



Tilting at doctrine in a changing world: the three editions of Henry Reynolds' *The Law of the Land*

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Henry Reynolds' *The Law of the Land* was first published in 1987 and advanced a radical reassessment of the history of property ownership in Australia. Reynolds' work challenged the prevailing legal and historical orthodoxy under which it was assumed that as a consequence of colonisation, the Indigenous peoples of Australia no longer enjoyed any enforceable rights to land arising from their traditional use and occupation. Since its initial publication, *The Law of the Land* has been reissued in a new and expanded edition twice: first in 1992 and again in 2003. Each of the fresh editions of *The Law of the Land* contained additional material that was neither a product of new historical research by the author nor a rejoinder to scholarly criticism, but rather a response to changing events in the present. This article analyses the third edition of *The Law of the Land* and reflects on the evolution of the work in the context of both Reynolds' proclivities as an historian and shifts in current politics and law.

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***The Law of the Land* (first edition)**

The story of Henry Reynolds' emergence as Australia's most prominent scholar of Aboriginal history is well known.¹ He was a self-conscious 'product of the sixties', one of a 'bevy of younger scholars' who 'all expressed a passionate, radical commitment to change the present through a rewriting of the past'.² Although he had been researching and writing in Indigenous history for more than fifteen years, it was not until *The Law of the Land* that the 'complex political, legal and moral questions' associated with the contest over real property ownership between Australia's Indigenous peoples and the colonists became 'the central issue' of Reynolds' work.³ The principal thesis of *The Law of the Land* in both its original and revised editions was that conventional understandings of law and history relied on a mistaken notion: that 'before 1788 Australia was *terra nullius*,' meaning 'a land belonging to no-one'.⁴ The consequence, in terms of the evolution of Australian real property law, was that land had been regarded as without pre-existing occupants; Indigenous peoples merely 'ranged over it' – they were not owners.⁵

In Reynolds' view, it was the erroneous assumption that Aboriginal people were without traditional systems of property ownership that enabled the Crown to assert actual ownership over the continent of Australia.⁶ Yet Reynolds claimed that only a short time after first contact, the misconception that Aboriginal people were not land owners had vanished, replaced by awareness that the indigenes held proprietary rights under their own traditional law and custom.⁷ Reynolds' view was that such recognition actually led to

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Indigenous customary rights in land being legally recognised between 1838 and 1848 at the centre of Empire in London, even if the rule of law was being ignored in the antipodes.⁸ Unfortunately, Reynolds argued, the recognition of native title between 1838 and 1848 had been disregarded in posterity by both historians and lawyers. The forgetfulness allowed Justice Richard Blackburn to honestly but erroneously decide against the plaintiffs in the one case in Australian history where the point had been directly tested, *Milirrpum v Nabalco*, in 1971.⁹

The production of *The Law of the Land* was intimately connected with the litigation which culminated in the High Court's decision in *Mabo v Queensland* in 1992. Reynolds became acquainted with Eddie Mabo after the latter began working at Townsville University College as a groundsman. Indeed, Reynolds asserts that it was he who first told Mabo that Australian law did not recognise Indigenous customary title to land.¹⁰ Later, Reynolds participated in the crucial conference in Townsville in 1981 at which the decision was made by Mabo and others to initiate proceedings.¹¹ Once the *Mabo* litigation began, Reynolds 'had little to do with the case itself from that time' in direct terms, but *The Law of the Land* was written 'as an argument that lawyers could follow' and with a potential judicial audience in mind.¹² Thus, as Peter Cochrane argued in an article in 1998, Reynolds 'makes a point' and 'lists his examples ... much as a social science text would do' so that the work would 'read like a report', in order to suit judges.¹³ Although he derided the current state of the law, Reynolds made it clear that a 'way out of the situation' remained 'available to Australian jurists'. When *Mabo* was handed down, the influence of Reynolds' work seemed abundantly clear; it was cited expressly by Justice Toohey and implicitly by Justices Deane and Gaudron.¹⁴ Some of the passionate language of the bench was redolent of Reynolds' prose. Most significantly, the majority judges all appeared to adopt Reynolds' legal-historical thesis by 'rejecting' *terra nullius* and recognising native title as forming part of the common law of Australia.¹⁵

Famously and infamously, the *Mabo* decision appeared as an unprecedented public and juridical vindication of the work of an Australian historian. Justice Deane had even written to Reynolds to thank him.¹⁶ Various commentators glibly attacked the Court for its foray into history, while others defended it, setting up an unsatisfying debate of polarised positions. Reynolds himself routinely and robustly defended *Mabo*. The result was a self-reinforcing dynamic in which the High Court majority, which had adopted Reynolds, was then in turn defended by the historian as having made the correct decision. It was an extraordinary consequence of the High Court's treatment of Reynolds that an historian without any legal training became publicly regarded as a proficient intercessor of the law of the land.

The Law of the Land (second edition)

In August 1992 and a mere two months after the *Mabo* decision, Reynolds completed the manuscript of the second edition of *The Law of the Land*.¹⁷ The High Court's decision was 'of such direct relevance' that Reynolds hurriedly added 'a postscript concerned with the judgement'.¹⁸ Triumphant, Reynolds wrote that 'the court answered many of the stringent criticisms of Australian jurisprudence' made out in *The Law of the Land* and thus 'confirmed the arguments around which the book was crafted'.¹⁹ The High Court had brought 'jurisprudence in line with Australian history', had 'clearly absorbed the lessons' embodied in 'the new historiography of European-Aboriginal relations' and 'rejected the concept of *terra nullius* because it was so out of harmony with contemporary opinion and concern for indigenous rights'.²⁰ Yet, Reynolds observed, *Mabo* was a 'beginning' as well

as an 'ending.'²¹ The Court made it clear that native title could be wiped out by an inconsistent act of government and Reynolds forecasted that 'Historians and jurists have a massive task in front of them to establish the basic facts' given that extinguishment had occurred 'bit by bit over a long period of time'.²² Reynolds concluded the book by arguing that 'ultimately Australia will have to settle either in court or out' and it would 'be to everyone's advantage if we settle soon, and settle with good grace'.²³

In the second edition, Reynolds identified 'the question of Aboriginal use and occupancy rights on all lands held under pastoral lease' as a critical matter that had been left undecided in *Mabo*.²⁴ His own views were well known as he had previously argued (for example in *Frontier* in 1987 and in the first edition of *The Law of the Land*) that if native title were recognised in Australia, then pastoral leases should not have an extinguishing effect.²⁵ However, in 'the wake' of *Mabo* Reynolds felt it appropriate to repeat the 'main points of the argument' in a new postscript.²⁶ When the Keating government responded to *Mabo* with the *Native Title Act 1993*, it was largely left to the judiciary to decide whether or not pastoral leases extinguished native title.²⁷ In cooperation with the Cape York Land Council and with a test case in mind, Reynolds conducted some further research on the pastoral lease question and published commentary on the subject in a number of law journals.²⁸ Significantly, Reynolds' arguments were again grounded not only in 'facts and law', but in arguments about morality and fairness. If pastoral leases extinguished native title then *Mabo* would be 'a hollow thing ... a ruse designed to make Australian law look good and the Australian community feel good ... without giving anything of substance away; a cleansing of the conscience; a washing of the hands'.²⁹ Once again law would have 'trampled on history' and 'triumphed over justice'.³⁰ When, against most predictions, *Wik v Queensland* was decided narrowly in favour of the Indigenous parties, Reynolds' work was again cited. He appeared to possess the uncanny knack for guiding the High Court to a particular result.³¹

The election of the Howard government in 1996 marked a fundamental change in the spirit and content of Australian political and cultural life, confounding those who had assumed that the Keating years marked some sort of lasting cultural victory for the intellectual left. In the specific context of native title, after the ascension of the Coalition to power, Commonwealth protection of Indigenous interests could no longer be relied upon. After extensive parliamentary debate, the Howard government's *Native Title Amendment Act* was passed in 1998, severely curtailing some of the beneficial qualities of the original legislation.³² The general trend of cases since *Wik* in both the High and Federal Courts has also been toward curtailing the content of native title and the labyrinthine native title system has proved to be alienating. Far from the realisation of Reynolds' hopes of a swift and graceful 'settlement,' the recognition of native title in Australia has been protracted, partial, incremental and a disappointment for many.³³ Such was the environment in which the third edition of *The Law of the Land* was published.

The Law of the Land (third edition)

In a new prologue to the third edition, Reynolds reflected that many 'problems arise when updating a book' written fifteen years earlier 'when the subject of the study has changed so quickly and so broadly'.³⁴ One of Reynolds' chief aims in the new edition was to describe how the principles of native title had evolved since *Mabo*, but his digest of new legal developments was not altogether successful, as a brief assessment will indicate. The seminal *Yorta Yorta* case did not so much consider 'how and when extinguishment happened', as Reynolds asserted, but decided that because native title had ceased to exist in the area,

there was no need to consider any extinguishing impact of tenure at all.³⁵ More generally, he did not seem to distinguish between positive extinguishment by an act of state and the inability to make out native title because of a breakdown of tradition. Reynolds exhibited a general failure to appreciate the impact of the Commonwealth *Native Title Act*, notwithstanding the High Court's clear indication that interpretation now begins with the statute, not judge-made law.³⁶ Nor was there any description of the institutions of the elaborate national native title system for the processing of claims, which has functioned since 1994. He also underestimated the number and significance of negotiated agreements achieved between traditional owners and government or private interests.³⁷ The impact of the pivotal *Ward* case which confirmed native title as a bundle of rights amenable to piecemeal extinguishment was not explained.³⁸ Ultimately, in order to understand the current state of native title in Australia and to query whether 'land justice' (however defined) is being done, it is necessary to go beyond the utterances of the High Court. A description and explanation of the current native title system in Australia drawn only from an eclectic selection of High Court judgments was destined for superficiality.

The third edition of *The Law of the Land* does not expressly respond to any of the critics of the first two editions and does not engage with the vast secondary literature which now exists about native title in Australia. Reynolds perhaps struggled to recognise that he was no longer a prophet in the wilderness, but merely one voice amidst multiple crowded dialogues.³⁹ Native title is no longer something arcane or obscure, but the subject of numerous specialist works, professional conferences and dedicated undergraduate and postgraduate units at a number of universities.⁴⁰ All mainland Australian governments have native title units, the National Native Title Tribunal is a large bureaucracy and there are almost twenty specialist regional legal services representing indigenous interests.⁴¹ Reynolds appears a keen amateur commentator in an area of public life which is now institutionalised, intricate and vocational. 'Working in native title' has become a professional career path, rather than a matter of social conscience or activism. The iconic issue of whether native title is known under Australian law has been superseded by the minutiae of individual claims.

The authority of the law and justice for Aborigines

Peter Cochrane has observed that 'the message Reynolds leaves us with' is that the 'law will always come good.'⁴² In updating *The Law of the Land*, Reynolds faced greater difficulties than simply keeping up with the law, because changing events also exerted pressures on the book's analytical framework. Reynolds had not sought 'merely' to understand the past for its own sake, but rather was driven by contemporary imperatives which required that 'the conventional view of Australian settlement' 'had to be significantly reassessed'.⁴³ Present purpose shaped Reynolds' interpretation of history; the past was interpreted so as to support the contemporary recognition of Indigenous rights in land arising from original occupation. Bain Attwood has argued that *The Law of the Land* is best understood as a work of 'juridical history', that is, almost as if told to a judge in a courtroom.⁴⁴ Understood as a 'juridical historian', Reynolds necessarily evinced a 'presentist' outlook because he was writing history 'designed from a present perspective to answer present problems'.⁴⁵ Further, in order to be cognizable to the judiciary, *The Law of the Land* had to be written in the liberal positivist tradition.⁴⁶

Building on the work of Sharp and others, New Zealand historian Giselle Byrnes has recently further elaborated on the nature of the historical narratives produced by historians employed by the Waitangi Tribunal. Byrnes coined the expression 'liberation history' to

describe what she discerned as 'a form of alternate history' with a 'strongly presentist and clearly emancipatory ... purpose.'⁴⁷ According to Byrne, the primary objective of such history is to 'liberate' the subjects of that narrative from 'perceived (historical and contemporary) injustices.' She concludes that 'liberation history is, therefore, a distinct type of postcolonial narrative' that 'offers a critical rereading of colonisation, driven by present-minded concerns'; a characterisation that can aptly be applied to Reynolds' work.⁴⁸

The thesis advanced in *The Law of the Land* revolves around the argument that a single doctrine was mistakenly employed in the Australian colonies, where the common law had been corrupted, and in order to now make things right, all that was required was to reject the villainy of *terra nullius*.⁴⁹ There are two principal problems with the central contention in *The Law of the Land*. First, as a matter of legal principle, it is wrong to assert that the doctrine of *terra nullius* had ever prevented native title being recognised in Australia.⁵⁰ The better understanding is that the matter had simply not been tested before a court until 1971 and then the single Judge of the Supreme Court of the Northern Territory got it wrong.⁵¹ Reynolds himself set the matter out plainly in *Frontier* (published in the same year as the first edition of *The Law of the Land*) when he wrote that:

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. Without enforcement, there was no litigation. Without litigation there were no judicial attempts to define Aboriginal rights; no dicta; no precedents; no case law. It is not surprising that in the late twentieth century jurists can assert that native title never existed in Australia. But in so doing they rest their case not on what the law actually said but on an abject failure to enforce it.⁵²

Reynolds was more accurate in *Frontier* than *The Law of the Land*. When the question was first properly ventilated in *Mabo*, the High Court needed to do no more than turn to every other major jurisdiction in the English-speaking world to see that native title was properly part of the common law of Australia.⁵³

The second problem with Reynolds' notion that it was only a warped version of the law in Australia which had seen Indigenous people's interests set aside, was that such a proposition seemed to deny the reality that colonial enterprises generally involve dispossession. Anchored to a traditional liberal positivist conception of law, Reynolds did not recognise the powerful role of law as a justificatory instrument of empire critical to legitimising the displacement of Indigenous societies.⁵⁴ Reynolds simply posited a preferred more 'just' model of colonial acquisition in order to establish that there was an alternative available to the Court. Ironically though, while Reynolds underestimated the role of law *per se* as a discourse that justified colonisation, he perhaps overstated the role of law as an actual instrument of the dispossession, as opposed to the more straightforward playing out of power on the frontier: individual colonials came, saw and took, with the law following later.

The simplicity of Reynolds' legal-positivist understanding of the role of law became more analytically problematic after native title had been recognised in *Mabo*. It is presupposed in *The Law of the Land* that, with *terra nullius* out of the way, Indigenous people would have had land justice, yet on the final page of the third edition Reynolds commented that:

Eleven years ago the Aborigines and Islanders that I knew were both burdened with and vivified by a profound sense of historic injustice. Despite *Mabo* and *Wik* ... I suspect that sense of injustice remains. A great opportunity created by the *Mabo* judgement has been squandered. The response has too often been grudging and legalistic.⁵⁵

Yet ironically, Reynolds attempted to explain the disjunction between the legal victories of *Mabo*, *Wik* and so on with the lingering sense of injustice, by further recourse to legalism. He turned to the common law, arguing that once again there had been a corruption of doctrine in Australia, compared with elsewhere in the former British Empire. Reynolds contended that the law of native title was superior in New Zealand, Canada and America, explaining Australia's inferiority by reference to what 'the High Court has bestowed'.⁵⁶ In an echo of the earlier preoccupation with *terra nullius*, Reynolds seized on a particular phrase used by Justice Michael Kirby, who describes native title in one case as 'inherently fragile'.⁵⁷ Bitterly, Reynolds wrote that if 'you can no longer sustain *terra nullius* in the face of world opinion, an "inherently fragile" native title is the next thing'.⁵⁸ The High Court, once Reynolds' great hope and vindication, had become a source of disappointment: 'Having given birth to native title, the High Court decided to bind its feet before it could develop any jurisprudential strength and mobility'.⁵⁹

Even if Reynolds had embarked on a more sophisticated interrogation of the current legal and administrative arrangements for native title in Australia for the third edition of *The Law of the Land*, his simultaneous commitment to legal positivism and political activism had left him in a bind. Foregoing more critical possibilities, Reynolds was prevented from considering whether the law and legal institutions *per se* might be working as instruments of subtle and ongoing 'deep colonisation'.⁶⁰ There would, of course, have been great risks in Reynolds (for example) deciding to add a radical legal-historical critique of the evolution of native title since *Wik* to the third edition as it would likely have served to undermine the idea of the 'good common law' so necessary to the original content of *The Law of the Land*. Disputing the authority of the court is particularly difficult for one who has written history for the attention of the judiciary. New Zealand historian Andrew Sharp has observed that the 'juridical historian' is 'in the position of an inferior who appeals to a superior authority'.⁶¹ Like counsel appearing, the juridical historian is effectively 'submitting' to the authority of the court. Reynolds even took the submission one step further, arguing that law should actually condition the work of historians.⁶² Having so deeply acquiesced to the authority of law, Reynolds was left in a deep quandary when the jurisprudence began to depart from his convictions, and his dissatisfaction with later decisions of the High Court in the third edition is jarring. On the other hand, Reynolds' ongoing commitment to a certain emancipatory vision of 'land justice' meant that he could not simply accept the legitimacy of the new jurisprudence to the extent that it was inconsistent with his politics. The unsatisfying result is that Reynolds appears as a supporter of the liberal legal framework, but one who only accepts the decisions of the High Court with which he agrees.

Ann Curthoys has described Reynolds' work as evincing an 'emphasis on the moral evaluation of historical actors' and Peter Cochrane has referred to the same tone as 'a kind of morally charged positivism'.⁶³ Considerations of justice and fairness are central to the historical methodology employed in *The Law of the Land*. In the emotional advocacy of the prose, the content of the argument, and most obviously the very purpose for writing, 'justice for Aborigines' is Reynolds' evident preoccupation. However, what constitutes 'justice' is historically contingent, rendering it conceptually problematic as a framework for writing history. What is considered to be morally 'right' changes over time, making the question of whether past arrangements were 'just' or not a limited window through which to try and understand historical actors and processes on their own terms. What 'justice for Aborigines' entails has never been a matter of settled agreement.

Curthoys has asked; in relation to Reynolds' work, whether 'the way forward' was really 'to perpetuate a style of history which is cast in terms of moral evaluation' or, indeed,

whether 'politically committed and passionately written history' was 'necessarily morally evaluative history'.⁶⁴ Such questions bear revisiting in light of the third edition of *The Law of the Land*. Invariably, Reynolds' explanation of events since *Mabo* and *Wik* turns on the alleged failure to achieve 'justice', but moral accounting is blind to complexities and inhibits a deeper appreciation of the current state of affairs.⁶⁵ Instead, Reynolds is left broadly lamenting that 'there has been no officially funded campaign to fully account for past injustice' without any apparent awareness of the ahistorical nature of the statement, let alone the practical impossibility of what he would apparently like to see undertaken.⁶⁶ The grievance exemplifies Reynolds' apparent belief that redemption from historical injustice is possible; a belief which is implicit throughout Reynolds' work and which is closely linked to his identity as an historian.

The myth of Reynolds

In addition to the narrative elaborated within *The Law of the Land*, a second story was propounded about the book and its author, namely that Reynolds as historian was the man who made *Mabo*, having exposed the doctrine of *terra nullius* as wrong in history and in law, providing the basis for the High Court's ruling. Ironically, the 'myth of Reynolds' has not only been propounded by admirers, but also by opponents of native title who have facilely assumed that if they were able to discredit the historian, then the doctrine would also be tarnished.⁶⁷ Indeed, Reynolds has actively engaged with the myth of himself. In numerous public explanations about where he has come from, who he is and why he has written, and particularly in the intellectual memoir published in 1999 called *Why Weren't We Told?*, Reynolds has offered a largely uncomplicated narrative of personal, political and intellectual self-development.⁶⁸

The pretext for *Why Weren't We Told?* was Reynolds' curiosity as to why he 'had the knowledge, the information, the necessary insights' to 'know' what others apparently did not.⁶⁹ In *Why Weren't We Told?*, Reynolds explains himself as an historian motivated by injustice to Indigenous Australians to undertake 'a personal search for the truth about our history'. All the personal information in *Why Weren't We Told?* is seen through the prism of the author's self-declared 'obsession' with 'researching the relations between indigenous and immigrant Australians'.⁷⁰ Reynolds perhaps sees himself, to use metaphors he favours, as someone who heard 'the whispering in our hearts', felt 'the stain of blood upon us' and was driven by 'an urgency to put things right'.⁷¹ Increasingly, Reynolds has also emphasised the special relationship that he enjoyed with Eddie Mabo, who died before the decision was handed down, even suggesting that the spirit of the deceased may have visited him in a dreaming state, and contemplating how Mabo 'would' have reacted toward subsequent events, had he lived to see them.⁷²

Updating *The Law of the Land* in a third edition was undoubtedly complicated by the entry of Reynolds as a participant in the narrative. Reynolds as a moral and political actor became the subject of his own narration but, having entered the plot as a character, he lost the mantle of 'independent expert' which he had employed to such advantage in the first edition of *The Law of the Land*. In *Mabo*, the High Court cited Reynolds because he had standing as an expert, not because he was a public intellectual with well-known opinions. The discursive strength of *The Law of the Land* lay in Reynolds' declared position as an historical scholar, perhaps motivated by 'injustice', but still driven to unearth the truth underneath the prevailing legal-historical apocrypha. However, since *Mabo* and *Wik*, Reynolds' public profile has rendered it impossible to see him as 'only' an historian and the aura of the objective academic is gone for good. Now, when Reynolds describes something

as 'unfair', he no longer carries the same power of a perception of scholarly independence. Instead, Reynolds is the celebrity public intellectual: 'a hero for some, a demon for others'. 'the preacher who is our moral conscience' and a 'Living National Treasure'.⁷³

The Law of the Land was a stunning intellectual achievement that succeeded in making a major contribution to the reconfiguration of the legal and political present through a reappraisal of history. However, the very devices that made the book so effective as a catalyst for change have meant that it has dated rapidly as a work of scholarship. Reynolds' combination of faith in the common law and commitment to political change as reflected in the *The Law of the Land* came together in *Mabo* and *Wik*, but proved impossible to reconcile in the face of the later jurisprudence which followed. The explanatory and political power of *The Law of the Land* has been overtaken by the complexities of systematised native title. If Reynolds' work had been less inclined to a specific legal result then perhaps it would have stood up better to changing circumstances and would have been more amenable to the publication of later editions. Instead, both the specific political project and the theoretical framework of *The Law of the Land* have proven antithetical to effective updating. The work is now best viewed as a classic or as source material. Understood in the political context of the 1980s, *The Law of the Land* remains required reading for those who, in Reynolds' own words, 'wonder what all the fuss was about'.⁷⁴

Notes

1. See Henry Reynolds, *Why Weren't We Told? A Personal Search for the Truth about Our History*, Viking, Melbourne, 1999 and Heather Felton, "'Beyond the frontier": an interview with Henry Reynolds', *Island*, no.49, Summer, 1991.
2. Bain Attwood, 'Aborigines and academic historians: some recent encounters', *Australian Historical Studies*, vol. 24, no. 94, 1990, p. 123.
3. As Reynolds acknowledges in *The Law of the Land*, 1st ed., Penguin, Melbourne, 1987, p. xvii, his earlier works, *The Other Side of the Frontier* and *Frontier* both dealt at some length with the 'land question.' See Henry Reynolds, *The Other Side of the Frontier*, Penguin, Townsville, 1981 and Henry Reynolds, *Frontier: Aborigines, Settlers and Land*, Allen & Unwin, Sydney, 1987.
4. Reynolds, *The Law of the Land*, 1st ed., p. 12.
5. Reynolds, *The Law of the Land*, 1st ed., p. 13.
6. Reynolds, *The Law of the Land*, 1st ed., p. 13.
7. Reynolds, *The Law of the Land*, 1st ed., pp. 79-80.
8. Reynolds, *The Law of the Land*, 1st ed., pp. 97-103, 140.
9. Reynolds, *The Law of the Land*, 1st ed., pp. 121-2.
10. Reynolds, *Why Weren't We Told?*, p. 187.
11. For a record of the conference see Eric Olbrei (ed.), *Black Australians: The Prospects for Change*, James Cook University, Townsville, 1982.
12. Reynolds, *Why Weren't We Told?*, p. 191; Felton, "'Beyond the Frontier'", p. 34.
13. Peter Cochrane, 'Hunting not Travelling', *Eureka Street*, vol. 8, no. 8, 1998, p. 33.
14. Reynolds is actually referred to in *Mabo* itself by Toohey J. *Mabo and Others v State of Queensland* (2) (1992) 107 ALR 1 at 141, while Gaudron and Deane J.J. stated at 91 that 'in the writing of this judgement, we have 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 judgement has necessarily ventured. We acknowledge our indebtedness to their writings.'
15. *Mabo and Others v State of Queensland* (2) (1992) 107 ALR 1; Brennan J., with whom Mason C.J. and McHugh J., agreed p. 41; Deane and Gaudron pp. 82-3 and Toohey J. pp. 141-2.
16. Cochrane, 'Hunting not Travelling', p. 32.
17. Reynolds, *The Law of the Land*, Penguin, Melbourne, 2nd ed., 1992, p.xiii. The second edition appears to contain only two changes: a postscript on *Mabo* (2) and some expanded treatment of the rejection of Batman's Treaty.
18. Reynolds, *The Law of the Land*, 2nd ed., p. xiii.
19. Reynolds, *The Law of the Land*, 2nd ed., p. 186.
20. Reynolds, *The Law of the Land*, 2nd ed., pp. 188-9, 195.

21. Reynolds, *The Law of the Land*, 2nd ed., p. 195.
22. Reynolds, *The Law of the Land*, 2nd ed., p. 190.
23. Reynolds, *The Law of the Land*, 2nd ed., p. 202.
24. Reynolds, *The Law of the Land*, 2nd ed., p. 194.
25. See Reynolds, *Frontier*, pp. 151–8 and Reynolds, *The Law of the Land*, 1st ed., pp. 143–4.
26. Reynolds, *The Law of the Land*, 2nd ed., pp. 194–6.
27. The *Native Title Act 1993 (Cwth)* did not deal with the relationship of a validly granted pastoral lease and native title, leaving it instead to the judiciary to decide the matter in appropriate test cases.
28. Henry Reynolds, 'Native title and pastoral leases', *Aboriginal Law Bulletin*, [1996] ILB 29; (1996) 3 (85) ILB 14 and Henry Reynolds and James Dalziel, 'Aborigines, pastoral leases and promises by the crown: imperial and colonial policy, 1826–1855', *University of New South Wales Law Journal*, vol. 19, no. 2, 1996, p. 315.
29. Henry Reynolds, 'Native title and pastoral leases', p. 14.
30. Reynolds, 'Native title and pastoral leases', p. 15.
31. *Wik Peoples v Queensland* (1996) 187 CLR 1.
32. The March 1999 decision of the Committee on the Convention on the Elimination of All Forms of Racial Discrimination (CERD) found that the Federal Government's 1998 amendments to the *Native Title Act 1993* were in breach of Australia's obligations under the Convention: see the (Cwth) Human Rights and Equal Opportunities Commission, *Native Title Report*, 1999.
33. For varied examples of criticism by Indigenous commentators, see Tony Lee, 'The natives are restless: a personal reflection on ten years of native title' in Christine Choo and Shawn Hollbach (eds), *History and Native Title*, Studies in Western Australian History, The Centre for WA History, UWA, Perth, 2003; Noel Pearson, 'Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia', *Eddie Mabo Lecture* presented on day one of the *Native Title Representative Bodies Conference*, Alice Springs, 3 June 2003 available at <http://www.capeyorkpartnerships.com/team/noelpearson/pdf/np-mabo-lecture-3-6-03.pdf>; Michelle Riley, 'Winning native title: the experience of the Nharnuwangga Wajarri and Ngarla people', *Land, Rights, Laws: Issues of Native Title*, series 2, no. 19, 2002; Mick Dodson, 'Native title on the precipice: the implications of the High Court's judgement on the Ward case', ANU Institute for Indigenous Australia, Canberra, 17 October 2002 available at <http://ni.anu.edu.au/docs/dodson.pdf>, and Wayne Atkinson, "Mediating the Mindset of Opposition", *Indigenous Law Bulletin*, vol. 5, no.15, 2002.
34. Reynolds, *The Law of the Land*, Penguin, Melbourne 3rd ed., 2003, p. 1.
35. Reynolds, *The Law of the Land*, 3rd ed., p. 227. In *Yorta Yorta Aboriginal Community v Victoria* [1998] 1606 FCA (18 December 1998), Justice Olney stated at para 130 that 'As it has happened, in the light of the conclusion expressed above, it is unnecessary to embark upon a consideration of whether, and to what extent, native title rights and interests have been subjected to extinguishing events, nor does the question of the coexistence of native title and other rights arise'.
36. See for example *Western Australia v Ward* (2002) 213 CLR 1 and *Yorta Yorta v Victoria* (2002) 194 ALR 538.
37. See Reynolds, *The Law of the Land*, 3rd ed., p. 246. For an overview see the Australian Treaties and Negotiated Settlements data base at <http://www.atns.net.au>
38. See the various articles in *Australian Mining and Petroleum Law Journal*, vol. 21, no. 3, December 2002.
39. Though the extent to which Reynolds was ever a lone voice is questionable. Bain Attwood for example has described how some of the white campaigners for Aboriginal rights to land in the 1960s anticipated the arguments Reynolds made in *Law of the Land*: Bain Attwood, *Rights for Aborigines*, Allen & Unwin, Sydney, 2003. It has been noted of Reynolds in the past that he can show a tendency to not engage with existing secondary literature and to maintain silence in response to criticism. Ann Curthoys commented of *The Other Side of the Frontier* that 'the spirit of the book is to insist on its uniqueness, its non-location in existing historical scholarship': Ann Curthoys, 'Rewriting Australian history: including Aboriginal history', *Arena*, no. 62, 1983, p. 103. See also Cochrane, 'Hunting not travelling', p. 37.
40. Including for example Richard Bartlett, *Native Title in Australia*, Butterworths, Sydney, 2004; Melissa Perry and Stephen Lloyd, *Australian Native Title Law*, Thompson, Sydney, 2003; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge University Press,

- Cambridge, 2003; Bryan Horrigan and Simon Young (eds), *Commercial Implications of Native Title*, Federation Press, Sydney, 1997; Bryan Keon-Cohen, *Native Title in the New Millennium*, Aboriginal Studies Press, Canberra, 2001 and Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis*, Federation Press, Sydney, 2000. Relevant journals include *Land, Rights, Laws: Issues of Native Title*, *Indigenous Law Bulletin*, *Australian Indigenous Law Reporter*, *Australian Mining and Petroleum Law Journal* and *Native Title News*. See also the LexisNexis *Native Title Service* [cited as NTS] edited by Graeme Neate, President of the National Native Title Tribunal.
41. Known as native title representative bodies: see Part 11 of the (*Cwth*) *Native Title Act (1993)*.
 42. Cochrane, 'Hunting not travelling', p. 40.
 43. Reynolds, *The Law of the Land*, 1st ed., p. xii.
 44. Bain Attwood, 'Myth, history and the law of the land', *Australian Financial Review*, 11 June 2004, p. 6 (this article appears expanded and referenced as Bain Attwood, 'The Law of the Land or the law of the land?: history, law and narrative in a settler society', *History Compass*, vol. 2, no. 1, 2004). Attwood has never been an unqualified admirer of Reynolds' work and was particularly critical of *The Law of the Land* in Attwood, 'Aborigines and academic historians'. Attwood adopted the expression 'juridical history' from Andrew Sharp, 'Recent juridical and constitutional histories of Maori' in Andrew Sharp and Paul McHugh (eds), *Histories, Power and Loss: Uses of the Past – A New Zealand Commentary*, Bridget Williams, Wellington, 2001, p. 32.
 45. Sharp, 'Recent juridical and constitutional histories of Maori', p. 32.
 46. See Hal Wootten, 'Conflicting imperatives: pursuing truth in the courts' in Iain McCalman and Ann McGrath, *Proof & Truth. The Humanist as Expert*, Australian Academy of the Humanities, Canberra, 2003.
 47. Giselle Byrnes, *The Waitangi Tribunal and New Zealand History*, Oxford University Press, Oxford, 2004, p. 152.
 48. Byrnes, *The Waitangi Tribunal and New Zealand History*, p. 156.
 49. Reynolds, *The Law of the Land*, 1st ed., p. 4.
 50. See Richard Bartlett, *The Mabo Decision*, Butterworths, Sydney, 1993, p. ix. Various hypotheses have been advanced as to why the Court did engage in the legally inert exercise of 'rejecting *terra nullius*'. See for example Gerry Simpson, 'Mabo, international law, *terra nullius* and the stories of settlement: an unresolved jurisprudence', *Melbourne University Law Review*, vol. 19, no. 1, 1993, pp. 195–210; Attwood, 'The Law of the Land or the law of the land?'; Robert van Krieken, 'From *Milirrpum* to *Mabo*: the High Court, *terra nullius* and moral entrepreneurship' *UNSW Law Journal*, vol. 23, no. 1, 2000 and David Ritter, 'The "rejection of *terra nullius*" in *Mabo*: a critical analysis', *Sydney Law Review*, vol. 18, no.1, 1996, pp. 5–33.
 51. *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141. *Mabo* directly reversed the decision in *Milirrpum* as wrong at law.
 52. Reynolds, *Frontier*, p. 156.
 53. For some pre-*Mabo* (2) commentaries to this effect see Richard Bartlett, 'Aboriginal land claims at common law', *University of Western Australia Law Review*, 1983 15, 293 and Kent. McNeil, *Common Law Aboriginal Title*, Oxford University Press, Oxford, 1989.
 54. See Victoria Gollan's contribution to Rozanna Lilley et al., 'The appropriation of *terra nullius*. A review symposium', *Oceania*, vol. 59, no. 3, 1989, p. 229; Valerie Kerruish, 'Reynolds, Thompson and the Rule of Law', *Law in Context*, vol. 7, no. 1, 1989; Ritter, 'The "rejection of *terra nullius*" in *Mabo*, and Ian Hunter, 'Native title: acts of state and the rule of law' in Murray Goot and Tim Rowse (eds), *Make a Better Offer: The Politics of Mabo*, Pluto Press, Sydney, 1994.
 55. Reynolds, *The Law of the Land*, 3rd ed., p. 248.
 56. Reynolds, *The Law of the Land*, 3rd ed., p. 235.
 57. See *Fejo v Northern Territory* (1998) 195 CLR 96.
 58. Reynolds, *The Law of the Land*, 3rd ed., p. 235.
 59. Reynolds, *The Law of the Land*, 3rd ed., p. 235.
 60. Meaning 'practices that are embedded in the institutions that are meant to reverse processes of colonization': Deborah Bird Rose, 'Land rights and deep colonising: the erasure of women', *Aboriginal Law Bulletin*, vol. 3, no.85, 1986, pp. 6–13.
 61. Sharp, 'recent juridical and constitutional histories of Maori', p. 32.
 62. In November 1993, Reynolds told an audience that a 'radical reinterpretation of history carried through during the last 20 years provided critical underpinning for the legal resolution ushered in

- by *Mabo*. In turn the judgment itself is also a major contribution to Australian historiography which will influence the way history is taught and researched': Henry Reynolds, 'Origins and implications of *Mabo*: an historical perspective' in W. Sanders (ed.), *Mabo and Native Title: Origins and Institutional Implications*, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra, Research Monograph 7, 1994, p. 30.
63. Curthoys, 'Rewriting Australian history', p. 100; Cochrane, 'Hunting not travelling', p. 34.
 64. Curthoys, 'Rewriting Australian history', p. 101.
 65. Reynolds, *The Law of the Land*, 3rd ed., 2003, pp. 239, 247, 248; Attwood, 'Myth, history and the law of the land', p. 8.
 66. See Reynolds, *The Law of the Land*, 3rd ed., 2003, p. 247.
 67. For some critics of Reynolds who link what they argue to be flaws in his historical method with their own implicit or express disapproval of the recognition of native title see John Dawson, 'The nullius ideal: on "terra nullius reborn" by Henry Reynolds', *Quadrant*, vol. 48, no. 7/8, 2004 and Geoffrey Partington, 'The aetiology of *Mabo*', *Upholding the Constitution*, vol. 4, ch. 1, 1994. The most extended attack is contained in Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia*, Macleay Press, Sydney, 2005. Connor's work is misconceived: see David Ritter, 'Myths, truths and arguments: some recent writings on Aboriginal history', *Australian Journal of Politics and History*, vol. 53, no.1, 2007, pp. 138-48.
 68. Reynolds, *Why Weren't We Told?*, p. 4. Within the book Reynolds semi-implicitly contrasts himself with another prominent Australian of the same generation: John Howard. See particularly pp. 133 and 153.
 69. Reynolds, *Why Weren't We Told?*, p. 2.
 70. Reynolds, *Why Weren't We Told?*, p. 2.
 71. Reynolds, *Why Weren't We Told?*, pp. 163, 193.
 72. Reynolds, *Why Weren't We Told?*, pp. 192-3; Reynolds, *The Law of the Land*, 3rd ed., p. 245.
 73. Cochrane, 'Hunting not travelling', p. 32. The National Trust includes Reynolds within a list of Australia's 100 'Living National Treasures'. See also Attwood, 'The *Law of the Land* or the law of the land?'. See also the discussion in Gillian Whitlock, 'Becoming Migloo' in David Carter (ed.), *The Ideas Market*, Melbourne University Press, Melbourne, 2004, pp. 236-58.
 74. Reynolds, *The Law of the Land*, 3rd ed., pp. xiii, 1-3.