

ULTRA

Positions and Polarities Beyond Crisis

TO CITE THIS PAPER | Julian Raxworthy. "A Story of Two Titles: The Torrens System and Parcel 702, Adelaide." In *Proceedings of the Society of Architectural Historians, Australia and New Zealand: 38, Ultra: Positions and Polarities Beyond Crisis*, edited by David Kroll, James Curry and Madeline Nolan, 266-272. Adelaide: SAHANZ, 2022. Accepted for publication December 1, 2021. DOI: 10.55939/a4023p41ye



Image: Michaelmore, Roeger & Russell, *Chester House*, Belair 1966, State Library of South Australia BRG 346/28/6/2.

PROCEEDINGS OF THE SOCIETY OF ARCHITECTURAL HISTORIANS, AUSTRALIA AND NEW ZEALAND (SAHANZ) VOLUME 38

Convened by The University of Adelaide, School of Architecture and Built Environment, Adelaide,
10-13 November, 2021.

Edited by David Kroll, James Curry and Madeline Nolan.

Published in Adelaide, South Australia, by SAHANZ, 2022.

ISBN: 978-0-646-85443-4

Copyright of this volume belongs to SAHANZ; authors retain the copyright of the content of their individual papers. All efforts have been undertaken to ensure the authors have secured appropriate permissions to reproduce the images illustrating individual contributions. Interested parties may contact the editors.

A Story of Two Titles: The Torrens System and Parcel 702, Adelaide

Julian Raxworthy
University of Canberra

Abstract

Although the catchment - the topographically defined edge where "all rainfall... drains naturally ... or is directed to by human intervention towards ... the catchment outlet [which may be immediately a creek, but ultimately is the ocean] " - is the most significant boundary for ecological function of landscapes, Raxworthy has argued that property boundaries and land tenure make it such that "landscape pattern is as much an emergent quality of capitalism as it is propensity[y] of [the landscape]." Despite its role in establishing the pattern of the landscape, landscape architects tend to treat property boundary as a given that is almost invisible when every act they do reacts to it in some way, necessitating, Raxworthy continues, a theorising of land tenure in landscape architecture. I hope to continue Raxworthy's project in this paper by examining the celebrated model of contemporary land titling - the Torrens System - in its place of origination - Adelaide - and explore the relationship between landscape, people and land titling.

Two of the things Adelaide is most famous for might seem complimentary but are actually contradictory: the Torrens System of title (which Atkinson, quoting Greg Taylor, calls ""South Australia's most successful intellectual export."") and the first successful determination Native Title in a capital city of Australia. Developed by Robert Richard Torrens, the "Real Property Act (1858)" (which subsequently became known as Torrens Title, or the Torrens System) and "simplify[ied] the Laws relating to the transfer and encumbrance of freehold and other interests in land," by creating a centralised registration system of actual land ownership, rather than simply deeds, removing potentials for contestation. In the developing world the Torrens System has been a very important tool in helping secure land title in post-colonial countries "[becoming] the norm in both Anglophone and Francophone colonial Africa," yet, as Leonie Kelleher has argued, the Torrens System effectively eclipsed the previous sovereignty of Aboriginal people in the very place of its creation.

Introduction

1. Julian Raxworthy, "Land AS: Conflicting Definitions of Land – and Disciplinary Relations to It – in Landscape Architecture," *Urban Transcripts* 3, no. 5 (2020), <http://journal.urbantranscripts.org/article/land-as-conflicting-definitions-of-land-and-disciplinary-relations-to-it-in-landscape-architecture-julian-raxworthy/>.

2. Michael Atkinson, "Changing the Lie of the Land. The Torrens Title: 150 Years Old," *Bulletin (Law Society of South Australia)* 30, no. 7 (2008): 27.

3. House of Assembly, South Australia, "Real Property or 'Torrens Title' Act 1858" (1858), 143, <https://www.foundingdocs.gov.au/item-sdid-43.html>.

4. Carol Wilson Dickerman and Grenville Barnes, *Security of Tenure and Land Registration in Africa: Literature Review and Synthesis* (Land Tenure Center, University of Wisconsin-Madison, 1989), viii.

5. Leonie Kelleher, "The Story of Robert Torrens," *Kellehers Australia Barristers & Solicitors* (blog), 2015, <https://kellehers.com.au/news-flash/the-story-of-robert-torrens/>.

6. J Mortimer, *Agius v State of South Australia* (No 6) [2018] FCA 358, No. SAD 6001 of 2000 (Federal Court of Australia March 21, 2018).

I have argued that property boundaries and land tenure make it such that "landscape pattern is as much an emergent quality of capitalism [as it is a] propensity of [the] landscape."¹ Despite its role in establishing the pattern of the landscape, landscape architects tend to treat property boundaries as an 'invisible given' necessitating a theorising of land tenure in landscape architecture to which I hope to contribute. In this paper I examine the internationally celebrated model of contemporary land titling – the Torrens System – by exploring the relationship between landscape, people and land titling in its place of origination – Adelaide – in relation to two of the things Adelaide is most famous for which might seem complimentary but are actually contradictory: the Torrens System of title (which Atkinson, quoting Greg Taylor, calls "South Australia's most successful intellectual export."²) and the first successful determination of Native Title in a capital city of Australia.

Developed by Robert Richard Torrens, the "Real Property Act (1858)" (which subsequently became known as Torrens Title, or the Torrens System) "simplify[ed] the Laws relating to the transfer and encumbrance of freehold and other interests in land,"³ by creating a centralised registration system of land ownership, rather than simply deeds, removing potentials for contestation. In the developing world the Torrens System has been a very important tool in helping secure land title in post-colonial countries "[becoming] the norm in both Anglophone and Francophone colonial Africa,"⁴ yet, as Leonie Kelleher has argued, the Torrens System effectively eclipsed the previous sovereignty of Aboriginal people in the very place of its creation.⁵

One hundred and sixty years later – in what is known as the Kurna Peoples Native Title Claim – on 21st March 2018 the Federal Court of Australia a positive Native Title Determination in the case *Agius v State of South Australia* was made which restored some of that sovereignty, Justice Mortimer noting "this will be the first time that there has been a positive determination of native title over any area within the area of an Australian capital city," another significant first for Adelaide.⁶ One of the specific sites closest to the city of Adelaide that the Kurna gained native title to is Parcel 702 in Belair, a small parcel of 1700 m² where title was not seen to have been extinguished. Parcel 702 is approximately 2km from Robert Richard Torrens own property Torrens Park Estate, now the site of Adelaide's Scotch College.

The landscape is a corporeal entity shaped by complex and dynamic geographical and cultural forces, with each place having highly specific qualities. Despite this, land ownership tends to be highly transactional and abstract and often bears little relationship to lands corporeality, often divided according to tropes of surveying or financial yield. If landscape is marked physically by traces of processes, so too is land title, which is shaped by iterative transactions to produce odd parcel shapes often with little – or negative – relation(s) to land. After introducing Torrens Title, in this paper I will cast a lens on the titling process of these two nearby places and moments in their titling processes, placed in relation to their physical landscapes. I will show that the acquisition of Torrens Park almost 200 years ago began as a totally abstract series of placeless transactions by Torrens father that then

focussed on highly valued land from the Kurna, while the contemporary Kurna were only able to acquire a parcel in their successful Native Title Claim that was an 'artifact' of previous land titling operations, a remnant from prior to Torrens Title found through hurried GIS mapping.

The Torrens System

7. It was Torrens-senior after whom Adelaide's River Torrens was named.

Arriving in South Australia in 1840, six years after South Australia was established as a British Province in an act by the British Parliament, Sir Robert Richard Torrens was quickly involved in colonial government as a collector of customs, possibly due to his fathers involvement in the establishment of South Australia. Torrens' father, economist and Royal Marine officer Robert Torrens [who I shall refer to as "Torrens-senior" throughout], was chairman of the South Australian Colonization Commission – and one of 13 colonial commissioners located in London – from its establishment in 1835 until it was replaced under the South Australia Act 1842.⁷ Torrens-senior is relevant to this discussion because of property transactions he conducted remotely – never travelling to South Australia – that secured the land that would become his sons at Torrens Park, its nature not yet known by Torrens-senior since it had only had its boundaries abstractly located at that stage.

8. Douglas J. Whalan, "Torrens, Sir Robert Richard (1814–1884)," in *Australian Dictionary of Biography* (Canberra: Australian National University Press, 1976), <http://adb.anu.edu.au/biography/torrens-sir-robert-richard-4739>.

Despite a reputation for being difficult, Torrens later became treasurer & registrar general for the colony and was nominated as a member of the Legislative Council, becoming a member of the Executive Council in 1855 and "the next year [1856] he joined in the land title registration crusade".⁸ The final, resultant piece of legislation assented to by the House of Assembly, South Australia on 27th January 1858 was entitled the "Real Property Act", and its purpose was to "simplify the Laws relating to the transfer and encumbrance of freehold and other interests in land,"⁹ since deed processes meant that legal fees could be greater than the cost of the land itself at the time.

9. House of Assembly, South Australia, Real Property or "Torrens Title" Act 1858, 143.

10. Whalan, "Torrens, Sir Robert Richard (1814–1884)."

Whalan describes the principles that comprise the Torrens System, "an important legal reform that is indigenous to Australia", as follows: "1. Land titles no longer passed by the execution of deeds but by the registration of dealings on a public register; 2. Once registered the title of a purchaser became indefeasible unless he was guilty of fraud; 3. and innocent dealers with interests in registered land were guaranteed either their interest in the land or monetary compensation therefor."¹⁰ Writing on the Torrens System on its 150 year birthday in 2008, then South Australian Attorney-General Michael Atkinson noted it is difficult for land owners now to "appreciate what a revolution was sparked by this new way of thinking about land title" because they were blessed "with never knowing how fraught the system used to be."¹¹ By 1905, American James Edward Hogg was referring to the system created by the Real Property Act using Robert Torrens' name in the title of his book "The Australian Torrens System",¹² and indeed it is now universally known as "The Torrens System (which is what I refer to it as in this paper) or "Torrens Title". However, Murray Raff argues, like others, for "the influence [of] German jurisprudence... on the development of the Torrens system and on land registration systems internationally,"¹³ a desire to include a "'Teutonic influence' [underpinning] the importance of gaining the assistance of Dr juris Ulrich Hübbe [1805-1892] for the Torrens reform group."

11. Atkinson, "Changing the Lie of the Land. The Torrens Title: 150 Years Old," 26.

12. James Edward Hogg, *The Australian Torrens System: Being a Treatise on the System of Land Transfer and Registration of Title Now in Operation in the Six States of the Commonwealth of Australia, the Colony of New Zealand, and Fiji and British New Guinea. Including the Text of the Torrens Statutes and Ordinances in the Nine Territories, and References to Other Statutes Relating to Land, and an Historical Account of the Growth of the System* (W. Clowes, 1905), <https://books.google.com.au/books?id=rXktAQAAAJ>.

13. Murray Raff, "Torrens, Hubbe, Stewardship and the Globalisation of Property Law Systems," *Adelaide Law Review* 30, no. 2 (2010): 245.

14. Ken Preiss and Pamela Oborn, *The Torrens Park Estate: A Social and Architectural History* (Underdale, South Australia: Ken Preiss & Pamela Oborn, 1991). As an aside, my original intention for this paper had been to do exactly what Preiss and Oborn had done 30 years earlier.

15. South Australia. Town Planning Committee, *Report on the Metropolitan Area of Adelaide 1962 / Prepared by the Town Planning Committee*, Accessed from <https://nla.gov.au/nla.cat-vn2237013> ([Adelaide]: Government of South Australia, 1962).

16. Christine Bender and Susan Piddock, "Quarries and Quarrymen of the Foothills," in *Valleys of Stone: The Archaeology and History of Adelaide's Hills Face*, ed. Pam Smith, F.Donald Pate, and Robert Martin (Belair, South Australia: Kōpi Books, 2006), x.

17. Pam Smith and F.Donald Pate, "The Adelaide Hills Face Zone, 1836-1936: A Significant Cultural Landscape," in *Valleys of Stone: The Archaeology and History of Adelaide's Hills Face*, ed. Pam Smith, F.Donald Pate, and Robert Martin (Belair, South Australia: Kōpi Books, 2006), 1.

18. Preiss and Oborn, *The Torrens Park Estate: A Social and Architectural History*, 5.

19. Preiss and Oborn, 6.

20. Jacob Kochergen, "Sleeps Hill Quarry Reserve Maintenance Plan" (City of Mitcham, 2005), 4.

21. Mitcham Local History Service and Heritage Research Centre, "Hills Face Across Mitcham" (City of Mitcham, 2004), https://www.mitchamcouncil.sa.gov.au/__data/assets/pdf_file/0041/89888/hills_face_zone_mitcham.pdf.

To demonstrate the difference between the previous title system and the Torrens System, authors Ken Preiss and Pamela Oborn – in their book about Torrens Park Estate – show the different scale of documentation of the Old System compared to the Torrens System using themselves as models with the actual title documents for Torrens Park. Dwarfed by maps and pages surrounding him, Preiss is surrounded by the numerous deeds required to confirm ownership due to the Old System, while Oborn simply presents a single large ledger open in front of her when the same ownership was confirmed under the Torrens System.¹⁴

Two Landscapes

Both Torrens Park and Parcel 702 are part of the Local Government Area (LGA) of the City of Mitcham, and are included in "The Hills Face Zone" which was proposed in the *Report on the Metropolitan Area of Adelaide: 1962*¹⁵ and formally protected in 1967. The Hills Face Zone is "defined by the western face of the Mount Lofty Ranges and extends for approximately 90 kilometres from Sellicks Hill south of Adelaide to Gawler, north of Adelaide,"¹⁶ and was protected in recognition of their important and ongoing role in the Adelaide landscape, "those enchanted hills", as Colonel Light referred to them in 1836,¹⁷ forming the backdrop to the city. The Hills Face Zone runs north-east/south-west, with Torrens Park located on the rolling foothills of Brownhill Creek, north of Parcel 702, which is located on the rocky slopes of Sleeps Hill.

Torrens Park

Describing the landscape that would later become Torrens Park, Preiss & Oborn quote Pastor William Finlayson, who arrived in 1837, initially helping with grazing South Australian Company sheep on the site. Finlayson referred to the landscape as "park lands", describing "land... thickly, I might say densely, timbered with peppermint [*Eucalyptus odorata*] or boxwood [*Eucalyptus macrocarpa*]."¹⁸ Both Finlayson and Allen referred to the difficulty of cutting down the thick woodlands on the site. River Redgum (*Eucalyptus camaldulensis*) were also present on Brownhill Creek, of which a remnant tree, the "Monarch of the Glen", remains. Finlayson notes that Kurna people had a settlement along Brownhill Creek, which was described by another settler, James Allen, as a "little brook, which runs between [Brown Hill] and Flagstaff Hill".¹⁹

Parcel 702

In contrast, Parcel 702 is part of a steep, rocky landscape in the same range to the south, the site comprising sandstones and quartzites, covered in coppiced regrowth of Grey box (*Eucalyptus microcarpa*), together with Drooping Sheoak (*Allocasurina verticillata*) woodland with Golden Wattle (*Acacia pycnantha*). Its geological properties made it suitable for extraction, and nearby are quarries that opened in 1916, where quarrying of rock for aggregate and for sand continued until the 1950's.²⁰ The area around Parcel 702 is the Sleeps Hill Quarries Reserve which was declared in 1970 by the City of Mitcham.²¹ Despite proposals

in the 1990's to fill and then revegetate the quarries community appreciation of their heritage values lead to their preservation and inclusion into the State Heritage Authority Register.

The differences between the two landscapes – Torrens Park and Parcel 702 – are stark, the former gently undulating woodland by water and the latter dry rocky hills with a scrubby character. However, while these landscapes are different and the contrast in value between them great, both are part of the same landscape morphology and both were – and still are – Kurna lands, even if Native Title has been extinguished at Torrens Park. Establishing the landscape as a material, territorial (and presumably spiritual, for the Kurna) entity in the first instance is an assertion of the specific corporeality of the place. In the following I shall contrast this with the entirely legal and transactional operations that have governed this landscape's ownership and geometries of title, intersecting but abstract of this corporeality.

Two Titles

Referred to earlier, when Preiss & Oborn demonstrate the difference of title evidence before and after the Torrens System, what they demonstrate is the nature and of title documentation. This reveals that title is largely an administrative affair abstract of place, or landscape corporeality as I have been calling it. If this were not an abstract enough conception of land, then the mechanisms by which the shape of the land of both Torrens Park Estate & also Parcel 702 were arrived at is revealed as particularly abstract, the former starting as a purchase of rights to land not yet specified, and the latter as a left over of successive subdivision processes.

Torrens Park Estate

22. Michael Llewellyn-Smith, *Behind the Scenes* (University of Adelaide Press, 2012), 31, <http://www.jstor.org/stable/10.20851/j.ctt1sq5wvd>.

23. John Arrowsmith, *The District of Adelaide, South Australia [Cartographic Material] : As Divided into Country Sections / from the Trigonometrical Surveys of Colonel Light, Late Survr. Genl.*, Cadastral Map (London: John Arrowsmith, 1839), https://www.flickr.com/photos/state_library_south_australia/8399506431.

24. Preiss and Oborn, *The Torrens Park Estate: A Social and Architectural History*, 4.

Originally owned by Torrens-senior, Torrens owned a property called Torrens Park Estate, located in the foothills of the Mount Lofty Ranges, adjacent to the town of Mitcham, which predated it. The Colonial story of Torrens Park Estate commences abstractly in 1835, before Colonel Light had surveyed the 515 "Country Sections" of 134 acres each [54.42 hectares] outside Adelaide that were orientated on a north-south and east-west grid.²² In a reproduction of Colonel Light's survey from 1839,²³ what later became Torrens Park is located alongside a waterway called "Brown Hill Rivulet" – called Wirraparinga by the indigenous owners, the Kurna and subsequently Brownhill Creek – in Sections 245, 246, 247, 248, and un-surveyed parts of adjacent Brown Hill. Section 246, the main site of Torrens Park is identified on this map as owned by George Barnes, who was the Treasurer to the Board of Commissioners, while those around it were shown as still owned by "S.A.Co", presumably by the South Australian Colonization Commission. In 1835 George Barnes purchased "six preliminary land orders" on behalf of Torrens-senior, which were not redeemed and specifically allocated until "7 March 1839 [when] George Barnes' used Preliminary Land Order No.22 to acquire Sections 246". Preiss & suggest that these lots were being held by Barnes and the Commission in the interim until Torrens-senior was able to organise payment for them.²⁴ It was not until 1846 that "a statutory

25. Preiss and Oborn, 18.

indenture of release" allowed them to become property of Torrens-senior,²⁵ however in the same year he sold Section 246 and his son Torrens bought it back in 1852, for double the price his father sold it for. It is interesting (and weird) to place this timeline of ownership of Section 246 in relation to Torrens' biography, it indicates that Torrens' senior had the land – which he had never seen – the year before his son arrived, but did not transfer it to his son. One might wonder about the role of this circuitous title process around Section 246 in Torrens' development of the Real Estate Act in 1856, 4 years after he bought it.

Parcel 702

26. Mortimer, *Agius v State of South Australia* (No 6) [2018] FCA 358.

27. Mortimer.

In what is known as the Kurna Peoples Native Title Claim, on 21st March 2018 – almost twenty years after their initial application – in the Federal Court of Australia, Justice Mortimer made a Native Title Determination in the case *Agius v State of South Australia* based on a settlement between the Kurna Peoples Native Title Claim Group and the State of South Australia. Mortimer noted "it is not in dispute that at sovereignty, Aboriginal people lived in the claim area... from the time of white settlement," adding that "the original Aboriginal custodians of the land were affected in a unique way by the province of South Australia including the City of Adelaide and its surrounds and that the Applicant represents a group that has contemporary recognition by the state as representing those original inhabitants".²⁶ The Kurna peoples successful native title claim covered 7000 square kilometres South Australia and covered the city of Adelaide. However, paradoxically, even as Mortimer supported the Kurna claim in her Determination, she also noted that "it has always been clear to all parties that the intensive settlement of the Adelaide plains and its surrounds resulted in the early extinguishment of the vast majority of native title in the region"²⁷ This sobering assessment meant that even at the moment Native Title was established, it was also recognised to be gone in almost the entirety of that area apart from certain parcels where "...intense and targeted work has been performed to locate parcels within the determination area that have not been subject to extinguishing acts which wholly extinguish native title rights and interests". Parcel 702 is one of the parcels where title has not been extinguished.

28. Frazer S Crawford, *Township of Warnertown: Hundred of Napperby* (Adelaide: Surveyor Generals Office, 1873), <https://www.catalog.slsa.sa.gov.au/record=b2842305~S1>. Note that the Hundred of Adelaide is included in the Warnertown set.

29. Kochergen, "Sleeps Hill Quarry Reserve Maintenance Plan," 3.

Apart from its boundary shown on cadastral plans, no physical features reveal Parcel 702's existence, and it blends into bushland. This area exists south-west of Torrens' sections, in areas that were unsurveyed in the original Light survey but appear in a map of Adelaide's Hundreds from 1873. It shows the possible provenance of this site, located to the west of Sleepshill, an un-labelled triangle nestled between lots 261, 1147 and 1073.²⁸ In 2005 a Maintenance Plan for the Sleeps Hill Quarry Reserve described "a native title claim on Parcel 702 (CR5764/6990 which is approximately 1,700m² in area and situated on the reserve's eastern boundary... [whose] title... [appears to] overlap a portion of Quarry J."²⁹ Despite being included in "Schedule 3 – Land and waters where native title exists (Native Land Title)" and listed as a "Portion of Sleeps Hill Quarry Site" in the Determination appendices, the overall Native Title Determination of the Adelaide area and its ILUA are shown only as a broad zone on the state government Location SA Map Viewer, which does not designate this specific parcel using either the Native

Title Register or Native Title Schedule legend, with only “Other interests (Council with care, control and management)” listed for the parcel, that include “Public Bike Trail, Waterworks easement over southern portion. (City of Mitcham).” In the same mapping portal however, the reason why this parcel may have been chosen – amongst much surrounding municipal reserve land that might have still been included is – is indicated in the “Date From” field for Parcel 702 which is listed as 29/10/1846, while all the adjacent parcels around it date from the period 1994-1995. Thinking back to Judge Mortimer’s description of “intense and targeted work... performed to locate parcels”, one can imagine a GIS mapping process that used “Date From” as a criteria, which found the parcel by looking for Crown land with the oldest un-transferred title dating back to Colonial times, within 10 years of the adoption of the Torrens System.

Conclusion

30. Eric Willmot, *Pemulwuy, the Rainbow Warrior* / by Eric Willmot, Accessed from <https://nla.gov.au/nla.cat-vn1485300> (McMahons Point, N.S.W: Weldons, 1987).

Reflecting on Torrens Park Estate and Parcel 702, a key conclusion that I have argued throughout is that there is a great disconnect between land as a something with specific qualities, histories and values, and the administrative processes of ownership. For First Nations people, the fact that they must focus on the latter when the nature of their unique connection to land is primarily based on the former renders the establishment of ownership of Parcel 702 as an important but nonetheless Pyrrhic victory. Although directly unrelated, Eric Willmot’s imagining of a similar recognition by the indigenous warrior Pemulwuy in his fictionalised account seems pertinent: looking at a landscape edged in by fences, Pemulwuy reflects that his fighting about territory that is finite and demarcated like it is by colonists is already an abdication of his cultures totally different way of understanding land.³⁰

31. Tyson Yunkaporta, *Sand Talk: How Indigenous Thinking Can Save The World* (Melbourne: Text Publishing, 2019), 13.

Tyson Yunkaporta has noted that the “the recently imposed ‘authenticity’ requirement of declaring an uninterrupted cultural tradition back to the dawn of time is a difficult concession for most of us to make, when the reality is that we are affiliated with multiple groups and also have disrupted affiliations.”³¹ Considering that the aim of the Torrens System was to bring to a close a previous tenure system that required copious proof and the collection of previous deeds to demonstrate continuity of ownership, the requirements that indigenous people must use to prove authenticity – as Yunkaporta tells us – resemble closely the pre-Torrens system.

32. Raff, “Torrens, Hubbe, Stewardship and the Globalisation of Property Law Systems,” 246.

For Murray Raff, understanding the relationship between the Hanseatic German system and the Torrens System (which drew on it) allows for an “evolution of principles of equity... in law reform methodologies... especially with respect to environmental responsibilities.”³² Here “environment” might be a proxy for place, for specificity, something which is absent from the Torrens System which is transactional and premised on ownership for the sake of capital and potential of sale. In reflecting on the Kurna claim and their unextinguished title of Parcel 702, what they were forced to prove was actually a continuity of occupation prior to the existence of titles, a linkage to landscape, to place. Perhaps this is a requirement that needs to be applied to all owners of land, where land is not just a transaction but something with a body, something to which we are responsible.