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'A GREAT AND GLORIOUS REFORMATION': SIX EARLY SOUTH AUSTRALIAN LEGAL INNOVATIONS

By Greg Taylor
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A hazy memory of undergraduate history classes at the University of Melbourne some 45 years ago features the late John La Nauze ('Jack the Knife' to successive not wholly enamoured if certainly intimidated student generations) insisting with characteristic acerbity — à propos some generalisation or other about Australia's past — that whatever might hold true for the rest of the country, South Australia was always likely to be a special case. As I now realise, Professor La Nauze spoke on this subject with more than usual authority, having taught for a decade at the University of Adelaide en route from Perth and Oxford to Melbourne and ultimately Canberra, and there taking to wife Barbara Cleland, daughter of a distinguished Old Adelaide Family. Yet such considerations would have carried little weight with his overwhelmingly homegrown audience, whose parochialism looked outwards only to far distant metropolitan centres: London, Paris, possibly New York. We had little or no interest in the doings of neighbouring crow-eaters, past or present, even if some faint awareness of the *Stuart case*[1] may have penetrated our collective consciousness. As to what distinguished the origins and subsequent history of South Australia from those of the rest of the country, some possibly possessed — thanks to Section 4.II of Manning Clark's *Select Documents in Australian History 1788-1850* — a nodding acquaintance with the 'Wakefield system' and consequent lack of convicts among the colony's first settlers. Otherwise South Australia was *terra incognita*, and La Nauze did little to encourage its further exploration.

Today, as in 1960, what the rest of the mainland sometimes refers to as the Eastern states still dominate Australian historical research, teaching and writing. While this situation may accurately mirror various demographic, economic and political realities, it is also true that recent work on South Australia's past scarcely exists in sufficient quality or quantity to pose a serious challenge to the dominant national historiography. For that reason alone, Greg Taylor's decision to bring together this collection of essays on early South Australian law reform is very welcome. While

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[1] Kenneth Stanley Inglis, *The Stuart Case* (1961).

all but one of his substantive chapters have previously appeared in print, to have them between one set of covers is a considerable convenience. It also prompts reflection on the causes, consequences and overall significance of early South Australian legal inventiveness.

Mr Taylor approaches these matters in straightforward fashion. The six 'Legal Innovations' of his sub-title are each allotted a separate and largely self-contained chapter. There is some cross-referencing, for example on the roles of the Hamburg-born Dr Ulrich Hübbe in the drafting and promotion of the *Real Property Act* 1854, which established what came to be known as the Torrens system of land titles registration, and the *Associations Incorporation Act* passed four years later, providing for the establishment and maintenance of non-governmental non-profit organisations in a fashion subsequently copied by all other Australian jurisdictions. Alongside these two major examples of legislative pioneering, Taylor draws attention to a further three significant statutory innovations achieved by nineteenth-century South Australian parliaments.

The *Claimants' Relief Act* (No. 6 of 1853) constituted the first provision anywhere in the British Empire abolishing Crown immunity from civil actions in contract and tort. It was likewise replicated by similar measures in other Australian colonies, New Zealand and South Africa; indeed Taylor sees the United Kingdom's 1947 *Crown Proceedings Act* (which abolished the convoluted petition of right procedure for such claims) as partly inspired by the line of Australian statutes originating in South Australia. Second, South Australia's 'Act to enable Persons Accused of Offences to give Evidence on Oath' (245 of 1882), better known as the *Accused Persons Evidence Act*, was signed into law a decade and a half before the relevant British measure, thanks largely to the determined efforts of Attorney General J W (later Sir John) Downer. Third, the *Supreme Court Procedure Amendment Act* (No. 5 of 1853) seemingly included the first attempt by any British jurisdiction to end the long-standing and much criticised divided administration of equity and law. However despite — or because — they preceded the UK's epochal *Judicature Act 1873* by 20 years, the South Australian provisions enabling plaintiffs to enforce equitable claims by actions at common law were in practice ignored by lawyers, litigants and judges alike.

Despite its non-legislative form, Taylor's sixth and final innovation appears at first glance the most far-reaching. In May 1851, a Supreme Court grand jury, having brought in a true bill against two groups of Aborigines indicted for the murder of other Aborigines in rural South Australia, presented the presiding judge, Justice Cooper, with an extensive memorial urging that these 'uncivilized men' had 'their own internal system for the punishment of offences', and raising the moral question 'whether we ourselves are not committing a similar offence (presuming the extreme

penalty of the law were inflicted) by punishing that as a crime which, in the minds of the persons punished, was simply the enforcement of their own mode of justice'.[2] Yet whether this document did indeed amount to a wholehearted 'call for the recognition of Aboriginal customary law by the Anglo-Australian legal system', as distinct from an elaborate plea for mercy with respect to particular cases then before the court, is perhaps open to more debate than Taylor would allow. He does however note that, despite considerable press discussion of the grand jurors' presentment, its long-term impact on colonial South Australian legal practice remains uncertain.

Currently in exile across the border at Monash University in Victoria, Greg Taylor is a loyal native son. His book, published by South Australia's leading independent publishing and distribution company, seems aimed at a largely, if not exclusively local market. Such readers would most readily identify with the author's opening remarks on the difficulty of accepting 'that Adelaide and South Australia are only just over two human lifetimes old. The city and State seem so well-established to those living in them today...'.[3] They might also endorse his celebration of South Australian achievement, not only in the book's almost comically boosterish title, derived from a contemporary editorial on the *Real Property Act*. This 'outpouring of legal creativity... successful and useful — change that was also progress'[4] is ascribed to exceptional founding circumstances and continuing ambience: 'There was something "in the air" in early South Australia, something which was connected with the origins of the colony as a "Paradise of Dissent"...'.[5] Such views plainly pose no challenge to the contentious centrality of 'difference' in South Australian historiography. But then Taylor seems to be writing primarily for fellow lawyers, rather than historians or the putative general reader: why else gloss 'Hansard'[6] but not 'Judicial Committee',[7] let alone adopt the unhelpful bibliographical convention of citing authors by surname alone?

Taken together with the ongoing work of John Emerson, Robert Foster and John Bennett, this book points to something like a current renaissance in South Australian legal-historical studies. There is certainly no shortage of potential subjects, from the Supreme Court and its judiciary (a comprehensive biography of Sir Samuel Way being a particular desideratum) via the district and local courts, to the magistracy and legal profession at large; legal education, both academic and other; litigation and litigants (who used which courts, for what purposes and with

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2 Greg Taylor, *'A Great and Glorious Reformation': Six Early South Australian Legal Innovations* (2005) 57.
3 Ibid 7.
4 Ibid 201.
5 Ibid 203.
6 Ibid 111.
7 Ibid 157.

what outcomes?); criminal law and the administration of criminal justice; law reform; public attitudes towards, and images, of law and lawyers; the media and the law — all these topics, and more, cry out for systematic historical investigation. While some have already attracted the attention of a previous generation of scholars (notably Ralph Hague, A C Castles, and A J Hannan), the scope for further research remains very large indeed.

That agenda should certainly include studies of legal innovation, whether judicial or legislative in origin, along the lines Taylor has developed here. And while the technical expertise and archival thoroughness Taylor brings to his task are commendable, indeed indispensable, those who follow in his footsteps might with advantage take a somewhat broader view of their task. For it is very difficult either to gauge the significance or indeed to explain the origins of colonial South Australian legal innovations without adopting a more contextualised and systematically comparative approach. The *Real Property Act* of 1858 was doubtless unique. But were all other Australian colonial jurisdictions entirely lacking in legal inventiveness? Again, was dissent from and questioning of the customs, culture and institutions of the old world to be found only in South Australia? If not, then in what relevant respects was South Australia different? And how exactly did those differentiating features and their impact change over time? To answer such questions convincingly we need a South Australian legal history cast within a broader national and even international context, as in one notable account by a distinguished American scholar of late twentieth-century South Australian innovations in testamentary law.[8] That such an undertaking will not be the work of a moment is good reason to pursue it sooner rather than later.

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8 J H Langbein, 'Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law' (1987) *Columbia Law Review* 87.1, 1–54.