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Returning *Parna Wiru*: Restitution of the Maralinga Lands to Traditional Owners in South Australia

Odette Mazel[1]

Introduction

The restitution of traditional territories to indigenous people in Australia has progressed through a number of different forms and means since the passage of the first land rights legislation in South Australia in 1966. Well before common law recognition of native title in 1992 by the High Court of Australia, the Commonwealth and some State governments responded to increased lobbying by indigenous groups to redress past injustices through the restitution of land. Those governments engaged in negotiations with traditional owners which, where successful, resulted in various Acts of parliament facilitating the return of land under enduring tenures.

The return[2] of the Maralinga lands[3] to traditional owners in South Australia is a significant case in the Aboriginal land rights annals. Moved from their traditional territory in the early 1950s and prohibited from returning as a result of the British atomic weapons testing program, the Southern Pitjantjatjara entered negotiations with the State Government at a time when the Aboriginal land rights movement was taking form. With bipartisan political support, inalienable freehold title to an area of 76,420 square kilometres was handed over to traditional owners, by way of Act of Parliament, in 1984.

Following *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*Mabo*) and the development of the *Native Title Act* 1993 (Cth) (*NTA*), indigenous rights to land were recognised by the common law in Australia and applied nationally. While native title provided an important impetus for government and industry throughout Australia to engage with traditional owners (see Chapters 9 & 10 this volume; Langton et al 2004), a focus on litigated outcomes also created a shift in the way in which those engagements occurred. In the case of South Australia, where the government had previously participated actively in negotiations for the return of land, it now took the position of resistance – opposing claims before the courts (see *De Rose v South Australia* [2002] FCA 1342; Tehan 2003, 1998; Strelein 2004). In other States too, governments and industry took oppositional stances resulting in expensive litigation of native title issues through-

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arrangements' for the economic, social and cultural development of Aboriginal and Torres Strait Islander people (Arabena 2005, p 7; Office of Indigenous Policy Coordination 2004). Whilst the move toward mainstreaming service delivery (and the abolition of the Aboriginal and Torres Strait Islander Commission) may appear to have reduced the capacity for indigenous Australians to have an influence on their own affairs (see McCausland 2005), it may be that the current Federal Government's focus on agreement-making could help to restore this balance. If this is to be the case, the Maralinga experience – in which recognition, engagement, and respect produced positive outcomes – might prove a useful reference for successful agreement-making.

Notes

1 The author acknowledges the invaluable assistance of Hughie Windlass, Archie Barton, Darcy O'Shea, Andrew Collett, and the Hon Arthur Whyte who have informed this account of a process they were integral to. Thanks also to Maralinga Tjarutja and to Jane Covernton.

2 From the Southern Pitjantjatjara perspective, since title to their land was never lost, recognition of Aboriginal ownership could be a better description than the return of lands.

3 The term 'Maralinga lands' is used to describe the area of land that was returned under the *MTLRA*, and the term 'Maralinga people' encapsulates those people who have rights to that land under the Act.

4 Early records of Ronald and Catherine Berndt as well as the missionary Violet Turner suggest the presence of smaller tribal groups including the *Antiŋ'ari* (Antakirinja), *Kukata* (Kukatja/Aluridga) and *Ɗalia* (Ngalia) (Berndt & Berndt 1942a, p 324) as well as the Minning and the Wongapitcher (Violet Turner as cited in Mattingly & Hampton 1998, p 235).

5 There is speculation about whether the move from Ooldea was as a direct result of the plans to test nuclear weapons on Australian soil which had been announced five months before the closure of Ooldea, on 18 February 1952.

6 International conventions included the Universal Declaration of Human Rights 1948, International Convention on the Elimination of All Forms of Racial Discrimination 1965, and the International Covenant on Economic, Social and Cultural Rights 1966.

7 Also known as the *Pitjantjatjara Land Rights Act*.

8 In the 1967 referendum 90 per cent of Australians voted to give the Commonwealth Parliament the power to pass laws for Aboriginal people (Australian Constitution s 51(xxxvi)).

9 The aims as stated by the Commission are evidence of the intention of the legislation:

1. The doing of simple justice to a people who have been deprived of their land without their consent and without compensation.
2. The promotion of social harmony and stability within the wider Australian community by removing, so far as possible, the legitimate cases of complaint of an important minority group within that community.
3. The provision of land holdings as a first essential for people who are economically depressed and who have at present no real opportunity of achieving a normal Australian standard of living.
4. The preservation, where possible, of the spiritual link with his own land which gives each Aboriginal his sense of identity and which lies at the heart of his spiritual beliefs.
5. The maintenance and, perhaps, improvement of Australia's standing among the nations of the world by demonstrably fair treatment of an ethnic minority (Aboriginal Land Rights Commission 1973, p2).

10 For a discussion, see Toyne & Vachon 1984.

11 As a result of the Noonkanbah crises in 1980 when Aboriginal groups protested against the proposed drilling for oil in Western Australia, the South Australian Government was aware of the need to avoid such public conflict in South Australia (see Charlesworth 1984, p 41; D O'Shea 2004, pers comm, 24 July).

12 In his interview, O'Shea recounts how he would represent members of parliament using stones on the sand to show the community how members sat in the Council and what numbers were required to get the Bill passed (D O'Shea 2004, pers comm, 24 July).

13 The decision was appealed to the High Court of Australia where the court found that although land rights legislation might be discriminatory it was valid as a 'special measure' under s 8(1) of the *Racial Discrimination Act* 1975 (Cth) (*Gerhardy v Brown* (1985) 159 CLR 70; see also Nettheim 1993).

14 Prime Minister Bob Hawke requested Bannon to postpone proclamation of the Act scheduled for December, as he was anxious that the land rights agenda would impact negatively on the election campaign (D O'Shea 2004, pers comm, 24 July). The Royal Commission into British Nuclear Testing had also begun and there was concern that the land should not be passed back until the inquiry was complete. Crafter, however, refused to delay the proclamation fearing that another State government could be elected in the meantime. Instead, he altered the boundaries of the land to be handed back omitting 680 square kilometres of land including Emu and West Street that were thought to be contaminated. The Maralinga community also made it clear that they would have no more involvement in the Royal Commission hearings if the legislation was not proclaimed (D O'Shea 2004, pers comm, 24 July).

15 Changes to the proportion of funding supplied by the State and federal governments have changed over recent years.

16 The Unnamed Conservation Park lies in the far west of the State and was part of the Maralinga Prohibited Area until it was reverted to Crown land in 1970 and declared a park. It is now recognised as a United Nations Educational, Scientific and Cultural Organisation (UNESCO) World Biosphere Reserve containing arid zone wilderness with open woodland, shrub lands and significant fauna such as the hairy-footed dunnart, mallee fowl and scarlet and princess parrots. The area, known as *Mumungari* to traditional owners (Toyne & Johnston 1991, pp 8–9) features the Serpentine Lakes, an ancient Palaeozoic drainage channel, as well as archaeological deposits and landforms (Rann 2003a).

17 Issues of indemnity are slowing the negotiation process although the Commonwealth Government has indicated that it is willing to find a solution.

18 In 1983 the *Aboriginal Land Rights Act* 1983 (NSW) was passed under which application for the grant of freehold title over land can be made to the Minister in New South Wales; the *Land Act (Aboriginal and Islander Land Grants) Amendment Act* 1982 (Qld) established a Deed of Grant in Trust land-holding scheme for Aboriginal Communities to gain freehold title in Aboriginal reserves; the *Aboriginal Land Act* 1991 (Qld) and the *Torres Strait Islander Land Act* 1991 (Qld) allow vacant Crown land to be claimed in Queensland on the basis of 'traditional association, historical association or on economic or cultural viability needs basis' (French 1996, p 6). In Western Australia land rights legislation was introduced into parliament in 1985 but was defeated in the Legislative Council, and no provision for ongoing land claims exists in Victoria or Tasmania. The Commonwealth Government granted land rights in relation to specific areas of land through the *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986 (Cth), providing land to be vested in the Wreck Bay Aboriginal Community, and the *Aboriginal Land (Lake Condah and Framlingham Forest) Act* 1987 (Cth) granting freehold title to a corporation of elders on the request of the Victorian Government. Victoria also enacted a number of statutes vesting ownership of discrete areas of land to Aboriginal groups: *Aboriginal Land (Aboriginal Advancement League) (Wall Street Northcote) Act* 1982 (Vic); *Aboriginal Land (Northcote Land) Act* 1989 (Vic); *Aboriginal Lands Act* 1991 (Vic); *Aboriginal Land (Manatunga Land) Act* 1992 (Vic).

19 See also *Wilson v Anderson* (1999) 156 FLR 77.

20 See also *Western Australia v Ward* (2000) 99 FCR 316; *Ward v Western Australia* (1998) 159 ALR 483.

21 See also *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655; *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.