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THE *WIK* JUDGMENT, PASTORAL LEASES AND COLONIAL OFFICE POLICY AND INTENTION IN NSW IN THE 1840s

IN this paper I wish to assess Colonial Office attitudes to the pastoral lease question in New South Wales in the 1840s, as a means of examining the historical work placed before the High Court of Australia in *Wik*.[1] As is now well known, in that case the Court held that the pastoral leases at issue were not necessarily grants of exclusive possession. Since exclusive possession is the feature which primarily distinguishes a lease from a mere licence at common law, there was therefore no necessary extinguishment of all incidence of native title rights and interests by reason of the grant of those particular pastoral leases.

A key feature of the reasoning in the majority judgments is that these pastoral leases were creatures of statute; the Mitchelton lease being a grant made pursuant to the *Land Act* 1910 (Qld), and the Holroyd lease a grant made under the *Land Act* 1962 (Qld).[2] In this sense their Honours in the majority were of the view that such pastoral tenures were sui generis grants, designed for Australia's unique conditions. Because the Holroyd and Mitchelton leases were grants unknown to the common law, wholly unlike commercial leases in nature, they ought to be understood solely by reference to the statutes which gave rise to them. It was inappropriate, in the majority's view, to apply common law notions of leases to such grants.

Professor Henry Reynolds' and Jamie Dalziel's work on the pastoral lease in its historical context was submitted to the High Court by the Wik people

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1 *Wik People v Queensland; Thayorne People v Queensland* (1996) 187 CLR 1.

2 Per Toohey, Gaudron, Gummow and Kirby JJ.

as part of their case.[3] Reynolds' and Dalziel's paper attempts to elucidate the intention behind the Colonial Office insistence on the provision in pastoral leases of reservation clauses in favour of Aboriginal people. These reservation clauses enabled Aboriginal people to range over lands subject to pastoral lease grants, for hunting and subsistence purposes.

Three of the majority judgments in *Wik* quote approvingly the key passage from Earl Grey's despatches concerning the Crown's intentions with respect to pastoral leases and their effect on Aboriginal occupation.[4] This passage is central to Reynolds' and Dalziel's argument submitted to the Court in *Wik*, and to Reynolds' own broader historical project.

Earl Grey's key passage states:

> I think it essential that it should be generally understood that leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such land as they may require within the large limits thus assigned to them, but that these leases are not intended to deprive the natives of their *former right* to hunt over these districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed.[5]

Reynolds emphasises the word "right" in the phrase "former right to hunt". I tend to emphasise the word "former". To decide which word should receive the emphasis when interpreting this key phrase in this crucial passage pointing to Grey's intention requires a detailed look at the context in which this document should be read. When attempting to elucidate the context of Grey's utterances and communications on Aboriginal issues as they affected the development of the colony of New South Wales, it is

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3 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826 - 1855" *Wik Peoples' Outline of Argument*, (Appendix 15, Vol 3, *Wik*, High Court of Australia) published as Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy, 1826 - 1855" (1996) 19 *UNSW LJ* 315. Since this article is an examination of the historical work placed before the High Court in *Wik*, I refer throughout to the unpublished submission to the Court by Reynolds and Dalziel. I have provided page references, and, where different, quotations from the published piece for the reader's information.

4 "Despatch No 24: Earl Grey to the Governor": at 119 per Toohey J, at 141 per Gaudron J, at 227 per Kirby J.

5 Some emphasis added.

essential to look more broadly at the context than Reynolds does. The consequence of such a broader assessment, as set out below, leads me to place an emphasis on "former" and not on "right".

There is no justice in this for the original inhabitants of Australia. But I do not think this alternative view has massive ramifications for the outcome of *Wik*. The disciplinary concerns of law are very different to those of history. Law may reach a result through the interpretation of statute and case law which historians may think strange, but that in itself should not be surprising.

Yet, for historians, it is a very surprising result of Reynolds' argument that Grey should be held up as a defender of Aboriginal interests; as I suggest below, in New Zealand, Grey had an extremely simplistic understanding of native title and attitudes towards indigenous people entirely in keeping with his times and world-view.[6]

Reynolds has made a more than significant contribution to contemporary Australian understanding of the brutality of contact history and the range of white and black reactions to white settlement, including guerilla war, resistance, accommodation, reconciliation and in a few cases acceptance and co-existence. He has shown how passionate argument and polemic by historians can make a difference.

But polemic comes at a price; the cost is that important evidence could be glossed over in the justifiable desire to indicate that Australia's history on the question of Aboriginal land rights has been devastating to Aboriginal

6 At the Law and History Conference in Christchurch, New Zealand in July 1997, the New Zealand historians who heard a version of this paper were very surprised that Grey was being held up in this way in Australia. Waitangi Tribunal historians had long had the view that Grey was no defender of the Aboriginal interest. I am grateful to the participants at that Conference for their comments, and particularly to Dr Ann Parsonson for providing me with references. See: Parsonson, "The Challenge to Mana Maori" in *The Oxford History of New Zealand* (Oxford University Press, Melbourne, 2nd ed 1992) p176, where Grey's somewhat cynical approach to land issues in New Zealand is discussed. "Amalgamation" of the "natives" with the colonists was the avowed aim of colonial policy, in the view of Herman Merivale, Permanent Under-Secretary of State for War and Colonies under Grey (1847-1858). See: Merivale, *Lectures on Colonization and Colonies* (Longman, Green, Longman & Roberts, London 1861) p511. Merivale wrote that "amalgamation" meant "the union of natives with settlers in the same community, as master and servant, as fellow-labourers, as fellow-citizens, and, if possible, as connected by intermarriage."

interests. The presentation of evidence becomes even more important when these issues are live and before the courts and Parliament, as they should be. They must be approached openly and critically. The lesson in all of this, I believe, is that historians and lawyers should approach the question of history in the courts with great circumspection, otherwise public debate on an issue as important as native title may be adversely affected.[7]

Historical evidence is often treated in a somewhat perfunctory manner by the courts. And yet, as we have seen, the intentions of the Colonial Office in London concerning the recognition of native title in Australia are notoriously difficult to establish as facts, or as a "matrix of facts".[8] The facts to some extent gain their character as facts by virtue of the interpretative framework with which the historian surrounds them. As an historian, Reynolds is alive to the problems of interpretation, use of evidence and anachronism. It might be expected therefore that he be a little more circumspect in his assessment of the issues surrounding the settlement of Australia and its justification. Yet, Reynolds passes over, without comment, the difficulties of making rather bald statements like "Colonial Office officials who recognised native title were right. The settlers who didn't were wrong."[9] This may very well be true: but it does not explain why, with the influence and authority it had, the Colonial Office did not win the day, and did not force on Australian settlers the recognition of native title issues in the same way as had occurred in Canada, the United States, New Zealand and the Cape Colony.

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7 To this extent, a letter published in the *Australian* newspaper of 3 November 1997 is instructive. The letter, from RJ Allingham of Charters Towers, attempts to extrapolate from a piece of mine in Hiley (ed), *The Wik Case: Issues and Implications* (Butterworths, Sydney 1997) to prove that, since I (apparently) said that Reynolds was wrong, therefore the *Wik* judgment was wrong. I am, of course, aware that such arguments can and will be made. I simply reject that such extrapolations should be made from historical evidence to legal argument, without the strictest evidentiary sifting and the broadest possible examination of all the sources and issues. This is the category mistake that Reynolds makes, and Allingham makes a similar mistake. As I pointed out in the short piece of mine just referred to (at p52), I was deliberately not making a comment about the disciplinary concerns of the law. This was beyond my competence. But Reynolds' work deserves critical scrutiny from a historical perspective. Like all good arguments it deserves proper examination.

8 Transcript of *Wik* proceedings, 18 April 1994, p18 per Drummond J. See also Ward, "History and Historians Before the Waitangi Tribunal" (1990) 24 *NZ J of Hist* 150 at 152.

9 Reynolds, *The Law of the Land* (Penguin Books, Melbourne, 2nd ed 1992) p194.

Historians in Australia, whose services have quite suddenly become in demand as a result of native title cases like the Wik People's claim, ought to heed the advice of their New Zealand counterparts. The Waitangi Tribunal has for some years now engaged the services of professional historians, anthropologists and linguists to assist in the hearing of claims by Maori to land. Alan Ward, one of those professionals, has suggested that a set of considerations is involved when examining historical aspects of land claims which

> now commonly govern historical interpretation, namely, that parties to an event are always acting within particular cultural contexts. They are necessarily shaped by their culture or sub-culture, affected by its assumptions and values at the time.[10]

It is very important for the historian to guard against anachronism. As Pocock has helpfully put it, "the historian is not concerned to show that belief systems are ridiculous, but to discover why they were not ridiculous once".[11]

Historians like Henry Reynolds are right to shape their questions from contemporary concerns, but their answers should as far as possible seek to explain the belief systems of the past in as careful a manner as is possible. And historians should be careful not to defer too readily to the Courts as arbiters of evidence.

What does not follow from all of this is that I think that Reynolds is wrong and I am right. Reynolds' argument is interesting, controversial, and has had significant contemporary impact. Like all good arguments it deserves close scrutiny.

But I am very concerned when historians suggest that their account "illustrates the difficulties of trying to assimilate these leases to leases under the general law."[12] It seems to me that such an illustration is strictly a legal task, and it is significant that Gummow J's judgment does not refer

10 Ward, "History and Historians Before the Waitangi Tribunal" (1990) 24 *NZ J of Hist* 150 at 153.

11 Pocock, "Tangata Whenua and Enlightenment Anthropology" (1992) 26 *NZ J of Hist* 28 at 29.

12 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p4; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy, 1826-1855" (1996) 19 *UNSW LJ* 315 at 321.

(at least in any determinative way) to the accompanying historical material.[13] Moreover, Reynolds' emphasis on Grey's intention is counter-intuitive. It is hard to accept intuitively that Grey wanted to recognise and protect native title in the sense understood in *Mabo*.[14] The principal problem is that the fundamental context for Grey's assertions is a racist one, and the point about the *Mabo* decision was that it was intended to prevent Australian society from being frozen in an age of racial discrimination, to paraphrase the Chief Justice in that case.[15]

Bain Attwood has expressed unease about Reynolds' historical project in similar terms:

> Reynolds' attempts to prove that history supports a particular interpretation of "land rights" strikes me as a very risky strategy - one that is incumbent upon lawyers ... but not upon historians - inasmuch as if it could ever be proven conclusively that the imperial and colonial governments did *not* comprehensively endorse native title, this would require us to honour this immoral precedence.[16]

While I agree that Reynolds' strategy is a risky one for an historian, I do not see any necessity to honour the immoral precedence should it be proven. If it was "proven conclusively", which is unlikely, our generation is not required to embrace the racism of the past, as the High Court has demonstrated. Nevertheless, as Reynolds has quite rightly suggested, this generation of Australians must acknowledge the past, acknowledge that enormous pain and degradation occurred, that dispossession was done, sometimes violently, sometimes not; apologise as a nation and attempt to find ways to reconciliation. This does not, in my view, require as precondition the establishment of an original intent of the British Crown to

13 In *Wik* at 184, His Honour made a point which, as a historian, I at first did not understand. His Honour argues that it would be unjust to take the historical facts presented in *Wik* and extrapolate them "to an assumed generality of Australian conditions and history" in order to "further elucidate the common law principles of native title." I now understand this to mean that, in Gummow J's view, the application of historical understanding in general terms to specific legal cases may cause injustice to parties not before the Court in the specific circumstances of that case (see for instance His Honour's comments on "intention" at 168).

14 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

15 At 88, 98 per Brennan CJ.

16 Attwood, "Introduction: The Past as Future - Aborigines, Australia and (dis)course [sic] of History" in Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, Sydney 1996) pxviii, fn62 (emphasis original).

recognise and protect native title in the manner determined by the High Court in 1992. Recognition of native title by the common law is very different to recognition of native title by the Crown, as Aboriginal people have discovered in Australia in the 1990s. Reynolds' search for an original intent of the Crown in favour of the recognition of native title in Australia in the manner determined in *Mabo* is essentially anachronistic,[17] and tends to conflate recognition by the common law in 1992 with recognition by the Crown.

It is perhaps important to remember that pastoral leases were originally designed by people with little first hand knowledge of Australian conditions, but a thorough grounding in the common law of leases. And, more importantly, the Colonial Office officials were concerned, from an Imperial perspective, with the policy implications for future development of the leasing out of the land, within a broad policy framework of systematic colonisation.

The key passage of Grey's quoted above (and central to Reynolds' argument submitted to the High Court) was written in the context of the implications for New South Wales of Orders-in-Council issued under the *Sale of Waste Lands Act* 1846 (UK). When Earl Grey transferred that Act to Governor FitzRoy, he, initially at least, made no mention of the impact the Act might have on Aboriginal interests. This Act provided the power for the Crown to demise grants for a term, and to make Orders-in-Council to give effect to that power. RM Ross, a New Zealand historian, has pointed out that Grey's instruction to FitzRoy about that Act arose directly from a "simplistic" understanding in the Colonial Office of New Zealand's land tenure arrangements.[18] Grey's "simplistic" understanding is best summed up in a dispatch dated January 1847 from Earl Grey to Governor Grey in New Zealand:

> The opinion assumed, rather than advocated, by a large class of writers on this and kindred subjects is, that the

17 Reynolds' shorter, more journalistic pieces contain examples of this. In an article in the *Weekend Australian* on 18 May 1996 p22, he quotes from a despatch of 1848 from Earl Grey to the Governor of New South Wales, Charles FitzRoy. Grey stated that it was never intended that pastoral leases should enable the exclusion of Aboriginal people from runs, and Reynolds editorialises thus: in "contemporary terms pastoral leases were not to extinguish native title." Such a translation is anachronistic because it attributes language to historical actors which ought not in the interests of good scholarship be attributed to them.

18 Ross, "Te Tiriti o Waitangi: Texts and Translations" (1972) 6 *NZ J of Hist* 129 at 147-148.

> aboriginal inhabitants of any country are the proprietors of every part of its soil of which they have been accustomed to make any use, or to which they have been accustomed to assert any title. This claim is represented as sacred, however ignorant such natives may be of the arts and habits of civilised life, however small the number of their tribes, however unsettled their abodes, and however imperfect or occasional the uses they make of the land. Whether they are nomadic tribes depasturing cattle, or hunters living by the chase, or fishermen frequenting the coast or the banks of the rivers, the proprietary title in question is alike ascribed to them all. From this doctrine, whether it be maintained on the grounds of religion or morality, or of expedience, I entirely dissent.[19]

Grey went on to refer with approbation to the writings of Dr Thomas Arnold, who advocated the theory of property rights being created by cultivation, or the mixing of labour with the soil; the Lockean argument.[20]

Given the importance which Reynolds has ascribed to Grey's intention with respect to Aboriginal rights to land in New South Wales in the 1840s, it is not enough to assert merely one instance which does not support the view offered by Reynolds of Grey's intentions. Grey had long dissented from the view about Aboriginal people being the "proprietors of every part of [the] soil" of any country which they inhabited.

In 1844, when Viscount Howick, Grey chaired the Select Committee on the State of the Colony of New Zealand, established because of the difficulties arising from administration in New Zealand, including the establishment of the origin of title to land. The members of the Committee included Benjamin Hawes, later Parliamentary Under-Secretary for War and Colonies, when Grey was Secretary of State. In the Select Committee's final report, the Committee was quite clear that usual colonial policy practice had not been followed properly by the colonial officials in New Zealand. The report not only set out the errors which the

19 "The Affairs of New Zealand: Correspondence with Governor Grey, 1847" reproduced in "Accounts and Papers [of the] House of Commons", 1847 Vol XXXVIII, *Irish University Press Series of British Parliamentary Papers, Colonies: New Zealand* (Irish University Press, Shannon 1972) p524.

20 The extract from Dr Arnold's works quoted in the document cited in the previous footnote is preserved in note form in Grey's private papers: "3rd Earl Grey" *Notes Made from Dr Arnold's Miscellaneous Works* (Durham University Archives, Northumberland) pp156-157.

Committee believed had been made with respect to the application of "those rules as to the mode in which colonisation ought to be conducted."[21] The Committee also set out what the rules were.

The *Treaty of Waitangi*,[22] the Committee reported, had been badly handled. Captain Hobson, who had the carriage of negotiations over the Treaty, was not clearly apprised of a key rule which the Committee believed to have been firmly entrenched in British Colonial policy making, in his formal instructions. Hobson's instructions should have clearly laid "down the rule that sovereignty being established, all unoccupied lands would forthwith vest in the Crown, and that, except in virtue of grants from the Crown no valid title to land could be established by Europeans."[23] The Report went on:

> This mode of framing the instructions seems to have led the first Governor into the error of acting throughout on the assumption that no part of the extensive and unoccupied territory of New Zealand was to be considered as belonging to the Crown, or available under its authority for the purposes of settlement, until first regularly sold by the natives: this is not indeed distinctly stated by the *[T]reaty of Waitangi*; had it been so, this treaty would probably have been attended with less injurious consequences than it actually has been since in that case there can be little doubt that it would have at once been disallowed by Her Majesty's Government.[24]

As Chair of this Committee, Grey's later views clearly had their origins in this report. Aboriginal people in New Zealand, the report asserted, have had "firmly established in their minds notions which they had then but very recently been taught to entertain, of their having a proprietary title of very great value to land not actually occupied."[25] It was these notions

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21 Select Committee on the State of the Colony of New Zealand (Viscount Howick, Chair) *Report* (1844) reproduced in "Accounts and Papers [of the] House of Commons", 1844 (9) Vol XIII, *Irish University Press Series of British Parliamentary Papers, Colonies: New Zealand* pp5ff.

22 United Kingdom - New Zealand Chiefs, *Treaty of Waitangi*, Waitangi, 6 February 1840.

23 Select Committee on the State of the Colony of New Zealand (Viscount Howick, Chair) *Report* pp5-6.

24 As above.

25 At p5.

which the Committee believed had caused much of the difficulties. The Maori should have been made to understand that,

> while they were to be secured in the undisturbed enjoyment of the land they actually occupied, and whatever further quantity they may really want for their own use, all the unoccupied territory of the islands was to vest in the Crown by the virtue of the sovereignty that had been assumed.[26]

The Committee under Grey's chairmanship clearly believed that Aboriginal interests in land extended only to those lands in the "actual occupation and enjoyment" of the Aborigines.[27] Unoccupied land did not have to be purchased from the Maori before the Crown could alienate it. The Committee asserted:

> To have proceeded in this manner, and to have assumed at once all unoccupied lands to belong to the Crown as a right inherent in the sovereignty, would have been attended with no sort of injustice to the natives and would have been conducive to their interests.[28]

In 1846, at the beginning of his period of office, Grey affirmed that unoccupied or waste lands vested in the Crown the right of beneficial ownership by virtue of sovereignty. His understanding of the *Sale of Waste Lands Act* 1846 (UK) was clearly laid out in a Dispatch to Governor FitzRoy:

> [T]hat Act as you will perceive proceeds upon the principle of at once effectually asserting the property of the Crown to the vast tracts of land now occupied by the stockholders of Australia, and at the same time enabling Her Majesty to make regulations having the force of law by which the holders of wild lands will be rendered secure in their occupation for terms of not more than fourteen years and will at the end of their tenure be assured the value of any improvements which they may have effected.[29]

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26 As above.
27 At p6.
28 At p7.
29 "Despatch No 68: Secretary of State for War and Colonies to Governor of New South Wales, 29 November 1846" *HRA*, ser 1, vol 25, pp276-277.

This legislation provided Her Majesty's Government with the power to regulate by Orders-in-Council the "vast tracts" of land open to pasturage. As Ross suggests, the 1846 Act and the 1847 Order- in-Council ought to be placed in the context of the Colonial Office understanding evidenced in the 1844 Select Committee Report on New Zealand as outlined above. The Crown owned all the land except that in the "actual occupation" of the Aborigines, or sold to the settlers, as far as Grey and the Colonial Office were concerned.[30]

The whole thrust of the Reynolds and Dalziel argument in relation to the development of pastoral leases as a sui generis form of tenure is as an evolution from depasturing licences. The evolution began with Ripon's regulations of 1831 establishing sale of land by auction with a minimum price. The various Acts for restraining unauthorised occupation of Crown lands followed. Through them, Reynolds and Dalziel argue, the Imperial Government (particularly through the Governorship of Sir George Gipps) sought to balance the interests of the public with the interests of the squatters, licence-holders and the pastoral industry in New South Wales more generally. In Reynolds' and Dalziel's view, in the process of balancing these interests, greater security of tenure for licensees was offered,[31] but not so as to compromise the public interests in the land.

There are two principal problems with the evolutionary argument about the development of pastoral leases offered by Reynolds and Dalziel. These are their account of what the squatters were seeking in their battles with Gipps, and a very real discontinuity between the battles over pastoral tenure in the period 1831-1845 and the period from 1846, and the passing of the *Sale of Waste Lands Act* 1846 (UK), to 1855.

First, Reynolds and Dalziel maintain that

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30 Select Committee on the State of the Colony of New Zealand, *Report* p6. See also Grey, *The Colonial Policy of Lord John Russell's Administration* (Richard Bentley, London 1853) Vol 2, p322. This is the only reference to Aborigines in Australia I have been able to find in this two-volume justification by Grey of his colonial policy. See also Ross, "Te Tiriti o Waitangi" (1972) 6 *NZ J of Hist* 129 at 148.

31 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* pp56, 81-82; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy, 1826-1855" (1996) 19 *UNSW LJ* 315 at 339-340. See for instance "Government Notice - Departuring Licences" *NSW Gazette* 2 April 1844, p508.

> what the squatters sought during this period [1831-45] in the form of a lease of their runs, was not secure possession which they already had although for a limited period, but a secure title (vis à vis the Crown) for a fixed term.[32]

The squatters or licence holders could not until 1 July 1845 relate their licence to a specific run with defined boundaries. They were only able to hold the licence for one year at a time and were therefore subject, as they saw it, to the whim of the Commissioners for Crown Lands.[33] Further, a run could be sold, without any compensation for improvements, out from under the licensee. As William Campbell put it:

> The occupants were powerless against the government, as they had only an annual licence - they could not be otherwise than dissatisfied - they required a better tenure, to secure them against the irresponsible acts of an arbitrary Governor and his needy subordinates.[34]

Campbell then went on to describe what the squatters obtained. They

> agitated their grievances, and ultimately obtained an equitable title to a lease upon *definite terms* with a preferable right to purchase at a fair value. They obtained that title through an Act of Parliament and an Order of Her Majesty in Council.[35]

But it is strange to argue, as Reynolds and Dalziel do, that the squatter did not seek a more secure possession from the Crown. Why opt for a lease, if, as the Colonial Land and Emigration Commissioner had argued in the early 1840s, it was the purpose of the pastoral occupation licence to

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32 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826 - 1855" *Wik Peoples' Outline of Argument* p51; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy, 1826-1855" (1996) 19 *UNSWLJ* 315 at 341-342.

33 See, for example, evidence of this contained in the "Enclosures to Governor of New South Wales to Secretary of State for War and Colonies, 8 September 1844", Public Record Office, London CO 201/349, reproduced on Aust Joint Copying Project microfilm reel 359; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 341.

34 Campbell, *The Crown Lands of Australia* (John Smith, Glasgow 1855) ppx-xi.

35 As above (emphasis original).

provide an "exclusive right of possession" annually?[36] Reynolds and Dalziel go on to argue that

> at no time during the prolonged and often bitter debate in the early 1840s concerning the shortcomings of the annual occupation licence and more generally, the system of land administration in the colony, did attention focus on what rights of possession would be conferred by any new form of title to pastoral runs.[37]

This is hardly surprising, since as Reynolds and Dalziel admit, and as the Colonial Land and Emigration Commissioners indicated, the annual licence already provided exclusive possession. But the fact that the principal difference between a lease and a licence at common law was exclusive possession was not lost on the squatters. It was no accident that the "language of lease"[38] quelled the agitations in late 1845.

Second, there is a clear discontinuity between the agitations before 1845, and the 1846 Act and 1847 Order-in-Council. Agitation ceased towards the end of 1845. As Campbell put it, Earl Grey made it very plain in his despatches accompanying the Act and Order-in-Council that "lands defined as *unsettled*, would be *put out of the power of the Crown and rendered unavailable to the public for purchase for the long period of fourteen years*."[39] First Stanley and then Gipps had capitulated to the squatters and conceded that leases should be granted. The Colonial Office no longer had the capacity to resist the squatters demands for leases.

Once leases were available it dawned, first, upon GA Robinson, the Chief Protector of Aborigines in the Port Phillip District, his Assistant

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36 "Commissioners for Colonial Land and Emigration [Elliot and Villiers] to Permanent Under-Secretary, Colonial Office, 29 December 1841", Public Records Office, London CO 386/59, folio 300, reproduced on Aust Joint Copying Project microfilm reel 868.

37 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p58. Cf Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 342 which reads: "At no time during this long and sometimes bitter debate concerning the nature and scope of rights to be afforded squatters were there demands for more secure rights of possession against third parties, including the Aborigines".

38 *Wik* at 76 per Brennan CJ.

39 "Despatch No 68: Secretary of State for War and Colonies to Governor of New South Wales, 29 November 1846" (emphasis original). See also Campbell, *The Crown Lands of Australia* p7.

Protectors[40] and the Commissioners of Crown Lands (in their capacity as protectors of Aborigines), then the New South Wales Government, and then only after that, the Imperial Government, that access of Aborigines to pastoral runs leased out could be compromised. Reynolds and Dalziel consider that

> to suggest that leases conferred a right to exclude the Aborigines would surely mean that the Imperial government and Minister advising the Queen in Council understood that leases would have this effect as a matter of law.[41]

Successive Secretaries of State for War and Colonies, Stanley and Grey, were aware of the potential effect grants of leases would have upon Aborigines occupying land the subject of a lease. The Colonial Land and Emigration Commissioners had advised the Colonial Office on 8 August 1845 of the concerns of Commissioners of Crown Lands about this potential. Stanley's response, in a confidential dispatch, was merely to say that such potential "difficulties may be obviated by inserting sufficiently stringent provisions in whatever leases may be granted."[42]

Earl Grey did not refer explicitly to this potential effect of leases when transmitting the *Sale of Waste Lands Act* 1846 (UK) and the 1847 Order-in-Council. It therefore is not apparent what, if anything, he advised the Queen-in-Council in relation to the effect of leases on Aboriginal people when recommending the 1847 Order-in-Council to Her Majesty. Only after comments by Thomas Murdoch (one of the Colonial Land and Emigration Commissioners) on a dispatch from FitzRoy to Grey transmitting the reports of the Chief Protector of Aborigines (Port Phillip District), among others, for 1846, did the Colonial Office begin to address

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40 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* pp85ff; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 355.

41 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p84. Cf Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 342 which states: "it is certainly not clear that it was intended to give lessees a legal right of dispersal or dispossession."

42 "Secretary of State for War and Colonies to Governor of New South Wales, 31 August 1845", *HRA*, Ser 1, Vol 24, p505.

the question as to the effect of leases.[43] Murdoch summarised the issues discussed in the Protectors' reports and the injustice that would result if the Aborigines were excluded because of the grant of leases.[44] He also reported on Robinson's proposal to offset this potential effect by the granting of reserves. Under-Secretary of State Herman Merivale noted that reserves had not altogether been successful and suggested asking Robinson for further thoughts.[45] Grey, on 6 December 1847, agreed with the promotion of reserves, pointing out that they were a potential solution to the exclusion issue, although care had to be taken not to drive Aborigines from the grazing stations.[46]

From these marginal comments a dispatch was drafted and sent on 11 February 1848; it is heavily relied upon by Reynolds and Dalziel as articulating quite clearly the intention of Grey, and therefore the Imperial Government:[47]

> the rights of possession conferred by a lease for pastoral purposes [under the 1847 Order-in-Council] did not include a right to exclude Aboriginal people.[48]

Reynolds' and Dalziel's emphasis on Grey's intention would be compelling but for two factors:

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43 "Despatch No 107: Governor of New South Wales to Secretary of State for War and Colonies, 17 May 1847", Public Records Office, London CO 201/382, reproduced on Aust Joint Copying Project microfilm reel 383.

44 Minute by Murdoch on Despatch No 107, dated 22 November 1847.

45 Minute by Merivale on Despatch No 107, dated 3 December 1847.

46 At the time that Lord Stanley was considering the position of reserves in New South Wales, the Governor of the Cape Colony was writing to Stanley reporting on a letter from Henry Calderwood to Dr Phillip concerning the problems on the eastern frontier of the Cape Colony. Part of this correspondence is reproduced in Macmillan, *Bantu, Boer and Briton: The Making of the South African Native Problem* (Clarendon Press, Oxford, revised and enlarged ed 1963) pp287-289.

47 Grey's minute on Despatch No 107. See fn 4 above.

48 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p91. Cf Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 342 which reads: "However, there is no evidence that either Government (ie Sydney or London) believed (let alone intended) that by granting the squatters a secure title over their runs for a fixed term, the Aborigines would no longer be entitled to have any access to leased land, and more over, that they could be treated as trespassers and driven off".

(a) what has been said above about Grey's attitudes and intentions, and Colonial Office policy and practice in New Zealand;

(b) the legal advice received from both the New South Wales law officers and Thomas Murdoch and Frederic Rogers of the Colonial Land and Emigration Office.

(A) COLONIAL OFFICE POLICY

Much of the discussion by Reynolds and Dalziel of Earl Grey's intentions omits the material I have alluded to above, which tends to cut across any thoroughgoing assertions they make about the handling of native title by Grey.

(B) LEGAL ADVICE

By a dispatch of 11 October 1848, FitzRoy transmitted to Grey the legal opinion of the New South Wales law officers, particularly the Attorney-General, JH Plunkett, as to the ability to insert reservation clauses in favour of Aboriginal people in leases proposed to be granted under the 1847 Order-in-Council. Both Plunkett and the Solicitor-General, W Foster, advised the Executive Council of New South Wales

> that no condition securing to the Aborigines the privilege of free access to lands remaining in an unimproved state could legally be introduced into the Leases of Crown Lands proposed to be granted under the provisions of 9th and 10th of Vict ch 104 [*Sale of Waste Lands Act* 1846 (UK)]. Probably Her Majesty might by some future Order in Council to be made under the 6th section of the aforesaid Act authorise the insertion of such a condition in the Leases; but the present existing Orders in Council made by Her Majesty on 9th March 1847, by virtue of this Act, do not seem to authorise the insertion of any such condition.
>
> The Third Section of the 5th and 6th Victoria ch 36 [1842], as also 8th & 9th Sections of Chapter II of the aforesaid Orders-in-Council provide for the Grant or reservation of such particular portions of land as may be required for the use or benefit of the Aboriginal inhabitants but this is very different from providing that such Aboriginal inhabitants

> should have a general permission granted to them to enter upon lands which had been granted or leased to others.[49]

Grey's assertion in his Minute on FitzRoy's Dispatch that "Her Majesty did not intend and had no power by these leases to exclude the natives from the use they had been accustomed to make of these unimproved lands" was directly contradicted by the New South Wales law officers. It is clear from Plunkett's opinion that the Queen had the power to do just that. It may not have been Grey's intention that this should have been so, but the Commissioners for Colonial Land and Emigration basically confirmed the legal implications of demises of leases for pastoral purposes.

The Commissioners for Colonial Land and Emigration, in their role as Colonial Office law officers, outlined the position with respect to the rights conferred by a valid pastoral lease. The interesting point about this letter is that drafts of it have survived and, while they were substantially amended, they allow us a glimpse into the mind of legal and policy advisers to the Colonial Office as they set out to "make all necessary provision for the protection of the natives".[50] Regarding lands already leased out, in the draft the Commissioners pointed out that

> the Crown up to the making of the Lease [was] to have been absolute master. They might have been disposed of by sale, and if so disposed of, the purchaser would have received them wholly unencumbered by native rights.[51]

In this draft opinion, Murdoch and Rogers argued that any Order-in-Council which sought to allow Aborigines and others the right of traverse across pastoral lands

> would reduce the territorial interest of a leaseholder under the Order-in-Council to that bare right of occupation which was conferred in former times by a licence, and we should fear that this would raise considerable objections on the part of those lessees whose interests are affected.[52]

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49 "Commissioners of Colonial Land and Emigration (Murdoch and Rogers) to Permanent Under Secretary, Colonial Office, 17 April 1849", Public Records Office, London, CO 386/66, Fol 319 reproduced on Aust Joint Copying Project microfilm reel 870. See also fn 56 below.

50 As above.

51 As above.

52 As above.

In the final draft of the letter forwarded to Herman Merivale (from which the above passages quoted were omitted), the Commissioners set out the immediate objects of the proposed Order-in-Council: "1st to secure to the Natives the right of seeking their subsistence and 2ndly to secure to the public the right of searching for minerals over the lands under Lease."[53] They went on to argue that "great disappointment" would be occasioned amongst the squatters if they believed that rights conferred by a pastoral lease would be written down by the insertion of reservation clauses. They proposed to provide, by Order-in-Council, for the insertion in future leases of all reservation clauses necessary for public convenience:

> The effect of this course will be to leave undisturbed all interests which have been definitively granted by lease and only to interfere with those indefinite and prospective rights which are possessed by persons entitled to claim Leases under the provisions of the Order in Council; and with these rights it only interferes to the extent of determining that the Lease which they are entitled to claim, and the nature of which is by the Order in Council left very indefinite shall contain the conditions necessary to avoid public inconvenience - such conditions not interfering with the substantial benefits which it is the main object of the Lease to confer.[54]

With regard to existing leases issued under the 1847 Order-in-Council, it was suggested that Chapter 2 Section 9 thereof empowered the Governor to resume any land subject to pastoral lease for the use and benefit of Aboriginal people. This power enabled the Governor to put pressure on existing leaseholders to agree to the insertion of reservation clauses in their existing leases; otherwise they would lose the land altogether.

Anyone who has worked in public administration is aware of the difficulty on occasion of delivering a policy intention in its pristine form because of insurmountable legal difficulties of one kind or another. This was exactly the situation in which Grey found himself. A further Order-in-Council was required to express the policy intention he articulated, but even then it did not deliver that intention in the form suggested by Reynolds in New South Wales. Reynolds and Dalziel argue that

53 As above.
54 As above.

> the opinion of the Attorney-General and Solicitor-General was confined to the question whether or not it was possible to insert a relevant clause in pastoral leases. They did not deal with the question whether leases under the 1847 Order-in-Council in fact afforded lessees the power to exclude Aboriginal people from their land.[55]

But this is a somewhat strange claim, given that just about everyone, from Commissioners of Crown Lands to New South Wales Law Officers, to Murdoch and Rogers, was suggesting that the potential was there for exactly that to occur. Another Order-in-Council was required to give the power to insert reservation clauses which would prevent lessees excluding Aborigines from their leases for pastoral purposes. The clear implication of the legal advice was that such a power was required, because technically, in a legal view, leases granted exclusive possession and therefore the potential to exclude Aborigines.

Reynolds and Dalziel argue that Murdoch and Rogers were at odds in their legal view with Earl Grey's policy intent.[56] That is correct. But it is taking the argument where it cannot go to assert further that Murdoch and Rogers formed this view because of the difficulty they had in giving legal effect to the "imprecise language" used by Earl Grey and Governor FitzRoy to describe the rights conferred by pastoral leases. The employment of Ockham's Razor suggests that leases conferred exclusive possession, and the only way to overcome this was to pass another Order-in-Council enabling the insertion of the "general permission" for free access for Aboriginal people as outlined by Plunkett.[57]

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55 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p95; Reynolds & Dalziel, "Aborigines and Pastoral Leases. - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 363. In fact, Reynolds and Dalziel acknowledge here that Murdoch and Rogers "concluded, perhaps sensitive to the reaction of squatting interests in New South Wales, that lessees had an absolute right of exclusive possession".

56 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* pp100-101; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 362.

57 The Attorney General, JH Plunkett, wrote to the Colonial Secretary on 28 August 1848 advising that he had consulted the Solicitor General: "Attorney General to Colonial Secretary, 28 August 1848" reproduced as "Appendix" *Proceedings of the Executive Council of New South Wales*, 5 September 1848 and enclosed with "Governor of New South Wales to Secretary of State for War

Reynolds and Dalziel then argue that the condition to be inserted in leases giving rights of access "was declaratory of existing Aboriginal rights in relation to pastoral lands in the Colony".[58] This is merely an assertion which appears to be contradicted by Grey's use of the word "former" when referring to Aboriginal rights to hunt, the legal advice, and the necessity of the 1849 Order-in-Council. Further, Reynolds and Dalziel merely note Benjamin Hawes' comment that the "nature and extent of the access of the natives must surely be defined - or far more serious collisions may arise".[59] However they do not refer to a part of Hawes' very brief note. After "arise", Hawes wrote, "than now that they can be restrained."[60] Two comments can be made about Hawes' concerns. Firstly, he sought greater definition of how exactly this reservation would work in practice. The fact, too, that he believed that there may be some benefit in having some capacity to restrain Aboriginal people is evidence of his concern about frontier violence, a matter of continuing concern to Colonial Office officials. He perhaps knew that the reason for Grey's comments about the illegality of driving Aboriginal people from the runs was based not so much on a recognition of currently held rights (they were "former rights"), as on a concern for the protection of Aboriginal people on the frontier. Certainly, it is well established by current historiography that frontier violence, if not endemic, was widespread. Reece's work points to a "terrible contradiction underlying government policy towards the Aborigines - a paradox underpinned by a desire of the Government to

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and Colonies, 11 October 1848", Public Records Office, London CO 201/400, reproduced on Aust Joint Copying Project microfilm reel 394.

58 Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p107. Cf Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 365 which states: Grey "at least, believed that a condition in leases reserving the Aborigines access to leased lands was declaratory of the Imperial Government's intention with respect to the rights afforded by pastoral leases under the 1846 Act and 1847 Order in Council".

59 "Minute by Parliamentary Under Secretary of State for War and Colonies, 6 June 1849 on Commissioners of Colonial Land and Emigration to Permanent Under Secretary, Colonial Office, 17 April 1849", Public Record Office, London CO 386/66 reproduced on Aust Joint Copying Project microfilm reel 870; Reynolds & Dalziel, "Aborigines, Pastoral Leases and Promises by the Crown: Imperial and Colonial Policy, 1826-1855" *Wik Peoples' Outline of Argument* p111; Reynolds & Dalziel, "Aborigines and Pastoral Leases - Imperial and Colonial Policy 1826-1855" (1996) 19 *UNSW LJ* 315 at 368 fn 269.

60 "Minute by Parliamentary Under Secretary of State for War and Colonies, 6 June 1849 on Commissioners of Colonial Land and Emigration to Permanent Under Secretary, Colonial Office, 17 April 1849".

facilitate pastoral expansion (albeit well regulated) and protect Aborigines."[61]

In Australia it was difficult to determine where exactly the Aborigines were in "actual occupation and enjoyment", if they were not in occupation of the whole continent. Unlike the Maori, so the Colonial Office believed, who were relatively settled and kept within delimited boundaries, the Australian Aborigines ranged far and wide in search of subsistence. By 1850, however, after nearly a decade of annual investigation by successive Commissioners of Crown Lands into the nature, condition and prospects of the Aborigines, the extent of knowledge about Aboriginal notions of property were greatly increased. Commissioner McDonald's report of 15 February 1850 contrasted notions of tenure amongst the Mallee Aborigines with accounts of Indian concepts of land ownership discussed by Alexis de Tocqueville:

> De Torqueville [sic] speaking of the American Indian, says, "the property of a hunting nation is ill-defined; it is the common property of the tribe, and belongs to no one in particular, so that individual interests are not concerned in the protection of any part of it". The custom, however, appears to be the reverse among the tribes on the Murray, for although a certain tract of country is considered as belonging to the tribe in general, still every particular creek, lake, or locality (the boundaries of which are perfectly well understood) is apparently the inherited property of a particular individual, who is generally the head or elder of a family, and who is succeeded in his property by his eldest son, or brother, or nearest male relative; and it is common to hear the natives remark that the ground on which the settlers have formed their stations belongs to a particular individual, and which they very naturally consider gives the aboriginal [sic] proprietor a certain claim on the European occupant.[62]

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61 Reece, *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s* (Sydney University Press, Sydney 1974) pp104-139.

62 "Commissioner McDonald's Report, Lower Darling District, 15 February 1850", enclosure to "Despatch No 135: Governor-General to Secretary of State for War and Colonies, 18 July 1850", in "Papers Relative to Crown Lands, Part 1, 6 May 1853: Accounts and papers [of the] House of Commons", 1852-1853, Vol VII, *Irish University Press Series of British Parliamentary Papers, Colonies: Australia* p37. In some respects this is not far away from anthropological

The squatters and the Colonial Office did not in most cases recognise such Aboriginal conceptions. When granted leases, squatters believed the exclusive possession was theirs. The Colonial Office attempted to regulate access through reservation clauses. Squatters believed they were still justified in using force against Aborigines stealing cattle or stock.

The point of this paper has been to assert that there are alternative contexts for understanding Earl Grey's intention in that key passage cited by three of their Honours in the majority in *Wik*. It is interesting to note that Grey in that passage refers to the "former right" of the "natives" to "hunt over these districts" where pastoral leases were granted. Grey insisted on a reservation clause to allow Aboriginal access not as a recognition of the continuation of native title rights, but as a general permission for Aboriginal people to access land over which they had formerly had a right to hunt or fish, conduct ceremonies and the like.

Grey had a simplistic understanding of the complex interaction which took place physically on the frontier, and conceptually in the courts, of the Australian colonies. But Grey's understanding was not isolated from mainstream opinion of the time. It is no accident that he chose, as James Stephen's successor as Permanent Under-Secretary of State for War and Colonies, a former Professor of Political Economy at Oxford, Herman Merivale. After eleven years as Under-Secretary, Merivale wrote a second edition of his *Lectures* (first published in 1841) in which the following footnote appeared:

> One of the most unfortunate instances of the misapplication of notions founded on English law to the case of the savages has been, in my belief, the system adopted in New Zealand as to the so-called "tribal ownership" of land by the natives. The New Zealand tribes had as between themselves some recognised rights over the soil. One tribe respected the boundary of another, unless in case of disputed right. Each tribe cultivated patches of land occasionally, moving from one to another, within its own district, but regular occupation there was none. This title the British Government thought fit to erect into the absolute right of an owner of the soil, according to strict European usage. By the *Treaty of Waitangi*, the Crown guaranteed "to the chiefs and tribes of New Zealand and to the families

accounts of today, see, for example, Wilmsen (ed), *We are Here: Politics of Aboriginal Land Tenure* (University of California Press, Berkeley 1989).

and individuals thereof, the full, exclusive, and undisturbed possession of their lands *and estates*". They yielded to the Crown "the exclusive right of preemption over such lands as the *proprietors* thereof may wish to *alienate*". Thus, by a few words of conveyancing language, the "tribes" in their collective character were recognised as the private landowners of the whole of a great island, into which at the same time European settlers were poured by thousands. Lord Grey indeed contended on very strong grounds of abstract reason and in conformity with the general understanding of nations, "that the savage inhabitants of New Zealand had no right *of property* in land which they do not occupy, and which has remained unsubdued for the purposes of man". But this assertion of general principle came too late to be of much practical use after the *[T]reaty of Waitangi*. And the friends of the Aborigines in New Zealand and in England, in what I must deem mistaken zeal, insisted on the literal execution of that treaty, not simply as a treaty, but as in itself founded upon correct principles. They stood up for native rights, forgetting that when a right is established, without at the same time establishing the corresponding power to maintain it, evil instead of good is done to the protected party. If the doctrine that the natives were the absolute owners of the soil, and not compellable to part with it, was to be maintained, British settlers should have been excluded and the Northern island maintained as a native preserve. The doctrine and the practice were impracticable. To induce the natives to part with their land has required a constant exercise of diplomacy and cajolery, and sometimes, doubtless of fraud; while on their part, the caprice of uncultivated minds or mistaken notions of self interest, or the evil counsels of others, have constantly interfered to make them retain land urgently wanted; and the disputes of the tribes themselves about a "right" artificially rendered so valuable that led to bloody feuds, and at last to a disastrous war, which nothing but singularly temperate management could have averted for so long. Had the New Zealanders, from the beginning, been treated as clients for whom the British Government was authorised to act - no fancied "right" of ownership acknowledged, but fair compensation always made them whenever land, over which a tribe was

> accustomed to range, was taken for the use of settlers - it is probable enough, that these evils might have been averted, but that a noble race, now hastening apparently to decay, might have been preserved to Christianity and civilisation.[63]

Merivale had the same simplistic notions of Aboriginal rights to land as his political master Grey. He confirmed in this passage Grey's understanding. The past contains little hope and no justice for the Aboriginal people of Australia. Justice and hope must be sought in the future.

63 Merivale, *Lectures on Colonization and Colonies* note on pp497-498 (emphasis original).