

Colonial Letters Patent and Excolonialism: Forgetting, Counter-Memory and Mnemonic Potentiality

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In 1834, in authorising the colonisation of South Australia, the British Colonial Office issued Letters Patent specifying its policy of conduct to safeguard the rights of the Aboriginal inhabitants of lands in which nascent colonies were proposed or had been established. Although these property rights were subsequently breached, renewed attention to the Letters Patent reveals a broken promise of political recognition as a mode of engagement that was not widely actualised in the past but remains potential in the present; this potentiality may yet be seized to revive an alternative course of interaction between Indigenous and settler communities. Because colonial history involves two distinct kinds of forgetfulness—a missed actuality and a lost virtuality—remedial responsiveness requires two different efforts of remembrance: one will be critically directed to the truthful recovery of the past; and the other will make use of this memory to break with the habits of the past and identify a different foundation for future action. The first may best be thought of as a struggle for counter-memory to produce a more accurate and reflexive account of shared histories; the second requires a more nuanced and subtle attention to mnemonic potentiality and the prophetic rupture that it enables with respect to the past. This approach is developed with reference to the works of Foucault, Bergson and Ricoeur, together with an analysis of the strategic memory practices and modes of historical

responsiveness shown by Ngarrindjeri peoples of south-eastern South Australia. Ngarrindjeri activism is not limited to the critical task of recovering counter-memory, but also involves a style of political practice that exceeds critique and which has a focussed constructive aim: it draws public attention to, and makes use of, an original and unspent potential for respectful interaction contained within the founding moment of intercultural contact.

As an Indigenous Nation responsible for the stretch of Country across south-eastern South Australia, Ngarrindjeri peoples have 'occupied, enjoyed, managed and used [...] ancestral lands since Creation' (Ngarrindjeri Nation 2007, p. 11; 2003).ⁱ Ngarrindjeri have never ceded their sovereignty or their territory; nor have they entered into treaty with colonising authorities. On 15 August 1834, British Parliament assented to the *South Australian Colonisation Act*, which created the Province of South Australia and provided for the appointment of Commissioners empowered to execute the Act. Authority to settle within the territorial boundaries of the Province was formally given by Letters Patent, issued by King William IV in February 1836. The British Colonial Office was clear in expressing its policy of safeguarding Aboriginal peoples' rights to occupation and enjoyment of their lands, and it was emphatic that the colonial acquisition of territory should be conducted in a fair and just manner (Berg 2010; Rigney et al 2008). These intentions are made plain by the inclusion of the following *proviso* in the Letters Patent:ⁱⁱ

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...

The Governor and the Colonisation Commissioners for South Australia each received instruction regarding this provision. The First Annual Report of the Colonisation Commission (1836) again stressed that land could be acquired by the Commission for purchase by settlers, but only if it had first been voluntarily 'ceded' by the traditional owners:

The Colonial Commissioner is required to furnish the Protector of Aborigines [...] with evidence of the faithful fulfilment of the bargains or treaties which he may effect with the Aborigines for the cession of lands which they may have occupied or enjoyed; and it will be the duty of the Protector of Aborigines not only to see that such bargains or treaties are faithfully executed, but also to call upon the Executive Government of the Colony to protect the Aborigines in the undisturbed enjoyment of the lands over which they may possess proprietary rights, and of which they are not disposed to make a voluntary transfer. (Colonisation Commission 1836, p. 8)

As Henry Reynolds has remarked, this ‘was a clear definition of native title as understood in other parts of the empire. The Aborigines had rights—property rights. They should continue to enjoy those rights of possession, which could and should be inherited by their descendants like any other form of property’ (1987, p. 139). By an Order in Council dated 8 October 1836, the legal basis and rightful process for the transfer and sale of Aboriginal land was established unambiguously with the force of law and was clearly understood by the Executives of the Colonial Government of South Australia in 1836. And yet, these instructions were not followed: instead, ancestral lands in South Australia were stolen and sold without consent; the Indigenous inhabitants were widely dispersed from their Country and communities; and their rights of occupation and enjoyment were completely usurped.

For Ngarrindjeri, the broken promise of the Letters Patent is a ‘burning issue’ (Trevorrow et al 2010, p. vii), as it likewise must be acknowledged to be for all South Australians. As Shaun Berg points out: ‘If rights to those lands were already held by native inhabitants, then the first land grants were not validly granted [...], the first title would not be a valid title, and this would result in subsequent titles being, as a consequence, invalid’ (2010, p. 22). While we recognise the imperial intent of the British sovereign, we suggest there remains an unrealised constructive potential contained within the Letters Patent, associated with the forgotten promise of acknowledgement by settlers of an authoritative Indigenous presence exercising traditional sovereignty and with comprehensive rights to undisturbed enjoyment of place. Our aim in this essay is to consider how this unused potentiality may yet be collectively revived through the responsible work of memory when a select moment in an affective colonial history is grasped, transformed by action in the present time, and performed anew with a heightened sensitivity for the shared invention of ‘excolonial’ futures.ⁱⁱⁱ Responding in part to our conviction that an engaged contribution to postcolonial transformation has largely been shouldered by Indigenous peoples and shirked by settlers, we draw from some minor strains *within* Western traditions of thought—Nietzsche and Foucault, Bergson and Ricoeur—to complement a strong global tradition of Indigenous theorising about colonial forgetfulness and the complex persistence of the past in the present.^{iv} While the discussion makes use of historical sources that illuminate the uncertainty of South Australia’s colonial foundations, our exercise is, then, primarily political and philosophical in its nature. Our intention is in part to recover a subdued history of potentiality and collaboration, but even more so it is to promote a philosophical framework to assist in the tracing of a localised ‘multidirectional memory’ across the rifts that mark relations between Indigenous and non-Indigenous peoples cohabiting in settler colonial societies. This ‘creates the possibility for memory and resistance to forge alliances across historical and cultural experiences in opposition to the competitions upon which colonization relies’ (Byrd 2011, p. 53; see Rothberg 2009).

1. Forgetting

The King's Letters Patent represent a foundational instability within the colonial archive, a moment of historical contingency in which the South Australian settler presence had not yet taken its definitive dominating and exclusionary form. In the Letters Patent there is, therefore, a certain disavowal of original violence. This should give us cause for pause, since such disavowal or denial of aggressive colonial dispossession and appropriation often is an ideological characteristic of settlement fantasies and myths that function through the (wishful) erasure of Indigenous presence. Psychoanalytically informed interpretation of settler narratives can reveal significant mechanisms of repression at work, helping settlers cope with collective 'perpetrator guilt leading to stubborn and lingering anxieties over settler legitimacy and belonging' (Veracini 2010, p. 77; Maddison 2012). Examples of such repressive psychological defence strategies in colonial contexts include the wilful reconstruction of an immaculate foundation through a reinvention of the 'primal scene' in accordance with a fantasy of an empty land freely available for settlement; or else it involves the use of 'screen memory' that acknowledges an original Indigenous presence but obscures the historical fact of violent dispossession, thereby enabling a nostalgic and idealised commemoration of the colonial past. In fact, this is often how settler society recalls the founding moment of the South Australian colony, whose 'respectful' and 'peaceable' origins in the Letters Patent have at times been mobilised to deny the fact of frontier violence, as well as to differentiate the character of South Australia from other Australian states (see Foster, Hosking & Nettelbeck 2001; Foster & Nettelbeck 2012). The notion that Indigenous peoples agreed to the 'voluntary cession' of their land in return for 'civilisation', or the idea that Aboriginal Australians were nomadic wanderers who had no significant interest in a territory of their own, are other examples of 'screen memories' employed retrospectively by settler Australians to make their history of colonial aggression more palatable.

Yet, while the Letters Patent disavow original violence, this authoritative founding document does not falsely reconstruct an immaculate primal scene of territorial 'discovery' in which Indigenous peoples do not appear; nor does it assume the inevitable dispossession of Indigenous lands, whether by seizure or voluntary cession. In fact, the Letters Patent include a clear acknowledgement of Indigenous presence at the time of colonial settlement, also noting their proprietary rights and insisting that future generations of Indigenous peoples should have the undisturbed enjoyment of any territory they choose not to cede. The Letters Patent formally occupy colonial history in an anterior role, prior to European settlement. In fact, settlement actually took place more informally, often without regard for the regulations specified in the policy of the Colonial Office. It thereby initiated the violent colonial dispossession of Indigenous lands and set a course for Australian history that the Letters Patent failed to arrest. However, it is clearly the case that the Letters Patent do not simply sanction, screen and whitewash this process by

proclaiming the nascent province 'empty' of prior peoples, or by insisting that such peoples as did exist had no sovereign rights or proprietary interests. Instead of operating as a mechanism of repression enabling the systematic disavowal of original violence, the Letters Patent appear to evidence something more akin to 'ego-splitting' in the colonial subject, whereby 'two antithetical psychical attitudes coexist side by side without communicating, one taking reality into consideration, the other disavowing it' (Veracini 2010, p. 89). By acknowledging an Indigenous presence and respecting the sovereign authority and enjoyment of Indigenous inhabitants with respect to their Country, the Letters Patent encompass a reality-based attitude of political and intercultural engagement. This contrasts markedly with the mass psychosis associated with the juridical fantasy of *terra nullius*.

In the course of South Australian history that followed the abandonment of the instructions contained within the British Sovereign's Letters Patent, it is apparent how colonialism involves forgetting, 'not just of particular streams of human history, but of the loss of their geographies, histories and subjectivities' (Byrd 2011, p. xxiv). This, indeed, is the vast injustice dealt when decisions on the rights and freedoms of Indigenous peoples defer to the legal authority of a foreign sovereign imposed with colonisation. The rights ostensibly guaranteed by liberal democracies are themselves the consequences of a form of political economy—liberal capitalism—that was established in Australia through colonialism and the attendant erasure of Indigenous forms of social, political and economic life. Accordingly, as Lisa Lowe points out, in post-colonial contexts 'the affirmation of the desire for freedom is so inhabited by the forgetting of its condition of possibility that every narrative articulation of freedom is haunted by its burial, by the violence of forgetting' (cited in Byrd 2011, p. xxiv). Indeed, this 'burial' is especially striking in Federal Australian case law pertaining to Native Title. For example, while the *Mabo v Queensland no. 2* decision of 1992 decisively rejected the colonial doctrine of *terra nullius* as irrelevant for understanding native title jurisprudence in contemporary times, and implicitly acknowledged Indigenous Law and polity as the customary source of native title, the Court held that it could not logically recognise Indigenous sovereignty since this would undermine its own authority, based as this is in the legality of the original acquisition of territorial sovereignty by the British Crown (Brennan J in *Mabo* at 31). Therefore, in *Mabo*, 'the Court gave legal recognition to a concept of Indigenous property that had its origins in Indigenous customary laws (as evident in the Court's insistence that the content of native title was to emanate from the Indigenous claimants themselves), but continues to take it for granted that within the native title regime Indigenous peoples must continue to look to non-Indigenous institutions for the protection of their native title rights and interests' (Dominello 2009, p. 15). As has been evidenced in subsequent domestic cases including *Yorta Yorta v Victoria* ([2002] 214 CLR 422) and *Ward v Western Australia* ([1998] 1159 ALR 483), the Australian common law retains the power to decide whether the current practices of an Indigenous people are sufficiently 'traditional'

and can demonstrate enough unchanging continuity with pre-colonial practices to warrant the recognition of native title today. The burden of proof lies with the Indigenous communities, who have suffered dispossession and dislocation as a consequence of the decisions made throughout colonial history *by this same legal power*. Furthermore, it is clear from such judgements that common law property precepts cannot be used to give substance to Indigenous peoples' conceptions of property, which frequently manifest a collective and spiritual dimension irreducible to Western conventions of property as a medium of individual exchange. Indigenous peoples are thus required to establish the significance of their claims in terms of law that do not adequately capture the significance of Indigenous experiences and representations of reality.

There is a strange logic of temporality involved in such decisions. The Australian law in *Mabo* recognised the inappropriateness of upholding in contemporary times the colonial conventions and attitudes that were once thought by (some) settlers to be reasonable. On this basis, it rejected the notion that Australia was void and uninhabited at the time of British settlement, and it acknowledged that the colonial acquisition of territory by the British Crown did not necessarily entail that original native title was lost. In other words, it remembered the presence of Indigenous peoples at the time of colonial settlement. However, in failing to recognise the survival of Indigenous sovereignty today as a continuing source of the native title it was prepared to recognise, the Court wilfully repressed the dubious conditions of its establishment as a sovereign decision-making authority on Australian soil, and so failed to interrogate the presumed validity of its singular power of determination over decisions affecting Indigenous peoples. Once again, it set a course of action in the present, with colonial reverberations echoing into the future. As has been forcefully argued by historians including Henry Reynolds, our current potential for breaking with the colonial past rests upon our willingness to interpret history today in ways that are concerned with the meanings of historical realities for us, now, since it is only by understanding the present as the ground for the future that we can take action to remedy the persisting injustices of the past. The ethical moment before 'us'—as a would-be 'excolonial' nation of Indigenous and non-Indigenous peoples—is therefore to comprehend the multiform violence of postcolonial history as culminating in an actively acknowledged loss within the present (Byrd 2011, p. xxiv). This acknowledgement will necessarily start by understanding and finding agreed ways to redress collectively the material, political and subjective consequences that have accrued from the dispossessions and displacements suffered by Indigenous peoples as a result of the historical denial of Indigenous sovereignty.

Whereas much settler colonial history in Australia involves a kind of forgetting associated with the repression of the memory of wrongdoing in acts of dispossession, displacement, genocide and paternalism—and consequently involves the suppression of alternative Indigenous histories, institutions and representations of

reality—the missed opportunity signalled by the Letters Patent points to another kind of forgetting at work in the collective consciousness. This is a more profound type of forgetting, which does not simply block the traumatic memory of the actual (violent) events comprising the course of European settlement in Australia or strategically deny the histories actually lived through by Indigenous peoples prior to colonisation and during the course of colonial settlement. Indeed, renewed attention to the Letters Patent recovers a forgotten promise of political recognition and respectful engagement. This was seldom realised in practice but nonetheless constitutes a powerful virtuality that persists in the present and effectively dispels the illusion of inevitability with which historians tend to treat the colonial story as a ‘*necessary* deterritorialisation’ when ‘settler projects are *inevitably* premised on the traumatic, that is violent, replacement and/or displacement of indigenous Others’ (Veracini 2010, pp. 78, 75 emphasis added). The Letters Patent point to an alternative course of interaction between Indigenous and settler communities: a mode of engagement that was not widely actualised in the past but remains potential in the present. Because colonial history involves two distinct kinds of forgetfulness—a repressed actuality and a lost virtuality—remedial responsiveness requires two different efforts of remembrance: one will be critically directed to the truthful recovery of the past; and the other will make use of this memory to break with the habits of the past and inhabit a different foundation for future action. The first may best be thought of as a struggle for counter-memory to produce a more accurate and reflexive account of shared histories; the second requires a more nuanced and subtle attention to mnemonic potentiality and the prophetic rupture that it enables with respect to the past.

2. Counter-Memory

In his lecture series titled ‘Society Must Be Defended’, given at the Collège de France in 1976, Michel Foucault describes two distinct political functions of history in connection with sovereignty. The first of these acts in the service of sovereignty and upholds a juridical model of power; the second is employed in the service of ‘race war’, in which power takes the form of force relations between unequally positioned parties who are vying for control over a regime of public truth. Foucault describes the first kind of history as having a function of memorialisation. We can see this at work in certain historical re-enactments, such as the annual Proclamation Day ceremony in South Australia, which involves a commemorative ‘celebration of foundation’ (Foster 2013, p. 106). This kind of history demonstrates the continuity of the law by tracing sovereign origins and ancestry, by recording and chronicling the daily events and decisions of sovereign power and so investing them with importance and significance, and by recording contemporary examples of ‘glory made law’ that attest to the ongoing might of sovereign power over time and simultaneously to the greatness of its effects in the present. By contrast, the political discourse of race war functions as a ‘counter-history’, in which it becomes clear that ‘the history of some is not the history of others’,

and 'the function of memory acquires a whole new meaning' (Foucault 2003, pp. 69, 72). For Foucault, this alternative function is not directed towards the memorialisation of power's continuity, but is instead revolutionary. Race war deploys a critical counter-memory aimed at disrupting sovereign lineages by destabilising the certainty of sovereign foundations and recovering the 'history of others' that has been neglected and necessarily suppressed in the trajectory of sovereign might.

Ngarrindjeri Country in the 1990s became the scene of a particular episode of 'race war', when a battle was fought between developers and Ngarrindjeri over the construction of a bridge between the mainland and Hindmarsh Island, or Kumarangk, where the freshwater of the River Murray mouth mingles with ocean saltwater (see Bell 2003; Simons 2003). The litigation around the bridge was fought in multiple courts and in both state and federal jurisdictions, and was accompanied by a Royal Commission of enquiry ([1998] HCA 22; [1998] 195 CLR 337). A group of Ngarrindjeri women appealed for an Order prohibiting the development; they claimed the island was sacred to them for reasons that could not be revealed publically, though these reasons were written down and sealed in envelopes marked as confidential and for viewing by women only. However, when a second group of Ngarrindjeri women later came forward and said they had no knowledge of the 'secret women's business', the verity of the cultural information was placed in doubt. The confidentiality the Ngarrindjeri women had placed in trust when they allowed their sacred knowledge to be written down was breached when the information was then interrogated at law and widely disclosed. Furthermore, the law found that the women's claims had been fabricated. Accused of inventing their cultural knowledge, and judged guilty as charged by the sovereign authority of the settler law, Ngarrindjeri Elders watched with anger and dismay as the bridge was built and the sacred passage between water and sky was blocked. In 2001, the Federal Court in Adelaide re-examined the judicial findings. This time, the Court heard evidence that explained how Indigenous knowledge is layered, and ancestral stories are dispersed in the community such that various individuals protect and preserve an aspect of the story that they have particular responsibility for. The more sacred and vital the cultural knowledge is, the narrower its circulation will be: the most important accounts are known in entirety only by select Elders. Accordingly, the community as a whole does not have general access to a sacred story, which is splintered by access privileges shared differentially. This contrasts with Western notions of epistemological significance and transparency, which generally deem as important and true those facts that are most widely known. By the time settler law came to this cultural understanding and acceptance of epistemological diversity, the bridge had already been built, the women's business had been desecrated, and intercultural relations had soured beyond repair for many of those who had been scarred by the 'race war' battle.

The Hindmarsh Island affair was constructed through the media as much as it was conducted through the Courts. It saw various political entities wage war over the significance of the 'histories of others', which conventionally are excluded from the dominant regime of truth defined by 'expert' settler institutions including the disciplines of anthropology and law. In this case, the history in question concerned Ngarrindjeri peoples' cultural knowledge, traditionally underpinning their sovereign relationship with their Country. While the settler state and capitalist venture emerged as the material winners of this dispute, the Hindmarsh affair nonetheless arguably resulted in a moral victory for Ngarrindjeri and their supporters. This in turn prompts reflection about the politics of recognition in Australia and the capacity of settler institutions to be adequately receptive to Indigenous practices and worldviews. In this way, Hindmarsh created the critical conditions necessary for the formation of a collective 'counter-memory'. It opened the potential for increased public acknowledgement of the cultural limitations of settler law and the lingering effects of past wrongs when Indigenous authority over matters of self-representation is ignored or devalued. This new intercultural understanding, while perhaps not widely shared by the South Australian settler community, was at times given public voice in a series of formal apology to Ngarrindjeri, which included clear statements of acknowledgement that Ngarrindjeri are the best authors of their own self-representation and the most appropriate sources of authority concerning their cultural knowledge and their enduring sense of responsibility for Country.^v

Chickasaw scholar Jodi Byrd explains: 'To read mnemonically is to connect the violences and genocides of colonization to cultural productions and political movements in order to disrupt the elisions of multicultural liberal democracy that seek to rationalize the originary historical traumas that birthed settler colonialism through inclusion. Such a reading practice understands indigeneity as radical alterity and uses remembrance as a means through which to read counter to the stories that empire tells itself' (Byrd 2011, pp. xii-xiii). As has been attested in processes of reconciliation taking place elsewhere in conflict-riven parts of the world, the acknowledgement of peoples on their own terms, accompanied by the recognition that a lack of such acknowledgement in the past has been wounding, is a first step towards the post-colonial healing that begins with intercultural receptivity and mutual respect (Todorov 2010). This is no doubt partly because of the 'healing power of knowing the truth in the case of collective memories' (Avishai 2002, p. 5), but also because the critical regime of truth captured in the counter-memory more adequately reflects actual historical experiences of inequity before the law imposed with colonisation, and the relational truths of pain and remorse felt when a previously asserted universality is newly perceived to be partial and unfair. It paves the way for a more careful managing of relations, 'taming evil' so that traumatic affective consequences (such as pain and remorse) can be avoided in future engagements (Todorov 2010, p. 82).

It is with reference to this reflexive perspective afforded by critical genealogy that Michael Clifford suggests: 'If postcolonial theory is effective in bringing about a change in the relationship between colonising subject and colonised Other, it is not by appeal to rights and freedoms in a juridical sense, nor through retrieval of a lost identity, but rather through a genealogically informed critique of the mechanisms through which such identities have been created' (Clifford 2001, p. 169).^{vi} However, while the 'mechanism' of power struggle over contesting regimes of truth is a vital source of public information leading to improved intercultural understanding, it remains the case that 'race war' has limited scope for creating sociality beyond hostility. Viewed as a perpetual process of power-play, Foucault's theory of history—as a discontinuous process of social formation incessantly driven by shifting occasions of strife in a dense network of power relations—leaves intact an underlying political ontology of conflict. Because it has a driving role in the process of history, conflict remains indispensable in this scheme. Thus, although it illuminates a mechanism of historical process in the struggle for control waged at the nexus of power, right and truth, this philosophy of history does not, in itself, allow us to see how a more equitable distribution of power might be achieved in post-colonial contexts through intercultural collaboration (see Bignall 2014).

The importance of a genealogical approach therefore does not reside simply in the critical understanding it opens up as a result of renewed appreciation of contested truths that shape the passage of history. In fact, transformative postcolonialism, or 'excolonialism', requires a more considered attention to the ways in which historical genealogy additionally opens up new scope for a reconstructive politics, in which the driving mechanism of conflict is itself transfigured. Our task is to 'brush history against the grain' (Benjamin 1969, p. 257) and to become 'untimely': 'acting counter to our time and thereby acting on our time and, let us hope, for the benefit of a time to come' (Nietzsche 1997, p. 60). Indeed, if Australian social life is able to develop 'excolonial' habits, Indigenous and non-Indigenous peoples alike are called upon to experience their relational being in a genuinely 'revolutionary' mode of temporality, which breaks with a problematic past by tearing asunder current (conflictual) practices of sociability and remaking social practices in accordance with intercultural principles of negotiated consent. This redemptive action takes place in the complex mode of temporal experience that Walter Benjamin refers to as 'the time of the now'. Here, a present form of existence is conceived as potential as a consequence of the internal pressures arising from its unstable past, when decisions taken contingently in moments of past uncertainty definitively shaped the course of history. To articulate the past historically in this way therefore does not mean to recognize it 'the way it really was'; but rather, 'it means to seize hold of a memory as it flashes up at a moment of danger' or indecision (Benjamin 1969, p. 255). A historical break or discontinuity occurs when the participants in a social formation seize collectively a presently lived moment and use it to 'blast open the continuum of history':

A historian who takes this as his point of departure stops telling the sequence of events like the beads of a rosary. Instead, he grasps the constellation which his own era has formed with a definite earlier one. (Benjamin 1969, pp. 262-3)

By returning to examine the contested and unstable origins of social formations, genealogy reveals alternative sources of self in the decisions and courses of action *not* chosen at the time. Once remembered, these forgotten sources can be revitalised as alternative mechanisms of ethical and cooperative relationship, potentially useful in materialising new institutions of relational conduct. While historical re-enactments, such as the annual Proclamation Day ceremony in South Australia or the 1988 bicentenary of Cook's landing at Botany Bay in 1788, very often work to serve a colonialist agenda, the process of historical re-enactment can alternatively revive the political potentiality of encounters and actions once presented for consideration, which could always have proceeded differently (e.g. Bignall & Galliford 2003; Nanni & James 2013; Foster 2013; Attwood 2009). The promise contained within King William's colonial Letters Patent recalls one such source of political potentiality, bearing a transformational force that Ngarrindjeri currently are using in a remarkable way.

3. Mnemonic Potentiality

In *Matter and Memory*, Henri Bergson outlines a pragmatic theory of recollection, which privileges the operative function of memory for the purpose of action. For him, bodies are 'images' that encounter one another with an affective force that leaves enduring traces. Affects therefore survive, persisting into the future, even when their source is not immediately present. This, indeed, is something Bergsonian philosophy shares in common with psychoanalytic approaches that affirm the indestructibility of a past affection and the permanent possibility of its recovery and 'working through' under suitably receptive conditions (Freud 1958). For Bergson, recollection and recognition are forms of repetition, whereby the original impression is called forth once again from the reservoir of past images/affects and resumes a current role in action. Memories are therefore kept in reserve as tools for action taking place in the present, and forgetting (like memory) has a pragmatic function, insofar as it protects consciousness from being overwhelmed by the numberless past affects that crowd one's soul and clamour for presence. Bergson uses the term 'attention to life' to define the reflective state of mind that selects images or affects perceived to have currency and relevance in the immediate negotiation of the actions one chooses to live by. For Bergson, then, past images or affects survive in the unconscious and persist available for recognition and use, but are not usually found ready-to-hand. They remain latent as dispositions towards action, and it is the task of recollection to bring images to consciousness in accordance with a contextual disposition to act, manifest in one's attention to life.

Unconscious or habitual action results when an affective encounter in a present moment prompts the automatic recall of affects past, which were experienced in similar contexts or situations, disposing one to repeat the same responsive actions mechanically and with little regard for the benefits that may be brought by creativity or innovation. Habitual recollection of affects for the purpose of present action is crucial for daily survival, where the majority of responses to existential problems must come immediately and routinely. By contrast, thinking, reflection, and recollection together constitute *acts* of remembrance by which, through a certain effort, an affect is wilfully recalled, deliberately selected, sectioned off from the impassive pool of past experience, revived and consciously directed to purposeful action, thus furnishing a creative solution to a current existential problem. In this process, the experience remembered and drawn upon for the purpose of action may be direct and individual; but it may also stem from collective memory, and therefore from a less direct understanding of affective consequences, gleaned through the long record of social history (see also Poole 2008).

As Deleuze explains, Bergson's theory of memory depends upon a particular conceptualisation of temporality: in existing, we occupy not only a moment in the passing present, but also at the same time live with 'all our past, which coexists with each present' (Deleuze 1988, p. 59).^{vii} Like many Indigenous philosophies of temporality, a Bergsonian perspective allows that past, present and future are multiple and coextensive rather than singular and successive; and that they interact in complex and nonlinear ways. For Bergson, as for Benjamin and Nietzsche, while action belongs to the present moment alone, it necessarily takes place with a nod directed to the past in its entirety, and a gaze fixed on the future consequences that are anticipated to follow. An action can alter the trajectory of history when it sheds new light on obscure aspects of the past, or when it develops an unrealised potentiality to new fruition and so invests a minor tradition with a new brilliance and a historical significance previously unnoticed. The future, too, is multiply shaped in accordance with the contingency of the effects produced by momentary actions that have been freed from the weight of habit or tradition.^{viii} Here, the 'pure', passive past is the total reserve of affective history: it does not itself act, but it nonetheless provides the fuel for action. From a Bergsonian perspective, we see that we can't change the past that has happened, but we can nonetheless draw upon the unspent potential that accompanies every past act. Memory is creative because it retains a virtuality, unspent and un-lived, *alongside* the actual history that has been produced by actions chosen in the past. This virtual memory is actualised in the present, when action recalls past affects and puts them to work in present dispositions. In this way, Bergson views the present as a contraction of memory; a contextual point of action condensed from the pure past in its entirety.

Bergson explains that an affection we may have encountered in the past will become available for use in the present when 'we prepare ourselves to receive it by adopting the appropriate attitude' (1950, p.

134). In his major, final work *Memory, History, Forgetting*, Paul Ricoeur elaborates this ethical dimension of Bergson's theory of memory. If 'the moment of actual recognition marks the reinsertion of memories within the thickness of lived action', it becomes apparent that 'forgetting then designates the *unperceived* character of the perseverance of memories, their removal from the vigilance of consciousness' (Ricoeur 2004, pp. 439, 440). Because it serves the purpose of present action, recollection is interested; this 'unperceived' content of the immemorial can mark a wily form of forgetting—partly active and partly unconscious—characterising an 'abuse of memory': its blocking or manipulation. Thus, Ricoeur wryly notes: 'The cases of forgetting plans—omitting doing something [for example, failing to honour the instructions given in the Letters Patent]—reveals, in addition, the strategic resources of desire in its relations with others: conscience will draw its arsenal of excuses from it in its strategy of exoneration' (2004, p. 447; see also Todorov 1995). Responsible remembering therefore firstly requires a careful 'vigilance when the ruses of the attention to daily life are deployed'. It calls for a special effort of perceptiveness, which works to understand the desires or motives that underscore processes of interested forgetting. Then, remembering involves not only the recall of forgotten or failed acts—the memory of things that actually happened but have been lost to consciousness—but also reveals the hidden reasons *why* forgetting took place, and *who* benefitted by forgetting. In the case of the forgotten promise of the Letters Patent, it is clear that the benefit lay in the theft of coveted land and fell entirely to the settler population. The first 'appropriate attitude' of ethical remembrance therefore is critical and directed primarily to the politics of desire and its disclosure.

A second attitude of responsiveness to the problem of forgetting concerns 'the immemorial: that which was never an event for me and which we have never even actually learned, and which is less formal than ontological' (Ricoeur 2004, p. 441). The recovery of 'the immemorial' requires an attitude of openness to alterity, a receptivity to renewed styles of relationship potentially generating a being-otherwise. Importantly, this 'being-otherwise' does not refer to conceptualisations of selfhood as such (and we acknowledge that Indigenous peoples have long been forced into processes of being-otherwise than Indigenous). Rather, the historical alterity we are highlighting bears upon the problematic form of relation or engagement that now binds Indigenous and non-Indigenous peoples in settler colonial localities. It calls for attention to the unrealised possibilities evident in the course of history, in those potential directions for relational history that were blocked by powerful desires at the time of the colonial event, giving them the historical and ontological status of 'non-events'. Whereas the subject of the first ethical attitude asks 'whose desires were served by forgetting?', the second asks 'which desires were repressed and unrealised in history, and to what effect?' Discovery of such historically repressed desires requires powerful subjects to adopt an attitude of respectful listening, which strives to hear what previously has been silenced or rendered insensible by a hostile and unreceptive ear. In the case of the failed

response to the Letters Patent, we can see that Indigenous peoples' desires to be recognised as sovereign agents with continuing capacity for enjoyment of their Country were left unacknowledged, with devastating implications for their well-being as peoples; but furthermore, a shared post-colonial desire for a respectful political relationship between Indigenous and settler societies was likewise aborted. A responsive attitude of openness to historical alterity enables the recall of past affects (such as intercultural respect and recognition), that were presented for choice at a particular event in time but remained virtual and unactualised. Yet, having once existed as options for action, their virtual presence can be called to mind even now, with a force capable of shaping action in the present time. Mindfulness of the potential alterity of the past in the moments of its actual occurrence thereby opens us to the constructive force of alterity in the present: action may yet be released from its habitual determinations by historically powerful desires, and instead consciously directed in accordance with a set of desires chosen for their ethical consequences, newly consistent with an 'excolonial' ethos of engagement.

This, indeed, is a kind of historical responsiveness Ngarrindjeri are actively developing for themselves and encouraging in others (Hemming & Rigney 2008). In recent years, Ngarrindjeri have instigated a new regime of negotiation with the South Australian state and other settler institutions such as the Museum and Universities (Hemming et al 2011; Hemming & Rigney 2011). Employing the principles of contract law, this negotiation regime is geared towards the creation of legally binding accords known as '*Kungun Ngarrindjeri Yunnan*' (KNY) Agreements. Translated as 'Listen to Ngarrindjeri People Talking', the KNY process requires parties to commit to enter into discussion and negotiation over any and all management matters concerning Ngarrindjeri jurisdiction over their peoples and their Country. Importantly, in accordance with contract law, the negotiation can only proceed when there is a formal procedural recognition of the capacity of each partner to enter into the negotiation and agreement process. This necessarily includes an *a priori* recognition of the Ngarrindjeri Regional Authority as a peak political body that registers the fact of Ngarrindjeri sovereignty over their (unceded) territories, and proceeds from the principle of respect for sovereign authority as was set forth in the Letters Patent (Rigney, Hemming & Berg 2008). Ngarrindjeri have negotiated a number of such contracts over subsequent years, including some very significant accords with government outlining the co-management of land and resources, and statements of apology for past wrongs and of new commitment to better relations (see NRA/DEWNR 2011). Ngarrindjeri negotiation with government and other colonial powers proceeds in good faith and does not deny the common law imposed at the time of settlement, but returns it to a genuinely common use shared by Indigenous and non-Indigenous South Australians as was promised in the Letters Patent at the beginning of colonial settlement. Here, Ngarrindjeri are wilfully recalling a virtual foundation of respectful intercultural relationship; and they are using it to transform the conflictual mechanism of 'race

war' that has defined Indigenous and settler battles for control of the regime of truth that marks the dominant versions of Australian history. Ngarrindjeri negotiation is collaborative and constructive, rather than conflictual, oppositional or obstructive. Because it draws from Ngarrindjeri traditions of governance *and* from the conventions of Western contract law, it creates a genuinely new political mechanism with a superior capacity to mediate the authoritative forms of the Indigenous Regional Authority and the settler state, without subordinating one to the other or conducting the negotiation on singular and dominating terms of reference.

In this way, Ngarrindjeri not only are involved in remembering and recovering a forgotten form of respectful political engagement in Australian history, but also are employing a strategic kind of forgetting. This is a lapse of memory of the kind Nietzsche asserts is necessary, if we are to stop the past from becoming the 'gravedigger of the present' (Nietzsche 1997, p. 62). Ngarrindjeri command that Indigenous and settler peoples collectively 'forget' our habitual ways of engagement, which have been informed at their heart by settler interests and the colonial desire for appropriation of Ngarrindjeri Country. This is, then, a 'commanded forgetting', which Ricoeur suggests is at once a gift of forgiveness:

Under the sign of forgiveness, the guilty person is to be considered capable of something other than his offenses and his faults. He is held to be restored to his capacity for acting, and action restored to its capacity for continuing. ... And, finally, this restored capacity is enlisted by promising as it projects action towards the future. The formula for this liberating word, reduced to the bareness of its utterance, would be: you are better than your actions. (Ricoeur 2004, p. 493)

With this constructed lapse of memory comes a new scope for settler responsibility and responsive action that would be adequate to the potential for ethical-being. Commanded forgetting thus takes its place alongside active remembering, opening all Australians up to the creative potential of the virtual past and the alternative dispositions it furnishes for collaborative ethical action towards an excolonial future.

While this possibility is articulated with respect to the 'plastic power' of humanity as the capacity to 'develop out of oneself ... to heal wounds, to replace what has been lost, to recreate broken moulds' (Nietzsche 1997, p. 62), the attendant conceptualisation of history as a field of potentiality permanently available for social reconstruction should not be thought to rest upon a counterfactual conceptualisation of reality. This, indeed, is a charge that has occasionally been put to Henry Reynolds, with some historians perceiving in his work 'an attempt to uncover a history of what might have been instead of a history of what was' (Attwood and Griffiths 2009, p. 31; see also Attwood 1996a). This accusation is made especially in respect of Reynolds' ambition (for example, in *The Law of the Land*) to redeem from the past certain moments bearing the promise of ethical engagement, and to amplify

them as the basis for reworking the relationship between Aboriginal peoples and the state or law. With Nietzsche, we agree it is not possible to alter the past that has happened, but only to seize every opportunity to direct future emergences on the basis of the resources of *unlived potentiality*, left over from *actually lived* history, that remain permanently available for recovery in 'the time of the now'. Nietzsche expresses this aptly, and in a way that is suggestive for the hopeful development of excolonial futures:

we are the outcome of earlier generations, we are also the outcome of their aberrations, passions and errors, and indeed of their crimes; it is not possible to wholly free oneself of this chain. If we condemn these aberrations and regard ourselves as free of them, this does not alter the fact that we originate in them. The best we can do is to confront our inherited and hereditary nature with our knowledge, and through a new, stern discipline combat our inborn heritage and implant in ourselves a new habit, a new instinct, a second nature, so that our first withers away. It is an attempt to give oneself, *a posteriori*, a past in which one would like to originate in opposition to that in which one did originate. (Nietzsche 1997, p. 76)

Of course, the desire for 'a new past' only makes sense when it corresponds to a set of genetic conditions needed for an eventual present one would like to inhabit, and a future self one hopes to become.

We have described how recent Ngarrindjeri action around the colonial Letters Patent involves a politics of counter-memory, in which Ngarrindjeri experiences of elision by Australian state sovereignty are remembered and a history of broken promises is revealed. However, and more significantly, we have argued that Ngarrindjeri activism is not limited to the critical task of recovering counter-memory, but also involves a style of political practice that exceeds critique and which has a focussed constructive aim: it draws public attention to, and makes use of, an original and unspent potential for respectful interaction contained within the founding moment of intercultural contact. We have explained how this permanent potentiality was embodied within the Letters Patent at the time of South Australian colonial settlement, and yet was forsaken in the course of South Australian history. The Letters Patent point to a history that has not yet been lived through and so cannot simply be 'recovered' and re-valued. This is not a suppressed history that can be 'recounted', but rather is an unlived history, which must responsibly be invented for the future, and which Ngarrindjeri are actively engaged in creating through negotiations with the State and settler institutions. In this way, the Letters Patent works as a mnemonic aid—a string wound around a finger of the body politic—which reminds Australians collectively of something that is yet to be done.

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Notes

ⁱ For Indigenous Australian peoples, land is not simply owned as territory but is also the source of cultural, spiritual, philosophical, legal and political practices and knowledge. For Ngarrindjeri, this complex set of ontological connections is encompassed by the word 'Ruwe', which is not directly translatable into English but corresponds loosely to the word 'Country', which is usually capitalised to signify its important cultural and epistemological status. 'Caring for Country' is a core sovereign activity for all Indigenous Nations in Australia. For information about Ngarrindjeri Country, see the Ngarrindjeri Nation Sea-Country Plan (2007). For a wider discussion of 'Caring for Country', see Altman and Kerins (2012).

ⁱⁱ 'Letters Patent under the Great Seal of the United Kingdom erecting and establishing the Province of South Australia and fixing the boundaries thereof, 19 February 1836', State Records of South Australia, SRSA: GRG 2/64. Available online at <http://www.foundingdocs.gov.au/item-sdid-38.html>

A transcript of the Letters Patent is available online at http://www.foundingdocs.gov.au/resources/transcripts/sa2_doc_1836.pdf

ⁱⁱⁱ 'Excolonialism' is a term coined by Simone Bignall (2012) to signal an 'exit-from-colonialism'. 'Excolonialism' designates an ideally decolonised form of future community that is (perpetually) 'yet to come' in Australia. 'Excolonialism' is distinct from 'postcolonialism', which best signifies the actually lived time of a (neo) colonial present following a colonial past. Thus, post-colonial Australia exists as a nation that has been colonised by settlers, which remains invested predominantly by settler interests and retains institutionalised characteristics of settler colonisation; excolonialism is mindful of the history associated with the event of settler colonisation and affirms the continuing co-existence of Indigenous and non-Indigenous peoples following this event, but refers to a future-form of decolonised sociability that has conscientiously 'exited' the settler-interested modes of social production characterising Australian colonialism, and which currently exists virtually or potentially as a minor form of Australian sociability, yet to be widely actualised in the present. For related commentary on historical discontinuity in the context of post-colonial transformations, see Bignall (2010), especially chapter six. See also Foucault's articles on Kant and the Enlightenment for an elaboration of the notion of 'discontinuous progress'.

^{iv} Our selection of these particular representatives of the Western philosophical tradition is strategic rather than exhaustive, and indeed we could have chosen from a range of thinkers including, for example, Deleuze, Agamben or Heidegger. This points to the fact that Western Philosophy is not inevitably imperial in character; to responsibly serve an 'excolonial' agenda it must be interrogated to recover hidden or minor strains of non-imperial modes of knowing and engaging with others. Our strategic inclusion here of such a diverse range of thinkers in the Continental tradition—representing philosophers as different as Benjamin and Bergson—indicates how Western thought, in all its variety, is rich in such minor strains of non-imperialism. Nonetheless, while they are diverse in character and thought, the European philosophers we discuss are also united for our purposes, since they share a political interest in the transformative role of memory work, and agree broadly in their conceptualisations of the complex persistence of the past in the present. For an alternative elaboration of the themes discussed in this article in relation to the secular philosophy of redemption presented by Agamben in *The Time That Remains*, see Bignall, Rigney and Hattam (2014). Of course, Indigenous theory is likewise comprised of diverse philosophical traditions, which due to the scope of our paper we have been unable to survey adequately. For an Indigenous Australian account of temporality and being, see, for example, Aileen Moreton Robinson:

Indigenous people's sense of belonging is derived from an ontological relationship to country derived from the Dreaming, which provides the precedents for what is believed to have occurred in the beginning in the original form of social living created by ancestral beings. During the Dreaming, ancestral beings created the land and life, and they are tied to particular tracks of country.

Knowledge and beliefs tied to the Dreaming inform the present and future. Within this system of beliefs there is scope for interpretation and change by individuals through dreams and their lived experiences. (2004, p. 31)

^v See, for example, the letter of 'sorrow and apology' by the Alexandrina Council to Ngarrindjeri, which forms part of an Agreement co-created between the Alexandrina Council and Ngarrindjeri Elders and leaders (2002). This document signifies a new model of relationship:

To the Ngarrindjeri people, the traditional owners of the land and waters within the region, the Alexandrina Council expresses sorrow and sincere regret for the suffering and injustice that you have experienced since colonisation and we share with you our feelings of shame and sorrow at the mistreatment your people have suffered. We respect your autonomy and uniqueness of your culture. We offer our support and commitment to your determination to empower your communities in the struggle for justice, freedom and protection of your Heritage, Culture and interests within the Council area and acknowledge your right to determine your future. We commit to work with you. We acknowledge your wisdom and we commit to ensuring our actions and expressions best assist your work. We accept your frustrations at our past ways of misunderstanding you. We are shamed to acknowledge that there is still racism within our communities. We accept that our words must match our actions and we pledge to you that we will work to remove racism and ignorance. We will recognise your leadership, we honour your visions, and we hope for a future of working together with respect of each other. We look forward to achieving reconciliation with justice. We ask to walk beside you, and to stand with you to remedy the legacy of 166 years of European occupation of your land and waters and control of your lives. The work of the Alexandrina Council will be guided by your vision of a future where reconciliation through agreement making may be possible and we may walk together. The Alexandrina Council acknowledges the Ngarrindjeri People's ongoing connection to the land and waters within its area and further acknowledge the Ngarrindjeri People's continuing culture and interests therein.

^{vi} On the topic of 'Genealogical Politics', see also Wendy Brown (1998). This is not to say that the importance individuals and peoples attach to experiences of memory and descriptions of history cannot, or should not, also be framed in terms of rights, duties and freedoms. See for example, the discussion by Antoon de Baets (2009) on 'rights to memory and history'.

^{vii} On Bergson, ontology and the philosophy of history, see Lundy (2013).

^{viii} For recent reflections on the relationship between memory and the future, see the collection of essays published in 2010 by Gutman, Brown and Sodaro.

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