# Chapter Three:
# History, Anthropology and the Politics of Aboriginal Society

Keith Windschuttle

After the High Court's *Mabo* judgment in 1992, Henry Reynolds, who describes himself as "an historian and advocate for indigenous rights",[1] commented on its future implications. He said the judgment was a major landmark in the "decolonising" of Australian law and society. It was, none the less, only a beginning to the process of redressing the legal injustice to Australia's indigenous people. "Now the time has come", he said, "to move on to tackle the question of Aboriginal sovereignty". The High Court had determined that Aborigines had a form of land tenure before colonisation. This had survived the British declaration of sovereignty in 1788. How, Reynolds asked, did land ownership survive without some accompanying form of sovereignty? The very existence of land tenure, he said, implied a form of Aboriginal law and government.[2]

About the same time, the visiting Canadian legal academic, Patrick Macklem, observed that in his *Mabo* judgment, Justice Brennan had rejected the principle that Britain had used to justify its dispossession of Aboriginal land. This was the belief that the Australian Aborigines were insufficiently civilised to merit being regarded as having sovereign authority over their land. Judged by today's standards, Brennan said, such a law was unjust. Macklem observed that the same test Brennan had applied to land rights should also be applied to political rights. "Just as it is unjust to deny the validity of Aboriginal rights with respect to land based on the fallacy of European superiority", Macklem contended, "it is also unjust to deny the validity of Aboriginal rights of governance on the same fallacy". Therefore, he went on:

> "Aboriginal rights of governance ought to be recognised as surviving the assertion of Crown sovereignty according to the same principle of justice governing the survival of Aboriginal rights with respect to land".[3]

This argument is the basis for the current demand for a treaty between Aborigines and the rest of Australia. The goal of the treaty is to complete what Aboriginal activists call the "unfinished business" of colonisation. Its principal aim is to restore Aboriginal governance or sovereignty. According to an Aboriginal and Torres Strait Islander Commission (ATSIC) booklet published in May this year:

> "Aboriginal sovereignty refers to the ability of indigenous peoples to act as a nation or nations. This includes the ability to be self-determining and to exercise self-government. Even though Australian governments and courts have never recognised indigenous sovereignty, many indigenous peoples believe that we have never given up sovereignty and retain it even if it has not been recognised by the Australian state".[4]

Moreover, ATSIC is serious about the goal of self-government. In the same document, it asks the question: "Is a treaty about setting up a 'black state'?", and replies:

> "Treaties in other countries have provided for indigenous self-government. It is likely that Aboriginal peoples and Torres Strait Islander peoples would want to negotiate self-government in relation to traditional lands as part of a treaty in Australia".[5]

In short, the answer to a black state is "Yes".

There are some Aborigines, like the current ATSIC chairman Geoff Clark and his colleague Michael Mansell, respectively deputy chairman and secretary of the organisation called the Aboriginal Provisional Government, who argue that self-government involves secession from the Commonwealth. They want to establish "a nation exercising total jurisdiction over its communities to the exclusion of all others". There are other activists, however, who are wary of demanding outright secession and who seek an outcome more politically acceptable to mainstream Australia. They see a black state as having similar powers to the existing Australian States, or to that of a largely self-governing territory like Norfolk Island.[6]

Where would this more limited black state be located? No one has yet drawn up a map, but there are now large tracts of Aboriginal owned land stretching across the centre of the continent from the Great Australian Bight north almost to Darwin. Add some sizeable enclaves in Western Australia, Arnhem Land and Queensland, and you have a territory already larger than Victoria.

In other words, the logical extension of the arguments used by the judges in the *Mabo Case* amounts to a very radical realignment of the Australian political framework. As Professor Garth Nettheim has observed, these arguments question the very legitimacy of the original British sovereignty of the Australian continent, and thus the legitimacy of its heir, the Commonwealth of Australia.[7]

However, there is a major legal problem involved here. This is to find a judicial forum in which to argue it. In its *Mabo* judgments, the High Court unanimously confirmed that the validity of the sovereignty of the Crown was not justiciable in Australian courts. The acquisition of sovereignty was an Act of State that the High Court could not review. Moreover, Aborigines cannot take a case of this kind to the International Court of Justice because only a state can invoke this jurisdiction. So Aboriginal activists appear to face a Catch 22: in order to argue before a court that they constitute a state, they first have to be accepted as a state. This is why they regard a treaty as so important. Short of open insurrection, a treaty is the most politically effective way of realising an Aboriginal state.

The proponents of a treaty expect little from the conservative side of politics but are pinning their hopes on a future Labor government. ATSIC says it would first seek a treaty that endorsed broad principles, such as "the right to self-determination" and "the protection of indigenous laws and culture". Motherhood statements like these would then be left to the courts to interpret into political reality. In other words, once the Commonwealth has signed the treaty, the details would be out of the hands of our democratic process. The courts would decide ATSIC demands such as "ownership of land, waters and resources; reparations and compensation; self-government; constitutional recognition".[8] ATSIC is plainly looking to a judiciary stacked with sympathetic activists like Sir William Deane and Sir Ronald Wilson.

Even though the *Mabo* judgment and the subsequent legislation by the Keating Government in 1993 appear to have settled the issue of land rights for the time being, the existence of pre-colonial land tenure still remains vital to the next stage of Aboriginal political demands: the quest for sovereignty. However, if pre-colonial Aborigines did not have a concept of land ownership, and did not act in ways that implied land ownership, then the argument for sovereignty loses its most crucial premise. Without it, claims about the continued existence of pre-colonial Aboriginal government and laws would have to be made independently, a much harder thing to do.

The *Mabo* judgment did not analyse the actual existence of land tenure on the mainland of Australia. Once it had established this existed on the island of Mer in the Torres Strait, the judgment simply declared that this should be extended to the whole of the continent. Justice Brennan expressly rejected the course of inquiring whether the Meriam people were "higher on the scale of social organisation" than mainland Aborigines. The court steered clear of anthropological texts and confined its argumentation, as far as possible, to questions of law. It simply made the assumption that on the mainland, amongst hunter-gatherer Aboriginal tribes, some form of land ownership existed in principle. Whether it exists in fact, and exactly where it exists in particular, were questions to be determined on a case by case basis. This is what Keating's 1993 post-*Mabo* legislation provided for. Those most qualified to establish the facts of native title are historians and anthropologists. So, by extension, the existence of Aboriginal sovereignty is ultimately a question for historical and anthropological investigation too. Hence, Aboriginal politics now hinges on the veracity of historians and anthropologists.

I am currently engaged in a long project that is questioning the credibility of these two groups of scholars on the Aboriginal question. My long-term interest is not actually in Aboriginal politics. It is primarily to set straight the record of Australian history by closely examining the evidence for the current orthodoxy. It seems obvious to me that, given what else we know about the conduct and the culture of the early British colonisers of this continent, the claims by historians that they engaged in systematic massacres and genocide of the Aborigines would have been totally out of character. None the less, this has to be established empirically. Last year I gave a preview of this project in a series of articles in *Quadrant*. I am now examining the whole record of frontier conflict from 1788 to the 1920s.

I am not giving anything away here by saying that on balance, and despite some notable exceptions, neither our historians nor our anthropologists can be trusted to tell the truth about Aboriginal affairs.

I will start with the anthropologists. Today, many of them openly acknowledge the aim of their discipline is to serve the interests of Aboriginal communities. In his 1997 general text, *Continent of Hunter-Gatherers: New Perspectives in Australian Prehistory*, Harry Lourandos criticises earlier anthropologists for failing to recognise the dynamism of traditional Aboriginal culture. However, he says the current generation of scholars is now producing research to counteract this and to help "empower" Aboriginal communities. "This book", Lourandos writes, "attempts to redress the unequal relations between the people whose history is being studied … and the rest of us".[9]

One of the first of this new breed was Rhys Jones, who made his name in the 1970s with the prehistory of Tasmania. Before the Tasmanian Aborigines were rounded up in the 1830s and shipped off to a mission on Flinders Island, there was very little anthropological fieldwork done among them. All we have are a few brief observations by visiting Frenchmen and the diaries of the five years spent in the field by George Augustus Robinson, the man who did all the rounding up. But the disadvantage of the brevity of the evidence is matched by the advantage that it is finite. Anyone can read all the evidence in a reasonable amount of time and check to see if the currently accepted conclusions really do follow.

The most comprehensive survey of the Tasmanian evidence was done by Rhys Jones in 1974 for Norman Tindale's monumental volume, *The Aboriginal Tribes of Australia*. Before colonisation in 1803, Jones says, Tasmania had nine major tribal groups. Each tribe was composed of five or six bands who, in their seasonal movements, often entered and passed through the territory of neighbouring and even distant tribes along well-defined roads. Some of these bands regularly traversed almost the entire island, north to south and east to west.

Despite this mobility, Jones argues, each of the bands had a keen sense of possession and the exclusive use of its own territory, as well as the notion of trespass. They responded with violence to unwelcome incursions into their own country. Jones writes:

"Movements outside this territory, and of alien bands into it, were carefully sanctioned … Trespass was usually a challenge to or punished by war".[10]

If this interpretation is correct, the Aborigines certainly had the concept and practice of the ownership of their territory, just as the *Mabo* judges assumed. The problem with this argument, however, is that the evidence Jones himself presents does not support it.

Jones has gone through the 1,000 published pages of Robinson's diaries and extracted information about each tribal group's location, language, population, seasonal movements and political relationships. He has used this information to compile a profile of each of the nine tribes he identifies. So it is possible to look at his summary of information about each tribe to see how possessive it was about its territory and how often it engaged in conflicts with other tribes over breaches of its territorial sovereignty. If you do this you find that Jones's own analysis of tribal conflicts offers only one case where territorial intrusion might have led to conflict. But when you go back to the original source and check the relevant diary entry, you find Robinson does not suggest any reason at all for this sole incident. Jones makes the supposition that the Aborigines concerned were "intruders" on the territory of their attackers, but there is no indication in Robinson's diary that this was so.[11]

Moreover, if you go through all Robinson's diary entries, you find there are numerous references to internecine conflicts between Aboriginal bands and plenty of reasons given for them. My own tally of the causes of inter-tribal conflict in the diaries is:

- Disputes over women: 10.
- Long-standing vendettas: 5.
- Conflicts over goods, including game, ochre and guns: 3.
- Tribal honour: 2.

However, the offence of trespass is conspicuous by its absence. I read the whole of Robinson's Tasmanian diaries looking for confirmation of Jones's statement that "trespass was usually a challenge to or punished by war", but could find none. I double-checked all the index entries that might be relevant. None of these 66 index references provided even one example of trespass provoking violence. There are no statements of the kind: "we fought them because they came onto our territory", or any variants thereof.

This absence is itself strong evidence that the culture of the Tasmanian Aborigines did not have such a concept. Robinson's diaries clearly indicate that some Aborigines did identify themselves with certain territories, to which they had an emotional affinity, though not a connection we might call cultural or religious. They indicate just as plainly that British notions of the exclusive possession of that same territory, and the defence of it by force or any other sanction, were not part of the Aborigines' mental universe. In short, despite Jones's claims, the ethnographic evidence does not support the notion that the Tasmanian Aborigines, either conceptually or in practice, exercised the *ownership* of land.

In 1968, the Commonwealth government issued a mining lease to the company Nabalco on the Gove Peninsula so that it could extract aluminium. The lease took up part of the Arnhem Land Aboriginal Reserve. In response, Aborigines from the nearby Yirrkala Methodist Mission sued both the Commonwealth and Nabalco for unlawful invasion of their land. The case was heard in the Supreme Court of the Northern Territory by Justice Sir Richard Blackburn. Two of the witnesses were the anthropologists Professor William Stanner and Professor Ronald Berndt. These are two of the most distinguished anthropologists Australia has produced. Stanner and Berndt told Justice Blackburn that Aboriginal social structure was based on its relation to the territory inherited by each clan. Within each clan were smaller groups called bands. These were the food-gathering groups in which people lived. Most of the time, each band inhabited a territory owned by the male members of its clan.

Ten Aboriginal witnesses from eight different Northern Territory clans then appeared before the hearing. Not one of them agreed with Stanner or Berndt about the structure of their bands or their clan organisation, or of their notion of exclusive identification with a particular territory. Justice Blackburn summarised the Aboriginal evidence as follows:

> "None of the witnesses said that in the days before the Mission he lived chiefly in his clan territory… The people of each clan were deeply conscious of their clan kinship and of the spiritual significance of a particular land to their clan. On the other hand, … it was of no importance whether or not the members of a band had any relationships to each other, or conducted their food-gathering and communal living upon territory linked to any particular clan".[12]

Justice Blackburn decided that the Aborigines concerned did not have a proprietary interest in the land subject to the lease, that is, they did not have a concept of owning it.

This public conflict between what these eminent anthropologists claimed Aborigines had told them about their relationships to the land, and what the Aborigines themselves told the court, was obviously a major embarrassment for the anthropological profession. In discussing this case, Les Hiatt has said he believed that Stanner and Berndt gave this evidence because they thought it would serve the interests of the Aborigines in winning the case. "I have a letter from Stanner", Hiatt writes, "that would bear such an interpretation".[13] According to a number of anthropological studies cited by Hiatt, before white contact there was great variation among Aboriginal groups in terms of their identification with, and possession of, certain tracts of land. Aboriginal identity could derive from a language, a prominent person, either matrilineal or patrilineal descent, sacred sites, *or* a tract of land.[14]

Two weeks ago, the new Premier of Western Australia, Dr Geoff Gallop, ceded 26,000 square kilometres of land to the Tjurabalan people, in a negotiated settlement before their land rights claim went to the Federal Court where their evidence could be publicly heard. Gallop said he was doing this because the existing procedures were taking too long to recognise Aborigines as the owners of the land. At the handover ceremony, Gallop told the Tjurabalan people: "This country belongs to you and you belong to this country".[15] Without hearing the evidence, however, Gallop had no right to make such a presumption. His statement is merely romantic mythology.

Without surveying all the literature about Aboriginal concepts of land ownership, there are two conclusions we can confidently draw from the two examples I've provided here from Tasmania and Arnhem Land. First, before British colonisation, *some* Aboriginal groups did *not* have either the concept or the practice of land ownership. Second, some anthropologists are prepared to publicly misrepresent the evidence to claim they did.

How you approach cases where the experts and professionals, whom you would normally trust to tell the truth, are prepared to manufacture data to suit the occasion, is a difficult question. Until it is resolved, there must remain a shadow over the whole credibility of the discipline of anthropology.

Since the Blackburn judgment, land rights legislation has avoided the concept of English-law ownership by defining traditional ownership in terms of common spiritual affiliations, spiritual responsibilities and mere occupancy. While this might suffice in the case of native title, it does not resolve the more radical issue of sovereignty. The fact that some Aboriginal groups did not have either the concept or practice of land ownership means that those activists who now want to argue that Aborigines had their own government and laws cannot do so simply by a deduction from the existence of Aboriginal land rights. Spiritual affiliations and responsibilities for sacred sites held by various clans do not imply anything as secular or as radical as an Aboriginal government. In short, the argument by activists that Aboriginal *sovereignty* automatically flows from the 1992 *Mabo* judgment does not follow.

Justice Blackburn's 1971 judgment is also of considerable importance to the historical profession. In rejecting Aboriginal land rights in Australia, Blackburn discussed at length the differences between the colonisation of Australia and New Zealand. He said:

> "One of the reasons for the fact that a system of native land law exists in New Zealand and does not exist in Australia is that in New Zealand the government had several times to wage armed conflict with organised bands of natives, which never occurred in Australia".[16]

Since that statement was made, a major industry has emerged in this country to prove it wrong. In the 1970s, Henry Reynolds produced a number of articles and monographs with the theme of "the unrecorded battlefields" of Australia. In 1981 he wrote the book *The Other Side of the Frontier*, and has since produced ten other books plus an ABC television documentary series, all of which have the same argument: faced with white invasion, the Aborigines responded by mounting guerilla warfare in a patriotic defence of their territory. As the frontier shifted across the continent from 1788 to the 1920s, Aborigines resisted all the way. Reynolds has now produced a whole school of followers. Like the new breed of anthropologists, these historians have no compunction about acknowledging their aim of putting scholarship into the service of Aboriginal political interests.

My own project is not only to provide a more realistic account of the degree of violence done to Aborigines during colonisation, but also to examine the question of frontier warfare. I intend to examine this question in every State and Territory.

So far, I have concluded work on Tasmania. This is where the proponents of the guerilla warfare thesis think they have their strongest case. There was a series of hostilities during what they call the Black War of 1824 to 1831, when a total of 185 white settlers and their convict servants were killed and 213 were wounded by Aborigines over eight years. Henry Reynolds calls this "the biggest internal threat that Australia has ever had",[17] and he has been lobbying for some years for the Australian National War Memorial in Canberra to honour the 500 Aboriginal guerilla fighters he says were killed on their home soil in defence of their country. Apart from the total of white casualties, however, all of these claims are false. My own tally of the credible Aboriginal death toll is less than one hundred.

I have come to a quite different interpretation of the causes of the hostilities of this period. I will conclude today by reading to you the summary of my project's arguments against the frontier warfare thesis in Van Diemen's Land:

> "The hostilities of the Tasmanian Aborigines did not amount to either conventional or guerilla warfare. In their first three years, 1824-1826, the hostilities were almost entirely confined to the action of a small group of Aboriginal bushrangers, who had two leaders. One of them, Musquito, was a native of Sydney who had no ethnic or cultural connection to the Tasmanian people or to any territory on the island; the other, Black Tom, was a detribalised Aborigine reared since childhood in a white household in Hobart Town. Moreover, the hostilities began at a time when white farms and pastoral property had not yet seriously deprived the Aborigines of very much land or barred them from passage over it. At the time, the settlers occupied only 3.1 per cent of the island, most of it unfenced.
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> "For the entire period of the 'Black War' from 1824 to 1831, there is no credible evidence that the Aborigines had any military, political or patriotic objectives. Nor did they have any military or other kind of organisation. They never engaged in anything that could be defined as warfare. Almost all their victims were unarmed settlers, stock-keepers and their families in isolated locations. Ten per cent of casualties were white women and children.

"As far as we can tell from the ethnographic evidence, the Aborigines did not have the kind of relationship to the land that would lead them to wage sustained warfare in its defence. If they had had strong territorial instincts, the Aborigines would have displayed them in the first twenty years of British colonisation when they would have been most affronted. In these two decades, however, the Aborigines made little attempt to resist the trespass of the intruders. Several bands willingly came in to the white settlement seeking food and household goods. They were never starving or even seriously deprived of traditional food. In fact, the evidence shows that, at the height of the hostilities, native game abounded throughout the whole of the island.

"Instead, the motives of the Aborigines lay in a combination of revenge and plunder. A small number wanted to revenge themselves on white colonists who had injured them or killed their kinfolk. This revenge took the form of indiscriminate violence against any white people they encountered. However, the principal reason for Aboriginal violence was their desire for British consumer goods, especially flour, sugar, tea, blankets and bedding. Excluded from the labour force and having no way except begging of legally acquiring what to them were luxury products, the Aborigines chose to plunder them from the huts and homesteads of settlers instead, and to kill any whites they found in their way. The actions of the Aborigines were not noble: they never rose beyond robbery, arson, assault and murder".

The idea that Aborigines, either in Tasmania or on the mainland, were patriots engaged in a valiant defence of their territory against the firepower of British imperialism did not originate in Australian history. It is a piece of ideology derived from the anti-colonial movements of Asia and Africa in the 1950s and '60s. It has nothing to do with the mentality of tribal hunter-gatherers of the late 18th and early 19th Centuries. In other words, the underlying inspiration for modern Aboriginal politics, the notion of resistance to white invasion, does not derive from traditional Aboriginal culture either. It is a continuation of the radical politics of the Sixties by other means.

**Endnotes:**

1. *The Weekend Australian Magazine*, 25-26 August, 2001, p.50.

2. Henry Reynolds, *After Mabo, What About Aboriginal Sovereignty?*, in *Australian Humanities Review*, April-June, 1996 (www.lib.latrobe.edu.au/AHR/).

3. Patrick Macklem, *Indigenous Peoples and the Canadian Constitution: Lessons for Australia*, Paper to Conference on Indigenous People in National Constitutions, Canberra, May, 1993, p.41.

4. Aboriginal and Torres Strait Islander Commission, *Treaty: Let's Get it Right,* ATSIC National Treaty Support Group, May, 2001, p.17.

5. *Ibid.*, p.16.

6. Henry Reynolds, *Aboriginal Sovereignty*, Allen and Unwin, Sydney, 1996, pp.182-3.

7. Garth Nettheim, *A Response to Henry Reynolds*, in *Australian Humanities Review*, April-June, 1996.

8. ATSIC, *op. cit.*, p.8.

9. Harry Lourandos, *Continent of Hunter-Gatherers: New Perspectives in Australian Prehistory*, Cambridge University Press, Melbourne, 1997, pp.xiv-xvi.

10. Jones, *Tasmanian Tribes*, Appendix to Norman Tindale, *Aboriginal Tribes of Australia*, Australian National University Press, Canberra, 1974, p.328.

11. Jones, *Tasmanian Tribes*, *loc. cit.*, p.334; Robinson, diary, 26 September, 1830, *Friendly Mission*, (ed. NJB Plomley), Tasmanian Historical Research Association, Hobart, 1966, p.220.

12. Justice Blackburn, *Milirrpum and Others v. Nabalco Pty Ltd and the Commonwealth of Australia*, 1971, in Jean Malor (ed.) *Federal Law Reports*, Vol. 17, Law Book Company, Sydney, pp.169-71.

13. LR Hiatt, *Arguments About Aborigines*, Cambridge University Press, Melbourne, 1996, p.190, n.50.

14. *Ibid.*, pp.23-6, 32-3.

15. *The Australian*, 21 August, 2001.

16. Blackburn, *loc. cit.*, at p.239.

17. Henry Reynolds, *A War to Remember,* in *The Weekend Australian*, 1-2 April, 1995.