at other places—when prospecting parties burning mallee scrub revealed small payable quantities.[32] Within a few months, the rush had grown to 5,000 miners working 6 miles of rich auriferous gullies and the numbers soon climbed, briefly reaching 16,000.[33] However, rich surface finds dwindled quickly and many soon departed to try their luck elsewhere. Gold in the conglomerate hilltops nearby was traced down to the flat country and followed underground as deep leads, and quartz mining and crushing was soon established. Small groups continued to work puddling machines, but they were hampered by lack of water. Most miners worked as part of larger groups in deep leads and quartz mines. Although the fortunes of the industry rose and fell in the following years, gold provided a platform of prosperity for Inglewood until World War I and beyond.[34]

The Inglewood GFC was declared on 28 January 1861.[35] At 50,096 acres or 78 square miles in area, it was one of the largest commons in Victoria and surrounded the township of Inglewood on all sides. The rectangular-shaped common extended 13¼ miles (21 kilometres) west from the Loddon River and then south for 5½ miles (9 kilometres). It lay within the Korong Division of the Maryborough Mining District, and a notional population of 2,000 miners and residents were entitled to use the common.[36] The Kingower GFC, of 5,800 acres, was established at the same time and abutted the southern boundary of the Inglewood GFC. The Reverend William Hall's Glenalbyn pre-emptive right paddock, which had been rushed by diggers in June 1860, was sandwiched between these two public domains. However, much of the rest of Hall's run was lost to the commons. Another squatter, John Catto, who had held the Loddon run since 1839, was also affected.

It took only a few weeks for the complaints to begin. Dennis Rowan was an eager local petitioner whose letters dominate correspondence from the early to mid-1860s. He reported in February 1861 that Catto was running his sheep on the common while deterring others from doing the same. Rowan had heard that Catto intended 'to give the people and the Government all the annoyance that he can by not withdrawing his sheep' on the grounds that the boundaries of the common were not well defined.[37] Catto acknowledged that he had to remove his stock but wanted a reduction in his licence fee for 20,000 sheep.[38] Although Catto lost the north-west part of his run to the Inglewood common, he otherwise retained miles of river frontage on both sides of the Loddon and well grassed plains east of the river.[39]

A more substantial dispute began the following year, in 1862, when squatter William Hall complained to Charles Gavan Duffy, president of the Board of Land and Survey.

Hall had purchased his Glenalbyn run in 1853, only to find that the creation of the Inglewood common deprived him of most of his land, and he lost money on the sale of his dairy cattle as a result. Hall sought to have a sizeable portion of the common—11,650 acres—restored to his run (Figure 2). According to Hall, this western portion was too far from Inglewood to be of any use to gold miners and too dry and remote from the Loddon River for use by dairymen; therefore, it was suitable only for sheep. The district surveyor, Philip Chauncey, reporting to the Maryborough Mining Board on Hall's request, stated that the land was, in fact, reasonably well watered for much of the year by springs and surface flow and was 'pretty fairly grassed'. However, Chauncey also noted that a great portion of the Inglewood GFC was 'a dense mass of scrub (blocks of which are four miles square in extent)' and that cutting off the proposed section would deprive miners of the benefit of water for their cattle.[40] Chauncey had some sympathy for Hall's predicament, but the Mining Board supported the district's gold miners and declined to grant his request.

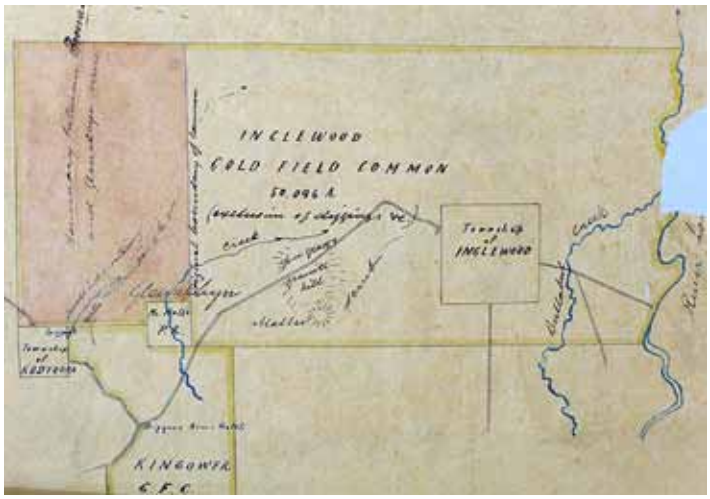


Figure 2: Plan of Inglewood Gold Field Common from 1862 with shaded section showing the area that squatter William Hall wanted restored to his run, PROV, VPRS 242/P0, Unit 246, plan by District Surveyor Philip Chauncey, 8 October 1862.

In this early period, the Inglewood GFC was mostly used for dairy cows and calves. In May 1863, the managers of the common informed the Board of Land and Works that they were compelled to restrict the privilege of depasturing to dairy cattle, as the supply of dairy products was not enough to meet local demand. Manager James Granger listed 20 men who ran a total of 755 cows and calves on the common, with William Bacon and son having the highest number at 97. Dairy cows cost 3 shillings per head per year to graze the common, while horses cost 6 shillings and bulls cost 10 shillings. Rules and regulations for the Inglewood GFC were published in the *Inglewood Advertiser* on 28 January 1863 and included the warning that no-one was allowed to build fences or stockyards on the common unless they had special permission from the managers to do so. A herdsmen was employed to manage animals grazing the common, all of which had to be branded.[41]

A complex dispute arose the following year over Chinese market gardeners who had earlier established plots on the common by the Loddon River near the township of Bridgewater. Dennis Rowan was by now a manager of the common and wrote in complaint that the Chinese had fenced off 100 feet of land along the riverbank, thus depriving cattle of access to water.[42] Rowan had earlier demanded that one of the Chinese, Ah Yot, attend a meeting and pay £10 for the privilege of cultivating garden plots.[43] However, within the legal context of GFCs, such payments for cultivation purposes were probably illegal.

A petition from six local landholders had also been sent to the managers of the common in July 1863 complaining about the Chinese.[44] It claimed that the Chinese had glut the market with their vegetables, thus depriving European growers of sales and income. Many of the usual objections to Chinese were also rehearsed: they were 'not good colonists', hired no labour, failed to build 'comfortable' houses in the way of 'Europeans and other civilised Christians', and did 'not marry wives as other men do'. The petitioners' complaints reveal a mix of racial prejudice and economic jealousy that was typical of goldfields in this period.[45]

In response to such hostility, John Gray wrote to the Board of Land and Works on behalf of Ah Yot, calling attention to the injustice perpetrated on the Chinese (Figure 3).[46] Gray explained that, in early 1861, Ah Yot and his party had fenced ground along the Loddon near Bridgewater for garden purposes. They had supplied Inglewood residents with 'good and cheap vegetables' in the years since, including asparagus, cauliflowers, peas and celery.[47] The Chinese were willing to purchase the land or pay a fair rent to the government, allowing for the improvements they had made. Chauncey reported a few days later that Rowan had erected fences and occupied land adjoining the Chinese garden, adding that Rowan's occupation was as unauthorised as the Chinese party—'besides which he has a large herd of cattle'. [48] It seems that Rowan wanted the Chinese removed so he could take possession of their land for himself, which was worth 'at least £100'.

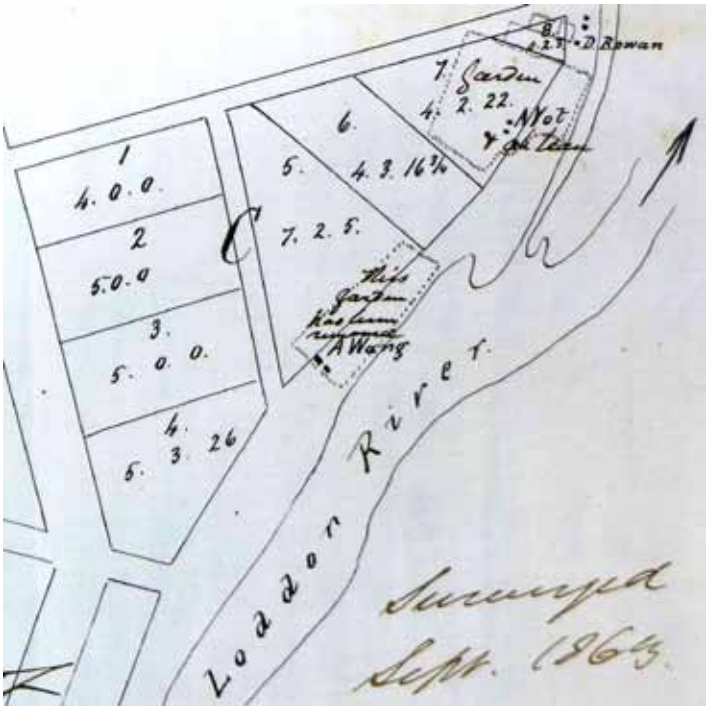


Figure 3: Map showing location of Chinese gardens and Dennis Rowan's property by the Loddon River, PROV, VPRS 242/P0, Unit 246, attached to the letter from John Gray to the Board of Land and Works, 24 October 1864.

Rowan defended himself by pointing out that the Chinese parties of Ah Yot and Ah Yang had fenced-in a total of 10 acres and, thus, no longer held 'cabbage gardens' but substantial farms. They employed 24 Chinese hands and used eight horses for carting vegetables a radius of 16 miles. He estimated their receipts at up to £1200 per annum.[49] Rowan's hostility to the Chinese inadvertently reveals the energy and thrift that brought them agricultural and commercial success. As for the Chinese themselves, they were eager to do the right thing and gain proper legal possession of their land; although, as a consequence of not being naturalised, some form of lease was probably the best they could hope for.

Aboriginal people were also present on GFCs. The Inglewood GFC lay in the traditional lands of the Dja Dja Wurrung people, which extended north from the Great Dividing Range and included the headwaters of the Loddon and Avoca Rivers.[50] Historian Fred Cahir has noted that, despite frequent violent conflict between Indigenous and non-Indigenous people, there was also a high degree of cooperation on the goldfields. Aboriginal people fossicked for gold and worked as police, gold escorts, guides, bark cutters, prostitutes, trackers, child minders, bushrangers, entertainers and prison guards.

[51] In May 1865, a group of 12 or so Aboriginal men, 'accompanied by some lubras and their King with a few picaninnies', arrived at Inglewood from the Murray River. At night they put on a 'grand corroboree'—but only after levying money from white onlookers. Aboriginal people were more than capable of exploiting their exotic interest with costume and performance to pursue another angle of economic advantage.[52]

By late 1865, the worst drought then known in Victoria's European history was beginning to bite.[53] Fees were reduced to help offset the effects of 'famine and disease' among stock.[54] Against this background, the Borough Council of Inglewood petitioned the Board of Land and Works to apportion 25,000 acres, fully half of the GFC, as a town common. This was almost 40 square miles and accounted for the better watered eastern half of the common adjacent to the Loddon River (Figure 4). Under the Sale of Crown Lands Act 1860 (Section 69), this meant transferring management of the land away from the distant Maryborough Mining Board, based 60 kilometres to the south, and into the hands of the local council, thereby dramatically increasing the area it controlled. The Inglewood council argued that local management would provide 'constant and vigilant supervision' and put an end to the gross mismanagement on the part of the current GFC managers.[55] Counter petitions by miners argued that those who actually used the common were best placed to care for it, and that local ratepayers were entitled to run their stock on the common anyway.[56] This set up an argument between town dwellers and miners that rumbled away for years to come.

Figure 4: Plan of Inglewood Gold Field Common showing area applied for by the Borough Council, marked A, B, C and D, PROV, VPRS 242/P0, Unit 246, plan by District Surveyor Philip Chauncey, 23 October 1866.

The Inglewood GFC was reduced in size to 39,500 acres by the Board of Land and Works on 17 June 1867, when 7,800 acres were transferred to the Inglewood Borough Common.[57] A few years later, there was fear that the neighbouring Korong Shire Council wished to have the remainder of the Inglewood GFC abolished and proclaim a farmers common under their jurisdiction, although no formal application was ever lodged.[58] Over the following years, more of the Inglewood common was taken up by selectors, prompting another petition in July 1874 by several hundred farmers, miners and dairymen asking for an expansion of the common; however, no response is recorded.[59] The Glenalbyn Timber Reserve of 5,580 acres was declared on a temporary basis in September 1874. It was made permanent and excised from the Inglewood GFC in 1887.[60]

By the 1880s, the common had been reduced to a residue of mallee scrub infested with rabbits, the best portions having been selected. A Special Land Board in 1885 heard that 20,000 acres of the remaining common 'would not keep a cow', with large areas unable even to grow grass.[61] The Maryborough Mining Board wanted to be rid of the common and the problems it caused. Only a few pounds were available for rabbit control, yet 50 men were needed to do the job properly. There was very little useful land left within the bounds of the common and much of that was littered with treetops left by wood splitters. Cattle numbers were down to 100 or less, meaning small receipts and little money for effective management.[62] The final straw came in 1898 when the Maryborough Mining Board was prosecuted by the Lands Department for failing to destroy all the vermin on the Inglewood GFC. The board simply relinquished control of the common and refused to have any further responsibility for it.[63] Subsequently, the decision was taken to 'Abolish the common' and, by June 1898, it had officially ceased to exist.[64]

Most other GFCs were also whittled away by selectors in the nineteenth century and eventually abolished. However, a few endured into the twentieth century, including Lamplough (1861–1931), Omeo (1861–1909), Wedderburn (1861–1941) and Dunolly (1862–1907). The Fryerstown GFC was abolished in 1910 but reinstated in 1927 and lasted for another decade.[65] Although the Inglewood common was gone by the turn of the century, thousands of acres north and west of Inglewood itself were soon reserved as forest for eucalyptus distilling and much remains today as public land in the Inglewood Nature Conservation Reserve and as Crown timber reserves.[66]

Conclusion

The shadow of Garrett Hardin's 'tragedy of the commons' hangs over many discussions of common-pool resources and the history of their use.[67] Hardin argued that common ownership inevitably results in environmental degradation, as each agent (herdsmen in his theoretical example) seeks to maximise his gain at the expense of his fellows. There is no incentive to conserve, and the commons are destroyed as individuals pursue their own interests. Although the model has long been challenged by economists, historians, sociologists and others, it is still important to ask how the commons functioned in specific historical circumstances.[68] The commons provided a middle or third way of land management between exclusive state control and complete private ownership.

In the English tradition of common lands, a productive commons had always been an insurance against hard times, a retreat when survival was threatened. The commons provided fuel, food and materials that gave people a degree of independence and freedom from the marketplace for labour and goods.[69] However, the enclosure movement deprived commoners of access to land and turned them into landless labourers, paupers or emigrants to the New World and Australasia. Conversely, GFCs in Victoria were less a refuge than a resource to be exploited. People paid fees to graze dairy cows, horses and sheep but they were always subject to a range of controls and oversight. Local herdsmen and managers had responsibility for day-to-day management, while district mining boards created rules and regulations and the more distant but powerful Board of Land and Works had the power to change the boundaries and status of the commons. Time and use brought growing awareness of the potential and limits of the commons' natural resources. The Inglewood GFC was not necessarily ruined or destroyed; however, it was diminished as selectors claimed the best parts, leaving the scrubby remainder to be overrun with rabbits and reclassified as a timber reserve. There was no 'tragedy of the commons'; instead, there was a rough balance of competing interests.

The Inglewood GFC was a large, useful—but also troublesome—public domain for local people. As such, it was a contested space, a locus of competition, jealousy, conflict and, on occasions, racism. There were accusations of greed, corruption, mismanagement and negligence. Petitions were met with counter petitions as people sought favourable consideration and preferment from local, regional and colonial officials. The commons kept potentially auriferous land in public hands and allowed gold prospecting to continue. It may also have provided

a place for fringe dwellers to eke out a living in remote corners of the goldfields.[70] As miners abandoned the goldfields and made their lives elsewhere, most of the common land they left behind was too poor and degraded for farming. Much of it remained as Crown land and persists today in public ownership.

Endnotes

[1] JC Weaver, *The great land rush and the making of the modern world 1650–1900*, McGill-Queen's University Press, Montreal, 2003.

[2] JM Powell, *The public lands of Australia Felix: settlement and land appraisal in Victoria 1834–1891 with special reference to the western plains*, Oxford University Press, Melbourne, 1970, p.80.

[3] Powell, *The public lands of Australia Felix*, pp. 80–83.

[4] R Wright, *The bureaucrats' domain: space and the public interest in Victoria, 1836–1884*, Oxford University Press, Melbourne, 1989, p. 6.

[5] Ibid., pp. 5–7.

[6] JM Neeson, *Commoners: common right, enclosure and social change in England, 1700–1820*, Cambridge University Press, Cambridge, 1993, pp. 41–42.

[7] WE Colby, 'The freedom of the miner and its influence on water law', in M Radin & AM Kidd (eds), *Legal essays in tribute to Orrin Kip McMurray*, University of California Press, Berkeley, 1935, p. 69.

[8] Neeson, *Commoners*.

[9] EP Thompson, *The making of the English working class*, Random House, New York, 1964, p. 218.

[10] WG Hoskins & LD Stamp, *The common lands of England and Wales*, Collins, London, 1963, p. 3.

[11] M Bowden, G Brown & N Smith, *An archaeology of town commons in England*, English Heritage, Swindon, 2009.

[12] B Maddison, 'Radical commons discourse and the challenges of colonialism', *Radical History Review*, vol. 108, 2010, pp. 29–48; Wright, The bureaucrats' domain, p. 6.

[13] BH Fletcher, *Landed enterprise and penal society: a history of farming and grazing in New South Wales before 1821*, Sydney University Press, Sydney, 1976, p. 46.

[14] F Watson (ed.), *Historical records of Australia. Series I, Governors' despatches to and from England*, vol. 7 (January 1809 – June 1813), The Library Committee of the Commonwealth Parliament, Melbourne, 1916, p. 400.

[15] 'Report of the Commission appointed to enquire into the tenure of the waste lands of the crown', *Victorian Parliamentary Papers*, B–no. 70, 1854–1855. p. 63.

[16] 'Report of the Commission appointed to enquire into the conditions of the gold fields of Victoria', *Victorian Parliamentary Papers*, A–no. 76, 1854–1855. p. xiv.

[17] Powell, *The public lands of Australia Felix*, p. 66.

[18] D Goodman, Gold seeking: *Victoria and California in the 1850s*, Allen & Unwin, Sydney, 1994; S Lawrence, *Dolly's Creek: an archaeology of a Victorian goldfields community*, Melbourne University Press, Melbourne, 2000.

[19] 'Report of the Commission appointed to enquire into the conditions of the gold fields', pp. xiv–xix; C Wright, *The forgotten rebels of Eureka*, Text, Melbourne, 2013, pp. 208–210.

[20] T Dingle, *The Victorians: settling*, Fairfax, Syme & Weldon Associates, Sydney, 1984, pp. 58–76; Powell, *The public lands of Australia Felix*; JM Powell (ed.), *Yeoman and bureaucrats: the Victorian Crown Lands Commission 1878–1879*, Oxford University Press, Melbourne, 1973.

[21] JH Brooke, 'Regulations for farmers' commons', *Victorian Parliamentary Papers*, no. 69, 1860–1861.

[22] C Hodgkinson, 'Commons. Reply to question put by Mr. K. E. Brodribb', *Victorian Parliamentary Papers*, A–no. 28, 1862.

[23] JH Brooke, 'Gold Fields Commons. Proclamation', Victorian Parliamentary Papers, no. 59, 1861; Lawrence, *Dolly's Creek*, pp. 94–95.

[24] P Nelson & L Alves, *Lands guide: a guide to finding records of Crown land at Public Record Office Victoria*, Public Record Office Victoria, Melbourne, 2009, p. 197.

[25] 'Residence and cultivation licenses', *Victorian Parliamentary Papers*, A–no. 9, 1861.

[26] E Nathan, *Lost waters: a history of a troubled catchment*, Melbourne University Press, Melbourne, 2007, pp. 21–22.

[27] C Hodgkinson, 'Commons. Reply to a question put by Mr. K. E. Brodribb', *Victorian Parliamentary Papers*, A–no. 28, 1862.

[28] Victoria, *Mining surveyors' reports*, vol. 35 (February 1861), Dave Evans, Ballarat, p. 67; Select Committee, 'Report from the Select Committee on Mr. Hines's case', *Victorian Parliamentary Papers*, D–no. 38, 1861–1861. Commonage was also available on the New Zealand goldfields but much more sparingly so than in Victoria. Goldfields officials and 'wool lords' colluded to minimise diggers' access to grazing land. See S Eldred-Grigg, *Diggers, hatters & whores: the story of the New Zealand gold rushes*, Random House New Zealand, Auckland, 2008, pp. 344–346.

[29] Hodgkinson, 'Commons', pp. 4–6.

[30] Bureau of Meteorology, climate data online, station 810020, available at <http://www.bom.gov.au/climate/data/>, accessed 4 April 2017.

[31] Environment Conservation Council, *Box-Ironbark forests and woodlands investigation resources and issues report*, Environment Conservation Council, Melbourne, 1997.

[32] J Flett, *The history of gold discovery in Victoria*, The Hawthorn Press, Melbourne, 1970, p. 302.

[33] D Bannear, *Historic mining sites in the Inglewood, Wedderburn and St Arnaud mining divisions*, Department of Conservation and Natural Resources, North West Area, [Bendigo], 1994, p. 7; AM Nixon, *Inglewood gold*, rev. edn, Sundowner Press, Greensborough, 1982, p. 16.

[34] Bannear, *Historic mining sites*, pp. 5–19; K Twigg, 'City in the scrub': Inglewood conservation study, Masters thesis, Monash University, 1989, pp. 1–2.

[35] *Victoria Government Gazette*, no. 18, 6 February 1861, p. 259.

[36] PROV, VA 538 Department of Crown Lands and Survey, VPRS 242/P/0 Crown Reserves Correspondence, Unit 246, memo from Philip Chauncey, 8 October 1862.

[37] PROV, VPRS 242/P0, Unit 246, letter from Dennis Rowan to president, Board of Land and Works, 23 February 1861.

[38] PROV, VPRS 242/P0, Unit 246, letter from Dennis Catto to Philip Chauncey, 3 March 1861.

[39] W Owen, *Map of Victoria including the pastoral runs with alterations to 1868*, Melbourne, [1968] State Library of Victoria, available at <http://search.slv.vic.gov.au/MAIN:Everything:SLV_VOYAGER659153>, accessed 9 May 2018; P de Serville, *Pounds and pedigrees: the upper class in Victoria 1850–80*, Oxford University Press, Melbourne, 1991, p.381; C Webb & J Quinlan, *Greater than gold: a history of agriculture in the Bendigo district from 1835 to* 1985, Cambridge Press, Bendigo, 1985, pp. 72–73.

[40] PROV, VPRS 242/P0, Unit 246, letter from Philip Chauncey to Mining Board Office, Maryborough, 18 September 1862.

[41] PROV, VPRS 242/P0, Unit 246, letter from James Granger to president, Board of Land and Works, 18 June 1863; 'Inglewood Goldfield Common', *Inglewood Advertiser*, 28 January 1863.

[42] PROV, VPRS 242/P0, Unit 246, letter from Dennis Rowan, report of the managers of the Inglewood Goldfield Common, 23 May 1864.

[43] PROV, VPRS 242/P0, Unit 246, letter from Dennis Rowan to Ah Yot and party, 8 April 1864.

[44] PROV, VPRS 242/P0, Unit 246, petition to the managers of the Inglewood Gold Field Common, 1 July 1863.

[45] K Cronin, *Colonial casualties: Chinese in early Victoria*, Melbourne University Press, Melbourne, 1982, pp. 41–79; A Markus, *Fear and hatred: purifying Australia and California 1850–1901*, Hale & Iremonger, Sydney, 1979, pp. 34–43; Twigg, 'City in the scrub', p. 52

[46] PROV, VPRS 242/P0, Unit 246, letter from John Gray to president, Board of Land and Works, 24 October 1864.

[47] 'Chinese gardens', *Maryborough and Dunolly Advertiser*, 3 July 1863, 6f.

[48] PROV, VPRS 242/P0, Unit 246, letter Philip Chauncey to president, Board of Land and Works, 28 October 1864.

[49] PROV, VPRS 242/P0, Unit 246, letter from managers of Inglewood Common to Board of Land and Works, 15 November 1864.

[50] ID Clark, *Aboriginal languages and clans: an historical atlas of western and central Victoria, 1800–1900*, Monash Publications in Geography No.37, Monash University, Clayton, 1990, p. 153.

[51] F Cahir, 2012, *Black gold: Aboriginal people on the goldfields of Victoria, 1850–1870*, Aboriginal History and ANU EPress, Canberra.

[52] Cahir, *Black gold*, p. 80.

[53] D Garden, *Droughts, floods & cyclones: El Niños that shaped our colonial past*, Australian Scholarly Publishing, Melbourne, 2009, pp. 45–55; J Keating, *The drought walked through: A history of water shortage in Victoria*, Department of Water Resources Victoria, Melbourne, 1992, pp. 33–38.

[54] PROV, VPRS 242/P0, Unit 246, petition of about 175 people to president and members of the Board of Lands and Survey, 26 October 1865.

[55] PROV, VPRS 242/P0, Unit 246, petition, Alex McNaughton, Inglewood town clerk, to Board of Land and Works, 12 December 1865.

[56] PROV, VPRS 242/P0, Unit 246, petition from farmers, dairymen and owners of stock depasturing on the Inglewood Goldfield Common to Board of Land and Survey, c.1866.

[57] PROV, VPRS 242/P0, Unit 246, Office of Lands and Survey, internal note, 17 June 1867; PROV, VA 538 Department of Crown Lands and Survey, VPRS 8769/P1 Register of Description of Permanent Reserves-Commons, Unit 1, p. 111; *Victoria Government Gazette*, no. 70, 25 June 1867, p. 1137.

[58] PROV, VPRS 242/P0, Unit 246, petition of 13 miners to the Maryborough Mining Board, March 1870.

[59] PROV, VPRS 242/P0, Unit 246, petition to the minister of lands, 21 July 1874.

[60] *Victoria Government Gazette*, no. 53, 17 June 1887, p. 1852.

[61] 'Meeting of a Special Land Board', *Inglewood Advertiser*, 6 August 1885, 2e.

[62] PROV, VPRS 242/P0, Unit 246, letters from David Beckett, clerk of Maryborough Mining Board, to secretary for lands, 15 March 1887 and 21 December 1887.

[63] PROV, VPRS 242/P0, Unit 246, letter from K Guy, clerk of Maryborough Mining Board to secretary for lands, 9 February 1898.

[64] PROV, VPRS 242/P0, Unit 246, Lands Department memo, 11 March 1898; *Victoria Government Gazette*, no. 51, 3 June 1898, p. 1954.

[65] *Victoria Government Gazette*, no.172, 14 December 1927, p. 3930.

[66] Twigg, 'City in the scrub', p. 79.

[67] G Hardin, 'The tragedy of the commons', Science, vol. 162, no. 3859, 1968, pp. 1243–1248.

[68] See, for example, E Ostrom, *Governing the commons: the evolution of institutions for collective action*, Cambridge University Press, Cambridge, UK, 1990; D Wall, *The commons in history: culture, conflict and ecology*, The MIT Press, Cambridge, MA, 2014.

[69] Neeson, *Commoners*, p. 177.

[70] See correspondence of forester John La Gerche and his dealing with prospectors on the Creswick goldfields in the 1880s and 1890s, in A Taylor, *A forester's log*, Melbourne University Press, Melbourne, 1998.

‘The smallpox on Ballarat’

Nineteenth-century public vaccination on the Victorian goldfields

‘“The smallpox on Ballarat”: nineteenth-century public vaccination on the Victorian goldfields’, *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

This is a peer reviewed article.

Dr Nicola Cousen completed her PhD in history at Federation University in 2017. Her thesis was the first in-depth biography of Dr James Stewart who was an Irish doctor and philanthropist on the Ballarat goldfield and left generous bequests to Ballarat institutions and the medical school at the University of Melbourne.

Author email: nicolacc@gmail.com

Abstract

This article seeks to examine public health issues on the Victorian goldfields during the 1850s and 1860s, concentrating on the colonial experience of vaccination against smallpox on the Ballarat goldfield. It explores the history and development of vaccination, the role of the Central Board of Health, the medical profession and the public vaccinator in trying to prevent the spread of disease. Records of public vaccination, mortality and infection on the Ballarat goldfield in the initial gold rush decades, along with municipal council minutes and correspondence, are utilised to gain a clearer understanding of Victorian colonial medical practice on the goldfields.

This article examines public health issues on the Victorian goldfields during the first two decades of the gold rush through a focus on the colonial experience of vaccination against smallpox on the Ballarat goldfield. During the nineteenth century, vaccination was considered a key factor in controlling smallpox infection in the event of an outbreak in Victoria. Its implementation was successful thanks to the efforts of public vaccinators and their medical colleagues and powerful professional and local networks. The history and development of vaccination is explored, along with the roles of the central and local boards of health, the medical profession and the public vaccinator in trying to prevent the spread of disease. Victoria was a leader in the Australian colonies in public health in terms of the comprehensive manner in which vaccination policy was implemented. The public vaccinators in Ballarat serve as an example of practices that were common to all public vaccinators throughout the colony; however, they also reveal public health issues that were distinctive to the goldfields. The birthrate in this community climbed as more women arrived after the initial gold rush years, thus increasing the vulnerable immunologically naive population. Gaining a clearer understanding of colonial medical practice on the Victorian goldfields, as well as the difficulties of maintaining public health, illuminates the experience of nineteenth-century medicine throughout Australia.

Records of public vaccination, mortality and infection on the Ballarat goldfield in the initial gold rush decades, along with municipal council minutes and correspondence, and the records of the chief medical officer and the Central Board of Health (CBH) in the Chief Secretary’s Department, are utilised to gain a clearer understanding of Victorian colonial medical practice on the goldfields. Additionally, newspaper reports, medical journals, and the professional lives and practices of Ballarat doctors involved in the vaccination process from 1852 to 1869 are examined. These not only demonstrate how public vaccinators in Ballarat provided the goldfields population with a means of securing comparative immunity from smallpox, but also how vaccination policy developed. Further investigation into the records of the Chief Secretary’s Department would provide more depth to the discussion of wider vaccination issues in the early years of Victoria; however, it is beyond the scope of this article.

Public health issues on the Ballarat goldfields reflected the city’s changing population during its first two decades. In the initial gold rush years, men far outnumbered women. According to the 1854 census, there were 12,660 males living in Ballarat and 4,023 females—with females representing only 24 per cent of the population.[1] This differed from Melbourne and Geelong where females represented 44 per cent and 41 per cent of the population, respectively. The leading causes of death in Victoria at this time were zymotic diseases—that is, contagious diseases. The highest mortality rates in the colony were reported as being from dysentery and typhus (later diagnosed as typhoid or ‘colonial fever’—a diarrhoeal disease that was the scourge of the goldfields), followed by phthisis (tuberculosis) in areas outside of Melbourne.[2]

Ballarat was constituted a municipality in December 1855. When the *Public Health Act 1854* was extended to encompass the district in July 1856, a Local Board of Health (LBH) was established.[3] After Ballarat East was proclaimed a municipality in May 1857, the former Ballarat municipality became known as Ballarat West. Women constituted 35 per cent of the population in Ballarat West in 1857; by 1861, the ratio was closer to equal at 44.8 per cent.[4] This was nearly double the 1854 ratio of women to men. In Ballarat East, the percentage of women was 39.8.

As more women arrived and the goldfields population became more settled, the birthrate climbed. By 1861, children under the age of 10 constituted 30 per cent of Ballarat West's population and 27 per cent of Ballarat East's population.[5] The leading cause of disease continued to be contagious diseases; however, the number of children's illnesses and deaths became more prominent with these demographic changes. Childhood diseases and birth-related conditions joined gastroenteritis and diarrhoea as the leading causes of death in the district for 1863, followed by diphtheria.[6] Other large contributors to the mortality rate were marasmus (the undernourishment of children), scarlatina, premature birth, protracted birth, malformation and dentition (diarrhoea attributed to teething). Not only was there a larger infant population, but also new diseases introduced to this population could have a devastating effect, as was the case with diphtheria. As Janet McCalman and Rebecca Kippen assert, infections that survived the long voyage to Australia produced severe effects on the immunologically naive colonial-born population.[7] In the case of diphtheria, there was no vaccination in Australia until the twentieth century; however, smallpox was different.

Smallpox inoculation and vaccination

The World Health Organization has described smallpox as 'one of the most devastating diseases known to humanity'.[8] Acutely contagious, it was transmitted by contact with infected people and, to a lesser extent, through contact with contaminated clothes and bedding. The disease entered the body through the respiratory tract and caused mouth and skin lesions. People became unwell 10–12 days after exposure to smallpox, suffering fever, headache, myalgia and vomiting. Two or three days after the fever began, a characteristic rash developed that progressed to pustules, which turned to scabs and separated after one to two weeks. Some sufferers were able to recover; however, for many, the next stage was death.

Smallpox no longer occurs naturally; it was declared globally eradicated in 1980. However, in the nineteenth century, it formed a very real threat to the wellbeing of the inhabitants of Victoria. Unvaccinated populations in which the disease had not previously existed were hit hardest. Its impact on the Aboriginal population was brutal. Richard Broome estimates that up to 60 per cent of the exposed Victorian Aboriginal population before the 1830s died from the disease.[9] Devastation from the disease was also part of the collective memory of immigrants to the colony who had experienced it in their home countries.[10] Deborah Brunton's research shows that, during the eighteenth century, smallpox accounted for 8 per cent of deaths in Sweden, Finland and London, and 21 per cent of deaths in Dublin.[11] Further, Elizabeth Fenn contends that a smallpox outbreak in North America from 1775 to 1782 (which coincided with the American Revolution) took more lives than the war.[12]

Inoculation was introduced to England and Ireland as early as 1721 as a means of inducing immunity to smallpox. This helped to reduce the mortality rate from smallpox during the eighteenth century; however, historians are not in agreement on the extent of its effectiveness. Inoculation could be achieved by applying scabs or pus (lymph) from an individual infected with smallpox (the variola virus) to broken skin to develop a milder form of the disease and induce immunity. This was called variolation. In a modified form of inoculation, the lymph matter of humans or animals—such as calves infected with cowpox (the vaccinia virus)—was used. This was called vaccination. Variolation meant that patients had to endure a case of smallpox in an attempt to acquire immunity. By contrast, through vaccination, immunity might be acquired without suffering a case of the disease.

Vaccination was generally introduced to the skin by piercing through a drop of vaccine, rubbing vaccine into an incision or using a vaccine-charged instrument in one or multiple sites. The effectiveness of the vaccine depended on the potency, the virus strain, its preparation and storage conditions, and the extent of bacterial fungal and viral contamination from lymph harvested from live animals.

Nineteenth-century Ireland provides an example of the success of vaccination in a country where smallpox was endemic. Legislation was introduced to make vaccination free in 1851 and compulsory in 1863. The mortality rate from the disease dropped from 854 in 1864 to just 20 in 1869. Despite virtually identical legislation in Ireland and England, the compulsion to vaccinate was more successful in Ireland. Deborah Brunton attributes this to the work of medical practitioners.[13] Medical practitioners were to play an important role in the success of vaccination in Victoria too.

Vaccine lymph was distributed to the colonies through the avenues of empire. It was transported to Australia on board ships through arm-to-arm transmission using human lymph. Human lymph was mostly used in Victoria before 1880, after which the usage of calf lymph became more common. This was largely due to concerns about transmission of childhood diseases and syphilis during the operation, as Alison Bashford suggests.[14] Lymph was distributed to Victorian country areas on glass wrapped in moist paper and oiled silk by the registrar-general and, later, by the chief medical officer.[15] Over 300 charges of vaccine lymph were distributed throughout the colony in this manner in the second half of 1858. Vaccinators helped to determine how long the lymph remained effective through this distribution method as the practice developed in Victoria and distribution methods improved.

Vaccinators in Ballarat received their vaccine supplies from three sources: government medical officials, other doctors and lymph taken from children they had vaccinated. Children were required to return to the vaccinator eight days after the operation to check whether the vaccine had taken. During these visits, vaccinators issued vaccination certificates and took lymph for use in future vaccinations, thus maintaining their vaccine matter supplies (see Figure 1). Sometimes, multiple attempts were required for a vaccination to take, with some in Ballarat not working after seven attempts.

Figure 1: Certificate of successful vaccination 1858 signed by Dr James Stewart, the public vaccinator for Ballarat, 79.0695: Vaccination Certificate, Gold Museum (The Sovereign Hill Museums Association), Ballarat.

The Victorian *Compulsory Vaccination Act 1854* and the public vaccinators

The influx of highly educated middle-class immigrants during the gold rush, many of whom expeditiously established institutions, meant that Victoria developed differently to other Australian colonies. The relative modernity of Victorian public health is reflected in the speed at which the colony adopted medical advances and legislation following changes in the United Kingdom. Victoria's CBH was established soon after its counterpart in England and Wales. This differs greatly from public health in New South Wales where the first Board of Health was not established until 1881 when public and political demand was spurred by a smallpox epidemic.[16] Victoria established high quality vital registration, some quite modern hospitals and a medical society and journal by the 1860s. In contrast, New South Wales had no permanent professional medical association or journal until the 1880s.[17] Ballarat followed the broad pattern of Victorian public health, but was also addressing the distinctive health needs of the goldfields community. By 1860, Ballarat's visionary pioneers had established a public hospital for miners, an LBH (after the establishment of Ballarat's first municipal council) and a benevolent asylum.

Australian colonies followed different courses with their vaccination enforcement. As Rebecca McWhirter asserts, 'Victoria both enacted and enforced compulsory vaccination; Tasmania passed, but failed to consistently enforce, similar legislation; and New South Wales never imposed compulsory vaccination'.[18] *Victoria's Compulsory Vaccination Act 1854* made vaccination compulsory in the colony. It followed the United Kingdom Vaccination Act 1853, which mandated the vaccination of infants born in England or Wales. Examination of correspondence between Dr William McCrea, who was both chief medical officer of Victoria and president of the CBH, and the Chief Secretary's Department, provides insight into many facets of the decision-making process involved in vaccination policy. Elements of these records are echoed in contemporary newspaper reports; however, the records provide greater context and extra detail of the human agency involved in the process. They highlight the efforts of some doctors in their fight to protect the Victorian population from potential smallpox outbreaks, as well as opposition to those measures. For example, prompted by the prevalence of the disease in Mauritius, McCrea sought to organise a vaccine facility in Melbourne as part of the Act.[19]

Under the 1854 Act, the colony was divided into 28 vaccination districts and 28 public vaccinators were appointed.[20] By 1862, the number of public vaccinators had climbed to 144, reflecting the needs for disease control in the burgeoning population.[21] As in Ireland, England and Wales, it became illegal to perform inoculations in Victoria, as this kept the smallpox disease in circulation. Bashford contends that 'replacing inoculation with vaccination was part of the mission of imperial medicine'[22]—a mission that was enlarged through the spread of smallpox to isolated communities as part of imperial expansion in the first place.

Any medical practitioner legally qualified in the colony under the *Medical Practitioners Act 1854* could perform vaccinations and this continued to be the case after public vaccinators were introduced. Philippa Martyr suggests that public vaccinators appointed 'in outlying districts were generally lay people, as they were more likely to abide by the letter of the law'.[23] However, this does not adequately reflect the experience in Victoria. There were a few cases where laypeople were made vaccinators for districts where no registered practitioner was available, but this was problematic, brief and not the practice in the majority of cases. For example, laypeople were appointed vaccinators in 25 districts in 1865 and the vaccinator for two of these places had already been struck off for non-compliance with the Act.[24] Some doctors were concerned that 'unqualified medical men' holding the government appointment of vaccinator were 'falsely assuming the title of "Doctor"' and misleading the public 'who believed they must be "*bona fide* Doctors"'.[25] As David Evans suggests, the practice attracted 'fierce opposition from the medical profession'.[26] Doctors had to fight hard to protect their professional status and incomes in the years prior to medicine's professionalisation in Victoria.

The public vaccinators of Ballarat

Appointed in December 1854, Ballarat district's first public vaccinators were Dr James Williams (at Ballarat) and Dr James Graham (at Buninyong).[27] Williams was soon replaced by Dr James Stewart who remained the public vaccinator for Ballarat until he left the colony in 1869. Public vaccinators were appointed in other parts of the district as the population grew (see Table 1). These included Dr Henry Leman (at Ballarat East), Dr Louis Saenger (at Smythesdale), Dr William Bailey Rankin (at Buninyong), Dr John Aucterlonie Creelman (at Learmonth) and Dr Henry Crossen (at Carngham). Reflecting Ballarat's melting pot of nationalities, they came from a range of countries—including Ireland, England, Scotland and Saxe-Weimar—and brought with them different levels of medical education, understanding and experience.

Ballarat:
Dr James Williams (Jan–Feb 1855)
Dr James Stewart (1855–1869)
Dr James William King for Dr Stewart (1863–1864)
Dr William MacFarlane (additional vaccinator) (1865–1872)
Dr George Henry Hamilton (1869–1871)

Buninyong:
Dr James Graham (Jan 1855)
Dr William Bailey Rankin (1855–1864)
Dr Cornelius Gavin Casey (1864–1868)
Dr Richard Brown (1868–1873)

Smythesdale:
Dr Louis Saenger (1857–1865)
Dr Thomas Foster for Dr Saenger (1864)
Dr Henry Barnett (1865)

Ballarat East:
Dr Henry Leman (1858–1859)
Dr Richard Jones Hobson (1859–1865)
Dr George Clendinning (1865–1876)

Gordon's and Mount Egerton:
Dr William MacFarlane (1858)
Dr Herbert Brown (1859–?)
Dr Jairus James Wilcocks (1863–1866)
Dr George Clendinning (1866)
Dr George Bull (1866–1868)
Dr Caesar Kieser (1868–c.1872)

Learmonth (and, later, Burrumbeet and The Springs):
Dr John Auctherlonie Creelman (1860–1868)
Dr James Thomas Brudenell Laurie (1868–1870)

Carngham:
Dr William Armstrong Smith (?-1860)
Dr Henry Crossen (1860–1863)
Dr William Miller Dickinson (1863–1864)
Dr Thomas Carter Wigg (1864–1866)
Dr Thomas Robert Nason (1866–1871)

Durham Lead:
Dr Richard Brown (1864–1873)

Sebastopol:
Dr George Leicester Hillas (1865–1871)

Warrenheip:
Dr George Clendinning (1866–1867)
Dr Caesar Kieser (1867–1872)

Table 1: Public vaccinators for Ballarat and district during the 1850s and 1860s

During the 1850s and 1860s, Ballarat's public vaccinators were some of the leading doctors of the area. Men of influence in their community, many were popularly elected to honorary hospital and public positions. Most had travelled to Victoria as ship's surgeons and this formative experience influenced the goldfields medicine of Ballarat as well as its civic development. This was because ship's surgeons had many duties in addition to medical care. To maintain the health and wellbeing of passengers on their voyage to Australia, ship's surgeons were responsible for controlling discipline, sanitation and spaces on board the ship. Some Ballarat doctors, such as Stewart and Clendinning, were also municipal councillors and, thus, were members of the local boards of health. Council minutes, central and local boards of health correspondence, and health reports, are integral to understanding the ways in which communication between government bodies at colonial and local levels and doctors served to influence disease control measures. Councillors sat as the LBH at the end of council meetings, but health issues and correspondence from the central and local boards of health were also addressed during council meetings.[28] It was through these local boards that the CBH effected its measures. There were just five local boards when sanitary administration began in Victoria in the 1850s; however, by 1871, there were 166 local boards of health.[29]

The reach of public vaccinators extended well beyond their official role into a wide range of medical positions in the community. For example, the introduction of public vaccinators in Victoria coincided with measures of the newly formed Ballarat Medico-Chirurgical Society to protect the goldfields population from 'quacks'. The first list of qualified practitioners was published in the Ballarat Star on 1 January 1855, the day the Compulsory Vaccination Act took effect. This also served to direct business to the listed doctors. Through forming professional groups, medical practitioners increased their power and status in the district, and strengthened their networks, which enabled them to take on other public positions.

Vaccination was embraced by many people in the Ballarat district. From the commencement of the Compulsory Vaccination Act in January 1855 to March 1861, 7,738 children were vaccinated in the district; another 2,914 were vaccinated in Ballarat over the following two years. [30] Yet, vaccination rates were never close to universal for Ballarat or for the entire colony and not everybody conformed to vaccination laws. The public vaccinators could employ a variety of means to encourage people to

vaccinate their children. If they failed to do so, or did not return after eight days to check if the operation was successful, parents or guardians could be fined up to 40 shillings for the first offence and up to £5 for further offences.[31] In March 1861, Dr Stewart took John Graber to court for not bringing his child back to check whether the vaccination had taken effect.[32] Stewart did not wish to press charges; instead, he used the occasion to alert the public that they had to comply with the Compulsory Vaccination Act.

The strong networks and connections of the Ballarat doctors helped the vaccinators to influence public health. Many public vaccinators in Ballarat were also accoucheurs—doctors trained in midwifery—and, as such, could influence the vaccination of infants for whom they had been the birth doctors. They worked closely with the deputy registrar for Ballarat, William Pooley. Pooley regularly placed warnings in the Ballarat newspapers that parents and guardians who neglected registration and vaccination risked fines or imprisonment. He also took people to court for not vaccinating their children within the time prescribed by law.

Children were supposed to be vaccinated by six months of age, although Ballarat doctors also vaccinated children who were much older. Sometimes, older children were vaccinated for the first time with their younger siblings; consequently, in the event of an outbreak, there were children of varying ages who were susceptible. The CBH recommended that adults who had not been vaccinated for over 10 years get revaccinated, particularly during times of suspected outbreaks.[33] Vaccination registers provide important insight into how closely the vaccinators followed vaccination policy. Ages of vaccinated people listed in the extant vaccination registers for the Ballarat district during the 1860s range from five weeks to 19 years.[34] This indicates that most, if not all, of these vaccinations were first time vaccinations and not the revaccinations of adults. However, this is only an indication of vaccination practices, as the registers held by the Public Record Office Victoria are not complete for the district or for all years. For example, the important 1850s registers are missing and there are no registers for Dr Stewart's vaccination office or the Ballarat East vaccination office. This is a large gap in the data, as Stewart was the longest standing public vaccinator for the district during this period and his clinic remained the most popular, even after other newer clinics were more readily accessible to patients. For example, Dr Leman claimed that few children visited his vaccination office in 1858 because most attended Dr Stewart's office for vaccination.[35]

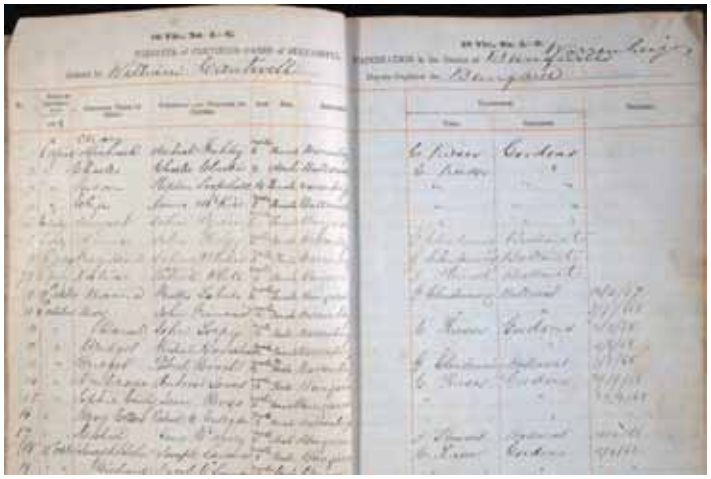


Figure 2: Register of certified cases of successful vaccination in the district of Bungaree, 1868, PROV, VPRS 3654/P1, Unit 1, Registers of Vaccination.

The registers provide details of the child's name, age, father's name, address (town/district) and the name of the vaccinator, occasionally with some remarks. Unfortunately, they do not list how many attempts were required for each child's vaccination to work. Although public vaccinators would be the vaccinator for the majority of children in their district, the registers confirm that a number of other vaccinators were vaccinating children within the same district. Most of the extra vaccinators were from nearby areas, but some came from further afield. For example, Dr JTB Laurie was the public vaccinator for Learmonth in 1869 and, along with local doctors JA Creelman and John Fishbourne, he vaccinated the majority of children in the register. In the same register, there were also vaccinations performed by Dr Steel at Creswick, Dr Robinson at Clunes, D Fowling at Talbot, WH Hinchcliff at Mortlake and George Crowlands at Inglewood.

Central Board of Health measures against the spread of smallpox

Smallpox came to Victoria during the 1850s aboard immigrant ships. Thereafter, the risk from infectious diseases was redefined by the technological transformation of the seaways, as Peter Hobbins argues.[36] The chief medical officer's correspondence provides useful insights into the experiences of health and quarantine measures involved in attempts to keep Victoria free of smallpox. The *Ocean Chief* had 14 cases of smallpox during its voyage to Victoria in 1857 and was held in quarantine off Point Nepean after its arrival in Port

Phillip on 26 June.[37] About 340 passengers (excluding saloon passengers) were removed to the sanitary station under the control of the chief medical officer. By waiting for no more infections to occur, the disease was prevented from entering the colony, despite the failed attempt of saloon passengers to be excused from such quarantine measures.[38] However, the disease circumvented quarantine measures three months later, resulting in three deaths. The infection was spread by three passengers from the *Commodore Perry*, which arrived at Port Phillip Heads on 12 September 1857 from Liverpool. According to the CBH, it was through 'the wilful concealment of the presence of the disease' and an 'attempt to evade quarantine laws'[39] that infected passengers were allowed off the ship. It took 18 days for new suspected cases to appear in the Melbourne and Gisborne areas. The disease could spread in the colony away from the original outbreak site, as carriers may not have known they had the disease due to its asymptomatic incubation period.

When suspected cases appeared in the neighbourhood of Lonsdale and Spencer streets in Melbourne a few weeks after the ship's arrival, the CBH considered that 'the vaccination of all individuals (both children and adults) upon whom that operation has not been performed, a sufficient precaution against the spread of the disease'.[40] The CBH chose not to invoke the 23rd section of the Public Health Act at this time. This would have allowed them to order the cleansing, purifying, ventilating and disinfecting of houses, buildings, churches and places of assembly.[41]

Dr McCrea experienced resistance and opposition when trying to implement the CBH's sanitary measures during the suspected outbreak. He ordered a young member of the Kirk family who was suspected of suffering from the disease to be removed from Jeffcott Street to Royal Park in October 1857. McCrea asked his companion, Dr Knaggs, to immediately vaccinate an unvaccinated child in the house 'to prevent the disease spreading to the neighbourhood, and to prevent if possible [the] other child from being attacked'.[42] A former naval surgeon, McCrea was a strong advocate for vaccination. As Hobbins contends, British naval surgeons were both powerful advocates and instruments for vaccinating those travelling to and living in the colonies.[43]

Knaggs did not return with vaccination lymph; instead, he informed the child's father that removal was optional.[44] Adding to public fear and misunderstandings of procedures, Knaggs wrote to the newspapers, spreading what McCrea referred to as 'generally malignant falsehoods' and deliberately doing 'every thing in his power to thwart the sanitary precautions of the Central Board of Health'.[45] The parents eventually agreed to having their child removed; however, the child died within few hours of reaching Royal Park. Immediately after the child's removal, McCrea ordered that the Kirk family's clothes and bedding be put through boiling water and that their home be cleansed with boiling water, the walls and floors washed with diluted chloride of zinc solution. McCrea's attempt to vaccinate the second child failed and it too succumbed to the disease.

The Medical Society of Victoria also resisted the CBH's sanitary measures. In protest against the final enactment of the Bill for the Suppression of Small Pox in 1857, it claimed that the Bill could not 'fail to lower the character and prestige of the Medical Profession of Victoria in the eyes of their medical brethren in the neighboring colonies and also at home'.[46] The society was concerned that medical men should not be penalised for not doing their job, that the Bill allowed unqualified men to perform vaccinations and that transmitting vaccination certificates to the registrar-general added to the medical men's workloads (without adding to their purses).[47] However, its members supported the preventatives of general vaccination and sanitary measures, conceding that 'small-pox cannot now be excluded from the colony by any oppressive quarantine regulation'.[48] As events played out in the newspapers, the potential for the reading public to lose faith in the CBH, thereby reducing its impact and impeding the effectiveness of its measures, was noted. Out of concern that the public might view its future work with 'mistrust',[49] the CBH called for an enquiry into the matter. Highlighting the important role medical men played in shaping policy—and in what probably amounted to a policy of appeasement—the CBH announced that 'the moral influence possessed by them [the CBH], in connection with the Medical men of the city, will be sufficient to induce persons afflicted to remove to the Royal Park';[50] no further legislation for compulsory measures was required.

The CBH's records also reveal the extent to which financial concerns affected the effective implementation of sanitary measures to avoid the spread of smallpox in the colony. The board had a budget of £250 in 1857 (supplemented with £550) and £150 in 1858. In early 1858, it requested more money to cover expenses involved in the 'considerable and unforeseen expenditure' accompanying smallpox outbreaks. McCrea indicated that, unless additional money was made available, 'the Board will not feel themselves justified in incurring any further expense which some unforseen [sic] emergency may possibly render necessary'.[51] Further, he claimed that any

contrary decision would 'so fetter its [the CBH's] operations and cripple its usefulness by preventing that energetic action so necessary in enforcing its regulations, that the object for which the Board has been constituted will be very much, if not wholly, set aside'.[52] McCrea and other board members had contributed some of their own private money to prevent such a crippling of the board's efficiency and operations.[53] The chief secretary promptly advocated for the CBH to receive an extra £500 for 1858.[54]

Outbreak fears in Ballarat

After the 1857 outbreak in Melbourne, local boards of health were reminded of the necessity for general vaccination as a precaution against the outbreak of the disease and of measures to be taken to suppress the disease in the event of its introduction. The CBH wrote to the Ballarat LBH with guidelines 'for the prevention as far as possible and mitigation of epidemic or contagious disease'.[55] The municipal and Chief Secretary's Department correspondence reveals the extent to which board communication facilitated the implementation of these measures. The public vaccinator had to be notified of all cases of smallpox and had to vaccinate all children in the neighbourhood of the cases who had not already had the operation. The infected person had to be isolated and could only be visited by medical attendants. Another person had to be found to take care of them if no relative or friend was willing to attend them, preferably someone who had already had the disease and possible immunity to it.

Conditions particular to the goldfields caused additional complications. In 1858, drainage issues in Ballarat concerned the local and central boards of health. Debris from puddling and sluicing operations (sludge) filled the beds of water courses, encroached on the roads, damaged property and interfered with drainage. In the event of a smallpox outbreak, the cleansing and disinfecting of a house or tent of an infected person would be impaired by lack of drainage and by the contaminated liquids waiting to evaporate. Ground pollution from privy cesspits could also spread disease; however, it was not until 1872 that the city's LBH began a zealous campaign to convert over 4,000 privies to the earth closet system.[56] During the 1850s and 1860s, privies at the Ballarat Railway Station were still being flushed into the Yarrowee Creek, and there was a special channel for the flushing of the city's hospital, bank and hotel closet cesspools.

In the wake of the smallpox outbreak in Melbourne, a suspected outbreak occurred in Ballarat that exemplifies the fear and confusion about smallpox in Australia and the varied opinions of doctors. In April 1858, an eight-year-old girl, Miss Lecki, was suspected to have contracted the disease.[57] Dr Edward Duffin Allison had been attending her and considered her conical-shaped pustules to be an aggravated case of chickenpox. Dr Walter Lindesay Richardson, who had vaccinated Lecki a year earlier, believed that she was suffering from malignant smallpox, as she was covered in pustules of various stages. In the belief that smallpox was a consequence of 'ignorance and filth', and despite vaccinating some of his patients, Richardson was in favour of sanitary measures over vaccination.[58] Not everyone shared his beliefs. On being notified of the case, CBH President Dr McCrea requested authority to extend the Public Health Act to encompass Ballarat East and for the Chief Secretary's Department to incur whatever expense was required to prevent the spread of the disease.[59] McCrea also called for an investigation by the public vaccinator, Dr Stewart, and the honorary medical officers of the Ballarat Hospital, Charles Kenworthy, George Nicholson and Henry Mount. The doctors concluded that the girl had the less dangerous cowpox and not smallpox.

The *Star* newspaper, which misreported the case in an alarmist manner, suggested that Dr Allison was disgracefully derelict in his duty, and that he had placed the community at risk of the virulently infectious disease. A pitiable apology was given the following day; the newspaper expressed regret for having caused unnecessary alarm—*if* they had made a mistake, which they were not convinced they had, they were in the company of medical professionals who could not agree. The *Star* was entirely unhelpful; it continued to undermine Stewart and the other doctors and recommended that the 60 or 70 children who attended Miss Lecki's school should stay at home. As public vaccinator, Stewart condemned the spread of false reports; he explained that, had he and his colleagues not investigated the case, the Lecki family's tent and bedding would have been needlessly destroyed. If the doctors, particularly the public vaccinator, had not been so well trusted by the public, the *Star* could have stirred up vigilantes to burn the family's tent and belongings, placing the sick child at risk. During the 1857 Melbourne outbreak, lodgers who shared a house with a patient suspected of having smallpox were 'inclined to remove him by any means'.[60] The man had been refused admission to the Melbourne Hospital. McCrea had to intervene, placing the sick man in an isolated area of the Immigration Depot overnight while he made arrangements for his care and isolation from the rest of the community.

[61] In actions reflecting those of the Ballarat district public vaccinators, McCrea felt that he 'was bound by common humanity to provide for [the patient] in some way and the only means at my disposal were those I adopted'.[62]

Attempts to obtain a vaccination office for Ballarat East before the suspected outbreak in 1857 had failed, despite Dr George Clendinning's concern that it 'was really too much, for delicate females to undergo, the long journey through the mud of the Main-road up to the Western Township',[63] which is where Dr Stewart's vaccination office was situated. However, rather than out of concern for poor 'delicate' females, Clendinning's motives were business-oriented. With the population and birthrate increasing, female and child patients were important contributors to a doctor's livelihood and much business was being directed towards the doctors of Ballarat West. Dr Leman was appointed the first public vaccinator for Ballarat East following this smallpox scare.

Public vaccinators continued to play an important part in the prevention of smallpox through vaccination and in calming public fears during the 1860s. Doctors Stewart, Nicholson and Thomas Le Gay Holthouse were called to consult on a suspected smallpox case at the Ballarat Benevolent Asylum in November 1862.[64] The female patient had thick papular eruptions on her face, arms and body, which became pustular. However, the doctors all agreed that it was not smallpox. Other suspected outbreaks in the colony continued to heighten fear of the disease.

A second smallpox outbreak began in Melbourne in 1868. The disease had again breached quarantine measures, as its source was ship passengers. This outbreak lasted six months and involved 43 verified cases.[65] The chief mate of the infected ship, the *Avon Vale*, died from smallpox in the Immigration Hospital, as did a patient in his hospital ward. Several suspected cases were reported in the hospital neighbourhood but were determined to be chickenpox. An article in the *Australian Medical Journal* suggested that some cases were incorrectly diagnosed as smallpox because the people involved had 'an inordinate craving after notoriety'.[66] A commission was appointed to investigate and its nine medical practitioners were divided in opinion: two thought the cases were true smallpox, three thought they were smallpox modified by vaccination but capable of producing true smallpox in the unvaccinated and four thought it was not smallpox at all. The lack of consensus raised questions about correct diagnoses, adding to the public's confusion and fear.

The press and public health awareness

Victorians were kept aware of the harsh reality of smallpox through newspaper reports of mortality rates and endemic and intermittent states in their home countries and other overseas countries, as well as reports of suspected outbreaks in Victoria. There was also a good deal of scaremongering. This could be both beneficial and detrimental. Suspected outbreaks were so significant that, according to McWhirter, they 'provided the stimulus necessary for great leaps forward in the development of public health'.[67] However, scaremongering could also be dangerous and encourage mob mentality. For example, as already noted, had the Ballarat public vaccinator's opinion and advice not been trusted, the outcome in the 1858 Lecki case could have been dire.

Public vaccinators, registrars, the chief medical officer and the CBH also used newspapers and journals to administer the Compulsory Vaccination Act and implement precautionary public health messages and measures. Reports on court cases provided fear of punishment for not vaccinating, important news on possible outbreaks kept the public informed and medical authorities published information in attempts to dispel harmful myths and misinformation. Heightened fear from news of suspected outbreaks served to increase vaccination rates, especially when people had been lax, as had been the experience in Melbourne.

The CBH used the prevalence of smallpox in London in July 1863 to encourage parents to vaccinate their children. According to the *Star*, the response in Ballarat was so great that the footpath outside the public vaccinator's office in Armstrong Street was 'rendered almost impassable with women and children',[68] and the vaccinator's supply of lymph was exhausted (for example, see Figure 3). The newspaper also reported that the deputy registrar was taking out summonses against those who neglected to vaccinate their children, thus combining the fear of disease with the fear of financial loss to achieve the desired effect. The CBH began to admit reporters to their meetings in early 1869. Public health in Ballarat was more transparent and accessible to the public, as LBH meetings were always reported in the *Star* as part of municipal council proceedings.

Figure 3: A vaccination office crowded with women and children. 'Small-pox precautions: vaccination "from the calf"', *Australian Sketcher*, 6 May 1882.

Victoria's two greatest protections from outbreaks of smallpox were its isolation from countries where smallpox existed and vaccination. As the 1857 and 1868 experiences reveal, immigration medical checks and quarantine measures were not a perfect barrier to the disease. The CBH considered extensive vaccination to be 'the only means of rendering such a visitation as harmless as possible',[69] as it secured comparative immunity from the disease.

The Ballarat public vaccinators provided their goldfields population with a means of securing comparative immunity from smallpox. They provided the knowledge and advice to allay fears, diagnosis of suspected cases (despite divided medical opinions) and the care of the community through their medical and civic roles. By such means, they earned the trust of their community, which, in turn, prevented fear from turning into panic and vigilantism. These doctors had high status in their community and the role of public vaccinator added to this status. Public health in Ballarat reflects the larger pattern of Victorian public health, which differed from other Australian colonies. However, it also diverged from this pattern, as its doctors adapted to the distinctive goldfields conditions, networks and demography. Vaccination was a key factor for controlling smallpox infection in the event of an outbreak in Victoria during the nineteenth century and its implementation was successful thanks to the efforts of the public vaccinators, the central and local boards of health, their medical colleagues and their powerful professional and local networks.

Acknowledgments

I wish to acknowledge and thank Sebastian Gurciullo and Abigail Belfrage for their generous assistance with accessing some of the Public Record Office Victoria records.

Endnotes

[1] Victoria, *Census of Victoria*, 1854, Government Printer, Melbourne, [1855].

[2] Victoria, *Births, deaths, and marriages in the Colony of Victoria: annual report of the registrar general*, Government Printer, Melbourne, [1855–1856], pp. 37, 45, 47; Janet McCalman, 'Diseases and epidemics', available at <http://www.emelbourne.net.au/biogs/EM00473b.htm>, accessed 13 March 2018.

[3] PROV, VA 478 Ballaarat (Municipal District 1855–1863; Borough 1863–1870; City 1870–1994), VPRS 2500/P0 General Correspondence Files, Unit 1, Health Reports 1856–1867, Public Health Act Extended to Ballaarat, proclamation.

[4] Victoria, *Census of Victoria*, 1861, Government Printer, Melbourne, [1862], p. 13; Weston Bate, *Lucky city: the first generation at Ballarat, 1851-1901*. Melbourne University Press, Carlton South, 1978, p. 106.

[5] Victoria, *Census of Victoria*, 1861, p. 24.

[6] 'Vital statistics of Ballarat', *Star*, 27 February 1864, p. 1S.

[7] Janet McCalman & Rebecca Kippen, 'Population and health', in Alison Bashford & Stuart Macintyre (eds), *The Cambridge history of Australia: Indigenous and colonial Australia*, vol. 1, Cambridge University Press, Port Melbourne, 2013, p. 309.

[8] WHO, 'Smallpox', available at <http://www.who.int/biologicals/vaccines/smallpox>, accessed 17 May 2016.

[9] Richard Broome, *The Victorians: arriving*, Fairfax, Syme & Weldon, McMahons Point, 1984, p. 28.

[10] Anne Hardy, 'The medical response to epidemic disease during the long eighteenth century', in JAI Champion (ed.), *Epidemic disease in London*, Centre for Metropolitan History, Institute of Historical Research, University of London, 1993, p. 65.

[11] Deborah Brunton, *The politics of vaccination: practice and policy in England, Wales, Ireland, and Scotland, 1800–1874*, University of Rochester Press, Rochester, 2008, p. 12.

[12] Elizabeth A Fenn, *Pox Americana: the great smallpox epidemic of 1775–1782*, Hill and Wang, New York, 2001, pp. 6, 266.

[13] Deborah Brunton, 'The problems of implementation: the failure and success of public vaccination against smallpox in Ireland, 1840–1873', in Greta Jones & Elizabeth Malcolm (eds), *Medicine, disease and the state in Ireland, 1650–1940*, Cork University Press, Cork, 1999, p. 151.

[14] Alison Bashford, *Imperial hygiene: a critical history of colonialism, nationalism and public health*, Palgrave Macmillan, Basingstoke, 2004, p. 20.

[15] Victoria, Central Board of Health, *Fifth annual report under the Act 18 Victoria, No. 13*, Government Printer, Melbourne, 1859–1860, p. 3.

[16] CJ Cummins, *A history of medical administration in NSW 1788–1973*, NSW Department of Health, North Sydney, 1979, pp. 63, 65.

[17] Milton Lewis & Roy MacLeod, 'Medical politics and the professionalisation of medicine in New South Wales, 1850-1901', *Journal of Australian Studies*, no. 22, 1988, p. 81.

[18] Rebecca McWhirter, 'Lymph or liberty': responses to smallpox vaccination in the eastern Australian colonies, PhD thesis, University of Tasmania, 2008, p. iv.

[19] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 133, Medical: Chief Medical Officer (Colonial Surgeon until June 1854), Coroner, 1854–, letter from William McCrea, chief medical officer, to colonial secretary, 17 August 1854.

[20] Victoria, *Compulsory Vaccination Act 1854*, Government Printer, [Melbourne], 1854, p. 9; Victoria Government Gazette, 26 December 1854, p. 3056.

[21] Victoria, *Statistics of the Colony of Victoria for the year 1862*, Government Printer, Melbourne, 1862, pp. 343–345.

[22] Alison Bashford, 'Medicine, gender, and empire', in Phillipa Levine (ed.), *Gender and empire*, Oxford University Press, New York, 2004, p. 116.

[23] Philippa Martyr, *Paradise of quacks: an alternative history of medicine in Australia*, Macleay Press, Paddington, 2002, p. 67.

[24] 'Local news', *Australian Medical Journal*, April 1865, p. 143.

[25] 'Medical news', *Australian Medical Journal*, July 1858, p. 240.

[26] David Evans, 'Vaccine lymph: some difficulties with logistics in colonial Victoria, 1854–1874', in John Pearn & Catherine O'Carrigan (eds), *Australia's quest for colonial health: some influences on early health and medicine in Australia*, Department of Child Health, Royal Children's Hospital, Brisbane, 1983, p. 161.

[27] *Victoria Government Gazette*, 26 December 1854, p. 3056.

[28] PROV, VPRS 13007 Council Minutes; PROV, VPRS 2500/P0 General Correspondence Files, Unit 1, Health Reports 1856–1867, letter from Fred Thomas, secretary CBH, 5 October 1857.

[29] Victoria, Central Board of Health, *Twelfth report with appendices*, Government Printer, Melbourne, 1871, p. 3.

[30] 'News and notes', *Star*, 23 April 1861, p. 2; 'Social', Star, 23 July 1863, p. 1S.

[31] Victoria, *Compulsory Vaccination Act 1854*, p. 12.

[32] 'District police court', *Star*, 27 March 1861, p. 4.

[33] Victoria, *Central Board of Health third annual report*, Government Printer, Melbourne, 1858, p. 3.

[34] PROV, VA 2889 Registrar-General's Department, VPRS 3654/P0 Registers of Vaccinations. Bungaree 1868, 1869; Buninyong 1864, 1865, 1866, 1867, 1868, 1869; Burrumbeet 1863, 1864, 1865, 1868; Durham Lead 1865, 1866, 1868, 1869; Learmonth 1863, 1864, 1866, 1867, 1869.

[35] 'Eastern Municipal Council', *Star*, 8 June 1859, p. 3.

[36] Peter Hobbins, 'Union Jack or Yellow Jack? Smallpox, sailors, settlers and sovereignty', *Journal of Imperial and Commonwealth History*, vol. 45, no. 3, 2017, p. 391.

[37] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, chief medical officer, to chief secretary, 17 July 1857.

[38] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from McKay, Baines & Co to His Excellency Sir Henry Barkly, 15 July 1857.

[39] Victoria, *Central Board of Health third annual report*, p. 8.

[40] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, president CBH, to Chief Secretary, 29 September 1857.

[41] Victoria, *Public Health Act 1854*, Government Printer, Melbourne, 1854, Section XXIII.

[42] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, president CBH, to chief secretary, 6 November 1857.

[43] Hobbins, 'Union Jack or Yellow Jack?', p. 399.

[44] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from JN Hassall, superintending inspector, to secretary CBH, 22 October 1857.

[45] McCrea to chief secretary, 6 November 1857.

[46] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, paper presented by deputation from the Medical Society to His Excellency, 23 November 1857.

[47] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, copy of resolution passed by the Medical Society in reference to Kirk's child and legislation, 25 November 1857.

[48] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, resolution adopted at a meeting of the Medical Society of Victoria held on 4 November 1857.

[49] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, president CBH, to chief secretary, 25 November 1857.

[50] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, president CBH, to chief secretary, 2 October 1857.

[51] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 554, Medical, 1858–, letter from William McCrea, president CBH, to chief secretary, 15 April 1858.

[52] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 554, Medical, 1858–, letter from William McCrea, president CBH, to chief secretary, 18 February 1858.

[53] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 554, Medical, 1858–, letter from William McCrea, president CBH, to chief secretary, 10 February 1858.

[54] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 554, Medical, 1858–, CBH expenses, April 1858.

[55] Letter from Fred Thomas, 5 October 1857.

[56] Victoria, *Central Board of Health report of the board for the year 1872*, Government Printer, Melbourne, 1873, p. 6.

[57] 'The reported case of small-pox at Ballaarat', *Argus*, 30 April 1858, p. 5; 'The small-pox on Ballarat', *Star*, 28 April 1858, p. 2; 'The reported small-pox', *Star*, 29 April 1858, p. 2; 'Eastern Municipal Council', *Star*, 29 April 1858, pp. 2-3; Keith Macrae Bowden, *Goldrush doctors at Ballaarat*, Magenta Press, Mulgrave, 1977, p. 72.

[58] Dorothy Green, 'Anti-vaccination and syphilis', *Medical Journal of Australia*, 7 March 1970, p. 500.

[59] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 554, Medical, 1858–, letter from William McCrea, president CBH, to chief secretary, 28 April 1858.

[60] Victoria, *Central Board of Health third annual report*, p. 4.

[61] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, president CBH, to chief secretary, 11 November 1857.

[62] PROV, VPRS 1189/P0 Chief Secretary's Department, Inward Correspondence 1, Unit 553, Medical, 1857–, letter from William McCrea, chief medical officer, to chief secretary, 1 October 1857.

[63] 'Municipal Council East', *Star*, 15 July 1857, p. 3.

[64] 'The committee of the Benevolent Asylum and Dr Bunce', Star, 25 November 1862, p. 1S.

[65] Evans, 'Vaccine lymph', p. 167.

[66] 'Variola or varicella', *Australian Medical Journal*, January 1869, p. 27.

[67] McWhirter, 'Lymph or liberty', p. 49.

[68] 'Social', *Star*, 23 July 1863, p. 1S.

[69] Victoria, Central Board of Health, *Fourth annual report under the Act 18 Victoria, No. 13*, Government Printer, Melbourne, 1859-1860, p. 4.

Forum articles

The notorious Michael O'Grady

Big Mick in early Melbourne

'The notorious Michael O'Grady: Big Mick in early Melbourne', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

Lauren Murphy is PhD candidate in history at La Trobe University. Her recent honours thesis focused on the attribution of vases from Magna Graecia. She is a long-time resident of the northern suburbs of Melbourne and has an interest in local, as well as ancient, history. This is her first journal submission.

Author email: ouroboros81@bigpond.com

Abstract

Michael 'Big Mick' O'Grady was a notorious character in Melbourne's early days. He was both a criminal and a constable, and at one point considered entering politics. His misdemeanours were celebrated in the newspapers of the day; however, since his death, his story has been lost to history. I intend to resurrect this figure so that modern audiences can appreciate the combination of criminality and larrikinism that helped to build the character of our city and nation.

On 11 March 1847, the *Port Phillip Patriot* reported that Michael O'Grady was arrested for stealing a blunderbuss—a firearm with a fluted muzzle. The article stated that 'some fun may be anticipated' at the hearing, due to 'Mr Grady's well-known oratorical powers'.[1] This is one of many lighthearted, humorous stories about 'Big Mick' that appeared in the Melbourne press during the 1840s. Each story adds to an evolving picture of a man who gained fame, or infamy, for being both a criminal and an enforcer of the law.

O'Grady's exploits made him well known in Melbourne during his lifetime; however, he has been overlooked in histories relating to the establishment of the City of Melbourne. Most histories of early Melbourne focus on more renowned and respectable characters—people who have streets and suburbs named after them. By contrast, Big Mick was a beloved nuisance and source of entertainment for the people of the city. Victorian Public Records Series (VPRS) 19—which primarily consists of correspondence directed to the superintendent of the Port Phillip District—contains a number of letters from O'Grady. Were it not for these letters at Public Record Office Victoria (PROV), the historical record of Big Mick would be limited to sensationalist newspaper accounts. By neglecting O'Grady's story, we have overlooked a figure who, arguably, influenced early Melbourne's character and (along with many other similarly overlooked local figures) contributed to the emerging national character.

Michael O'Grady, sometimes referred to as Michael Grady, but more commonly known as Big Mick, was transported to Australia in 1832.[2] A repeated absconder, his physical appearance was described in the *New South Wales Government Gazette* on numerous occasions during the 1830s. He was 5 foot 10½ inches (179 centimetres) tall, with a ruddy, freckled complexion, light brown hair, light grey eyes, a scar over his left eyebrow and another scar on his left arm.[3] O'Grady's height, hardly deserving of the moniker 'big' in modern times, was nonetheless quite tall by convict standards; most of the other runaway convicts in the *Gazette* were listed as being around 5 foot 4 inches tall. A letter written by O'Grady in the 1840s reveals that he was rejected from service in the border police due to his size;[4] however, it is not clear whether this was because he was too tall or too heavy or both. Certainly, his employment as a night watchman conjures the possibility that he may have been an intimidating figure.

Despite his repeated escape attempts, O'Grady received his ticket of leave in 1839.[5] His first appearance in Melbourne's newspapers hardly belies his later notoriety; he was listed among many who were fined 5 shillings in June 1840 for the crime of drunkenness—convicted 'for the first time!', the *Port Phillip Patriot* proclaimed with characteristic jocularity and enthusiasm.[6]

Drunkenness was a problem in the colony. Robyn Annear, author of Bearbrass, describes drunkenness as the 'common ingredient in most of the crimes and misdemeanours to attract the notice of the police and newspapers'.[7] O'Grady's later appearances before the court, as described in newspaper reports, often mention that he was drunk, or suspected of being drunk, at the time he committed the crime of which he was accused. For example, in April 1843, after being charged with drunkenness and using 'epithets not of the most choice description', O'Grady appeared before the bench. The Melbourne Times recorded that he 'scratched his head, the infallible resource to which embarrassed people have recourse, and admitted the drunkenness'.[8] This

description, so early in Grady's career as a nuisance whose 'love of fun and whiskey is well known',[9] foreshadows the playful tone that the press would continue to take when reporting his crimes and misdemeanours. According to press representations, his crimes were rarely taken seriously, and his befuddlement, outbursts, and colourful use of language were presented as a form of entertainment for newspaper readers.

Employed as a night watchman, O'Grady saw his work as being 'in the public service', for, as he put it, 'many a dark and dreary night have I paced the dismal streets, protecting your lives and property from the depredations of the midnight robber and the assassin'.[10] He wrote repeatedly to Charles Joseph La Trobe, the superintendent of Port Phillip, seeking employment with the police.[11] Although his letters were eloquently written, with penmanship quite unexpected from someone of O'Grady's class and reputation, the differing hands and spelling evident in the letters suggest that O'Grady may not have written them; like most convicts, he was probably illiterate. He was eventually appointed a special constable—a position like a deputy, rather than a regular constable; however, his appointment was short lived. According to contemporary press accounts, O'Grady's employment was terminated due to continuing bouts of drunkenness as well as his own penchant for criminal acts. The *Port Phillip Gazette* reported that, 'by some means, a notorious character named Michael Grady alias Big Mick, has been appointed a special constable, and within the last week he has been before the bench for improper conduct twice'.[12] He was finally dismissed from his position for constantly bickering with another special constable during the middle of the night and disturbing the peace.[13]

O'Grady's treatment by the press provides insight into the way that certain characters in Melbourne, particularly those that might be termed 'larrikins', were tolerated and even indulged, by the authorities and, more significantly, by the media. As recently as the 1970s, James Murray—in *Larrikins: 19th century outrage*—regarded larrikins as social terrorists, a group he 'equated with the Irish immigrant who has brought such antagonism to the country'.[14] In *Larrikins: a history*, Melissa Bellanta dates the appearance of the term 'larrikin' to the 1860s, with its first appearance in the press in 1870.[15] According to Bellanta, 'to be a larrikin is to be sceptical and irreverent, to knock authority and mock pomposity'. O'Grady epitomises this characterisation.[16] Bellanta was primarily looking at a later period; however, it is arguable that the larrikin of Australian lore has its roots in figures such as Big Mick.

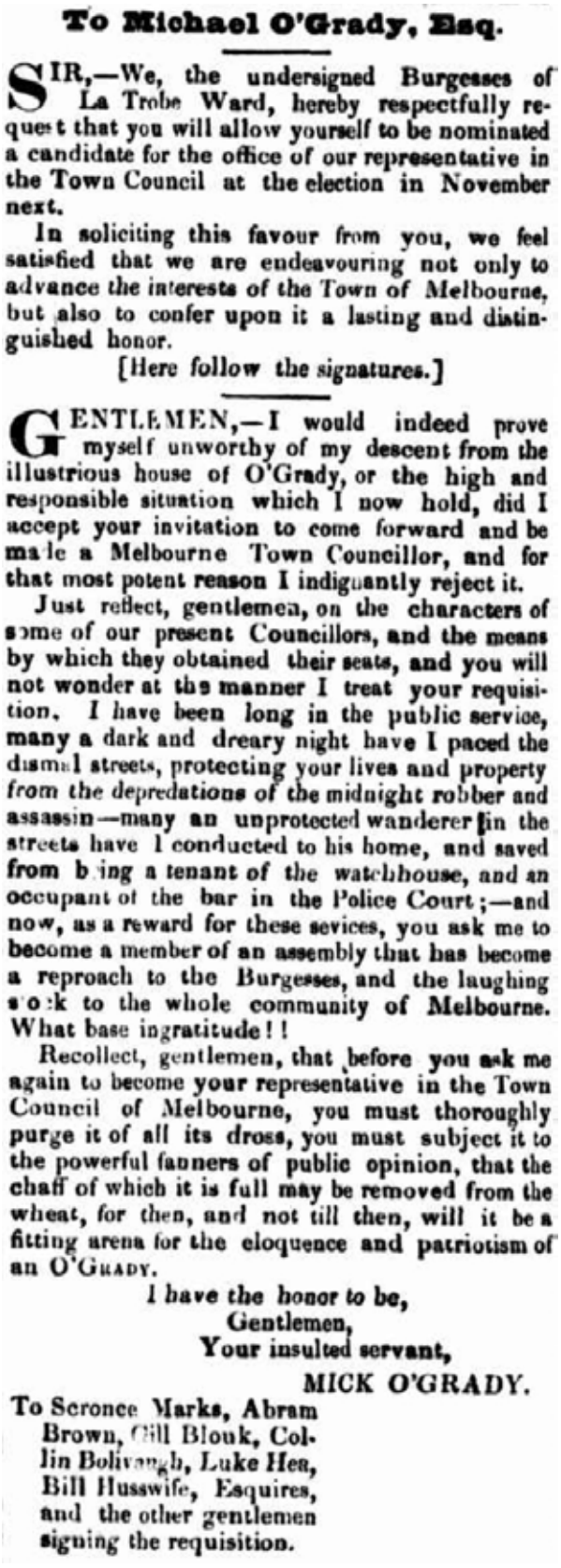
Numerous contemporary historians have examined the prejudice towards Irish immigrants by English settlers in early Melbourne. As Raelene Frances observes, the Irish were routinely portrayed as 'dirty, drunken, lazy, emotional, dishonest and addicted to fighting and the singing of mournful ballads'.[17] In *The Irish in Australia*, Patrick O'Farrell relates a stream of complaints made during the 1830s and 1840s, such as that 'Australia was being flooded with ignorant, uncivilised, degraded Catholic paupers'.[18] The Reverend John Dunmore Lang's 1841 pamphlet, *The question of questions! Or, is this colony to be transformed into a province of the Popedom? A letter to the Protestant landholders of New South Wales*, was typical of such complaints. Lang proposed measures to reduce the number of immigrants coming from undesirable areas of Ireland, which he saw as 'the strongest holds of popery, bigotry, superstition, and immorality, in the British Empire'.[19] The Irish were present at both the top and bottom of the colony's growing social establishments, separated by gulfs in 'education, social background, sophistication, and, usually, religion'.[20] Notably, many of the colony's lawmakers shared Irish heritage, with the policing of Melbourne modelled on that of both the London Metropolitan Police and the Irish Constabulary.[21]

Highlighting his Irish background, Big Mick was generally quoted in dialect, rather than paraphrased. This added to the charm—relative to stereotypes of the Irish working class—with which his character was imbued. For example, the *Port Phillip Gazette* recorded that he sang 'Oh nanny wilt thou gaho wi' me' in court while looking 'wistfully' at a goat whose ownership was in dispute (and which he was accused of stealing).[22] This kind of reporting indicates that the press and the law indulged O'Grady's colourful behaviour. That O'Grady was in a state of 'effervescence', and that it took 'a few magisterial frowns to keep the hot blood of the O'Gradies from boiling over', was acceptable because he put on a show for the court and the press.[23]

The timing of O'Grady's crimes, as well as his appearance before the police court and mayor's court rather than the Supreme Court, means that there is dearth of official records detailing his encounters with the law. Victoria did not have a Supreme Court until William a'Beckett and Redmond Barry first sat on its bench on 10 February 1852.[24] While records of Victoria's superior courts are largely well maintained, records documenting matters of the police and magistrates courts are far less detailed or complete. VPRS 51 contains the deposition registers from 28 April 1845 to 23 October 1855; however, the records from 1847—the year when Grady's criminal exploits were at their height—are absent. We know that the police court at this time was 'a temporary wooden building

insufficiently small'.[25] These conditions are unlikely to have fostered good record keeping practices, a potential factor in the loss or destruction of many records of lower courts, including those concerning O'Grady.

Something of a local celebrity, Grady's notoriety purportedly led to a formal request by the burgesses of La Trobe Ward that he accept a nomination for the Melbourne Town Council in 1846 (see Figure 1). Grady 'indignantly rejected' the nomination, stating that it represented 'base ingratitude' for his services, and that the council was not a 'fitting arena for the eloquence and patriotism of an O'Grady'.[26] Later, reporting that his job as night watchman was in jeopardy, he averred that he was willing to submit to the 'degradation of the name of O'Grady' and allow himself to be elected to council.[27] However, there is no record of him running for council. The entire incident may have been in jest—a joke run by the *Argus*; yet, the fondness with which Grady was regarded at the time, at least by the local media, remains evident.



To Michael O'Grady, Esq.

SIR,—We, the undersigned Burgesses of La Trobe Ward, hereby respectfully request that you will allow yourself to be nominated a candidate for the office of our representative in the Town Council at the election in November next.

In soliciting this favour from you, we feel satisfied that we are endeavouring not only to advance the interests of the Town of Melbourne, but also to confer upon it a lasting and distinguished honor.

[Here follow the signatures.]

GENTLEMEN,—I would indeed prove myself unworthy of my descent from the illustrious house of O'Grady, or the high and responsible situation which I now hold, did I accept your invitation to come forward and be made a Melbourne Town Councillor, and for that most potent reason I indignantly reject it.

Just reflect, gentlemen, on the characters of some of our present Councillors, and the means by which they obtained their seats, and you will not wonder at the manner I treat your requisition. I have been long in the public service, many a dark and dreary night have I paced the dismal streets, protecting your lives and property from the depredations of the midnight robber and assassin—many an unprotected wanderer in the streets have I conducted to his home, and saved from being a tenant of the watchhouse, and an occupant of the bar in the Police Court;—and now, as a reward for these sevices, you ask me to become a member of an assembly that has become a reproach to the Burgesses, and the laughing stock to the whole community of Melbourne. What base ingratitude!!

Recollect, gentlemen, that before you ask me again to become your representative in the Town Council of Melbourne, you must thoroughly purge it of all its dross, you must subject it to the powerful fanners of public opinion, that the chaff of which it is full may be removed from the wheat, for then, and not till then, will it be a fitting arena for the eloquence and patriotism of an O'GRADY.

I have the honor to be,
Gentlemen,
Your insulted servant,
MICK O'GRADY.

To Seronce Marks, Abram Brown, Bill Blouk, Collin Bolivaugh, Luke Hea, Bill Husswife, Esquires, and the other gentlemen signing the requisition.

Figure 1: Michael O'Grady is encouraged to run for a position on the town council, *Argus*, 13 October 1846, p. 3.

The theft of the blunderbuss from the shop of French watchmaker, Monsieur Charet, appears to have been the high point of Grady's career as a criminal and celebrity. Grady examined the gun 'very coolly, put it under his arm' and crossed the road to the pub. Charet attempted to retrieve the gun in a polite manner, and was rebuffed by Grady with a 'coarse brutality of the lower order of Mick's countrymen'.[28] Charet sought a warrant from the police, stating that 'from what he knew of the prisoner's character, as well as by general report, he had no doubt that he would commit some act of violence if he encountered him in the public streets'.[29] Sergeant King, the owner of the gun, questioned Grady when he saw him with it and, according to the Argus, was told by the drunken Irishman that it was obtained from Charet's shop.[30] One of the jurors asked whether Grady was insane, as he had seen him 'walk about in a furious state, but this might have been from the influence of liquor'.[31] Reflecting Grady's reputation and level of esteem, he was found not guilty and 'departed, greatly pleased, no doubt, at his lucky escape'.[32]

The theft of the firearm and subsequent legal proceedings led to days of coverage in the *Port Phillip Patriot, Port Phillip Gazette, Melbourne Argus* and *Geelong Advertiser*. The *Geelong Advertiser* took a serious tone in its reporting, noting that 'Michael Grady, charged with stealing a blunderbuss, was found not guilty, and discharged'.[33] By contrast, Melbourne's papers, seemingly relying on the infamy of the accused, used the events to entertain their readers. The *Port Phillip Patriot* quoted Grady's wife as saying that a 'more correcter [sic]' man than her husband had never lived, thereby playing to audiences' preconceptions about Grady's background—Irish, uneducated and lower class. The paper continued in this vein, describing O'Grady's defence (or lack thereof) in whimsical terms: 'Mr. O'Grady, for the first time in his life since he learnt the use of his tongue, was dumb; he had not one word to say in his own behalf.'[34]

There are few modern analogues for the kind of esteem O'Grady enjoyed in the days when Melbourne was still a small town. Perhaps we could look at the modern fascination with criminality in Melbourne through television programs such as *Underbelly*, or through the celebrity of figures such as Chopper Read, immortalised in the film *Chopper*; however, to a great extent, this fascination is based on a fictionalised portrayal of brutally violent but charismatic figures. The clear affection and tolerance shown towards Michael O'Grady—evident in the press and in the sentence of 'not guilty' delivered by the jury when all evidence appeared to indicate the contrary—is not replicated in these modern examples.

A better comparison is Ned Kelly; in particular, Ned Kelly's posthumous public reputation as a folk hero as well as Australia's 'sole national hero'.[35]. The violence and criminality of his actions is either downplayed or seemingly outweighed by his appeal as an Irish–Australian larrikin who challenged the establishment.

The exploits of Michael O'Grady came to an end in September 1847. The reports of his death failed to make a significant mark in the newspapers. The *Melbourne Argus* was the only newspaper that sought to memorialise him:

> Yesterday morning an individual of some notoriety, no other than Mr. Michael O'Grady alias Big Mick, paid the debt of nature—his death having been greatly accelerated by habits of intemperance. [36]

No tear-soaked obituaries (or tales of doleful mourners drinking to his memory) filled the papers. With his death, the press' fondness for his antics dissipated as though it had never existed and he disappeared from the public eye. A local charity paid for his burial in the Old Cemetery, but his grave was not among those recorded for posterity when the Queen Victoria Market was built over the site. [37] There are extensive records held by PROV concerning the Old Cemetery, including records of exhumed bodies and plans, but it is impossible to know the identities of those buried on the site due to a fire in 1864 that destroyed the building where the records were kept.[38]

In 1888, Edmund Finn, writing *The chronicles of early Melbourne*, recalled that Big Mick 'skulked and begged for free drinks' at the back doors of public houses.[39] Apart from this short paragraph, there appear to be no other references to O'Grady in the narratives of early Melbourne. Instead, he has remained largely forgotten in the popular consciousness. Thankfully, traces of his life can still be found at PROV and in newspapers. Big Mick played a modest but notable role in the emerging social character of Melbourne; by garnering the sympathy of the populace concerning lower class Irish 'larrikins', his antics may have helped to lay the groundwork for folk heroes such as Ned Kelly. Perhaps now, at long last, the 'redoubted Mick' can regain some of the renown (and infamy) that he held in life.

Endnotes

[1] 'A night watchman in trouble', *Port Phillip Patriot and Morning Advertiser*, 11 March 1847, p. 2.

[2] SLQ, Roll 89, HO11/8, p. 238.

[3] 'Principal superintendent of convict's office, Sydney', *New South Wales Government Gazette*, 31 October 1832, p. 381.

[4] PROV, VPRS 19/P0001, bundle 1844/1828, 44/1785.

[5] 'Government gazette notices', *New South Wales Government Gazette*, 17 April 1839, p. 457.

[6] 'Police intelligence', *Port Phillip Patriot and Melbourne Advertiser*, 29 June 1840, p. 3.

[7] Robyn Annear, *Bearbrass: imagining early Melbourne*, Schwartz Publishing, Melbourne, 2005, p. 59.

[8] 'Police intelligence', *Melbourne Times*, 29 April 1843, p. 2.

[9] 'Domestic intelligence', *Port Phillip Gazette and Settler's Journal*, 13 March 1847, p. 2.

[10] 'To Michael O'Grady, Esq.', *Melbourne Argus*, 13 October 1846, p. 3.

[11] PROV, VPRS 19/P0001, bundle 1844/1828, 44/1785; PROV, VPRS 19/P0001, bundle 1844/2124, 44/2124; PROV, VPRS 19/P0001, bundle 1844/2132, 44/2132.

[12] 'Domestic intelligence', *Port Phillip Gazette and Settler's Journal*, 15 October 1845, p. 2.

[13] 'Local intelligence', *Port Phillip Gazette and Settler's Journal*, 24 December 1845, p. 2.

[14] James Murray, *Larrikins: 19th century outrage*, Lansdowne Press, Melbourne, 1973, p. 19.

[15] Melissa Bellanta, *Larrikins: a history*, University of Queensland Press, St Lucia, 2012, pp. 2–3.

[16] Ibid., p. xii.

[17] Raelene Frances, 'Green demons: Irish–Catholics and Muslims in Australian history', *Islam and Christian–Muslim Relations*, vol. 22, no. 4, 2011, p. 444.

[18] Patrick O'Farrell, *The Irish in Australia*, New South Wales University Press, Kensington, 1993, p. 71.

[19] John Dunmore Lang, *The question of questions! Or, is this colony to be transformed into a province of the popedom? A letter to the protestant landholders of New South Wales*, J Tegg and Co, Sydney,1841, p. 10.

[20] O'Farrell, The Irish in Australia, p. 93.

[21] Mark Finnane, 'Law and order', in *eMelbourne: the city past and present*, 2008, available at <http://www.emelbourne.net.au/biogs/EM00839b.htm> paragraph 3, 5, accessed 2 January 2018.

[22] 'Domestic gazette', *Port Phillip Gazette and Settler's Journal*, 23 August 1847, p. 2.

[23] Ibid.

[24] 'Our history', Supreme Court of Victoria, 2017, available at <https://www.supremecourt.vic.gov.au/our-history> paragraph 2, accessed 14 February 2018.

[25] J Porter, 'Port Phillip, as she is at present', in Peter Lund Simmonds (ed.), Simmonds colonial magazine and foreign miscellany, Volume 4, Simmonds and Ward, London, 1845, p. 303.

[26] 'Committal for felony', *Port Phillip Patriot and Morning Advertiser*, 12 March 1847, p. 2.

[27] 'To Michael O'Grady, Esq'.

[28] 'To the burgesses of La Trobe Ward', *Melbourne Argus*, 23 October 1846, p. 3.

[29] 'Domestic intelligence', *Melbourne Argus*, 12 March 1847, p. 2.

[30] Ibid.

[31] 'Supreme Court—Crown side', *Port Philip Gazette and Settler's Journal*, 17 March 1847, p. 3.

[32] Ibid.

[33] 'Supreme Court—Crown side', *Geelong Advertiser and Squatters' Advocate*, 26 March 1847, p. 2.

[34] 'Committal for felony'.

[35] Graham Seal, 'Ned Kelly: the genesis of a national hero', *History Today*, vol. 30, no. 11, 1980, p. 9.

[36] 'Domestic intelligence', *Melbourne Argus*, 10 September 1847, p. 2.

[37] Edmund Finn, *Chronicles of early Melbourne: 1835 to 1852 historical, anecdotal and personal*, Ferguson and Mitchell, Melbourne, 1888, p. 942.

[38] Godden Mackay Logan, Old Melbourne Cemetery: information collation, stage 2 documentation, draft report, 2017, available at <https://www.melbourne.vic.gov.au/sitecollectiondocuments/qvmpr-old-melbourne-cemetery-report.pdf>, p. 12, accessed 24 February 2018.

[39] Finn, *Chronicles of early Melbourne*, p. 942.

Dating Melbourne's cesspits

Digging through the archives

'Dating Melbourne's cesspits: digging through the archives', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

Barbara Minchinton completed her PhD on nineteenth century land selection in the Otways, Victoria, at the University of Melbourne in 2011. She is an independent researcher and a volunteer at Public Record Office Victoria, and has worked on numerous paid and unpaid projects from the archaeology of Little Lon to the transcription of nineteenth-century shipping lists and the digitisation of soldier settler records.

Author email: bminch@netspace.net.au

Sarah Hayes is an Australian Research Council 'Discovery Early Career Researcher Award' recipient in archaeology at La Trobe University. Her research focus is on urban archaeology, comparative artefact analysis, class construction and social mobility. Sarah has also worked as a tutor at La Trobe University, as an artefact specialist in consulting archaeology and in the management of moveable heritage in the museum and cultural heritage contexts.

Author email: S.Hayes@latrobe.edu.au

Abstract

From the late 1980s to the early 2000s, a number of archaeological digs were conducted at what was known as 'Little Lon' in Melbourne's central business district. Public Record Office Victoria holds extensive archival records that supported these archaeological investigations; however, records specifying the dates when cesspits were closed were not identified until late 2013. The discovery of these records opens the possibility of correlating artefacts recovered from Little Lon's cesspits with the people who might have discarded them. For the archaeologists working on material from Little Lon and other nineteenth-century sites in Melbourne, the records are an extraordinary boon. This paper places the creation of these records within the context of Melbourne's waste management history, considering in particular the construction and closure of its cesspits.

Today, flush toilets are taken for granted in Melbourne. Few people will remember nightmen trundling up the back lane to collect their household's night soil each week. These days, only campers in out-of-the-way places encounter cesspits and nightpans, those foul-smelling precursors to sewerage pipes. However, for historical archaeologists, old cesspits can be goldmines of information. From 1835 (when Europeans invaded from across Bass Strait) until the 1870s, Melbourne relied entirely on what we might regard today as camp-style toileting and rubbish arrangements. When cesspits were no longer needed for their original purpose, they were often used for getting rid of excess household refuse. Rubbish discarded by householders of the nineteenth century can provide all kinds of information about the people who owned it and the lives they lived, but it is necessary to establish when the cesspit was closed to accurately date the contents.

Since 1988, there have been numerous archaeological investigations conducted in the area of Melbourne known as 'Little Lon' (see Figure 1); however, historical archaeologists were often unable to date their finds with any degree of certainty because not enough was known about the process of cesspit closures in Melbourne. In 2013, by following the general history of Melbourne's waste disposal and the ways in which the Melbourne City Council (MCC) administered and recorded it, research at Public Record Office Victoria (PROV) revealed a series of records that provided specific dates for the closure of many of the cesspits in the Little Lon area. This article explains who created the records and for what purpose. Readers who are interested in urban archaeologists' use of these records can also consult 'Cesspit formation processes and waste management history in Melbourne: evidence from Little Lon' in *Australian Archaeology* (2016). [1]

The research presented in this article forms part of an Australian Research Council funded project: *A Historical Archaeology of the Commonwealth Block 1850–1950* (LP 0989224). The 'Commonwealth Block' refers to the block of land owned by the Commonwealth of Australia bounded by Little Lonsdale Street, Lonsdale Street, Exhibition Street and Spring Street in Melbourne's north-east corner (Figure 1), commonly known as 'Little Lon'. There were numerous archaeological research reports published about the area prior to the discovery of the MCC records. [2]

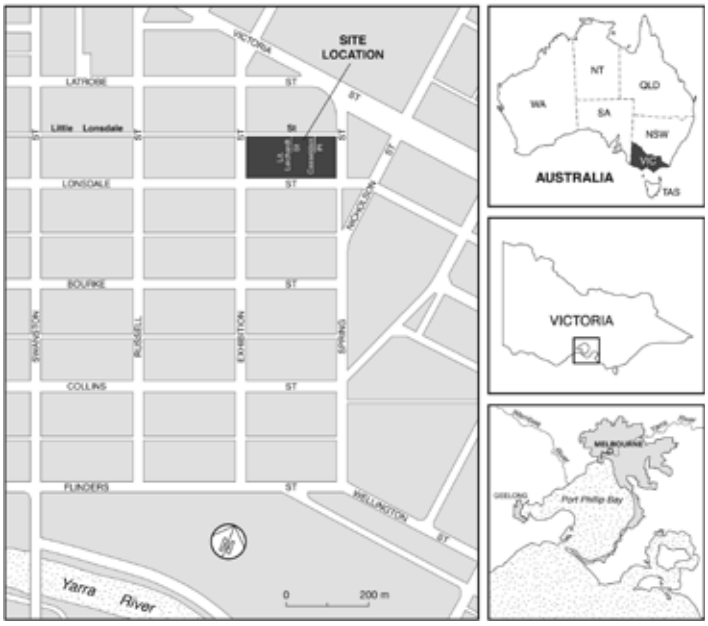


Figure 1: Location of Little Lon. Source: Ming Wei. Originally published in T Murray & A Mayne, 'Imaginary landscapes: reading Melbourne's "Little Lon"', in A Mayne & T Murray (eds), *The archaeology of urban landscapes: explorations in slumland*, New Directions in Archaeology Series, University of Cambridge, 2001, p. 91.

Cesspit construction, the boards of health and the inspector of nuisances

Every city's waste management history is different. For example, much of Sydney moved directly from cesspits to sewers.[3] By contrast, after cesspits were abandoned in Melbourne, nightsoil was collected from above-ground nightpans at the rear of each property for some time before sewerage pipes were installed. Consequently, answering the critical question of when a cesspit was closed in the Melbourne area requires an understanding of the broader waste management context. In the case of Little Lon, that context was controlled by the MCC.

The archaeological record shows that the construction of cesspits in Little Lon can be characterised in three stages.[4] The earliest pits were unlined—simple holes in the ground. Pits from the second stage were lined but still leaky. In the third stage, pits were sealed, having been lined with waterproof casks and/or puddled clay to prevent seepage. These stages can be clearly identified in the historical record, beginning with negative public comments about cesspits in newspapers in the 1850s.[5] In widely spread settlements, unlined pits allowed fluids to be gradually absorbed by the surrounding ground; however, in densely populated areas, there was too much fluid to be safely absorbed. By the late 1850s, seepage was a problem and responsible owners began lining their cesspits in an effort to reduce it. Conversely, when mains water became available from the Yan Yean Reservoir in 1857,[6] some owners began running water continuously into their cesspits ('water-closets'), allowing the liquid overflow to run into the street channels through grates that held back solids. The increase in 'offensive fluids'—as the MCC called them—caused the public to become even more concerned.[7] Yet, by 1860, very few cesspits in poorer neighbourhoods such as Little Lon had been lined.[8]

It was at this point that the MCC began to take responsibility for the public health aspects of Melbourne's cesspits—hence, the story continues through the MCC archives. Administratively, the MCC was designated as a Local Board of Health (LBH)—an offshoot of the Central Board of Health (CBH) in the Chief Secretary's Department—so that the MCC could enact its own by-laws relating to public health.[9] In October 1860, the MCC introduced by-law 42 for the annual licensing of nightmen; however, their work continued to be contracted and paid for by individual property owners. In 1864, there were only 10 nightmen licensed by the MCC for emptying 'privy cesspits' for a population of about 86,000 occupying about 9,300 buildings.[10] This indicates that most property owners still allowed their underground cesspits to overflow into the drains. The MCC could prosecute property owners for causing a nuisance under the *Town and Country Police Act 1854*, but privies had to be overflowing at the time of inspection to secure a conviction. No papers have been found in the archives relating to such prosecutions. In any case, preventing cesspits from overflowing did not solve the seepage problem. Seeking to address this issue, in 1861 the CBH distributed a circular to all local boards of health[11] setting out plans for the construction of two different types of lined cesspools (cesspits) (Figure 2). The MCC archives at PROV include a rare copy of this circular, which is a critical piece of evidence for dating the cesspits of Little Lon because it provides archaeologists with specific measurements and construction techniques for cesspits.[12]

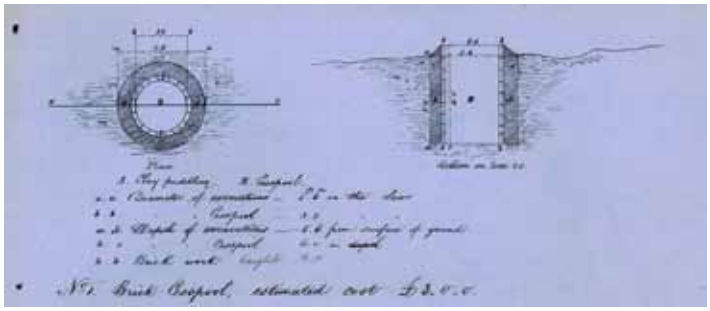


Figure 2: Diagram from the 1861 Central Board of Health circular showing plans for approved cesspits. Source: VPRS 3181/P0, Unit 364 Central Board of Health Circular, p. 2. This and all subsequent images of Melbourne City Council records are held at PROV and reproduced with the permission of Melbourne City Council.

However, cesspits were going out of favour. Earth closets—above-ground pans with dry powdered earth to cover excrement—were coming in. The MCC's licensed nightmen could collect and empty them, so the MCC began issuing notices to the owners of leaking cesspits requiring them to 'remedy' the problem, with earth closets being one of the possible remedies.[13] These notices have not been found in the MCC archives either; however, since the law did not provide for compulsory closure of the old pits, cesspit closures could not have been reliably deduced from them.

LBH reports and MCC by-laws can be found in the MCC archives at PROV. In addition, the MCC had its own Health Committee and employed inspectors to implement the council's regulations. In early 1867, Sergeant John Fullerton was appointed as the MCC inspector of nuisances.[14] Later that year, when *An Act to Amend the Laws Relating to or Affecting Public Health* came into force, every leaking cesspit was deemed an illegal health hazard. As an LBH, the MCC, through its inspector of nuisances, could issue an 'Order to Amend Cesspools' and specify the form of proper cesspits to be constructed by property owners or occupiers. It could also demand that overflowing or leaking cesspits be filled in and replaced by above-ground receptacles (or earth closets)—provided the inspector's orders were formally approved at a meeting of the MCC. Fullerton's orders usually included instructions to replace cesspits according to the CBH circular, and owners or occupiers were given either seven or 30 days to comply (Figures 3 and 4).

Figure 3: Order to Amend Cesspools &c. Source: Health Committee Report 29, 7 December 1868, PROV VPRS 3103/P0, MCC Committee Reports, Unit 10, 1868–1869.

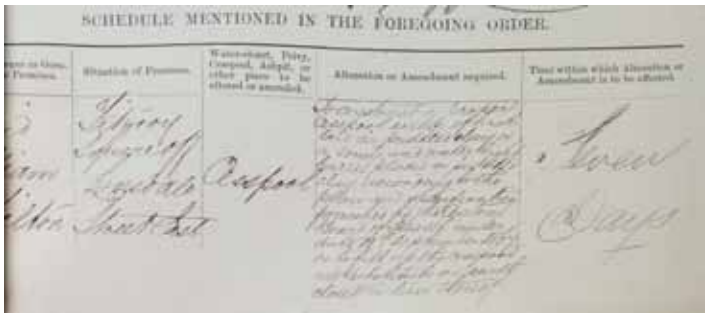
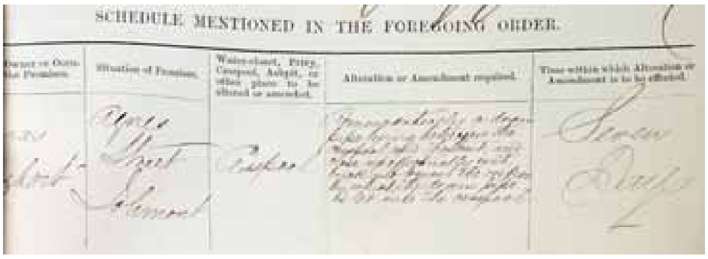


Figure 4: Order to Amend Cesspools &c. Source: Health Committee Report 75, 1 February 1869, PROV VPRS 3103/P0, MCC Committee Reports, Unit 10, 1868–1869.

Fullerton's recommendations were always accepted by the MCC and his orders are all neatly filed in the archives held by PROV. However, they are not contained in the Minute Books of Council (VPRS 8910) or among the Proceedings of Council (VPRS 54); nor are they in the Committee Minutes (VPRS 8945) or the Health Committee Minutes (VPRS 4038). Instead, they are housed in a completely separate series: VPRS 3103/P0 Committee Reports. In the period covering the cesspit closures, each year of this series comprises two volumes of reports compiled from all of the standing committees of council, the largest usually being the Public Works Committee.

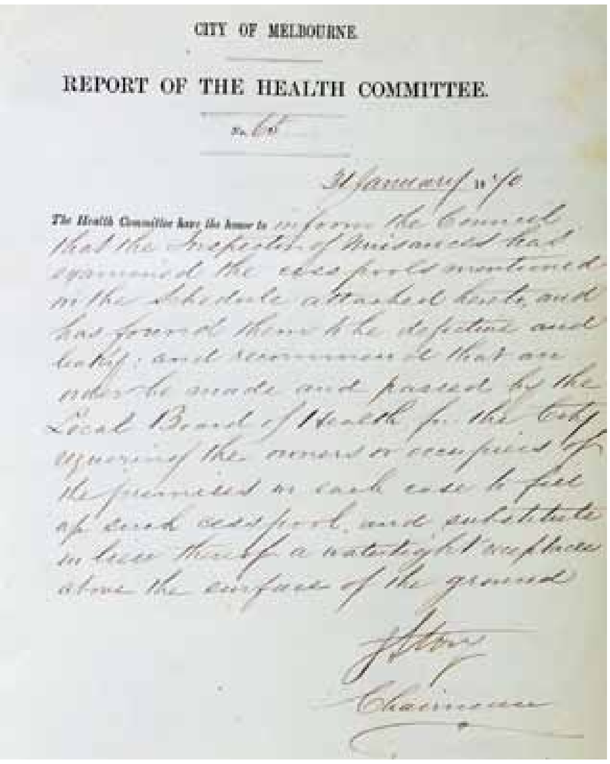
Fullerton did his best to 'abate the nuisances' as outlined in the 1867 Act, but owners were inclined to make use of the lengthy council procedures involved in acting on notices to avoid the expense of closure. Probably as a result, the inspector of nuisances issued very few 'Orders to Amend Cesspools, &c.' in 1868. However, by the end of that year, Fullerton had a system of lists in place for dealing with 'leaky cesspools', 'defective drains', 'low lying land' and other 'offensive fluids'. He issued a few notices to remove cesspool drains within seven days (Figure 5), but most of the notices from this period specify that cesspits should be rebuilt according to the CBH's specifications within 30 days (as in Figure 3).


SCHEDULE MENTIONED IN THE FOREGOING ORDER.

Owner or Occupier of the Premises.	Situation of Premises.	Water-closet, Privy, Cesspool, Ashpit, or other place to be altered or amended.	Alteration or Amendment required.	Time within which Alteration or Amendment is to be effected.

Figure 5: Order to Amend Cesspool &c. Source: Health Committee Report 38, 14 December 1868, VPRS 3103/P0, MCC Committee Reports, Unit 10, 1868–1869.

By mid-1869, Fullerton's leaky cesspool reports had virtually ceased, probably because prosecution was proving difficult and the MCC had started planning their municipal nightpan collection service. On 12 July 1869, the Health Committee forwarded draft specifications to the MCC for the emptying of nightpans from all premises within the city.[15] The collection service commenced on 17 January 1870.[16] Once the MCC nightsoil collections began, Fullerton's work as inspector of nuisances focused solely on cesspit closures. With enormous and growing public pressure for all cesspits to be filled in, Fullerton issued the first closure order on 31 January 1870[17] (Figure 6).


CITY OF MELBOURNE.

REPORT OF THE HEALTH COMMITTEE.

No. 65

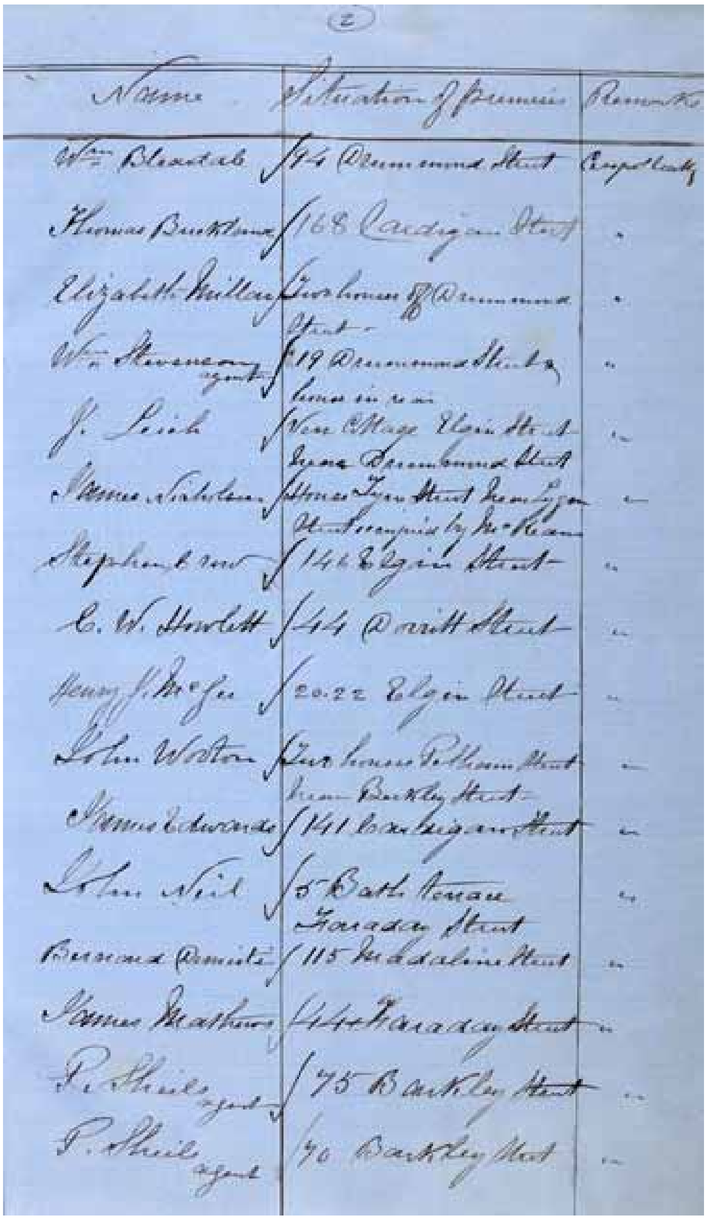
31 January 1870

The Health Committee have the honor to inform the Council that the Inspector of Nuisances had examined the cesspools mentioned in the Schedule attached hereto, and has found them to be defective and leaky, and recommend that an order be made and passed by the Local Board of Health for the City requiring the owners or occupiers of the premises in each case to fill up each cesspool and substitute in lieu thereof a watertight receptacle above the surface of the ground.

Chairman

Figure 6: The first order to fill in a cesspool. Source: Health Committee Report 65, 31 January 1870, PROV VPRS 3103/P0, MCC Committee Reports, Unit 12, 1869–1870.

Fullerton quickly developed a reporting style that allowed him to recommend closures in bulk (Figure 7) and, in the first month after nightpan collections began, he recommended the closure of over three hundred leaky cesspits.[18] He continued at that pace throughout 1870. Each order required that the owners or occupiers of the premises fill up the leaking cesspit and install a watertight receptacle (nightpan) above the surface of the ground. From 4 April 1870, the notices gave owners/occupiers only seven days to effect the change.[19]


(2)

Name	Situation of Premises	Remarks
Wm Bleasdale	14 Drummond Street	Expeditely
Thomas Buckland	168 Cardigan Street	
Elizabeth Millar	Two houses off Drummond Street	
Wm Stevenson agent	19 Drummond Street & house in rear	
J. Leish	New Cottage Elgin Street near Drummond Street	
James Nicholson	Houses Lygon Street near Lygon Street occupied by McKean	
Stephen Crow	146 Elgin Street	
C. W. Howlett	44 Orrett Street	
Henry J. McGee	20.22 Elgin Street	
John Wotton	Four houses Pelham Street near Barkly Street	
James Edwards	141 Cardigan Street	
John Neil	5 Bath Terrace Faraday Street	
Bernard Demits	115 Madeline Street	
James Mathews	44 Faraday Street	
P. Sheil agent	75 Barkly Street	
P. Sheil agent	70 Barkly Street	

Figure 7: Order to Amend Cesspools &c. Source: Health Committee Report 2, 28 November 1870, PROV VPRS 3103/P0, MCC Committee Reports, Unit 14, 1870–1871.

As valuable to Melbourne's historical archaeologists as these fortnightly Health Committee reports recommending cesspit closures and drain removals are, they do not provide sufficient detail to immediately identify the property involved—they list owners and/or tenants for each cesspit, but not their specific addresses. Fortunately, the MCC Rate Books (VPRS 5708 P9) record the names of owners and tenants for each allotment with great accuracy. By correlating these two sets of records and testing the result against the archaeological evidence obtained from the cesspit, cesspit closures can often be precisely dated. Unfortunately, not all cesspits were closed by council notice and many cesspits were used by more than one house. At the end of 1870, the *Argus* noted that the inspector of nuisances had caused the closure of: 'Single cesspools ... 1,029 ; double do., 539; cesspools used by from three to seven houses, 84; total, 1,622, representing 2,527 houses'.[20] With access to Fullerton's lists recommending these closures, often cesspits serving more than one property can be identified in the records.

Other cesspits were closed by building processes. In 1872, the MCC health officer noted that 'all the houses built during the same period [1870–71] have, I believe, with hardly an exception, been constructed without the addition of these disgraceful pits'.[21] This comment makes the records in VPRS 9288/P1, MCC Intention to Build Notices, essential reading for archaeologists working with cesspits from this period. A cesspit located below a building that was constructed after notice to the MCC may thus be precisely dated.[22]

Late in 1874, the *Argus* reported that 'the cesspits in Melbourne proper have been filled up'.[23] Although MCC records show that this was not entirely correct, the MCC could do nothing about cesspits that were not causing a nuisance. However, a tragedy the following year changed everything. Two nightmen, father and son, were cleaning out a cesspit when they were overcome by 'foul air' (carbolic acid gas) and suffocated at the bottom of the pit. At the inquest into their deaths, the city coroner, Dr Youl, made his views clear. 'The true evil', he raged, 'was the cesspits'. The *Argus* reported that:

> [Youl] had held inquests in West Melbourne on the bodies of two children who had been drowned in them, and he had also held two inquests, one in East Melbourne and one in Fitzroy, in which similar accidents to children had occurred. In all these cases he had pointed out the evil of allowing such pits to exist, and the answer—the true answer too—was always the same, that unless a cesspit overflowed neither the corporation nor any one [sic] else had any power to have the pit filled up.[24]

After this latest horror, the coroner, 'at the request of the jury, promised to bring this matter before the Government through the Central Board of Health, so as to attempt to obtain the abolition of cesspits'.[25] The following month, the *Argus* ran a substantial series on 'The Sanatory [sic] Condition of Melbourne', reporting that there were about 2,000 cesspits remaining in the city.[26] The majority of people had changed over to 'above-ground receptacles'; however, because it cost people money to do so—and because there was no coercive power in the Act—there were still cesspits fouling the city. As a result of public pressure, *The Public Health Amendment Act 1876* legislated the capacity for local health boards (including the MCC) to forcibly close cesspits and prohibit the building of new ones. The inspector of nuisances was given authority to issue closure certificates directly to owners/occupiers without requiring council approval; however, in the first six months of 1877, he only needed to issue notices on about 200 of these[27] before shifting his attention to the provision of a proper number of privies per group of houses, and ensuring that they had proper doors and coverings.[28] Again, VPRS 3103 contains all of these reports. Very few leaky cesspits were recommended for closure in 1878[29] and none thereafter.

Conclusion

This article has shown how the process of cesspit closures in Melbourne can be traced by correlating several sets of MCC records held at PROV. The changeover from cesspits to nightpans was a gradual one throughout Melbourne and, while the process was similar from one municipality to another, the timeframe for the introduction of nightpans varied because each LBH responded differently to orders from the colony's CBH. For example, Emerald Hill (modern-day South Melbourne), Fitzroy, Prahran and St Kilda all had their own local boards of health and health committees; therefore, dating cesspit closures outside the MCC area would require research in the archives of those relevant council areas. Nevertheless, the records held at PROV provide a complex, rich and irreplaceable resource supporting the endeavours of urban archaeologists working within the early boundaries of the MCC.

Acknowledgments

This paper is based on research for the Australian Research Council–funded project *A Historical Archaeology of the Commonwealth Block 1850–1950* undertaken by La Trobe University and Museum Victoria (LP 0989224; chief investigators are Professor Tim Murray and Dr Charlotte Smith).

Endnotes

[1] S Hayes & B Minchinton, 'Cesspit formation processes and waste management history in Melbourne: evidence from Little Lon', *Australian Archaeology*, vol. 82, no.1, 2016, pp. 12–24.

[2] See, for example, J McCarthy, 'Archaeological investigation: Commonwealth offices and Telecom corporate building sites, the Commonwealth Block, Melbourne, Victoria', Volume 1: Historical and Archaeological Report, Department of Administrative Services and Telecom Australia, Melbourne, 1989; Godden Mackay Logan, Austral Archaeology and La Trobe University, 'Casselden Place, 50 Lonsdale Street, Melbourne, archaeological excavations research archive report', Volume 1: Introduction and Background, ISPT and Heritage Victoria, Melbourne, 2004; S Hayes, 'Amalgamation of archaeological assemblages: experiences from the Commonwealth Block project, Melbourne', *Australian Archaeology*, no. 73, 2011, pp. 13–24.

[3] P Crook & T Murray, 'The analysis of cesspit deposits from the Rocks, Sydney', *Australasian Historical Archaeology*, vol. 22, 2004, pp. 44–56.

[4] For more detail see Hayes & Minchinton, 'Cesspit formation processes', p. 14.

[5] For example, 'Public health and public works', *Argus*, 6 April 1858, p. 6.

[6] AE Dingle & H Doyle, *Yan Yean: a history of Melbourne's early water supply*, Public Record Office, Melbourne, 2003, p. 35.

[7] For example, 'A nuisance', *Argus*, 4 August 1859, p. 6 and 'City Council. Correspondence', 20 September 1859, p. 5.

[8] 'Fitzroy Municipal Council', *Argus*, 6 September 1860, p. 5.

[9] Records relating to by-laws are held in PROV VA 511 Melbourne (Town 1842–1847; City 1847–ct) (hereafter 'Melbourne'), VPRS 16940 By-Laws.

[10] JN Hassall, 'Superintending inspector's report', *Argus*, 13 September 1864, p. 7.

[11] 'Fitzroy Municipal Council', *Argus*, 14 February 1861, p. 5.

[12] Central Board of Health Circular, 1 January 1861, PROV, VA 511 'Melbourne', VPRS 3181/P0, MCC Town Clerk's Correspondence Files Series 1, Unit 364.

[13] Hassall, 'Sanitary condition of Melbourne', *Argus*, 13 September 1864.

[14] 'City Council. Weekly meeting', *Argus*, 29 January 1867, p. 6.

[15] Health Committee Report 224, 12 July 1869, PROV VA 511 'Melbourne', VPRS 3103/P0, MCC Committee Reports, Unit 10, 1868–1869.

[16] Meeting 6 December 1869, p. 20, no.15, Health Committee Report 20, PROV VA 511 'Melbourne', VPRS 8911/P1 MCC Proceedings of Council Meetings (MCC 2/1), Unit 1, 1869–1870; 'Cesspools cleansing', *Argus*, 17 January 1870, p. 7.

[17] Health Committee Report 65, 31 January 1870, PROV VA 511 'Melbourne', VPRS 3103/P0, MCC Committee Reports, Unit 12, 1869–1870.

[18] Health Committee Report 73, 9 February 1870, and Health Committee Report 90, 28 February 1870, PROV VA 511 'Melbourne', VPRS 3103/P0 MCC Committee Reports, Unit 12, 1869–1870.

[19] Health Committee Report 132, 4 April 1870, PROV VA 511 'Melbourne', VPRS 3103/P0, MCC Committee Reports, Unit 12, 1869–1870.

[20] J Fullerton, 'MCC Health Committee', *Argus*, 13 December 1870, p. 6.

[21] TM Girdlestone, Report to the Health Committee, 9 May 1872, PROV VA 511 'Melbourne', VPRS 54/P0, MCC Notice Papers and Proceedings of the Council, Unit 19, 1871–1872, p. 1.

[22] MCC Notices of Intention to Build, PROV VA 511 'Melbourne', VPRS 9288/P1; Hayes & Minchinton, 'Cesspit formation processes', p. 17.

[23] *Argus*,17 October 1874, p. 6.

[24] 'Two men smothered in a cesspit', *Argus*, 16 October 1875, p. 9.

[25] Ibid.

[26] 'The sanatory [sic] condition of Melbourne', *Argus*, 24 November, 1875, p. 6.

[27] Health Committee Report 99, 11 June 1877, VA 511 'Melbourne', VPRS 3103/P0, MCC Committee Reports, Unit 26, 1876–1877.

[28] Health Committee Report 141, 24 September 1877, VA 511 'Melbourne', VPRS 3103/P0, MCC Committee Reports, Unit 26, 1876–1877.

[29] Health Committee Report 35, 22 February 1878, VA 511 'Melbourne', VPRS 3103/P0, MCC Committee Reports, Unit 28, 1877–1878.

The Best Land Act

Hope and despair at Merton

'The Best Land Act: hope and despair at Merton', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

Jennifer McNeice is a local and family historian: writing, providing consultancy advice and conducting workshops for other researchers. She is a member of the Genealogical Society of Victoria and the Society of Australian Genealogists, and holds a Bachelor of Science (University of Melbourne) and Diploma in Family Historical Studies. She has recently written a history of Koonung Cottage. In her spare time, Jennifer is a volunteer biographer at Eastern Palliative Care and occasionally writes cryptic crosswords.

Author email: mcneicejen@gmail.com

Abstract

A large group of selectors met at Merton in April 1898 to discuss their concerns with Sections 32 and 42 of *The Land Act 1884*. Selectors had to pay the same price for land, £1 per acre, regardless of its quality. The Land Act also required selectors to make improvements but selectors of poor land could not make enough income to pay for the improvements. Robert Best, minister for lands, set about reform in 1898. He consulted selectors extensively and attended community meetings throughout Victoria. Although he did not visit Merton, his consultative approach created widespread hope. Land selection files held at Public Record Office Victoria include firsthand accounts of the difficulties that landholders faced. This article explores the experience of some of the families in the Merton district to discuss the issues associated with land selection and why the Best Land Act did not always deliver the hope it had promised.

Introduction

In April 1898, Victoria was emerging from the deep financial depression of the 1890s and in the midst of a serious drought. The government intended to reform *The Land Act 1884*. At Merton in the foothills of the Strathbogie Ranges in north-eastern Victoria, landholders met to discuss their concerns with the existing Act. James Hoare roused the assembled group with his claim that 'some of its [the present Land Act's] clauses were extremely ridiculous as it parted with the cream of the land in the colony at £1 per acre, and yet compelled latter day selectors who had taken up inferior land to pay the same price'.[1] Hoare was attacking the provisions of the Land Act under which premium land was sold at the same price as poor land. The Land Act also required selectors to make improvements to the land, but many selectors of poor land could not make enough income to pay for such improvements.

The Victorian government had been adjusting and revising various land acts since the *Sale of Crown Lands Act 1860* (known as the Nicholson Act). Early land acts in Victoria were often referred to by the name of the politician who created them, for example, the *Sale and Occupation of Crown Lands Act 1862* was known as the Duffy Land Act 1862. In 1898, Minister for Lands Robert Best consulted widely with landholders before the Best *Land Act 1898* introduced closer settlement[2] and a new concept of land classification.

At the time of the Merton meeting, Best had recently travelled through Gippsland and the north-eastern districts to determine how the Land Act should be reformed.[3] The minister did not visit Merton. However, the Merton landholders decided to express their views by sending a copy of the meeting's resolutions to Best with their 'hearty thanks ... for the energetic effort he was making to prepare a satisfactory Land Act'.[4] The minister's approach to reform created hope.

The Merton landholders were primarily concerned with reforms to Sections 32 and 42 of *The Land Act 1884*. These sections referred to grazing areas and agricultural allotments, respectively. The concept of land classification introduced in the Best Land Act was intended to address those concerns. Correspondence in the Public Record Office Victoria (PROV) (VPRS 626 P0, Selection Files) reveals both the problems that made reform necessary and the problems with reform that led to despair.

Legislative background

Section 32 of *The Land Act 1884* allowed a grazing lease of up to 1,000 acres at an annual rent between 2d and 4d per acre. This land could not be purchased and would revert to the Crown by 29 December 1898. Grazing leases were available to anyone aged 18 years or older. Conditions included fencing, destruction of vermin and restrictions on cutting timber.[5]

Section 42 of *The Land Act 1884* was a later version of Sections 19 and 20 of *The Land Act 1869*, as amended by *The Land Act 1878*. Through land legislation, the Victorian government tried to break up large squatting runs and allow more people to hold moderate sized farms. A selector could apply for a licence to occupy an area of land subject to certain conditions and payment of rent. When the licence expired, the selector could apply for a lease and, after paying a total of £1 (20s) per acre, the selector could apply for a Crown grant—that is, land held by the Crown could be granted to the selector as the new owner.

The Land Act 1869 allowed the selection of up to 320 acres, including unsurveyed land, via the process of licensing, leasing and grants. The licence could be issued for three years at an annual rent of 2s per acre paid half yearly in advance. After that, the selector could apply for a seven-year lease at the same rent. After paying a total of £1 (20s) per acre, the selector could apply for a Crown grant.[6]

Bernard Nolan was a very early resident and one of the earliest selectors at Merton under these provisions.[7] He selected 238 acres on the Merton Creek in May 1873, applied for a lease in June 1876 and received the Crown grant in January 1883.[8] His son, Henry Peter Nolan, was probably the H Nolan who attended the landholders' meeting at Merton in April 1898.

The 1878 amendment doubled licence and lease terms to six and 14 years, respectively. Correspondingly, the annual rent was halved to 1s per acre. Conditions of agricultural licences included fencing, cultivation, destroying vermin, occupancy and improvements. Agricultural allotments were available to anyone 18 years or older, except married women.[9]

Application of Section 32

Conditions of lease

Lessees of grazing areas were required to destroy all vermin within three years, enclose the land with fencing within three years and not remove timber except for use on the selection (see Figure 1).[10] John Hewish already had an agricultural licence when, in January 1886, he obtained a grazing lease for 400 acres in Garratanbunell, the parish immediately west of Merton.[11] Hewish and his neighbour Arthur Viney are probably the J Hewish and A Viney who attended the 1898 landholders meeting at Merton. In March 1890, Viney wrote to the minister for lands, requesting 'permission to split [timber] on John Hewish['s] Leased Land'; he added that Hewish had 'no objection to my splitting if you grant me permission'.[12]

The suppression of rabbits took up so much of Hewish's time that, in 1891, he was allowed a six-month extension to complete his fencing of the land. The fencing was completed; however, by January 1894, he owed three rents amounting to £7 10s. In response to a letter requesting payment, Hewish wrote: 'I will pay two rents on or before the first of March if that will do. I've been short of cash since the banks went into reconstruction.'[13]

Hewish held on to the land for a while longer; however, in November 1897, five months before the landholders' meeting, the lease was revoked for non-payment of rent.[14] In January 1898, John's eldest child, John Edward Hewish, died of typhoid. It was reported as 'the first case of typhoid fever in this district for many years'.[15] Typhoid claimed more young lives soon after. It seems that the drought exacerbated the effect of contaminants in the water supply.[16]

Figure 1: Samuel Calvert, 'Rabbit extermination in Victoria', *Illustrated Australian News*, 18 March 1885, available at http://handle.slv.vic.gov.au/10381/253534, accessed 21 May 2018.

Married women

Married women were permitted to hold a grazing lease under Section 32, but not an agricultural licence under Section 42. Unmarried women could hold a licence under Section 32 or Section 42. In 1887, an unmarried woman, Maria Elizabeth Drought, selected a grazing area of 99 acres in Merton under Section 32. In March 1892, she appeared before the Land Board at Alexandra to have the licence transferred to Section 42 of the *Land Act 1890*.[17] The licence was granted, but Drought married Dugald McIntyre in April—before the licence was issued in her maiden name in July 1892.[18] Maria McIntyre applied for the lease in 1898; however, a file note records that, 'as she married prior to the date of the license, she was not eligible to hold such license and consequently the lease must be refused'.[19] Duncan McIntyre requested assistance from the member for Anglesey, Mr MK McKenzie, on behalf of his sister-in-law. The land had been improved with a five-roomed house, kitchen, orchard, garden and water race. Part of it was cultivated and all rents had been paid. In November 1898, a lease for 14 years was recommended.[20]

Application of Section 42

Licensees of agricultural selections were required to destroy all vermin within two years, fence the land within six years, cultivate at least 1 acre in 10 during the licence period, occupy the land for at least five years and make improvements to the value of £1 per acre within six years. If these conditions were met, they could apply for a lease or Crown grant.

Public or mining purposes

Licence holders were specifically barred from mining their selections under Section 20 of *The Land Act 1869*. There were also ongoing provisions to prevent Crown grants of land required for public or mining purposes.[21] John Hewish worked as a boundary rider at Faithfull's Creek station before selecting agricultural land in August 1883.[22] He selected 289 acres of unsurveyed land in Garratanbunell. His father, James Hewish, selected 319 acres of adjoining land. There was some delay in obtaining the licences and both men wrote several times to the secretary for lands in Melbourne:

> Would you be so kind as to inform me how my occupation license was rejected as my selection of 289 acres of land in the parish of Garratanbunell is not within half a mile of Bismark Creek the creek the Diggers wants Reserved. I saw the Merton diggers and they told me they had no objection to me getting my selection.[23]

The licence was finally approved on 3 November 1884.[24]

Cultivation and improvements

When John Hewish applied for a lease in 1890, the cultivation requirement was not met because the land was unfit. The family lived on the selection in a four-room slot and iron house and, in addition to fencing, burning, scrubbing and clearing, John built a dairy and stockyard. Rents repeatedly fell into arrears in the early 1890s.[25]

In July 1878, Frederick Howell from Geelong applied for a licence on 319 acres in Wondoomarook, the parish immediately north of Merton. His brother, Richard, and father, William Stephens Howell, applied for adjacent lots. When applying for a lease in 1884, Frederick explained why the cultivation requirement had not been met:

> My land is extremely rough, hilly and stony, and quite unsuitable for cultivation, it is a perfect harbour for wombats and wallabies, even if fit for cultivation, it would only be throwing money away as they would destroy it like they did my brothers. He cropped his three years ago and only took one small crop of about 8 cwt [hundredweight] of hay per acre off of it … You will see our improvements are considerable, permanent and far in excess of the requirements of the Act.[26]

The lease was transferred to his father in 1891.

The McIntyre siblings, Dugald, Duncan, John and Katherine, lived and worked together to develop their selections.[27] D McIntyre and J McIntyre were recorded at the 1898 landholders meeting at Merton. When applying for a lease in 1889, Duncan wrote:

> We cannot afford to live separately on our selections yet because we have lost so much by death in horses, cattle and sheep, and have to do all our own labour. We have improved the selection we are residing on the most (Dugald's) as it is the most central and the most accessable [sic] by road. We will improve and cultivate all we can on the others, but before we can cultivate on them, we must cut sidings and make crossings and bridges over steep gullies, owing to the rugged nature of our selections.[28]

Occupation

Licence holders were required to occupy the land for at least five years. *The Land Act 1878* made provision to apply for an absence of up to three months per year.[29] William Hoare explained that he was not able to fully comply with the occupation requirement because he had four young children at school and there was no school within six miles of his selection.[30]

Other factors also affected occupation. Struggling to make ends meet, some farmers sought employment elsewhere. In 1895, John McIntyre wrote:

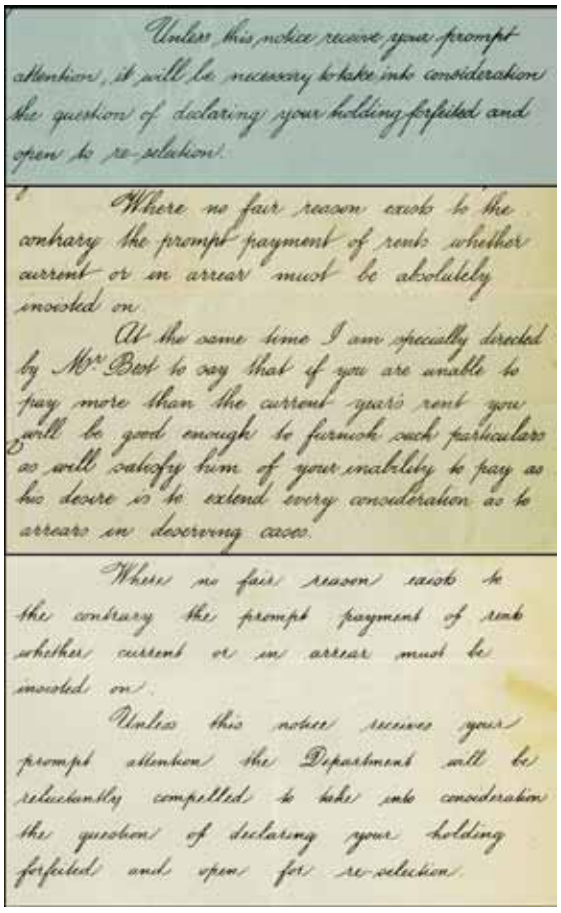
> This land is very poor and heavily timbered and will not grow crops of any kind. It is very mountainous stony land and takes three acres of it to carry one sheep and they are poorly fed at that. I could not make a living on the land at all but for having other employment in a butter factory for a few months in every year.[31]

The requirement to control the rabbit population also affected occupation. As Dugald McIntyre wrote in March 1898, one month before the landholders' meeting:

> I have always done my level best to keep rents paid, but failed of late years. Rabbits are a continual drag. If I leave to earn money, the rabbit inspector will have me. It would be hard to have the land forfeited after all I have spent on it.[32]

Rents

The selection files at PROV reveal the constant financial pressure the farmers faced. As we saw earlier, John Hewish's grazing lease was revoked for non-payment of rent five months before the landholders' meeting. In 1897, Frederick Howell had seven rents due, at a total of £56.[33] Joseph Stephen Barns, who obtained a transferred lease on 320 acres at Wondoomarook in 1894, owed £56 in 1896.[34] Standard requests for payment softened during 1896 and 1897 but became sterner in 1898 (see Figure 2).


Unless this notice receive your prompt attention, it will be necessary to take into consideration the question of declaring your holding forfeited and open to re-selection.

Where no fair reason exists to the contrary the prompt payment of rents whether current or in arrear must be absolutely insisted on.

At the same time I am specially directed by Mr. Best to say that if you are unable to pay more than the current year's rent you will be good enough to furnish such particulars as will satisfy him of your inability to pay as he desires to extend every consideration as to arrears in deserving cases.

Where no fair reason exists to the contrary the prompt payment of rents whether current or in arrear must be insisted on.

Unless this notice receives your prompt attention the Department will be reluctantly compelled to take into consideration the question of declaring your holding forfeited and open for re-selection.

Figure 2: Standard requests for payment of rent in January 1895, January 1897 and February 1898, PROV, VPRS 626/P0, Unit 602, Item 16823; PROV, VPRS 626/P0, Unit 611, Item 17280; PROV, VPRS 626/P0, Unit 611, Item 17278.

Limit of holdings

The Hoare family came from Point Henry, Geelong. In 1882, William Hoare and his two eldest sons, James and John Joseph, each selected 320 acres at Wondoomarook.[35] Hoare's daughters, Bridget and Ellen, also held land temporarily.[36] James Hoare convened the 1898 Merton landholders' meeting and occupied the chair. His brother, John Joseph Hoare, was appointed secretary.[37]

Like other selectors, the Hoares were not always up to date with their rents. As William Hoare explained, they:

> Had very bad luck with wild dogs worrying the sheep the disease got amongst the cattle also four of our best Horses dying the first and second year and native animals destroying the crops [and] should never have been able to carry it out had I given up my farm at Leopold.[38]

However, James Hoare was extraordinarily successful. No-one could hold a licence for more than 320 acres of agricultural land. James was able to increase his landholding by buying leases from other selectors.

Thomas Kipping was one of the original Merton purchasers at the Crown land sales in 1858.[39] His son, Thomas, obtained an agricultural licence for a further 208 acres in 1876 and lease in 1880. Unable to pay his rent in 1884, Thomas jnr wrote: 'Failure of my crop two years running and sickness in family and also death of my aged father has left me very short of money until I can get my corn threshed and into market.'[40] He appealed again in April 1893, explaining that:

> I am sorry to say I have not been able to pay my rent owing to the bad season of last winter, losses of stock and dullness of trade this summer has thrown me behind. As I expect to have a sum of money shortly I will pay all off if possible, thanking you for your past patience and hoping you will not press me for a while longer.[41]

Three months later, James Hoare wrote to the secretary for lands:

> Please oblige by advising me as to the exact amount of rents paid on T. Kipping selection ... also when the last rent was paid and when it was due as I am about purchasing same and would like to know the exact liabilities on it to the Crown.[42]

Thomas Kipping's lease for Merton Lot 46 was transferred to James Hoare on 7 September 1893; he obtained the Crown grant in 1895.

In 1883, John Mills applied for 166 acres next to John Hewish in Garratanbunell and 160 acres in Wondoomarook. When he was unable to pay his rent in 1896, Mills explained:

> I cannot pay any rent to government simply because I have not got a pound to call my own. I can scarcely get enough food and clothing for my wife and family. The land is very poor and I have got to keep the land instead of the land keeping me in fact I would be better if I had never seen the land.[43]

Both leases were transferred to James Hoare in March 1897.

The Best approach

At the end of September 1897, Best gave a wide-ranging re-election speech at Fitzroy. He discussed trade tariffs; minimum wages; the one man, one vote principle; export trade; federation; and the need for land reform. Three years earlier, he had become the minister of lands and commissioner of customs. During his speech, he declared that 'the Government was prepared to be judged by its performance as a Liberal one. A leading plank of Liberalism was that of protection.'[44]

Grazing leases were due to expire in 1898. The question was whether to renew the leases or put the land up for sale. Best acknowledged that the fixed selection area of 320 acres did not allow for different classes of land. The area was too large in some districts and too small in others. He noted the large arrears of rent in the colony—amounting to £776,456—and affirmed his intention to maintain a fair and liberal approach. Best also announced his intention to personally investigate land issues by visiting some of the districts (see Figure 3). He began a tour of the Mallee within a month and, by late March 1898, it was reported that, 'for several months past, he has been travelling in all directions ... to make himself thoroughly acquainted with his subject'.[45] Best received many representations about Sections 32 and 42, including meetings at Heathcote, Puckapunyal and Maffra. Land classification was a continuing theme and it was alleged 'that some land around Puckapunyal was too poor to keep rabbits alive'.[46]

Figure 3: 'Minister of lands on tour', Australasian, 1 October 1898, p. 26.

Merton landholders' meeting

Best did not visit Merton. However, the Merton landholders added their voices to those calling for reform. John Joseph Hoare, secretary of the Merton landholders meeting, was instructed to send a copy of their resolutions to Best, and members of the Legislative Assembly, JH Graves, MK McKenzie and JT Brown.[47]

For agricultural leases under Section 42, the Merton meeting resolved to ask that all land be reclassified on a sliding scale from 5s to 20s per acre, and that selectors who had already paid 10s or more in rent be entitled to a Crown grant. For grazing leases under Section 32 they resolved that:

- the annual rent be reduced to 1d per acre[48]
- all rents paid on grazing areas be credited as purchase money on agricultural selections
- selectors be allowed to excise up to 640 acres as an agricultural allotment[49]
- the term of grazing leases be extended for 21 years[50]
- married women with grazing leases be allowed to select an agricultural allotment from her grazing area.[51]

The Best *Land Act 1898*

Some of the Merton landholders' requests were adopted in the new legislation, probably providing new hope for the future. Provision was made for agricultural and grazing land to be classified as first, second or third class. Up to 200 acres of first class land, 320 acres of second class land or 640 acres of third class land could be selected as an agricultural allotment, at annual rents of 1s, 9d and 6d per acre, respectively. The restriction on married women holding agricultural allotments was removed.[52]

The term of current grazing leases was extended by one year and provision was made for further leases for terms up to 21 years. However, the permitted area was changed to 200 acres of first class land, 640 acres of second class land or 1,280 acres of third class land. The annual rents for grazing leases were set at 3d per acre for first class land, 2d per acre for second class land and 1d per acre for third class land.[53]

Best had invested time and energy in the Land Act. It dealt with many other aspects of land administration including closer settlement, the Mallee, swamp lands and village settlements. He ordered the compilation of an explanatory handbook in which he claimed that his Land Act 'virtually constitutes the last chapter in Victorian legislation dealing with the settlement of the Crown lands of the colony'.[54] Yet, it was still claimed that 'there are many hundreds of landowners and others interested in Mr. Best's splendid Act who cannot grasp even his explanations'.[55]

Bushfire

The district was prone to bushfire (see Figure 4). While working to understand the new legislation, Merton landholders suffered another major setback. The drought of the late 1890s created dangerous bushfire conditions. In late December 1899, several major bushfires broke out around Victoria. A serious fire started at Gooram and split into three fronts that headed to Strathbogie, Ruffy and Merton.[56] In April 1900, John and Eliza Hewish wrote to the minister of lands:

> We are sorry to inform you we cannot pay the whole amount of rent due on our holdings, on account of sickness and deaths in family, and on Xmas day having had all our fences and grass burnt through the bushfires. We have paid one years rent on our holdings this month. Hoping this will satisfy the department.[57]

The Lands Department issued grants on the Hewish Garratanbunell properties in April 1904.[58]

In the 1899 bushfire, James Hoare lost 1,600 acres of grass and five miles of fencing; his seven outbuildings and all their contents, including a wool press, milk wagon, dray, reaping machine and farm implements; and crops and an orchard that had taken 15 years to develop. [59] The scale of his loss is indicative of the scale of his farming operation. Hoare was an eminent member of the community and he was elected to the Euroa Shire Council in 1901.[60]

Figure 4: 'Disastrous fire in the Strathbogie Ranges', *Illustrated Australian News*, 22 February 1882, available at http://handle.slv.vic.gov.au/10381/252380, accessed 21 May 2018.

Sickness and death

After John Joseph Hoare's first wife died in 1905 (aged 35), he married Bernard Nolan's youngest daughter, Jessie May. At around the same time, he received Crown grants on several properties, including his original selection and the selections of his father William and sister Ellen.[61]

In 1904, Maria McIntyre (nee Drought) wrote to the secretary for lands, explaining that she had 'only just completed payment of doctors and undertakers accounts and at present am entirely without means'.[62] Maria's youngest daughter, Julia, had died of marasmus (malnutrition) in 1903, aged 14 months.[63]

John McIntyre died of pneumonia at the age of 36 years in 1900. His widow, Isabella, had further trouble to contend with. On 16 March 1904 she wrote: 'I have been away from Merton for nine months as my two children have been very ill and each has gone through an operation, besides I have been under treatment by Dr. Kent Hughes myself for my eyes.'[64] It was noted on her file that 'the lease having expired on 31st January 1903, she now has no title to the land and the amount due must be paid in order that a grant may be issued. Allow till 15th June next for payment.'[65] The payment was made and Isabella received the Crown grant.[66]

Rent

The Best Land Act included a concession for existing agricultural leaseholders who were not able to pay arrears of rent. Rents due when the Act was passed could be postponed until the end of the lease, without interest, and the lease term could be extended by the amount of time for which arrears were due. The leaseholder had to make an application within 12 months of the passage of the Act. [67] Although this concession appeared generous, many leaseholders continued to struggle with arrears.

Frederick and Katherine Howell (nee McIntyre) invested in Mildura and lived there for eight years, but lost their entire fruit crop in three consecutive years. They were unable to sell the land and had to abandon it. Katherine also tried to sell her Merton land, but it was infested with rabbits and considered worthless. In January 1905, the overdue rents at Merton amounted to £52 4s 8p.[68]

William Howell struggled to pay overdue rents in Wondoomarook. In 1900, he observed that, under the present Land Act, his land 'would be only 3rd class'. In April 1901, with a rent debt of £74 4s 10p, he advised that he had been too ill over the previous six months to attend to his renewal notice and was not much better now.[69] He died six months later.[70]

Joseph Barns also continued to struggle under the new Land Act. He asserted:

> I find it impossible to pay 4 years Rent as requested as this Block of Land is very rough. I have spent a large amount of money on it and last Summer a fire broke out in Gooram Gong and spread in a few hours over thousands of acres and destroyed nearly all my fence. Therefore I could not afford to Fence the Land again and continue paying the Rents as requested and I think under the Circumstances it would not be unreasonable for me to ask you to bring this land under the new act and allow me to pay £8 per year instead of £16.[71]

By 1902, Barns had 19 overdue rents, amounting to £152. [72]

Early in 1904, James Hoare obtained Crown grants on several allotments, including his original selection and the land originally selected by his sister Bridget and by John Mills in Wondoomarook and Garratanbunell.[73] During 1904 and 1905, Hoare also obtained lease transfers and Crown grants on the land held by Katherine Howell, William Howell and Joseph Barns.[74]

Land classification

The 1898 landholders' meeting had resolved that selectors who had already paid 10s or more in rent be entitled to a Crown grant. Eleven years later, Duncan McIntyre asked if he could obtain the Crown grant on the amount he had already paid on it 'as several of our neighbours have received their Crown Grants on payment of 10/- per acre—and better land than mine, and near the town of Merton'.[75] A file note records that 'his request [could] not be complied with as the Act under which he selected requires that rents equivalent to £1 per acre be paid' before a Crown grant could be issued. Duncan McIntyre had selected land under *The Land Act 1869*, as amended by *The Land Act 1878*. The Best Land Act allowed existing licence holders under previous land acts to apply to have their land classified under the new scheme.[76] However, this provision did not extend to those who had already obtained their agricultural lease.

Angus McIntyre was too young to select land at the same time as his older siblings. He obtained a grazing lease in September 1889 and surrendered the lease in August 1893 to obtain an agricultural licence. Therefore, he was eligible to have the land reclassified, but he did not do so. In January 1900, he obtained an agricultural lease. Four years later, he realised his mistake: 'I should have applied to have this land re classified but I was [too] late in giving thought to it.'[77] One year later, the land was reclassified as second class land. Still struggling to pay rent, three years later, Angus wrote: 'I am far from being satisfied with the re-classification of the land and [its] value is about 10/ per acre, those adjoining have had their land classed as 3rd or 4th class, while mine is termed 2nd class and if anything, is worse than the rest.'[78] There was no power to alter the classification. In October 1914, Angus was ambivalent:

> The greatest mistake in my life was to select that Block and in [one] way you would do me an extreme kindness with forfeiture as my expense would come to an end ... however I am prepared to pay up arrears in hopes that I may get something for it in the future.[79]

He obtained the Crown grant two months later.[80]

Hardship

One year after the Merton meeting, Dugald McIntyre wrote with feeling:

> I have been in Gippsland for some months trying to earn by labour what would pay or reduce my debt to the State (as it is hard for me to see the amount accumulating) but have got nothing permanent to do and very little pay for what I did ... I wish to hold the land if possible. I have worked very hard for it, and will still do so, and be carefull [sic]. What more can a Scotchman do?[81]

In 1904, McIntyre was in a dire position:

> I will have to submit myself to be dealt with by a land board according to the wording of this circular for my arrears of rent, which I cannot yet pay. If I can reduce it any before the 1st of March I will most willingly do so. I am well aware of my obligations to the Lands department; but I cannot help it as I have done my best, and cannot blame myself for anything.[82]

The official reply was swift:

> I beg to state that your lease having expired on 28 February '03 you now have no title to the land. You should therefore pay the amount due in order that a Crown grant may be issued. I may add that you will be allowed until 15th June next for payment. [83]

As the June deadline approached, Dugald appealed to Thomas Hunt MLA to do whatever was in his powers to obtain grace.[84] Hunt inquired on Dugald's behalf and the secretary for lands responded 'that if one rent further be paid by 1st September '04, the balance will be allowed to stand over until after next harvest'.[85] Unable to pay the balance after harvest, Dugald wrote again to Hunt. There had been sickness in the family and another bushfire in January had destroyed nearly all his fencing, grass and buildings: 'Could you save me for a time from the humiliating position of being interrogated by a land board?'[86]

Dugald obtained his Crown grant in April 1906.[87] His brother, Duncan McIntyre, explained some of the difficulties involved in making payments: 'I took some stock to a sale on the 6th of this month, but not getting nearly sufficient to pay this amount [four rents], I have to borrow the balance and pay interest on it. For this purpose I have to go to Yea.'[88] Duncan asked to be excused from appearing before the Land Board at Benalla, as 'it will save me a ride of 60 miles or more and other expenses'.[89] The second bushfire also affected Duncan. He wrote in 1905: 'Owing to being burnt out last year it has crippled me, having no insurance. I am struggling along with a young family of four, and on poor land it is hard to make ends meet, in fact it can't be done on this land.'[90] Worn down 'after over 25 years of hard work and wasted energy', Duncan declared: 'it is slavery to rear my family on [the land]'.[91] His Crown grant was eventually issued in September 1909.

Conclusion

Correspondence in the selection files conveys the fortitude of the Merton selectors and their desire to hold onto their land at all costs. At the time of the Best Land Act they had already endured rabbit, wombat and wallaby pests, the hardship caused by steep rocky ground that defied cultivation, drought and the deep depression of the 1890s. Potential reform of the Land Act gave them hope and they sought active involvement in the reforms. Led by James Hoare, who showed a keen political interest as well as astute farm management, the Merton landholders outlined the reforms they believed were necessary.

Some of their suggestions were implemented. However, many landholders remained bound by the initial terms of their selections and the new system of land classification did not help them. This was a source of grievance in Merton and more broadly throughout the colony including Rushworth, Heytesbury Forest (near Cobden), Forrest (via Birregurra), Kaanglang and Yarck.[92] 'A 30 years' selector' from Yarck wrote:

> I could point out hundreds of selections in the rough parts of Anglesey and Delatite which have been taken up under the £1 an acre valuation, and it is simply cruel for the Government to exact such a price for the land … It is no wonder selectors are in arrears, because the land was never worth the money. A retort to Mr. Best by one of the members during the debate about extending the classification to the lessees, as well as the licensees, was very apt, viz., 'You recognize the justice of the claim, but you cannot afford to be just.'[93]

Two serious bushfires had a further crippling effect. The selectors' letters reveal their physical and emotional trials. Merton selectors endured the pain of loss, frustration and humiliation at their predicament. Some were forced to cut their losses and abandon the land while others held on against seemingly impossible odds.

Endnotes

[1] 'Meeting of landholders', *Euroa Advertiser*, 29 April 1898, p. 3.

[2] Closer settlement allowed the Land Board to purchase private land for subdivision into smaller allotments to be offered to small farmers. VPRS 5714 contains selection files relating to closer settlement and soldier settlement schemes.

[3] 'Ministerial visit to Yackandandah', *Ovens and Murray Advertiser*, 26 March 1898, p. 6; 'New land legislation', Argus, 4 April 1898, p. 7.

[4] 'Meeting of landholders'.

[5] Victoria, *The Land Act 1884* (48 Victoria no. 812), Government Printer, Melbourne, 1885.

[6] Victoria, *The Land Act 1869* (33 Victoria no. 360), Government Printer, Melbourne, 1869.

[7] In 1838, at 14 years of age, Bernard Nolan was held at Dublin's Kilmainham Prison for the 'felony of handkerchiefs' (pickpocketing) and sentenced to seven years transportation to Australia. He obtained a ticket of leave in 1843 and is recorded as a shoemaker in annual musters before becoming a publican at Merton. In 1868, he and his wife were highly respected and had been many years in Merton. Dublin Kilmainham Prison General Register 1836–1840, Book 1/10/30, Item 3, via findmypast.com; PROV, VPRS 110, Convict Register 1842–1854, pp. 43, 71, 160, 183 via findmypast.com; 'Country News', Age, 5 March 1868, p. 6.

[8] PROV, VPRS 625/P0, Unit 433, Item 31870, Lots 32a and 32b.

[9] *The Land Act 1869*, Sections 38, 32, 44, 43. *The Land Act 1878* (42 Victoria no. 634), Government Printer, Melbourne, 1878.

[10] *The Land Act 1884*, Section 38.

[11] PROV, VPRS 440/P0, Unit 13, Item 2469, application, 8 January 1886.

[12] PROV, VPRS 440/P0, Unit 13, Item 2469, letter from A Viney to minister of lands, registered 25 March 1890. A mounted constable reported that Mr Viney wished to split rails for the Yea to Mansfield railway. The timber was of poor quality and unsuitable for any other purpose.

[13] PROV, VPRS 440/P0, Unit 13, Item 2469, letter from John Hewish to JJ Blundell, 1 February 1894.

[14] PROV, VPRS 440/P0, Unit 13, Item 2469, notice from secretary for lands, 19 November 1897.

[15] 'Typhoid', *Euroa Advertiser*, 21 January 1898, p. 2.

[16] 'Occasional Notes', *Euroa Advertiser*, 18 March 1898, p. 2.

[17]Section 42 of the *Land Act 1890* had the same provisions as Section 42 of *The Land Act 1884*.

[18] PROV, VPRS 440/P0, Unit 4, Item 457, licence issue, 1 July 1892.

[19] PROV, VPRS 440/P0, Unit 4, Item 457, file note, 5 September 1898.

[20] PROV, VPRS 440/P0, Unit 4, Item 457, lease recommendation, 11 November 1898.

[21] *The Land Act 1869*, Section 31; *The Land Act 1878*, Section 10; The Land Act 1884, Section 44(7).

[22] PROV, VPRS 625/P0, Unit 67, Item 3531.

[23] PROV, VPRS 626/P0, Unit 54, Item 3747, letter from John Hewish to secretary of lands, April 1884.

[24] PROV, VPRS 626/P0, Unit 54, Item 3747, licence approval, 3 November 1884.

[25] PROV, VPRS 626/P0, Unit 54, Item 3747, letter from John Hewish to secretary for lands, 18 December 1893; PROV, VPRS 626/P0, Unit 54, Item 3747, arrears notice, 29 January 1895.

[26] PROV, VPRS 626/P0, Unit 496, Item 10776. Cwt is an abbreviation for the hundredweight. In North America, a 'short' hundredweight was 100 pounds and in England a 'long' hundredweight was 112 pounds.

[27] The family of Angus McIntyre, a farmer at Mt Moriac in the Geelong district, was linked to the Howell family. His daughters, Katherine and Julia, married brothers Frederick and Richard Howell. His sons, Dugald, Duncan and John, applied for approximately 320 acres each in Wondoomarook in May 1882; Katherine applied for 134 acres in February 1884. John was 18 years of age at the time of his selection and had to produce a birth certificate. PROV, VPRS 626/P0, Unit 611, Items 17278, 17279 and 17280; PROV, VPRS 626/P0, Unit 643, Item 19222.

[28] PROV, VPRS 626/P0, Unit 611, Item 17279, letter from Duncan McIntyre with lease application, 25 February 1889.

[29] *The Land Act 1878*, Section 9.

[30] PROV, VPRS 626/P0, Unit 602, Item 16819, letter from William Hoare to president of board of land and works, 1 July 1889.

[31] PROV, VPRS 626/P0, Unit 611, Item 17280, letter from John McIntyre to secretary for lands, 28 May 1895.

[32] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from Dugald McIntyre, 4 March 1898.

[33] PROV, VPRS 626/P0, Unit 496, Item 10776, arrears notice, 29 January 1897.

[34] PROV, VPRS 626/ P0, Unit 586, Item 16150. Jessie Sutherland Tait Calder Barns was a widow in 1883 when she applied for an agricultural licence on 320 acres in Wondoomarook. She died in 1888 and the licence was transferred to her eldest son, James Larking Barns. He successfully applied for a lease in 1889 and transferred the lease to his younger brother, Joseph Stephens Barns, in 1894.

[35] PROV, VPRS 626/P0, Unit 602, Items 16819, 16820 and 16823.

[36] In 1883, William's daughter Bridget, a dressmaker, obtained a licence for 159 acres in Wondoomarook. Bridget's power of attorney was transferred to her brother, James, in 1891. In 1887, the next daughter, Ellen, selected 390 acres in Garratanbunell. She held 320 acres under Section 42 and 70 acres under Section 32. Her grazing lease was transferred to her brother John Joseph Hoare, dairyman, grazier and fruitgrower, in 1897. PROV, VPRS 626/P0, Unit 636, Item 18737; PROV, VPRS 440/P0, Unit 11, Item 2376. Lot 50 is also shown as lot 10A and 10B of Section B.

[37] 'Meeting of landholders'.

[38] PROV, VPRS 626/P0, Unit 602, Item 16819, letter from William Hoare to president of board of land and works, 1 July 1889.

[39] PROV, VPRS 873, P1, Unit 23. See also PROV, VPRS 11862, P1, Unit 5, pp. 150–151 for 1854 auction.

[40] PROV, VPRS 626, P0, Unit 7, Item 465, letter from Thomas Kipping to secretary for lands, 4 February 1884.

[41] PROV, VPRS 626, P0, Unit 7, Item 465, letter dated 21 April 1893.

[42] PROV, VPRS 626, P0, Unit 7, Item 465, letter from James Hoare to secretary for lands, 29 July 1893.

[43] PROV, VPRS 626/P0, Unit 58, Item 4101, letter from John Mills to Mr Markham, 9 March 1896.

[44] 'The general elections', *Age*, 1 October 1897, p. 5.

[45] 'Mr Best's land policy', *Weekly Times*, 26 March 1898, p. 20.

[46] 'Agricultural news', *Leader*, 18 September 1897, p. 9; 'The minister of lands on tour', *Age*, 2 March 1898, p. 5; 'Mr Best in Gippsland', *Argus*, 18 April 1898, p. 7.

[47] 'Meeting of landholders'.

[48] The annual rent was between 2d and 4d under Section 37, *The Land Act 1884*.

[49] The limit was 320 acres under Section 33, *The Land Act 1884*.

[50] The leases were due to expire at 29 December 1898 under Section 32, *The Land Act 1884*.

[51] Married women could hold grazing licences but were not allowed to hold agricultural allotments under Section 43, *The Land Act 1884*.

[52] Sections 44, 45 and 59, *Land Act 1898*. The landholders referred to total purchase prices. The annual rents equated to purchase prices of £1, 15s and 10s per acre for first, second and third class land, respectively.

[53] *Land Act 1898*, Sections 28, 29 and 36.

[54] RW Best, 21 March 1899, 'Preface', in Victoria, *Handbook of the Land Act 1898, and other land acts*, Victorian Government Agricultural Department Offices, Melbourne, 1899.

[55] 'The new Land Act', *Alexandra and Yea Standard*, 19 May 1899, p. 2.

[56] 'Bush fires', *Argus*, 27 December 1899, p. 7.

[57] PROV, VPRS 626/P0, Unit 54, Item 3746, letter from John and Eliza Hewish to minister for lands, 9 April 1900.

[58] PROV, VPRS 626/P0, Unit 54, Items 3746 and 3747, grants, 26 April 1904.

[59] VPRS 626/P0, Unit 636, Item 18737, letter from James Hoare to JH Graves, 17 January 1900.

[60] 'Shire elections', *Euroa Advertiser*, 23 August 1901, p. 3.

[61] PROV, VPRS 626/P0, Unit 602, Items 16819 and 16823; PROV, VPRS 440/P0, Unit 11, Item 2376.

[62] PROV, VPRS 440/P0, Unit 4, Item 457, letter from ME McIntyre to secretary for lands, 9 February 1904.

[63] 'Deaths', *Argus*, 29 September 1903, p. 1.

[64] PROV, VPRS 626/P0, Unit 611, Item 17280, letter from Isabella McIntyre to secretary for lands, 16 March 1904.

[65] PROV, VPRS 626/P0, Unit 611, Item 17280, file note, 28 March 1904.

[66] PROV, VPRS 626/P0, Unit 611, Item 17280, grant, 28 June 1905.

[67] *Land Act 1898*, Section 53.

[68] PROV, VPRS 626/P0, Unit 643, Item 19222, letter from Mrs FW Howell to secretary of lands, 19 February 1896.

[69] PROV, VPRS 626/P0, Unit 496, Item 10776, letters from WS Howell to secretary for lands, 20 March 1900 and 8 April 1901.

[70] PROV, VPRS 28/P2, Unit 604, Item 81/970.

[71] PROV, VPRS 626/P0, Unit 586, Item 16150, letter from Joseph Stevens Barns to secretary for lands, 9 June 1900.

[72] PROV, VPRS 626/P0, Unit 586, Item 16150, arrears notice, 15 May 1902.

[73] PROV, VPRS 626/P0, Unit 602, Item 16820; PROV, VPRS 626/P0, Unit 636, Item 18737; PROV, VPRS 626/P0, Unit 641, Item 19065; PROV, VPRS 626/P0, Unit 58, Item 4101.

[74] PROV, VPRS 626/P0, Unit 643, Item 19222; PROV, VPRS 626/P0, Unit 496, Item 10776; PROV, VPRS 626/P0, Unit 586, Item 16150.

[75] PROV, VPRS 626, P0, Unit 611, Item 17279, letter from Duncan McIntyre to secretary for lands, 2 August 1909.

[76] *Land Act 1898*, Section 51.

[77] PROV, VPRS 5357/P0, Unit 1206, Item 2633, letter from Angus McIntyre to secretary for lands, 16 February 1904.

[78] PROV, VPRS 5357/P0, Unit 1206, Item 2633, letter from Angus McIntyre to secretary for lands, 15 January 1908.

[79] PROV, VPRS 5357/P0, Unit 1206, Item 2633, letter from Angus McIntyre to land officer, Benalla, 19 October 1914.

[80] PROV, VPRS 5357/P0, Unit 1206, Item 2633, grant, 18 December 1914.

[81] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from Dugald McIntyre to secretary for lands, 3 March 1899.

[82] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from Dugald McIntyre to secretary for lands, 9 February 1904.

[83] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from secretary for lands to Dugald McIntyre, 24 February 1904.

[84] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from Dugald McIntyre to Thomas Hunt, 10 June 1904.

[85] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from secretary for lands to Thomas Hunt, 22 June 1904.

[86] PROV, VPRS 626/P0, Unit 611, Item 17278, letter from Dugald McIntyre to Thomas Hunt, date unclear.

[87] PROV, VPRS 626/P0, Unit 611, Item 17278, grant, 5 April 1906.

[88] PROV, VPRS 626/P0, Unit 611, Item 17279, letter from Duncan McIntyre to secretary for lands, 17 April 1899.

[89] Ibid.

[90] PROV, VPRS 626/P0, Unit 611, Item 17279, letter from Duncan McIntyre to secretary for lands, 6 April 1905.

[91] PROV, VPRS 626/P0, Unit 611, Item 17279, letter from Duncan McIntyre to secretary for lands, 2 August 1909.

[92] 'Lessees' grievance', *Maffra Spectator*, 19 July 1900, p. 3; 'The Land Act', *Weekly Times*, 11 August 1900, p. 40; 'Land classification', *Leader*, 6 October 1900, p. 8; 'Land classification', *Leader*, 1 September 1900, p. 8.

[93] 'The land laws', *Leader*, 1 September 1900, p. 8. The parish of Merton is immediately north-east of the parish of Yarck and spans part of the border between the counties of Anglesey and Delatite.

Ethel

'Ethel', *Provenance: The Journal of Public Record Office Victoria*, issue no. 16, 2018. ISSN 1832-2522.

Kath McKay is now retired from the paid workforce but still very active in the fields that filled her professional life: research, social change and activism for the rights of women.

Author email: kmckay@vtown.com.au

Abstract

This article draws on the detailed record held at the Public Record Office Victoria (PROV) of a criminal trial in the Victorian Supreme Court in December 1895. A man was accused of 'assault with intent to carnally know a girl under 10 years of age', but the charge was dismissed in a lower court: the Essendon Court of Petty Sessions. Among the almost 100 pages of content in the file at PROV are formal court documents, transcripts of witness statements and formal correspondence between court officials, the Victorian attorney-general and Crown prosecutors. The trial lasted one week. The jury found the accused not guilty.

The trial has historical and contemporary significance. It marks a moment in the public life of key public figures such as Victorian Attorney-General Isaac Isaacs, later the first Australian-born governor-general of Australia, and Dr Emma Constance Stone, a pioneer woman doctor and one of the founders of the Victoria Hospital for Women and Children (later the Queen Victoria Hospital). It was the first time that a woman doctor had given professional evidence in a Victorian court. The trial underlines the difficulties still faced by women and girls in making formal complaints against sexual assault. For the writer of this article, Kath McKay, the file has added significance. The little girl was her grandmother Ethel.

On 18 November 1895 in the Essendon Court of Petty Sessions, Ethel Wilkinson gave evidence at the trial of the man accused of raping her. Her deposition, which extended to over 14 handwritten pages, included intimate details of physical assaults and emotional threats by her alleged attacker.[1] She was cross-examined by a Queens Counsel for the accused and questioned by the three justices of the peace and the chair of the court. According to trial documents, Ethel spoke clearly and well, but wept at one point under cross-examination. She was nine years old.

The man accused of raping her, Edwin Worrall, was the father of a family in Ascot Vale with whom Ethel and her two brothers boarded while their sole-parent father, Harry Wilkinson, worked as a journalist at the Age. Worrall had been charged with 'assault with intent to carnally know a girl under 10 years of age'. He was not called to give evidence and was not cross-examined.[2]

According to Ethel's statement to the court, Worrall assaulted her many times over a period of months, but she was too frightened to tell anyone—not Worrall's wife, her brothers or her father. Harry Wilkinson had been a sole parent for around four years and Ethel only saw him once a week on his day off, as he lived in a rooming house in the central business district while his three children were lodged with the Worrall family in Ascot Vale. Eventually, in October 1895, Ethel found a time and the courage to tell her father that she had a 'secret'.[3] She whispered to him what Worrall had done to her. Outraged, Harry confronted Worrall, but Worrall denied everything. Harry wrote several strong letters to Worrall and offered to set up a conciliation with three respectable local women. Worrall refused; he continued to deny everything. Next, Harry took his little daughter to Dr Emma Constance Stone, the first woman doctor to practise in Australia and to register with the Medical Board of Victoria.[4] Stone examined Ethel, confirmed that there was physical evidence to support Ethel's claim of assault and provided an expert report.[5] Harry lodged a complaint with the Essendon police. On 11 November 1895, Worrall went with his family to the Age office where Harry worked and engaged in an argument with him. Worrall was arrested by police and charged with 'assault with intent to carnally know a girl under 10 years of age'.[6]

The case came before the Essendon Court of Petty Sessions on 18 November 1895 and was heard by four justices of the peace—not magistrates or judges or even legally qualified people. According to the court records, Ethel, who was required to swear on the Bible, gave her testimony clearly and well. In her deposition, she described instance after instance when Worrall had isolated her from the other children in the household—his own children and her brothers. She described assaults occurring in the washhouse with the door locked while the other children were sent to take the dog for a walk, in the kitchen when the others were out and in her bedroom after he had sent his daughters into another room. She described one evening when he had come home drunk and, after his wife had sent him out of their marital bedroom, he had gone into Ethel's room and bed—but not before removing his own daughters into another room. In her childish vocabulary, Ethel told how he:

> Put the place where he makes water to the place where I make water. He had sent the others out of the kitchen before this. He told them to go and take the dog for a walk. He said to me not to tell Mrs. W.[7]

Ethel's deposition runs to 14 handwritten pages of transcript. Her father and Dr Stone also made detailed depositions and took the witness stand. Harry Wilkinson was cross-examined by counsel for the defence, QC Purves, who accused him of making the story up to avoid paying a debt to Worrall. This he denied. He was also cross-examined on his suitability as a parent. Stone's evidence comprised details of a thorough physical examination of the child and her opinion that the evidence was consistent with Ethel's claims.

Represented by QC Purves and QC Dethridge, the accused was not required to address the court and the case was dismissed.[8] Unhappy with this result, the police prosecutor, Robert Walsh, took his concerns to Isaac Isaacs, the Victorian attorney-general.[9] Isaacs agreed with Walsh and they met with the members of the Essendon Court to discuss their decision. The notes of this meeting, made by Isaacs, document the four justices of the peace, Davies, Puckle, Letheran and Maxim's, reasons for dismissing the case:

- 'The girl's statement was apparently straightforward but too good to be real—more like a child repeating a lesson it had learnt'
- ' Purves (counsel for the Defence) pressed upon them that the father's evidence was unreliable'
- ' Stone's evidence was not of a positive character'
- 'The girl was intelligent—too intelligent. But when she was cross-examined she began to cry when she was pushed a little hard and that led me to doubt whether she was telling the truth'
- 'We took into account that although the man had assaulted her several times, she never complained to Mrs. W'
- 'A crime that is not likely to have been committed in daylight'
- 'There was a lack of corroborative evidence which they thought was necessary in the case of rape. This had been impressed upon them by Mr. Purves (counsel for the accused, Worrall). One of the justices was at first in favour of committing but he afterwards fell into our view on the grounds that corroboration was necessary'
- 'It struck them as strange that this was a private prosecution and the Crown was not represented by the police'.[10]

Isaacs and Walsh did not accept these reasons. Isaacs interviewed Davies, the chairman of the Essendon Bench. With Walsh, he then reviewed the details of the depositions and proceedings. Isaacs stated that 'after weighing all the circumstances I think there is no course open to me other than directing the case to be tried'.[11]

Isaacs's reasons for referring the case to the Supreme Court are documented on the file. They include:

- 'In the first place the magistrates were evidently under some degree of misapprehension as to the law respecting the necessity of "sufficient corroboration". As the girl was sworn, her evidence did not require by law any corroboration'
- 'In the next place, the evidence of the girl was, according to the Depositions, clear and distinct, and unshaken in cross-examination'
- 'Then certain appearances, as partial rupture deposed to by Dr. Stone, are so far unaccounted for'
- 'The two first letters of the father went unanswered'
- 'And the Defendant did not on oath deny the charge'
- 'The bench should have committed for trial. The matter must be left for the consideration of a jury to finally determine the truth.'[12]

The case proceeded to the Supreme Court to be heard before a judge and jury.

Before the Supreme Court trial began, Harry Wilkinson wrote to the Crown prosecutor asking for permission to submit further evidence. He explained that 'when this case was heard at the Essendon Court I was abused and reviled by the accused's counsel because I owed some money. I was not allowed to make any explanation.'[13] Harry had been accused of making the story up because he owed money to Worrall. Therefore, he provided detailed

information for the court on his earnings, expenditure, borrowings and loans. He also supplied a number of character references from people such as a subeditor of the *Age* and his former employers.[14] A further witness statement was presented to the court from Jane Falconer, a maid at the Victoria Coffee Palace[15] where Harry boarded, to the effect that she had witnessed a heated exchange between Mr and Mrs Worrall in relation to the night when Worrall came home drunk, was told to leave the marital bedroom and went to the room where Ethel was sleeping. The witness statement supported the account given by Ethel in her deposition to the Essendon Court.

The trial began on 16 December 1895 before Chief Justice of the Supreme Court, Sir John Madden, and a jury of 12 men of various occupations.[16] Ethel again gave her evidence, as did her father and Dr Stone. Supporting information was provided by Jane Falconer, housemaid at the Victorian Coffee Palace, and even the accused's wife.[17] Once again, the accused was not required to speak. He had three learned legal counsel to speak for him. They interrogated a nine-year-old child in front of a jury of 12 men, a judge, the accused himself and a courtroom of curious public attendees and reporters. The trial went for over a week. At the end of the trial, Chief Justice Madden made the following statement to the jury: 'If you believe the evidence of the little girl, it proves either of the charges made against him.'[18] On Christmas Eve, 24 December 1895, the jury found the accused not guilty and the case was dismissed. The trial outcome was reported in the metropolitan newspapers that afternoon and both Ethel Wilkinson and Edwin Worrall were named.[19]

Happy Christmas Ethel and Harry.

****

Ethel Wilkinson was my grandmother. However, until I found the newspaper reports and court records of this case, her grandchildren knew nothing about this harrowing episode in her life; she never breathed a word to anyone. Both her daughters are long dead and it is unlikely that they knew anything about it. To us, Ethel was our adored little Gran; she taught us our table manners—how to use a butter knife and the correct way to take the top off a boiled egg (it is with a spoon!). Gran told us many stories of her life, but never this one. I only came to learn of the court case last year, 50 years after she died. I was trawling through some old newspapers on Trove (National Library of Australia) one day and saw a newspaper article.[20] It detailed the court case and named the victim, Ethel Wilkinson, and the accused, Edwin Worrall. This lead me to seek out the trial transcripts from Public Record Office Victoria (PROV). Was this really 'our' Ethel Wilkinson? Yes, indeed it was. It was all there—on the record, over 100 pages of transcripts. I wept as I stood at the copying facility at PROV, painstakingly scanning each page of this tragic and traumatic episode from my Gran's life. It took me so long that the staff were giving me the hurry-up as they wanted to close the building. 'Give me a break', I said through my tears; 'I am copying the trial of the rape of my grandmother when she was nine years old!' They let me continue.

Figure 1. Ethel Wilkinson as a young woman. Photograph courtesy of the author.

Has anything changed in 120 years? We regularly hear of young women who have decided not to pursue criminal cases of rape, who have been too fearful to face their rapists in court or to endure the cross-examination of legal counsel for the accused. Has the law developed any more sensitivity than it had in 1895? Will right-thinking people ever be able to shake the social and legal system so that justice can be done?

Many have tried. In 1896, Dr Emma Constance Stone, her sister, her cousin and other women set up a clinic for women and girls in inner Melbourne and later organised the women of Victoria into a 'shilling drive' that resulted in the building of the Victoria Hospital for Women and Children (later the Queen Victoria Hospital).[21] They were pioneers in the rights for women movement in Australia. When Stone gave evidence at Ethel's trial, it was the first time a woman doctor had given evidence in a Supreme Court trial.[22] One wonders what the all-male jury, legal counsel and judges made of that. The newspapers certainly noted it.

Harry Wilkinson, Ethel's father, also tried to improve the lot of women in Victoria. He became a founding editor of the short-lived feminist/socialist journal the Champion. However, by 1898, just three years after the failed trial, he was unemployed, destitute and penniless. The relationship between him and now 13-year-old Ethel had apparently broken down completely. The Presbyterian and Scots Church Neglected Children's Aid Society was concerned for her welfare and took her in, against Harry's wishes.[23] Eventually, they convinced Harry to transfer guardianship to them, which he did, but reluctantly. They placed Ethel as a servant with a family on a large property on the Goulbourn River. She thrived, staying for seven years. She left to marry the love of her life, ex-Boer War soldier and the son of the local Trawool stationmaster, William McKay, who became my grandfather.

Figure 2: 'Ettie's dad by himself', July 1892. Image courtesy of the author. [24]

Harry Wilkinson took his youngest son Roy to Queensland where they too thrived and Harry became a respected and commissioned artist whose paintings are still part of major collections.[25] Harry and Ethel's relationship never recovered from the bruising effects of that sexual assault and subsequent court case, and later forced separation. As far as we know, they never met again.

Endnotes

[1] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543, Office of Public Prosecutions, Criminal Trial Brief, trial of Edwin Worrall, 1895, deposition of Ethel Wilkinson.

[2] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543.

[3] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543, deposition of Harry Wilkinson.

[4] Australian Women's Register, 'Stone, Emma Constance', available at http://www.womenaustralia.info/biogs/AWE0048b.htm, accessed 21 May 2018.

[5] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543, deposition of Dr E Constance Stone.

[6] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543, statement to Supreme Court by Constable Charles William Thompson, Criminal Investigation Branch, Melbourne, December 1895.

[7] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543, deposition of Ethel Wilkinson.

[8] PROV, VPRS 30/PO Criminal Trial Briefs, Unit 1043, Set Four 543, Supreme Court notice of trial, 6 December 1895.

[9] PROV VPRS 30/PO Unit 1043, Set Four 543, Crown Prosecutor Robert Walsh notes to Victorian Attorney-General Isaac Isaacs 29 November 1895.

[10] PROV VPRS 30/PO Unit 1043, Set Four 543, notes of Attorney-General Isaacs of discussions with Essendon Magistrates, 3 December 1895,

[11] PROV, VPRS 30/PO Unit 1043, Set Four 543, 3 December 1895, statement of Victorian Attorney General Isaac Isaacs.

[12] PROV, VPRS 30/PO Unit 1043, Set Four 543, 3 December 1895, file note of Victorian Attorney General Isaac Isaacs.

[13] PROV VPRS 30/P0, Unit 1043, Set Four 543, letter from Harry Wilkinson to Victorian Attorney General Isaac Isaacs, 10 December 1895.

[14] PROV, VPRS 30/PO, Unit 1043, Set Four 543, JS Stephens, sub-editor, Age, reference for Harry Wilkinson, 28 June 1895.

[15] PROV, VPRS 30/PO, Unit 1043, Set Four 543, statement of Jane Falconer, maid at the Victoria Coffee Palace, 16 December 1895.

[16] PROV, VPRS 30/PO, Unit 1043, Set Four 543, Victorian Police Department, Criminal Investigation Branch, list of jurors to try issues, 18 December 1895.

[17] PROV, VPRS 30/PO, Unit 1043, Set Four 543, statement of Jane Falconer, maid at the Victoria Coffee Palace, 16 December 1895.

[18] PROV, VPRS 30/PO, Unit 1043, Set Four 543, handwritten court notes by Crown Prosecutor Robert Walsh in Supreme Court trial 18–24 December 1894, p. 4 of 4.

[19] 'Alleged assault on a child', *Argus*, 24 December 1895, p. 7.

[20] 'A criminal assault charge dismissed', *Age*, 24 December 1895, p. 6.

[21] Australian Women's Register, 'Stone, Emma Constance'.

[22] 'Latest intelligence', *Avoca Mail*, 24 December 1895, p. 2.

[23] Care leaver file for Ethel Wilkinson obtained from Kildonan Uniting Care 188 McDonalds Road, Epping (Victoria) on 15 May 2012 by Katherine McKay, granddaughter of Ethel Wilkinson.

[24] 'Ettie' is the name that Harry used for Ethel. This is a self-portrait of Harry Strongitharm Wilkinson (the name he used in later life and as an artist). It is dated July 1892 and we believe it was given to Ethel when Harry had to leave her and her two brothers in the Sydney benevolent home while he went to Melbourne to seek work. He was separated from his wife, homeless, destitute and unemployed. Ethel kept that picture all her life and her family found it in her wallet after her death—carefully folded. The fold lines can be seen on the copy.

[25] Harry Strongitharm Wilkinson's art works are spread across Australia and some parts of England in private and family collections. Works in public collections include Royal Historical Society of Queensland, Wellsby Collection (Brisbane River Early Morning (winter) 1907) and Brisbane Turf Club, Permanent Collection (Fitz Grafton 1907, winner of the Viceroy Cup, India; Poseidon 1906, Winner of the Melbourne Cup).