King's Seal – Letters Patent 1836

In the 2014 documentary "***King's Seal***" it was alleged that consecutive governments have ignored the legal rights of Aboriginal people of South Australia contained in clause 8.1 of the ***Letters Patent 1836 (SA)*** which provides:

> "PROVIDED ALWAYS that nothing in these 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…"

According to the ***film makers***, this constituted treason as it was contrary to the Kings command that sovereignty be exercised over the Aboriginal people of South Australia.

NITV segment:

https://freemandelusion.com/the-kings-seal_-the-constitution-treason-and-the-sa-letters-patent-from-1836-mp4/

There were several protests regarding the Letters Patent, in which Owen Karpany and his son Daniel were involved, as they were challenging fishing rights after being charged for catching undersize abalone. The Karpany's are featured heavily in the documentary, despite the fact that the Letters Patent argument was not part of their High Court challenge.

In the Magistrates Court, the contention that the Letters Patent afforded any defence was rejected, but as the abalone were taken in accordance with the traditional laws and customs of the Narrunga People, the applicants successfully invoked section 211 of the *Native Title Act* 1993 (Cth). On appeal in the Supreme Court in ***Dietman v Karpany (2012) 112 SASR 514*** it was held that the native title rights and interests conceded in the Magistrates Court was wrong, and that the relevant native title rights, which, absent extinguishment, would have embraced the taking of the undersize abalone, had been extinguished by the *Fisheries Act* 1971 (SA).

The Karpany's sought special leave to appeal to the High Court in ***Karpany and Anor v Dietman [2012] HCATrans 210*** which was granted, and reserved in ***Karpany and Anor v Dietman [2013] HCATrans 236***. The basis of this challenge was not regarding the Letters Patent, but section 211 of the *Native Title Act* 1993 (Cth), although the following was submitted and never raised again:

> *"That is the relevance of the letters patent argument in the sense of the matters put before the court. It arises in two ways. It either arises so as to distinguish the public right from the native title right or, alternatively, it arises by reason of the fact that if one looks to the scheme of the fisheries legislation, in our respectful submission, it is insufficient to simply…..the scheme by looking at the fisheries legislation and ignoring the preservation of rights contained in the letters patent and the subsequent Orders in Council."*

The challenge was successful, in ***Karpany v Dietman [2013] HCA 47*** the High Court held that the *Fisheries Act* 1971 (SA) did not extinguish the applicants' native title right to take fish, as it permitted a person

without holding a licence to take fish by certain means and *"otherwise than for the purpose of sale"*. The *Fisheries Act* 1971 (SA) regulated, but was not inconsistent with, the continued enjoyment of native title rights.

Several months prior, the Federal Court addressed the issue of the Letters Patent in no uncertain terms, in ***Walker v State of South Australia (No 2) [2013] FCA 700***. The applicant asserted that the Letters Patent that established the Province of South Australia had the effect of "*barring*" the Crown from *"extending … sovereignty or dominion over the Ramindjeris' lands and people…"* The court rejected this proposition. (From 26):

> *"Neither the 1834 SA Act nor the Letters Patent preserve any sense of sovereignty in the Aboriginal people of South Australia. I do not accept that the language of the Letters Patent ascribes any protection of indigenous sovereignty. In* ***Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141*** *at 278, Blackburn J characterised the contrary argument as follows:*
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> *That the words of the Letters Patent do not naturally suggest this meaning appears to me to be self-evident. That the Government would have tried to effect such a result by an instrument in such terms seems unlikely.*
>
> *A construction of the Letters Patent proviso that provides for some protection of sovereignty is inconsistent with the fact that by 1770, and at least by 1834, the Crown understood that it had acquired full legal and beneficial ownership over the whole of eastern Australia, including that which is now South Australia. The clear terms of s 1 of the 1834 SA Act provided for the erection of a colony over which full sovereignty was exercised, expressly providing that:*
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> *All and every person who shall at any time hereafter inhabit or reside within His Majesty's said province … shall be subject to and bound to obey such laws, orders, Statutes, and Constitutions as shall from time to time, in the manner herein-after directed, be made, ordered, and enacted for the Government of His Majesty's province … of South Australia.*
>
> *Moreover, s 6 of the 1834 SA Act authorised the Commissioners of the Province to declare all lands of the Province to be public lands, open to purchase by British subjects. Considering the proviso in light of s 6, Blackburn J in Milirrpum at 281 held:*
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> *It is impossible to see how, if the proviso to the Letters Patent is to be construed as either giving or preserving to any persons any proprietary rights in any lands of the Province, it was not repugnant to the express provisions of the Act, and thus invalid to that extent.*
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> *It is consistent with the express provisions of the South Australia Act 1834 (Imp) that broad powers to convey and alienate the waste lands of the Crown vested in the Governor, and subsequently the legislature of the Province are granted by the Imperial Acts 5 & 6 Victoria c 35 (1842) and 18 & 19 Victoria c 56 (1855).*
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> *The Proclamation of Governor Hindmarsh on 28 December 1836 included the resolution:*
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> *… to take every lawful means of extending the same protection to the NATIVE POPULATION as to the rest of His Majesty's Subjects, and of my firm determination to punish with exemplary severity,*

all acts of violence or injustice which may in any manner be practiced or attempted against the NATIVES, who are to be considered as much under the Safeguard of the law as the Colonists themselves, and equally entitled to the privileges of British Subjects.

It shows that sovereignty over all inhabitants of the newly established colony vested in the Crown in right of the Colony was in place.

In my view, the clear effect of the South Australia Act 1834 (Imp), and that which was recognised by the Proclamation of Governor Hindmarsh, is that the Indigenous people inhabiting the Province of South Australia were to be treated as British subjects, in the same way as the colonists themselves were. I reject the assertion of sovereignty vested in the Indigenous people of South Australia carved out by the Letters Patent proviso: Mabo (No 2) at 107 per Deane and Gaudron JJ."

(From 50)

*"It is desirable to say a little more about the Letters Patent proviso. The Letters Patent proviso was addressed with at length by Blackburn J in Milirrpum at 274-283 and briefly by Kirby J (agreeing with the majority, who however did not address this question) in **Fejo v Northern Territory (1998) 195 CLR 96**. In both cases, their Honours rejected a less radical argument than Mr Walker's argument – namely, an argument that the Letters Patent proviso protected the rights of Aboriginal people to the occupation or enjoyment of their lands from any inconsistent legislative or executive act.*

Kirby J in Fejo dismissed an argument that the Letters Patent proviso provides any protection for the rights of Aboriginal people to the occupation or enjoyment of their lands other than protection from any effect the terms of the Letters Patent itself might have on such rights. Some of his reasons for that conclusion are not applicable to this case, but the following reasoning at [91] is directly applicable to this case and highly persuasive:

[A]ccording to the terms of the [Letters Patent] proviso the only rights affected [by the Letters Patent proviso] were those arising from the activities of erecting and establishing the Province of South Australia and fixing its boundaries. The Letters Patent do not purport to deny, still less do they have the effect in law of denying, the quality of other acts which would otherwise affect the rights of the defined Aboriginals and their descendants. [Also], the [South Australia Act 1834 (Imp)] provided that it was the Colonisation Commissioners, not the Governor, who could declare all lands in the Province to be public lands available for purchase and to sell such lands and apply the funds recovered (e.g. for future immigration to the Province). Thus the actual alienation of land in South Australia was, from the start, effected pursuant to express statutory provision, not the Royal Prerogative. Any limitation on the power to grant a legal interest in land would therefore have to conform to the applicable statute. A proviso in the Letters Patent of the Governor could not override such a statutory source of power. [Further], and in any case, the mere fact of erecting and establishing the Province of South Australia and fixing its boundaries did not of itself adversely affect the rights referred to in the proviso. With the wisdom of hindsight and the modern understanding of the effect of the acquisition of sovereignty over Australia by the Crown, its establishment of a settlement (such as the Province of South Australia) did not of itself

adversely affect native title. Any such effect arose from later conduct which on no view could be seen as subject to the proviso's limitations.

That is, with respect, clearly correct. The terms of the Letters Patent proviso are expressly limited in their application to the substantive provisions of the Letters Patent. They merely establish the province of South Australia and fix its boundaries. They do not provide for the Crown's acquisition of sovereignty over the relevant land. That had already been acquired, because the relevant land was, prior to the Letters Patent, part of the colony of New South Wales. As such, the Letters Patent proviso cannot be said to have any effect on the sovereignty of the Commonwealth over the asserted Ramindjeri lands. See also per Blackburn J in Milirrpum at 281 and at 282-283."

https://freemandelusion.com/wp-content/uploads/2020/11/walker-v-state-of-south-australia-no-2-2013-fca-700.pdf

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