

The Australian History of Henry Reynolds

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This short monograph considers the contribution made by Dr Henry Reynolds to the High Court of Australia's conscious rejection of Australia's history in the Mabo Judgment of 1992. The Commonwealth Government's 'Discussion paper' on Mabo, itself a work of advocacy rather than analysis, freely concedes that *'up to June 1992, grants of interests in land were made before native title was recognised in Australian law'*.¹ Judges Deane and Gaudron did not seek to conceal that they had repudiated what they termed *'a basis of the real property law of this country for more than a hundred and fifty years'*.² The essence of what they rejected was the legal doctrine that the original British claim of sovereignty extinguished all prior rights to property, so that after 1788 all titles, rights and interests whatsoever in land were the direct consequence of some grant from the crown. In justification of their repudiation their Honours referred to *'the conflagration of oppression and conflict which was, over the century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame'*.³ They concluded that *'the nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices'*.⁴

On what grounds did their Honours reject the Australian past as unutterably shameful? Judges Gaudron and Deane said they had been *'assisted not only by the material placed before us by the parties but by the researches of the many scholars who have written in the areas into which this judgment has necessarily ventured. We acknowledge our indebtedness to their writings and the fact that our own research has been largely directed to sources which they had already identified'*.⁵ Who were these scholars? Very few historians are mentioned in their Honours' footnotes, but we find there that they read *The Historical Records of Australia*, which are not interpretative, one book each by Ernest Scott and Sir Kenneth Roberts-Wray, who give no support to their position, an article by R.S. King, and Henry Reynolds' 1987 *The Law of the Land*.⁶ There can be no doubt that their Honours were influenced particularly strongly by Reynolds. Indeed, several important passages of their judgment are virtual paraphrases of Reynolds. Justices Dawson and Toohey also cited Reynolds' *The Law of the Land* on pastoral

¹ Commonwealth of Australia (1993). *Mabo: The High Court Decision on Native Title: Discussion Paper*. Canberra: Commonwealth Government Printer, p. 3.

² 107 A.L.R. 1 (1992), p. 82.

³ *op. cit.*, p. 79.

⁴ *op. cit.*, p. 82.

⁵ *op. cit.*, p. 91.

⁶ *op. cit.*, pp. 57, 60, 74, 81.

leases in Queensland.⁷ Gordon Briscoe, a research scholar of Aboriginal descent critical of Mabo, claims: ‘*The weakness of the Mabo decision lies in the way that one historical idea raised by one historian, Henry Reynolds, and one ethnographic document made up the sole proof relied on by the Court*’.⁸ On the opposite side of the argument Mr Noel Pearson of the Hope Valley Aboriginal Community holds that it was Reynolds who demonstrated ‘*that native title was recognised by the Imperial government in the nineteenth century and respect for this title was supposed to govern colonial “settlement” in Australia. Reynolds shows how the colonists contrived to deny these rights*’.⁹ In The Law Book Company’s 1993 *Essays on the Mabo Decision*, all of which were written in support of Mabo or demanding its further extension, several contributors acknowledged Reynolds’s contribution to the struggle.¹⁰ Susan Burton Phillips attributed to Reynolds ‘*historical material reflecting the concerns of Australian colonial administrators that access to and use of land be retained for the indigenous inhabitants*’; Nonie Sharp referred readers to Reynolds for the meanings of *terra nullius*; Michael Mansell referred to Reynolds as a ‘*noted commentator*’ who favours a separate Aboriginal Republic in Australia, which Reynolds may not in fact support; Garth Nettheim drew attention to Reynolds’ definition of ‘*the distinctive and unenviable contribution of Australian jurisprudence to the history of the relations between Europeans and the indigenous peoples of the non-European world*’ which, Nettheim claimed, is denial of ‘*the right, even the fact, of possession*’.

Eddie Mabo himself was once Reynolds’ research assistant at James Cook University. Reynolds relates that he and his colleague Noel Loos ‘*had the unpleasant task of explaining to him (Mabo) the doctrine of terra nullius ... It was a shocking revelation and one that hardened his determination to fight for justice.*’¹¹ Reynolds added that the ingredients of the Mabo case came together ‘*at a land rights conference at the university in Townsville where he (Mabo) and several of his associates met some of the leading land rights lawyers and academics*’.¹² One must agree with Reynolds own contention that

there can be little doubt that the History Department {of James Cook University} played a major role in the fundamental re-interpretation of Australia’s past which found expression in the Mabo decision’.¹³

⁷ *op. cit.*, pp. 109, 141.

⁸ Briscoe, G. (1993). ‘Land Reform: Mabo and “Native Title”. Reality or Illusion?’ in *Pacific Research*, 6 (4), pp. 3-4.

⁹ Pearson, N. (1993). ‘204 years of invisible title’ in M.A. Stephenson and S.Ratnapala (eds). *Mabo: A Judicial Revolution*. St.Lucia: University of Queensland Press, pp. 88-9.

¹⁰ The Law Book Company. 1993 *Essays on the Mabo Decision*. Sydney, pp. 3, 37, 54-5, 105.

¹¹ Reynolds, H. (1993a). ‘Introduction’ to Reynolds, H. (ed.) *Race Relations in North Queensland*, 2nd edition, Townsville: James Cook University, p. 3.

¹² Felton, H. and Reynolds, H. (1991) ‘Beyond the Frontier’ in *Island*, 49, p. 35.

¹³ Reynolds, 1993a, p.3.

As with many great discoveries there is some dispute about influence and precedence. Mr Greg McIntyre, a Perth barrister who was solicitor in the Milirrpum and Mabo cases, claimed that ‘*the Mabo case was conceived as a test case arising from a meeting of Barbara Hocking (a Melbourne Barrister), Eddie Kiokie Mabo, Fr. Dave Passi, Flo Kennedy (of Thursday Island), Noni Sharp (of La Trobe University) and the writer at a conference on Race Relations and Land Rights at James Cook University in 1981*’.¹⁴ However, despite his omission of Reynolds’ name, Mr McIntyre acknowledged the importance of the role played by the James Cook University in the origins of Mabo.

Reynolds’ early work

One of Reynolds’ contentions in his earlier works of the 1970s was that Aborigines had been shamefully neglected by Australian historians. The first page of his first book described Aborigines as ‘*the fringe-dwellers of Australian historiography*’ who suffered from the ‘*great Australian silence*’.¹⁵ Yet there is a wide range of detail readily available in official, semi-official and unofficial sources, and two of Reynolds’ early books, *Aborigines and Settlers: The Australian Experience 1788-1939*. (1972) and *Race Relations in North Queensland*. (1978), consist largely of extracts from these well-known sources, together with some authorial commentary. In his early writings during the 1970s on Aboriginal history Reynolds had little interest in land rights or the doctrine of *terra nullius*, the subjects on which his later work most influenced the High Court. His earlier objective was to overthrow established views that there was little serious Aboriginal resistance to British colonisation of Australia and that Aborigines had little interest in the skills, techniques and culture of the colonists. Reynolds maintained that Aborigines were both highly belligerent and able to make good use of such innovations as were relevant and profitable to them.

Aboriginal violence

The early British and Irish colonists of Australia undoubtedly included many very violent people, but Reynolds’ chief interest was ‘*not with European brutality towards the blacks but with Aboriginal violence—perhaps their counter-violence*’. He set out to banish ‘*two legends*’: one presenting Australian history as ‘*uniquely peaceful*’ and the other depicting Aborigines as ‘*an inimitably mild race*’ which abjectly acquiesced in British colonization. Reynolds denied that ‘*blacks were helpless victims of white attack*’ or ‘*passive recipients of promiscuous brutality*.’ He declared that they ‘*did not sit around their camp fires waiting to be massacred*’

¹⁴ McIntyre, G. (1992). “Retreat from Injustice”: Mabo -v- The State of Queensland’ in The Centre for Commercial and Resources Law of the University of Western Australia and Murdoch University. *Resource Development and Aboriginal Land Rights Conference*. Perth, 28 August.

¹⁵ Reynolds, H. (1972). *Aborigines and Settlers: The Australian Experience 1788-1939*. Cassell Australia, p. ix.

but that, allowing for differences in fire-power, they gave as much as they got.¹⁶ He argued that, although ‘*central co-ordination was impossible and the many tribes had very little sense of a common Aboriginal identity*’, Aboriginal resistance was on a substantial, even massive, scale, from attacks on the first white settlers, mainly convicts and emancipists, on the Hawkesbury in the 1790s to conflicts in Northern Queensland a century later.

Reynolds noted that ‘*revenge killing for the death or serious injury of kin was a common feature of traditional Aboriginal society*’. When whites offended them, Aborigines had to decide whether to punish particular individuals or to hold whites collectively responsible. Some squatters and police reported only direct retaliation, but Reynolds drew particular attention to evidence that Aborigines intended ‘*to attack and kill whites whenever they met any*’ in order to gain vengeance. He cited among others Frederick Walker in Queensland in 1861, B. Doyle in Maitland in 1842, J.D. MacTaggart in New South Wales in 1858, and the magistrates of Upper Dawson in 1857, as evidence that Aborigines intended mass and indiscriminate revenge because of the very presence of the colonists, irrespective of specific actions. He insisted that contemporary descriptions of Aborigines as ‘*hostile and intractable*’, ‘*hostile, treacherous and murderous*’, and ever ready to commit ‘*outrages*’, ‘*atrocious murders*’ and ‘*diabolical acts*’, reflected the reality of violence, although Reynolds considered the violence justified and objected to the critical epithets used to describe it. Other phrases from evidence he cited as representative include:

‘Aborigines resent the intrusion of white men in their country.’

‘the result of the white man’s intrusion is a permanent feud between the blacks and whites’.

‘white entrance into their country is an act of war, and they will halt at no opportunity of attacking the white invaders.’

‘occupation of the country for pastoral purposes and peaceable relations with the native tribes are hopelessly irreconcilable.’

‘entrance into their country is an act of war.’

‘they will halt at no opportunity of attacking the white invaders.’

‘If we want a league of peace of equal grounds, really there is no road to it but that we give up their land and forsake their country ... The blacks cannot be conciliated unless by giving up their country.’

Reynolds described in detail how violence followed the moving frontiers of contact. He estimated that in Queensland alone Aborigines killed between 900 and 1000, later revised to

¹⁶ Reynolds, H. (1981). *The Other Side of the Frontier: An interpretation of the Aboriginal response to the invasion and settlement of Australia*. James Cook University p. 140. (Reynolds, as is entirely reasonable, made some textual changes in this book when Penguin re-published it in 1982).

about 850, colonists, among whom he included Chinese, Melanesians and Aborigines who co-operated with the colonists. His estimate for the whole continent was between 2,000 and 2,500 deaths caused by Aborigines, as against some 20,000 Aboriginal deaths directly through white or black trooper violence.¹⁷ There were also many large-scale attacks by Aborigines on sheep and cattle, the numbers lost in single campaigns running into thousands, bringing financial ruin to many settlers. Reynolds wrote of insecurity among miners and townspeople as well as pastoralists and farmers, and widespread fear, especially for the safety of women and children, in Queensland towns such as Gladstone, Cardwell, Cooktown, Normanton, Cloncurry, Smithfield, Georgetown, Maryborough and Gilberton, and even Ipswich and Brisbane. Mining was especially detested by Aborigines, because the miners arrived suddenly, were strong in numbers, had relatively few animals and vegetables to steal, frightened away the native fauna, and often desecrated sacred sites, even if inadvertently. As a result Aboriginal violence against miners was usually open and indiscriminate, including sustained attacks on any bullock teams and prospecting parties which might appear.¹⁸ Reynolds has been criticised by Bain Attwood for having paid ‘little attention to “settled” Australia where very different patterns can be seen to have emerged after the initial phase of contact’.¹⁹ Ann McGrath has also challenged Reynolds’ claim that ‘violent conflict’ was of ‘overwhelming importance’ in overall relations between Aborigines and colonists.²⁰ The sequence of relationships continued to be very like that described by the NSW grazier Robert Scott in the 1830s:²¹

Violence, however, ceases as they become better acquainted with our power to punish, and it is only in our first intercourse with the natives, that outrage is to be apprehended.

Such a pattern would not, of course, diminish the reality of the initial violence depicted by Reynolds.

Reynolds condemned earlier radical historians for dismissing black trackers and troopers as ‘people without will of their own’ who ‘were bullied or tricked into working with the Europeans’. He conceded that, whatever may have been the level of violence by whites in frontier conflicts, ‘the same judgment’ must be made about Aboriginal stockmen, troopers and

¹⁷ Reynolds fully conceded that the overwhelming majority of Aboriginal deaths resulted from disease and epidemic and were not killed by the colonists. Other estimates of white deaths through Aboriginal violence are much smaller than those on which Reynolds relies. For example, Beverley Vance found 59 cases in the Port Phillip District, as against the estimate of about 200 of M.F. Christie, on whom Reynolds relied. See Nance, B. (1981). ‘The Level of Violence in Port Phillip, 1835-1850’ in *Historical Studies*, 19, no. 77, pp. 532-52.

¹⁸ Reynolds, 1981, pp. 153-4.

¹⁹ Attwood, B. (1990). ‘Aborigines and Academic Historians: Some Recent Encounters’ in *Australian Historical Studies*, 24, no 94, p. 124.

²⁰ McGrath, A. (1987). *Born in the Cattle’: Aborigines in Cattle Country*. Sydney: Allen and Unwin.

²¹ Cited in Harrison, B. (1978). ‘The Myall Creek Massacre’ in I. McBryde (ed.). *Records of Time Past*. Canberra; Australian Institute of Aboriginal Studies, p, 22,

trackers who were so often by their side.'²² George Grey wrote that his Aboriginal guides 'kept continually requesting me, not to attempt to kill anybody, until I had passed a spot ... and they then advised me indiscriminately to shoot everybody I saw'. Reynolds agreed with Marie Fels in *Good Men and True* that black troopers enjoyed high prestige among many Aboriginal groups and relatively high material standards. Although hostile accounts of the native police emphasised the violence used to maintain discipline, Fels noted that the odds in the bush were highly in favour of the troopers as against the one or two whites in command. These officers were dependent, too, on trooper advice on whether to attack or not and on their tracking skills as to whether they actually reached or engaged the groups targeted. Reynolds accepted J.K. Wilson's claim that Aborigines, fearful of black troopers, 'frequently go to the white people for protection' against them, although he contested Fels' denial that troopers perpetrated unprovoked atrocities. Reynolds became highly impressed with Aboriginal military skills and maintained that strange blacks were perceived by other Aborigines as a greater danger in warfare than strange whites.²³

Reynolds has been reluctant to criticise any Aboriginal actions even by stylistic inference: killings by Aborigines, such as the Maria 'massacre' in South Australia, are given the benefit of quotation marks, whereas killings of blacks by whites such as the Coniston massacre are denied that privilege. Reynolds commented approvingly on the Maria deaths that '*Aboriginal action was carefully planned and thoroughly considered*' and cited the Hornet Bank massacre as evidence that Aborigines could plan ahead effectively. He made no extenuations in cases of white violence, but always found mitigating circumstances for Aboriginal acts. Reynolds claimed, for example, that the Maria victims

probably did not understand what the Aborigines were trying to tell them ... Their deaths were not inevitable. With a little luck the survivors might have reached Adelaide full of praise for the friendly blacks of the Coorong.

Similarly he suggested that the massacred Wills party '*may have died totally unaware of what had gone wrong with the peaceful pattern of contact established during their weeks in the district*'.²⁴ Reynolds complained that '*each case was seen at the time as evidence of Aboriginal savagery and treachery*', but gave no convincing grounds for judging them differently.

Thus Reynolds challenged '*myths*' of Aboriginal passivity in the face of white colonisation and exulted in the violence of Aboriginal resistance. This did not prevent him from lamenting only for Aborigines when he recalled '*the memory of the dead, all 20, 000 and more*', which '*lived*

²² Reynolds, H. (1990). *With the White People*. Penguin Books Australia, p. 232.

²³ Reynolds, 1990, p. 80-3; Reynolds, H. (1978). *Race Relations in North Queensland*. James Cook University, pp. 40-2.

²⁴ Reynolds, 1981, pp. 107, 64-7.

on, stamped deeply and indelibly into the consciousness of the survivors, their children, and their children's children'.²⁵ Yet, given the subsequent demographic pattern, almost as many living descendants of the colonists must have ancestors killed by Aborigines as living descendants of the Aborigines have ancestors killed by colonists. Furthermore, over the generations countless Aborigines were killed by other Aborigines, but none of these deaths is held by Reynolds to have been stamped deeply and indelibly on the consciousness of any Aborigines, or even to occasion any feelings of guilt whatsoever.

Reynolds may have exaggerated the amount of violence in relations between Aborigines and settlers during the nineteenth century, as has been claimed by Bain Attwood, Marie Fels and Ann McGrath. What cannot be doubted is that in so far as he was right, to that same extent he demonstrated how difficult it was to include Aborigines in the civil societies developed in the Australian colonies or to implement the types of shared land usage between whites and Aborigines proposed in Westminster and Whitehall and subsequently lauded by Reynolds as the policy which colonial governments should have adopted. Furthermore, when the myth of Aboriginal non-violence was resurrected in the Mabo Judgment Reynolds did not demur.

Perhaps fearful that his emphasis on Aboriginal violence might strengthen negative stereotypes, Reynolds attacked the '*unfavourable conception of the brutal and debased savage*' which, he claimed, '*was still afloat in the parish ethnology of Britain*' and '*was impervious to experience*.'²⁶ He condemned Social Darwinism and similar theories which hold that some individuals and/or societies are more advanced or civilized than others. However, he did not chide Karl Marx and Frederick Engels, although he must have known of Engels' work in anthropology, which has been very influential in recent years among radical feminists. Engels and the American anthropologist Lewis Henry Morgan divided the human past into '*three main epochs, savagery, barbarism and civilisation*', separating savagery into a '*lower*', '*middle*' and '*upper*' stage. Although no direct evidence remained of the lower stage of savagery which they postulated as a transitional stage from ape-like ancestors, they thought '*the Australasians and many Polynesians are to this day in this middle stage of savagery*'. Engels held that the lowest stage of human development still surviving was represented by '*the Australian Negroes of Mount Gambier in South Australia*'.²⁷ Until recently most Australians of left-wing opinions followed the eminent Marxist prehistorian, Vere Gordon Childe, in using terms such as savage and barbarian in much the same way as the nineteenth century anthropologists and social scientists denounced by Reynolds.

²⁵ *op. cit.*, p. 104.

²⁶ Reynolds, H. (1987a). *Frontier: Aborigines, Settlers and Land*. Allen and Unwin, p. 108.

²⁷ Engels, F. (1970) 'The Origin of the Family, Private Property and the State' in Marx, K. and Engels, F. *Selected Works*. 3 vols. Moscow: Progress Publishers, III, pp.191; 201; 222.

Despite his castigation of colonists or anthropologists who classified Aborigines as savage or primitive, Reynolds' own sources make it very understandable why such views were held. Some Aborigines believed the first British ships they saw were '*huge winged monsters*' or trees growing in the sea. Others thought the British were their dead kinsmen who had '*jumped-up*' white and that they themselves might in their turn return to earth after death as whites with all their powers and goods. After a time they decided the British were not their returned kin and reclassified them in terms meaning '*devil, malignant spirit or simply evil doer*' or '*ugly head*'.²⁸ Reynolds insisted that '*it is important to stress that far from being an example of childlike fantasy, fancy or primitive irrationality this view of the Europeans was a logical conclusion*',²⁹ although he conceded that some '*Aboriginal misconceptions*' had the apparently regrettable consequence of '*shielding infant and insecure settlements from latent black hostility*'.³⁰ British officials and colonists failed to perceive the logic identified by Reynolds. They counted their own misidentification as reincarnated Aborigines and then as devils as part of the evidence for the difficulties of making treaties with Aboriginal groups and more generally of achieving common understandings. Many Aborigines believed '*the newcomers' possessions were organic products of an exotic natural environment*' and that '*European weapons were manifestly dangerous, but not necessarily more so, or more mysterious, than the magic of powerful clever men*' in traditional society. The most surprising thing to the Aborigines about the colonists' weapons, Reynolds suggested, despite his support of claims that Aboriginal societies were highly egalitarian, was that all the white men had access to them, whereas comparable Aboriginal magic was confined to '*a few select "men of high degree."*'³¹

Reynolds noted that '*Aborigines clung to their own theory of illness, despite the traumatic impact of introduced disease*' and believed smallpox and other epidemics were the work of sorcerers from other Aboriginal groups, who were capable of killing, sometimes from a distance, with bullocks' teeth, sheep's' jawbones and fragments of glass.³² White medical practitioners found it very hard to help sick Aborigines, who typically would not take recommended medicines at all or, if convinced of their value, would insist on swallowing the whole lot at one gulp. Aborigines had, of course, no built-in immunity to sexually transmitted diseases, or to other infections such as smallpox and measles introduced by the colonists without intention. Europe had been ravaged during the sixteenth century by syphilis, '*Montezuma's revenge*', to which Europeans had none of the immunities built up over the generations by the indigenous peoples of the Americas, but most European societies made some accommodations to the new dangers, including the new '*Puritanism*' characteristic of Reformation and Counter-Reformation

²⁸ Reynolds, 1981, p. 30.

²⁹ Reynolds, H. (1982) *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*. Melbourne: Penguin Australia Books, pp. 6, 38, 31.

³⁰ Reynolds, 1981, p. 32.

³¹ *op. cit.*, pp. 44-5.

³² Reynolds, 1981, pp. 56-7; Reynolds, 1982, pp. 51-3.

movements, whereas among Aborigines subincision and other sexual practices which greatly increased the virulence of venereal diseases seem to have been too deeply embedded in cultural beliefs to be challenged.³³ These were but a few of the beliefs and practices in Aboriginal culture which proved deeply counter-productive after contact with whites, but to Reynolds they were apparently '*perfectly logical ... given acceptance of a few basic assumptions*'.³⁴ He seems to have taken satisfaction in noting that '*twentieth century studies make it clear that faith in magic ... has been one of the most enduring features of traditional culture*'.³⁵ After describing the disastrous results of many Aboriginal miscalculations he claimed: '*it was a course of action fraught with risk yet the Aboriginal renaissance of the last decade suggests that ultimately the sacrifices were justified*'.³⁶ Such encouragement to Aborigines to retain ancient errors may well hinder such a renaissance from taking place.

Aboriginal co-operation

As well as depicting Aboriginal violence in detail, the early Reynolds also wished to show that Aborigines, far from being frozen in traditional practices, made substantial constructive accommodations to new ways. Contact with whites brought about massive and speedy changes on a scale totally unprecedented in the Aboriginal past. Many changes were involuntary and of a destructive character, but others were voluntary and potentially at least valuable and helpful to Aboriginal development. Reynolds acknowledged that white settlements acted as a magnet to many Aborigines. In some cases the attraction was that only there was food was available after white incursions disrupted traditional food supplies, but the pull was frequently of a different kind. Reynolds noted that

European goods like steel axes and knives, pieces of iron, tins, cloth and glass were all eagerly sought and used by Aboriginal tribes even before contact had been made with settlers on the advancing frontier. Western food, tobacco and alcohol also exerted a tremendous attraction

He described how '*all sorts of iron—shear blades, horse-shoes, nails—as well as glass, cloth and leather*' were '*successfully incorporated into an increasingly modified traditional “tool-kit”*'. He noted that the availability of food from the animals of the settlers made possible larger Aboriginal military formations and enabled them to stay together longer than in pre-contact times. He argued that Aborigines were quick and skilful in mastering new techniques introduced by whites, especially in the control of dogs and horses. He extended his admiration to systematic wounding of cattle and driving them over gullies and ravines so they could be killed finally in

³³ Reynolds, 1972, pp. 85-6.

³⁴ Reynolds, 1982, p. 32

³⁵ *op. cit.*, p. 92.

³⁶ *op. cit.*, p. 155.

conditions of safety, and to judicious breaking of their legs to prevent sheep acquired from the whites from straying.³⁷

Among examples of successful co-operation between black and white, Reynolds cited evidence from Normanton, and other Queensland towns, of Aborigines employed as houseboys, firewood cutters, stable hands, yard cleaners, nurse girls, washerwomen, charwomen and gardeners, some of whom could bargain for wages '*with all the shrewdness of a white man*'. There was in addition much evidence of less constructive Aboriginal accommodations, such as prostitution, begging and pilfering. Sharing or prostitution of their women by Aboriginal males occurred almost as soon as whites appeared: Sturt reported that '*his camp was overwhelmed with offers of sexual accommodation*'. Sometimes Aborigines expected such offers would strengthen amity and respect as well as elicit major material reciprocity, but the objective effect was to reduce respect for Aboriginal culture, even among those very willing to take advantage of the opportunities of sexual gratification thus made available. Reynolds criticized '*activists*' who '*ignored and despised*' Aborigines working with or assisting whites, or unfairly condemned black troopers, stock workers and servants '*either as collaborators and traitors to the Aboriginal cause or as people with wills so weak that they lacked minds of their own and became, as a result, willing tools of the whites*'. Reynolds considered that Aboriginal co-operation, when it was forthcoming, was rational and productive. This was indeed very often the case, but by no means invariably. Reynolds failed to make the critique of Aboriginal actions which he had no hesitation of making in respect of the shortcomings of the colonists.

Changes in Aboriginal ways included willingness to leave ancient clan territories. Reynolds described the bitter conflict between Aborigines from the Adelaide plain and children of River Murray Aborigines brought into Adelaide to attend school and then accused by the locals of '*obtaining food in a territory to which they had no hereditary right.*'³⁸ He frequently cited Professor Stanner's account of voluntary mass movement of Aborigines from the Fitzmaurice River area of the Northern Territory. Stanner, who with Professor R.M. Berndt was in 1971 one of two expert witnesses called by the plaintiffs in the Gove Land Rights or Milirrpum Case, reported that their '*appetites for tobacco and to a lesser extent for tea became so intense that neither man nor woman could bear to be without*' and as a result '*individuals, families and parties of friends simply went away to places where the avidly desired things could be obtained*'. Stanner considered that '*voluntary movements of this kind occurred widely in Australia*', so that '*we must look all over again at what we suppose to have been the conditions of collapse of Aboriginal life*'. The reported arrival of Europeans '*was sufficient to unsettle aborigines still long distances away*' and '*for every aborigine who, so to speak, had*

³⁷ Reynolds, 1981, pp. 39-41.

³⁸ *op. cit.*, p. 161.

Europeans thrust upon him, at least one other had sought them out. Stanner concluded that *'disintegration following on a voluntary and banded migration is a very different kind of problem from the kind we usually picture—that of the ruin of a helpless people, overwhelmed by circumstances'*. One idea Stanner thought needed *'drastic revision'* was that *'to part an aboriginal from his clan country is to wrest his soul from his body'*.³⁹ The early Reynolds endorsed Stanner's account and referred to *'the more or less voluntary coming in of aborigines to European settlements'*.⁴⁰ Ten years later he still admitted that *'during the twentieth century there have been many well-documented examples of voluntary migration from tribal homelands in towards European settlements'*, but suggested that Stanner's account of the nineteenth century was *'not so much wrong as anachronistic'*.⁴¹ Yet Reynolds own sources show clearly that the same thing often happened during the first century of Aboriginal contact with the British. When the Mabo Judgment resurrected the myth of a timeless nexus between Aborigines and land, Reynolds did not demur.

The late Professor R.M. Berndt also wrote of discontinuity in Aboriginal occupation of land, combined with subsequent changes in myth to justify the new situation. For example, in 1912 there seem to have been no Gunwinggu people at Oenpelli, but by the 1950s they had become the predominant group. The lateness of their arrival did not inhibit their establishing Dreamtime links with their new territory.⁴² The speed with which Aborigines can establish *'timeless'* links with the land was also shown at Elsey Station, where the Aborigine Gudir (Luganin in Algwa) came as a Native Policeman but was within a generation thoroughly incorporated into local Aboriginal society and its genealogical system.⁴³ Despite the fact that Gudir was known to have come from a distant and unrelated clan, he was said to have been brought to Elsey by a *'wild wind'*, the totemic property of the semi-moiety to which he was allocated. When the Parlamanyin of the Northern Territory died out as a separate group, the Kungarakany quickly laid claim to their territories and their myths. When it appeared to the Maranunngu that there was rich potential value in lands to the north of their traditional territories, they rapidly made land claims, backed by the assertion that they were familiar with the mythic lore of the northerly area.⁴⁴ Over the last two hundred years there have been many breaks in continuity of occupancy of once traditional lands by individuals and whole groups resulting from unforced Aboriginal decisions to relocate.

³⁹ *op. cit.*, pp. 42-5.

⁴⁰ Reynolds, 1972, p. 41.

⁴¹ Reynolds, 1982, p. 115.

⁴² Berndt R.M. and Berndt, C.M. (1970). *Man, Land and Myth in North Australia: The Gunwingu People*, pp. 5, 17.

⁴³ Merlon, F. (1978). *"Making people quiet" in the pastoral north: reminiscences of Elstey Station* in *Aboriginal History*, 2 (1), p.84ff.

⁴⁴ Layton, R. and Williams, N. (1980). *The Finnis River Land Claims*. Darwin: Northern Land Council.

Although Reynolds drew attention to examples of successful Aboriginal adaptation to the totally new situations created by British colonialization, he also provided evidence of failures to do so. This was often the fault of the colonists. Aborigines who made great strides in mastering the ways of white society but were rejected and subsequently sank into ruin included Bungaree, a successful student at Sydney College, Maria, brought up in the household of Bishop and Mrs Short in Adelaide, and Miago who sailed on the *Beagle*. Even the most accomplished Aboriginal males were rejected sexually by respectable white women. Admission into respectable male white society was often difficult, too, so that educated Aborigines were thrust into the company of the least desirable white companions. White artisans were frequently hostile to the entry of Aborigines into their trades on the grounds that wages and conditions would suffer. Aborigines were prevented from working in Maryborough by a '*leading white labour advocate*' who organised an agitation against blacks being employed on the river wharves.⁴⁵

Reynolds' overall view, however, was that assimilation took place on only a very limited scale not so much because of white resistance or Aboriginal incapacity as of deliberate and highly defensible Aboriginal rejection of white ways. When citing E.S. Parker's description of the way in which Loddon River blacks opposed education of their children by white people, Reynolds interpreted their action as resistance to '*assertive promotion of European culture and the continuous subversion of their children.*'⁴⁶ Reynolds claimed that '*Many Aborigines have not wanted to emulate white Australians and have manifested a cultural resistance which is rooted in their ethnic history.*'⁴⁷ Tribal leaders often prevented co-operation between black and white and Reynolds noted that the '*array of methods*' used to preserve their authority, especially over women, included '*threats, sorcery, ritual spearing, even execution.*' Reynolds conceded that

Aboriginal women may have gone to European men willingly and actually sought them out either to escape undesired marriage or tribal punishment or to gain access to the many attractive possessions of the Europeans

On the other hand he does not seem to believe that such punishments or deaths inflicted on women by male Aborigines are '*stamped deeply and indelibly*' in Aboriginal consciousness in the same way as are, he holds, acts of sexual violence committed against Aboriginal women by whites.⁴⁸ He write later that the coming of the British simply meant that '*many thousands of years of freedom from outside interference were coming to an abrupt and bloody end*'⁴⁹ and that Aborigines lost all and gained nothing by British colonisation.

⁴⁵ Reynolds, 1978, p. 169

⁴⁶ Reynolds, 1981, p. 110.

⁴⁷ Reynolds, 1972, p. 57.

⁴⁸ Reynolds, 1981, p. 104.

⁴⁹ *op. cit.*, p. 19.

Terra nullius

Reynolds' early work on Aborigines paid relatively little attention to land ownership. In 1987 he admitted that his interest in land rights questions was a '*very belated development*' and he '*had gone on for years accepting at face value ideas and interpretations that were wrong.*' He did not draw attention in his earlier writing to Governor Gawler's observation in 1840 that '*if the claims of the natives are not void before all, they are preliminary to all. They cannot occupy a middle station*', yet in 1987 he considered that Gawler '*put his finger on the fundamental issue*'.⁵⁰ Reynolds' second thoughts may well be mistaken, too, since it is rare that one aspect of a question is either everything or nothing.

Even when he became interested in issues concerning land, especially in relationship to the doctrine of *terra nullius*, the subject on which he exerted greatest influence on the Mabo judges, he was deeply ambivalent. Sometimes he agreed that in 1788 Britain gained sovereignty over Australia in terms fully acceptable in international law:

the British claim of sovereignty over the whole of Australia was not surprising given the attitudes of European powers. It would have been unexceptional at any time in the nineteenth century.⁵¹

On other occasions, however, he claimed that Grotius in 1738, Heineccius in 1743 and Wolff and Vattel in the 1760s supported the contention that British sovereignty could only extend to the power of keeping out other European or 'civilized' powers and only then '*as far as the crest of the watershed flowing into the ocean on the line of the coast actually discovered*'.

Reynolds has also been inconsistent in his analyses of the legal doctrine that Australian colonies were colonies of settlement. He wrote of New South Wales that '*the legal situation was clear from the beginning*': namely that it was '*a colony of settlement, not conquest. The common law arrived with the First Fleet; the Aborigines became instant subjects of the King, amenable to, and in theory protected by, the law.*'⁵² He conceded that Blackstone, who was regarded as authoritative on the matter in subsequent cases in several countries with legal systems based on English common law, '*drew a clear distinction between colonies won by conquest or treaty and those where "lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother countries"*'. In colonies of settlement '*English law was "immediately there in force" on the assumption that no prior legal code and no land tenure had ever existed*': in other words it was *terra nullius*. At other times Reynolds made the very different claim that the phrase '*desert and uncultivated*' is '*ambiguous*', since it

⁵⁰ Reynolds, H. (1987b). *The Law of the Land*. Penguin Books Australia. p 2.

⁵¹ Reynolds, 1987b, pp. 12-3.

⁵² Reynolds, 1987a, p. 4.

might or might not mean ‘*uninhabited*’, and suggested that Blackstone really meant uninhabited, or else would have used the phrase ‘*desert or uncultivated*’, not ‘*desert and uncultivated*’.⁵³ Mr Justice Blackburn’s opinion in 1971 was that the words ‘desert and uncultivated’ used by Blackstone ‘*have always been taken to include territory in which live uncivilized inhabitants in a primitive state of society*’, not simply or mainly territory which is unoccupied.⁵⁴ Blackburn held that ‘*whether a colony comes into one category or the other {conquered or settled} is a matter of law*’, not of subsequent historical inquiry, and that ‘*there is no doubt that Australia came into the category of a settled or occupied colony*’. Alan Frost accurately restated Blackstone’s position as follows:⁵⁵

If, then, the inhabitants of a region over which a European state was interested in acquiring sovereignty had advanced beyond the state of nature and mixed their labour with the land so as to have enclosed and cultivated it, made roads and raised houses and towns; if they had formed themselves into a society exhibiting the use of reason in systems of customs, religion and commerce; if they had developed a code of laws and a government to administer this code—that is, if they had established themselves into a polity, then they had established sovereignty over the region, and the would-be possessor had either to persuade them to accept overlordship, or to lease a portion. However, if the indigenous had advanced beyond the state of nature only so far as to have developed language and the community of the family, but no further; if they had not yet mixed their labour with the earth in any permanent way; or if the region were literally uninhabited, then Europeans considered it to be *terra nullius*, in which they might gain permanent title by first discovery and effective occupation.

There was and should be now little confusion on the matter. The words of the *Privy Council in Vajesingji v Secretary of State for India* in 1924 are among many other pronouncements that defined the concept of *terra nullius* very clearly: ‘*territory hitherto not occupied by a recognised ruler*’.⁵⁶ New Holland was considered a paradigm case of *terra nullius* because the British could identify no territorial units with a recognisable form of government, not because of a mistaken belief that it had no Aboriginal inhabitants. It is the High Court which is mistaken in believing that British explorers, Whitehall officials or Australian colonists held the mistaken belief that Australia was uninhabited or nearly so. It owes its mistake in large measure to Henry Reynolds.

A similar situation exists with the concepts of ‘waste lands’ and ‘waste lands of the Crown’. Because its population was less sparse than had been supposed in 1788 and hunting and food-

⁵³ Reynolds, 1987b, p. 33.

⁵⁴ *Milirrpum v. Nabalco Pty.Ltd. (Gove Land Rights Case)*: Judgment of the Honourable Mr. Justice Blackburn (1971). p. 201. (subsequently cited as Blackburn, 1971).

⁵⁵ Frost, A. (1981). ‘New South Wales as *Terra Nullius*: The British Denial of Aboriginal Land Rights’ in *Historical Studies*, vol. 19. p. 515.

⁵⁶ (1924) LR 51 Ind. App. at 360, cited by Dawson J. in *107 A.L.R. 1*, p. 94.

gathering of a systematic character took place, Reynolds denounced the colonists for mistakenly believing Australia was waste land. George Chalmers, Blackstones's distinguished Scottish contemporary, explained in 1780 when considering Britain's dealing with '*the aboriginal tribes of America*': '*their country was only considered as waste, because it was uncultivated, and therefore open to the occupancy and use of other nations*'.⁵⁷ Chalmers was not deluded that no such tribes existed. Blackburn J drew attention both to the primary dictionary meaning of '*uninhabited (or sparsely inhabited) country*' and its accepted legal meaning of '*lands of the Crown which have not been alienated*'. Blackburn added that '*waste lands*' '*appears to have been understood in the courts of law long before Phillip's time down to 1842 to designate colonial lands not appropriated under any title from the Crown*'.

Reynolds claimed that '*over much of the continent the Aborigines clearly had possession of a character of which the land was capable*',⁵⁸ but, except in the least fertile areas, this is not true and at best confuses actual and potential use. Hardly any land in continental Australia before 1788 was used for purposes of agriculture, horticulture or animal husbandry as these were, and are now, understood, so that all land subsequently put to these uses rebuts his claim that Aborigines already used them in those ways of which they were capable. Reynolds countered the argument that Aborigines possessed no land rights because they did not till or enclose land by noting that much land recognised to have full legal title in Britain was not tilled or enclosed, but it was clear to all in Britain what the boundaries were between the enclosed and the open or the sown and the wild, which land was under which type of use and, even more to the point, who owned it and under what title, whereas it was very unclear to the best-intentioned settler or colonial official which land in Australia was held by whom and for what purposes. Although one cannot conclude that negotiations more satisfactory than those of Batman in Port Phillip would have proved possible if Governor Phillip or his successors had sought a formal treaty with Aborigines, Frost was entirely correct when he observed:

Had Pitt and his advisers known that Aborigines were not truly nomadic, that they had indeed mixed their labour with the land, and that they lived within a complex social, political and religious framework—that is, had the British *not* seen New South Wales to be *terra nullius*, then they *would* have negotiated for the right to settle the Botany Bay area.

Reynolds placed great emphasis on the distinction between '*the actual ownership of every inch of land*' and general suzerainty. In his 1971 judgment Blackburn drew attention to this argument as expressly advanced by counsel in *Attorney-General v. Brown* (1847) and then expressly rejected by Chief Justice Stephen, with a full statement of the legal and historical reasons for

⁵⁷ Cited in Blackburn, 1971, p. 202.

⁵⁸ Reynolds, 1987b, p. 22.

doing so. Other cases rejecting this distinction include *R. v Steel* (1834), *Hatfield v. Alford* (1846) and *Doe d. Wilson v. Terry* (1849). These were held binding in twentieth century cases such as *Council of the Municipality of Randwick v. Rutledge* (1959). All these judgments affirmed that the Crown became the owner in demesne of all the land of New South Wales immediately the settlement was established. Blackburn's judgment simply followed these precedents by declaring that '*the Crown being the absolute owner in demesne of all unalienated lands, there is no room for any doctrine of communal native title.*'⁵⁹ The consistent legal doctrine from 1788 until the Mabo case was, indeed, that the original British claim of sovereignty extinguished all prior rights to property and that after 1788 '*all titles, rights, and interests whatever in land which existed*' were the '*direct consequence of some grant from the Crown*'. In consequence Blackburn judged that

as there appeared to be no legislation which specifically created native title none existed and did not and never had formed part of the law of any part of Australia.

Native title in North America and New Zealand

Reynolds claimed that pre-Mabo Australian cases differed from opinions offered in other legal systems based on English common law, especially those of Chief Justice Marshall in the United States Supreme Court. Reynolds favoured the non-Australian authorities and tended to dismiss the Australian judges as merely responding to political pressure from squatters and others who gained from illegal expropriation of Aborigines. Reynolds claimed that Marshall, while accepting that the sovereignty exercised by the British Crown and subsequently the government of the United States excluded all other European powers and exercised sole right of acquiring land from the natives, denied that the Indians lost their right of occupancy of the land. Blackburn looked closely at the dicta of Marshall in *Johnson and Graham's Lessee v. M'Intosh* (1823) that:

the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable degree, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy ... Thus has our whole country been granted by the Crown while in the occupation of the Indians. These grants purport to convey the soil as well as the right

⁵⁹ Blackburn, 1971, p. 247.

of dominion to the grantees ... It has never been objected to this, or to any other similar grant, that the title as well as the possession was in the Indians when it was made, and that it passed nothing on that account ... All our institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute right of the Crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians.⁶⁰

On the basis of such passages Blackburn held that Marshall

did not affirm the principle that the Indian “right of occupancy” was an interest which could be set up against the sovereign, in the same manner as an interest arising under the ordinary law of real property.

After considering further cases presented by Woodward, counsel for the plaintiffs in Gove, Blackburn concluded that

none of these cases is authority for the proposition that the mere fact of communal claiming under him

and that

native occupancy never achieves the status of being unequivocally defined as a proprietary interest in relation to proprietary interests derived from the sovereign.⁶¹

Reynolds’ interpretation of Marshall is highly suspect.

Reynolds also cited the judgment of Mr Justice Chapman in New Zealand in 1847 in *Symonds v. the Crown*. Chapman declared that native title

is entitled to be respected, that it cannot be extinguished ... otherwise than by the free consent of the native occupiers. But for their protection and for the sake of humanity the Government is bound to maintain and the Courts to assert the Queen’s exclusive right to extinguish it.

The Treaty of Waitangi guaranteed to the Maori chiefs of the North Island ‘*the full exclusive and undisturbed possession of their lands and estates forests fisheries and other properties*’ and also recognized the natives of New Zealand as enjoying ‘*all the rights and privileges of British subjects*’. The New Zealand *Land Claims Ordinance* of 1841 used a similar formulation to several in the Australian colonies

⁶⁰ *op. cit.*, pp, 212-3.

⁶¹ *op. cit.*, p. 217.

that all unappropriated lands within the Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony—are and remain Crown or domain lands of Her Majesty.

Blackburn agreed that *'this was the first of many legislative provisions in New Zealand which expressly recognized Maori occupancy of tribal lands'*, but he also noted that the Judicial Committee of the Privy Council in *Nireaha Tamaki v. Baker* (1901), whilst taking that Ordinance to be *'a legislative recognition of the rights confirmed and guaranteed by the Treaty of Waitangi'*, nevertheless found that it *'would not of itself be sufficient to create a right in the native occupiers cognizable in a court of law'*. The implications for native title in Australia are thus much less compelling than Reynolds suggested. To the extent that the Treaty of Waitangi is relied upon, there is the obvious rejoinder that it was never found possible in Australia, even by those who most sincerely advocated such a policy, to make a comparable treaty with any Australian Aboriginal group. In consequence, as Blackburn found, *'the whole question of native land title in the Dominion of New Zealand'* was placed on *'a footing quite different from that which exists in Australia.'*

Native title in Australia

Learned anthropologists still disagree about the basic pattern of traditional Aboriginal practice. The view of Radcliffe-Brown⁶² that Aborigines usually had a *'very rigid system'* characterized by a *'small group of persons owning a certain area of territory, the boundaries of which are known, and possessing in common proprietary rights over the land and its products'* has since been supported by Birdsell⁶³ and Tindale,⁶⁴ who held that groups commonly occupied a *'discrete territory with finite limits beyond which members have a sense of trespass'*. On the other hand Sutton shares Lauriston Sharp's scepticism about the existence of such clear-cut boundaries. Sharp⁶⁵ found that Yir-Yorunt clans have *'multiple countries which are not contiguous'* and exercise the *'right of exclusion'* only in *'exceptional cases in which there is an actual or pretended drain on the resources of the land'*. Sharp claimed these clans

may forbid a man crossing clan territory to get from one of his own clan territories to another, but no example of such extreme action could be cited. People gather and hunt, ordinarily, in whatever country they will. Thus there is practically a standing permission which opens a clan's country to all, but this permission may be withdrawn by the clan for those who are *persona non grata*

⁶² Radcliffe-Brown, A.B (1913). 'Three Tribes of Western Australia' in *Journal of Royal Anthropological Institute*, 43, p. 137; and (1930). 'The Social Organisation of Australian Tribes' in *Oceania*, 1, p. 35.

⁶³ Birdsell, J.B. (1970). 'Local Group composition Among the Australian Aborigines' in *Current Anthropology*, 11 (2).

⁶⁴ Tindale, N.B (1974). *Aboriginal Tribes of Australia*. Canberra: ANU Press, p. 115

⁶⁵ Sharp, Lauriston (1934). 'Ritual Life and Economics of the Yir-Yomont of Cape York Peninsula' in *Oceania*, 5, p. 23.

Sutton⁶⁶ claimed that ‘descent groups owned constellations of sacred sites rather than neat parcels of land’ and that

while most of the sites were clustered together a significant number were separated by sites belonging to other descent groups, while some sites were owned by more than one descent group

Given that correct interpretation remains difficult even now for specialists, it is unfair of Reynolds to condemn British explorers and colonists over a century ago for failing to comprehend customs relating to land usage in traditional Aboriginal society. Few peoples can ever have been more unlike each other than the British and the Aboriginal peoples of Australia. One big difference was that, even more than any other European people, the British regarded land as an alienable commodity and were able to make multiple swift changes in where and how they lived.⁶⁷ A further obstacle to understanding was the unwillingness of many Aboriginal groups to divulge information about their beliefs and customs, including those concerning land.

Kenneth Maddock has explored the failure of the Aboriginal Land Rights (Northern Territory) Act 1976, the Aboriginal Sacred Sites Ordinance 1978, the Aboriginal and Torres Strait Islander Heritage Act 1984 and subsequent legislation to define at all clearly what is meant by either sacred or site when reference is made to ‘sacred sites’.⁶⁸ Maddock identified as a basic problem, as did Justice Woodward in his 1974 Report, the reluctance of Aborigines to ‘disclose the whereabouts of sacred sites to strangers’. This reluctance may apply to extensive territories. The late Professor Berndt, on whom Woodward placed great reliance, oscillated between a restricted definition of sacred sites as ‘secret-sacred’ places believed to be dangerous and only to be visited by fully initiated Aborigines and an extended one of land that was shaped by spirit beings. The extended one readily covers the whole of the continent. The political strategy favoured by Land Rights movements seems to be to present as extended a definition as courts or governments will accept at any given moment and, if it is accepted, to use it subsequently as a basis for further expansion.

Reynolds conceded that the Australian situation was ‘less clear-cut’ than that in North America or New Zealand, especially since there were no treaties with Aborigines. Indeed, his own judgments on whether Aboriginal native title to land was recognised in Australian law have been far from clear-cut. He has ardently argued in favour of two propositions, each of which is highly dubious in its own right and which are utterly incompatible with each other. The first proposition is that British and Australians, judges, lawyers, politicians and colonists, were all grievously at

⁶⁶ Cited in Reynolds, 1981, p. 63.

⁶⁷ See McFarland, Alan. (1978). *The Origins of English Individualism*. London: Blackwell.

⁶⁸ Maddock, K. (1992) ‘Sanctity in Aboriginal Landscape: Problems of Ascertainment and Definition in Australia’ in Reynolds and Nile, pp. 111-122.

fault because they refused to recognise Aboriginal communal native title or any comparable conception of land rights. The second proposition is that some form or other of Aboriginal communal native title was generally accepted by these same judges, lawyers, politicians and colonists, and was mainstream opinion. Examples of the first line of argument include:⁶⁹

Despite all the evidence to the contrary the law continued to insist that Australia was uninhabited, that no-one was in possession. Various jurists described the country as being “waste and uninhabited”, “waste and unoccupied”, “desert and uninhabited”, “unpeopled”. This assessment was given even greater status by the Privy Council in a case in 1889 when it determined that at the time of settlement Australia was “practically unoccupied without settled inhabitants”.

The official view is clear. The British claimed not only the sovereignty over New South Wales—then comprising the whole eastern half of Australia—but also the ownership of all the million and a half square miles contained therein.

Mr Justice Isaacs ... declared: ‘So we start with the unquestionable position that, when Governor Phillip received his first Commission from George III on 12th October 1786 the whole of the lands of Australia were already in law the property of the King of England’.

[Vattel] argued in several passages, quoted many times in two hundred years of Australian settlement, that given the Divine injunction to subdue the earth the Indians should not expect to remain forever in exclusive possession of the whole of North America.

The commonly accepted view has always been that the Aborigines had no land rights because they were not farmers, did not enclose the land and did not till the soil.

It was easier and much more advantageous to argue that the Aborigines were living in a state of primaevial simplicity where the soil and pasture of the earth “remained still common as before, and open to every occupant”. Blackstone developed this idea in a passage which echoed through colonial debates about Aboriginal land rights for half a century and more.

the Act of the British Parliament in 1834 establishing South Australia gave no recognition to Aboriginal land rights.

further research may eventually turn up a relevant case of two, but it is reasonable to assume that no colonial court ever defended the Aboriginal right of occupancy.

little attention was given to Aboriginal interests in the fierce debates about law and tenure.

the claim of the Aborigine to a reasonable share in the soil of their fatherland has not, I regret to say, been recognized in any of the discussions which for so great a length

⁶⁹ Reynolds, 1987a, pp. 144, 156; Reynolds, 1987b, pp. 3, 7, 8, 17, 19, 27; Reynolds, 1992, pp. 8, 9.

of time have agitated the public mind on the question of the rights of the Squatters to the occupancy of the lands of the Crown (Protector Robinson).

Reynolds advanced versions of the second contradictory proposition just as vehemently, often in the same works. He asserted in 1987 that the *'mainstream view has been that native title arose from the incontrovertible fact of occupation'* and that native title *'was not extinguished because it was neglected or ignored'*, but *'required specific and precise legislation'* to extinguish it.⁷⁰ By 1993 he had become confident that

it is beyond doubt, then, that the doctrine of native title was well known and understood in leading legal and political circles in the 1830s and 1840s. Moreover, it was "fully admitted" to be part of the colonial common law which applied throughout the Empire.⁷¹

By 1993 it had all become very simple indeed: *'Australia started with the land owned by the Aborigines under English common law'*.⁷² Apparently neither he nor members of the High Court who rely upon his testimony noticed that there might be even the slightest discrepancy between the two sets of assertions. Furthermore, Blackstone's distinction between settled and conquered colonies might never have been made!

Reynolds' own sources make his second proposition manifestly untrue. There is nothing in his work or in the judgments made in Mabo by the majority of the High Court to challenge the historical truth of the minority judgment made by Dawson J, who noted *inter alia*⁷³

the laws which were passed in New South Wales make it plain that, from the inception of the colony, the Crown treated all land in the colony as unoccupied and afforded no recognition to any form of native interest in the land. It simply treated the land as its own to dispose of without regard sovereignty. What was done was quite inconsistent with any recognition, by acquiescence or otherwise, of native title. Indeed, it is apparent that those in authority at the time did not consider that any recognisable form of native title existed.

none of the measures taken for the welfare of the Aboriginal inhabitants involved the acceptance of any native rights over the land.

the Crown regarded unalienated waste land as entirely its own to deal with as it pleased.

⁷⁰ Reynolds, 1987a, pp. 158-9.

⁷¹ Reynolds, H. (1993b). 'Native Title and Pastoral Leases' in A. Stephenson and S. Ratnapala (eds). *Mabo: A Judicial Revolution*. St. Lucia: University of Queensland Press, p. 120.

⁷² Reynolds, H. (1993c). 'Mabo: questions and answers' in *Environment* 15 (1), p. 9.

⁷³ A.L.R. 1 (1992), pp. 106-7, 108, 110

A similar view was taken in the Gove Lands Case by Blackburn J whose judgment was described by Dawson J in *Mabo* as based on ‘a full and scholarly examination’⁷⁴, and in every other case before 1992 before an Australian court.

Dawson J noted⁷⁵ that ‘the policy which lay behind the legal regime’ so much detested by the other members of the High Court’ was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law’. His Honour argued that ‘it requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognise its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided’. The majority of the High Court decided that historical revision and policy-making were within its competence, irrespective of whether the legal foundations of Australia were impugned or not.

Reynolds claims that ‘leading English lawyers of the 1830s’, such as James Stephen, Pemberton, Burge, Follet and Lushington, were ‘fully aware of native title and believed that it applied with equal force in Australia as in the other colonies of settlement’. This is, of course, a question-begging formulation, since these jurists followed Blackstone in holding that all colonies of settlement by definition adopted the common law, in so far as it could be transmitted, on coming under the sovereignty of the Crown. Reynolds argues that these British lawyers held that Aborigines ‘retained their rights based on prior occupation until the Crown exerted its exclusive rights of pre-emption’, but this again is question-begging, since the central question concerns whether Aboriginal rights were held to be legal or moral and what they might comprise. Reynolds claims that communal native title was accepted in London at the Colonial Office by the responsible minister, Lord Glenelg, and the Permanent Secretary, James Stephen, as ‘an authoritative assessment of the law as it then stood’. Reynolds cites Stephen in several books and in the index of *The Law of the Land* a page reference for ‘supports land rights’ appears against Stephen’s name. Yet Reynolds omits any reference to one of Stephen’s most pertinent observations: that Great Britain acquired New South Wales ‘neither by conquest nor cession, but by the mere occupation of a desert or uninhabited land.’⁷⁶

In some areas traditional Aboriginal life and land usage were completely disrupted by the incursion of the British, but in others there was considerable continuity. Reynolds noted with approval that in New South Wales from the 1840s onwards the Imperial Government

⁷⁴ *op. cit.*, p. 105.

⁷⁵ *op. cit.*, p. 111.

⁷⁶ Stephen, J. (1822). ‘Opinion of the validity of the statute 20 Geo II c.19 in the Colony’ in *Historical Records of Australia*, 4th series, vol 1, p. 414.

determined that the Aborigines should be compensated for the loss of land by the establishment of reserves, but this in no way implied an acceptance of Aboriginal title in particular lands. The reserves allocated for some clans or tribes were on land which they and their ancestors had certainly not occupied and their allocation simply expressed, however insufficiently, a principle of benevolence, not a recognition of legal title. It seemed to Earl Grey and others praised by Reynolds for their concern for Aboriginal interests inequitable to recognise rights of groups who fortuitously had considerable continuity of occupation since this was not available to groups whose traditional lands were been alienated by the Crown or whose contact with those lands had been drastically disrupted. During the 1990s several leading Aborigines have made the point that Mabo and comparable decisions and subsequent legislation lead to very different and inequitable outcomes for groups which through historical vicissitude have either maintained or lost continuity of occupation or traditional customs. Earl Grey considered that the use of the prerogative of the Crown based on the legal doctrine of its ultimate ownership of all land was potentially more equitable to different Aboriginal interests than the hazard of *de facto* continuity. That is not to suggest, of course, that the legal powers of the Crown over the alienation and granting of land were in practice exercised equitably. Reynolds noted that the '*Colonial Office accepted that when the land was enclosed and cultivated the usage was inconsistent with a continuing Aboriginal interest*', yet this alone demonstrates that no native title existed which could resist enclosure for tillage. Nor was any compensation held to be legally due to any group which may have foraged in times past in land which was enclosed. Reynolds attacks colonial Australia both for lacking laws which gave Aborigines the sort of rights to land he considers their moral due, and for having such laws but ignoring them.

Earl Grey's belief that finance to compensate Aborigines for losses they incurred by white settlement should enjoy first priority in colonial budgets is not evidence that he believed native title was legally admissible. Reynolds noted that '*the Imperial Government was determined to assert its right to control all Crown Land*', but under common law there was no land in the colony which was not held by or of the Crown. Reynolds also noted correctly that Grey and the Colonial Office wished to protect Aboriginal interests, among other ways, by ensuring that pastoral leases did not

deprive the natives of their former right to hunt over these districts, or to wander over them in search of subsistence in the manner to which they have been accustomed, from the spontaneous produce of the soil, except over land actually cultivated or fenced in for that purpose⁷⁷

Grey acknowledged that

⁷⁷ *Historical Records of Australia*, Series 1, 225.

the very difficulty of thus locating the Aboriginal Tribes absolutely apart from the Settlers renders it more incumbent on Government to prevent them from being altogether excluded from the land under pastoral occupation

He declared that

leases granted for this purpose gave the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require within the large limits thus assigned to them, but that leases are not intended to deprive the natives of their former right to hunt over these Districts, or to wander on them

However, this declaration clearly implies that Grey did not consider that Aborigines possessed native title of a kind which could enable them to prevent settlers from grazing or planting crops on lands in which they had carried out traditional pursuits, but that serious efforts should be made to make possible shared, mutual, dual or multiple use of the land. One result of Grey's concern was the clause inserted in pastoral leases in South Australia from 1850 onwards and subsequently with very little change in the Northern Territory which reserved to Aborigines

full and free right of ingress egress and regress into upon and over the said Waste Lands of the Crown ... and in and to the Springs and surface water thereon and to make and erect such wurlies and other dwellings as the said Aboriginal Natives have been heretofore accustomed to make and erect and to take and use for food birds and animals *ferae naturae* in such manner as they would have been entitled to if this demise had not been made

In the Gove Land Rights Case the plaintiffs conceded that this clause was not a recognition of any native title, but held that at least it had the effect of preventing the lease from terminating the native title. Blackburn J found on the contrary that the clause was '*entirely consistent with the whole pattern of non-recognition of communal title by Australian law*'. Conditions had to be built into leases to embody the government's benevolent intentions towards Aborigines precisely because there was no body of communal native title which could be pleaded before any court of law.⁷⁸ Reynolds claims the restrictions the Colonial Office insisted be placed on squatters receiving pastoral leases constituted '*a reservation in the precise legal sense of retaining or holding back some right, power, or privilege. Equally, when they wrote of "rights" they referred, not to moral, but to legal rights*'. In fact the Colonial Office often referred to or implied moral as well as legal rights, but the point Reynolds refuses to understand or must reject if his case is to hold together at all, is that the legal rights the Colonial Office wished to embody in pastoral leases were the creation of statutes or the prerogative power of the Crown, not an acknowledgement of any native communal title unknown to the common law or the courts.

⁷⁸ Blackburn, 1971, pp. 260-1.

The shared land usage built into pastoral leases was, of course, often resented and sabotaged by Aborigines and by many squatters and other colonists. Legislation introduced into Western Australia late in 1993 seems very similar in spirit to Earl Grey's intentions: Aborigines would be protected in the exercise of traditional ways of life, including foraging and all religious obligations, but would have no automatic entitlement to benefit from types of land usage unknown in traditional society. Whether such a system will prove acceptable to Aborigines in the 1990s remains as yet uncertain. Reynolds argued that

had the three measures proposed by the imperial government in the 1840s—compensation, reserves, usufructuary right on Crown land—been fully implemented, the situation would have been much improved.⁷⁹

The Commissioners for South Australia tried to satisfy Aboriginal needs by ensuring that before any land was declared open for sale, notice should be given to the Protector of Aborigines, *'whose duty it will be to ascertain whether the lands thus surveyed or any portion of them, are in the occupation or enjoyment of the natives'* and that any that were should not be declared open to public sale *'unless the Natives shall surrender their right of occupation or enjoyment, by a voluntary sale made to the Colonial Commissioner'*. If no such voluntary surrender was made, the natives were to have *'full and undisturbed occupation or enjoyment of their lands'*. Reynolds noted that Gawler as Governor and Charles Sturt as Land Commissioner in South Australia tried to secure to Aborigines the *'natural indefeasible rights'* which were *'vested in them as their birthright'* by providing

an absolute right of selection prior to all Europeans who have settled in it during the last four years, of reasonable portions of the choicest land, for their especial use and benefit, out of the very extensive districts over which, from time immemorial, these Aborigines have exercised distinct, defined and absolute rights of proprietary and hereditary possession'.⁸⁰

Reynolds conceded that Gawler's scheme *'was judged to be illegal under the terms of the original South Australia Act'*, but claimed that continued recognition of native title was shown by the 1841 Resolution of the House of Commons Select Committee on South Australia which authorized the Crown to

reserve and set apart within the said Province, for the use of the Aboriginal Inhabitants thereof, any lands which it may be found necessary so to reserve and set apart for the occupation and subsistence of such Aboriginal Inhabitants'.⁸¹

⁷⁹ Reynolds, 1987b, p. 154.

⁸⁰ Reynolds, 1987a, pp. 147-8.

⁸¹ *op. cit.*, p. 148.

This last formula was circular and question-begging, since it failed to show what was held to constitute necessity. So, too, were the provision of the 1842 Australian Waste Lands Act of the Westminster Parliament allowing for the reservation or disposal of land ‘for the use and benefit of the aboriginal inhabitants of the country’ and the declaration in the South Australian Letters Patent of 1836 that no other clause should

affect or be construed to affect the rights of any aboriginal natives of the said Province to the actual occupation or enjoyment or in the Persons of their descendants of any lands therein now actually occupied or enjoyed by such Natives.

Reynolds cited evidence of the concern of colonial officials that Aborigines were being denied ‘*a reasonable share in the soil of their fatherland*’, that ‘*it would, of course, be most unjust that the Natives should be extruded in the manner described*’ and that care should be taken that Aborigines are ‘*not driven off all that country which is divided into grazing and let under the recent regulations*’. He cited, too, Lord Glenelg’s expressions of concern that the new colony of South Australia⁸²

would extend very far into the interior of New Holland, and might embrace within its range numerous Tribes of People whose proprietary title to the soil we have not the slightest ground for disputing

Yet this formulation implied that Glenelg considered there were at least some ‘*tribes of people*’ whose title might be disputed. Moreover, Glenelg conceded that the wide limits he deplored were ones ‘*which Parliament has sanctioned*’.

Reynolds cited Governor Gipps’ address to the Legislative Council of New South Wales in 1840:

uncivilized inhabitants of any country have but a qualified dominion over it, a right of occupancy only; and that, until they establish among themselves a settled form of government, and subjugate the ground to their own uses, by the cultivation of it, they cannot grant to individuals, nor of their own tribe, any portion of it, for the simple reason that they have not themselves any individual property in it ... if a settlement be made in any such country by a civilized power, the right of preemption of the soil, or in other words, the right of extinguishing the native title, is exclusively in the government of that power, and cannot be enjoyed by individuals without the consent of their government.

Yet Gipps’ concept of a ‘right of occupancy’ did not imply native land title, but relates to moral and political obligations which the Crown ought to discharge towards Aborigines. Furthermore,

⁸² *op. cit.*, p. 146

the view Reynolds attributes to Burge that the ultimate dominion of the crown was '*qualified by allowing [Aborigines] to retain, not only the rights of occupancy, but also a restricted power of alienating those parts of the territory which they occupied*' is mistaken. Aborigines were never conceded even a restricted power of alienation to the Crown, let alone to any subject. The express denial of the Aboriginal plaintiffs in the Gove Land Rights Case that native land title, as they perceived it, includes any possibility of even partial alienation of clan territory,⁸³ indicated that no leases, reserves or any other use of the power of the Crown to alienate land in part or whole could be valid evidence for the prior or continued existence of communal Aboriginal title. Reynolds himself has asserted that '*alienation of land was not only unthinkable, it was literally impossible*' in traditional society.⁸⁴

Sir Howard Douglas argued in the House of Commons in 1843 that '*it does not appear that any servant of the Crown was found openly to deny or disavow*' the policy of recognising native title to lands over which the Crown had established sovereignty. Reading that speech prompted Reynolds to conclude that ⁸⁵

the task for historians, jurists and politicians, then, is not to prove that native title existed in Australia; rather it is to show that it was ever extinguished.

Yet it is clear that officials such as Stephen and politicians such as Douglas and Earl Grey sympathetic to the plight of Aborigines, confronted as they were by white tillage and pastoral squatting and by the entire paraphernalia of a new, different and alien society, fully understood that the basic legal doctrines of land tenure were fatal to any attempt on their part to press formally for recognition of communal native title. That is why they concentrated their efforts on seeking to ensure that arrangements made by the Crown in the exercise of its legal power over all land titles were as solicitous as possible of Aboriginal interests. They neither denied nor affirmed native land title. The Society of Friends, the Aborigines Protection Society and many other branches of evangelical and humanitarian movements based on Exeter Hall, for whom T.F. Buxton was a leading spokesman, advanced similar concerns, but they were aware that there was no communal native title which could be called upon in the courts to ensure provision for Aborigines. Reynolds cites Buxton in 1837 as having '*clearly stated*' the '*principles of native title*'.⁸⁶ Buxton wrote: 'It might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil', but he added: '*a plain and sacred right, however, which seems not to have been understood*'. Buxton's complaint was that the law did not recognise what he and his friends considered a clear moral right and obligation.

⁸³ Blackburn, 1971, p. 272.

⁸⁴ Reynolds, 1981, p. 53.

⁸⁵ Reynolds, 1987a, p. 154.

⁸⁶ Reynolds, 1993, p. 121.

Reynolds concedes that Aboriginal native title was neglected and ignored in New South Wales and Tasmania in the early decades of settlement and in all the Australian colonies from the 1850s until 1971. Indeed, he attacked the colonial governments as not only mistaken in their policies but *ultra vires* in disregarding such legislation as the 1855 *Imperial Repeal of Colonial Waste Lands Acts*. He makes the granting of internal self-government to the Australian colonies seem a grave dereliction of duty by the United Kingdom. He asserts, however, that Aboriginal native title existed before 1788, that only express legislation could extinguish it, and that for most of the land of Australia such express legislation has never been enacted.⁸⁷ Reynolds considers Western Australia in 1850 to have been the most convincing demonstration of full legal acceptance of Aboriginal native title

we can trace with certainty the evolution of that policy from the ministerial minute scribbled on a despatch in May to the gazetting of the regulations in Perth at the end of the year. We could not wish for a more complete endorsement of the policy of protecting Aboriginal occupancy rights on all land leased for pastoral purposes anywhere in the Australian colonies.⁸⁸

One must agree that there is no better evidence for Reynolds' case than this. Yet the Western Australia material made no reference to Aboriginal communal land title enforceable in the courts and relied instead on *ad hoc* measures to protect Aborigines on leases to which Aborigines would never have consented had they possessed the legal rights Reynolds attributes to them. Earl Grey and the British and Western Australian administrations were agreed, if on nothing else, that no such native title existed.

Despite all his efforts to inflate the legal implications for land rights of the struggles of humanitarians to protect basic Aboriginal interests, Reynolds does not suggest that their efforts had much effect on the law. He argues that in the 1840s '*Colonial Office officials were clear about what they wanted to achieve*', namely, '*the reservation in Leases of Pastoral Land of the rights of the Natives*'.⁸⁹ He thus seems to concede that Aboriginal native title had not been accepted practice or legal doctrine before the 1840s, since there would then have been no need to try to introduce it during the 1840s. Furthermore, he complains frequently and at length that it was not accepted after the 1840s. Since Aboriginal native title did not exist before the 1840s or after the 1840s, where did it exist during the 1840s? The absence of legislation establishing or recognising communal native title forces Reynolds to claim that it existed '*less in the Order-in-Council, which was a public document published in the New South Wales Government Gazette, and more in the dispatch [from the Colonial Office] which was only for official eyes*' and in the

⁸⁷ Reynolds, H. (1992). 'Mabo and Pastoral Leases' in *Aboriginal Law Bulletin*, 2, 59, December.

⁸⁸ Reynolds, 1992, pp. 8, 9.

⁸⁹ Reynolds, 1993b, p. 125.

correspondence of Earl Grey and others.⁹⁰ Yet it is a well-known principle of law that preparatory papers are inadmissible on the question of the interpretation of a statute. In any case the preparatory papers cited do not substantiate Reynolds' contentions. It is on this fragile basis that Noel Pearson believes that Reynolds has demonstrated '*that native title was recognised by the Imperial government in the nineteenth century and respect for this title was supposed to govern colonial "settlement" in Australia*'. This is the level of evidence which the High Court of Australia apparently found sufficiently convincing to justify overturning a '*basis of the real property law of this country for more than a hundred and fifty years*'.

Reynolds and Great Britain

In 1987 Reynolds denounced the 1889 *Cooper v. Stuart* decision of the Judicial Committee of the Privy Council that whether a colony had earlier come under the category of conquered or settled was a matter of law, not of subsequent historical enquiry and that Australia had always been classified as a settled or occupied colony. He was indignant that the judgment of '*an English law lord who knew little about Australia and Aborigines*' was still '*binding on Australian courts as late as the 1970s*'⁹¹. Yet, as noted above, he has often cited at length English authorities much earlier than 1889 to support his own contentions. He depends mainly on the British humanitarian movement, Colonial Office officials and Westminster Parliamentarians to support his contention that Aboriginal native title always formed part of the Australian legal system. He has acknowledged that the expressed intentions of Imperial Governments were invariably benevolent and accepts the sincerity of Governor Darling's Instructions requiring him to '*by all lawful means prevent and restrain all violence and injustice, which may in any manner be practised or attempted against them*' and of the words of the 1837 Parliamentary Select Committee on Aborigines:

He who has made Great Britain what she is, will inquire at our hands how we have employed the influence He has lent to us in our dealings with the untutored and defenceless savage; whether it has been engaged in seizing their lands, warring upon their people, and transplanting unknown disease, and deeper degradation, through the remote regions of the earth; or whether we have, as far as we have been able, informed their ignorance, and invited and afforded them the opportunity of becoming partakers of that civilization, that innocent commerce, that knowledge and that faith with which it has pleased a gracious Providence to bless our own country.

Reynolds has argued that Aborigines would have enjoyed much fuller legal rights and practical advantages if the policies of '*imperial reformers*' in London had been adopted rather than those of the settler governments. He has complained that British governments did not interfere more often and more decisively to veto Aboriginal land policies of Australian colonial governments

⁹⁰ *op. cit.*, p. 127.

⁹¹ Reynolds, 1987b, p.3.

after the 1850s. He has argued that '*the Imperial motherland which essentially gave to the colonies power over land and affairs said to the Australian colonies at the time of the transfer of power: in taking the land off these people you have taken on a sacred trust of great proportions to look after, be responsible and spend money in providing education and health*'.⁹² Australian governments in general have been willing to spend generously for these purposes. He added that '*according to the British authorities which we all revere so much* [a satirical touch given the audience he was addressing], *Aboriginal and European interests run in parallel over the great rangelands of Australia*'. The British authorities certainly hoped that the interests of the Aborigines and the new Australians could be reconciled, but this did not imply that a form of communal native title was accepted by the Australian courts.

Reynolds argued that with the grant of internal self-government by the Crown the colonies '*only acquired a qualified right to dispose of land*'. This is true in the sense that the colonial governments were bound by the general rule of law, existing legal contracts and agreements entered into by the Crown. There remained, too, the power of the Crown acting through the Westminster Government to disallow colonial legislation on land as on other matters. Nonetheless the rights and powers over land of the colonial governments were extensive and energetically put to use. Reynolds is right in believing that British governments continued to consider that the '*honour of the Crown*' would be involved if successor colonial governments failed to carry out earlier pledges made earlier, but wrong in supposing that Westminster could act effectively to '*protect customary land rights*'. He is wrong on three counts. Firstly, there did not exist in law any communal native title to protect. Secondly, although Earl Grey and other British ministers drafted shared land leases to enable Aborigines to pursue traditional hunting, gathering and ceremonial activities on land given over to pasture, it was by the 1850s difficult enough from Adelaide, Sydney or Brisbane to compel settlers or Aborigines to abide by such conditions and impossible from Westminster. The Aboriginal violence so carefully depicted by Reynolds himself was just as destructive of the intentions of land-sharing leases as were squatter violations of their terms. Thirdly there would have been powerful colonial resentment after the 1850s against imperial interference in internal matters. The most radical policy in colonial politics, opening up the country to selection, was far more inimical to traditional Aboriginal land usage than was depasturing sheep by squatters. It is an irony that the New Left as represented by Henry Reynolds is so antagonistic to the land policies most dear to late nineteenth century Australian radicals and to Old Left historians such as Manning Clark, Russel Ward, Ian Turner and Brian Fitzpatrick!

Reynolds argued that

⁹² Reynolds, 1993c, p. 11.

it seems certain, then, that the British *Repeal of Colonial Waste Lands Act* of 1855 protected Aboriginal land rights. Being an Imperial statute with specific reference to the Australian colonies it had paramount force throughout the country.⁹³

This is not only not certain but not the case at all. The only conceivable situation in which Westminster or the Colonial Office might have acted politically would have been a formal repudiation by a colonial government of the duties of benevolence, in particular the duty of trying to ensure that the spirit and letter of pastoral leases were carried out, but no colonial government admitted to be doing other than implementing the law, law which did not include native title. The judiciary, as distinct from the executive government, of the United Kingdom retained some influence on Australian internal affairs through the Judicial Committee of the Privy Council, but only on appeal from the colonial courts. Yet Reynolds' response to occasions, such as that in 1889, when the Judicial Committee did sit in judgment on such matters was to condemn it for meddling.

Reynolds' ideology

In his historical studies Reynolds may have encountered the career of John Morton, Bishop of Ely, Archbishop of Canterbury and finally a Cardinal, as well as Chancellor and financial adviser of Henry VII, the first Tudor king. Francis Bacon recounted the origins of 'Morton's fork'. When entertained sumptuously by a nobleman, Henry would suggest before departing that his host's extravagance showed he must be wealthier than the king himself and would be required therefore to pay a large sum of money to help meet the costs of governing the realm. When Henry's entertainment was niggardly he would suggest that such miserly ways also revealed the subject must be wealthier than the monarch and should therefore contribute an equal sum.

Many of the arguments now advanced by those who claim to speak on behalf of Aborigines are of a Morton's fork, or 'heads you lose and tails I win' character. If Aborigines were not very belligerent in resisting the colonists, we should praise them for their pacific character, if they were very bellicose for their willingness to fight in defence of their own interests. If some nineteenth century legal authorities can be shown to have recognised Aboriginal land rights, that is evidence that these always existed and were never expunged; if no such recognition can be found, that shows that these supposed authorities were ignorant racists. Whenever Aborigines adopted or adapted white ways, that is evidence of their capacity for change; failure or refusal to adapt is evidence that traditional Aboriginal ways were superior. If Aborigines were left by colonists and their governments to their own devices, that is evidence of inequality and neglect of human rights; attempts to initiate Aborigines into white ways are evidence of contempt for traditional culture and perhaps even of cultural genocide. Aborigines must be given autonomy

⁹³ Reynolds, 1992, p. 10.

and self-government; they must also have medical, educational, scientific and legal support only available from non-Aboriginal Australians and must not suffer any unfortunate consequences from bad decisions made autonomously. Much of Reynolds' work has unfortunately been marred by use of Morton's Fork.

Reynolds could be described as a transferred nationalist in the sense used by George Orwell. By nationalism Orwell meant a powerful ideological attachment, irrespective of whether it was to a nation state, ethnic group, party, church, or any other cause. By a transferred nationalism he meant attachment to a unit or cause sharply opposed to the one in which the believer was born and bred. Orwell observed that 'nationalist feeling can be purely negative'. Many western intellectuals hostile to 'capitalism', 'bourgeois society' or the 'class system' once found an enemy of their enemy, and thus apparently a friend, in the Soviet Union and then China. The general discrediting of Marxism and communism led to a search for substitutes such as 'The Peace Movement', 'The Environment', 'The Third World', 'The South' or 'The Indigenous Peoples'. Orwell noted that with nationalism in this wider sense *'it is not even strictly necessary that the units in which it deals should actually exist'*.⁹⁴ Orwell included the 'White Race' among *'objects of passionate nationalistic feeling'* whose *'existence can be seriously questioned'*. Reynolds seems to be attached to an abstracted Aboriginality defined by its differences from 'whites'.

Reynolds does not purport to be above political battles. He is proud that his *The Other Side of the Frontier* 'was not conceived, researched or written in a mood of detached scholarship' but was *'inescapably political, dealing as it must with issues that have aroused deep passions'*.⁹⁵ He *'challenges the legal and moral assumptions underlying the European occupation of Australia'* ⁹⁶—he often describes white Australians as 'Europeans' rather than 'Australians'. He was glad in 1972 that Australia was feeling *'the swell of those anti-western currents which have followed the end of European predominance'*.⁹⁷ Reynolds threatened white Australians that, unless Aborigines are satisfied in their demands, *'they will seek sustenance in the anti-colonial, anti-European history of the Third World'*. A year of sustenance by a Third World government might concentrate a few thoughts. He cited with approval an Aboriginal submission to the United Nations Commission on Human Rights which denounced *'the original primary genocidal acts'* allegedly perpetrated upon them. He believes that in the *'dark underside of the Australian mind'* there is *'violence, the arrogant assertion of superiority, the ruthless, single-minded and often amoral pursuit of material progress.'* ⁹⁸ Despite his admission that he missed

⁹⁴ Orwell, G. (1968). 'Notes on Nationalism' in S. Orwell and I. Angus (eds). *The Collected Essays, Journalism and Letters of George Orwell*. London: Secker and Warburg, pp. 362-3.

⁹⁵ Reynolds, 1982, p. 1.

⁹⁶ Reynolds, 1987b, Frontispiece.

⁹⁷ Reynolds, 1972, x-xi.

⁹⁸ *op. cit.* xii.

for several years the significance of nineteenth century material he later found essential, Reynolds seems to find it hard to believe that those who disagree with him can be both honest and reasonable. He dismissed dissenters as purveyors of ‘*the self-serving, unscrupulous propaganda of mining and rural interests.*’⁹⁹

Even though he once included Chinese, Kanakas and collaborating Aborigines in the total of whites killed in warfare by Aborigines, Reynolds later limited ‘*the moral responsibility for the dispossession*’ to ‘all generations of white Australians’.¹⁰⁰ Why do all non-white immigrants bear less of whatever guilt and moral responsibility has to be borne than do all white immigrants, even those who arrived after them? Reynolds has asserted that their attitude to Aboriginal historical experience is ‘*the litmus test which indicates if white Australians have become assimilated to their continent or are still colonists at heart*’, and that Australians must refuse to ‘*stand in the eyes of the world as a people still chained intellectually and emotionally to our C19th Anglo-Saxon origins, ever the transplanted Britishers*’. But he does not specify what in traditional Aboriginal economics, politics, morals or aesthetics should be imitated, or which elements of the British or wider western heritage should be jettisoned.¹⁰¹ Reynolds has disclaimed ‘*any guilt about black Australia*’ and expressed concern about the ‘*strong tendency among white Australians towards inverted racism*’,¹⁰² but he has become a leading apostle of white guilt and finds it difficult to avoid that inversion. He stated correctly that ‘*Aborigines have seen so much of the dark underside of white Australia*’, but did not add that they also saw much that was just and decent, or that much in Aboriginal ways, traditional or contemporary, is unattractive, too.

Reynolds seriously underestimates the massive problems faced by the colonists in establishing a *modus vivendi* with Aborigines. Forgetful of the massive evidence of Aboriginal violence he compiled, he contrasts Aboriginal willingness to share with the ‘morally obnoxious’ selfishness of colonists in not sharing their flocks and other goods. He stated bluntly:

The settlers were transplanting a policy of possessive individualism, hierarchy and inequality. Aboriginal society was reciprocal and materially egalitarian, although there were important political and religious inequalities based on age and sex. Two such diametrically opposed societies could not merge without conflict. One or the other had to prevail.¹⁰³

Reynolds appears to believe that the wrong one prevailed.

⁹⁹ Reynolds, 1987b, p. 175.

¹⁰⁰ Reynolds, 1987a, p. 179.

¹⁰¹ Reynolds, 1981, pp. 163-6

¹⁰² Felton and Reynolds, 1991, p. 33.

¹⁰³ Reynolds, 1982, pp. 69-70.

Reynolds may yet live to regret the consequences of his work and prove a Girondin or Menshevik. For all the criticisms I have offered of his work I acknowledge that he has made important positive contributions to our understanding of past relationships between Aborigines and other Australians and it is unlikely that he could accept the demand of some Aborigines that they should 'own their own history'. Reynolds surely accepts the central principle of the open society: nothing that is human is alien to me. He wrote recently that

anthropologists introduced western ideas of the sacred into the description and analysis of Australian Aboriginal society and religion. These ideas have since spread from anthropology into legal, political and popular discourse about Aborigines, becoming firmly embedded among the indigenous peoples themselves in the process.

He added that '*sacredness can be invoked as part of a political strategy to obtain mundane advantages*'.¹⁰⁴ Such candour makes him very vulnerable to attack from the left. Reynolds has also shown concern about Aboriginal claims to '*own their own history*' and to exclude even sympathetic non-Aborigines from it. He fears that Australia may follow down the path taken by New Zealand where a friend of his '*was actually fire-bombed through a window because it was felt she shouldn't be writing Maori history*'.¹⁰⁵

However, Reynolds is blessed with a wife who will not only prevent back-sliding, but will help to force the pace. Senator Margaret Reynolds, a stalwart of the ALP Left, has been Prime Minister Keating's representative on the Council for Aboriginal Reconciliation. She was quick to condemn the guarantee given by Mr Keating and responsible federal minister Frank Walker to Marshall Perron, premier of the Northern Territory, that the McArthur Ratification Act would not be adversely affected by the Mabo Judgment. Senator Reynolds asserted that this step '*jeopardised the hard-won, patient and positive atmosphere in the Mabo negotiations ... Its timing undermines the faith we all have in the process*'.¹⁰⁶ She has also¹⁰⁷ called for self-government in areas such as the Torres Strait, Kimberley and Arnhem Land, although she is a strong opponent of the rights given the existing states in the Australian constitution.

There are even tougher radicals around than Senator Reynolds who see Mabo only as a first installment in the complete dismantlement of the first two centuries of Australian legal and constitutional development. Law lecturer Valerie Kerruish was so impressed by Reynolds' '*passionate contribution to the case for Aboriginal land rights*' that she concluded, '*If there*

¹⁰⁴ Reynolds, H. and Nile, R. (eds).(1992). 'Introduction' to *Indigenous Rights in the Pacific and North America: Race and Nation in the Late Twentieth Century*. University of London: Sir Robert Menzies Centre for Australian Studies, p. 10.

¹⁰⁵ Felton. and Reynolds, 1991, p. 34.

¹⁰⁶ Cited in Hewat, T. (1993). *Who made the Mabo mess?*. North Brighton, Vic: Wrightbooks, pp. 83-4.

¹⁰⁷ *West Australian*, 5 Oct. 1992.

were such things as unqualified goods Reynolds' work would be one'.¹⁰⁸ However, Ms Kerruish immediately qualified her praise by regretting that in his work lurked 'a suggestion that the law in general ought to be respected and that some particular institutionalisations of it are corrupt versions of an ideal common law of England or of natural law'. For emphasis she added that she takes issue with Reynolds' assumption that there is a form of the common law of England which is entitled to the respect of all', since 'the rule of law is not an unqualified good'.¹⁰⁹ If and when Ms Kerruish becomes one of those educating the judges, including the High Court, in the requirements of international and community opinion, we may look back with some regret to the golden days when the High Court was content to follow Reynolds' version of Australia's history and laws. As the ill-used Edgar declares in *King Lear*: 'The worst is not,/So long as we can say, "This is the worst"'.

Yet, although what we now face may not be the worst, it is bad enough, bad enough, I believe, to justify our spending some time on examining how the work of Henry Reynolds influenced the High Court in *Mabo* in its repudiation of the Australian past. Reynolds' opinions about Aboriginal violence and accommodation, *terra nullius*, communal native title and a host of related matters have some intrinsic interest, but their adoption by the High Court makes them a matter of national importance rather than mere interest. If the court considered Reynolds authoritative, even my brief analysis is surely sufficient to warrant some questioning of their judgment. If the judges relied mainly on scholars other than Reynolds, who were they? The High Court should share with all Australians the evidence on which it relied in framing some highly contentious historical assessments, particularly that Australia's national past is one of unutterable shame, assessments which the Court made the basis for the transformation of the land laws of the entire continent.

¹⁰⁸ Kerruish, V. (1989) 'Reynolds, Thompson and the Rule of Law: Jurisprudence and Ideology in Terra Nullius' in *Law in Context*, vol 7, p. 120.

¹⁰⁹ *op. cit.*, p. 122.