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**Aboriginal Convicts: Race, Law, and
Transportation in Colonial New South Wales**

Kristyn Evelyn Harman BA (Hons)

Submitted in fulfilment of the requirements for the
Degree of Doctor of Philosophy

University of Tasmania

May 2008

Statement of Authorship

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Abstract

This thesis challenges the long-standing convention within Australian historiography whereby ‘Aborigines’ and ‘convicts’ have been treated as two distinct categories. It identifies the points at which these descriptors converge, that is, in the bodies of Aboriginal men from New South Wales sentenced to banishment or transportation. It locates their experiences on a trajectory extending from the early part of the nineteenth century through to the formative middle decades during which the rationale underpinning the trial and transportation of Aboriginal men was refined by the colonial state.

In the opening decades of the nineteenth century colonial governors occasionally exercised their prerogative to banish Aboriginal men considered fomenters of hostilities against the colonists. However, they were constrained from making public examples of such men by way of staging trials as early legal opinion railed against doing so. By the middle decades of the nineteenth century colonial discourses constructing Aborigines as British subjects were deployed to argue for the sameness of Aboriginal and white subjects before the law. The perverse corollary of affording Aboriginal people protection under the law was that they also became accountable under colonial laws whose functions were often well outside their ambit of experience.

This thesis argues that advocating equal treatment for all served to naturalise the disadvantages faced by Aboriginal defendants in the colonial courtroom thus facilitating trials described as farcical by some contemporaneous commentators. It

demonstrates that situating Aboriginal people as British subjects facilitated the criminalisation of some acts that might otherwise be read as political resistance as it was reasoned that one cohort of British subjects could not be considered to be at war with other British subjects. Paradoxically, atypical treatment of Aboriginal people both within and beyond the courtroom was predicated on notions of difference. This led, for example, to the employment of court interpreters to facilitate the trials of Aboriginal defendants. Difference also informed official edicts eventually issued in relation to Aboriginal deaths in custody later in the middle decades of the nineteenth century. Most of all, notions of difference underpinned the rationale of exemplary sentencing that saw sixty Aboriginal men from New South Wales incorporated into the convict system during the first half of the nineteenth century as a strategy to subdue not only the captives but also their respective communities. Tellingly, no Aboriginal women became convicts. It was men, not women, who colonists considered to be martial enemies.

Acknowledgements

This thesis has been made possible through my having been the grateful recipient of a Tasmanian Graduate Research Scholarship funded through the University of Tasmania. I would also like to thank both the School of History and Classics and the Riawunna Centre for Aboriginal Studies for supporting this project in a number of ways, not the least of which has been providing funding through the Graduate Research Support Scheme to assist with expenses such as conference attendance.

My heartfelt thanks also extends to my wonderful team of supervisors, Dr Hamish Maxwell-Stewart who has been there all along, Professor Cassandra Pybus who was involved in the earlier stages, and Dr Mitchell Rolls, a welcome later addition to the team. To be surrounded by such intellects and talent is sometimes daunting but always inspiring.

My experience of candidature has been greatly enhanced through various intellectual exchanges. For that I thank past and present students, honours and postgraduate colleagues, History staff, and Aboriginal Studies staff, as well as fellow participants in the Imaginary Friends biography group, and the Rethinking History discussion group. The Centre for Colonialism and Its Aftermath conferences and work-in-progress days, Removing the Boundaries seminars, and the Centre for Tasmanian Historical Studies seminar series have provided valued opportunities to present my work and to engage with other scholars working across a range of topics. The feedback received from colleagues at conferences is also valued and appreciated.

My appreciation also extends to the numerous archivists and librarians whose assistance has been invaluable. The document delivery service at the University of

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Without the generous assistance of Lisa Holden, Perry McIntyre, and Harriet Parsons, obtaining some of the archival materials that I have drawn on would not have been nearly as straightforward. A significant amount of archival material pertaining to some of the trials discussed in this thesis has been translated as part of an ongoing project led by Professor Bruce Kercher from Macquarie University. I am most appreciative of the work carried out by Professor Kercher and his team. My gratitude is also due to Matthew Rääbus for producing the maps for this thesis. Thanks, too, to Robert Saltmarsh, a fifth generation Tasmanian whose ancestor's name appears on the same monument as Musquito's in St David's Park, Hobart, and who drew my attention to its existence. Andrew Gregg deserves a special mention for reading and commenting on draft sections, for his enthusiasm, and for being encouraging and companionable.

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Some Notes on Terminology

The usage of personal names and place names is consistent with their usage throughout the period to which this thesis refers. As a result, some names may appear with different spellings than those with which a present day readership might be more familiar. During the times in which the events described are set, spelling variants were common particularly in relation to Aboriginal personal names. At times, some Aboriginal personal names appear with inconsistent spellings as in the use of direct quotations. Such names have been reproduced as they originally appeared.

Where it has been possible to identify tribal affiliations with a certain measure of certainty, tribal nomenclature has been used. Otherwise, descriptors such as ‘Aboriginal people’ or ‘Aborigines’ or simply ‘men’ have been utilised. In some places, a minor comparative dimension has been introduced through drawing on materials pertinent to the colony of the Cape of Good Hope. This colony is referred to as the Cape colony and some of its indigenous peoples as Khoena. Much debate has surrounded the appropriate nomenclature in relation to these people, with some commentators suggesting that the term Khoikhoi is inaccurate as it is taken to mean ‘men of men’ or even ‘king of kings’.¹ Grammatically, Khoena is a gender inclusive term.²

During the early decades of colonial contact, the colony of New South Wales included Van Diemen’s Land, the Port Phillip District, and Norfolk Island. Van Diemen’s Land and the Port Phillip District have since been renamed Tasmania and

¹ Julia Wells. ‘Eva’s Men: Gender and Power in the Establishment of the Cape of Good Hope, 1652–74’, *Journal of African History*, Volume 39, 1998, p. 417.

² *ibid.*

Victoria and are separate states from New South Wales within the present day Commonwealth of Australia.

Throughout this thesis the term ‘intrusion’ is utilised in preference to ‘invasion’ or ‘settlement’ to describe the arrival and establishment of people mostly of British origins on Aboriginal lands. The new arrivals are referred to as colonists. This term encompasses both those who came willingly as free settlers and others who were sent out as convicts. Outside of direct quotations, if one of these latter terms is used, it is because the situation or material being referred to pertains solely to one or other of these cohorts.

To reflect the colonial period to which this thesis refers, imperial measurements have been used for both distances and currency. The spellings adopted during the early era of colonial contact are also conserved so that, for example, colonial judges are referred to as His Honor rather than His Honour. Other terminology has also been preserved to reflect something of the character of the times albeit at a risk of offending present day sensibilities. For example, Aboriginal actions against colonists were often referred to as ‘outrages’ or ‘depredations’ and Aboriginal people were considered to belong to ‘tribes’.

Throughout this thesis, the phrase ‘Aboriginal convicts’ has been used to refer to men sentenced to transportation or whose death sentences were commuted to transportation. Particularly in the final chapter, where a transitional phase is discussed, the term ‘Aboriginal prisoners’ is used as a descriptor for men taken into custody but not sentenced to transportation. In some instances, the term is also used to describe incarcerated men prior to their being sentenced to transportation.

Abbreviations

AOT	Archives Office of Tasmania
HRA	Historical Records of Australia
HRNSW	Historical Records of New South Wales
HRV	Historical Records of Victoria
PROVIC	Public Records Office of Victoria
SRNSW	State Records of New South Wales

Table of Contents

Introduction		xiii
Chapter One	Banishment to ‘Bloodhounds’: The Changing Colonial Fortunes of Musquito and Duall	1
Chapter Two	‘A Mere Mockery’: The Trial and Tribulations of Jackey	60
Chapter Three	‘Until They Be Trained Like Children’: The Coercive Instruction of <i>Monkey and Others</i>	113
Chapter Four	‘Crimes of the Most Atrocious Description’: Criminalising Aboriginal Defendants at the Maitland Circuit Court	170
Chapter Five	‘A Sentence Of Early Death’: The Exemplary Sentencing of Aboriginal Men Transported from the Port Phillip District	226
Chapter Six	‘Under the Very Eye of Authority’: Aboriginal Deaths in Custody on Cockatoo Island	286
Conclusion		344
Bibliography		362
Appendix One	Map of New South Wales Including Norfolk Island and Van Diemen’s Land	383
Appendix Two	Map of Sydney, the Cowpastures, and the Penal Islands at Port Jackson	384
Appendix Three	Map of Brisbane Water District, Newcastle, and Maitland	385
Appendix Four	Map of the Port Phillip District of New South Wales	386
Appendix Five	Map of Van Diemen’s Land	387

List of Graphs and Illustrations

Figure 1	Monument in St David's Park, Hobart, Tasmania	56
Figure 2	Alleged Offences (Non-Aboriginal Defendants), Maitland Circuit Court, September 1843	217
Figure 3	Sentences and Outcomes (Non-Aboriginal Defendants), Maitland Circuit Court, September 1843	218
Figure 4	Outcomes for Aboriginal Convicts, Cockatoo Island, 1 January 1839 – 16 December 1850	324
Figure 5	Comparative Death Rates for Aboriginal and non-Aboriginal Male Convicts	325

Introduction

On Wednesday 12 March 1846, Mr Justice Therry presided over a trial in the Maitland circuit court involving Harry and Bownas. The civil jury found the defendants guilty of ‘assaulting, with intent to rob, one Peter Davis, at Congarina, on the 28th May last’.³ Several features of this case were unusual. The prisoners had to rely on ‘a lad named Thomas Thomson, apparently between 12 and 14 years of age’ to make them ‘understand’ the charge they faced.⁴ As Thomson exhibited ‘diffidence in speaking out’ and was ‘afflicted with stammering’, this was no easy task.⁵ The men were constrained from being able to summons any of their compatriots as witnesses as they belonged to a cohort of people who were not allowed to testify in court. Yet one of the prisoners, Harry, challenged the evidence of prosecution witnesses by claiming that he ‘raised his nullah-nullah’ with the intention of striking a colonist who he ‘ingeniously’ alleged had assaulted the prosecutrix Davis.⁶ Unusually, the defendants in this case were Aboriginal men. Even more remarkably, on being sentenced to transportation, one of these men became an Aboriginal convict.⁷

This thesis demonstrates that while ‘Aborigines’ and ‘convicts’ have formerly been treated as two quite distinct and therefore discrete categories within Australian historiography, the points at which these two descriptors converge is in the bodies of

³ *Maitland Mercury*, 14 March 1846, p. 4; *Sydney Morning Herald*, 17 March 1846, p. 2.

⁴ *Maitland Mercury*, 14 March 1846, p. 4.

⁵ *ibid.*

⁶ *ibid.*

⁷ Harry arrived in Van Diemen’s Land on the *Louisa* on 26 April 1846. He served a twenty-one month period of probation working in a convict gang before being sent out to private individuals to work as their assigned servant. Harry obtained a ticket-of-leave on 26 January 1848 but subsequently contravened its provisions and was sentenced to nine months’ hard labour. He absconded on 28 July 1853 but was eventually recaptured and on 24 January 1854 was sentenced to eighteen months’ hard labour. After several stays in hospital, Harry died at Impression Bay, a convict station for invalids at Tasman’s Peninsula, on 15 January 1856. See CON37/3, p. 620, Archives Office of Tasmania (hereafter referred to as AOT); CON16/3, p. 240, AOT.

Aboriginal men from New South Wales sentenced to banishment or transportation between 1788 and 1856. It argues that colonial discourses constructing Aboriginal people as British subjects and advocating equal treatment for all served to naturalise the disadvantages faced by Aboriginal defendants in the colonial courtroom while, paradoxically, atypical treatment of Aborigines both within and beyond the courtroom was predicated on notions of difference. It also argues that exemplary punishment provided the rationale underpinning their exile into captivity. The punishment meted out to Aboriginal defendants was expressly designed to subdue not only the captives but also their respective communities. It was also dispensed with a view to appeasing colonists and to dissuade them from taking the law into their own hands.

The thesis focuses on the ways in which colonial perceptions of Aboriginal people shaped decisions to criminalise their activities, inflected court proceedings, and informed the exemplary sentencing of Aboriginal defendants. Such perceptions were powerful. This is graphically illustrated by the marked disparity evident in the sentencing of Harry and Bownas. The comparatively youthful Bownas who was of ‘short stature’ and was known to have ‘often been useful to the police’ was sentenced to twelve months’ in Newcastle Gaol.⁸ On the other hand, Harry, who was perceived by colonists to be a stout and ‘dangerous character ... in the habit of committing depredations on the white population’ and who resisted his arrest, was sentenced to fifteen years’ transportation to Van Diemen’s Land.⁹

⁸ *Maitland Mercury*, 14 March 1846, p. 2.

⁹ *ibid.*

Court sentences imposed from 1834 until the late 1850s became one of several pathways via which Aboriginal people became incorporated into the convict system. That they could become convicts was a direct result of the basis on which the British sought to legitimate their claim to New South Wales. Because the colony was constructed as having been settled rather than ceded or won through conquest, Aboriginal people already inhabiting the land were considered to be British subjects. Notionally, this implied that they were entitled to full protection under the British Crown. In reality, their status as British subjects meant that those Aboriginal men who were not dealt with summarily at the frontier were held accountable as and when they contravened English-derived laws with which they were not fully conversant if at all. While some Aboriginal prisoners were discharged and never put on trial, others were hanged or transported to penal colonies where a premature death awaited most of them.

The inspiration to engage in this research project germinated from a research seminar at the University of Tasmania presented in 2004 by Professor Cassandra Pybus and Professor Lucy Frost. During the course of the presentation it became apparent that a number of emancipated slaves had been transported to Van Diemen's Land and incorporated into the convict system. In ensuing discussions, it also became evident that some indigenous people from British colonies such as the Cape colony and New Zealand were also transported as convicts to Van Diemen's Land.

Realising that indigenous people from other colonies had become convicts led to my posing the following questions in relation to Aboriginal people: were any people described as 'Aborigines' or 'black natives' incorporated into the local convict

system? If indeed there were any Aboriginal convicts, what factors contributed to their being banished or transported? What social and legal justifications might have been deployed to facilitate such a process? What impacts did life within the convict system have on any Aboriginal captives? To what extent did the colonial authorities appreciate the ramifications of banishing or transporting Aboriginal people as convicts?

At the outset of this research project, it seemed improbable that many if indeed any Aboriginal people had been contained within the convict system. Several people who seemed most likely to be aware of such convicts professed little knowledge as to the presence or otherwise of any Aboriginal or, in the terminology of the times, 'black native' convicts. For example, an enquiry to the Port Arthur Historic Site in Tasmania in 2004 elicited a preliminary response that the presence of any Aboriginal convicts could not readily be confirmed. This was complicated by the fact that some convicts were described in the records as 'native born'. This phrase simply meant such people had been born in the colony rather than elsewhere. It did not indicate Aboriginality.¹⁰ Conversations with several senior academics resulted in one suggesting that maybe half a dozen Aboriginal men had been present in the convict system in Van Diemen's Land in the early part of the nineteenth century, while later another said she knew some Aboriginal men from the Port Phillip District had been sentenced to transportation, but had no idea if these sentences had been carried out.¹¹

¹⁰ Susan Hood. Personal Communication, 10 September 2004.

¹¹ Cassandra Pybus. Personal Communication, 17 September 2004; Lyndall Ryan, Personal Communication, 9 December 2006.

Initial visits to the Archives Office of Tasmania and the State Reference

Library resulted in what Edward Bishop described as an archival jolt.¹² This refers to the moment when it becomes obvious something remarkable has fallen into one's hands, documentary evidence that conjures up the past powerfully and has the potential to reshape present-day understandings of past events. Page by page, various convict records, colonial letters, diaries, and newspapers revealed that many Aboriginal men had been transported as convicts to sites ranging from the notorious penal stations at Norfolk Island and Van Diemen's Land to the smaller, yet no less harsh, penal islands at Port Jackson. Overall, this research has uncovered empirical evidence demonstrating the existence of sixty Aboriginal convicts. The circumstances surrounding their exile into captivity illuminated a nexus of race, law, and transportation in colonial New South Wales that before now had never been addressed.

Given the capacity of the convict system to contain women, one of the most striking peculiarities pertaining to the sixty Aboriginal convicts identified in this research project was that they were all male. The reasons behind this phenomenon will become evident as the thesis unfolds. There was but one instance uncovered during the course of this research where an Aboriginal woman potentially could have been sentenced to transportation. Mary Ann appeared in the Supreme Court of New South Wales in 1839 to answer a charge of being present at, and aiding and abetting in, the shooting of Joseph Fleming with the intent to murder him. Her co-defendants, four white male bushrangers, were all found guilty and sentenced to be transported to

¹² Edward Bishop. 'Archiving "Archiving"', Michael O'Driscoll and Edward Bishop, University of Alberta, accessed on 14 July 2007 at <<http://ejournals.library.ualberta.ca/index.php/ESC/article/viewFile/311/288>>

Norfolk Island for the terms of their natural lives.¹³ Intriguingly, Chief Justice Dowling ‘invited the particular attention of the Jury to the case of the female prisoner’ instructing them ‘if they had any doubts as to her participation in the offence to give her the benefit of it’.¹⁴ The jury acquitted Mary Ann. Dowling’s action in influencing the jurymen to allow her to walk free was in stark contrast to the treatment meted out to Aboriginal men.

Another anomaly was that Aboriginal men continued to be transported to the penal station at Cockatoo Island, Port Jackson, for two decades after transportation to New South Wales formally ceased in 1841. This indicated a racial dimension to transportation, a theme that is pursued throughout this thesis. Given the duration of indigenous transportation within New South Wales and the numbers of men involved, it was remarkable to find that the existence of Aboriginal convicts had been entirely overlooked in the secondary literature, leaving a significant gap in the historiography.

This thesis is informed by materials drawn from fields of intellectual exploration ranging from legal history, convict historiography, and histories of early colonial contact in British colonies to postcolonial writings, and theories specific to carceral situations. As well as adding a new dimension to studies of early colonial contact in the Australian colonies, it makes a specific contribution to the emerging field of knowledge about Aboriginal experiences within the criminal justice system in the first half of the nineteenth century. It also makes a contribution to convict

¹³ R v Young and Others 1839, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 October 2005 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_young__1839.htm>

¹⁴ *ibid.*

historiography, specifically to the sub-genre relating to the presence of black people within the convict system in early colonial New South Wales (including Van Diemen's Land).

One of the most significant monographs in relation to the imposition of English-derived law on Aboriginal people is Henry Reynolds' *The Law of the Land*. Reynolds observed that the 'claim has always been that English law was blind to racial differences and that Aborigines became subjects of the Crown from the first instance of settlement', then went on to question 'how, then, could Aboriginal rights be totally ignored?'¹⁵ As its title suggests, this monograph focuses on issues related to the land and, in particular, land rights for Aboriginal people. This thesis takes Reynolds' point in relation to the claim of English law having been constructed as colour blind and interrogates it in a different context, the extension of English-derived criminal law to Aboriginal defendants who underwent transportation.

Scant scholarly attention has been given to the complex relationships between Aboriginal people and the criminal justice system in the early to mid-nineteenth century. One of the most comprehensive studies in this field is a journal article co-authored by Mark Finnane and John McGuire. Finnane and McGuire focussed on the adaptation of colonial modes of punishment to deal with indigenous offending. While their research was geographically centred on the colonies of Queensland and Western Australia, including the former Aboriginal prison at Rottnest Island, aspects of their analysis can usefully be extended to New South Wales. As Finnane and McGuire pointed out, Queensland and Western Australia were not marked out 'as wholly

¹⁵ Henry Reynolds. *The Law of the Land*, Penguin, Camberwell, (third edition), 2003, pp. 1, 2.

distinguishable from the other colonies of Southern and Eastern Australia'.¹⁶ This thesis concurs with their assertion that in the transitional period from frontier violence to settlement 'the traditional elements of the criminal justice system – police, courts and prisons – assumed a more pervasive role in disciplining the indigenous population'.¹⁷ It builds on their research through extending the area of enquiry to the colony of New South Wales.

Several scholars have produced book length studies and book chapters relating to the interactions of police and indigenous peoples in the Australian colonies during the nineteenth century. In considering the nature of colonial policing, Chris Cunneen asserted that the particularities of life in the colonies resulted in the establishment of modes of policing that differed markedly from those at the imperial centre. He pointed to the importance of the developing pastoral economy in the early nineteenth century and the concomitant removal of Aboriginal peoples from their lands. This provided the backdrop for 'a suspension in the rule of law in relation to Indigenous people ... despite the view that Aboriginal people were British subjects'.¹⁸ In a similar vein, Cunneen critiqued the way in which the native police forces deployed in the eastern colonies 'remained outside the recognised force', a factor that he found:

significant in relation to the practical role they played in containing Indigenous resistance, as well as to the symbolic separation from the administration of justice and the rule of law seen to apply to other inhabitants of Australia.¹⁹

¹⁶ Mark Finnane and John McGuire. 'The Uses of Punishment and Exile: Aborigines in Colonial Australia', *Punishment and Society*, Volume 3, Issue 2, 2001, p. 280.

¹⁷ *ibid.*

¹⁸ Chris Cunneen. *Conflict, Politics and Crime: Aboriginal Communities and the Police*, Allen & Unwin, Crows Nest, 2001, p. 60.

¹⁹ *ibid.*, p. 55.

As Cunneen pointed out, the ambiguity in the way in which the native police forces were structured illuminates what being considered British subjects meant in reality for Aboriginal people involved in the forces and for those being policed.

In an extensive and nuanced study of the native police corps in the Port Phillip District of New South Wales, Marie Fels demonstrated how the force was used to subdue Aboriginal people. This was achieved through establishing a presence and patrolling areas considered to be particularly troublesome by colonists. A number of violent collisions are also recorded as having taken place. Fels referred briefly to Yanem Goona, one of the subjects of this thesis, and pointed out that his story remained to be told.²⁰ This thesis is informed by these studies and adds to the scholarship through elaborating the stories of Aboriginal men who slipped into the ranks of the convict system.

In 1979, Leslie Duly flagged the presence of black convicts within the penal colonies of New South Wales in a journal article examining the way in which the Supreme Court at the colony of the Cape of Good Hope used transportation as a means of banishing persons of colour to Hobart and Sydney. Duly found that at the court's behest people described as Khoikhoi (formerly known pejoratively as Hottentots), Malay, and San (Bushmen) among others were shipped halfway around the world to be held in captivity in the Australian penal colonies. He considered that the absence of research into this colonial phenomenon owed much to the 'generally agreed' notion 'that only three per cent or less of Australia's convicts came from

²⁰ Marie Fels. *Good Men and True: The Aboriginal Police of the Port Phillip District 1837-1853*, Melbourne University Press, Melbourne, 1988, pp. 151-52.

possessions outside of the British Isles'.²¹ This scholarly neglect extended to the broader field of the 'actual administration of justice in the British colonies in the nineteenth century', a field that Duly stated 'remains one of the most unexplored ... for the historian'.²²

In a series of journal articles published over the ensuing two decades, Candy Malherbe examined the processes through which forty apprentices, free black African people, and San were transported to New South Wales and Van Diemen's Land between 1820 and 1842.²³ Whereas Malherbe's emphasis was primarily on determining the causes and mechanisms that led to the transportation of these former slaves and indigenous peoples, scholars such as Ian Duffield have extended this field of enquiry through producing micro-historical accounts of the subsequent lives of black convicts within the penal colonies.²⁴

Black convicts were not limited to people originating from the African continent. Several articles have usefully examined the transportation of Maori

²¹ Leslie Duly. "'Hottentots to Hobart and Sydney': the Cape Supreme Court's Use of Transportation 1828-38", *Australian Journal of Politics and History*, Volume 25, Issue 1, 1979, p. 39.

²² *ibid.*

²³ V. C. (Candy) Malherbe. 'David Stuurman: "Last Chief of the Hottentots"', *African Studies*, Volume 39, Issue 1, 1980, pp. 47-64; 'Khoikhoi and the Question of Convict Transportation from the Cape Colony, 1820-1842', *South African Historical Journal/Suid Afrikaanse Historiese Joernaal*, Number 17, 1985, pp. 19-39; 'South African Bushmen to Australia? Some Soldier Convicts Investigated', *Journal of Australian Colonial History*, Volume 3, Issue 1, 2001, pp. 100-24; 'How the Khoekhoen Were Drawn into Dutch and British Defensive Systems to c1809', *Military History Journal*, Volume 12, Number 3, 2002, pp. 94-9; 'The Khoekhoe Soldier at the Cape of Good Hope, Part Two: Life and Times in the Cape Regiment, c1806 to 1870', *Military History Journal*, Volume 12, Number 4, 2002, pp. 148-54.

²⁴ Ian Duffield. 'Martin Beck and Afro-Blacks in Colonial Australia', *Journal of Australian Studies*, Issue 16, 1985, pp. 3-20; 'From Slave Colonies to Penal Colonies: The West Indian Convict Transportees to Australia', *Slavery and Abolition*, Volume 7, Issue 1, 1986, 25-45; 'The Life and Death of "Black" John Goff: Aspects of the Black Contribution to Resistance Patterns During the Transportation Era in Eastern Australia', *Australian Journal of Politics and History*, Volume 1, Issue 33, 1987, pp. 30-44; 'Daylight on Convict Lived Experience: The History of a Pious Negro Servant', *Tasmanian Historical Studies*, Volume 6, Issue 2, 1999, pp. 29-62; 'Billy Blue: Power, Popular Culture and Mimicry in Early Sydney', *Journal of Popular Culture*, Volume 33, Issue 1, 1999, pp. 7-22.

political prisoners from New Zealand to Van Diemen's Land in the 1840s.²⁵ The most recent and extensive contribution to the broader field of scholarship relating to black convicts is a monograph by Cassandra Pybus. She revealed that a cohort of former black American slaves was amongst the First Fleet on its arrival in New South Wales.²⁶ This thesis extends the scholarship pertaining to black convicts by enunciating the presence within the convict system of Aboriginal convicts from New South Wales and through examining the mechanisms that facilitated their exile into captivity.

Several Aboriginal people discussed in this thesis have received brief mention in secondary sources, only one of which focuses specifically on legal proceedings. In a recent monograph relating some of the interesting and more unusual cases tried before the Supreme Court of New South Wales between 1824 and 1836, Bruce Kercher devoted a chapter to 'Aboriginal murderers'. He succinctly outlined the case *R v Monkey and Others 1835* that forms the basis for the third chapter of this thesis. My research project has provided the scope to elaborate this case in greater depth, particularly in relation to the precursors and aftermath of the trial as well the court hearing itself. Documentary evidence that demonstrates a military deployment against Aboriginal peoples in the Brisbane Water District, including those men who appeared

²⁵ John Tattersall. *Maoris on Maria Island: Punishment by Exile*, Hawke's Bay Art Gallery and Museum, Napier, 1973; Jeff Hopkins. "'Fighting Those Who Came Against Their Country": Maori Political Transportees to Van Diemen's Land 1846-48', *Tasmanian Historical Research Association Papers and Proceedings*, Volume 44, Number 1, 1997, pp. 49-67.

²⁶ Cassandra Pybus. *Black Founders: The Unknown Story of Australia's First Black Settlers*, University of New South Wales Press, Sydney, 2006.

before the Supreme Court of New South Wales in *R v Monkey and Others* 1835, provides a significant departure from Kercher's work.²⁷

Of all the Aboriginal men discussed in this thesis, Musquito has received by far the most attention in secondary sources. Several book chapters have been devoted to him, including chapters in David Lowe's *Forgotten Rebels: Black Australians Who Fought Back* and Robert Cox's *Steps to the Scaffold: The Untold Story Of Tasmania's Black Bushrangers*.²⁸ Elements of these stories have been contested over the past few years as part of what has come to be known colloquially as the Australian history wars.²⁹ Musquito has, until now, been represented as a resistance leader and also as a black bushranger. This thesis proposes that Musquito be remembered as one of the first Aboriginal convicts, at least in practice if not in law. At the same time, it is not intended that 'Aboriginal convict' becomes yet another descriptor simply to replace the established labels 'resistance leader' and 'black bushranger'. Instead, it posits that engaging in a nuanced reading of archival representations of Musquito's life highlights the frequency and complexity of his changing subject position at the colonial interface.

²⁷ Bruce Kercher. *Outsiders: Tales from the Supreme Court of NSW, 1824-1836*, Australian Scholarly Publishing, North Melbourne, 2006.

²⁸ David Lowe. *Forgotten Rebels: Black Australians Who Fought Back*, Permanent Press, St Kilda, 1994; Robert Cox. *Steps To The Scaffold: The Untold Story Of Tasmania's Black Bushrangers*, Cornhill Publishing, Pawleena, 2004.

²⁹ For differing views on Musquito and the resultant contestation of those interpretations, see Keith Windschuttle. *The Fabrication of Aboriginal History: Volume One, Van Diemen's Land, 1803-1847*, McLeay Press, Paddington, 2002; Naomi Parry. "'Many Deeds of Terror': Windschuttle and Musquito', *Labour History*, Issue 85, 2003, pp. 207-12; Windschuttle. 'Guerilla Warrior and Resistance Fighter? The Career of Musquito', *Labour History*, Issue 87, 2004, pp. 221-35; and Parry. "'Many Deeds of Error": Response to Windschuttle's Defence of his View of Musquito', *Labour History*, Issue 87, 2004, pp. 236-38.

As mentioned, one of the initial challenges in researching this topic was to ascertain whether and to what extent Aboriginal people had been incorporated into the convict system. With an initial focus on Van Diemen's Land as the repository for any such convicts, working through the shipping lists of vessels utilised for intra-colony transportation at the Archives Office of Tasmania revealed names that were unlikely to belong to white convicts. For example, some of the names on these lists stood out due to the absence of a surname. Fortunately, convict conduct records remain extant for almost all of the Aboriginal convicts shipped to Van Diemen's Land. Such records contain a wealth of information. In addition to listing the person's location and offences committed while they were in the convict system, the date and place of trial was also recorded. The physical descriptions detailed on these records together with annotations such as 'aboriginal black native' confirmed the supposition that men with names like Jacky Jacky were indeed Aboriginal convicts.

Some convict conduct records pertaining to the penal station at Norfolk Island have also been preserved. Amongst these records are convict conduct records for some of the Aboriginal men transported there. Unfortunately, very early records such as those that would have pertained to Musquito and Bull Dog in the early 1800s at Norfolk Island and, later, to Musquito and Duall during the 1810s in Van Diemen's Land are no longer extant. However, a plethora of correspondence both to and from the New South Wales Colonial Secretary's office has survived and has yielded some significant material in relation to Aboriginal convicts not only in Van Diemen's Land and at Norfolk Island, but also in relation to Goat Island and Cockatoo Island at Port Jackson, Sydney.

In many instances, court documents such as the information (witnesses' statements) compiled preceding a case being brought to trial as well as trial transcripts, judges' notebooks, and judicial correspondence relating to the trials and convictions of Aboriginal prisoners has survived. Some of these primary sources have recently been made more readily available through an extensive transcription project led by Professor Bruce Kercher at the Law Division, Macquarie University, Sydney. These transcripts have been utilised throughout the course of this research project, and have been supplemented by primary research materials held in collections at the Mitchell Library, State Records New South Wales, Public Records Office of Victoria, Percy Haslam Collection at the Newcastle University Library, and the materials referred to above from the Archives Office of Tasmania.

In some cases, official documentation has not survived with regard to the trials of Aboriginal men identified through their extant convict records. Because the convict conduct records state the nature of the offence, and the date and place of trial, it has been possible to retrieve details of the trials through consulting colonial newspapers within the appropriate date range and locality. Like the official court records, the newspaper accounts reflect the biases of their times. This facet of the reportage has been of particular interest and pertinence to a study engaging, in part, with prevalent racial attitudes.

Depending on the locality from which Aboriginal defendants originated, accounts of their cases are also available in other sources. Particularly useful details pertaining to the Brisbane Water trials have survived in the journals of the missionary Reverend Launcelot Threlkeld. The private journals and official papers of the Chief

Protector of Aborigines at the Port Phillip Protectorate, George Augustus Robinson, have provided some useful counter-perspectives on many of the cases originating in this region.

In terms of placing Aboriginal convicts within a colonial setting, the only materials available relate to the points of contact with settler society. Outside of such moments, they vanish from the record. Their lives as Aboriginal people and as convicts are therefore circumscribed by encounters with others. The traces left in the colonial archive reflect colonial perceptions of these people and perhaps tell the reader more about the points that colonists considered noteworthy than they do about the men themselves. Nevertheless, such details are highly significant for the very same forces that shaped the colonial archive impacted on the lived experiences of the Aboriginal men who became convicts.

This research project is predominantly a qualitative study. Some quantitative data has been incorporated in the form of graphs where it has been considered useful in terms of visually illustrating a particularly pertinent point. In presenting these research findings, a driving motivation has been to reconstruct as much of these men's stories as possible. This consideration has influenced the thesis methodology which is closely informed by what Nick Salvatore has termed 'social biography'.³⁰ Salvatore uses this phrase to describe the process of using biography as a form of historical writing. The test, he suggested, for biographical writing 'is not whether the subject is representative ... but rather what is it that we might learn from the study of

³⁰ Nick Salvatore. 'Biography and Social History: an Intimate Relationship', *Labour History*, Issue 87, 2004, pp. 187-92.

a specific life'.³¹ The appeal of taking such an approach lies in the way that it enables an exploration of how accounts built around individual lives help 'to chart the major societal changes that are underway, but not merely at some broad social level'.³²

The lives of the Aboriginal convicts have been contextualised within the colonial settings that encompassed the factors that led to their transportation. A plethora of primary and secondary sources have been consulted in order to build up a picture of the circumstances leading up to and surrounding the exile of these men. Each of the thesis chapters has a different thematic emphasis, and they progress in a chronological order. This reflects the way in which the exile into captivity of Aboriginal men followed the moving frontier, an observable phenomenon that illuminates the pertinence of considering their lives within the context of frontier conflict. Maps showing the locations at which such conflict took place, as well as where the men's trials were held, and the places to which they were sent are included as appendices.

Chapter One Banishment to 'Bloodhounds': The Changing Colonial Fortunes of Duall and Musquito identifies the first Aboriginal men to be sent into captivity as convicts. It discusses the circumstances surrounding their arrests and subsequent banishment, and has a particular emphasis on the fluidity of Aboriginal subjectivity at the early colonial frontier.

Chapter Two 'A Mere Mockery': The Trial and Tribulations of Jackey considers the first Aboriginal defendant to be sentenced to transportation by the colonial judiciary. It examines in particular the role the expropriation of Aboriginal

³¹ *ibid.*, p. 190.

³² Brian Roberts. *Biographical Research*, Open University Press, Buckingham, 2002, p. 5.

land had as a contributing factor, and also discusses the court cases that set the precedent whereby the court had the jurisdiction to sentence locally born people to transportation.

Chapter Three ‘Until They Be Trained Like Children’: The Coercive Instruction of *Monkey and Others* discusses a cohort of Aboriginal men who were sent to Goat Island to be subjected to coercive instruction under the tuition of a catechist. Particular attention is given to the processes through which actions perpetrated by large and organised groups of Aboriginal men against colonists were construed as criminal activities.

Chapter Four ‘Crimes of the Most Atrocious Description’: Criminalising Aboriginal Defendants at the Maitland Circuit Court moves beyond Sydney to consider a series of cases that were heard at the September 1843 circuit court in the outlying town of Maitland. It continues to demonstrate how frontier conflict provided the backdrop for actions that resulted in Aboriginal men becoming incorporated into the convict system. It identifies the circuit courts as having provided a conduit through which this phenomenon occurred, and illustrates how some men became convicts following the amelioration of death sentences. This chapter also has a particular focus on whether the benefits that the then newly-introduced circuit courts were said to deliver were realised in relation to Aboriginal defendants.

Chapter Five ‘A Sentence of Early Death’: The Exemplary Sentencing of Aboriginal Men Transported from the Port Phillip District discusses a series of cases heard in the Court of the Resident Judge in Melbourne following what has been euphemistically termed the ‘opening up to settlement’ of the Port Phillip District. It

engages specifically with the concept that the punishments meted out to Aboriginal men, including transportation, were designed to be exemplary both to an Aboriginal and colonial audience alike.

Chapter Six 'Under the Very Eye of Authority': Aboriginal Deaths in Custody on Cockatoo Island discusses the belated official acknowledgement of the phenomenon of Aboriginal deaths in custody and the resultant policy formulated within the higher echelons of the colonial government in an effort to ameliorate the situation. Some attention is also given to indications of a transition in the types of crimes with which Aboriginal people were being charged.