Historical Document
Afterword: On the Rights of the Settlers of Australia

EDWARD CAVANAGH
History Workshop
University of the Witwatersrand, Johannesburg

LORENZO VERACINI
Institute for Social Research
Swinburne University of Technology, Melbourne

We have decided to include this lecture in the first issue of *settler colonial studies* because we believe that Richard Windeyer’s early-1840s talk reveals a number of distinctively Australian settler claims, as well as discursive refrains that are typical of settler discourse elsewhere. As such, this text gives us an opportunity to reflect on what we believe is specific about settler colonialism.

Let’s recap his argument. Windeyer firstly clarifies that he is talking about Aboriginal rights to property that are specific to Aboriginal peoples. He is considering the possibility of Aboriginal title, not addressing universal rights similar to those identified by the US Declaration of Independence (it would be ‘out of place’, he notes). Aboriginal rights, whatever they may be, are thus to be based on Aboriginal customs. In the subsequent pages, Windeyer outlines his version of Aboriginal life and customs: Aborigines ‘wander’, have no ‘fixed dwelling place of any kind’, there is no ‘bond of union between the families’, and even within the family, rape and violence are fundamentally shaping all relationships. The solidarity between man and woman is compromised. Women are forced to work, he remarks: ‘Is there a burden to be carried, the woman carries it. Is there work to be done, she does it. Is there privation of food to be endured, she endures it’. Not only that, the decomposition of basic human relations is so comprehensive that it reaches the most primary of human connections: Aborigines, Windeyer alleges, eat their children.

Thus, Windeyer’s characterisation of Aboriginal customs, the hypothetical source of their putative property rights, approximates the Hobbesian ‘state of nature’. It is a barbarous life: ‘all having a right to everything, a consequence is the war of all against all’. In other words, the Aboriginal custom is that there is no custom. And here is the catch: if Aboriginal rights to property are to be recognised through their laws, and their laws are nowhere to be seen, their property rights are fundamentally and irretrievably undermined. There are no laws: ‘Do the Customs of the Aborigines come within the definition?’, he rhetorically asks. ‘The mere statement of them is an answer to the question’, he concludes.

That there are deep continuities between Windeyer’s stance and Australia’s settler colonial present should be noted: it was, for example, the representation of a corrupted Hobbesian world that justified the Northern Territory Emergency Response in 2007 (i.e., the ‘Intervention’). An imaginary crucially shaped around the portrayal of a generalised collapse of familial relation and descriptions of abused childhood could be mobilised in the 1840s as it is mobilised now. Windeyer referred to ‘that state of nature conceived by Hobbes’; Prime Minister John Howard, in an address entitled ‘To Stabilise and Protect’, referred to a ‘Hobbesian nightmare of violence, abuse and neglect’. While Windeyer would have been genuinely horrified to know that the Prime Minister of a future Australian Commonwealth at the beginning of the 21st century would use his very terminology (more on this below), the Intervention should be seen as a reversion to settler colonial tactics. (Aboriginal dysfunction, a point extensively addressed in debates surrounding the Intervention, is beside the point: a dispossessory reflex and impulse remains what it is, irrespective of whether the excuse that is adduced to justify it is factually grounded or not.)

Ultimately, in Windeyer’s estimation Aboriginal life is characterised by three fundamental deficiencies. Indeed, ‘On the Rights of the Aborigines of Australia’ can be seen as an exercise in negative definition: Aborigines wander without any specific appreciation of territory (that is, they lack dominium), they are so independent of each other that they do not recognise any particular authority or organise into identifiable polities (that is, they lack imperium), and they do not invest labour in the land or erect fixed
dwellings (that is, they lack property). It is a foolproof argument that survives in recent contestations pertaining to indigenous title and authenticity: only if they are following custom they have property, but if they are following custom they have no significant actionable property rights (and, logically, should they somehow acquire property they would not be genuinely indigenous).

All of this to say that the land is not theirs. Windeyer sees *terra nullius* wherever he looks. The ‘fallacy’ of the Philanthropists, he concludes, ‘is the assumption that the land belongs to them [Aboriginal people]’. The humanitarians and other shapers of British colonial policy are the real target of his polemic: they are so removed from Australian circumstances that they fail to understand Australian specificity. That his perspective is not that of the imperial centre is a significant aspect of his argument: what should apply to Australia cannot be ascertained from elsewhere and can only flow from actual experience (this is a classic settler refrain: distant authorities are always to blame for being soft on indigenous peoples). That Windeyer’s argument was in practice challenging the hierarchical structuring of a colonial relation should also be emphasised. In theory, decisions pertaining to a colonial outpost should be taken by the metropolitan centre, not at the periphery. On the contrary, settlers think in settler colonial, not colonial, terms. Elsewhere, Windeyer remarks, Europeans have encountered different societies, however primitive, and they conquered them. In Australia Europeans have encountered no society. Society ‘can hardly be said to have struggled into existence among the aborigines’; Europeans dispossessed indigenous people elsewhere, and this may be reprehensible, he acknowledges, but they have done no such thing in Australia. One cannot be dispossessed of something he or she does not own.

‘On the Rights of the Aborigines in Australia’ in sum concludes that Aborigines have no rights: ‘is it not the height of absurdity to talk of the title of these men of the woods to anything not under the immediate control of their bludgeons [?]’.

Sceptical towards both land rights (i.e., ‘the soil of the country’) and resource rights (i.e., ‘its wild animals’), Windeyer regards Aboriginal rights to the latter with somewhat greater sympathy. And little has changed: settler courts remain lenient when it comes to cases relating to hunting and fishing
rights but are much less understanding when it is about rights in land. They are inherently transient, and so is their interest in land. Sympathy towards its customary use is indeed compatible with unease regarding the possibility that indigenous people may actually own it, that they may claim, to use Windeyer’s words, ‘the substance of the soil to the exclusion of others’.

Of course, it is not the ‘Aborigines of Australia’ and their rights with which Windeyer is primarily concerned. If Aborigines are negatively defined, their counterpart – the settlers – must be positively defined. Thus, Windeyer’s reasoning is ultimately about the rights of the settlers of Australia: true, they just got here, but – and this is his take-home message – ‘a black man here first has no better title [...] than a white man here last’. For an argument programmatically premised on the ‘facts’ of Aboriginal life, the level of abstraction becomes stratospheric. This is how he drives his point:

Let us simplify the question by reducing the contending parties to two. Imagine a pair wrecked in an unknown sea: one lands on a beautiful island, the other is drifted to a rock on its farther side where he subsists for a day or two on limpets [mollusks], but at length the waves abating succeeds in swimming to the verdant shores where he hopes for a happier fate. His fellow, having walked across the island, meets him on the sands, saying ‘Back to your rock and your limpets, this beautiful island is mine, all the living things on it are mine for I slept under yonder tree last night, yesterday I slew a deer and presently I intend to have one of the birds flying in the air for breakfast’.

Time and space (what distinguishes the Aboriginal from the settler title – one was here first, the other is from somewhere else) must be flattened, and for this there is no better trick than deliberately manipulating perspective. We are all indigenous to planet Earth, he says; indigenous priority is nothing because space is nothing relative to ‘the infinity of the creation’, and time is nothing because centuries are ‘but days in Eternity’. The settler claim is thus not only superior,
it is actually original and ultimately based on prior occupancy. The settlers are, after all, the very first to ‘inhabit’ (rather than range over) ‘an evergreen country […] surpassing all others in salubrity’. This is a uniquely settler colonial reflex: not only settlers want the land of indigenous peoples; they also want to own it as if they were indigenous. Indeed, claiming a special relationship to land is the way settlers become indigenous (one may acquire ownership of land without necessarily fantasising about being the first to really own it; settlers, on the other hand, claim the land in culturally specific ways).

All of this to say the land only belongs to the settlers. But while the case is ‘closed’, Windeyer cannot rest. He still detects a ‘whispering in the bottom of our hearts’, and, as Henry Reynolds has also maintained, this unease should be considered genuine (Reynolds even entitled his 1998 book on the people who took this apprehension seriously after Windeyer’s evocation). Indeed, it is exactly because the case is closed that Windeyer is not at peace. He is concerned about the ‘collateral damage’ produced by his logic. He knows that denying Aboriginal title and establishing the legitimacy of the settler one are connected moves that create an unresolved problem, and that the settler claim will remain imperfect until this further issue is also resolved (hence the apprehension). Here is the solution: if Aboriginal people have no property rights as Aborigines, they could become something else. Thus, a crucial part of the settler job as Windeyer sees it is facilitating Aboriginal transformation. Windeyer considers the ‘duty cast upon us by fit means of education to make him [the Aboriginal person] conscious of the dignity, the holiness of the Mind he shares with ourselves’ imperative. Aboriginal peoples should, metaphorically speaking, swim back to the other island, survive on limpets for a while and then come back (except that by the time they get back they will not find a disorganised people; tough luck – they will do what every newcomer must do, and respect an already established system of property rights). Then and only then, Windeyer maintains, the settlers will be generous to these refugees (alas, he would have also been horrified to know that the descendants of the settlers whose interests he was upholding would be especially unkind to all refugees reaching Australia’s shores).

At the end of a process of acculturation Aboriginal people may acquire rights to property similar to those of settlers elsewhere. This is Windeyer’s settler colonial logic’s ultimate consummation: settler and indigenous person must swap places.