

The Legacy of the Letters Patent

Robert Foster

There were no real efforts to act upon the sentiments contained in the Letters Patent until after Governor George Gawler had arrived in the colony in 1838. By this time the colony's Foundation Act had been amended to incorporate the passage from the Letters Patent, and a full-time Protector of Aborigines had arrived. In 1840, as new land surveys were opened up for selection, Gawler asked the Protector of Aborigines to reserve sections of land for Aboriginal people. He did so, but the South Australia Company was furious; people, who we now know primarily as the names of suburbs, electoral districts and streets, protested, they had purchased Preliminary Land orders, but Aboriginal interests were being given priority! Gawler, speaking through Assistant Commissioner Charles Sturt responded with a passionate defence of Aboriginal Land rights. He said: 'Prior to the landing of the first British settlers [Aboriginal people] possessed well-understood and distinctly defined proprietary rights over the whole of the available lands of the Province'. The Royal Instructions and the Instructions to the Resident Commissioner, he reminded them, directed that 'they shall not be disturbed in the enjoyment of lands of which they may possess proprietary rights, and of which they are not disposed to make a voluntary transfer'. But in the end, Gawler was a realist and his actions were pragmatic. It would have been to their great disadvantage, he said, 'to have entered into general treaties with them for the cession of lands'. The course he chose to take was to set aside reserve lands their 'future use' and 'support', such lands being 'secured in the Governor, the Council and Protector of Aborigines, as trustees'. What flowed from this, over the course of the 19th century, was not much. Most of the reserve lands that set aside were granted as a privilege rather than a right, primarily to serve a policy of assimilation. Aboriginal men, for instance, were sometimes given grants if they were willing to farm the land, sometimes women were given grants, as a sort of dowry, if they married European men, while most of the lands that were granted went to support mission reserves.

In the 1850s, just prior to self-government, the British Colonial Office made one last effort to secure Aboriginal people rights to land. When authorising the introduction of pastoral leases it insisted that Aboriginal people not be excluded from them, as a result, all leases included provisions guaranteeing Aboriginal people the right to reside upon those lands, hunt and gather upon them and pass through them. In modern language, it tried to ensure some degree of co-existence.

The next significant moment in the history of Aboriginal rights to land in South Australia happened in the 1920s with the establishment of the North West Reserve, what would eventually become Pitjantjatjara lands. For the first time land was being set aside as a buffer, to protect Aboriginal people in the region who were still living traditionally. In the 1960s, we see the beginnings of the land rights movement, and South Australia took the lead. In 1966 the government established the Aboriginal Land Trust, vesting authority over reserve lands in Aboriginal people. Then in the 1980s there was the Pitjantjatjara Land Rights Act and then the Maralinga Land Rights Act. Despite the progress, these were still essentially government grants, dependant on the goodwill of the government. Recognition of Aboriginal title, in common law - Native Title - didn't come until the *Mabo* decision of the High Court in 1992. It's worth noting that the circumstances surrounding South Australia's foundation, the discussions over Aboriginal rights to land that occurred at the time, played an important role in the decision. The history continues to resonate.

A few years ago I was involved in successful De Rose Hill Native Title case. In 2006, members of the Yankunytjatjara community invited the team to their lands to witness the Federal Court present them with a document acknowledging their Native Title. As I witnessed the ceremony I was struck by the fact that, for the first time, I was standing on Aboriginal lands recognized as such in Australian Common law. I was also struck by something one of the Federal Court Judges said during the ceremony, and I'm quoting from memory here, 'the government isn't granting you these lands, it is recognising that they have always been yours'.