

Jewish refugees) occupied a marginal place in Australian politics.

Those who took sides tended to do so, she shows, on the basis of established sympathies. Support for the republicans came chiefly from the left of the labour movement and the ranks of the middle-class progressives. Support for Franco's rebels came chiefly from devout Catholics. The picture that emerges from the first part of the book is of a narrow base of left activists, swamped in set-piece encounters by the Catholic activists. The celebrated debate at the University of Melbourne between Nettie Palmer, Jack Legge and Gerry O'Day, on the one hand, and Santamaria and two other zealots of the Church militant on the other, illustrates the pattern. Hundreds of Catholics turned up to stand and applaud the cry "Long Live Christ the King!"

Alongside these public displays, Inglis shows smaller support groups working by publicity, propaganda, and collection of funds to gather assistance for their side. Again, the Catholics raised the larger sums, but the Spanish Relief Committee kept up a remarkable level of activity for the republicans. One feature here is the prominence of women. It was a group of nurses who led the way in volunteering to serve in Spain; one of them, Mary Lowson, became the best-known publicist. And Nettie Palmer was the outstanding figure from outside the organised labour movement.

Inglis then turns to the volunteers. The backgrounds and motives of many are shadowy, since only a minority left any substantial record, but we see a wide variety of committed activists, idealists, wanderers and adventurers. She does not omit the single volunteer fighting on Franco's side, and his experiences provide an instructive contrast to those on the republican side.

The course of events, and the desperate, ultimately doomed, efforts to defend the republic form a backdrop to the activities of the Australians. Some fell out with their companions or were caught up in the tragic internal struggles within the republican ranks. Some died, some

were captured, some executed, some expelled. But the overwhelming impression is of their continuing attachment to the cause they served. Inglis then shows them returning to a country that cared little for their sacrifices, even though some were shortly to bear arms again in the Second World War.

The literature on Australian involvement in the Spanish Civil War is growing. Amirah Inglis' own edition of *Letters from Spain*, dealing with the particular

experiences of Lloyd Edmonds, is soon to be complemented by Judith Keene's edition of the diary of one of the nurses. But this fine history is likely to remain the standard general account of this important chapter in the left's involvement in international events.

STUART MACINTYRE teaches in History at Melbourne University.

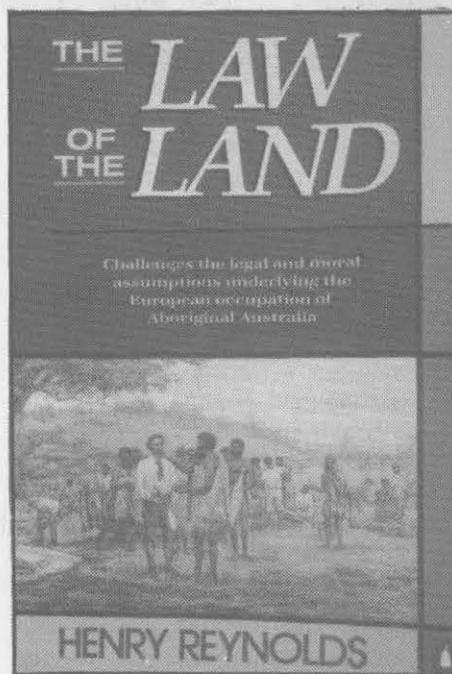
Lie of the Land

Henry Reynolds, *The Law of the Land*, Penguin, 1987. \$12.95. Reviewed by Madeline Smith.

Mining magnate Hugh Morgan recently grabbed the headlines of Darwin's Northern Territory News predicting Aboriginal urban terrorism. The Alice Springs Centralian Advocate reported him making some interesting statements concerning demands for recognition of Aboriginal Rights:

"A sovereign nation does not sign treaties with its own citizens ... The legal term terra nullius had been turned into a term of derogatory abuse of our forefathers" ... Mr. Morgan said that the doctrine meant that "those who did inhabit it were at such a primitive state of development that no treaty with them was possible."

A read of Henry Reynolds' latest book *The Law of the Land* would quickly reveal the conflation of ideas in Mr. Morgan's reported opinions. Reynolds' book is the third in a series revealing the hidden history of Australia — the history of black-white relations. He rigorously examines the law surrounding the possession of Australia and finds it a mass of contradictory and inconsistent doctrines leaving



Australians with a legacy of unresolved injustice within the confines of our own legal system. As usual the work is based on impressively extensive research, as shown in the lengthy bibliography. Fortunately, in this study references and quotations are individually endnoted so the curious or sceptical can pursue Reynolds' findings.

Reynolds explains the concept of sovereignty, and distinguishes it from possession:

The doctrine underlying the traditional view of settlement was that before 1788 Australia was *terra nullius*, a land belonging to no one. We need to ask what this obscure Latin concept actually means and if it was legitimately applied to Australia in the late eighteenth century. Confusion has abounded because *terra nullius* has two different meanings, usually conflated. It means both a country without a sovereign recognised by European authorities and a territory where nobody owns any land at all, where no tenure of any sort existed.

He then sets out to demonstrate that in legal writings of the day concerning international law, discovery and conquest, sovereignty over new territories did not automatically give unconditional ownership of the land. Rather it gave the sovereign power the sole right *vis a vis* the competing colonial powers to acquire that territory from the original occupants. This was recognised in other former colonies: America, Canada and New Zealand. However, in Australia there was not, and still has not been, any recognition of the former possession of the land by Aboriginal people or their right to just compensation for its loss.

Reynolds shows how initially Europeans conveniently believed the place to be scarcely inhabited, so literally fitting the *terra nullius* doctrine. As it became rapidly evident following settlement and expansion that there were many more Aborigines than previously thought, and that the interior was populated, the justifications for the doctrine changed. The notion of possession altered to the effect that people who lived ranging lives were considered to be only in possession for as long as they occupied a territory. After that, they were considered to have vacated it for whoever (for instance, colonists) might come along. Reynolds swiftly points out the vacuity of this argument by reference to the English common law of the day closely guarding rights to property whether the land be used for cultivation, hunting, fishing ... or nothing. The

Privy Council determined in 1887 that "by possession is meant possession of that character of which the thing is capable". The great legal writer Pollock wrote that where the land was uncultivated and partly forested "shooting over it during some months of the shooting season" was considered "enough to constitute de facto possession". The notion that land not used for cultivation was not used at all was absurd in a country developed on the basis of extensive pastoralism.

In short, the English law under which Aborigines became British subjects did not offer them the ordinary protection of the property laws developed for numerous forms of property holding in Britain. Instead popular justifications filled the gap between law and reality.

Reynolds proceeds to a history of the land rights movement. He sees the current debates echoing those of the past and, indeed, suffering from a lack of historical perspective:

Neither supporters nor opponents of land rights have paid much attention to developments of the last century. They are often ignorant of the extent to which old arguments are repeated in the course of contemporary debates and old positions defended as if for the first time. Anti-land rights campaigners believe that history is on their side. They are fortified by Blackburn's judgment of 1971 that there had never been any recognition of native title in Australian history. There has been little incentive to dig any deeper, to turn over such old and comfortable certainties. It is more surprising that advocates of land rights have paid so little attention to their predecessors, have missed the opportunity to find powerful precedents and to root their cause deep in Australian historical experience.

What he is arguing is that there has long been recognition of the prior possession of the land by Aborigines but that our law as received in the Gove Land Rights Case is a denial of this. He documents colonists', missionaries' and officials' recognition of Aboriginal property in the soil. In 1840, James Stephen, then permanent head of the Colonial Office, wrote in a despatch from South Australia:

It is an important and unsuspected fact that these Tribes had Proprietary in the Soil — that is, in particular sections of it which were clearly defined and well understood before the occupation of their country.

Reynolds then presents the thwarted efforts of reformists in the 1830s to provide protection for Aborigines during the colonisation of South Australia by requiring purchase of their land by the settlers. He argues that legislation providing for reserves, directing that a percentage of land revenue be set aside for Aborigines benefit, and guaranteeing hunting and gathering rights over pastoral properties, was not benevolence but recognition of a prior right to stolen land.

In his conclusion, Reynolds points out that Aboriginal activists are demanding both sovereignty and land rights. His argument throughout has been posited on the separateness of the concepts of sovereignty and possession. Although he does not say as much, he seems to be suggesting that demands for compensation and/or return of land as opposed to sovereignty can be logically justified in existing Australian law. Having admirably presented us with the purely fictional quality of our developed case law it seems sometimes he is tempted to believe a legal logic can somehow still be ultimately distilled from it which can be used to present a just alternative. Instead, we should recognise the injustice embodied in our illogical, inconsistent, but expedient law and demand legislative implementation of recognition of Aboriginal prior possession, rights to land and compensation.

The book's occasionally confusing quality only serves to emphasise the pedantry required to rationalise the law surrounding the conquest of Australia. Reynolds' work is indispensable to anyone wanting to know more about the legal doctrines used in Australia's colonisation, and the history of agitation for Aboriginal rights.

MADELEINE SMITH works in the office of the NT Land Commissioner in Darwin.