

# KELLEHERS

## AUSTRALIA

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### *The story of Robert Torrens*

The Torrens system is the basis of most Australia in land ownership. It has been adopted throughout many parts of the world. Its inventor is said to be a Colonial Land Commissioner, Robert Torrens. Torrens is widely hailed and honored.

Some background to Robert Torrens casts a slightly different light. Torrens was the son of an early Chairman of the UK Commissioners for the province of South Australia. Appointed Collector of Customs for South Australia, he arrived in 1840 at age 26. Apparently an able orator, he was once convicted of common assault for beating a newspaper editor with a walking stick.

Torrens became a commissioner under the *South Australian Act (1842) (Imp)*. As such, he operated under instructions from the UK government. The Letters Patent from King William IV, on 19 February 1836, authorising the settlement of South Australia, contained the condition that:

*'nothing ... shall affect ... the rights of any Aboriginal Natives ... to the ... occupation or enjoyment... of any Land ... not actually occupied or enjoyed by such Natives'.*

The Resident Commissioner for South Australia received additional specific Instructions proscribing a process for acquiring land from the Aboriginal inhabitants<sup>1</sup>.

UK Colonial policy acknowledged that a system of land tenure existed in the Australian Colonies. It clearly recognized that Aboriginal people were in occupation and enjoyment of land<sup>2</sup>. In *Mabo*, Justices Deane and Gaudron referred to a dispatch by James Stephen, a permanent head of the Colonial Office, that;

*'Aborigines had proprietary rights in the Soil – that is in particular sections of it which were clearly defined or well understood before the occupation of their country'*<sup>3</sup>.

Torrens had the opportunity to create a fair relationship with Aboriginal people when requested by the 1836 Select Committee on the Disposal of Land in the British Colonies, to report as to how the colonists intended to deal with Aboriginal people. His response was to recommend a Protector of Aborigines:

*'to see that no land which the Aborigines really have in possession or enjoyment (I believe they have none) shall be taken for settlement'.*

Some explain Torrens' attitude by the zeitgeist, probably springing from views of social evolution<sup>4</sup>. However, the approach is more likely commercial than racial. It was well recognised that:

*'even in its rude wild state, the land was demonstrably worth a very large amount of money'*<sup>5</sup>.

Thus in a Colony of settlers deeply committed to securing rights to occupy and own land, local governance brooked no interference with arrangements to 'take up' land: even when directly conflicting with UK

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<sup>1</sup> Letter of Instructions from Colonization Commissioners to Resident Commissioner James Hurtle Fisher dated 8 October 1836, as reproduced in *Second Report of the Colonization Commissioners of South Australia, 1838*, House of Lords, London.

<sup>2</sup> Gawler, George, 1840, *South Australian Gazette*, and Kings Papers, Mitchell Library, State Library of New South Wales (as quoted in Reynolds 1988, p11), Glenelg (as quoted in K. Gilbert), *Aboriginal Sovereignty: Justice, the land and land*, Treaty 88, Canberra, 1988, p113, Hodder, E., 1891, *George Fife Angus – Father and Founder of South Australia*, Hodder & Stoughton, London, p144, *William v Attorney-General* 428 Barton ACJ, p211 and 216, Blacket, J., 1911, *History of South Australia – A Romantic and successful experiment in colonization*, 2<sup>nd</sup> ed., Hussey & Gillingham, Adelaide, 109, Hassell, Kathleen, 1966, *The Relations Between the Settlers and Aborigines in South Australia 1836-1860*, Libraries Board of South Australia, Adelaide.

<sup>3</sup> *Mabo v Queensland (No. 2)*, [1992] 175 CLR 1, 107.

<sup>4</sup> Simmonds, Claire and Shaun Berg, 2010, *The law as a prisoner of history: An examination of Aboriginal title in South Australia*, in Berg, Shaun, *Coming to Terms: Aboriginal Title in South Australia*, Wakefield Press, p 206, who refer to Attwood, B., 2002, *The past as future: Aborigines, Australia and the (dis)course of history*, in Jordan, T. and S. Pile, *Social Change*, (as excerpted) Blackwell, Oxford, p87, *Re Southern Rhodesia* [1919] AC 211.

<sup>5</sup> Select Committee on Aborigines (British Settlements), 1837, p79, quoted by Robertson, QC, Geoffrey, 2010, Foreword, in Berg, Shaun (ed.), *Coming to Terms: Aboriginal Title in South Australia*, Wakefield Press, South Australia.

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directions. Agreements with Aboriginals to 'buy' land, met strong immediate response in the Colony of New South Wales. When, in May 1835, John Batman attempted to enter into a land agreement with Melbourne Aboriginals, Governor Sir Robert Bourke stridently proclaimed on September 1835 that<sup>6</sup>:

*'every treaty, bargain and contract with the aboriginal natives for the possession, title, or claims to the lands ..., was void and of no effect against the rights of the Crown....'*

The Torrens system, a 'great and glorious'<sup>7</sup> legal innovation, fundamentally changed land law. Land ownership could only be changed via a government public register, with registration conferring title. On registration, any prior defect in title ceased. Private agreement was only effective on registration.

The Torrens system sought to address complexity in cumbersome English conveyancing practice. In an expanding colonial country, controlling *Crown and Waste Lands*, was difficult. There was pressure for something more in keeping with a young far away Colony. A series of leading articles in the *South Australian Register*, called for a faster, cheaper and more certain system<sup>8</sup>. German lawyer, Dr Ulrich Hubbe, drew on the system of transfer by registration that had existed for over 600 years in the Hanse Towns of northern Germany. The Torrens system was modelled on the Lloyds of London shipping register and UK *Shipping Act 1854*. The Hon. Anthony Foster recalled:

*'As all lawyers were against it, it could never have been brought to a final consummation, but for the efficient help of Dr Hubbe... The provisions of the Bill were settled by Mr. Torrens and a few friends and put into proper form by Dr. Hubbe. Torrens took charge of it in the Assembly, and I in the Legislative Council. We had the whole Colony at our back<sup>9</sup>.'*

On 3 January 1852, Torrens was appointed Registrar-General and Colonial Treasurer and subsequently entered parliament, being Premier for a short period – and the rest is history.

Yet the possibility remains that the first Torrens titles were suspect for non-compliance with the Letters Patent, and the Resident Commissioner's Instruction, that nothing should affect Aboriginal rights to the enjoyment of the land. Some suggest that Aboriginals have compensation entitlements under the Associations fund<sup>10</sup> for land interests lost due to registrations under the Torrens system.

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29 April 2015

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<sup>6</sup> New South Wales *Government Gazette*, 2 and 9 September 1835.

<sup>7</sup> Taylor, G, 2005, *A Great and Glorious Reformation: Six early South Australian legal innovations*, Wakerfield Press, Adelaide, p18.

<sup>8</sup> Barry, J.P. and J.D Lines, 1994, Land Tenure, Section 4 of *The Surveyors Handbook*, refer to articles in 1856 in the *South Australian Register*, by Anthony Forster and Dr Ulrich Hubbe, p 96.

<sup>9</sup> Barry, J.P. and J.D Lines, 1994, Land Tenure, Section 4 of *The Surveyors Handbook*, refer to articles in 1856 in the *South Australian Register*, by Anthony Forster and Dr Ulrich Hubbe, p 97-98, referring to a letter by Anthony Forster, dated St Leonards on the Sea, 15 May 1892.

<sup>10</sup> Robertson, Ian, *The rise and rise of Aboriginal title to land: the effect on predecessor title on Aboriginal land under the Torrens System*, in Berg, Shaun, *Coming to Terms: Aboriginal Title in South Australia*, Wakefield Press, p 206, who refer to Attwood, B., 2002, *The past as future: Aborigines, Australia and the (dis)course of history*, in Jordan, T. and S. Pile, *Social Change*, (as excerpted) Blackwell, Oxford, p87, *Re Southern Rhodesia* [1919] AC 211.