

## Chapter Eleven

### *Mabo* and the Fabrication of Aboriginal History

Keith Windschuttle

Let me start by putting a case which, to The Samuel Griffith Society, might smack of heresy. There are two good arguments in favour of preserving the rights of the indigenous peoples who became subjects of the British Empire in the colonial era. The first is that, since 1066, British political culture has been committed to the “continuity theory” of constitutional law, in which the legal and political institutions of peoples who were vanquished, rendered vassals or subsumed by colonization were deemed to survive the process. Not even their conquest, John Locke wrote in his *Second Treatise of Government*, would have deprived them of their legal and political inheritance.<sup>1</sup> So, after colonisation, indigenous peoples would have retained their laws and customs until they voluntarily surrendered them.

The second argument is that the previous major decision in this field, by the Privy Council in 1889, was based on the assumption that, when New South Wales became a British colony in 1788, it was “a tract of territory practically unoccupied”. This is empirically untrue. At the time, there were probably about 300,000 people living on and subsisting off the Australian continent. Under any principle of natural justice, the Privy Council should have started by recognizing this.

According to a forthcoming book on the history of Australian philosophy by James Franklin, provocatively entitled *Corrupting the Youth*, the *Mabo* decision derived primarily from the Catholic doctrine of natural law, which goes back as far as Thomas Aquinas. The majority of those who supported *Mabo* were Catholics, and three of them had been students of jurisprudence at the University of Sydney under Julius Stone, who, while not a Catholic or supporter of Catholic doctrine himself, taught that judges should look not only to the law itself, but also to the underlying principles derived from moral reasoning that informed the law.<sup>2</sup>

So, because indigenous people lived here in substantial numbers before colonization and retained their own laws and customs, then, irrespective of the specific contents of British common law or the provisions of the Australian Constitution, they had rights deriving from those facts. So, from both the British constitutional tradition, on the one hand, and the principles of justice or natural law, on the other, the Australian Aborigines certainly retained their existing rights beyond 1788.

To say this, however, is not to support the kind of judicial adventurism for which the High Court became notorious in the 1990s. It is simply to argue that there are some cases where one needs to go beyond the Constitution and black letter law, back to first principles. The rights of the original inhabitants are one of those cases – perhaps the only one.

There was, however, far more to the *Mabo* decision than Catholic moral reasoning. The judgment was conceived within the political atmosphere that had prevailed since the 1960s, and it relied upon a significant number of assumptions drawn from contemporary anthropology and the history written in that period.

What I want to suggest is that any reconsideration of the *Mabo* judgment needs to examine its extra-legal dimensions, that is, its political, anthropological and historical assumptions.

While I’m not yet sure of the precise origins of the demand for land rights for Aborigines, the phrase was certainly in common use on the political Left in the late 1960s. The Whitlam Labor Party campaigned for land rights in its successful bid for government in 1972. In office, Whitlam gave Mr Justice Woodward a brief to institute a land rights regime in the Northern Territory, which he did with

the *Northern Territory Land Rights Act* of 1976. Whitlam had a great deal of support for this action from within Australia's political, legal, academic, media and arts communities. He had very little credible opposition.<sup>3</sup>

Indeed, Australia's intellectual classes took up the issue with more fervour than Aboriginal people themselves. In a paper to this society two years ago,<sup>4</sup> I noted that in the *Gove Case* as early as 1971, the anthropologists Ronald Berndt and Bill Stanner assured Justice Blackburn that the local Aborigines had long traditions of ownership of the land in question. However, when ten Aboriginal witnesses from eight different Northern Territory clans appeared in the case, they all denied this, especially the notion of their exclusive identification with this particular territory. Justice Blackburn subsequently decided that the Aborigines did not have a proprietary interest in these tracts of land, that is, they did not have a concept of ownership over them.<sup>5</sup>

In reaching this decision, Justice Blackburn discussed at some length the differences between the colonization of Australia and New Zealand. He said:

“One of the reasons for the fact that a system of 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 organized bands of natives, which never occurred in Australia”.<sup>6</sup>

Since that statement was made, a major industry has emerged to prove it wrong. The first and still most influential text of this movement was *The Other Side of the Frontier* by Henry Reynolds, which argued that, faced with white invasion of their land, the Aborigines mounted a century-long campaign of frontier hostilities, with guerilla warfare as their principal tactic.<sup>7</sup> Since its publication in 1981, this work has spawned a host of imitators from other authors, as well as another twelve books and an ABC television documentary series by Reynolds himself. Some of his colleagues, with more than a little envy at his popular success, have unkindly suggested that Reynolds has written the same book, twelve times.

The notions of Aboriginal resistance, frontier warfare and patriotic defence have been accepted throughout the historical profession itself. Only a handful of skeptics have dared suggest that Reynolds has overdone the violence.<sup>8</sup> The few complaints have been confined to the specialist academic literature, and have done virtually nothing to influence wider intellectual circles. The judges in the *Mabo Case* had no doubt that Reynolds's story was true. Indeed, the Deane and Gaudron judgment discusses hostilities between British colonists and Aborigines as early as the 1790s, and goes on to describe:

“..... a conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame”.<sup>9</sup>

Three years ago I began a project to examine the evidence that the historians had used to construct this case. I started with Reynolds's claim in *The Other Side of the Frontier* that 10,000 Aborigines had been killed in Queensland before federation.<sup>10</sup> The reference Reynolds provided for this was an article of his own in an anthology called *Race Relations in North Queensland*. This was a typescript publication held by only a few libraries, but I found a copy and read it. To my surprise, it was not about Aboriginal deaths at all. It was a tally of the number of *whites* killed by Aborigines. Nowhere did it mention an Aboriginal death toll of 10,000. Reynolds had provided a false citation of his evidence.<sup>11</sup>

Since then I have been checking the footnotes of the other historians in this field, and have found a similar degree of misrepresentation, deceit and outright fabrication. The project began in Tasmania, or Van Diemen's Land as it was known until 1855, about which I originally expected to write a single chapter. However, in going back to the archives to check what happened there, I found such a wealth of material, including some of the most hair-raising breaches of historical practice imaginable, that Van Diemen's Land has become the subject of the first of what will eventually be a three-volume series entitled *The Fabrication of Aboriginal History*.<sup>12</sup>

Volume One (*Van Diemen's Land, 1803-1847*) has two major arguments: first, that there was no

genocide in Van Diemen's Land; second, that there was nothing that deserved the name of frontier warfare either. In any discussion of *Mabo* and land rights, the question of frontier warfare is the key. If the Aborigines acted as Reynolds says they did, then not only was Justice Blackburn wrong in 1971, but the case for land rights would also be substantially strengthened.

In the debate over genocide, I can report that my opponents among the historians of Tasmania have largely conceded. Frontier warfare, however, is a different matter, and there is no sign of any of them giving way. So let me give some examples of the case against them.

Lyndall Ryan says the so-called "Black War" of Tasmania began in the winter of 1824 with the Big River tribe launching patriotic attacks on the invaders. However, the assaults on whites that winter were made by a small gang of detribalized blacks led by a man named Musquito, who was not defending his tribal lands. He was an Aborigine, originally from Sydney, who had worked in Hobart for ten years before becoming a bushranger. He had no Tasmanian tribal lands to defend. Musquito was captured and executed in 1825.

His successor as leader of the gang was Black Tom, a young man who, again, was not a tribal Aborigine. He had Tasmanian native parents, but had been reared since infancy in the white middle class household of Thomas Birch, a Hobart merchant. He apparently joined Musquito's gang because it offered him the prospect of a female companionship, which he could not find in white society. Until his capture in 1827, he was Tasmania's leading bushranger but, as with Musquito, his actions cannot be interpreted as any kind of patriotic defence of tribal Aboriginal territory.<sup>13</sup>

From 1828 to 1830, tribal Aborigines emulated these predecessors by raiding white households, assaulting and killing their occupants, and stealing their contents. Henry Reynolds claims Lieutenant-Governor Arthur recognized, from his experience in the Peninsular War against Napoleon, that the hostilities emulated the Spanish tactic of guerilla warfare, in which small bands attacked the troops of their enemy. However, during his military career Arthur never served in Spain. If you read the full text of the statement Reynolds cites, you find Arthur was talking not about troops coming under attack by guerrillas, but of Aborigines robbing and assaulting unarmed shepherds on remote outstations.<sup>14</sup>

In 1841, after they accompanied George Augustus Robinson to Victoria, five Tasmanian Aborigines attacked several shepherds and looted their huts in the Westernport-Dandenong districts. Ryan claims: "Their tactics had all the marks of sustained guerilla resistance to white settlement".<sup>15</sup> However, these so-called "guerillas" were in what was to them a foreign country, where they were intruders just as much as anyone from England. The notion that they were offering "resistance" to white incursions of the tribal lands of Victorian Aborigines, with whom they had no cultural, linguistic, tribal or kin connections of any kind, is absurd. Yet this is what passes for historical analysis in the book described by Henry Reynolds as "by far the best and most scholarly work on the Tasmanian Aborigines in the 20th Century".<sup>16</sup>

Arthur inaugurated the "Black Line" in 1830, Reynolds claims, because "he feared 'a general decline in the prosperity' and the 'eventual extirpation of the colony' ".<sup>17</sup> Reynolds presents that last phrase as a verbatim quotation from Arthur. However, Arthur never said this. Reynolds altered his words. When confronted by journalists of *The Sydney Morning Herald* with this charge from my book, Reynolds replied: "I've never said that. That's quite, quite misleading. How could the Aborigines destroy the colony? ... Nowhere did I suggest that Arthur thought they could wipe out the colony. That would be a silly thing to say".<sup>18</sup> However, six days later, after journalists sent Reynolds the page in his book *Frontier* where he did quote Arthur saying exactly that, he finally agreed what he had done. He said: "It's a bad mistake. I obviously didn't know it existed, far from it that I had done it deliberately to distort the story ... All historians are fallible and make mistakes".<sup>19</sup>

However, anyone who reads the offending page in Reynolds's book *Frontier* will struggle to understand how it could be merely a mistake. In the same paragraph there are five other truncated

quotations that appear to support the same false claim, that the colonial authorities thought the Aborigines threatened the very survival of the colony. One of them was made by the editor of the *Hobart Town Courier*, James Ross, who said at a public meeting in 1830 that if Aboriginal violence was not stopped they would “come and drive us from this very Court room and compel us to take refuge in the ships”.

Reynolds presents this statement as if it were a common fear at the time. But he neglects to say that as soon as Ross said this, Robert Lathrop Murray, the editor of the rival newspaper, *The Tasmanian*, got to his feet and said:

“No doubt that they are enabled to commit many atrocities, most frequently by the exercise of that cunning by which all savages are distinguished, but to talk of six dozen miserable creatures, and never was a larger body seen assembled than 72, driving us from this room, is of course a joke”.<sup>20</sup>

Reynolds knew full well that Murray had made this statement, but he deliberately kept it from his readers in order to falsely portray all the settlers quaking with fear. This omission is just as much a distortion of the truth as Reynolds’s original alteration of Lieutenant-Governor Arthur’s words. None of this is an accident or a mistake. Indeed, Reynolds claims such fears were common throughout Australia. He writes:

“Many pioneer towns – including Perth and Brisbane – were to experience moments of equal anxiety during the half century after 1830”.<sup>21</sup>

Lyndall Ryan claims that in 1826, police killed fourteen Aborigines at Pitt Water. However, none of the three references she provides mention any Aborigines being killed there in 1826 or any other time.<sup>22</sup>

Ryan claims that hostilities in the northern districts of Tasmania in 1827 included: a massacre of Port Dalrymple Aborigines by a vigilante group of stockmen at Norfolk Plains; the killing of a kangaroo hunter in reprisal for him shooting Aboriginal men; the burning of a settler’s house because his stockmen had seized Aboriginal women; and the spearing of three other stockmen, and clubbing of one to death, at Western Lagoon. But not one of the five sources she cites mentions any of these events.<sup>23</sup>

Between 1828 and 1830, according to Ryan, “roving parties” of police constables and convicts killed 60 Aborigines. Not one of the three references she cites mentions any Aborigines being killed, let alone 60. The Governor at the time, and most subsequent authors, regarded the roving parties as completely ineffectual.<sup>24</sup>

Lloyd Robson, author of the two-volume *History of Tasmania*, claims the settler James Hobbs in 1815 witnessed Aborigines killing 300 sheep at Oyster Bay, and the next day the 48th Regiment killed 22 Aborigines in retribution. However, it would have been difficult for Hobbs to have witnessed this in 1815 because at the time he was living in India. Moreover, the first sheep did not arrive at Oyster Bay until 1821, and in 1815 there is no evidence the 48th Regiment ever went anywhere near Oyster Bay.<sup>25</sup>

Robson, and four other authors, repeat a story that 70 Aborigines were killed in a battle with the 40<sup>th</sup> Regiment near Campbell Town in 1828. However, all neglect to say that a local merchant told a government inquiry that he went to the alleged site with a corporal on the following day but could find no bodies or blood, only three dead dogs. “To tell you the truth,” the corporal then confessed, “we did not kill any of them”.<sup>26</sup>

Both Robson and Ryan also repeat the story of the heroic Aboriginal resistance fighter, Quamby, after whom the peak known as Quamby Bluff is supposedly named. They claim Quamby disputed the land occupied by the colonists near Westbury and repelled them, although he was later shot dead. However, Quamby Bluff was not named after an Aboriginal person at all. The first account of how it got its name appeared in the *Hobart Town Courier* in March, 1829. A party of white kangaroo hunters came across a lone Aborigine, who fell to his knees crying “quamby, quamby” meaning “mercy, mercy”. In other words, “quamby” was not the name of a man but an expression of the language. More than a year later George Augustus Robinson invented the story about the Aboriginal resistance leader, which

academic historians now repeat as if it were true. They repeat this story because it supports their thesis about frontier warfare, their assumption being that, because it fits the thesis, it therefore must be true.<sup>27</sup>

This whole case is not just a fabrication, it is a romantic fantasy derived from academic admiration of the anti-colonial struggles in South-East Asia in the 1950s and '60s. The truth is that in Tasmania more than a century before, there was nothing on the Aborigines' side that resembled frontier warfare, patriotic struggle or systematic resistance of any kind.

It is a similar story on the white side of the frontier. The infamous Tasmanian "Black Line" of 1830 is described by Reynolds as an act of "ethnic cleansing", and it is commonly regarded as an attempt to capture or exterminate all the Aborigines.<sup>28</sup> However, its true purpose was to remove from the settled districts only two of the nine tribes on the island to uninhabited country, from where they could no longer assault white households. The Lieutenant-Governor specifically ordered that five of the other seven tribes be left alone.<sup>29</sup>

The so-called "Black War" turns out to have been a minor crime wave by two Europeanised black bushrangers, followed by an outbreak of robbery, assault and murder by tribal Aborigines. All the evidence at the time, on both the white and black sides of the frontier, was that their principal objective was to acquire flour, tea, sugar and bedding, objects that to them were European luxury goods.<sup>30</sup>

In the entire period from 1803, when the colonists first arrived, to 1834, when all but one family of Aborigines had been removed to Flinders Island, my calculation is that the British were responsible for killing only 120 of the original inhabitants, mostly in self defence, or in hot pursuit of Aborigines who had just assaulted white households. In these incidents, the Aborigines killed 187 colonists.<sup>31</sup> In all of Europe's colonial encounters with the New Worlds of the Americas and the Pacific, the Colony of Van Diemen's Land was probably the site where the least indigenous blood of all was deliberately shed.

One of the critical issues in the debate over native title is the attitude the pre-contact Aborigines had to the land. Most discussion assumes they had clearly defined territories, which were exclusively theirs. This concept was one of the principal assumptions on which the *Mabo* decision was made. Justice Sir Gerard Brennan has made clear that his own judgment had been informed by his son, Father Frank Brennan, the Jesuit barrister and advisor to the Catholic bishops on Aboriginal affairs. In an article in 1988, Frank Brennan wrote:

"When a traditional tribal community has continued to reside on its traditional land, discharging its spiritual obligations with regard to that land, and that land has never been occupied by any other persons, that community is entitled to a legal title to that land in legal recognition of the fact that they have always lived on that land, land to which no other persons have any moral claim".<sup>32</sup>

The anthropology of Van Diemen's Land has long been based upon assumptions of this kind. The archaeologist and anthropologist Rhys Jones says that the Tasmanian Aborigines had clearly defined territories and were prepared to defend them against interlopers. Jones writes:

"Movements outside this territory, and of alien bands into it, were carefully sanctioned and had reciprocal economic advantages to the bands concerned. Trespass was usually a challenge to or punished by war".<sup>33</sup>

However, in my investigation of the sources from which Jones derived this information, I was surprised to find that his own evidence does not support it. Jones based his conclusion on the ethnographic information about Tasmanian bands contained in the diaries of George Augustus Robinson, who traversed Van Diemen's Land between 1829 and 1834 rounding up tribal Aborigines. But nowhere in the diary entries that Jones cites, nor anywhere else in the diaries for that matter, is there any mention of tribal conflict over trespass. There is a good deal of information about conflict between Aboriginal bands over women (the main cause), over long-standing vendettas, and over tribal honour, but no statement anywhere of the kind: "we fought them because they came onto our territory". Nor has any other author ever recorded one statement by the Tasmanian Aborigines that would confirm that they had

sanctions against trespass, or any concept of the exclusive use of the land.<sup>34</sup>

The strongest evidence for this thesis is actually the history of white colonization and the timing of the conflict that did occur between blacks and whites. Most observers at the time agreed there was very little violence in Tasmania for the first twenty years after the British arrived. And the historians, except Lyndall Ryan, agree there were minimal hostilities before 1824.<sup>35</sup> If the Aborigines had really felt the land was exclusively theirs, they would not have waited more than twenty years after the colonists arrived to do something about it.

Moreover, none of the Tasmanian languages had a word for land. There were twelve separate vocabularies compiled in the 19th Century. Some contained words for “ground”, but this was a synonym for “earth”. Others contained a word for “country”, as in “her country”, but this meant the country where she was born, or the country with which she identified herself. The vocabularies recorded that this meant no more than the English phrase “my country”. When I say Australia is my country, or Sydney is my city, I do not imply ownership, exclusive possession or sanctions against trespass. The word “land” does appear in the index entry to Brian Plomley’s compilation of the vocabularies, but when you look up the text you find the actual entry is “grassland”, which Plomley himself distinguishes from “forest” and “heath”; that is, it refers to a form of vegetation or landscape.<sup>36</sup>

Individual Aboriginal bands were certainly identified with particular territories, which they regularly visited. But they by no means confined themselves to these territories. Members of the Big River tribe, for instance, annually visited Cape Grim in the north-west, Port Sorell on the north coast, Oyster Bay on the east coast, and Pittwater and Storm Bay in the south-east; that is, they regularly traversed most of the island.

Nowhere in the Tasmanian language, or indeed mindset, was there “land” in the sense that we use it, that is, as a two-dimensional space marked out with definite boundaries, which can be owned by individuals or groups, which can be inherited, which is preserved for the exclusive use of its owner, and which carries sanctions against trespassers. In other words, in Tasmania there was nothing that corresponded to Frank Brennan’s notion of “land to which no other persons have any moral claim”.

Indeed, in Tasmania there is a further point to be made. Brennan’s case is based on the assumption that Aborigines “have always lived on that land”, and that “that land has never been occupied by any other persons”. The timescales he imagines, however, do not fit the evidence we have about the lifespan of Aboriginal bands.

Robinson’s diaries indicate that within Tasmanian tribal society, the formation, extinction and re-formation of hunter-gatherer bands was a very fluid process. Bands could merge with one another or be destroyed by internecine warfare, all within the span of one generation. Robinson recorded one incident where natives from Bruny Island mounted an expedition to the Tasman Peninsula, where they killed several of the men of the local tribe and took away their women. Obviously, without women, this band would not survive beyond the remnants of the current generation. Robinson records at least ten other incidents of inter-tribal fighting to capture women, some of which must also have led to the complete inability of the losing band to reproduce itself.<sup>37</sup> There is not enough data to record the rate of band extinction in Tasmania, but anthropological evidence from tribal societies in New Guinea and the Amazon basin indicates that, within a tribe, that is, a population sharing language and inter-marriage, the rate of extinction of particular territorial bands can range from ten to thirty per cent every twenty five years.<sup>38</sup>

In other words, Frank Brennan’s assumption that there are territories which an identifiable group of indigenous people have always lived on, cannot be automatically made without good evidence. And it certainly should not be made for Tasmania, given all the evidence we have to the contrary.

Any analysis of land rights in Tasmania is bound to remain an academic exercise. While there are people today who certainly have genetic links with the Tasmanian Aborigines, there was no cultural

continuity between the original inhabitants and their modern descendants. Under existing Commonwealth legislation, no land claim from Tasmania would be successful, which is why politicians from that State who have given land to the modern descendants have done so simply by making grants or purchases through the Indigenous Land Fund.

On mainland Australia, however, the situation is obviously very different. There are some indigenous communities with long-standing connections to particular territories. If you read the work of the most reliable anthropologists on the subject, that is, the anthropologists who have been least infected by the modern politicization of the topic, such as Ken Maddock and Les Hiatt,<sup>39</sup> you find the situation is mixed. There are some mainland Aborigines who do have notions of exclusive ownership and responsibilities to particular territories. From both their own oral evidence and British colonial records, they can demonstrate very long ties to these lands. In what is now Victoria, some built stone huts and engaged in semi-permanent activities such as fish and eel farming. Others, however, appear to have had no closer a relationship to the land than that prevailing in Tasmania.

The problem with the *Mabo* judgment was its sweeping assumptions about all of this. As is well known, its decision was made about land on the island of Mer, where the indigenous people cultivated gardens. The judges simply said that the same title was also applicable to land on the mainland, where the overwhelming pattern of land use was nomadic hunting and gathering.

I would argue that we have to make distinctions among hunter-gatherers themselves. The Aborigines were not one people, and they did not inhabit one culture. When the British arrived in 1788, the Aboriginal population had been formed by successive waves of hunter-gatherers who had made the crossing from Asia since the Pleistocene era. Some came here as much as forty thousand years ago; others, especially those who brought the dingo, did not arrive until about five thousand years ago. The evidence of both stone tool cultures and mitochondrial DNA analysis indicates the Australian continent actually contained a greater diversity of indigenous peoples than Europe.<sup>40</sup>

The *Mabo* judgment lumped them all together. As the evidence from Tasmania demonstrates, however, some pre-contact indigenous cultures did not exercise any land rights. This is not an argument that they had no rights of any kind. The rights that would have persisted beyond colonization in 1788 would have been those they exercised and enjoyed before the British ever arrived on the scene. Whether we take Thomas Aquinas or John Locke as our guide, these would have been hunting rights, fishing rights, foraging rights, traveling rights and perhaps some others that the evidence would support. The Tasmanians certainly thought the game belonged to them, since the very little conflict that did occur in the first twenty years of settlement was over whites taking kangaroos, which the Tasmanians plainly regarded as their sole prerogative. But native title, in terms of a two-dimensional space conferring exclusive rights of occupation, was not part of their conceptual universe.

None the less, as I said before, I do not know at this stage to what extent that mentality was replicated on the mainland. Nor am I certain at what point in colonial history the Aborigines would have voluntarily surrendered their original laws and customs, and thus lost those rights that Locke assures us they did retain. Some of them “came in” to white society and became dependent upon it soon after the initial settlement, as early as the 1790s in Sydney, but as late as the 1930s in some parts of northern Australia.

What we can be more certain of, however, even from the sole perspective of the Tasmanian evidence, is that the High Court’s *Mabo* judgment was an inadequate response to the complexity of pre-contact Aboriginal culture, and to those genuine rights that Aboriginal people did have by the fact of their earlier occupation of this continent. In making its judgment, the Court was heavily influenced by the politics of the day, by the push for land rights that emerged in the 1960s, and by the highly politicized version of history that was part of the same movement.

The major problem that stems from the judgment is also political. Since the 1970s, land rights have

been seen as the panacea for Aboriginal problems. Land rights were supposed to usher in an era of Aboriginal self-determination.

Today, Aboriginal people have now been subject to almost thirty years of an extensive and expensive social experiment. Native title has not been the only variable in this experiment and so cannot be allocated all the blame. Other variables have been the decisions of industrial relations tribunals, the policies of the welfare state, the curriculum of the education system, and the activities of the legal fraternity. On any reasonable assessment of the outcomes, the experiment has been a failure.

There are now prominent Aborigines who are prepared to tell it like it is. John Ah Kitt, an Aboriginal Minister in the government of the Northern Territory, where nearly all Aborigines have had land rights for decades, says it is now almost impossible to find an Aboriginal community that is not dysfunctional:

“I don’t mean the 10 to 15 communities that my department tells me at any one stage are managerial or financial basket cases ... I am talking of dysfunction that is endemic through virtually all of our communities, both in towns and the bush”.<sup>41</sup>

Others, like Noel Pearson, speak of the despair and violence produced by the regime of passive welfare. Recently, Richard Ahmat from Cape York wrote: “Our people are mired in social dysfunction and economically we are neck-deep in dependency”.<sup>42</sup>

Land rights may not have originated as a white man’s idea, but it has certainly been a white man’s solution. It has provided the means for white society to congratulate itself on its munificence, but at the same time to avoid the problem of integrating Aborigines into mainstream society. The policy of land rights has focused on the Aboriginal past rather than the Aboriginal future.

If you look at the broad demographics of Aboriginal society it is not hard to see where the future lies. Today more than 70 per cent of Aboriginal people live in what the Census describes as major urban and other urban centres, that is, the cities and large country towns.<sup>43</sup> There are more Aborigines now living in Sydney alone than in the entire western third of the continent, outside Perth. The news media, of course, prefer the bad news out of inner urban ghettos like Redfern, and miss the main story of measurable progress in the outer suburbs. The Australian Bureau of Statistics shows clearly that, in suburban Australia, there is now an Aboriginal middle class. Even at the lower socio-economic levels, in urban regions the majority of Aboriginal adult males are employed, and the majority of Aboriginal children leave school literate and numerate. In the remote communities, where they have long enjoyed land rights, these statistics are completely reversed.

In other words, most Aboriginal people have voted with their feet in favour of integration with white Australia. They are now the long-term beneficiaries of the modernization and civilization that Britain first brought to these shores in 1788. You would never know this, however, if you only listen to Australia’s intellectual classes. They still advocate the politics of segregation, of which native title is but the latest manifestation. By giving its imprimatur to this same old, persistently failed approach to Aboriginal affairs, the High Court’s *Mabo* judgment deserves to be recognised as part of the problem, not part of the solution.

#### Endnotes:

1. John Locke, *Of Conquest*, in *Second Treatise of Government*, paragraph 175, in *Two Treatises of Government*, ed. Peter Laslett, Mentor, New York, 1965, p. 431.
2. James Franklin, *Corrupting the Youth: A History of Philosophy in Australia*, Macleay Press, Sydney,



- forthcoming 2003.
3. Kenneth Maddock, *The Australian Aborigines: A Portrait of their Society*, Penguin Books, Ringwood, second edn, 1982, pp. 17-18.
  4. Keith Windschuttle, *History, Anthropology and the Politics of Aboriginal Sovereignty*, in *Upholding the Australian Constitution*, Proceedings of The Samuel Griffith Society, Volume 13 (2001), pp. 43-60.
  5. 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.
  6. *Ibid.*, p. 239.
  7. Henry Reynolds, *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin Books, Ringwood, 1982.
  8. For example, Bob Reece, *Inventing Aborigines*, in Valerie Chapman and Peter Read (eds), *Terrible Hard Biscuits: A Reader in Aboriginal History*, Allen and Unwin, Sydney, 1996, pp. 32-3.
  9. Justices Deane and Gaudron, High Court of Australia, *Mabo v. Queensland*, in Richard H Bartlett (ed.), *The Mabo Decision*, Butterworths, Sydney, 1993, p. 79.
  10. Reynolds, *op. cit.*, p. 122.
  11. Henry Reynolds (ed.), *Race Relations in North Queensland*, History Department, James Cook University of North Queensland, 1978. See Reynolds's own contribution, *The Unrecorded Battlefields of Queensland*, pp. 23-52, especially footnote 128, which is the only comment in the article on the Aboriginal death toll:
 

“Aboriginal fear and insecurity was, we must assume, infinitely greater than that of the settlers. Their death rate may have been ten times more than that of the Europeans”.
  12. Keith Windschuttle, *The Fabrication of Aboriginal History: Volume One, Van Diemen's Land 1803-1847*, Macleay Press, Sydney, 2002.
  13. *Ibid.*, pp. 65-77.
  14. *Ibid.*, p. 96.
  15. Lyndall Ryan, *The Aboriginal Tasmanians*, revised edition, Allen and Unwin, Sydney, 1996, p. 197.
  16. Cover blurb on Ryan, *op. cit.*, 1996 edition.
  17. Henry Reynolds, *Frontier: Aborigines, Settlers and the Land*, Allen and Unwin, Sydney, 1996, p. 29.
  18. *It's 170 years on, and historians are still fighting the Aboriginal wars*, in *The Sydney Morning Herald*, 22 November, 2002.
  19. *Historian admits misquoting governor Arthur over Aboriginal attacks*, in *The Sydney Morning Herald*, 30 November, 2002.

20. *Colonial Times*, Hobart, 24 September, 1830, p. 3.
21. Henry Reynolds, *The Black War: A New Look at an Old Story*, in *Tasmanian Historical Research Association: Papers and Proceedings*, Vol. 31, No. 4, December, 1984, p. 5.
22. Windschuttle, *The Fabrication of Aboriginal History*, pp. 135-7.
23. *Ibid.*, pp. 139-43.
24. *Ibid.*, pp. 149-58.
25. *Ibid.*, pp. 144-6.
26. *Ibid.*, pp. 146-9.
27. *Ibid.*, pp. 280-1.
28. Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History*, Viking, Ringwood, 2001, p. 76.
29. Windschuttle, *The Fabrication of Aboriginal History*, pp. 172-4.
30. *Ibid.*, pp. 122-9.
31. *Ibid.*, pp. 85, 387-97.
32. F Brennan, *The absurdity and injustice of terra nullius*, Ormond Papers 5, 1988, p. 54.
33. Rhys Jones, *Tasmanian Tribes*, appendix to Norman Tindale, *Aboriginal Tribes of Australia: Their Terrain, Environmental Controls, Distribution, Limits and Proper Names*, Australian National University Press, Canberra, 1974, p. 328.
34. Windschuttle, *The Fabrication of Aboriginal History*, pp. 103-11.
35. *Ibid.*, pp. 111-3.
36. H Ling Roth, *The Aborigines of Tasmania*, F King and Sons, Halifax, 1899, appendices A, B, C, D, E and F, pp. i-xxxiii; N J B Plomley, *A Word-list of the Tasmanian Aboriginal Languages*, published by author in association with the Government of Tasmania, 1976, p. 243.
37. N J B Plomley (ed.), *Friendly Mission: The Tasmanian Journals and Papers of George Augustus Robinson*, Tasmanian Historical Research Association, Hobart 1966, pp. 181, 187, 257, 379, 520, 548, 554, 618-9, 887-8.
38. Joseph Soltis *et al*, *Can group-functional behaviours evolve by cultural group selection?*, in *Current Anthropology*, Vol. 36, No. 3, June, 1995, Table 1, p. 477. See also Lawrence H Keeley, *War Before Civilization: The Myth of the Peaceful Savage*, Oxford University Press, New York and Oxford, 1996.
39. Maddock, *The Australian Aborigines*, especially Chapter Two, *Land and Society*; L R Hyatt, *Arguments about Aborigines: Australia and the Evolution of Social Anthropology*, Cambridge University Press,

Melbourne, 1996, especially Chapter Two, *Real Estates and Phantom Hordes*.

40. M Stoneking and A C Wilson, *Mitochondrial DNA*, in Adrian V S Hill and Susan W Serjeantson (eds), *The Colonization of the Pacific: A Genetic Trail*, Clarendon Press, Oxford, 1989.
41. *Black communities in a mess, warns Aboriginal minister*, in *The Sydney Morning Herald*, 8 March, 2002; Northern Territory government Hansard, 8 March, 2002.
42. *Market forces bit the Cape*, in *The Australian*, 23 May, 2003.
43. Australian Bureau of Statistics, *Census of Population and Housing, Selected Social and Housing Characteristics*, Australia, 2001, Cat. no. 2015.0.