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COMING TO TERMS –
ABORIGINAL TITLE IN
SOUTH AUSTRALIA

Shaun Berg (Ed) (Wakefield Press, Adelaide, 2010).

BOOK REVIEW (Shorter version)
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SHORTER BOOK REVIEWS

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ABORIGINAL TITLE IN SOUTH AUSTRALIA

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When, by letters patent in 1836, William IV established the Province of South Australia, there was a significant qualification on the otherwise ample grant of powers he afforded:

“PROVIDED ALWAYS that nothing in our Letters Patent contained shall affect ... the rights of any Aboriginal Natives of the said Province to the actual occupation or enjoyment ... of any Land ... now actually occupied or enjoyed by [them or their descendants].”

The purpose of this book is to explore the extent to which this royal promise was intended to have legal effect. Or whether it was no more than a pious aspiration, quickly overruled by subsequent legislation.

The aspirational theory was accepted by Justice Richard Blackburn in the Gove land rights case. The override theory secured some support from *dicta* of the High Court in *Fejo v Northern Territory of Australia* (1998) 195 CLR 139. The issue has never been finally resolved by a binding decision of the highest courts. But one thing is clear. The royal promise was quickly and blatantly breached.

Shaun Berg urges the need for care in pursuing a litigious solution to claim redress for the breach of the royal promise. The other chapters in the book leave the legality of the promise unresolved. Instead, they

address various ways in which the proviso might be used as a springboard for securing modern and effective remedies to compensate South Australia's Aboriginal descendants for the breach of faith that involved in the loss of control of their traditional lands.

Sean Brennan views the promise as a ground for now creating a compensation fund to repay the modern descendants for the unconsensual seizure of their land. A similar thesis is propounded by Ian Robertson SC of the Adelaide Bar. He suggests a scheme for financial compensation based on levies imposed for land transactions in the State and payments into the statutory Torrens assurance fund. Paul Haveman, in his chapter on "Betrayal and Reparation", cites the precedent afforded by the reparations paid by both the British and Australian governments for the contamination of the traditional Aboriginal lands at Maralinga, where British atomic weapons were tested fifty years ago. In the last chapter, Megan Davis suggests the adoption of an indigenous bill of rights as the only way in which, retrospectively, the Australian community could repair the failure to observe the proviso. In a thoughtful foreword, Geoffrey Robertson QC suggests consideration of the idea of dedicated seats in the Australian Senate for the nation's indigenous people, after models adopted in New Zealand and Mauritius.

An emotional preface is written by three descendants of the Aboriginal people in South Australia. For them, this book is simply a continuation, by new means, of their fight for proper acknowledgement and recognition of rights promised to them at the beginning of 'white' settlement in Australia.

The book reveals to modern Australians a little known chapter of our colonial past. But will the Australians of today be any more attentive to the royal promise than earlier generations of settlers have been?
