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ABORIBINAL TITLE IN
SOUTH AUSTRALIA

Shaun Berg (Ed) (Wakefield Press, Adelaide, 2010)

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ABORIGINAL TITLE IN SOUTH AUSTRALIA

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Because the British Empire was a huge, multi-racial enterprise, the Colonial Office in London and the imperial authorities in Whitehall were commonly at loggerheads with the scattered British communities over their treatment of non 'white' populations. This was specially evident in correspondence concerning colonial, and later federal, immigration policies supporting 'White Australia'. But it was also present in the earlier attempts on the part of London to protect indigenous peoples from the policies of settlers, particularly with respect to the seizure of land.

An illustration of the endeavours of the imperial officials to protect the indigenous people of Australia is evident in the provisions of s70 of the *Constitution Act 1889 (WA)* providing, effectively, for the payment to the Crown, out of the consolidated revenue fund, of an amount equal to 1 percent of the gross revenue of the colony for the "welfare of the aboriginal natives". This sum was never paid. A challenge to the repeal of the provision, on the basis of the imperial requirements of compliance with "manner and form", failed in *Yougarla v Western Australia* (2001) 207 CLR 344.

Until the decisions of the High Court in *Mabo [No.2]* and *Wik*, it was generally assumed that the acquisition of British sovereignty over Australia (and the enactment of pastoral leases legislation) had extinguished any pre-existing Aboriginal title to traditional lands. *Mabo* and *Wik* breathed new life into the Aboriginal land rights movement. The decisions enlivened an appreciation of the injustices which Australian law had previously imposed on the indigenes. This book is the latest product of contemporary reflections on Aboriginal interests in traditional lands.

The book comprises a collection of essays edited by Shaun Berg. He is a lawyer practising in South Australia in the areas of indigenous rights and intellectual property law. The starting point for all of the chapters is the unique arrangements under which the Province of South Australia was established, not as a penal colony like the others but as a settlement of free immigrants. The settlement arrangements were planned and substantially “privatised” in London, with thousands of ‘white’ settlers brought in by the South Australian Company. The dangers of such arrangements were well recognised by the officials in Whitehall. In the original Letters Patent, authorised by King William IV in establishing the Province of South Australia, there was a significant royal qualification on the otherwise ample grant of powers to the new government:

“PROVIDED ALWAYS that nothing in our Letters Patent contained shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment in their Own Persons or in the Persons of their Descendants of any Land therein now actually occupied or enjoyed by such Natives.”

As with the Western Australian 1 percent of revenues, this recognition of Aboriginal land rights was ignored, save that Protectors of Aborigines were appointed to collect the indigenous people and place them on reserves where they would be both safe from, and to, the incoming settlers. The object of this book is to explore the extent to which the promise in the Letters Patent constituted an instruction by the British authorities that was intended to have legal effect. Or whether it was no more than an aspiration, quickly overruled by enactments authorising the governor and his officials to dispose of “waste and unoccupied land ... fit for the purpose of colonisation”.

The aspirational theory was accepted by Justice Blackburn in the Gove land rights case (*Milrrpum v Nabalco Pty Ltd* (1971) 17 FLR 141). The override theory secured some support from *dicta* of the High Court in *Fejo v Northern Territory of Australia* (1998) 195 CLR 139. However, the issue has never been finally resolved by a binding decision of the highest courts. The object of this book is to explore whether a legal remedy exists for the blatant breach of the Royal proviso. If not, the book asks what other recompense should now be offered to compensate for such a flagrant violation of the express Royal instruction.

Shaun Berg, in the first chapter (and in the third chapter co-written with Claire Simmonds) concludes that the Royal proviso amounts to a kind of constitutional recognition of native title in the peculiar colonial circumstances of South Australia. He argues that it affords legally enforceable rights to land for the indigenous people and is not repugnant to later Imperial, colonial and state legislation. His views deserve respect. Until they are finally ruled upon, no conclusive opinion is possible.

Still, there are various problems from a legal point of view which Mr. Berg acknowledges and carefully examines. They include the susceptibility of a 'prerogative act' on the part of the monarch to be overridden by later legislative enactments of Parliament. They also include the implications inherent in the Torrens system of registered title in land, which was to prove one of South Australia's greatest legal innovations, now copied throughout the world. The compensation scheme, time limit for inconsistent claims and objectives of certainty of land title under the Torrens statutes stand as potential barriers to the arguments supporting the legal effectiveness of the Royal promise.

Correctly, Shaun Berg indicates the need for care in pursuing a litigious solution to claim redress for the breach of the Royal promise. The other chapters in the book leave the legality of the promise unresolved. Instead, they address the ways in which the express terms of the Letters Patent might now be used as a springboard for securing more modern and effective remedies to compensate South Australia's Aboriginal descendants for the breach of faith that unfolded in the loss of control of their traditional lands.

Lee Godden sees the Letters Patent as an acknowledgement of Aboriginal sovereignty over land which preceded the arrival of the settlers. A treaty or the possible enactment of constitutional recognition of the Aboriginal interests in land (as in Canada, Brazil and Mexico) would, he suggests, be a proper step towards reconciliation and mutual respect.

Sean Brennan views the Royal promise as a ground for now creating a new compensation fund to repay the modern descendants of South Australia's indigenes for the unconsensual seizure of their land. A similar thesis is propounded by Ian Robertson SC of the Adelaide Bar. Drawing upon the innovative establishment of the Torrens system in South Australia, he suggests a scheme for financial compensation based on levies imposed upon land transactions and payments into the statutory assurance fund. Given that this would arise out of dealings in land, the equity and suitability of obliging land owners to contribute to a land acquisition fund is obviously arguable.

Paul Haveman in his chapter on "Betrayal and Reparation" draws attention to the precedent afforded to the South Australian authorities by the reparations paid by both the British and Australian governments for the contamination of the traditional Aboriginal lands at Maralinga, where British atomic weapons were tested fifty years ago. The payment of moneys and the provision of an apology could repair the betrayal of King William's protective gesture.

An American expert in the claims of native Americans in North America, Walter Echo-Hawk, urges the invocation of rights to self-determination expressed in the new *International Declaration on the Rights of Indigenous Peoples*. In the last chapter, Megan Davis suggests the adoption of an indigenous bill of rights as the only way that, retrospectively, the Australian community could repair the betrayal of the Royal promise contained in the Letters Patent. There is a somewhat similar idea to this in the thoughtful foreword written by Geoffrey Robertson QC. He too suggests explicit provisions in a new national "statute of liberty", a subject upon which he has written an extensive

proposal (G. Robertson, *The Statute of Liberty – How Australians Can Take Back Their Rights*, (Vintage, 2009). He also proposes consideration of the idea of dedicated seats in the Australian Senate for the nation's indigenous people, after models adopted in New Zealand and Mauritius.

Following the chapters with their contemporary views on the legality and politics of Aboriginal land rights in South Australia, an extensive appendix contains a mass of contemporaneous historical records concerning the South Australian settlement, stretching from 1832 to 1841. These extracts are invaluable and extremely interesting. They demonstrate, once again, the idealism present in the imperial government and its officials, fresh from their resolve to use the Royal Navy to bring to an end the blight of the North Atlantic slave trade in which Britain had previously participated. The Commons debates, the proclamation of the foundation of the South Australian colony, and the exchanges between London and Adelaide, read with a freshness that is sometimes startling. These records add strength to Shaun Berg's thesis that the language of the Letters Patent was taken seriously in London and was not meant to be mere pipe dreams. Yet, whatever may have been the demands from Whitehall, the settlers looked on the Aboriginal population as nomadic and uncivilised. It took 150 years for Australian law to begin the process of overcoming this approach.

There are excellent biographical notes, a splendid subject index, and a thoughtful preface written by three descendants of the Aboriginal people in Australia in South Australia. For them, this book is simply a continuation, by new means, of their fight for due acknowledgement and recognition of rights promised to them by King William IV. They describe

the issue presented by the book as a “burning” one that constitutes “unfinished business” in the relationship between the first peoples of the land and the settlers and their descendants.

In any future print run, it would be desirable to illustrate the book with some plates showing the *dramatis personae* at the extreme ends of the earth who played their respective parts in the saga described in these pages. The front cover has a pleasing reproduction of King William IV’s Letters Patent clasped by Aboriginal hands. And the most important reminder in the book appears in Megan Davis’s last chapter. She quotes Professor Mick Dodson on the spectacle he faced when the *Native Title Amendment Act 1998 (Cth)* was being negotiated with the Senate. On that occasion, Mick Dodson observed:

“What I see now is the spectacle of two white men, John Howard and Brian Harridine, discussing our native title when we’re not even in the room. How symbolically colonialist is that?”

In the next print run, it would also be desirable for closing chapter(s) be added with the practical thoughts and suggestions, offered by Australian Aboriginal leaders. They could draw together the themes recounted in this book and propose the way in which, a century and a half later, the undertaking of a British king to Aboriginal people in Australia could be fulfilled today by those in possession of what were once Aboriginal lands.
