1981
FIRST FREEHOLD LAND TITLE FOR ABORIGINES

Contents

Return to INDEX TO HISTORY ARTICLES

South Australia pioneers freehold land rights

Australian history came full circle on 4 November 1981 when, 211 years after Britain annexed half the Australian continent, South Australia became the first State to grant an Aboriginal community freehold title to its traditional land.

The move, which returned to the Pitjantjatjara people more than 102 000 square kilometres of the State — an area the size of Tasmania, Austria, or Portugal — was hailed by most Australians as being, in the words of the federal Minister for Aboriginal Affairs, Senator Peter Baume, a 'milestone in the history of Aboriginal affairs in Australia'.

In bringing to fruition the Pitjantjatjara Land Rights Act, passed in March 1981 by the South Australian Parliament, the State honoured, for the first time, the pledge of Governor John Hindmarsh when he proclaimed the Province of South Australia on 28 December 1836. He undertook to:

...take every lawful means for the same protection to the NATIVE POPULATION as to the rest of His Majesty's Servants... [and] to punish with exemplary severity, all acts of violence or injustice which may in any manner be committed against the Natives who are considered as much under the safeguard of the law as the Colonists themselves, and equally entitled to the privileges of British subjects.

Instead, as in many other parts of Australia, the Aborigines were treated more like vermin than people, being forced off the land they had always occupied to make way for the graziers who pushed the frontiers of Euro-

pean ‘civilisation’ deeper and deeper into the outback.

Although the First Fleet’s commander, Captain Arthur Phillip, like later governors in other parts of Australia, had been ordered ‘by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them’, the 1837 Select Committee on Aborigines in British Settlements reported to the House of Commons that:

... the most recent intelligence from New South Wales and from Western Australia records conflicts between the Europeans and the Aborigines, in which the former acted avowedly upon the principle of enforcing belligerent rights against a public enemy.

When it is remembered that unsettled land has been sold by the Government of New South Wales, yielding in a single year returns to the local Treasury exceeding 100,000 [pounds], and that in the recollection of many living men every part of this territory was the undisputed property of the Aborigines, it is demanding indeed little on their behalf to require that no expenditure should be withheld which can be incurred judiciously for the maintenance of missionaries, who should be employed to instruct the tribes, and of protectors, whose duties should be to defend them.

The protectors invariably were policemen, who were also responsible for removing Aborigines from towns and from land wanted by European farmers.

The amount of protection the law afforded the native inhabitants is well illus-

trated by the fact that for many years in New South Wales and Queensland, Aboriginal evidence of murders was not admissible in court.

Missionaries, attempting to 'civilise' their charges through Christianity, set up many mission stations which provided the Aborigines with some refuge. But, since they lacked permanent title, these lands inevitably fell prey to European graziers and farmers wanting more land.

Only undisputed ownership of land could have halted the continuing break-down of the Aboriginal society, but that was the last thing Britain and the colonial governments were prepared to yield.

Pushed into the isolated and mainly desert regions of the vast continent, the Aborigines survived in most cases through becoming a grossly-exploited work-force, serving cattle barons and others for no cash wages until after the first World War in Queensland, and until much later in some other areas. As Professor C. D. Rowley explains.

Governments did not acknowledge Aboriginal land rights, [so] the tribes had no bargaining power .... All over the continent the policy was adopted of using mission settlements to take the unwanted populations out of the way, and institutionalised communities were growing up. The same procedure was used to keep Aborigines away from towns, although small fringe settlements were necessary for the convenience of townsmen and others who required their labour.

The Australian Constitution provided that Aborigines should not be included in the census and that States, not the Commonwealth, should legislate indi-

vidually for the Aboriginal people; both clauses were abolished as late as 1967.

Only during the second World War, in many cases, did Aborigines win full award wages, and this was mainly because of the shortage of manpower. At the same time their relationship with the military, particularly in the north, helped remove some of the previous inequalities such as lack of cash wages.

During the post-war years, the emphasis was on ‘assimilation’: teaching full-blood Aborigines to become European-style citizens. In 1961 the Native Welfare Conference stated that the aim was for Aborigines to attain ‘the same manner of living as other Australians ... as members of a single Australian community’.

Soon land rights emerged as the rallying point for the emergent Aboriginal political struggle throughout Australia.

In 1963 Aborigines protested to the Federal Government over a mining lease granted on Yirrkala mission in Arnhem Land, but both Canberra and later the courts rejected the principle of prior occupation.

In 1966 South Australia took the lead with legislation which placed all Aboriginal reserves in the State in the possession of a Lands Trust.

In the Northern Territory, Mr Justice Woodward was appointed in 1973 by the Federal Government to enquire into Aboriginal land rights. Most of his far-reaching recommendations were included four years later in the Aboriginal Land Rights (Northern Territory) Act, which provided for Aboriginal land trusts to gain title to existing reserves and to vacant Crown land in the Terri-

tory where a traditional link with the land could be proved.

The law stipulated that trust land be administered by three Aboriginal land councils, whose members are elected by local communities. But it limited the freehold title because Aborigines still could not sell the land, and they needed government approval to lease it to non-Aborigines.

Although it stipulated that Aboriginal consent was required for mineral exploration and mining, the Act permitted the government to override such refusal 'in the national interest'.

In South Australia the Pitjantjatjara strongly objected to their reserve, in the north-west of the State, being incorporated under the Lands Trust. So, in 1978, Labor Premier Don Dunstan introduced a Pitjantjatjara Land Rights Bill, which was intended to grant freehold rights to the Aboriginal community.

However, the A.L.P. was defeated before the Bill became law; the new Liberal Government, after some stormy disagreements with the Pitjantjatjara, eventually reached a settlement with them on a new Bill, which was passed by the State Parliament in March 1981.

Through patient negotiation even the controversial issue of mineral exploitation was overcome, with the Act providing, *inter alia,* for a judge of a superior court to act as arbitrator in the event of a dispute over mining on the community's land; his decision is final and binding on all parties.

Noted the *Australian:*

The 43 clauses of the Pitjantjatjara Land Rights Bill are some of the most

complex ever passed by a State parliament and covered company, property and administrative law as well as a detailed reference to legislation relating to exploration, mining and roads and to innovative concepts of Aboriginal customary law as tentatively defined by the Law Reform Commission.

Premier David Tonkin hailed the settlement as ‘a momentous decision for the Aboriginal people, and for all South Australians, and one which is a turning point in the State’s history’.

The Mabo Decision

Land rights went much further when in June 1992 the High Court of Australia held, for the first time, that the common law of Australia recognised the prior land rights of Australian Aboriginal people.

The decision (Mabo v Queensland [No 2] (1992) 175 CLR 1) overturned the judgment of Mr Justice Blackburn who had held, 21 years earlier, that Aboriginal title to land had not survived British settlement of the continent.

The Federal Government passed the Native Title Act in 1993 to give effect to the principles of the Mabo decision.

The Act provides a regime for determining whether native title exists over particular areas of land or waters, for validating certain past acts of government and for regulating future acts which may affect Aboriginal rights in land.