Chapter One

The Aetiology of Mabo

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Aetiology is the study of causes, especially the causes of diseases. I can only touch now on one strand in the pathogeny of the full-blown Mabo Judgment of 1992, namely the contribution made by Dr Henry Reynolds to the High Court of Australia's conscious rejection of Australia's history.
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 Justices 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? Justices 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 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' 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 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

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), Nonie 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

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 colonization 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.

a. Aboriginal bellicosity

The early British and Irish colonists of Australia 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".15 He set out to banish "legends" that Australian history was "uniquely peaceful" and Aborigines "an inimitably mild race" which abjectly acquiesced in British colonization.16 Reynolds denied that "blacks were helpless victims of white attack" or "passive objects of European brutality".17 He declared that they "did not sit around their camp fires waiting to be massacred" but that, allowing for differences in fire-power, they gave as much as they got.18

Reynolds noted that revenge killing for the death or serious injury of kin was common in traditional Aboriginal society and that "death was universally attributed to malevolent sorcery".19 When whites offended them, Aborigines had to decide whether to punish particular individuals or to hold whites collectively responsible. Reynolds drew special attention to

evidence that Aborigines intended "to attack and kill whites whenever they met any" in order to gain vengeance. He estimated that in Queensland alone Aborigines killed about 850 colonists, among whom he included Chinese, Melanesians and Aborigines co- operating 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.20 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 many Queensland towns. 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 trackers who were so often by their side."21 He 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.

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".22 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 know of Engels' work in this field.

Engels and Marx accepted the division of the human past made by the American anthropologist Lewis Henry Morgan into "three main epochs, savagery, barbarism and civilisation". Morgan separated savagery into a "lower", "middle" and "upper" stage. Although no direct evidence remained of the lower stage of savagery, postulated as a transitional stage from ape-like ancestors, Engels wrote that "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".23 Until recently, left-wing Australians followed the eminent Marxist prehistorian, Vere Gordon Childe, in using terms such as savage and barbarian in much the same way as did nineteenth century anthropologists and social scientists denounced by Reynolds.

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. Other Aborigines thought the British were their dead kinsmen who had "jumped-up" as whites, and that they themselves in their turn might return to earth after death as whites with all their powers and goods. 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".24 This was not the view taken by British officials, who counted their own misidentification as reincarnated Aborigines as part of the evidence for the difficulties of making treaties with Aboriginal groups, and more generally of achieving common understandings.

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, sheeps' jawbones and fragments of glass.25 These beliefs and practices also seemed to Reynolds to be "perfectly logical . . . given acceptance of a few basic assumptions".26

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".27 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".28 Such encouragement to Aborigines to retain ancient errors actually hinders such a renaissance from taking place.

Thus Reynolds challenged the "myth" of Aboriginal passivity in the face of white colonization and exulted in the violence of Aboriginal resistance. He may have exaggerated the amount of violence in relations between Aborigines and settlers during the nineteenth century, as has been claimed by other scholars, such as Bain Attwood, Marie Fels and Ann McGrath.29 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 the colonial governments should have adopted. Furthermore, when the myth of Aboriginal non-violence was resurrected in the Mabo Judgment Reynolds did not demur.

b. Constructive Aboriginal responses to white society

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. Reynolds then perceived many advantages for Aborigines in contacts with whites. Many contacts were involuntary and of a destructive character, but others were voluntary and potentially very valuable and helpful to Aboriginal development. Reynolds acknowledged that white settlements acted as a magnet to Aborigines. In some cases the attraction was that only there was food 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."30

Reynolds criticised "activists" who "ignored and despised" Aborigines working with or assisting whites, or unfairly condemned black troopers, stockworkers 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".31 Reynolds considered that Aboriginal co-operation, when it was forthcoming, was rational and productive. There is no reason to challenge that view.

Post-contact changes in Aboriginal ways included long distance migrations to enter white settlements. Reynolds has often 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 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 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".32

The early Reynolds endorsed Stanner's account and referred to "the more or less voluntary coming in of Aborigines to European settlements".33 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".34 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.

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.35 This was often the fault of the colonists. Aborigines who made great strides in mastering the ways of white society were often rejected and subsequently sank into ruin. 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.

The overall view of the early Reynolds, 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. He interpreted Aborigine opposition to education of their children by white people as resistance to "assertive promotion of European culture and the continuous subversion of their children."36 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".37 Aboriginal men often prevented inter-racial co-operation. Reynolds noted that the "array of methods" used to preserve their authority, especially over women, included "threats, sorcery, ritual spearing, even execution." He 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.38"

Yet he could also write 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",39 and claimed later that Aborigines lost all and gained nothing by British colonization.

Terra nullius

Reynolds' early work on Aborigines paid 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." 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."40

On other occasions, however, he argued 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."41 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 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".42

In truth 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 pronouncements that defined the concept of terra nullius very clearly: "territory hitherto not occupied by a recognised ruler".43 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.

Reynolds claimed that "over much of the continent the Aborigines clearly had possession of a character of which the land was capable",44 but, except in the least fertile areas, this is not true and at best confuses actual and potential use. No land in 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.45 But it was clear to all in Britain what the boundaries were between the enclosed and the open or between 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.

Native title

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. I cannot demonstrate here the errors in Reynolds' interpretation of United States, New Zealand and other precedents, but can only note that he favoured the non-Australian authorities and dismissed Australian judges as puppets of squatters and others who gained from illegal expropriation of Aborigines.

However Reynolds did concede 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 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.

Among dozens of Reynolds' variants of the first proposition are:46

"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."

"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 primaeval 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 or 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."

"Aboriginal right of use and occupancy and the British recognition of native title were ignored, unenforced and apparently never tested in the colonial courts."

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.47 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."48

By 1993 it had all become very simple indeed: "Australia started with the land owned by the Aborigines under English common law".49 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.

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 Justice Dawson, who noted inter alia50:

"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 to such interests as the natives might have had prior to the assumption of 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."

A similar view was taken in the Gove Lands Case by Justice Blackburn, whose judgment was described by Judge Dawson as based on "a full and scholarly examination",51 and in every other case before 1992 before an Australian court.

Judge Dawson noted52 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 by the Colonial Office as "an authoritative assessment of the law as it then stood". On the contrary, British officials and politicians sympathetic to the plight of Aborigines confronted 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.

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".53 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 correspondence of Earl Grey and others.54 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".55 Yet 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 their sincerity. He 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 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".56 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 [an ironical 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' ideology

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".57 He "challenges the legal and moral assumptions underlying the European occupation of Australia"58 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".59 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".60 Despite his admission that he missed 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."61

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".62 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.63 Reynolds has disclaimed "any guilt about black Australia", and expressed concern about the "strong tendency among white Australians towards inverted racism",64 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."65

Reynolds appears to believe that the wrong one prevailed.

Reynolds may yet live to regret the consequences of his work and prove a Girondin or Menshevik. 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".66 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".67

However, Reynolds is blessed with a wife who will not only prevent back-sliding, but will help to force the pace. ALP Left Senator Margaret Reynolds 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".68 She has also69 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 instalment 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 were such things as unqualified goods, Reynolds' work would be one".70 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".71 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 revolutionary 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.

Endnotes:

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.

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. (in interview) (1991), Beyond the Frontier in Island, 49, p. 35.

13 Reynolds, 1993a, p.3.

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, 1992.

15 Reynolds, H. (1978). The Other Side of the Frontier in Reynolds, H. (ed). Race Relations in North Queensland, op. cit., pp. 8-9.

16 op. cit., p. 23.

17 Reynolds, H. (1982), The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia, Melbourne: Penguin Australia Books, p.198.

18 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].

19 Reynolds, 1982, p.72.

20 Reynolds, 1982, pp.121-2. Reynolds fully conceded that the overwhelming majority of Aboriginal deaths resulted from disease and epidemics and were not willed by the colonists. Other estimates of white deaths through Aboriginal violence are much smaller. See Nance, B. (1981). The Level of Violence in Port Phillip, 1835-1850 in Historical Studies, 19, no. 77, pp. 532-52.

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

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

23 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.
24 Reynolds, 1982, pp. 6, 38, 31.
25 Reynolds, 1981, pp. 56-7; Reynolds, 1982, pp. 51-3.
26 Reynolds, 1982, p. 32.
27 Ibid., p. 92.
28 Ibid., p. 155.
29 Attwood, B. (1990). Aborigines and Academic Historians: Some Recent Encounters in Australian Historical Studies, 24, no 94; McGrath, A. (1987). "Born in the Cattle": Aborigines in Cattle Country. Sydney: Allen and Unwin; Fels, M. (1988). Good men and true: the Aboriginal Police of the Port Phillip District 1837- 1853. Melbourne: Melbourne University Press.
30 Reynolds, Henry. (1972). Aborigines and Settlers: The Australian Experience 1788-1939. Cassell Australia, p. 40.
31 Reynolds, 1990, p. 232.
32 Ibid., pp. 42-5.
33 Reynolds, 1972, p. 41.
34 Reynolds, 1982, p. 115.
35 Ibid., pp. 148-51.
36 Reynolds, 1981, p. 110.
37 Reynolds, 1972, p. 57.
38 Reynolds, 1982, p. 133.
39 Ibid., p. 19.
40 Reynolds, Henry. (1987b). The Law of the Land (1987), Penguin Books Australia, pp. 12-3.
41 Reynolds, 1987a, p. 4.
42 Reynolds, l987b, p. 33.
43 (1924) LR 51 Ind. App. at 360, cited by Dawson J. in 107 A.L.R.1, p. 94.
44 Reynolds, 1987b, p. 22.
45 Ibid., p. 19.
46 For these and similar statements see Reynolds, 1987a, pp. 144, 156; Reynolds,1987b, pp. 7-8, 19, 27; Reynolds, 1992, pp. 8, 9; Reynolds, 1993b, pp. 128, 129.
47 Reynolds,1987a, pp. 158-9.
48 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.
49 Reynolds, H. (1993c). Mabo: questions and answers in Environment 15 (1), p. 9.
50 A.L.R. 1(1992), pp. 106-7, 108, 110.
51 Ibid., p. 105.
52 Ibid., p. 111.
53 Reynolds, 1993b, p. 125.
54 Ibid., p. 127.
55 Reynolds, 1987b, p. 3.
56 Reynolds, 1993c, p. 11.
57 Reynolds, 1982, p. 1.
58 Reynolds, 1987b, Frontispiece.
59 Reynolds, 1972, x- xi.
60 Ibid., xii.
61 Reynolds, 1987b, p. 175.
62 Reynolds, 1987a, p. 179.
63 Reynolds, 1981, pp. 163-6.

64 Felton and Reynolds, op.cit., p. 33.
65 Reynolds, 1982, pp. 69-70.
66 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.
67 Felton and Reynolds, op.cit., p. 34.
68 Cited in Hewat, T. (1993), Who made the Mabo mess?, North Brighton, Vic: Wrightbooks, pp. 83-4.
69 The West Australian, 5 October, 1992.
70 Kerruish, V. (1989) Reynolds, Thompson and the Rule of Law: Jurisprudence and Ideology in Terra Nullius in Law in Context, vol 7, p. 120.
71 Ibid., p. 122.