

Presentation by Shaun Berg, Lawyer at ‘Wodlianni – 173rd Anniversary of the Letters Patent’ at Government House on 19 February 2009

I acknowledge Kurna Yerta and I pay my respects to the people of these lands and waters.

Your Excellency, the Lieutenant Governor, Members of Parliament, Lord Mayor, Commissioner, Professors O’Donaghue, Thomas, Buckskin, Elders of the First Nations, Distinguished Guests.

The title I have given to this short presentation is ‘Everybody Knew’.

I believe this title connects the two topics we are here to talk about today: the letters patent and the stolen generations of children.

I say this because:

- (a) the government in 1836 ‘knew’ that the founding documents of the State of South Australia protected the Aboriginal inhabitants right to land; and
- (b) in the Trevorrow case Justice Gray said the government ‘knew’ in 1958 that it was not lawful for them to remove Aboriginal Children.

In each of these cases ‘everybody knew’.

The government knew its laws but it did not comply with them.

The impact of its decision in terms of the disruption and breaking of lives that are the Stolen Generations of children is clear.

Its failure to comply with the instructions given to it in the myriad of legal documents founding this State is yet to play out.

These documents include the Letters Patent of William IV. In asserting sovereignty for the British over this State he directed:

‘nothing in those 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 Lands therein now actually occupied or enjoyed by such Natives’

In the Proclamation of the State Governor Hindmarsh said:

‘It is also, at this time especially, my duty to apprise the Colonists of my resolution, to take every lawful means for extending the same protection to the NATIVE POPULATION as to the rest of His Majesty’s Subjects’

He said this because the protection of Aboriginal Rights was an important feature of the founding of this State.

The Governor’s instructions articulated in an Order in Council were in substantially the same terms as the Letters Patent. [23rd February 1836]

The Commissioners in England also knew what the instructions were, because not only did some of them draft the Letters Patent, but they also made plain their intentions in their official reports to the British Parliament, and importantly in exercising their powers under the Foundation Act they gave instructions to the Resident Commissioner.

They instructed [8 October 1836]:

You will see that no land which the natives may possess in occupation or enjoyment be offered for sale until previously ceded by the Natives to yourself. You will furnish the protector of the aborigines evidence of the faithful fulfillment of the Bargain or treaties which you may effect with the Aborigines for the cession of lands, and you will take care that the Aborigines are not disturbed in the enjoyment of the land over which they may possess proprietary rights and for which they are not disposed to make a voluntary transfer.

In 1838 the British Parliament enshrined the words of the Letters Patent into legislation.

In that same year a new Governor and Resident Commissioner was appointed. He was given the same instructions in his capacity as Resident Commissioner as Fisher had been given.

Each of these documents are legal documents; letters patent, orders in council, reports to parliament and legislation. If valid, to not follow them, when they should have been followed, is to act contrary to the law.

The British Parliament created a system to protect Aboriginal rights to land in South Australia.

A system to protect the rights of those Aboriginal People living in 1836 and for their descendents living now.

We know today these laws were not followed.

To use the words of Tom Trevorrow, Ngarrindjeri Elder: 'We need to come to terms with this, so that we can come to terms with each other.'

Regardless of how difficult this may be, I think that we have the capacity to work through these issues but what we must not do is to say 'we didn't know' because 'Everybody knew'.

[including King William IV knew, the Colonial Office knew, the Commissioners in England knew, Governor Hindmarsh knew, Resident Commissioner Fisher knew, Governor Gawler knew, and the colonists and land speculators knew ...]

Thank you