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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

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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 transitionary 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

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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

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.

historiography, the points at which these two descriptors converge is in the bodies of 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.

Chapter One

Banishment to ‘Bloodhounds’: the Changing Colonial Fortunes of Musquito and Duall

Against all odds, a Gai-Mariagal man born around 1780 and a Dharawal youth, both from New South Wales, ended up working together in 1818 in Van Diemen’s Land as blacktrackers.¹ Their paths crossed following what was for them epic journeys involving battles, sea voyages, and forced labour within the convict system.² The first man, known as Musquito, was said to possess ‘superior skills and muscular strength’.³ The younger man, Duall, was ‘distinguished by great ferocity of character’.⁴ He owed his name, which translated as ‘painfaced’, to the way he screwed up his face when smoking his bulbaloo (pipe).⁵ These men may never have met had it not been for the extraordinary times in which they lived, times that saw the arrival and spread of white people throughout their traditional lands, the gradual imposition of laws and customs other than their own,

¹ Christine Wise. ‘Black Rebel Musquito’, *Rebels & Radicals*, Eric Fry (ed). North Sydney, Allen & Unwin, 1983, p. 3.

² Musquito has sometimes been confused with another man also given the pseudonym ‘Musquito’ by colonists in Sydney. The latter was known by the Aboriginal name Yerrangoulaga; it was his portrait that appeared in the atlas of Peron’s and Freycinet’s voyages to Terra Australis, and he who died in hospital in Sydney in January 1806 following a fight with other Aborigines. See N J B (Brian Plomley). *Weep in Silence: A History of the Flinders Island Aboriginal Settlement*, Blubber Head Press, Hobart, 1987, p. 10; *Sydney Gazette*, 19 January 1806, p. 2; Naomi Parry. “‘Many deeds of error’: Response to Windschuttle’s Defence of his View of Musquito”, *Labour History*, Issue 87, 2004, pp. 236-38; Keith Windschuttle. ‘Guerilla Warrior and Resistance Fighter? The Career of Musquito’, *Labour History*, Issue 87, 2004, pp. 221-35.

³ Reverend William Horton. Letter to the Secretaries of the Wesleyan Missionary Society, 3 June 1823, *Wesleyan Missionary Papers*, Mitchell Library, BT 52, Volume 4, p. 1268.

⁴ John Bigge. *Report of the Commissioner of Inquiry on the States of Agriculture and Trade in the Colony of New South Wales*, Ordered by the House of Commons to be printed, 13 March 1823, (Australiana Facsimile Editions No. 70, Adelaide, Libraries Board of South Australia, 1966), p. 83. Bigge claimed to have seen Duall when he visited Van Diemen’s Land in 1820. However, Duall was returned to Sydney in 1819 suggesting that Bigge may have seen Musquito and mistaken him for Duall.

⁵ John McGuanne. ‘Centenary of Campbelltown: Appin’s Pride’, *Lone Hand*, 1920, cited in Robert Webster. *Currency Lad: the Story of Hamilton Hume and the Explorers*, Avalon Beach, Leisure Magazines, 1982, p. 19.

and the incursion of cloven hoofed animals that devastated their country.⁶ A series of remarkable events unfolded throughout their lifetimes that saw one of them hanged while the other received colonial rewards that included a brass breastplate and a blanket.⁷ At different times, and intriguingly sometimes even at the same time, each were considered by colonists to be a ‘friendly native’ and/or a ‘hostile native’.

This chapter introduces some of the key factors that saw Aboriginal men sent into exile: conflict over resources and competing land use practices; the imperative to impose exemplary punishments; and the type of thinking that developed into justifications for putting Aboriginal defendants on trial in the criminal courts of New South Wales. It elaborates the circumstances under which Musquito and his compatriot Bulldog, and later Duall, were sent into exile by Governors King and Macquarie respectively and considers their subsequent lives. These cases are particularly interesting in view of the men’s fluctuating subject positions at the colonial interface. It will be argued that such ambivalent positioning arose out of a mixture of reliance and fear that characterised colonists’ interactions with men viewed as Aboriginal leaders, and reflected British strategies to undermine Aboriginal leadership and resistance. Such unstable positioning epitomises the fluidity of subjectivity at the early colonial frontier in New South Wales, a phenomenon with very real consequences. As Musquito’s and Duall’s situations demonstrate, a person’s fortunes could fluctuate

⁶ Henry Reynolds. *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin, Ringwood, 1981; Ann McGrath (ed), *Contested Ground: Australian Aborigines Under the British Crown*, Allen & Unwin, St. Leonards, 1995; Richard Broome, *Aboriginal Australians: Black Response to White Dominance, 1788-1980*, Allen & Unwin, St Leonards, 1982.

⁷ *Hobart Town Gazette*, 25 February 1825, p. 2; ‘Government and General Orders, Civil Department’, 31 May 1819, *New South Wales’ Colonial Secretary’s Office Correspondence*, Reel 6038, pp. 47-50, Archives Office of Tasmania (hereafter AOT).

substantially over a relatively short period of time and sometimes with fatal consequences.

By 1795 the number of colonists at the Hawkesbury had increased from seventy the previous year to ‘upwards of four hundred persons’.⁸ With more than thirty miles of land adjacent to the Hawkesbury River in cultivation along both banks, the displaced indigenous inhabitants ‘assembled in large numbers’ and took up arms against the colonists.⁹ By June 1796 Captain Paterson feared the settlers would abandon the new settlement. To circumvent this, he ordered a detachment of the New South Wales Corps to the Hawkesbury where the soldiers killed ‘seven or eight natives’ and took five prisoners.¹⁰ It was Paterson’s intention to keep the man and four women imprisoned until he could persuade them that he was not willing to ‘suffer our people to be inhumanly butchered, and their labour rendered useless by their depredations, with impunity’.¹¹ He nevertheless acknowledged that Aboriginal people had been ‘cruelly treated’ by some of the first colonists to arrive at the Hawkesbury, and lamented having been ‘forced to destroy’ some of the Aborigines.¹²

Sporadic conflict between colonists and Aborigines continued at the Hawkesbury throughout the following decade. In 1800, five Hawkesbury settlers, Edward Powell, Simon Freebody, James Metcalfe, William Timms, and William Butler were arrested and taken to Sydney to appear before Judge-Advocate Captain Henry Waterhouse and a five member military jury. They were charged

⁸ Captain William Paterson, Administrator, to the Right Hon. Henry Dundas, 15 June 1795, *HRA*, Series I, Volume I, p. 499.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*, p. 500.

with the murder of two Aboriginal boys, Little George aged around eleven or twelve, and Young Jemmy aged around fifteen or sixteen.¹³ Evidence provided by Hawkesbury resident Jonas Archer revealed that since 1795 about twelve colonists and twenty Aborigines had been killed in inter-racial conflicts.¹⁴ During the court hearing, Lieutenant Thomas Hobby told the Judge Advocate he had made it clear to the Governor that when Aborigines committed 'outrages' he intended sending the military 'to kill five or six of them wherever they were to be found'.¹⁵ Senior Serjeant William Goodall of the New South Wales Corps said that when he served at the Hawkesbury 'parties of Soldiers were frequently sent out to kill the Natives'.¹⁶ One of the jury, Lieutenant Neil McKellar of the New South Wales Corps, previously held command at the Hawkesbury. Judge-Advocate Waterhouse allowed the prisoners to question him:

Q. – Pray Sir, when you commanded at the Hawkesbury what Orders did you Issue against the Natives for Committing Depredations on the Settlers?

A. – To destroy them whenever they were met with after having been guilty of outrages, except such Native children as were domesticated amongst the Settlers.¹⁷

The top echelons in the colonial administration from the Governor down apparently endorsed the attitudes revealed in court towards using violence against Aborigines considered hostile. Corporal Peter Farrell of the New South Wales Corps said that in December 1799 he escorted Charley, who allegedly speared a colonist, to the Governor in Sydney supposing that his commanding officer

¹³ Hunter to Portland, 2 January 1800, *HRA*, Series I, Volume II, Enclosure No. 1 'Trial for the Murder of Two Natives', pp. 403, 420.

¹⁴ *ibid.*, p. 413.

¹⁵ *ibid.*, p. 409.

¹⁶ *ibid.*, p. 417.

¹⁷ *ibid.*, p. 421.

wanted ‘to make a more Public Example of this Native’.¹⁸ However, Hunter was bemused by the prisoner’s presence, indicating the matter ought to have been dealt with locally. He said to Farrell ‘that it was not in his power to give Orders for the hanging or shooting of such Ignorant Creatures who could not be made sensible of what they might be guilty of’.¹⁹ Farrell was told that ‘immediate Retaliation should have been made on the spot’, implying that the military ought to have exercised their prerogative of summary execution.²⁰ Under the awkward circumstances of being confronted with Charley, Hunter simply ‘admonished’ him.²¹ While Hunter was comfortable for such men to be shot out in the field in the heat of the moment, he knew that he could not be seen to be condoning such violence in cold blood. Imposing death sentences and other severe punishments on Aboriginal men could be justified only if some capacity to understand their alleged crimes was apparent. Concerns of this nature dogged the colonial judiciary in trials involving Aboriginal defendants over the years that followed. However, the desire to make examples of certain Aboriginal prisoners gave rise to practices through which the judiciary circumvented such concerns, a point that will be taken up in subsequent chapters of this thesis.

Ultimately, the five colonists accused of killing Little George and Young Jemmy were found guilty. The verdict may have been designed to appease the Governor, as the men were effectively set free. The Judge Advocate bailed them while he sought further instructions from England.²² Whether through expediency or genuine feeling, Hunter decried what he termed the ‘horrid practice of wantonly destroying the natives’, and told the Duke of Portland that he had not

¹⁸ *ibid.*, p. 418.

¹⁹ *ibid.*

²⁰ *ibid.*

²¹ *ibid.*, p. 419.

²² *ibid.*, p. 422.

agreed with the court's process.²³ He wrote to Portland that he had laid before the court 'every information within my power respecting the light in which the natives of this country were to be held as a people now under the protection of His Majesty's Government'.²⁴ Viewing Aboriginal people as being under the protection of the Crown was of vital significance in the ensuing decades. It gave rise to the perverse notion that Aborigines were fully accountable under English law regardless of whether they were living beyond the boundaries of the settlement and despite being under the jurisdiction of laws or lores of their own. However, in this case Hunter's concerns were of a more localised nature. He resented being bypassed by the Judge Advocate, and also bemoaned the fact that the former prisoners were 'now at large and living upon their farms'.²⁵ While he had the power to rescind their bail, Hunter knew such a move would be unpopular with the colonists. He also wanted to uphold the impression that the judicial and executive authorities were acting in concert, and so in effect Hunter had to allow the men to go free.²⁶

By the end of 1804, settlement along the banks of the Hawkesbury had increased to an extent that saw local Aborigines protest to Governor Philip Gidley King that:

they did not like to be driven from the few places that were left on the banks of the river, where alone they could procure food; that they had gone down the river as the white men took possession of the banks; that if they went across white men's grounds the settlers fired upon them and were angry; that if they could retain some places on the lower part of the river they should be satisfied and would not trouble the white men.²⁷

²³ Hunter to Portland, 2 January 1800, *HRA*, Series I, Volume II, p. 402.

²⁴ *ibid.*

²⁵ *ibid.*

²⁶ *ibid.*

²⁷ Governor Philip Gidley King to Lord Hobart, 20 December 1804, *HRA*, Series I, Volume V, p. 166.

The Governor sought to address the situation and to reduce the potential for further conflict by assuring the Aborigines that no more colonists would be allowed to settle on the lower reaches of the Hawkesbury River. King thought at the time that the Aboriginal contingent seemed ‘well satisfied’.²⁸ Yet despite having ‘promised to be quiet’, by April 1805 Aborigines at the Hawkesbury were once again engaged in actions against the colonists.²⁹ King considered their conduct to be ‘most ungrateful and Treacherous’, and pointed out that it came ‘at the Moment they have been on the most Friendly Terms with the Settlers’.³⁰ The Governor failed to appreciate the full extent of Aboriginal concerns, characterising them as ingenious.³¹ With diplomacy having failed, King sent in the soldiers. On 28 April 1805 he published a General Order that read:

Whereas the Natives in different parts of the Out-Settlement have in an unprovoked and inexcusable manner lately committed the most brutal Murder on some defenceless Settlers whose hospitality appears to have drawn upon them the most barbarous treatment, and there being but little hopes of the Murderers being given up to Justice, the Governor has judged it necessary, for the preservation of the lives and properties of the Out-Settlers and Stockmen, to distribute Detachments from the New South Wales Corps among the Out-Settlements for their protection against those uncivilized Insurgents; but, as those measures alone will only be a present check, it is hereby required and ordered that no Natives be suffered to approach the Grounds or Dwellings of any Settler until the Murderers are given up; and that this Order may be carried into full effect, the Settlers are required to assist each other in repelling those Visits; and if any Settler, contrary to the purport and intent of this Order, harbours any Natives, he will be prosecuted for the breach of a Public Order intended for the Security of the Settlers.³²

King’s Order implicitly acknowledged the intimacy of relations at the colonial frontier. As Jan Critchett pointed out, the frontier was ‘a very local phenomenon’

²⁸ *ibid.*, p. 167.

²⁹ *ibid.*; King to Earl Camden, 30 April 1805, *HRA*, Series I, Volume V, p. 306.

³⁰ King to Camden, 30 April 1805, *HRA*, Series I, Volume V, p. 306.

³¹ *ibid.*; King to Hobart, 20 December 1804, *HRA*, Series I, Volume V, p. 166.

³² Note 88, *HRA*, Series I, Volume V, p. 820.

with the territory under dispute being ‘the very land each settler lived upon’.³³

‘The “other side of the frontier”’, according to Critchett, ‘was just down the yard or as close as the bed shared with an Aboriginal woman’.³⁴ Separating Aborigines and colonists created hardships. In several instances, Aboriginal women had been living amicably with white men at the Hawkesbury, albeit against the wishes of local Aboriginal men, and were expected to rescind those relationships.³⁵ Given the encroachment of colonists onto Aboriginal land and the increasing scarcity of traditional food resources, some Aborigines were taking meals with the settlers. Food was possibly provided in exchange for labour, as Aboriginal people often fetched wood and water for white people. The Governor’s Order meant that such associations temporarily became illegal.³⁶

On 20 May 1805 a group of settlers from the outlying districts of Sydney accompanied by constables from Parramatta ‘went in quest of the natives in the neighbourhood of Pendant (sic) Hills in order to disperse them’.³⁷ They returned with Tedbury in their custody. Tedbury, son of the well-known leader Pemulwuy, was incriminated in the murders of some stockmen at Prospect (near Sydney), and was coerced by his captors into revealing the hiding place of the weapons used in the attack. During this undertaking, the party came across a small group of Aborigines that included Bush Muschetta. According to a report in the *Sydney Gazette*, he ‘saluted them in good English’ and declared ‘a determination to continue’ the Aboriginal actions against the colonists.³⁸ As Naomi Parry has observed, the man referred to as Bush Muschetta is the same person more

³³ Jan Critchett, *A ‘Distant Field of Murder’: Western District Frontiers 1834-1848*, Melbourne University Press, Melbourne, 1990, p. 23.

³⁴ *ibid.*

³⁵ *HRA*, Series I, Volume II, ‘Trial for the Murder of Two Natives’, p. 413.

³⁶ King to Camden, 30 April 1805, *HRA*, Series I, Volume V, p. 306.

³⁷ *Sydney Gazette*, 19 May 1805, p. 2.

³⁸ *ibid.*

commonly known as Musquito or Mosquito. The reason the *Sydney Gazette* reverted to an earlier spelling for the word ‘Mosquito’ and prefaced the nickname with ‘Bush’ was to distinguish him from another man in Sydney upon whom the colonists had bestowed the same pseudonym.³⁹

On 15 June 1805, a group including Musquito set fire to the ‘Barn and Stacks’ of Abraham Young, a farmer at Portland Head in an act probably best read as economic sabotage.⁴⁰ Several Aborigines volunteered to search for Musquito, the man who the colonists considered responsible for keeping ‘the flames alive’.⁴¹ On 6 July 1805, a group of Aborigines ‘voluntarily’ gave up Musquito and his compatriot Bull Dog to the colonists. Both men were considered the main ‘Aggressors’ implicated in the murders of two settlers and several stockmen at the Hawkesbury.⁴² Those who turned in Musquito and Bull Dog had several motivations for doing so. Some of their number had been briefly committed to Parramatta Gaol on 1 July as suspects in relation to actions taken against colonists at the Hawkesbury. The following day, the men were liberated on the strength of their promise to capture Musquito. In exchange for turning Musquito and Bull Dog in to the colonial authorities, the former Aboriginal prisoners negotiated the release of Tedbury. This action can be understood in part through appreciating that while Musquito and probably Bull Dog were Gai-Maraigal men of the Kurringgai language group, Tedbury was a Bediagal man from the Darug language group.⁴³ It can therefore be conjectured that even if they

³⁹ Parry. ‘Many Deeds of Error’, p. 236.

⁴⁰ *Sydney Gazette*, 30 June 1805, p. 2.

⁴¹ *ibid.*

⁴² King to Camden, 20 July 1805, *HRA*, Series I, Volume V, p. 497.

⁴³ Musquito was identified as probably belonging to the Gai-Maraigal people by his descendent Dennis Foley as cited in Naomi Parry, ‘Musquito (c. 1780 - 1825)’, *Australian Dictionary of Biography*, Supplementary Volume, Melbourne University Press, 2005, p. 299; Tedbury’s father Pemulwuy was known to be a member of the Bediagal clan of the Darug tribe because of the designs on the spear that he carried. See James Kohen, ‘Tedbury (- 1810)’, *Australian*

were not at enmity with each other, Darug people would have had a greater loyalty to one of their own leaders than to Kurringgai men.

While Musquito had been at large, six Aborigines were shot by the settlers in retaliation for the deaths of four white men. King told the Aboriginal contingent that he considered the matter settled without any need for further reprisals. However, the Governor claimed that ‘they were so desirous of shewing their Sorrow for what had passed by giving up the Delinquents and requiring that they might be punished’ that he had decided to ‘try the expedient of sending them [the prisoners] to another Settlement to labour’.⁴⁴ This course of action was ‘much approved of’ by the Aboriginal party that had brought Musquito and Bull Dog to be lodged in Parramatta Gaol.⁴⁵ Described in the newspaper as ‘friendly natives’, it was speculated that the Aboriginal negotiators would soon become convinced of ‘how little their safety depends upon their own ability, and consequently how much they are indebted to the liberal clemency of our Government’.⁴⁶

Despite their co-operation with the colonial authorities, as of 9 June 1805 King’s General Orders of the preceding April remained in force, prohibiting Aboriginal people from mixing with the colonists at the Hawkesbury. According to the General Orders published in the *Sydney Gazette*, Aboriginal ‘depredations’ were continuing in the vicinity of the Hawkesbury and George’s River, although it was ‘hoped the apprehension of the Native called Musquito might effectually prevent any further mischief in those quarters’.⁴⁷ By 20 July 1805, King

Dictionary of Biography, Supplementary Volume, Melbourne University Press, 2005, pp 318-19.

⁴⁴ King to Camden, 20 July 1805, *HRA*, Series I, Volume V, p. 497.

⁴⁵ *ibid.*

⁴⁶ *Sydney Gazette*, 4 August 1805, p. 2.

⁴⁷ *Sydney Gazette*, 9 June 1805, p. 3.

considered the disputes between the Hawkesbury colonists and local Aborigines to have ended, meaning that the General Order barring contact no longer applied. He cited the engagement of four Aboriginal servants by one of the settlers as evidence of the former having resumed a continuation of ‘those domestic Habits with the Settlers they have been accustomed to’.⁴⁸

With Musquito and Bull Dog lodged in Parramatta Gaol, King began to investigate the legal mechanisms through which he might deal with them. He was certain that the evidence against the two men in relation to the murder of the Hawkesbury settlers and stockmen provided ‘the most circumstantial and conclusive proof’ of their guilt.⁴⁹ Considering it his duty ‘to cause Justice to be done to Natives as well as the Settlers’, King considered whether to put the two men on trial and requested the Judge-Advocate Richard Atkins’ opinion on ‘how far such a measure could be practicable’.⁵⁰ In Atkins’ response, he stated that there was nothing to be gained through considering whether the ‘outrages’ committed by Aborigines at the Hawkesbury arose through their ‘inherent brutality’ or from ‘real or supposed injuries’ received at the hands of colonists.⁵¹ Instead, he suggested that attention be directed towards preventing similar occurrences in the future.

Atkins considered that two options were available to the Governor, either to treat the Aboriginal offenders with ‘rigor’ or with ‘lenity’.⁵² The Judge Advocate considered the first option not to be in keeping with existing laws as ‘the evidence of Persons not bound by any moral or religious Tye can never be

⁴⁸ King to Camden, 20 July 1805, *HRA*, Series I, Volume V, p. 497.

⁴⁹ *ibid.*, p. 503.

⁵⁰ *ibid.*

⁵¹ King to Camden, 20 July 1805, Judge-Advocate Atkins’ Opinion on the Treatment of Natives, 8 July 1805, Enclosure 2, *HRA*, Series I, Volume V, p. 502.

⁵² *ibid.*

considered or construed as legal evidence'.⁵³ While he admitted to the 'strong necessity of making Public Examples of the Offending Natives', Atkins could not see how the Court of Criminal Jurisdiction could uphold its oath "to give a true Verdict according to the *Evidence*" if the prisoners were put on trial given that their evidence would be inadmissible.⁵⁴ He made several suggestions about different ways in which the settlers' farms might have been better situated in terms of defence, but given their relatively isolated locations submitted that the settlers 'must devise some means of protecting themselves by dedicating part of their time to their mutual protection'.⁵⁵ Atkins also posited a third option, one which would be understood in present day terminology as vigilante parties and that is further elucidated in the summary of his recommendations:

The object of this letter is to impress the Idea that the Natives of this Country (generally speaking) are at present incapable of being brought before a Criminal Court, either as Criminals or as Evidences; that it would be a mocking of Judicial Proceedings, and a Solecism in Law; and that the only mode at present, when they deserve it, is to pursue and inflict such punishment as they may merit.⁵⁶

In giving his opinion, Atkins omitted conflict over land usage as a possible cause of Aboriginal actions against colonists, although this oversight needs to be viewed within the context of his having dismissed the utility of devoting any time to considering Aboriginal motivations at all. When read in conjunction with his views on Aboriginal societies as not having any moral or religious framework, this omission demonstrates Atkins' ignorance of Aboriginal cultural beliefs and practices, an ignorance typical of his era. As Alastair Bonnett elaborated, within European settler societies 'an exclusionary and, eventually highly racialised,

⁵³ 'Atkins' Opinion on the Treatment of Natives', *HRA*, Series I, Volume V, p. 502.

⁵⁴ *ibid.* (Emphasis in the original.)

⁵⁵ *ibid.*, p. 503.

⁵⁶ *ibid.*, p. 504.

interpretation of whiteness' developed so that by the end of the eighteenth century 'a triple conflation of White = Europe = Christian' had arisen 'that imparted moral, cultural and territorial content to whiteness'.⁵⁷ This translated into a 'colonial discourse of white superiority and non-white inferiority'.⁵⁸ As Russell McGregor has pointed out, black people were considered to be at the bottom of a hierarchy of human beings arrayed lineally along 'the Great Chain of Being'. Aborigines were situated close to monkeys and thought of as savages. Some considered them to be living in a state of nature that Europeans had evolved beyond generations earlier. Others such as Judge-Advocate David Collins who sailed to Botany Bay on the First Fleet displayed an ambivalent attitude towards Aboriginal people. While he adhered to the negative stereotype of the cunning and vengeful savage, Collins also considered that Aboriginal people had some potential to become 'useful members of society'.⁵⁹ It was thought that Aboriginal people would gradually become civilised under the coercive tuition of their white colonisers.

That Atkins considered 'native' peoples as inferior is evident not only in legal opinions, but also in his personal diary. In an entry dated 26 July 1792, he discussed 'our knowledge of the chain of intellectual and corporeal beings' asserting that there was 'an immense distance' between 'a stupid Huron or Hottentot and a profound Philosopher'.⁶⁰ According to Atkins' diary entry, 'man in his lowest condition, is evidently linked, both in the form of his body and the

⁵⁷ Alastair Bonnett. *White Identities: Historical and International Perspectives*, Prentice Hall, London, 2000, pp. 16-17.

⁵⁸ *ibid.*, p. 17.

⁵⁹ Russell McGregor. *Imagined Destinies: Aboriginal Australians and the Doomed Race Theory, 1880-1939*, Melbourne University Press, Melbourne, 2000, p. 5.

⁶⁰ Richard Atkins. 'The New South Wales Journal of Richard Atkins', *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 11 November 2005 at <http://www.law.mq.edu.au/scnsw/html/atkins_1792.htm>

capacity of his mind, to the large and small orang-outangs'.⁶¹ He viewed a world where everything was apparently in its place, arranged in a scale that served to naturalise the marginalised position at the fringes of society that indigenous people came to occupy as a result of colonisation.

While King was seeking advice on the course of action available to him in his quest to turn them into a public example Musquito and Bull Dog did not simply become docile inmates within the walls of Parramatta Gaol. They 'ingeniously contrived to loosen some of the stone work by the help of a spike nail' and were overheard threatening to burn the Gaol and all the white men within it.⁶² Their clandestine conversation of Monday 5 August was duly reported to the turnkey who took action to foil their plan. This cost the informant an attack at the hands of the thwarted men, but also earned him a pardon as the local magistrate was impressed with the man's good conduct in preventing Musquito and Bull Dog from breaking out of custody.⁶³

As a trial was out of the question, King determined to exile Musquito and Bull Dog to one of the colony's harshest penal settlements, the convict station on Norfolk Island. In a letter dated 8 August 1805 to John Piper, the acting commandant at Norfolk Island, the Governor explained the situation and stipulated how the two Aboriginal convicts were to be treated:

The two Natives Bull Dog and Musquito having been given up by the other Natives as principals in their late Outrages are sent to Norfolk Island where they are to be kept, and if they can be brought to Labour will earn their Food – but as they must not be let to starve for want of subsistence – they are to be victualled from the Stores.⁶⁴

⁶¹ *ibid.*

⁶² *Sydney Gazette*, 11 August 1805, p. 2.

⁶³ *ibid.*

⁶⁴ King to John Piper, 8 August 1805, *New South Wales' Colonial Secretary's Office Correspondence*, Reel 6040, p. 41, AOT.

Musquito and Bull Dog arrived on Norfolk Island on 5 September 1805 where they spent more than seven years relegated to the lowest ranks of the labouring prisoners.⁶⁵ Their job was one of the least favourable at the penal station as they worked as assistants to a convict charcoal burner. By December 1810, only one charcoal burner remained on the island. There had been five in 1805 when Musquito and Bull Dog arrived.⁶⁶ The declining population of convicts on the island reflected a decision dating back to 1806 to close the penal establishment on Norfolk Island as it was being kept up 'at very great expense'.⁶⁷ Maintaining communications between the outpost and the administration at Port Jackson had proven to be difficult, as had approaching the island safely, given its lack of a 'Port secure from Tempests'.⁶⁸ For these reasons a considerable number of convicts had been transferred from Norfolk Island to Port Dalrymple in the north of the island of Van Diemen's Land by the end of 1806.⁶⁹ However, it was not until seven years' later on 20 January 1813 that Musquito boarded the *Minstrel II* to be conveyed to Van Diemen's Land.⁷⁰ Bull Dog's fate is uncertain; he probably died on Norfolk Island sometime after August 1812, but may have been shipped back to Port Jackson along with other evacuated convicts.⁷¹

Musquito was sent to Van Diemen's Land at a time during which convicts were routinely assigned to private individuals to be put to work as their servants. In return for a roof over their heads and 'rations and cloathes equal to that issued

⁶⁵ Raymond Nobbs. *Norfolk Island and its First Settlement, 1788-1814*, Library of Australian History, North Sydney, 1988, pp. 192, 198.

⁶⁶ *ibid.*, p. 125.

⁶⁷ Right Honourable William Windham to Governor William Bligh, 30 December 1806, *HRA*, Series I, Volume VI, p. 70.

⁶⁸ *ibid.*

⁶⁹ *ibid.*, p. 72.

⁷⁰ Nobbs. *Norfolk Island and its First Settlement*, p. 198; *Musquito Correspondence File*, AOT.

⁷¹ Nobbs. *Norfolk Island and its First Settlement*, p. 192; James Walker. *Early Tasmania: Papers Read Before the Royal Society of Tasmania During the Years 1888 to 1899*, Government Printer, Hobart, 1989, p. 166.

from the [Government] stores', a convict's master or mistress could expect him or her to provide them with labour equivalent to 'a full government task'.⁷² Failure to carry out the requisite duties, or being absent without leave would land a convict before the local magistrate.⁷³ Musquito's contemporary Jorgen Jorgenson later claimed that the Aboriginal convict was assigned to Edward Kimberly of Antill's Ponds for whom he worked as a stock keeper.⁷⁴ No material evidence remains to support this assertion.⁷⁵ Jorgenson also suggested that Musquito took a wife known as 'Gooseberry of Oyster Bay', but later 'killed the poor creature in the Government paddock'.⁷⁶ A number of such stories circulated about Musquito, as will be touched on later in this chapter.

Evidence exists of Aboriginal diplomatic efforts to have Musquito repatriated. On 17 August 1814 the New South Wales Colonial Secretary Thomas Campbell wrote to Lieutenant-Governor Davey in Van Diemen's Land explaining that:

Application having been made by some of the Natives of this District on behalf of A Native formerly banished ... by the late Governor King to Norfolk Island and who was lately removed from thence to Port Dalrymple on the final evacuation of that Island, soliciting that He might be returned to his Native Place, His Excellency has been pleased to Accede to said Solicitation.⁷⁷

Davey was asked to arrange for Musquito to be sent back to Sydney at 'the earliest opportunity'.⁷⁸ Campbell informed the Lieutenant Governor that an

⁷² King to Portland, 28 September 1800, Enclosure No. 5, 'General Orders', *HRA*, Series I, Volume II, p. 624.

⁷³ *ibid.*

⁷⁴ N J B (Brian) Plomley (ed). *Jorgen Jorgenson and the Aborigines of Van Diemen's Land*, Blubber Head Press, Hobart, 1991, p. 74.

⁷⁵ B. W. Wray, State Librarian wrote to W. F. Ellis, the Director of the Queen Victoria Museum and Art Gallery on 12 December 1962 stating in relation to Musquito 'We can find no record of ... his being assigned to Edward Kimberly'. See the *Musquito Correspondence File*, AOT.

⁷⁶ Plomley (ed). *Jorgen Jorgenson*, p. 74.

⁷⁷ Thomas Campbell to Lieutenant-Governor Thomas Davey, 17 August 1814, *New South Wales Colonial Secretary's Office Correspondence*, Reel 6004, p. 251, AOT.

⁷⁸ *ibid.*

Aboriginal man known as Phillip was travelling to Van Diemen's Land on board the brig *Kangaroo* to meet with Davey in relation to his brother's repatriation.⁷⁹ Despite direct orders to make arrangements for his return home, Davey did not send Musquito back to Sydney. The reasons for this are unclear, but it is possible that the man who was described as 'an admirable bloodhound' had become too valuable for his tracking skills to be lost to the colonial outpost.⁸⁰ Instead, by the time Lieutenant-Governor William Sorell replaced Davey, Musquito was working as a stockman for Edward Lord as well as being utilised as a blacktracker to locate escaped convicts and bushrangers.⁸¹

Musquito was one of two servants described as 'natives of these Colonies' in Lord's employ. At the time, he was looked upon favourably both as a stock-keeper and as an explorer of sorts. While moving Lord's cattle, Musquito, who was described as Lord's 'faithful servant', was said to have 'discovered' Lawrenny Plains.⁸² The plains, located in the south-east of Van Diemen's Land to the north of Mount Brown and inland from Buckland, were identified on colonial maps as 'Mosquito Plains'.⁸³

In accordance with the practice of the day, when Lord was intending to absent himself from Van Diemen's Land to visit Mauritius he advertised his intention in the *Hobart Town Gazette* so that creditors could present their claims prior to his departure. In the same edition of the newspaper, 24 February 1818, he placed a second notice advertising 'Muskitoo and James Brown (Natives of these

⁷⁹ *ibid.*

⁸⁰ James Bonwick. *The Last of the Tasmanians, or the Black War of Van Diemen's Land*, (London, 1870), reprint, Libraries Board of South Australia, Adelaide, 1969, p. 93.

⁸¹ *Hobart Town Gazette*, 24 February 1818, p. 2.

⁸² *Lieutenant Edward Lord*, a folder of notes compiled by W H Hudspeth (1874-1952), an amateur local historian, NS690/29, AOT.

⁸³ See, for example, George Frankland's 1835 map of Van Diemen's Land. See also Leventhorpe Hall's 1884 map of Tasmania.

Colonies) proceeding to the Isle of France [Mauritius] with Mr. E Lord, all claims are desired to be presented at his house in Macquarie-street'.⁸⁴ Lord apparently took two other servants with him instead of Musquito and James Brown, perhaps because, as Naomi Parry suggests, Lieutenant-Governor Sorell would not allow them to accompany their master on his cattle-buying expedition.⁸⁵ In any case, Musquito was in Van Diemen's Land in 1818 where he and another Aboriginal convict known as Duall were utilised to track bushrangers. The latter was banished to Port Dalrymple in Van Diemen's Land in 1816 from a tract of country around present day Camden, New South Wales, called Muringong by Aborigines and the Cowpastures by the colonists.⁸⁶

By the time Duall was born in the mid-1790s most of the yam beds which Aboriginal people in the greater Sydney area relied on for food had been destroyed. The land had been taken over by the settlers for cropping, and conflict over resources and competing land use practices was escalating.⁸⁷ In the 1790s, Dharawal people to the west of Sydney were yet to feel the full impact of the British arrival as were their Darug neighbours north of the Nepean River and the Gundungurra who lived in the Blue Mountains. All three peoples shared a common hunting ground, a bountiful plain situated about thirty miles inland from Sydney. The first of the newcomers to intrude onto this tract of country were not escaped convicts or parties of military explorers, but were in fact what Henry

⁸⁴ *Hobart Town Gazette*, 24 February 1818, p. 2.

⁸⁵ Naomi Parry. "'Many Deeds of Terror': Windschuttle and Musquito', *Labour History*, Issue 85, 2003, pp. 208, 211.

⁸⁶ 'Government Public Notice and Order: Civil Department', *Sydney Gazette*, 3 August 1816, p. 1; Jack Brook. *The Parramatta Native Institution*, New South Wales University Press, Kensington, 1991, p. 27.

⁸⁷ James Kohen. *The Darug and their Neighbours*, Darug Link, Blacktown, 1993, p. 63.

Reynolds has called ‘bovine pioneers’.⁸⁸ Two bulls and six cows that strayed from the Government Herd made their way inland five months after Sydney was established in January 1788.⁸⁹ The sudden appearance of what some later termed ‘beings with spears on the head’ amongst them must have been very disconcerting for Dharawal people.⁹⁰ An indication of what Carol Liston has termed their ‘sense of terror’ was conveyed through a Dharawal representation of a bull that dominated the wall of Bull Cave to the north of present day Campbelltown.⁹¹ As Liston observed, the bull was ‘so different in size to the soft-pawed kangaroo’ to which local Aboriginal people were connected and accustomed.⁹²

The loss of the black cattle that had joined the First Fleet in Cape Town was a devastating blow to the struggling settlement at Sydney Cove. Seven years later, a large herd of cattle descended from the runaways was sighted more than twenty miles inland from the settlement. Details of who relocated the herd, and the original number of animals that strayed, changed with the teller of the tale. This marks the narrative as being significant in terms of its value as a founding myth rather than as a factual account of an historic event.⁹³ Once the cattle were relocated, Governor John Hunter led an expedition to the area that he renamed the Cowpastures, deploying the nomenclature for an open area of common grazing

⁸⁸ Henry Reynolds, *The Other Side of the Frontier*, Penguin, Ringwood, 1981, p. 9.

⁸⁹ ‘State of the Settlement in 1795’ (reprinted from *Saunders’ News-Letter*, 30 January 1797), *HRNSW*, Volume II, p. 820.

⁹⁰ Reynolds, *The Other Side of the Frontier*, p. 9.

⁹¹ Carol Liston, ‘The Dharawal and Gandangara in Colonial Campbelltown, New South Wales, 1788-1830’, *Aboriginal History*, Volume 12, 1988, p. 50. Unfortunately vandals have destroyed the paintings in Bull Cave, effacing them from the public record.

⁹² *ibid.*

⁹³ One contemporaneous account claimed that a boat’s crew landed some distance from the settlement in search of fresh water and were surprised by an English voice directing them to a spring. The voice belonged to Wilson, a convict who had absconded from the settlement five years’ earlier, and was living with local Aborigines. Wilson was taken back to the settlement where he provided information as to the whereabouts of the stray cattle. See Letters from Sydney (reprinted from *Saunders’ News-Letter*, 12 April 1797), 8 April 1797, *HRNSW*, Volume III, p. 203. In another account published soon after the rediscovery of the cattle, the author claimed that it was ‘an officer’s servant, shooting in the woods’ who had discovered the herd. See State of the Settlement in 1795, *HRNSW*, Volume II, p. 820.

land located near an English village.⁹⁴ Deirdre Coleman has neatly encapsulated the sentiment implicit in this gesture:

The discovery of the Cowpastures, with its gratifying movement from loss to 'abundant recompense', stands as an allegory of a persistent utopian and Romantic strand of imagining about the shape of new world colonies in the late eighteenth century. The Cowpastures, with its happy herd, is an interior antipodean Eden, the cattle's populousness and sleek prosperity a story about finding the promised land – the desideratum, of course, of all colonizing enterprises.⁹⁵

The presence of a metaphorical snake or snakes within the garden extends Coleman's biblical allusion and complicates the tale. An account published within two years of Hunter's expedition described the escaped herd of cattle as 'extremely wild and vicious' and credited it with having 'taken possession of a most fertile valley'.⁹⁶ The member of the intrepid bovine colonisers that left the most memorable impression on the minds of those present was undoubtedly a particularly large and ferocious bull:

A bull, fierce and of great size, made an attack on the party with such obstinacy that they were obliged to shoot him. He took six balls through the body before they durst approach him; but in revenge they eat a beef-steak cut from his rump on the spot.⁹⁷

A correlation could be drawn between the attitudes displayed by the Governor's party towards the wild bull who stood in their way, and actions subsequently taken by some of the British colonists towards Aborigines. While some maintained good relations with Aborigines, James Kohen notes that many settlers along the Hawkesbury River 'shot any Aborigines they saw on their land'.⁹⁸ On some occasions, such actions were officially sanctioned. As Deborah Root has

⁹⁴ Alan Atkinson. *Camden: Farm and Village Life in Early New South Wales*, Oxford University Press, Melbourne, 1988, p. 8.

⁹⁵ Deirdre Coleman. *Romantic Colonization and British Anti-Slavery*, Cambridge University Press, Cambridge, 2005, p. 1.

⁹⁶ 'Letters from Sydney', 8 April 1797, *HRNSW*, Volume III, p. 203.

⁹⁷ *ibid.*, pp. 203-04.

⁹⁸ James Kohen. *The Darug and their Neighbours*, p. 63.

argued, people living beyond the bounds of Europe were often ‘identified with the land they occupied’ and ‘imagined as being part of the natural world’.⁹⁹ Just as a bull perceived to have gone wild could be shot, so too could an Aboriginal person who was perceived as being as wild as the lands they inhabited. Aborigines continued to be depicted as ‘wild men of the woods’ or ‘children of nature’ well into the middle of the nineteenth century.¹⁰⁰

While the English woodland was deployed as a symbolic icon for a regenerative social order, its Antipodean counterpart was viewed with a measure of trepidation.¹⁰¹ When the ‘wild cattle’ originally strayed into the woods ‘a fear of venturing far amongst the natives, then somewhat hostile, repressed all attempts to regain them’.¹⁰² The author of an account of their rediscovery could not fathom why ‘in the almost starving state of the colony’ the land where the cattle were found had not been explored previously in the hope of relocating the beasts.¹⁰³ He implied only ‘apathy or despondency’ on the part of the settlers could account for their apparent lack of effort.¹⁰⁴ Vestiges of the reluctance to traverse territory thought to be inhabited by hostile natives remained embedded within the psyches of the settler population of New South Wales for at least several decades following settlement and accounts, in part, for the popularity of procuring Aboriginal guides.

It was as an expedition guide that Duall first entered the colonial records, receiving positive attention for taking seventeen-year old Hamilton Hume on the

⁹⁹ Deborah Root. *Cannibal Culture: Art, Appropriation, and the Commodification of Difference*, Westview Press, Boulder, 1996, p. 159.

¹⁰⁰ There are numerous examples of such depictions in colonial newspapers. See, for example, the *Geelong Advertiser*, 5 December 1840, p. 3.

¹⁰¹ Stephen Daniels. ‘The Political Iconography of Woodland in Later Georgian England’, *The Iconography of Landscape*, Denis Cosgrove and Stephen Daniels (eds). Cambridge University Press, Cambridge, 1988, pp. 43-82.

¹⁰² ‘State of the Settlement in 1795’, *HRNSW*, Volume II, p. 820.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

latter's first exploratory journey in 1814. With Hume's brother, the three young men traversed the country to the south of the Cowpastures to Berrima.¹⁰⁵ Hume later claimed that he and his brother had 'discovered' the County of Argyle where Berrima is situated.¹⁰⁶ This assertion is problematic on two counts. It seems that Hume's uncle John Kennedy, a man also to feature prominently in Duall's life, preceded his nephews to Berrima. In his obituary, Kennedy was said to have been 'the first European who entered the new county of Argyle by the Bargo Brush, in the early part of the present century (if not before).'¹⁰⁷ This claim is confirmed by an entry in Macquarie's journal from when he toured Argyle. On 17 October 1820 he wrote:

After passing through Bargo, we entered a very long Barren Scrubby Brush of 9 miles in extent – now named Kennedy's Brush – in honor of the Person of that name who first passed through it with the Natives.¹⁰⁸

Regardless of which white person was celebrated as the first to set foot in the County of Argyle, claims to have 'discovered' this area are inherently problematic. Duall and other Aboriginal people were obviously already well aware of this tract of country, hence their ability to guide white expeditionary parties across this terrain. As Terry Goldie observed, 'the role of the white "discoverer" has become a vexing problem for historians in recent years, in deciding how a land with an existing population can be discovered'.¹⁰⁹ The consequences that followed such feats of white discovery are more readily

¹⁰⁵ Liston. 'The Dharawal and Gandangara in Colonial Campbelltown', p. 60.

¹⁰⁶ According to James Jervis, this claim was made in a letter to the *Monitor* of 15 December 1826. See James Jervis. *A History of the Berrima District 1798-1973*, Library of Australian History, North Sydney, 1973, p. 9.

¹⁰⁷ *Sydney Morning Herald*, 3 April 1843, p. 3.

¹⁰⁸ Lachlan Macquarie. 'Journal of a Tour of Inspection to the Western and Southern Countries some time since discovered by Chas. Throsby Esqr. - in Octr. & Novr. 1820', *Journeys in Time: the Journals of Lachlan and Elizabeth Macquarie*, Macquarie University Library, accessed on 30 November 2005 at <<http://www.lib.mq.edu.au/all/journeys/1820/>>

¹⁰⁹ Terry Goldie. *Fear and Temptation: the Image of the Indigene in Canadian, Australian and New Zealand Literatures*, McGill-Queen's University Press, Kingston, 1989, p. 42.

discernible. The areas considered by the colonists to be newly discovered were opened up for settlement with the trickle of settlers, servants, and stock moving in soon becoming a steady stream.

By the time Duall and the Hume brothers returned from their 1814 journey, the colony was badly affected by ‘Very Extraordinary and Unprecedented Droughts’ that continued until March 1816.¹¹⁰ The inclement weather resulted in ‘a very great Mortality amongst the Horned Cattle and Sheep throughout the colony, as well as greatly Injured the Crops’.¹¹¹ The already stressed Districts of Airds and Appin, adjacent to, and including the Cowpastures, came under an increasing strain from an influx of settlers that served to displace Aboriginal people and put pressure on existing resources.¹¹² This led to conflict between some of the colonists and Gundungurra people who traditionally came down regularly from the Blue Mountains seeking food at the Cowpastures. The escalation in hostilities led to Macquarie ordering a magisterial investigation. The magistrates found that ‘cruel acts’ were ‘reciprocally perpetrated by each party’.¹¹³ While there was adequate evidence ‘to convince any unprejudiced man that the first personal attacks were made on the part of the settlers’, it was decided that such evidence was insufficient to warrant any criminal prosecutions.¹¹⁴ This meant Macquarie’s resolution that those involved in the hostilities would receive ‘the most exemplary punishment’ applied only to those people considered to be hostile natives and did not extend to colonists complicit in perpetrating cruel acts.¹¹⁵ The Governor ordered a punitive expedition against Aboriginal people at

¹¹⁰ Macquarie to Earl Bathurst, 18 March 1816, *HRA*, Series I, Volume IX, pp. 52-3.

¹¹¹ *ibid.*

¹¹² Liston, ‘The Dharawal and Gandangara in Colonial Campbelltown’, p. 50.

¹¹³ *New South Wales Colonial Secretary’s Office Correspondence*, Reel 6044, pp. 213-32, AOT.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

the Cowpastures whom he considered to be hostile. He designated John Warby to lead the expedition, accompanied by John Jackson, ten other men drawn from the settler population, and four ‘friendly native’ Darug guides. Carol Liston has suggested that Macquarie wanted the punitive expeditionary party to pursue five Gundungurra men the colonists held responsible for the murders of two white children.¹¹⁶ The deaths were in retaliation for the murder of an Aboriginal woman and child at William Broughton’s farm in Appin.¹¹⁷

At about the same time Musquito and Bull Dog were sent to Norfolk Island, Warby became the first colonist officially sanctioned to reside at the Cowpastures where he worked as the Superintendent of the Wild Cattle.¹¹⁸ The local knowledge and relationships he built up during his long-term residence there led to demand for his services as a European guide. On more than one occasion, this placed him in the awkward position of being ordered to assist in punitive expeditions against Aboriginal people he had befriended while other Aboriginal friends were commandeered as guides under his supervision.¹¹⁹

While the ultimately unsuccessful punitive expedition of 1814 was in train, local Dharawal – who were generally thought of by colonists as being more peaceful than their mountain-dwelling neighbours – sought refuge with some of the Cowpastures settlers. One of the Dharawal leaders, Gogy, frightened the settlers with accounts of Gundungurra acts of cannibalism.¹²⁰ The veracity of such claims is unproven, but these stories nevertheless had the diplomatic effect of

¹¹⁶ Liston, ‘The Dharawal and Gandangara in Colonial Campbelltown’, p. 51.

¹¹⁷ Rachel Roxburgh. *Throsby Park: An Account of the Throsby Family in Australia 1802-1940*, Macarthur Press, Parramatta, 1989, p. 7.

¹¹⁸ John Warby (c1767-1851), *Journeys in Time 1809-1822: The Journals of Lachlan and Elizabeth Macquarie*, Macquarie University, accessed on 9 March 2006 at <<http://www.lib.mq.edu.au/all/journeys/people/profiles/warby.html>>

¹¹⁹ *New South Wales Colonial Secretary’s Office Correspondence*, Reel 6044, pp. 213-32, AOT.

¹²⁰ Liston, ‘The Dharawal and Gandangara in Colonial Campbelltown’, p. 51.

distancing in colonists' eyes Dharawal from the Gundungurra who were suspected of killing colonial children. Such fear inducing tales helped shore up settler support for Dharawal against a people who could be perceived as somehow even less civilised and as a common enemy. Obtaining a good level of local support, and therefore protection, was critical for Aboriginal people's safety during times of unrest.

After the 1814 punitive expedition, tensions escalated. Macquarie noted a disturbing change in the 'disposition' of 'the Natives' who had begun to take 'a portion of the maize and other grain' from the colonists just as it was becoming ripe and ready to harvest.¹²¹ The increasing numbers of Gundungurra descending from the mountains alarmed the settlers, as did the diminished fear of firearms on the part of Aborigines.¹²² Under such volatile conditions, cases of mistaken identity occurred where people's names were wrongly sullied. In some instances, though, the colonists found it expedient to correct such tactical errors. In an unprecedented move, a formal apology was published in the *Sydney Gazette* following an erroneous report that Budbury, a Dharawal guide to Warby's punitive expedition and a man who enjoyed the patronage of the influential Macarthur family, was present at an attack on a settler. The necessity of avoiding having a bad name incorrectly attached to an otherwise 'friendly native' was predicated on the grounds that such an error might become 'doubly fatal, in making an enemy of a friend'.¹²³ Nevertheless, despite Duall having been thought of as a friendly native in 1814, within two years his name appeared on a list of hostile natives compiled by Macquarie on the basis of information provided to

¹²¹ Lachlan Macquarie. Government and General Orders: Civil Department 18 June 1814', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6038, pp. 501-05, AOT.

¹²² *Sydney Gazette*, 23 March 1816, p. 2.

¹²³ *ibid.*

him by William Macarthur, a substantial landholder at the Cowpastures.¹²⁴ The list identified those considered to be instrumental in fomenting ongoing hostility towards the settlers.

Macquarie's list of hostile natives was circulated amongst the 'fittest and best troops' from the colonial garrison.¹²⁵ After hearing reports of 'large bodies of hostile natives' in the districts of Airds and Appin 'committing all sorts of outrages and depredations on the persons and properties of the settlers residing in those districts', Macquarie sent soldiers to the 'disturbed districts'.¹²⁶ As John Connor has pointed out, where British troops were engaged in fighting indigenous peoples they 'generally deployed as light infantry – that is, as skirmishers who moved and fired individually'.¹²⁷ On 9 April 1816, in what was 'one of the most elaborate operations ever carried out by the British Army on the Australian frontier', the Governor instructed the colonial garrison, the 46th (South Devonshire) Regiment, to undertake punitive expeditions against Aborigines in the Nepean, Hawkesbury, and Grose river valleys.¹²⁸ Captain G B W Schaw was told to proceed with his light infantry to Windsor. Captain James Wallis and the grenadiers were instructed to march to Liverpool, while Lieutenant Charles Dawe with his light infantry was sent to the Cowpastures. Macquarie ordered the expedition leaders to inflict 'exemplary punishments' on 'which of the guilty natives as you may be able to take alive'.¹²⁹ So-called friendly native guides were

¹²⁴ Lachlan Macquarie. 'List of Hostile Natives', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6005, p. 44, AOT.

¹²⁵ Lachlan Macquarie. 'Instructions to Schaw, Wallis, and Dawe', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6045, pp. 149-50, AOT; John Connor. *The Australian Frontier Wars, 1788-1838*, University of New South Wales Press, Sydney, 2002, p. 49.

¹²⁶ Lachlan Macquarie. 'Instructions to Schaw, Wallis, and Dawe', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6045, pp. 149-50, AOT.

¹²⁷ Connor. *The Australian Frontier Wars*, p. 13.

¹²⁸ Macquarie. 'Instructions to Schaw, Wallis, and Dawe', Reel 6045, p. 150, AOT; Connor. *The Australian Frontier Wars*, p. 49.

¹²⁹ Macquarie. 'Instructions to Schaw, Wallis, and Dawe', Reel 6045, p. 150, AOT.

commandeered to accompany each of the punitive expeditionary parties and were supposed to point out to the white soldiers those of the Aborigines considered hostile by Macquarie. As well as providing the detachments with Aboriginal and white guides, Macquarie provided Schaw and Wallis with mounted messengers to enable regular communication between them out in the field and gave the two main detachments horses and carts to improve their mobility.¹³⁰

The expedition leaders were instructed to ‘make prisoners of all the natives of both sexes whom you may see or fall in with ... delivering them over in charge of the magistrates’, using the horses and baggage carts for conveying the prisoners, ‘tied two and two together with ropes’.¹³¹ If people refused to surrender, the military was instructed to ‘fire upon and compel them to surrender, breaking and destroying the spears, clubs, and waddies of all those you take prisoners.’¹³² Any men killed were to be ‘hanged up on trees in conspicuous situations, to strike the survivors with the greater terror’ while women and children were to be taken prisoner or, if killed, ‘interred wherever they may happen to fall’.¹³³ Macquarie asked the punitive expedition leaders to ‘procure twelve boys and six girls ... for the Native Institution at Parramatta’.¹³⁴ The children were to be ‘fine healthy good looking children ... aged between four and six years’ and would be handed over to the authorities in Parramatta immediately upon their arrival.¹³⁵

¹³⁰ Connor. *The Australian Frontier Wars*, p. 49.

¹³¹ Macquarie. ‘Instructions to Schaw, Wallis, and Dawe’, Reel 6045, p. 152, AOT.

¹³² *ibid.*, p. 155.

¹³³ *ibid.*

¹³⁴ *ibid.*, p. 164.

¹³⁵ *ibid.*, p. 165. Macquarie’s instruction was underpinned by the notion that beneficial effects would derive from the early separation of indigenous children from their parents and their subsequent institutionalisation and training in European ways. This provides an early example of the kind of thinking that informed Australian policy more than a century later during the assimilation era and resulted in what has since become known colloquially as the ‘stolen generation’.

Connor has proposed that the deployment of British troops against Aboriginal people ought to 'be seen in the context of frontier warfare in the rest of the empire'.¹³⁶ He explained that in previous altercations with indigenous peoples on other continents, the British military built up a 'repertoire of strategies and tactics' that they later applied in their skirmishes with Aboriginal people in New South Wales.¹³⁷ One of these tactics involved forming alliances with some local indigenous groups, and then utilising the so-called friendly natives in their actions against those considered more hostile towards the colonists. In the Cape colony, for example, the British went so far as to recruit indigenous peoples into a regiment that came to be known as the Cape Corps or Cape Regiment. Using indigenes as troops had the advantage of involving less cost in the maintenance of the men. In addition, indigenous men were less susceptible to the local diseases that took their toll on colonial troops, although this was less of a problem in New South Wales than in some of the other British colonies.¹³⁸ In New South Wales, the first recorded use of Aboriginal people in a quasi-military capacity was as guides to punitive expeditions such as that led by Warby in 1814 and by the military two years' later.

The three detachments sent out by Macquarie in April 1816 were augmented by a selection of white and Aboriginal guides. Warby was ordered to accompany Wallis's detachment to Airds and Appin and was put in charge of the two Dharawal guides, Boodbury and Bundell.¹³⁹ These two single men had been sheltering at *Glenfield*, the home of Dr. Charles Throsby, since the previous month where they joined Gogy, Nighgingull and their families. These Dharawal

¹³⁶ Connor. *The Australian Frontier Wars*, p. 12.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ Lachlan Macquarie. 'Instructions to Captain Wallis', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6045, p. 8, AOT.

families took refuge at *Glenfield* as early as February 1816.¹⁴⁰ Throsby had arrived in New South Wales in 1802 on board the *Coromandel* on which he served as a naval surgeon. His skills were much needed in the new colony and he took over as medical officer at Castle Hill while the incumbent took a year's leave. In 1804 Throsby was appointed as assistant surgeon to the then newly established penal station at Newcastle. When the commandant resigned the following year and his replacement became insane, Throsby took over and remained in charge until he retired on grounds of failing health in 1808. He received a series of land grants, some of which were later rescinded, and eventually settled at Upper Minto (to the north of the Cowpastures and Campbelltown and south of Liverpool) where he had *Glenfield* built in 1810.¹⁴¹ In his retirement, Throsby became an advocate for Aboriginal people and a well-known explorer.

When tensions began to escalate between colonists and indigenous peoples in the districts to the west of Sydney, Throsby wrote 'lengthy missives' to Macquarie 'to complain frequently about their maltreatment by other settlers'.¹⁴² When he learned of the Governor's plans to send in the soldiers, he was concerned that those sheltering with him at *Glenfield* would wrongly be held to account for actions undertaken by others. Throsby also averred to the risk of Aboriginal retaliatory attacks against stockmen and others in remote areas. As Rachel Roxburgh has observed, Throsby's level of agitation was apparent in the

¹⁴⁰ Liston. 'The Dharawal and Gandangara in Colonial Campbelltown', p. 52. Liston states that Gogy became aware that the Governor had ordered that he be commandeered to act as a guide to the military and consequently fled to take shelter with a settler at Botany Bay.

¹⁴¹ Vivienne Parsons. 'Throsby, Charles (1777 - 1828)', *Australian Dictionary of Biography*, Volume 2, Melbourne University Press, Melbourne, 1967, pp. 530-31.

¹⁴² Roxburgh. *Throsby Park*, pp. 5, 7.

style of his handwriting.¹⁴³ Rather than invoking Macquarie's empathy, Throsby's letters had the unfortunate affect of arousing the Governor's suspicions. This resulted in his being denounced in a secret report dated 1 December 1817 of malcontents in which Macquarie named 'Persons residing at present in the Colony of New South Wales, who have always manifested an Opposition to the Measures and Administration of Governor Macquarie'.¹⁴⁴ The Governor complained to Lord Bathurst that some of the people whom he had looked upon most favourably had become his enemies and claimed that he owed it to his own character to:

make your Lordship acquainted with the Names of those Persons, *in the rank of Gentlemen*, in this Colony, whom I look upon as my *secret* tho' not avowed *Enemies*, and from whom I have always experienced every opposition, they could give with safety to themselves either Publickly or Privately, to the Various Measures and Regulations I had deemed it necessary to frame and establish for the improvement and Prosperity of the Colony over which I preside.¹⁴⁵

Macquarie's letter and the enclosed list of malcontents was intended to moderate the reports that he feared had been written to people in England containing 'the most gross Misrepresentations' of his administration.¹⁴⁶ He clearly did not appreciate interference from the likes of Throsby in the matter of his handling of the 'Aboriginal problem', and paid no heed to the doctor's urging to take a more moderate approach. Under pressure from other colonists to take action and experiencing 'personal strains' during this period of his administration, Macquarie could not be swayed from adopting an approach of military intervention.¹⁴⁷

¹⁴³ *ibid.*, p. 7.

¹⁴⁴ Macquarie to Bathurst, 1 December 1817, *HRA*, Series I, Volume IX, Enclosure, 'List of the Names, Designations, &c., of Persons residing at present in the Colony of New South Wales, who have always manifested an Opposition to the Measures and Administration of Governor Macquarie', p. 500.

¹⁴⁵ Macquarie to Bathurst, 1 December 1817, *HRA*, Series I, Volume IX, p. 499. (Emphasis in the original.)

¹⁴⁶ *ibid.*, p. 501.

¹⁴⁷ Kate White. *Dharug and Dungaree: Penrith and St Marys to 1860*, Hargreen Publishing Company, Melbourne, 1988, pp. 124-26.

As per the Governor's instructions, Wallis and his men marched to Liverpool on 10 April 1816 then on the following day to an outlying farm. On their arrival, Warby refused to take responsibility for Boodbury and Bundell. It seems likely that this was a strategy designed to facilitate the flight of the indigenous guides and absolve Warby of responsibility for their actions. Wallis had to take it upon himself to keep the indigenous guides under surveillance, but while he was distracted by the responsibilities of humouring his drenched and exhausted troops the Dharawal men absconded.¹⁴⁸ The loss of the Aboriginal guides was the only circumstance on which Wallis commented specifically in the covering letter to his official report on the punitive expedition.¹⁴⁹ However, the events that transpired over the course of the coming week are of far greater magnitude from a present day standpoint.

After gathering intelligence about the activities of Aborigines in the area, on 14 April, Wallis heard that a group of Gundungurra were camped nearby.¹⁵⁰ He led an attack on the camp at Broughton's farm near Appin during the night of 17 April that has since become known as the Appin Massacre. Wallis later reported that as the military approached 'the natives fled over the cliffs', leaving at least fourteen dead.¹⁵¹ He claimed to have 'ordered my men to make as many prisoners as possible, and to be careful in sparing and saving the women and children'. In the Gundungurra camp only two women and three children remained 'to whom death would not be a blessing'.¹⁵² The remainder of the group had

¹⁴⁸ Wallis to Macquarie, 9 May 1818, *New South Wales Colonial Secretary's Office Correspondence*, Reel 6045, pp. 52-3, AOT.

¹⁴⁹ *ibid.*, p. 51.

¹⁵⁰ *ibid.*, p. 54.

¹⁵¹ *ibid.*, pp. 55-6.

¹⁵² *ibid.*, p. 56.

either been shot by the military or rushed ‘in despair over the precipice’.¹⁵³ The bodies of two men considered ‘the most hostile of the natives’, Durelle and Kinabygal, were found amongst the dead.¹⁵⁴ In accordance with Macquarie’s written instructions, Wallis ordered Lieutenant Parker to take the men’s bodies ‘to be hanged’ in a conspicuous position in the nearby range of hills.¹⁵⁵

Making a public spectacle of the bodies of men considered miscreants was far from being unprecedented in New South Wales. During what Hamish Maxwell-Stewart described as ‘the post-1813 escalation of bushranging in Van Diemen’s Land’, the remains of two men considered to be ‘dreadful bushrangers’ were hanged in chains on Hunter’s Island at Hobart following their execution.¹⁵⁶ Wallis’ motivation in hanging the remains of Durelle and Kinabygal in the trees above Appin extended beyond making a public example of them. He was also using them as bait in the vain hope of enticing Boodbury and his companions out into the open, and had some of his men lie in ambush in case they appeared.¹⁵⁷

Wallis apparently sanctioned the post-mortem removal of Kinabygal’s head. In what Paul Turnbull has described as an ‘unplanned and largely unimagined consequence of complex negotiations, accommodations, and conflicts that characterized relations between colonists and Indigenous peoples’, Kinabygal’s severed head left the colony secreted in the luggage of the naval surgeon Patrick Hill.¹⁵⁸ According to Turnbull, Hill claimed that Parker supplied him with the skull. Sometime shortly after his return to Britain, Hill gave

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*, p. 56-7. Variant spellings for Kinabygal include Conibigal, Carnambaygal and Cannaboygal.

¹⁵⁵ *ibid.*, p. 57.

¹⁵⁶ Hamish Maxwell-Stewart. *The Bushrangers and the Convict System of Van Diemen’s Land, 1803-1846*, PhD Thesis, Edinburgh, University of Edinburgh, 1990, p. 213.

¹⁵⁷ Wallis to Macquarie, 9 May 1818, Reel 6045, p. 57, AOT.

¹⁵⁸ Paul Turnbull. “‘Outlawed Subjects’: The Procurement and Scientific Uses of Australian Aboriginal Heads, ca. 1803-1835”, *Eighteenth Century Life*, 22.1, 1998, p. 158.

Kinabygal's skull to Sir George Mackenzie, a mineralogist who had developed a strong interest in the emerging field of phrenology.¹⁵⁹

Elizabeth Collingham has elaborated the significance of phrenology within the broader context of anthropology as it developed during the nineteenth century:

Anthropology conceived of the body as the physical outer map of the inner moral man. It was believed that, along with racial characteristics, cultural and moral characteristics could be read off from the body. The ethnological techniques of phrenology and craniometry ... defined and classified racial groups according to measurements of the skull.¹⁶⁰

Collingham pointed out that the 'unstated presence' of the European body was the unacknowledged norm against which indigenous subjects of the British Empire were measured.¹⁶¹ British racial scientists produced the truth of the intellectual and moral inferiority of the indigenous subject based on the contours and size of the cavity of the indigenous skull.

Kinabygal's skull was the first acquired by the Edinburgh Phrenological Society's museum. Mackenzie put it to extensive use in his 1820 *Illustrations of Phrenology* using it as evidence of a lack of linguistic and mathematical ability. He also asserted that Kinabygal would have been incapable of showing compassion towards colonists. Mackenzie nevertheless concluded that although 'the progress of these people may be slow ... much may be done for these miserable race of beings'.¹⁶² Crania such as those of Kinabygal, Yagan, and Pemulwuy taken in battle then shipped to Europe were 'made to perform a new identity, that of national character or temperament'.¹⁶³ Turnbull has drawn a

¹⁵⁹ *ibid.*, p. 166.

¹⁶⁰ Elizabeth Collingham. *Imperial Bodies: The Physical Experience of the Raj c1800-1947*, Polity Press, Cambridge, 2001, p. 121.

¹⁶¹ *ibid.*

¹⁶² George Mackenzie. *Illustrations of Phrenology*, A. Constable & Co., Edinburgh, 1820, p. 235, cited in Turnbull, 'Outlawed Subjects', p. 237.

¹⁶³ Turnbull. 'Outlawed Subjects', p. 163.

useful correlation between narratives of the indigenous men's resistance to colonisation and the pseudo-scientific knowledge produced by phrenologists on examining crania. Knowledge gleaned from the skulls 'strengthened the claims of metropolitan anatomists and phrenological entrepreneurs to have produced knowledge capable of bringing order and humanity to the task of governing Britain's savage Australian subjects'.¹⁶⁴ The dialectic between racial science and colonial expansion has been theorised by Bonnett. He posited that while European expansion encouraged racial science, racial scientists in turn legitimated colonisation through drawing on evidence such as interpretations of crania acquired by colonists to demonstrate the apparent superiority of Europeans as a race.¹⁶⁵

Four days after Durelle's and Kinabygal's bodies were publicly displayed and the latter's skull removed, Parker with a small contingent went to the settler Woodhouse's farm 'to receive the same evening Duall and Quiet two hostile natives who had been taken on Mr Kennedy's farm in the morning'.¹⁶⁶ Kennedy was a known sympathiser towards Dharawal people. On an earlier occasion two of the wanted men, Yellooming and Bitugally, had been found hiding at Kennedy's farm. Wallis wanted to arrest the men, but was persuaded not to by Kennedy and his nephew Hume who told him that the Dharawal men protected their family farms from Aboriginal attacks. Kennedy offered to escort the men to the Governor and to proclaim their innocence, while Hume bluffed the military man with a story that Macquarie had removed their names from the list of hostile

¹⁶⁴ *ibid.*

¹⁶⁵ Bonnett. *White Identities*, pp. 18-20.

¹⁶⁶ Lieutenant A E Parker to Macquarie, 'Report of a Detachment of the 46th Regt. from the 22nd April to the 5th May 1816', Reel 6045, p. 60, AOT.

natives.¹⁶⁷ This time, guards had been posted at his farm where they located Duall and Quiet. On 22 April 1816 Parker placed the Dharawal men under arrest and the following morning he ordered a constable to escort Duall to Liverpool. Quiet was detained by Parker to show him the location of ‘that body of natives to which he belong’d’ before also being sent to Liverpool Gaol.¹⁶⁸

Macquarie recalled the three military detachments to Sydney at the end of April 1816, leaving behind a small number of soldiers at McArthur’s farm at the Cowpastures.¹⁶⁹ The *Sydney Gazette* reported the troops’ return, describing how the soldiers ‘underwent considerable fatigue and privations’ during the punitive expedition.¹⁷⁰ It was considered that while ‘the humanity with which this expedition has been conducted throughout ... claims our warmest commendations’ the punitive expedition had produced a result that was not ‘altogether so successful as might have been wished’.¹⁷¹ Dawe’s detachment from which the ‘friendly native guides’ had also absconded was the only force to encounter a significant number of Gundungurra. Kohen has suggested that this spectacular lack of ‘success’ could be attributed to the Darug guides employing strategies to subvert the military operation.¹⁷²

Regardless of perceptions that the military operation had not been entirely successful, rewards were bestowed upon the participants. Schaw and Wallis received 15 gallons of spirits while three junior-ranking officers, including Parker, and the assistant surgeon received 10 gallons. The sixty-eight soldiers each

¹⁶⁷ Liston. ‘The Dharawal and Gandangara in Colonial Campbelltown’, pp. 52-4.

¹⁶⁸ Parker to Macquarie, ‘Report’, Reel 6045, pp. 60-61, AOT. Quayat is a spelling variant for Quiet.

¹⁶⁹ Macquarie, 30 April 1816, *New South Wales Colonial Secretary’s Office Correspondence*, Reel 6045, pp. 20-21, AOT.

¹⁷⁰ *Sydney Gazette* (Supplement), 11 May 1816, p. 2.

¹⁷¹ *ibid.*

¹⁷² Kohen. *The Darug and Their Neighbours*, p. 68.

received a pair of new shoes and half a pint of spirits.¹⁷³ The white guides were paid £12 each and issued with slops (clothing), blankets and some stores. In contrast, the Aboriginal guides received no monetary payment. Instead, they were given slops, provisions to last four days, a blanket, half a pound of tobacco, and half a pint of spirits.¹⁷⁴ The disparity in payment demonstrates the different status that the men attained within, and on, the fringes of colonial society. Despite the more lowly reward bestowed on them by the colonial administration, the Aboriginal guides had the gratitude of their people, as they had for the most part managed to keep the military away from those that they most sought.

When the punitive expeditionary parties returned to Sydney, they had taken only a handful of Aboriginal prisoners. All except Duall were released from custody after one month's confinement.¹⁷⁵ Duall was left in gaol awaiting the Governor's pleasure and it was three months before his fate was made public by Macquarie in the *Sydney Gazette*. The Governor described Duall as 'dangerous to the peace and good order of the community' and stipulated that he had originally been sentenced to death.¹⁷⁶ Macquarie overturned the sentence, stating:

By virtue therefore of the power vested in me, as Governor in Chief of this Territory, and moved with compassion towards the said criminal, in consideration of his ignorance of the laws and duties of civilized nations, I do hereby remit the punishment of death, which his repeated crimes and offences had justly merited and incurred, and commute the same into banishment from this part of His Majesty's Territory of New South Wales to Port Dalrymple, in Van Diemen's Land, for the full term of seven years.¹⁷⁷

¹⁷³ Connor. *The Australian Frontier Wars*, p. 52.

¹⁷⁴ Brook. *The Parramatta Native Institution*, p. 31.

¹⁷⁵ Connor. *The Australian Frontier Wars*, p. 52.

¹⁷⁶ *Sydney Gazette*, 3 August 1816, p. 1.

¹⁷⁷ *ibid.*

Banishing Duall, reasoned Macquarie, would deter other Aboriginal people from committing similar ‘flagrant and sanguinary acts’.¹⁷⁸ Macquarie referred to Duall as ‘a Native Black Man of this Colony’.¹⁷⁹ This signifier encapsulates the dialectic between inclusion and exclusion that was also evident in Macquarie’s native policy.¹⁸⁰ Duall was positioned an outsider, a black person who had committed ‘various atrocious Acts of Robbery, Depredation, and Barbarity on the Property and Persons of His Majesty’s loyal Subjects residing in the Interior’.¹⁸¹ Paradoxically, he was at the same time an insider in the sense that Macquarie could exercise ‘Compassion towards the said Criminal’ in light of his ignorance of the ‘Laws and Duties of Civilized Nations’.¹⁸² Situating Duall as being ‘of this Colony’ brought him under Macquarie’s jurisdiction, thus legitimating (at least in colonial eyes) his banishment to Van Diemen’s Land.¹⁸³

Macquarie’s strategies in dealing with Aboriginal people like Duall who he saw as recalcitrant were embedded in a policy of exclusion. This extended not only to removing Duall from colonial society in and around the Cowpastures, but also to removing him from his tribe. The punishment was meant to be exemplary, as explained in the *Sydney Gazette* on the same day Duall’s banishment was announced. The editor George Howe referred to the anticipated outcome of pacifying the so-called hostile natives through the use of fear and intimidation:

The banishment of the native *Dewal* ... may possibly produce a greater dread in the minds of his predatory associates than if he had

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ Macquarie had, for example, utilised those considered to be friendly natives against hostile natives as discussed. He also opened a school for Aboriginal children and tried to encourage the adults to take up agriculture, thus promoting inclusion albeit after a period of segregated preparatory training. Yet on the other hand, Macquarie issued orders in May 1816 banning Aboriginal people from congregating in numbers of six or more, and from being within one mile of any town, village, or farm occupied by colonists.

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

been killed when in the act of plunder. The doubt of what may be his fate, when absent, is likely to excite a dread which may render them less liable to a similar treatment, the justness of which they cannot at the same time challenge, as they are sensible that the crimes of this offender were enormous.¹⁸⁴

The Governor intended the punishment to result in what can be termed an inexplicably absent body. The political ramifications were evident in that the punishment was designed to dissuade Aboriginal people from attacking colonists and their property. At the same time, there were economic consequences. Aboriginal people traditionally lived in small groups. Depriving a group of a young man like Duall reduced its capacity to hunt and to defend itself. Within the context of sporadic frontier conflict, Duall's absence also deprived Dharawal of a strategist and a man of fighting age and capacity. Given that Duall enjoyed long established relationships with key colonists at the Cowpastures, banishing him removed one of the significant cultural brokers from the district. Such a move may have been intended to break down what Macquarie viewed as opposition from men like Throsby and Kennedy who had formed associations with Duall, Gogy, and other significant Dharawal leaders. By the time Duall's fate was revealed in the columns of the *Sydney Gazette*, he was already aboard the brig *Kangaroo* with one hundred other male convicts bound for Van Diemen's Land. Also on board the ship was a letter from Macquarie to the Commandant at Port Dalrymple, Brevet-Major James Stewart, instructing him that the 'Black Native' Duall was 'to be kept at Hard Labour and to be fed in the same manner as the other Convicts.'¹⁸⁵

¹⁸⁴ *Sydney Gazette* (Supplement), 3 August 1816, p. 2.

¹⁸⁵ Macquarie to Brevet-Major James Stewart, 31 July 1816, *HRA*, Series III, Volume II, p. 471.

By 1816, Van Diemen's Land was in a state of chaos. In a letter conveyed on the *Kangaroo* Macquarie apologised to Lieutenant-Governor Davey for being unable to provide badly needed stores and clothing 'there being very few of the former, and none at all of the latter now remaining in the King's Stores here'.¹⁸⁶ The following year, Davey's replacement Lieutenant-Governor William Sorell petitioned Macquarie for relief, stating that many Van Diemen's Land convicts were 'totally without bedding'.¹⁸⁷ According to Sorell 'a large portion of the prisoners have not had Jackets, etc., for three Years.'¹⁸⁸ Two years later, the Government stores at Port Dalrymple remained in a state of 'complete destitution' and no more than 200 convict labourers could be victualled there.¹⁸⁹ The hardships had already led to anarchy within the ranks of the colonial administration and the garrison. In 1814, 'bands of runaway convicts' known as bushrangers or banditti plagued the population of Van Diemen's Land.¹⁹⁰ The men committed 'very violent Excesses', particularly in the area around Port Dalrymple, robbing houses and stealing stock in order to survive. The former Acting Deputy Surveyor of Lands Peter Mills and George Williams, the former Acting Deputy Commissary of Provisions at Port Dalrymple led these bands of men. As Macquarie observed, Mills and Williams had until recently 'held official and credible Situations under this Government' but took to the bush to avoid payment of their debts.¹⁹¹ Soldiers from the colonial garrison at Port Dalrymple had descended into a 'state of intoxication and insubordination', setting fire to

¹⁸⁶ Macquarie to Davey, 31 July 1816, *HRA*, Series III, Volume II, p. 156.

¹⁸⁷ Lieutenant-Governor William Sorell to Macquarie, 8 December 1817, *HRA*, Series III, Volume II, p. 289.

¹⁸⁸ *ibid.*

¹⁸⁹ Sorell to Commandant Gilbert Cimitiere, 2 September 1819, *HRA*, Series III, Volume II, pp. 527-89; Sorell to Cimitiere, 3 December 1819, *HRA*, Series III, Volume II, p. 540.

¹⁹⁰ Macquarie to Earl Bathurst, 7 May 1814, *HRA*, Series I, Volume III, p. 250.

¹⁹¹ *ibid.*

their barracks, burning their fences and those of their officers, destroying the gardens of the Commandant's house, and robbing the Assistant Pilot and Acting Chief Constable before driving them from their respective stations.¹⁹² The situation at Port Dalrymple was exacerbated by the behaviour of the Commandant whose conduct was viewed by colonial officials as 'highly insubordinate and unmilitary'.¹⁹³ Stewart was recalled, and most of his men were redeployed to India. In March 1818 the more orderly 48th Regiment replaced the unruly 46th.¹⁹⁴

When Sorell took office in Hobart Town on 9 April 1817, it was hoped that he would 'be able to restore order and bring direction and organization into the government' of Van Diemen's Land.¹⁹⁵ One of his tasks was to address the challenge posed to the authority of his administration by bushrangers. One man who particularly vexed Sorell was Michael Howe, a convict who had arrived in the colony on 19 October 1812 on the *Indefatigable* after being sentenced to seven years transportation for highway robbery. Sometime during 1815 Howe took over leadership of a gang of bushrangers formed about five years earlier. An audacious man, Howe wrote letters to both Davey and his replacement Sorell in which he styled himself variously as 'Lieutenant-Governor of the Woods' and 'Governor of the Ranges'.¹⁹⁶

¹⁹² Sorell to Macquarie, *HRA*, Series III, Vol II, pp. 340-41; Macquarie to Sorell, *HRA*, Series III, Vol II, p. 354.

¹⁹³ Macquarie to Sorell, *HRA*, Series III, Vol II, p. 354.

¹⁹⁴ For further details about the unruly colonial garrison and their insubordinate commandant, see Clem Sargent. *The Colonial Garrison 1817-1824*, TCS Publications, Canberra, 1996, p. 60; Jack Branagan. *The Historic Tamar Valley: its People, Places and Shipping, 1798-1990*, Regal Publications, Launceston, 1990, pp. 3-4; Llewelyn Bethall. *The Story of Port Dalrymple: Life and Work in Northern Tasmania*, Government Printer, Hobart, 1957, p. 15. See also *HRA*, Series III, Volume II.

¹⁹⁵ John Reynolds. 'Sorell, William (1775 - 1848)', *Australian Dictionary of Biography*, Volume 2, Melbourne University Press, Melbourne, 1967, pp. 459-62.

¹⁹⁶ Thomas Wells. *Michael Howe, The Last and Worst of the Bushrangers of Van Diemen's Land: Narrative of the Chief Atrocities Committed by This Great Murderer and his Associates, During a Period of Six Years in Van Diemen's Land*, (Hobart, 1819), reprint, Dubbo, Review Publications, 1979, pp. 9-10.

In 1818, the reward promised in return for Howe's capture was raised after he murdered one of his would be captors William Drew, also known as Slambow. Originally set at one hundred guineas, the incentive was increased to include Sorell's recommendation to the Governor of a free pardon and a passage to England for 'any Crown Prisoner who shall be the means of apprehending the said Michael Howe'.¹⁹⁷ Sorell did not rely solely on convicts turning in a man that had been one of their own. He regularly sent out detachments of the colonial garrison to scour the countryside, and according to Christine Wise he called for volunteers to help track the wanted man.¹⁹⁸ Wise stated that 'amongst the "volunteers" were Musquito, another Aborigine from Sydney called Dual and two convicts named Worrell and McGill'.¹⁹⁹ An exhaustive search of primary research materials has failed to locate any mention of Duall in relation to Howe. What has become apparent, however, was that a number of blacktrackers were utilised in the search for the elusive bushranger including the man's one time companion Mary Cockerill, a Tasmanian Aboriginal woman more commonly known as Black Mary.²⁰⁰ Another Aboriginal woman (unnamed) is also referred to as working with Cockerill and a contingent of the 46th Regiment to track bushrangers.²⁰¹

Thomas 'Jack' Worrell reminisced about life in Van Diemen's Land, including his involvement in the hunt for Howe. He recalled the search party taking with them a blacktracker who he described as 'a native that lived in the service of Mr Carlisle, and who had been ill-treated by the Bush-rangers but a few

¹⁹⁷ *Hobart Town Gazette*, 31 January 1818, p. 1.

¹⁹⁸ Wise. 'Black Rebel Musquito', p. 3.

¹⁹⁹ *ibid.* Spelling variants for Worrell include Worrall and Worrill.

²⁰⁰ Wells. *Michael Howe, The Last and Worst of the Bushrangers of Van Diemen's Land*, 1979, p. 13; for reference to Mary's surname, see *Hobart Town Gazette*, 12 April 1817, p. 2.

²⁰¹ 'Bushrangers Captured', *Hobart Town Gazette*, 16 August 1817, p. 2.

days before, when they were plundering his master's house'.²⁰² Howe and his gang, which at that stage included Cockerill, robbed several properties in New Norfolk, a small settlement inland from Hobart Town, in April 1815 during the course of which they killed several settlers, including Carlisle.²⁰³ Worrell's story predates Duall's arrival in Van Diemen's Land by a year, suggesting that the unnamed blacktracker may well have been Musquito who was working as an assigned convict servant for several years prior to 1817.

On 13 October 1817, Sorell wrote to Macquarie about shipping some of Carlisle's alleged murderers to Sydney on the *Jupiter* together with witnesses.²⁰⁴ One of the crown evidences, or witnesses, was Cockerill.²⁰⁵ Sorell told Macquarie the 'native Woman ... had lived three Years in the Woods with Howe' and that since being 'taken' by the military had 'been the Constant Guide of Serjt. McCarthy's party, which has, through her Capacity for tracking foot-marks, been enabled so often to come up with Bush-rangers'.²⁰⁶ In the same letter, Sorell petitioned Macquarie on behalf of Musquito:

a native of Port Jackson, who has been some years in this Settlement and who has also served constantly as a guide with one of the parties, and has been extremely useful and well conducted, also at his own desire goes to Sydney. I beg leave further to solicit Your Excellency's humane consideration of him on account of his useful Services.²⁰⁷

²⁰² William Maginn. *The Military Sketch-Book: Reminiscences of Seventeen Years in the Service Abroad and at Home by an Officer of the Line*, (second edition), Henry Colburn and Richard Bentley, London, 1831, p. 300.

²⁰³ Davey to Macquarie, 30 April 1815, Enclosure No. 2, 'Informations, D. McCarty and Christopher Hacking, on Charles Carlisle's Death', *HRA*, Series III, Volume II, pp. 92-8.

²⁰⁴ Sorell to Macquarie, 13 October 1817, *HRA*, Series III, Volume II, pp. 283-84.

²⁰⁵ Given the issues surrounding Aboriginal people providing evidence in court (they were not considered Christians and were precluded from taking the required oath) it is unclear how Cockerill's testimony was to be heard. No records pertaining to cases relying on her evidence appear to have survived.

²⁰⁶ Sorell to Macquarie, 13 October 1817, *HRA*, Series III, Volume II, p. 284.

²⁰⁷ *ibid.*

It has often been suggested that Sorell sought to repatriate Musquito because his work as a blacktracker led to some Van Diemen's Land convicts resenting and taunting him.²⁰⁸ This notion seems to have arisen through a misreading of the Lieutenant Governor's letter to Macquarie. In the letter in question, Sorell also sought a pardon for McGill, 'a prisoner for life' from England.²⁰⁹ He stated that McGill, because of his 'very great service against the Bush-rangers', had become 'unavoidably odious amongst the prisoners' in Van Diemen's Land.²¹⁰ So it was McGill rather than Musquito who Sorell described as having attracted the convicts' opprobrium.

In September 1818, McGill and Musquito nearly apprehended Howe. McGill was kangaroo hunting at the Fat Doe River when Howe robbed his hut. A couple of hours' later, McGill set out with Musquito to track the bushranger. They followed him for several days and saw Howe receiving flour from one of Lord's stock-keepers, William Davis, who later denied having seen the man.²¹¹ Surreptitious help was essential to men like Howe who evaded the law for lengthy periods. Commenting on Howe's long career, Carl Canteri suggested that it owed something to the patronage of Lord, a powerful player in Vandemonian colonial

²⁰⁸ See, for example, John West. *The History of Tasmania with Copious Information Respecting the Colonies of New South Wales, Victoria, South Australia, &c.*, (Launceston, 1852), reprint, Angus & Robertson, Sydney, 1971, p. 267; Henry Melville. *The History of the Island of Van Diemen's Land from the Year 1824 to 1835 Inclusive to Which is Added a Few Words on Prison Discipline*, (London, 1835), reprint, Libraries Board of South Australia, Adelaide, 1967, p. 25; Clive Turnbull. *Black War: the Extermination of the Tasmanian Aborigines*, (London, 1948), reprint, Sun Books, South Melbourne, 1974, p. 62.

²⁰⁹ Sorell to Macquarie, 13 October 1817, *HRA*, Series III, Volume II, p. 283. The convict's name has been transcribed as 'Mr Gill' but was more likely to have been 'McGill' as a convict of that name took part in expeditions against bushrangers, including Howe, and later received a free pardon for his services. See 'List of Twelve Conditional Pardons Granted by His Excellency Governor Macquarie (on the recommendation of His Honor the Lieutenant-Governor of Van Diemen's Land) for Persons in that Dependency bearing date 4th June 1819', CON 13/2, pp. 1-2, AOT.

²¹⁰ *ibid.*

²¹¹ Whitcoulls Limited. *A Bloodthirsty Banditti of Wretches: Informations on Oath Relating to Michael Howe and Others Between 1814 and 1818*, Sullivans Cove, Adelaide, 1985, pp. 100-01.

society whose economic competitors suffered losses at the hands of Howe and his gang.²¹² That Lord's stock-keeper so readily assisted Howe suggests that the man may well have been aware that he had his master's support in doing so. It also raises questions about whether Musquito, who was also a servant of Lord's, allowed Howe to slip through his grasp when he and McGill found the bushranger at his campfire. McGill later claimed that he and Musquito fired their fowling pieces at Howe as he fled the scene but failed to hit him.²¹³ The following month, a military party came across Howe and during the 'severe encounter' that followed he was shot dead.²¹⁴ When the reward for Howe was shared out, Worrell received £40 and was subsequently granted a free pardon.²¹⁵ However, Sorell's intention to repatriate Musquito to Sydney was never carried out.

Two months after Howe's death, Macquarie's secretary John Campbell wrote to Sorell regarding several matters including passengers embarking on the *Prince Leopold* about to sail from Sydney. Cockerill, the woman he referred to as 'Black Mary', was to have been on board but at the last minute sickness saw her return to Van Diemen's Land delayed while her passage was allocated to someone else.²¹⁶ In the same letter, Campbell wrote that 'the Governor requests that you

²¹² Carl Canteri. *The Origins of Australian Social Banantry: Bushranging in Van Diemen's Land, 1805-1818*, BLit Thesis, Oxford, University of Oxford, 1977, pp. 36, 102, and 176 cited in Maxwell-Stewart. *The Bushrangers and the Convict System of Van Diemen's Land, 1803-1846*, 1990, p. 161.

²¹³ Whitcoulls. *A Bloodthirsty Banditti of Wretches*, 1985, pp. 100-01. It is claimed in this text that Cockerill was with McGill and Musquito at the time. This seems unlikely as Cockerill was shipped to Sydney in October 1817 as a witness and was in hospital there in December 1818. It is possible, though, that she may have returned to Van Diemen's Land in the interim.

²¹⁴ *Hobart Town Gazette*, 24 October 1818, p. 2.

²¹⁵ Wells. *Michael Howe, The Last and Worst of the Bushrangers of Van Diemen's Land*, 1979, p. 38; Sorell to Macquarie, *Sorell Dispatches*, 20 October 1818, Mitchell Library, CY1096, pp. 91-5; 'List of Twelve Conditional Pardons Granted by His Excellency Governor Macquarie', CON 13/2, pp. 1-2, AOT; *Hobart Town Gazette* (Supplement), 9 January 1819, p. 1.

²¹⁶ *New South Wales Colonial Secretary's Office Correspondence*, Reel 6006, pp. 188-89, AOT. Cockerill was subsequently returned to Van Diemen's Land where she died in the Colonial Hospital in Hobart Town from 'a complication of disorders, which had been long gaining ground upon her, terminating at last in pulmonic affection [that] put an end to her life' on 29 June 1819. See the *Hobart Town Gazette*, 3 July 1819, p. 1.

will please to send hither by the earliest opportunity, a Native Black Man called Dicall (sic) who was Transported about two years ago to Port Dalrymple'.²¹⁷

Duall was returned to Sydney aboard the *Sindbad*, arriving a few days prior to 30 January 1819.²¹⁸

Duall's early recall from Van Diemen's Land was precipitated by Throsby's request to have him as an interpreter on an exploratory journey into the interior. This may have been motivated by a desire to see Duall repatriated to country, family, and friends. Facilitating his return would presumably have strengthened Throsby's position with local Dharawal. Yet as Throsby also appreciated, indigenous diplomacy was an essential prerequisite to successful attempts to explore the Australian continent. Henry Reynolds has elaborated the role played by professional guides like Duall who lived in close proximity with colonists:

The Aboriginal guide – the ubiquitous, albeit often anonymous, 'black boy' – played a vital role in the European exploration of the continent. Unlike casual advisers picked up temporarily along the line of march the professional guides came from the 'settled' districts and were usually permanent members of the exploring parties in question. Their expertise derived both from ancient Aboriginal traditions and from experience gained in contact with the Europeans.²¹⁹

Despite their value to early colonial exploratory parties, the roles of Aboriginal guides and interpreters have been understated in narratives of white exploration. Many such narratives have had their genesis in the explorer's journal. Goldie has remarked on the 'absence of literariness' in such narratives, citing Northrop Frye's assertion that these works are 'as innocent of literary intention as a mating

²¹⁷ 'Transfer of Dicall [Duall] from Port Dalrymple to Sydney', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6006, p. 188, AOT.

²¹⁸ 'Arrival in Sydney from Port Dalrymple per "Sindbad"', *New South Wales Colonial Secretary's Office Correspondence*, Reel 6006, p. 296, AOT.

²¹⁹ Henry Reynolds. *With The White People*, Penguin, Ringwood, 1990, p. 17.

loon'.²²⁰ It does need to be appreciated, though, that journals like Throsby's were tightly circumscribed by the explorers' worldviews and constrained by the dictates of the Governor. Like any other observer, Throsby was limited by the knowledge and language of his upbringing when it came to interpreting and representing what he saw and experienced during his exploratory journeys. As Stephen Greenblatt has pointed out in another context, what an explorer saw could only be understood as important if it had some relationship to something he already knew or anticipated finding. Greenblatt stated:

the form of the journal entry characteristically registers first the material sighting and then its significance; the space between the two – what I have called the caesura – is the place of discovery where the explanatory power of writing repeatedly tames the opacity of the eye's objects by rendering them transparent signs.²²¹

Any signs that are significant to indigenous people but that cannot be read by the explorer are, according to Greenblatt, on their way to losing their status as signifiers.²²² In any case, the signs Throsby was required to record were specified by Macquarie. Explorers were ordered to detail the 'general appearance of the country', to record 'the general nature of the climate, as to heat, cold, moisture, winds, rain, periodical seasons, the temperatures regularly registered from Fahrenheit thermometer as observed at two or three periods of the day' as well as to ascertain the Aborigines' 'condition and mode of government' and 'the influence of religion on their moral character and conduct'.²²³ Macquarie compelled colonial diarists to focus on ascertaining the suitability or otherwise of the land being traversed for pastoral and agricultural purposes, as well as the

²²⁰ Goldie. *Fear and Temptation*, p. 42.

²²¹ Stephen Greenblatt. *Marvelous Possessions: the Wonder of the New World*, Clarendon Press, Oxford, 1991, p. 88.

²²² *ibid.*

²²³ Macquarie. 'Memorandum', *NSW Colonial Secretary's Office Correspondence*, Reel 6065, April 1816, AOT.

extent to which local Aborigines might resist incoming colonists. With their focus on these imperatives, colonial explorers set out with a few friends, Aboriginal guides, provisions, and horses, kept journals of their journeys of ‘discovery’, and, in the process, wrote themselves into the landscape.

Throsby and his party, including Duall, set out from Airds on 25 April 1819 to find a direct route from the Cowpastures to Bathurst. They were accompanied by another interpreter, Bian, and guided by Coocoogong who was a Gundungurra man. Throsby did not make extensive mention of any members of his expeditionary party, either black or white, in his journal. However, he was clearly concerned for their health and recorded in his journal after two days traveling ‘a Native Boy, who came with us being taken very ill, was obliged to stop ... and made a hut for the night’.²²⁴ The journal entry does not reveal whether the afflicted person was Duall, Coocoogong, or Bian. However, by the next morning the patient had recovered sufficiently to travel up the Mittegon Range.

A further episode from Throsby’s journal illuminates the relationship between him and Coocoogong, and demonstrates the colonist’s reliance on Aboriginal knowledge and his respect for its purveyor. The expeditionary party was at Eeelough on 2 May when a thick fog descended, causing Coocoogong to mistake which range they were heading towards. Against his guide’s advice, Throsby ‘very imprudently persuaded him to take a straight direction ... instead of returning to our old track’.²²⁵ They were further delayed as the party’s horses had trouble travelling over the ‘rather broken country’ that the party ended up

²²⁴ Charles Throsby. ‘Journal of a Tour to Bathurst Through The Cow Pastures Commencing on April 25th 1819’, *New South Wales’ Colonial Secretary’s Office Correspondence*, Reel 6038, p. 78, AOT.

²²⁵ *ibid*, p. 81.

having to traverse.²²⁶ In his journal entry dated 4 May, Throsby emphasised that Coocoogong was ‘ever correct in his informations, very intelligent, and faithfull’.²²⁷ The guide led them through hilly country rather than following the river, but promised Throsby that he would lead them to Bathurst without difficulty before the party’s provisions were exhausted.²²⁸ Obviously Coocoogong was already familiar with the route from the Cowpastures to Bathurst that Throsby was since lauded for having ‘discovered’. Likewise, employing Duall and Bian as interpreters infers knowledge of the languages utilised across the territories being traversed.

Further evidence of the extent to which Aboriginal people traversed this terrain can also be found in Throsby’s journal. He described how he came across ‘a large Tribe of Natives’ near Bathurst on 4 May and observed that ‘several of them have been at the Cowpastures, one I have seen at my House’.²²⁹ The route between Cowpastures and Bathurst, whilst new to the settlers, was already known to, and utilised by, local indigenous peoples. As Philip Clarke has explained, more often than not exploratory parties followed Aboriginal trade routes, routes that later developed into stock routes and roads as the colonists made their own marks on the land. As explorers travelled in search of arable land, an Aboriginal presence in a given locality signified ‘good country’.²³⁰ Early white explorers were well aware that their success was dependant on their abilities, or those of their Aboriginal guides, to ‘read the land for its Aboriginal occupation’.²³¹ Provided that they were not present in numbers considered threatening to the

²²⁶ *ibid.*

²²⁷ *ibid.*, pp. 83-4.

²²⁸ *ibid.*, p. 84.

²²⁹ *ibid.*, p. 85.

²³⁰ Philip Clarke. *Where the Ancestors Walked: Australia as an Aboriginal Landscape*, Allen & Unwin, Crows Nest, 2003, p. 198.

²³¹ *ibid.*

colonists, local Aborigines were viewed as being useful informants and there are many recorded instances of their being happy to help. On other occasions when their assistance to expeditionary parties was not forthcoming it was sometimes acquired by force.²³²

Throsby maintained good working relationships with the Aboriginal guides and interpreters who accompanied him. He saw to it that they were adequately provisioned, even risking such provisioning being at his own expense despite being on official business.²³³ He also sought rewards for the men. Throsby asked that Coocoogong be designated 'Chief of the Burrakburrak Tribe, of which place he is a Native', suggesting such a measure 'may be the means of tranquilizing the Natives about Bathurst', an area that the settlers intended for more intensive occupation.²³⁴ In addition, Throsby requested that 'a Plate as a Reward of Merit' be bestowed upon Duall and Bian.²³⁵ Such titles and breastplates awarded to Aboriginal people in the early years of colonial contact functioned as symbols of colonial power and authority. Their distribution formed part of a strategy whereby British colonists aimed to break down traditional power structures and replace clan-selected chiefs with leaders sympathetic to their administration.²³⁶ A similar strategy was used in the Cape colony where the

²³² *ibid.* Clark illustrates his point that Aboriginal people were sometimes coerced into providing explorers with assistance with an instance in 1839 when John Bull was running short on water 'until a black was caught' who could show him where to replenish his supplies.

²³³ Throsby. 'Journal of a Tour to Bathurst Through The Cow Pastures', Reel 6038, p. 88, AOT.

²³⁴ *ibid.*, p. 89.

²³⁵ *ibid.* Breastplates were based on military gorgets. Often crescent shaped, they were inscribed metal plaques that hung from chains and were worn around the recipient's neck.

²³⁶ Examples abound, including that of Creek Jemmy, also known as Nurragingy. As well as sharing in cattle and a land grant with Colebee as rewards for their service as guides to the 1816 punitive exhibition, Nurragingy was awarded a breastplate inscribed with the title 'Chief of the South Creek Tribe' as he had showed fidelity to the Government. A decade later, he became an object of colonial ridicule for wanting to sell his stock to 'buy a Long Coat, and Cocked Hat, and be a Swell'. Aspiring to emulate the well-dressed class of convicts marked Nurragingy as a failure from a colonial perspective rather than as an exemplar of a successful outcome to an experiment of 'civilising' an Aborigine. See Brook. *The Parramatta Native Institution*, p. 37; Governor Ralph Darling to Right Honourable William Huskisson, 27 March

colonists transformed the leadership structures of Khoisan through granting staffs of office to favoured would-be leaders. Such decorated Captains were strongly encouraged to use their colonial-derived authority to recruit further Khoisan into the Cape Regiment.²³⁷

In colonial New South Wales and its dependencies, breastplates also functioned as symbols of protection. When John Batman captured four Aboriginal women of the Ben Lomond tribe in Van Diemen's Land in 1829, he later had them released from captivity in Launceston Gaol so that they might act as emissaries to their people. Accompanied by two Aboriginal men from New South Wales, the women set out in 1830 with plenty of supplies and 'wore brass plates to show they were emissaries who were not to be hindered by Europeans'.²³⁸ Within days, they discarded their breastplates and absconded.²³⁹ The women's actions reveal as much about their attitudes towards Batman, their abductor and the murderer of a number of their relatives, as they do about some Aboriginal attitudes towards breastplates.

On receiving news of the successful conclusion of Throsby's expedition, Macquarie ordered that the proposed titles and breastplates be bestowed upon Coocoogong and Duall (no further mention was made of Bian). Throsby was rewarded with a land grant of 1,000 acres in what the Governor termed the new country. The remaining white members of the expeditionary party received smaller land grants in recognition for their services.²⁴⁰ Duall went on to have a

1828, Enclosure No. 1, Archdeacon Scott to Darling, 1 August 1827, *HRA*, Series I, Volume XIV, p. 63.

²³⁷ Richard Elphick and Candy Malherbe. 'The Khoisan to 1828', *The Shaping of South African Society, 1652-1840*, Richard Elphick and Hermann Giliomee (eds). Wesleyan University Press, Connecticut, 1989, p. 42.

²³⁸ Alastair Campbell. *John Batman and the Aborigines*, Kibble Books, Malmsbury, 1987, pp. 37-8.

²³⁹ *ibid.*, pp. 38-9.

²⁴⁰ Macquarie. 'Government and General Orders', 31 May 1819, pp. 48-9.

distinguished career as an interpreter and guide to numerous exploratory expeditions.²⁴¹ He was last mentioned in the colonial records as receiving a blanket in the annual distribution in 1833 along with his kinsman Quiet. At the time, Duall was aged around 40 and was living at the Cowpastures with his wife and child.²⁴² Following his premature return to New South Wales, he had thus been restored to the subject position 'friendly native'.

Some time after Duall's departure from Van Diemen's Land, Musquito withdrew from colonial society, exchanging his stockman's position for life in the bush with a group of Aboriginal people known colloquially as the 'tame mob' or 'tame gang'.²⁴³ This group of around twenty to thirty had 'absconded from their proper tribes' and lived within the so-called settled districts surrounding Hobart Town where they were thought of as being inoffensive and quite distinct from 'the wild natives in the bush'.²⁴⁴ Wesleyan missionary Reverend William Horton noted that 'though they have been accustomed for several years to behold the superior comforts and pursuits of civilized man, they have not advanced one step from their original barbarism'.²⁴⁵ They preferred instead to remain 'perfectly naked' around their campfires in the bush.²⁴⁶ Musquito claimed he 'should like it very well' to 'till the ground and live as the English do' but assured Horton none of his companions would be interested in doing likewise.²⁴⁷

²⁴¹ Webster. *Currency Lad*, p. 19.

²⁴² 'Return of the Cowpasture Aborigines for 1833', AONSW 4/6666.3, cited in Liston. 'The Dharawal and Gandangara in Colonial Campbelltown', 1988, pp. 58-9.

²⁴³ Horton. *Wesleyan Missionary Papers*, p. 1269.

²⁴⁴ *ibid.*

²⁴⁵ *ibid.*, p. 1270.

²⁴⁶ *ibid.*, pp. 1270-271.

²⁴⁷ *ibid.*, p. 1274.

As well as consorting with the tame mob, Musquito formed an association with the Oyster Bay people. During late 1823 and 1824, they attacked settlers' properties on the east coast of Van Diemen's Land and killed several men. The 16 July 1824 spearing of Matthew Osborne was described in lurid detail in the *Hobart Town Gazette* with more than a full column given over to a vivid account of the incident.²⁴⁸ The editor blamed the 'mischief' on Musquito for corrupting local Aboriginal people having 'taught them a portion of his own villainy, and incited them time after time to join in his delinquencies'.²⁴⁹ By July 1824, the military and constabulary had been 'actively pursuing' Musquito and his cohort for some time.²⁵⁰ The following month, Musquito reportedly speared a man at Pittwater, a place to the north east of Hobart Town.²⁵¹ Three weeks later he was apprehended by a Van Diemen's Land Aboriginal man called Tegg who shot him three times, once in the body and twice in the thigh. Musquito 'ran a considerable distance' before succumbing to his wounds and being taken into captivity.²⁵² He was conveyed to the Colonial Hospital in Hobart Town where the Lieutenant Governor went to see him.

By December 1824, Musquito was sufficiently recovered from his wounds to stand trial in Hobart Town alongside 'Black Jack', an Aboriginal man from Van Diemen's Land. Without the aid of any legal counsel they were arraigned before the Supreme Court of Van Diemen's Land where they entered pleas of not guilty in relation to a charge of 'aiding and abetting in the wilful murder of William Hollyoak, at Grindstone Bay, on the 15th of November, 1823' and to a further charge of 'being principals in the second degree for aiding and abetting in

²⁴⁸ *Hobart Town Gazette*, 16 July 1824, p. 2.

²⁴⁹ *ibid.*

²⁵⁰ *ibid.*

²⁵¹ *Hobart Town Gazette*, 6 August 1824, p. 2.

²⁵² *ibid.*

the wilful murder of Mammoa, ... [a] Otaheitean'.²⁵³ As the defendants were not Christians and were therefore unable to take the oath required of witnesses, they were unable to tender any evidence to the court on their own behalf. They were further disadvantaged through not being provided with an interpreter. As Henry Melville later explained in relation to the trial:

What mockery! The wretched prisoners were not aware of one tittle of evidence adduced against them, were totally ignorant of having committed crime, and knew not why or wherefore they were placed in the criminal's dock, and so many eyes fixed upon them.²⁵⁴

After hearing evidence from a number of white witnesses, the jury found Musquito guilty of the first charge, while Black Jack was found not guilty. Both men were acquitted of murdering Mammoa.²⁵⁵ Black Jack later faced a charge of murdering Patrick McCarthy at Sorell Plains and was found guilty.²⁵⁶ Musquito and Black Jack were sentenced to hang for their crimes. In a frequently cited exchange that was said to have taken place between Musquito and his gaoler after the sentence was announced, the condemned man apparently said 'hanging no good for black fellow ... very good for white fellow, for *he* used to it'.²⁵⁷

On 25 February 1825, eight men including Musquito and Black Jack were hanged at Hobart Town. The *Hobart Town Gazette* reported that 'for the first time, the scaffold was erected within the Gaol-walls, but in view of the town'.²⁵⁸ The condemned men joined in a hymn and prayers while assembled together on the platform awaiting their deaths. After the Reverend William Bedford addressed the assembled crowd on behalf of the prisoners to 'acknowledge for them the

²⁵³ *Hobart Town Gazette*, 3 December 1824, p. 3.

²⁵⁴ Henry Melville. *Australasia and Prison Discipline*, J. Effingham Wilson and Chas. Cox, London, 1851, p. 352.

²⁵⁵ *Hobart Town Gazette*, 3 December 1824, p. 2.

²⁵⁶ Robert Cox. *Steps to the Scaffold: The Untold Story of Tasmania's Black Bushrangers*, Cornhill Publishing, Pawleena, 2004, p. 61.

²⁵⁷ Melville. *Australasia and Prison Discipline*, p. 352. (Emphasis in the original.)

²⁵⁸ *Hobart Town Gazette*, 25 February 1825, p. 2.

justice of their condemnation’ and to use their fate as a warning to others to desist from criminal activities ‘the hapless offenders after a short interval were launched into eternity’.²⁵⁹ Not everyone in Hobart Town concurred with the prisoners or at least with Bedford’s assertion on their behalf that justice was being done, or at least being seen to be done in the case of Musquito and Black Jack. Black Jack in particular was said to have known ‘scarcely ... half-a-dozen English words, and the whole of these were most horrid imprecations, taught him by the bushrangers and stock-keepers’, while both men had not been acquainted with English law.²⁶⁰ Controversy surrounded their trial and some considered it ‘a mere mockery of justice, placing warriors on their trial for murder, when they were only defending themselves from the attacks of the men who were about to become judges [jurors] in their own cause’.²⁶¹ Melville described the convict stock-keepers whose evidence against Aboriginal defendants was relied on to secure convictions as ‘ruffians’ and ‘the greatest enemies the natives had to contend with’.²⁶² When two Van Diemen’s Land Aboriginal men, Jack and Dick, were tried for murder two years’ later, the controversy surrounding the trial of Black Jack in particular saw ‘greater caution taken on this occasion’.²⁶³ According to Melville’s account of the proceedings, legal counsel were appointed to act on behalf of the Aboriginal defendants, an interpreter was provided by the court to inform the men of the proceedings that transpired, and more time was allowed for deliberation by the jury.²⁶⁴

²⁵⁹ *ibid.*

²⁶⁰ Melville. *Australasia and Prison Discipline*, p. 351.

²⁶¹ *ibid.*, p. 353.

²⁶² *ibid.*

²⁶³ *ibid.*

²⁶⁴ *ibid.*

While colonial commentators showed some sympathy towards Black Jack, the Aboriginal convicts transported to Van Diemen's Land from New South Wales were seen in a very different light. An extraordinary story circulated that Duall had been 'transported from Sydney, for chopping off the right arm of his wife: he said she should "make no more dough-boy"', which was apparently an oblique reference to miscegenation.²⁶⁵ Equally extraordinary stories circulated about Musquito who was said to have been transported for the rape and murder of a woman, or because he had killed his Aboriginal wife.²⁶⁶ Earlier celebratory accounts of Musquito as a blacktracker responsible for apprehending bushrangers and as the 'discoverer' of Lawrenny Plains were superseded by the mythology that emerged following his death. He was consigned to the subject position of violent, treacherous, murderous, hostile native until becoming rehabilitated as an Aboriginal resistance leader in more recent post-colonial recapitulations of his life story. Ironically for a man cast in such a bad light for so many decades, Musquito was commemorated (as 'Mosquitto') on a Hobart monument dedicated recently to 'The First Fleeters and Norfolk Islanders who came to Van Diemen's Land During the Evacuation 1807-1813' as pictured overleaf:

²⁶⁵ West. *The History of Tasmania*, p. 266. According to West, white people 'persuaded the natives that the lighter hue of their half-caste children resulted from the too free use of flour'.

²⁶⁶ See, for example, Bonwick. *The Last of the Tasmanians*, pp. 92-3; West. *The History of Tasmania*, p. 267; Ronald Giblin. *The Early History of Tasmania*, Volume II, Melbourne University Press, Melbourne, 1939, p. 163.



Figure 1: Monument in St David's Park, Hobart, Tasmania.
Photographed by Kristyn Harman, 2007.

The ambivalent subject positions occupied by Duall and Musquito during the early decades of the nineteenth century epitomise the fluidity of subjectivity at the early colonial frontier. However, the variety of colonial roles in which they were cast ranging from guides, interpreters, resistance leaders, charcoal burners, stockmen, blacktrackers, and neighbours, were circumscribed by race. Men like Duall and Musquito were positioned on a colonial continuum ranging from 'friendly' to 'hostile' native depending on the extent of their willingness to co-operate with colonists. Differing attitudes towards Duall exhibited by colonists at the Cowpastures and the Sydney-based administration demonstrate how Aboriginal men were sometimes viewed as occupying different positions along the scale at the same time depending on the standpoint of the commentator. Changing colonial attitudes over time are reflected in the increasingly exaggerated tales that circulated following Musquito's execution about the reasons why he was transported from Sydney in the first place.

Colonial attitudes towards Aboriginal men such as Duall and Musquito were characterised by a mixture of reliance and fear. Aboriginal skills like guiding and tracking as well as sourcing food and water in what to early colonists was a

hostile terrain were critical to the expansion of colonial settlement. Expedition parties relied on indigenous people for their safe conduct and transit across Aboriginal terrain. At the same time, these very same skills engendered fear as in the early years of colonial contact Aboriginal people proved to be formidable enemies in the bush. Aboriginal people were viewed by colonists as children of nature or wild children of the woods who had at least some potential to become civilised, that is, to learn to conform to white norms. However, any lack of enthusiasm on the part of Aboriginal people towards adopting white lifestyles was seen as indicative of incapacity rather than a lack of interest. The dialectical relationship between racial science and imperialism provided colonists with ‘evidence’ of their superiority and naturalised the consequences that followed from their sometimes violent acquisition of another people’s land.

Because of the absence of any declaration of war, Aboriginal acts of resistance to colonisation were treated as criminal activities. Military contingents were authorised to exact reprisals against, and make examples of, Aboriginal people suspected of being engaged in ‘hostile’ acts against colonists. While ‘destroying the natives’ was decried as a ‘horrid practice’ when ‘wanton’, it was considered entirely acceptable within the ranks of early colonial New South Wales from the top echelons of society down for the military to kill Aborigines in reprisal for attacks on the colonists’ persons and property.²⁶⁷ Aboriginal people were notionally British subjects. However, their socio-political structures clearly operated outside colonial systems of governance and came under attack through strategies to invest Aboriginal people most favoured by the colonists as leaders.

²⁶⁷ Hunter to Portland, 2 January 1800, *HRA*, Series I, Volume II, p. 402.

In the early decades of colonial contact in New South Wales, legal opinion railed against putting on trial those Aboriginal people who were not dispensed with at the frontier by way of summary execution. Thought of as heathen savages, Aborigines were unable to swear an oath and therefore not permitted to give evidence in a court of law. They were also considered to be insufficiently familiar with English laws for trials to be anything more than a solecism. Nevertheless, colonial governors were driven by a strong imperative to make a public example of Aboriginal men who continued to defy their authority by persisting in their attacks upon the persons and properties of settlers. In the early decades of colonial contact in New South Wales this was achieved through transporting Aboriginal men like Musquito, Bull Dog, and Duall to the outlying penal colonies at Norfolk Island and Van Diemen's Land. Such a tactic was deployed to create the phenomenon of the inexplicably absent indigenous body, and was designed to engender fear in the minds of the Aboriginal convict's friends and family. At the same time, absenting such men from their people deprived them of warriors, hunters, leaders, and men of reproductive age and capacity.

Transporting Aboriginal men could sometimes be considered advantageous by Aborigines who may traditionally have been at enmity with the group from whom the transportees were absented. Traces of this sentiment are evident in the reaction of Musquito's captors to the Governor's suggestion that sufficient recompense had already been exacted hence punishing the captive might not be altogether necessary. At least according to the colonial records, the cohort that captured Musquito and Bull Dog seemed pleased with the prospect of their being punished. At the same time, removing men like Musquito, Bull Dog, and Duall from their people and country must be seen as a strategy designed to

appease the minds of white settlers who might otherwise have been persuaded to give up their allotments through fear of ongoing Aboriginal attacks. Similar thinking underpinned the dispatch of military contingents to those areas considered the most desirable and, therefore, the most troubled over these early decades and throughout the years that followed.

Chapter Two

‘A Mere Mockery’: the Trial and Tribulations of Jackey

As the steamer *William IV* left Newcastle *en route* for Sydney in April 1834, an Aboriginal man known by the English name ‘Jackey’ was chained naked on the deck. He felt his situation ‘most bitterly’ and was crying as the boat departed from the coastal port.¹ Jackey was being conveyed to Sydney to stand trial for the murder of a convict, John Flynn, who died of spear wounds received at the William’s River after he and a posse of armed stockmen rode into an Aboriginal camp at dawn allegedly to speak peacefully with the occupants. The sea journey down the coast to Sydney formed the last leg in an arduous journey that began at the site of the alleged murder near the settlement of Maitland almost a month earlier.

Jackey arrived in Sydney on 1 May 1834 in a pitiful state. According to the *Australian*, the unfortunate man was ‘entirely naked, and the irons on his legs had lacerated them in a dreadful manner’.² The less conservative *Sydney Monitor* observed that Jackey’s condition spoke ‘badly on behalf of the Police and constables who had charge of the man. It appears they valued the black’s flesh at a less price than a piece of old rag, or a bit of old sugee bag’.³ By the time news of his arrival was printed in local newspapers, Jackey was lodged in Sydney Gaol. Three months’ later, he appeared before Chief Justice Forbes in the Supreme Court of New South Wales to answer a charge he barely comprehended. The resultant case *R v Jackey 1834* is a significant landmark in legal history as it provides the first instance of an

¹ *The Australian*, 6 May 1834, p. 2.

² *ibid.*; *Sydney Monitor*, 7 May 1834, p. 3.

³ *Sydney Monitor*, 7 May 1834, p. 3.

Aboriginal person being sentenced to transportation.⁴ Another compelling facet of this case is the way in which colonists viewed Jackey and his tribe as being camped on the fringes of Archibald Mossman's station, rather than as inhabiting their own country. Such thinking, it will be argued, is symptomatic of a colonial discourse of Aboriginality that was deployed to legitimate the expropriation of Aboriginal lands and to justify the criminalisation of those who resisted being dispossessed.

This chapter explores in greater depth the competition over land use practices introduced in the preceding chapter as a contributing factor to the transportation of Aboriginal men. It focuses on three distinct phases of white settlement in the Hunter Valley: the Newcastle penal station; the Australian Agricultural Company; and land grants to free settlers and emancipated convicts. A particular emphasis is placed on colonial discourses of Aboriginality embedded in these structures, and some attention is given to elucidating the complex nature of everyday relations between local Aborigines and the newcomers. As a corollary of white expansion into the Hunter Valley, Aboriginal social status and health declined considerably along with the birth rate. The British drew on the colonial dichotomy of 'civilised/savage' to explain this phenomenon, and used the same discourse to naturalise the disadvantages faced by Aboriginal defendants in the courtrooms. By the 1830s, the colony judiciary had determined that it had the jurisdiction to sentence people with no prior criminal record and locally born people to transportation. The pertinent case law is discussed later in this chapter, as are several cases that illustrate the strategies adopted by the

⁴ R v Jackey 1834, *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/Cases1834/html/r_v_jackey__1834.htm>

colonial judiciary to enable Aboriginal trials to proceed. It concludes with a discussion of Jackey's trial and its aftermath.

Near the end of the eighteenth century a boatload of convict absconders accompanied by two children were perhaps the first white intruders into Jackey's country. Their clandestine departure from Sydney Cove was followed by a brief sojourn up the coast, probably at Port Stephens, before they sailed to Timor and were recaptured.⁵ As in other British colonies, unofficial agents of Empire preceded the cumbersome official machinery of state by several years. Other colonists soon followed and altercations with local Aboriginal people ensued. Early violent encounters were ascribed to white fishermen assuaging their sexual appetites with Aboriginal women. Sexual encounters between white men and Aboriginal women became a sub-text to episodes of frontier violence between settlers and Aborigines. Questions about whether any forced contact had taken place were raised whenever violent attacks were made by Aborigines on settlers as such attacks were open to being read as retribution. Sometimes white men pre-empted the question by denying that they had interfered with the native women before they were even asked.

A local history provides more insight into a nineteenth-century understanding of the ongoing conflict between the settlers and Aborigines in the Hunter Valley. Henry Huntington described an affray at Port Stephens in 1796 being caused, he

⁵ James Martin. *Memorandums: Escape from Botany Bay, 1791: Being 'Memorandums' by James Martin: introduction and notes by Victor Crittenden*, Mulini Press, Canberra, 1991.

claimed, through fishermen having ‘molested some members of the native’s family’.⁶

He constructed this incident as a seminal event that revealed the origins of the ongoing conflict between settlers and Aborigines in the area. Following this affray it had, according to Huntington, become a practice in the Newcastle area to ‘fire upon the natives whenever they approached, and to deprive them of their women whenever the opportunity offered’.⁷ Huntington situated himself as a defender of Aborigines:

Persecuted and belied by the whites, they have been represented as destitute of virtues, worthless, and ferocious when, in reality, they frequently exhibit great generosity, elevation of spirit, and energy of address, which are not surpassed among the inhabitants of civilised countries.⁸

Despite his sympathetic portrayal of Aborigines, Huntington’s discourse was embedded within the colonial dichotomy ‘civilised/savage’ that informed Western understandings of themselves and others throughout the nineteenth century.

Describing Aborigines as ‘unoffending creatures’, he naturalised their militant responses to the white intrusion through deploying savagery as an explanatory framework. ‘Unable to draw distinctions’, Huntington postulated, Aborigines ‘invariably exercised that cruelty and resentment which a savage must naturally feel for injuries received’.⁹ Aborigines were thus constructed as unwitting victims of their own apparent irrationality, superstitions, and emotions or passions.

In 1796, fishermen near Port Stephens discovered a large deposit of coal.

News of their find spread through Sydney, inspiring others ‘with a spirit of enterprise

⁶ Henry Huntington. ‘History of Newcastle and the Northern District No. 4’, *Newcastle Morning Herald*, 17 August 1897, accessed on 30 May 2006 at
<<http://www.newcastle.edu.au/service/archives/aboriginalstudies/pdf/huntington1796.pdf>>

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

to reach the scene'.¹⁰ The discovery of coal in the Hunter Valley had significant implications for the indigenous people of the region and for those who were set to work extracting it. It led to a settlement originally known as King's Town being established on the site of present day Newcastle in 1804 with the help of the well-known Sydney identity, Bungaree, who acted as an interpreter for the colonists.¹¹ King's Town was seen as having several natural advantages that made it an ideal place to send convicts considered by the colonial administration to be the most recalcitrant. It took at least eight hours to reach the satellite settlement by sea from Sydney Cove, and the terrain separating the main settlement from King's Town was very hilly and uncharted. The first to arrive were thirty-four Irish convicts implicated in the Castle Hill uprising. Newcastle became a favoured place with Sydney judges to ship convicts who committed further offences whilst already under sentence, that is, those who were secondarily convicted. Between 1805 and 1808, they were overseen by Dr Charles Throsby who acted as commandant at the Newcastle penal station in addition to performing in his capacity as the surgeon there. Incidentally, Captain James Wallis, the man who commanded the expeditionary party that apprehended Duall, also served as a commandant at Newcastle. His term commenced after the 1816 punitive expedition and he was awarded a salary that was considerably higher than that paid to his predecessor.¹²

¹⁰ Henry Huntington. 'History of Newcastle and the Northern Districts No. 14', *Newcastle Morning Herald*, 21 September 1897, accessed on 30 May 2006 at

<<http://www.newcastle.edu.au/service/archives/aboriginalstudies/pdf/huntington1796b.pdf>>

¹¹ Newcastle Family History Society (NFHS). *Early Newcastle: The Fettered and the Free*, Newcastle Family History Society, Lambton, 2005, p. 212.

¹² *ibid.*, pp. 27, 38.

Convicts sent to Newcastle were put to work exploiting the region's abundant natural resources. The burgeoning but ill-housed, under-fed, and poorly dressed convict population was kept fully occupied mining coal, harvesting timber and salt, lime burning, and engaging in public works. Timber and coal were in short supply at the Cape colony, making them a valuable export commodity for the fledgling colony in New South Wales. In return, much needed livestock was imported from the Cape where a pastoral economy had been co-opted from the indigenous Khoena inhabitants by the Dutch and inherited and developed by the British.¹³

Establishing the penal station at Newcastle had implications for the local economy. The convict settlement may not have been 'a model of civilised society likely to endear itself to Aboriginal observers', yet the influx of British convicts and their overseers provided local Aborigines with a significant new trading partner.¹⁴ David Roberts described the new settlement as 'a principal site of cross-cultural trade that was quickly and firmly embedded in the Aboriginal economy'.¹⁵ According to Roberts, 'while convict labourers shovelled the ancient middens into lime kilns on Stockton Beach, Aborigines traded meat and fish for blankets and clothing'.¹⁶ With only two cattle and no sheep, goats, or swine at the new settlement in mid-1805, the newcomers were heavily reliant on trade with local Aborigines for a supply of fresh meat and fish.¹⁷ The value that local Aborigines attached to the blankets and clothing offered in exchange can be deduced from their willingness to continue to fish and

¹³ The Duke of Portland to the Right Hon. Henry Dundas, 19 December 1798, *HRNSW*, Volume III, pp. 517-18.

¹⁴ David Roberts. 'Aborigines, Commandants and Convicts: the Newcastle Penal Settlement', *Awaba*, University of Newcastle, accessed on 3 June 2006 at <<http://www.newcastle.edu.au/centre/awaba/awaba/group/amrhd/awaba/history/convicts.html>>

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*

obtain meat for the settlement. Trade may also have been influenced by an Aboriginal strategy of inclusion. By establishing alliances with some of the British, Aborigines were working to incorporate them into their own complex social structures and kinship systems.¹⁸ As well as having dietary requirements to fulfil, the British would have been motivated not to antagonise local Aborigines who, although substantially reduced in number following the smallpox epidemic of the late eighteenth century, still outnumbered them. The different societies were, on the face of it, operating as equal trading partners with both sides benefiting in various ways from the exchanges that were taking place. Despite the trading relationships that characterised these early years of cultural contact in the Hunter Valley, the commandants at the penal station deployed the figure of the Aboriginal savage, as well as actual Aborigines, in attempts to control the convict population. An interesting parallel is evident in British strategies at the Andaman Islands where a penal station was established off the Indian coast in the middle of the nineteenth century. Satadru Sen explained that:

Actual intervention against the savage on the outskirts of the settlement was, for the most part, less than energetic ... as long as the Andamanese did not pose a direct military threat to the settlement, the British could afford to leave them alone in the forest, and use them as a bogeyman of sorts to deter convicts who were contemplating escape.¹⁹

A further strategy was employed at Newcastle that involved allowing the deaths of escaped convicts at the hands of Aborigines to go unpunished. This was aimed at curbing the high desertion rate. Roberts suggested a further reason contact between

¹⁸ Henry Reynolds. *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin, Ringwood, 1981, p. 39.

¹⁹ Satadru Sen. *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands*, Oxford University Press, Oxford, 2000, p. 29.

Aborigines and convicts was curtailed was to circumvent escaped convicts inciting Aborigines to commit acts against colonists.²⁰

As well as posing an implicit threat to the convict population through their presence in the surrounding bush, Aboriginal men were encouraged to take on a policing role for the penal station. They were thus, to a limited extent, incorporated into a western model of law and order. John Thomas Bigge, the Commissioner dispatched by the British Government to New South Wales in 1817 to report on the state of the colony, observed Aborigines acting as black trackers for the Newcastle penal station:

By the extraordinary strength of sight that they possess, improved by their daily exercise of it in pursuit of kangaroos and opossums, they can trace to a great distance, with wonderful accuracy, the impressions of the human foot. Nor are they afraid of meeting the fugitive in the woods, when sent in their pursuit, without the soldiers; by their skill in throwing their long and pointed wooden darts they wound and disable them, strip them of their clothes, and bring them back as prisoners, by unknown roads and paths, to the Coal River. They are rewarded for these enterprizes by presents of maize and blankets, and notwithstanding the apprehensions of revenge from the convicts whom they bring back, they continue to live in Newcastle and its neighbourhood, but are observed to prefer the society of soldiers to that of the convicts.²¹

The favourable impression Bigge formed as to the utility of black trackers in retrieving convict absconders led to Aboriginal people being employed as blacktrackers for convict establishments at Bathurst, Wellington Valley, Port Macquarie, and Moreton Bay.²² The missionary Reverend Lancelot Threlkeld later told the New South Wales Supreme Court that in his opinion the practice of

²⁰ Roberts. 'Aborigines, Commandants and Convicts.'

²¹ John Bigge. *Report of the Commissioner of Inquiry into the State of the Colony of New South Wales*, Volume I, Ordered by the House of Commons to be printed, 1822, p. 117.

²² Roberts. 'Aborigines, Commandants and Convicts.'

rewarding Aborigines with the clothing of runaway convicts they apprehended led to Aborigines drawing ‘a distinction between free settlers and what they call “*croppies*” – that is, prisoners’ and contributed to the relatively harsh treatment often meted out to the latter.²³ ‘If they meet a free man in the bush they would not hurt him’, explained Threlkeld, ‘but if they met a prisoner they would probably strip him’.²⁴ Bigge did not appreciate the potential for Aborigines to draw such a distinction and to act upon it, probably because Newcastle at the time of his visit had been the sole province of Aborigines, convicts, and soldiers.

The official use of the threat and actuality of Aboriginal violence to restrict the illicit movements of the convict population, coupled with a system of rewards for those Aboriginal trackers who apprehended escaped convicts, did little to endear Aboriginal people to the Newcastle convict population. Convict attitudes towards Aborigines hardened in 1819 following a series of lashings being ordered for convicts who assaulted indigenes. The murder trial and execution in 1820 of the convict absconder John Kirby following the death of King Burrigan (also known as Jack, Chief of the Newcastle Tribe) who Kirby stabbed when an attempt was made to apprehend him strained tense relations further.²⁵ Kirby was the only white man to hang for the death of an Aborigine prior to the sensationalised and contentious hangings of seven participants in the Myall Creek massacre almost two decades

²³ R v Boatman or Jackass and Bulleye 1832, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 June 2006 at <http://www.law.mq.edu.au/scnsw/Cases1831-32/html/r_v_boatman_or_jackass_and_bull.html>

²⁴ *ibid.*

²⁵ ‘Burrigan Stabbed by John Kirby; died’, *New South Wales Colonial Secretary’s Office Correspondence*, Reel 6067, pp. 135-37, 143, 150, AOT; ‘John Kirby Convicted by Court of Criminal Jurisdiction of Murder of Burrigan’, *New South Wales Colonial Secretary’s Office Correspondence*, Reel 6023, p. 31, AOT.

later.²⁶ The Attorney General Saxe Bannister concluded that when Macquarie assented to hanging a white man for the murder of an Aborigine ‘the law of jurisdiction in the Colonial Courts was well settled’.²⁷ White men could and would be hanged for taking the lives of Aboriginal people.

On 1 November 1821, Governor Lachlan Macquarie boarded the *Elizabeth Henrietta* to undertake a tour of inspection of the penal stations at Port Macquarie and Newcastle. While in the vicinity of Newcastle, Macquarie took note of ‘a most rich and beautiful Tract of Forest Land ... situated between the River and the Creek, particularly well adapted for Cultivation, and forming a Government Agricultural Establishment on a large scale’.²⁸ By the middle of the decade, Macquarie’s vision

²⁶ The cases *R v Kilmeister (No. 1) 1838* and *R v Kilmeister and Others (No. 2) 1838* arose out of the event that has since become known colloquially as the Myall Creek Massacre. After eleven men from Myall Creek were acquitted on a charge of having murdered an Aboriginal man known as Daddy in the first trial, new charges were brought and a controversial second trial was held. This resulted in the seven defendants, Charles Kilmeister, James Oates, Edward Foley, John Russell, John Johnstone, William Hawkins, and James Parry, being found guilty and subsequently hanged. Public outrage at the hangings of the seven men for killing Aborigines reached such a level that the Government foreclosed on retrying the remaining four prisoners acquitted following the first trial. See *R v Kilmeister (No. 1) 1838, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 March 2006 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_kilmeister_no_1_1838.htm> ; *R v Kilmeister and Others (No. 2) 1838, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 March 2006 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_kilmeister_no_2_1838.htm> In 1826, Edward Colthurst had been hanged after standing trial for the murder of Tommy, an ‘Aboriginal native’. He was not, however, hanged for the murder but instead was capitally convicted of piracy. For details of this case, see *R v Ridgway, Chip, Colthurst and Stanly 1826, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 June 2006 at <http://www.law.mq.edu.au/scnsw/html/r_v_ridgway_chip_colthurst_a.htm>

²⁷ Niel Gunson (ed). *Australian Reminiscences & Papers of L. E. Threlkeld: Missionary to the Aborigines 1824-1859*, Volume II, Appendix XI: Saxe Bannister’s Observations on the Aborigines of New South Wales (1830), Australian Institute of Aboriginal Studies, Canberra, 1974, p. 358.

²⁸ Lachlan Macquarie. ‘A Voyage and Tour of Inspection from Port Jackson to the Settlements of Port Macquarie, and Newcastle in November 1821’, *Journeys in Time: The Journals of Lachlan and Elizabeth Macquarie*, Macquarie University Library, accessed on 4 April 2006 at <<http://www.lib.mq.edu.au/all/journeys/1821/1821b.html>>

came to fruition. In reports of 1822 and 1823 following his tour of New South Wales, Bigge recommended the development of a capitalist, pastoralist economy to provide opportunities for convicts who had served out their time and for those born free in the colony. New South Wales already had a reputation for raising fine wool. Plenty of labour was available in the form of convicts. Engaging convicts in the pastoral industry would have the added benefit of defraying some of the substantial costs that the government incurred in feeding, clothing, and housing them. The only question that remained to be resolved was where the capital needed to finance the proposed venture was going to come from.²⁹

Early in 1824, meetings held in London resulted in the formation of the Australian Agricultural Company and the Van Diemen's Land Company. Formed under a company charter that was modelled on the English East India Company, the Australian Agricultural Company received royal assent in 1824, the year following the closure of the Newcastle penal station. The Australian Agricultural Company's stated objective was 'Cultivating Waste Lands' in New South Wales. In reality, its interests lay primarily in producing wool. Engaging with crops such as flax, olives, and the grape that required cultivation of the soil was a secondary consideration. With nominal capital of one million pounds and a land grant of one million acres, the Company assumed rights over land that had been traversed, managed, and cared for by Jackey's ancestors and their neighbouring language groups for tens of thousands of years.³⁰

²⁹ Damaris Bairstow. *A Million Pounds, A Million Acres: The Pioneer Settlement of the Australian Agricultural Company*, D. Bairstow, Cremorne, 2003, pp. 1-4.

³⁰ *ibid.*, pp. 4-5.

The November 1825 arrival of the Australian Agricultural Company's inaugural executive resident, the Scotsman Robert Dawson, at Port Stephens together with 79 settlers, 720 sheep, 12 head of cattle, and seven horses heralded a new phase in relations between indigenes and settlers in the area. The Company's charter paved the way for pastoral expansion on a massive scale. Ostensibly with one million acres available on which to graze stock, the Company required an extensive labour force. It recruited its labourers from within the convict population, as well as hiring free people from within the colony and from overseas. Local Aboriginal people were employed to tend to the sheep and cattle, to work as surveyors and hutkeepers, to act as messengers and envoys, and also to take on roles as boat rowers, builders, and constables. They were considered to be amongst the most productive of the Company's employees. As tracts of their traditional country were divided up into pastoral runs, some Aboriginal people may have joined the Company at their own volition for, as Mark Hannah has argued, Aboriginal employees could maintain connections with their country and were also provided with a level of protection against violence from colonists. This protection was, however, contingent on their adopting an attitude of deference and laying down their arms. From the Company's standpoint, its Aboriginal workers exhibited a degree of 'psychological preparedness' and a 'generally high standard of physical well-being' that resulted in their being more productive and resilient than their British counterparts who were new to the Australian environment.³¹

³¹ Mark Hannah. 'Aboriginal Workers in the Australian Agricultural Company, 1824-1857', *Labour History*, Issue 82, 2002, pp. 17, 20, 24.

Under the auspices of the Australian Agricultural Company, Aboriginal people underwent a shift in subject position from trading partners to employees. While they were compensated for their labour the payments they received were nowhere near the equivalent of wages paid to the Company's white employees. Even so, prominent colonists such as James Macarthur disapproved of the level of expenditure incurred in remunerating Aboriginal employees and of their interactions with other Company employees:

With respect to the issues to Natives, I am of opinion that much expense is thus needlessly incurred, for the purpose either of indulging a whimsical vanity on the part of Mr Dawson, or of keeping up a delusion in the eyes of the British Public. I would by all means recommend the treatment of the Natives with kindness and with generosity, but there are bounds which cannot be overstepped without evil consequences, and I consider that at Port Stephens these bounds have been far exceeded, both in the presents which have been made to them, and in the disgusting familiarity in which they are countenanced and encouraged.³²

The disgusting familiarity that offended Macarthur's sensibilities was an oblique reference to venereal disease. Such was the extent of the problem that male convict workers were prohibited from entering the Aboriginal camps to visit the women. Despite the presence of venereal disease amongst the town campers, Aboriginal people attached to the Australian Agricultural Company were considered by Dr. Nesbit to be 'clean' and 'orderly', signs he read as verifying their 'considerable progress' towards becoming civilised.³³ In contrast, those beyond the settlement lived

³² 'Report of Mr James Macarthur to the Committee of Management, Parramatta, 13th March 1828', *Australian Agricultural Company Despatches*, B503-B531, accessed on 6 June 2006 at <<http://www.newcastle.edu.au/service/archives/aboriginalstudies/aacportstephens.html#26may1828b>>

³³ 'Dr Alexander Nesbit's Report on the State of the Hospitals at Carrabein and Stroud, May 1828?', *Australian Agricultural Company Despatches*, B905-B906, accessed on 6 June 2006 at <<http://www.newcastle.edu.au/services/library/collections/archives/int/aacportstephens.html#4aug1827>>

‘in a state of apparent wretchedness’.³⁴ Their abject condition was implicitly seen as arising from their distance from civilisation and was, therefore, attributable to their savage state rather than the colonisation process in which the Australian Agricultural Company was complicit.

The extent to which Aboriginal people attributed their declining fortunes directly to the intrusion of the Australian Agricultural Company is difficult to determine. What is clear, however, is that a measure of loyalty was engendered within the local Aboriginal population towards the Company itself. This is attested to by their willingness to return its absconding convict employees to the Company fold. Aboriginal inhabitants of the Cape Hawke and Myall River areas in the Hunter Valley were known for being particularly hostile towards white people because of mistreatment meted out to them by cedar getters. While these Aborigines were ‘exasperated in the highest degree’ with the cedar getters and retaliated against them, they treated Australian Agricultural Company employees differently.³⁵ For instance, on one occasion two sawyers were lost in the Myall River vicinity. They were captured by armed Aborigines and stripped of their clothes. On seeing the A.A. Company insignia stamped on their shirts, the Aborigines conducted the sawyers safely to the nearest stock station where they all took refreshments together. On another occasion, Myall River Aborigines located a lost convict and, on recognising his affiliation with the Australian Agricultural Company, they returned him to the settlement. This also contrasts greatly with the treatment meted out to convict absconders from Port Macquarie who tried to reach Port Stephens. Dawson described

³⁴ *ibid.*

³⁵ Bairstow. *A Million Pounds, A Million Acres*, pp. 87-8.

‘the few that arrive alive’ to have been ‘stripped and speared in some parts of the body by the Natives, one instance of which I saw in a Man who came across naked and speared through both legs’.³⁶

The informal policing role that some Aborigines had taken up while Newcastle was a convict establishment continued under the auspices of the Australian Agricultural Company. The expense involved in employing Aborigines in policing roles was just a fraction of the cost involved in employing convict constables, although the latter were seen as being more civilised and therefore more reliable. Dr Nesbit recommended that the services of Aborigines be reserved for those occasions on which ‘the tracing of stolen property, or the apprehending of runaway prisoners’ was required.³⁷ The notion of Aborigines becoming Native Constables was defective, thought Nesbit, ‘on account of their ignorance of our language and customs, also their dislike to anything that requires constant attention, or a fixed residence’.³⁸ He did allow, however, that ‘some dependence’ could be placed upon Aborigines carrying out policing functions because ‘artificial wants’ had been excited in them that the Company had the means of gratifying.³⁹ Evidence provided by Colonel Dumaresq confirms the Company’s policy and practice in relation to its Aboriginal employees: ‘Dawson’s treatment of the Native is mostly excellent ... he endeavours to create want amongst them; their labour is useful in various ways’.⁴⁰

³⁶ ‘Report from Mr Robert Dawson to The Governor and Deputy Governor of the Australian Agricultural Company, Sydney, 4 February 1826’, accessed on 1 June 2006 at <<http://www.newcastle.edu.au/services/library/collections/archives/int/aacportstephens.html#4aug1847>>

³⁷ ‘Dr Alexander Nesbit’s Report.’ *Australian Agricultural Company Despatches*, B905-B906.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ ‘Col. Dumaresq appeared before the Directors and informed them that he considered W. Dawson’s treatment of them (i.e. the Natives) most excellent about 600 around him, 30 November 1827’,

Like Macquarie in Sydney, Dawson sought to consolidate his influence with local Aborigines through awarding a military gorget or breastplate to the man he considered to be the chief. He brought a breastplate with him from Sydney for just such a purpose, and afterwards derided the 'awe' with which the decorated man's companions observed him as 'very ludicrous'.⁴¹ Jakelin Troy has suggested that Aborigines readily accepted breastplates or gorgets as they were aware of the status of the military officers who were adorned with these devices within the social hierarchy that shaped colonial society.⁴²

During the 1820s, a period marked by a shortage of convict labour, the Company employed about forty Aboriginal workers.⁴³ Jackey would, by this time, have been a young man in his twenties. He may not have taken up a Company position personally, but it can reasonably be assumed that he would have known some of the people who did choose to participate for shorter or longer periods in the Company's workforce. As the 1820s drew to a close, options available to Aborigines who were not associated with the Australian Agricultural Company were becoming increasingly limited. By the time of Jackey's arrest in 1834, the number of sheep run by the Company increased exponentially from the original 720 to 36,615.⁴⁴ The Company had taken up major land grants adjacent to the William's River, as had another major institution, the Church and School Corporation. An influx of free settlers added to the expropriation of Aboriginal land on a large scale. From 1822, the

Australian Agricultural Company Despatches, A408, accessed on 10 June 2006 at

<<http://www.newcastle.edu.au/service/archives/aboriginalstudies/aacportstephens.html#30nov1827>>

⁴¹ Australian Agricultural Company Despatches A408, *Col. Dumaresq appeared before the Directors*.

⁴² Jakelin Troy. *King Plates: A History of Aboriginal Gorgets*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1993, p. 19.

⁴³ Hannah. 'Aboriginal Workers in the Australian Agricultural Company, 1824-1857', p. 20.

⁴⁴ Bairstow. *A Million Pounds, A Million Acres*, p. 369.

number of emancipated convicts and free settlers allowed to take up land grants in the vicinity increased considerably:

Slowly, inexorably the boundary fences marking the individual selections of the new settlement extended deeper into aboriginal lands removing its people from their birthplace and the ancestral heritage of kinship with that land and all life that was a part of it. The basis of their social relationship the land rights of each horde or clan had been confiscated, forcing them to merge with unrelated people of unknown Totemic spiritual relationship.⁴⁵

The influx of free settlers into the Hunter Valley and the establishment of large, privately operated pastoral runs transformed the social order at the William's River. No longer viewed as trading partners or potential employees, Aboriginal people who were not under the auspices of the Australian Agricultural Company became fringe dwellers. Pushed to the margins of society, they were left to eke out a living as best they could. The tribal 'remnants', according to Bob Reece, 'had drifted into towns or were wandering from station to station begging food.'⁴⁶ Men like Jackey, considered 'quiet and domesticated', sometimes traded their labour with the free men and convict workers employed on the stations.⁴⁷ In exchange for fetching wood and water, they received small quantities of tobacco or other western commodities such as tea, flour, and sugar. Reece found that some Aboriginal people who were allowed to camp near stations in the area 'subsisted on skim milk, offal and bran in return for casual labour as bark-cutters, sheep washers, and reapers'.⁴⁸ The domestic labour of Aboriginal women and children was also useful to the early colonists, as Dawson explained in relation to Newcastle:

⁴⁵ R. Ford. *William's River: The Land and its People*, R. L. Ford, Clarencetown, 1995, pp. 34, 127.

⁴⁶ Bob (R H W) Reece. *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s*, Sydney University Press, Sydney, 1974, p. 19.

⁴⁷ R v Jackey 1834.

⁴⁸ Reece. *Aborigines and Colonists*, p. 19.

The native women and children were constantly in, or loitering about the doors of the huts, where it was quite common to see a black woman dressed up with an old gown or cap, and dandling in her arms the infant of a white woman; while others, especially young girls, frequently assisted their white neighbours at the wash-tub.⁴⁹

Despite Dawson's delightful vignette of Aboriginal participation in domestic life at the settlement, he embraced the Enlightenment ideals that characterised his time. He saw Aborigines as 'untutored children of nature' who 'must be treated with firmness and kindness'.⁵⁰ To Dawson and other colonists, it was a law of nature that the 'untutored savage' was unable to deviate from his uncontrolled pursuit of selfish pleasures.⁵¹ The British, 'happily born in civilized life', engaged instead in well-mannered social intercourse and intellectual pursuits.⁵² This line of reasoning legitimated the actions of men such as Dawson and landowners like George Mackenzie and Archibald Mossman who assumed responsibility for governing over the lives of the apparently childlike Aborigines.

The farms and stations of large property owners became the points around which a distinctive form of social organisation emerged along the New South Wales frontier. Not all property owners enjoyed the same status though. As Alan Atkinson pointed out, the distinction between 'great gentlemen and small ones' has often been overlooked.⁵³ Atkinson has elaborated it as follows:

mainly a difference in types of power, depending on the size of estates and the quality of political connections. A great gentleman often had some territorial authority, ruling whole networks of families living on his land. His acres were broad enough for him to draw together within his boundaries a body of people self-sufficient in their daily lives ...

⁴⁹ Bairstow. *A Million Pounds, A Million Acres*, p. 88.

⁵⁰ Bairstow. *A Million Pounds, A Million Acres*, p. 89.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ Alan Atkinson. *Camden: Farm and Village Life in Early New South Wales*, Oxford University Press, Melbourne, 1988, p. 68.

To create and keep up such a system was a source of much prestige, and the more self-sufficient it was the better.⁵⁴

Mackenzie and Mossman, the men whose decisions, properties, and workers were to have such a devastating impact on Jackey's life, both fall within Atkinson's definition of great gentlemen. They enjoyed considerable political patronage as the following biographical précis demonstrate. This patronage translated into local prestige and power as they took up substantial landholdings and the attendant status in colonial New South Wales.

Mackenzie was the son and namesake of Sir George Mackenzie, the Scottish phrenologist who received Kinibyal's severed head following the 1816 punitive expedition. A decade after receiving the Aboriginal skull, the elder Mackenzie wrote to fellow Scot John Gladstone, a wealthy merchant and slave owner who had moved south to Liverpool in England. He sought endorsement for his son George who was about to set sail for New South Wales to seek his fortune. Gladstone wrote to the Colonial Secretary, Huskisson, who provided a letter of recommendation to facilitate the younger Mackenzie's entry into colonial society.⁵⁵ When the young man left Dublin bound for New South Wales, he carried Huskisson's letter of recommendation on his person together with five hundred pounds provided by his father. The capital put up by Sir George, it was understood, would entitle his son to a land grant immediately upon his arrival in New South Wales. The younger Mackenzie was keen to acquire a tract of land in the same vicinity as two of his friends who had achieved notable success in the colony. It is likely that these two men were the Mossman

⁵⁴ *ibid.*

⁵⁵ John Gladstone to William Huskisson, 11 March 1828, *HRA*, Series I, Volume XIV, p. 30; Huskisson to Ralph Darling, 18 March 1828, *HRA*, Series I, Volume XIV, p. 30.

twins, Archibald and George, fellow Scots who had sought their fortunes in the West Indies before taking up land grants in New South Wales.⁵⁶

Archibald Mossman and his twin brother George were born in the village of Lesmahagow in Larnark, Scotland, on 15 October 1799.⁵⁷ Like so many others of their era, they decided to seek their fortunes abroad. Prior to their arrival in New South Wales, the Mossman brothers were involved in tin mining and cotton plantations in the West Indies.⁵⁸ When Archibald Mossman arrived in New South Wales in 1828, he was recommended to the ‘notice and protection’ of Governor Darling in a letter from Under-Secretary Stanley.⁵⁹ In orders dated 6 February 1829, he and his brother received grants of 2,560 acres of Crown Land. Archibald Mossman submitted his selection in June 1829 stating that it was situated on the north bank of the William’s River, upstream from Mr. Justice Dowling’s grant, and to the east of the grant taken up by the Government Surveyor. His selection was authorised on 24 July 1829 as a primary grant, with quit rent of twenty one pounds, six shillings, and eight pence being due to commence from 1 January 1837. George Mossman’s grant was adjacent to the east boundary of his brother’s property.⁶⁰

By the 1830s, the contrast between the lifestyles of the few remaining Aboriginal people and the increasing numbers of colonists in the Hunter Valley could hardly have been greater. Settlers at the upper reaches of the William’s River celebrated clement weather that increased the yield of milk from the dairy cows and

⁵⁶ Gladstone to Huskisson, 11 March 1828, *HRA*, Series 1, Volume XIV, p. 30; Lord. *William’s River*, p. 40.

⁵⁷ ‘Mossman Family Record’, *International Genealogical Index: British Isles*, accessed on 12 September 2005 at <<http://www.familysearch.org>>

⁵⁸ Lord. *William’s River*, p. 40.

⁵⁹ Lord Stanley to Darling, 24 November 1827, *HRA*, Series I, Vol. XIII, p. 625.

⁶⁰ Lord. *William’s River*, pp. 38-40.

improved their pastures. Indeed, by the middle of the decade pasturage at the William's River had 'never looked better'.⁶¹ By the mid-1830s, few Aboriginal people survived in the Hunter Valley. Reece pointed out that the number of Aborigines living within the nineteen counties had declined dramatically to about five hundred people, a fraction of the estimated number at contact. A small portion of the area extending from Botany Bay to Broken Bay was thought to have supported about 1,500 Aboriginal people when the First Fleet arrived in 1788.⁶² Those Aboriginal people who survived the introduced diseases as well as the rapes and murders that sporadically occurred on either side of the frontier, and who were not involved with the colonists, retreated to the hills at the upper reaches of the William's River. From there Aborigines, sometimes in the company of convict absconders and bushrangers, committed 'depredations' upon the persons and property of the colonists who usurped their ancestral lands.⁶³

It was against a backdrop of disease, depopulation, and dispossession that violent clashes sometimes ensued between Aboriginal men and the men working on the colonists' stations. One such encounter took place during the night of 2 April 1834 when a group of Aboriginal men attacked some of the convict servants assigned to Archibald Mossman on his sheep station adjacent to the William's River. They also robbed the workers' hut. Nobody was killed during the raid, but Mossman's men feared that the Aborigines would return to murder them. Two of the men rode for help to the station of their nearest neighbour, George Mackenzie, where they woke

⁶¹ 'Hunter's River', *Sydney Monitor*, 23 April 1834, p. 3.

⁶² Reece. *Aborigines and Colonists*, p. 17. Reece found five hundred to be 'the most commonly accepted estimate'. The estimated total of Aboriginal people living in the smaller area from Broken Bay to Botany Bay was based on Governor Arthur Phillip's 1788 population estimate.

⁶³ Ford. *William's River*, pp. 34, 127.

the overseer Thomas Rodwell and told him what had transpired. When Mackenzie heard about the night's events, he gave Rodwell guns loaded with powder and buckshot. He told his overseer to get together a party of men from his and Mossman's stations to 'apprehend two or three of the depredators'.⁶⁴

Rodwell, his two informants, and six other men from Mossman's station commandeered a person later described as a 'black boy called Lumpy' to guide them to the Aboriginal camp.⁶⁵ Before they approached the Aboriginal camp, Rodwell's party divided into two groups. Just after sunrise, the armed men rode into the camp from opposite directions. Rodwell later maintained that their intention was 'to speak peaceably' with the Aboriginal people, yet the men made no attempt to conceal their arms.⁶⁶ Rodwell noticed that Mossman's assigned convict servant John Flynn, armed with a fowling piece, was standing a little in front of his party. As he watched, Rodwell saw a spear hit Flynn just under the man's shoulder blade. It was thrown from Flynn's left where, according to Rodwell, only one black man had been standing although this point was later disputed in court. Flynn 'plucked out the spear', and chased after Jackey, his alleged assailant, a man who occasionally did jobs for Rodwell at Mackenzie's station.⁶⁷ Rodwell examined Flynn's wound in front of Jackey soon after the man's arrest. According to Rodwell the wound 'bled very little' and he 'did not think it a dangerous one'.⁶⁸ Over the next two days, Flynn walked twenty-two miles to the nearest courthouse at William's River to report the attack, swearing his deposition before the station owner Mackenzie.

⁶⁴ R v Jackey 1834.

⁶⁵ *ibid.*

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

Because Mackenzie's and Mossman's stations were situated at a considerable geographical and social distance from the settlements at Newcastle and Sydney, they of necessity became as self-sufficient as possible. Law and order at a mundane level was a local concern. In the socially stratified society transplanted from British to colonial soil, men from the upper echelons of local society such as Mackenzie filled positions on the bench of magistrates. As Rosalind Kidd pointed out, social position rather than qualifications dictated who performed such roles on the colonial frontier:

Local judiciaries signified position rather than profession ... Rural justices of the peace ... were usually prominent landowners nominated by local squatters. As settlement pushed outwards, men of "position" were co-opted into acting as legal and administrative deputies. But any legal training or even knowledge of the law was purely coincidental for either the paid magistrates or the unpaid justices.⁶⁹

The position of local constable was filled from within the lower ranks of the community. At the William's River the local constable was Mackenzie's station overseer, Rodwell. Men holding positions of power whether as magistrates, justices of the peace, or constables were intimately involved in their local communities as landowners, farm labourers, and such like. Their dual roles could not be entirely separated from one another. Such circumstances made it possible for Mackenzie to order Rodwell, who was a local constable as well as his employee, to arrest Aboriginal men perceived to be threatening his station and have the prisoners appear before him in his capacity as local magistrate to determine their fate. Regardless of the considerable potential for conflicts of interest to arise, the sparseness of the British population in outlying regional areas coupled with the harsh economic

⁶⁹ Rosalind Kidd. *The Way We Civilise: Aboriginal Affairs – the Untold Story*, University of Queensland Press, St Lucia, 1997, p. 11.

circumstances under which such communities laboured did not allow for dedicated and therefore disinterested upholders of law and order.⁷⁰

Despite Mackenzie later arguing in court that his and Rodwell's actions were predicated on a need to enforce the law, there appears to have been a backlash following the case *R v Jackey 1834*. Rodwell, a constable at the Upper William's River since April 1833, was temporarily relieved of his constabulary duties by the Bench of Magistrates in 1834 and replaced with a ticket-of-leave man. He was reappointed as a constable on 3 February 1838.⁷¹ While Mackenzie himself seemingly remained beyond reproach, having his man removed at least temporarily from serving in the capacity of local law enforcer would no doubt have been disadvantageous to a station owner with local interests to protect.

When Jackey appeared before Mackenzie in his capacity as a justice of the peace, he was compelled to watch as Flynn made his mark upon the document that led to the Aboriginal prisoner being gaoled. Two unnamed 'native blacks' were present to 'explain to the prisoner the nature of the accusation against him'.⁷² The following day, Flynn set out on foot for the long walk to the General Hospital at Newcastle to have his wound treated. He became increasingly ill on the way and was picked up by an Australian Agricultural Company dray. The Company men took Flynn to the *Settler's Arms* at Paterson's River and the colonial surgeon Dr Isaac Scott Nind was called on to tend to the ailing man. Nind later claimed in court that Flynn was in a dying state when he first saw him, although he said that the type of

⁷⁰ Lord. *William's River*, pp. 88-90.

⁷¹ *ibid.*, pp. 89, 127-28.

⁷² *R v Jackey 1834*.

wound he had received ‘was not ... necessarily fatal’.⁷³ When Flynn died that evening, the charge levelled against Jackey was upgraded from assault to wilful murder.

Jackey was probably forced to undertake the arduous journey from the William’s River to Newcastle Gaol on foot. The two-storied stone and brick gaol that sat above the sand hills at Newcastle Beach had been built in 1818 when Wallis was commandant at the Newcastle penal station. While it overlooked the sea, Jackey was unlikely to have had any view of the water from his prison cell as the gaol was surrounded by a twelve-foot high stone wall. When Jackey was led across the gaol yard *en route* to his cell he would have been confronted by the sight of numerous ‘instruments of torture’ for the interior yard was the site on which prisoners were tortured and executed.⁷⁴ His surroundings would have been daunting for a man unused to built structures and western methods of punishment and coercion.

Prior to his trial, Jackey was incarcerated for a further three months in Sydney Gaol. Built in 1801 from blocks of sandstone hewn out of the natural quarry at Sydney’s waterfront known as ‘The Rocks’, by the mid-1830s the Gaol was in a state of ill repair.⁷⁵ At night, a lamp was fixed to the side of the wall to provide the prisoners with a source from which to take a light should they require any assistance. While necessary owing to the extent of ill health amongst the inmates, it was claimed that the lamp ‘increases greatly the foulness of the air in a close crowded room, where the

⁷³ *ibid.*

⁷⁴ ‘Old Newcastle Gaol’, accessed on 15 May 2006 at
<http://www.jenwillets.com/law_and_order.htm>

⁷⁵ ‘Development of the Rocks’, accessed on 17 June 2006 at
<<http://www.records.nsw.gov.au/public/gallery/rocks/themes-2.html>>

thermometer is perhaps at 110 in summer nights, when even though there should be a breeze on Church Hill, there would not be a breath of air in ... the Gaol'.⁷⁶ The problem of overcrowding was so great that by order of the Chief Justice of the Supreme Court, rules introduced on 1 March 1834 allowed debtors with hearings pending to be lodged in houses within a proscribed area in the vicinity of the prison, excepting public houses, rather than being confined to Sydney Gaol.⁷⁷

Sydney society at the time of Jackey's arrival was characterised by class divisions that would not have been out of place in European cities such as London and Paris. A commentator writing in 1834 observed that the upper classes in Sydney comprised people involved in the civil and military functions of government, doctors, lawyers, British invalids retired from India, and visitors from France. A second class was made up of merchants and landholders involved in trade and agricultural pursuits, followed by a third class of persons, emancipated convicts who had gained some material wealth and status. Prisoners of the Crown formed the bottom class or 'final grade' of person in the new society.⁷⁸ Aborigines did not qualify for admittance into civilised society at all. The geographical and social space they occupied in the colony's capital in 1834 was described thus:

There is a further feature which gives a novel tone to the mind in parading the streets of Sydney, which is, the groupes of Blacks which are to be met at every corner. The appearance of these Blacks is distinct from whatever the imagination may have figured to itself of deformed and degraded in the human race. They are often in a state of perfect nudity; and their almost inhuman facial conformation and expression, their dark and coarse texture of skin, and frightful contour

⁷⁶ 'Sydney Gaol', *Sydney Monitor*, 14 March 1834, p. 2.

⁷⁷ 'Imprisonment for Debt, Rules,' *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 17 June 2006 at <http://www.law.mq.edu.au/scnsw/Cases1834/html/imprisonment_for_debt_rules_1.htm>

⁷⁸ 'Society in Sydney New South Wales', *Sydney Monitor*, 11 April 1834, p. 4.

of limb, produce upon the mind the most revolting impressions. These unfortunate beings are, however, the most interesting in other respects, of any other of the savage tribes. In disposition they are artless, confiding, and sociable; and, without the slightest exaggeration of terms, they may be said to possess the kindest of affections. They speak English with surprising volubility and enchanting sweetness, and are as full of mimicry as monkeys. I could write a volume in description of them, but I am travelling out of the proposed scope of my observations in making reference to them at all.⁷⁹

Reduced to an entertaining aside in a newspaper column, Sydney's Aboriginal population provided the writer with a foil. They were the antithesis of what it was to be civilised. Set apart from the four classes of persons comprising civilised Sydney society, the people referred to as the blacks were characterised as childlike and akin to animals. Lacking the most basic coverings of civilised life, in their unabashed nakedness the truth of the inferiority of the blacks and the consequent superiority of the whites was displayed for all to see. Their apparently degraded state was naturalised through a discourse of savagery that served to justify the visible outcomes of the processes of colonisation in New South Wales.

According to Reece, it was well known by 1830 that Aboriginal people living in Sydney and its immediate surrounds 'had lost many of their traditional skills', a factor that contributed to many colonists finding Aboriginal culture 'of no more interest or significance than the antics of animals'.⁸⁰ Visitors arriving in Sydney were taken aback by the extent to which alcohol, disease, and malnutrition were impacting on local Aboriginal people.⁸¹ Yet despite such psychological and physical hardships, 'the Sydney Aborigines ... did not accept an inferior status in colonial society'.⁸²

⁷⁹ *ibid.*

⁸⁰ Reece. *Aborigines and Colonists*, p. 10.

⁸¹ *ibid.*, p. 8.

⁸² *ibid.*, p. 11.

Instead, they interacted with white people in a way that saw them variously described as impudent or confident, depending on the standpoint of the commentator. Adults traded with, or begged from, colonists and let their children intermingle with white people who sometimes fed, clothed, and schooled them. Though as Reece pointed out, they did not embrace the concept of their offspring becoming domestic servants in the homes of their erstwhile white benefactors. Entering into service in a white household was often the outcome colonists intended for such children.⁸³

Not everyone in colonial New South Wales shared the same interpretation of the colonisation process and its impacts on Aboriginal people as the columnist cited above. However, common threads evident in observations recorded at the time cohere to form a discourse of Aboriginality. Read in conjunction with the views expounded by the correspondent to the *Sydney Monitor*, an example drawn from the journal of the Wesleyan missionary Reverend Lancelot Threlkeld illustrates this point. Threlkeld was one of a number of missionaries who arrived in New South Wales in the 1820s to work amongst Aboriginal people. While the missionary's views, like the correspondent's cited above, were informed by Western assumptions about the natural inferiority of Aborigines, his interpretation of the colonisation process and the resultant position of Aborigines varied considerably. He wrote:

The very weakness of the Blacks forms to noble minds the strongest appeal to justice, nor should Equity forget the price of the Land of their birth, which fills the coffers of our Exchequer with Gold, exalts Britain amongst the nations; and establishes her Colonies in the destruction of the native inhabitants thereof, and thus presents a powerful claim to the tender sympathies of our Christian Charities.⁸⁴

⁸³ *ibid.*

⁸⁴ Lancelot Threlkeld. '7th Report, Annual Report of Mission to the Aborigines New South Wales 1837', in Gunson (ed). *Australian Reminiscences & Papers of L.E.Threlkeld*, p. 136.

Threlkeld, like others amongst the colonising population, acknowledged the destructive impact of British settlement on Aboriginal life in New South Wales. Informed by a Christian worldview, his call for justice, equity, and sympathy to be displayed towards Aborigines took on a practical application in his own life. In his capacities as missionary and linguist, Threlkeld assisted Aboriginal defendants such as Jackey who were brought before the Supreme Court of New South Wales.

Because of the peculiarities of the colony of New South Wales, the Supreme Court itself was not established until some thirty-five years after the British established a settlement at Sydney Cove. Founded as a penal colony following the French and American Revolutions, in part to replace America as a destination for its exiled prisoners, New South Wales was the first British colony established without its own representative institutions. As time went on those born free in the colony, free settlers, and emancipated convicts all sought to have more say over their lives. By the 1820s, colonists were demanding some form of representative government on Australian soil, as well as the right to a trial by civil jury as guaranteed to all British subjects under the terms of the Magna Carta. As opposed to the force of arms, the rule of law was the cornerstone of the social systems of governance in New South Wales. The rule of law, according to David Neal, promised ‘decision-making within a specific type of procedural framework’.⁸⁵ Through recourse to the court of Civil Jurisdiction and the court of Criminal Jurisdiction, convicts and free settlers could have their cases heard in accordance with laws derived from England.

⁸⁵ David Neal. *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales*, Cambridge University Press, Cambridge, 2002, pp. 10, 15, 16.

While the first professional judge arrived in New South Wales as early as 1810 at which time Superior Courts were established, until 1823 the persons overseeing justice were a British-appointed Judge Advocate and a six-member panel of military officers. Following the Bigge Reports of 1822 and 1823, the *New South Wales Act 1823* was passed to facilitate the establishment of the Supreme Court of New South Wales which was to be overseen by a Chief Justice.⁸⁶ The legislation did not provide for trial by civil jury, despite Governor Richard Bourke having ascertained as early as February 1832 that the practice was ‘much desired by the great majority of free People in the Colony’.⁸⁷ It was not until 1833, one year before Jackey’s trial, that an Act was finally passed providing for trial by civil jury for all criminal cases heard in the colony, although defendants could still elect to have their cases determined by a military panel.

Several other significant and pertinent legal landmarks transpired during the five years prior to Jackey’s trial. In *R v Baxter 1829*, lawyers acting for George Baxter, a prisoner at Moreton Bay, challenged the legality of his sentence to transportation. The grounds for their objection was that Baxter had come to the colony as a free man, being a soldier serving with a British Regiment, and that as he had no prior convictions he ought not to have been sentenced to transportation. It was considered that transportation was a secondary punishment, that is, that legally this form of punishment ought only to be applied in cases where the prisoner had a history of at least one past transgression. Baxter’s lawyer argued that:

by the local ordinance 7. G. 4. No 5 16 August 1826. s. 5. this prisoner having come into the Colony free, could only be liable for his first

⁸⁶ *ibid.*, pp. 70, 76-7, 90, 106, 184-85.

⁸⁷ Governor Bourke to Viscount Goderich, 6 February 1832, *HRA, Series I, Volume XVI*, p. 515.

offence to be imprisoned and kept to hard labour within prison walls only, and consequently could not be transported to a penal settlement, and there rendered liable to be worked in Irons, or subjected to the rigid discipline of such settlements.⁸⁸

Chief Justice Forbes and Justices Stephen and Dowling heard the case and concurred that the sentence ought to stand. The basis for their decision was that the penalty was that which applied under English law for the transgression committed by the prisoner. This meant that the court therefore had jurisdiction to impose a sentence of transportation on Baxter. Forbes pointed out that the local ordinance raised by Baxter's lawyer had been designed to ensure consistency between the treatment meted out to convicts from Great Britain and those transported from England's foreign possessions. It was not meant to prevent the transportation of locally convicted men.

The Chief Justice declared that the court simply passed sentence on defendants and ensured that such sentences were consistent with English law. The court could sentence people to transportation and determine the length of the sentence. It was the responsibility of the Executive to nominate the places to which such prisoners might be sent, and this was done from time to time through an Order in Council. Dowling 'agreed entirely' with Forbes, adding that:

In the Courts at home the form of sentence is, that the prisoner shall be transported to such place beyond seas as His Majesty ... shall direct and appoint for such a term ... [A] penal Settlement is to be regarded in the same light with reference to the treatment of native free Colonists or free emigrants from the Mother Country transported thither as N.S.W. is regarded in the Mother Country as a place for transportation. A native born Colonist or a free subject transported to Moreton Bay, Port Macquarie or Norfolk Island is liable to assignment

⁸⁸ R v Baxter 1829, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 21 August 2006 at <http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_baxter__1829.htm>

and servitude but he is liable to no great degree of severity in discipline, than a person originally transported from England to N.S.W. In short he is not liable to be worked in irons unless for sufficient reasonable cause.⁸⁹

The three judges presided over a similar matter two years later in which James Kelly's sentence of transportation to Moreton Bay was challenged on the basis that the convict had been free born in the colony of New South Wales and that his sentence was therefore illegal. Kelly's lawyer argued that at most the prisoner was liable to imprisonment, but not to transportation. Referring to the precedent set in *R v Baxter 1829*, the judges confirmed that people born free in the colony could indeed be sentenced to transportation if they contravened laws that in England would result in such a sentence being imposed.⁹⁰ These cases are highly significant as they established that locally convicted defendants without previous criminal records could be sentenced to transportation. *R v Baxter 1829* and *R v Kelly 1831* set the legal precedents whereby the judiciary could sentence Aboriginal men to transportation.

Following its establishment in 1823, cases involving Aboriginal defendants were occasionally heard before the Supreme Court of New South Wales. Records relating to seven such cases involving eight Aboriginal defendants have survived for the period leading up to Jackey's trial.⁹¹ Accounts of two earlier cases heard in the court

⁸⁹ *ibid.*

⁹⁰ *R v Kelly 1831, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 21 August 2006 at <http://www.law.mq.edu.au/scnsw/Cases1831-32/html/r_v_kelly__1831.htm>

⁹¹ *R v Foley 1824, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/html/r_v_foley__1824.html>; *R v Devil Devil 1825, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/html/r_v_devil_devil__1825.htm>; 'Aboriginal Defendant'

of Criminal Jurisdiction involving four Aboriginal defendants are also extant.⁹² These cases illustrate the key debates that emerged in relation to the practice of trying Aboriginal defendants. A brief examination of the cases demonstrates various procedures that were mooted and, in some instances, implemented to circumvent colonial concerns about putting Aboriginal prisoners on trial.

The centrality of race and racialised thinking in relation to questions of people's capacity to stand trial and courtroom procedures is nowhere more evident than in the earliest surviving records of a trial held before Judge-Advocate Garling in the court of Criminal Jurisdiction on 27 September 1816.⁹³ Two Aboriginal defendants, Daniel Mow-watty and Bioorah, were to be tried for the rape of the sixteen-year old daughter of a Parramatta settler. Before the trial proceeded, the Judge Advocate had Bioorah discharged. His reasons for doing so were twofold. Garling claimed that there did not 'appear in the depositions ... sufficient cause' to try the

1827, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/aboriginal_defendant__1827.htm>; R v Tommy 1827, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_tommy__1827.htm>; R v Binge Mhulto 1828, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_binge_mhulto__1828.htm>; R v Ballard or Barrett 1829, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_ballard_or_barrett__1829.htm>; and R v Boatman or Jackass and Bulleye 1832. In correspondence relating to Binge Mhulto, another Aboriginal man named Willimore is referred to as also being held in custody in relation to a charge of murder. See Alexander Baxter to Colonial Secretary, 19 December 1828, 28/10171 4/2005, SRNSW.

⁹² R v Mow-watty and Bioorah 1816, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <<http://www.law.mq.edu.au/scnsw/html/R%20v%20Mow-watty,%201816.htm>>; R v Hatherly and Jackie 1823, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <<http://www.law.mq.edu.au/scnsw/html/R%20v%20Hatherly,%201823.htm>>

⁹³ *ibid.*

man for rape, but also referred to ‘the peculiar circumstances in which he stood’ before the court.⁹⁴ While the first point provided some legal justification to warrant the man’s discharge, the latter remark was a reference to Bioorah’s Aboriginality. Although the defendant was held to understand English ‘tolerably well’, he was unfamiliar with English laws and courtroom procedures. Having been brought up in the bush, Bioorah was not expected by the colonists to be able to discern between good and evil or to be able to tell what acts might transgress their social mores. Discharging Bioorah allowed Garling to circumvent the trial being seen by colonists as a farce.

In contrast, Bioorah’s co-defendant Mow-watty was a well-known and well-travelled colonial identity. Giving evidence at his trial, the Reverend Samuel Marsden said that he had known Mow-watty for almost twenty years. The young man had been ‘reared in Parramatta from his infancy, first in the family of Richard Partridge, and afterwards with Mr Caley, botanist, who took him to England with him’.⁹⁵ As well as spending a year in England in 1810, Mow-watty had earlier accompanied Caley to Norfolk Island and Van Diemen’s Land on an 1805 botanical expedition.⁹⁶ Evidence tendered to the court by witnesses like Marsden, the explorer Gregory Blaxland, and landowner Robert Lowe clearly established that Mow-watty was ‘an intelligent man’ who ‘had a clear conception’ of the difference between a good act and an evil one.⁹⁷ Lowe, who had shared a passage with Mow-watty on his 1811 journey out from England on *Mary of London*, told the court that the defendant was ‘much pleased

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ Keith Vincent Smith. ‘Moowattin, Daniel (c. 1791 - 1816)’, *Australian Dictionary of Biography*, Supplementary Volume, Melbourne University Press, Melbourne, 2005, p. 286.

⁹⁷ *R v Mow-watty and Bioorah* 1816.

with the manners and customs of Europeans’ and ‘had frequently during the passage avowed a determination to conform to them entirely after his arrival’ in New South Wales.⁹⁸ In a similar vein, Blaxland testified that Mow-watty had previously ‘shielded himself under the protection of the law by adhering to the habits in which he had been reared’.⁹⁹ Being thought of as a civilised Aborigine who enjoyed the benefits of a western education and was familiar with the colonisers’ customs, Mow-watty met the key criterion of being able to exercise a ‘clear and conscious discrimination between good and evil’.¹⁰⁰ The court having satisfied itself as to that point, Mow-watty was found guilty of rape. He was sentenced to death and subsequently hanged, probably at The Rocks, in Sydney. His long involvement with the colonists culminated in the dubious distinction of becoming the first Aboriginal man legally executed in the Australian colonies while Bioorah, who was considered ignorant of the arts of civilisation, walked free.¹⁰¹

As well as issues concerning the ability of Aboriginal defendants to discriminate between good and evil and to comprehend the nature of charges brought against them, difficulties arose in relation to the capacity of Aboriginal people to testify in court. Because Aboriginal people were not Christians, they were unable to take the required oath on the bible. The situation was of concern both to the Home Government and the local administration. On 17 July 1839, the Marquess of Normanby wrote to Governor George Gipps:

The attention of H. M.’s Government has been recently called to the necessity of making provision for receiving the evidence of Aboriginal

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ Smith. ‘Moowattin, Daniel (c. 1791 - 1816)’, p. 287.

Natives in Courts of Justice. This, however, is a question which I consider it better to leave to you to bring before the local Legislature, convinced that it will receive that consideration, which so important a question demands.¹⁰²

The colonial legislature attempted to address the inequity by passing 'An Act to Allow the Aboriginal Natives of New South Wales to be Received as Competent Witnesses in Criminal Cases 1839' (3 Vic. No 16).¹⁰³ The legislation, which provided for Aboriginal people to give evidence on the proviso that it was corroborated by the testimony of settlers or by circumstantial evidence, was designed to overcome problems extending beyond achieving equity in trials involving Aboriginal defendants. Allowing Aboriginal evidence might also have been of value in terms of curbing lawlessness at the frontier. As Threlkeld pointed out, squatters near Lake Macquarie 'encouraged the Aborigines in their several predatory expeditions' during 1834, and were in receipt of stolen goods. The squatters were well aware that any Aboriginal evidence against them would be inadmissible.¹⁰⁴

The possibility of allowing Aboriginal evidence to be heard in court was unpopular with some colonists. For example, George Augustus Robinson, Chief Protector of Aborigines in the Port Phillip District, recorded in his journal on 5 April 1845 that H. Darlot told him 'people were against the evidence of Natives being legal because so many are implicated in killing Natives'.¹⁰⁵ Gipps was, as Michael Christie pointed out, well aware of the unpopularity of the Act in some quarters so he allowed

¹⁰² Marquess of Normanby to Sir George Gipps, 17 July 1839, *HRA*, Series I, Volume XX, p. 243.

¹⁰³ John McCorquodale. *Aborigines and the Law: a Digest*, Aboriginal Studies Press, Canberra, 1987, p. 19; Michael Christie. *Aborigines in Colonial Victoria 1835-86*, Sydney University Press, Sydney, 1979, pp. 115-17.

¹⁰⁴ Threlkeld. 'Fourth Annual Report of the Aboriginal Mission at Lake Macquarie New South Wales', in Gunson (ed). *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 120.

¹⁰⁵ Ian Clark (ed). *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Four: 1 January 1844 – 24 October 1845*, Heritage Matters, Melbourne, 1998, p. 273.

it to be passed on the proviso that it be referred to the Home Government. This was a delaying tactic and also allowed the colonial legislature to abdicate final responsibility for the outcome.¹⁰⁶

In any case, the Home Government disallowed the Act. Campbell and Wilde, the British Attorney-General and Solicitor-General respectively, found that to admit evidence from witnesses who were ignorant of God or a future state would be contrary to the principles of British jurisprudence.¹⁰⁷ When the outcome became known in New South Wales, the *Geelong Advertiser* lambasted the Governments both at home and abroad, stating that ‘their profession of acknowledging the rights of the aborigines has been a complete burlesque, conceived in the bitterest style of irony ... Of all the displays of ribald mockery which have been disguised under high-sounding names, that of investing the Blacks with the NAME of *British Subjects* is the most “cruelly ridiculous”’.¹⁰⁸ The newspaper summarised the so-called privileges that had accrued to Aboriginal people as British subjects, numbering amongst these the deprivation of their lands and herds, and being hunted and shot by settlers.¹⁰⁹ It was not until the ‘Evidence Further Amendment Act 1876’ (40 Vic. No 8) was passed to allow for a declaration to be made in lieu of an oath that Aboriginal people could finally give evidence.¹¹⁰ By then, more than three generations of Aboriginal people had been excluded from testifying or being sworn as interpreters in the colonial courtrooms of New South Wales.

¹⁰⁶ Christie. *Aborigines in Colonial Victoria 1835-6*, pp. 115-17.

¹⁰⁷ *ibid.* See Russell Smandych. ‘Contemplating the Testimony of “Others”: James Stephen, the Colonial Office, and the Fate of Australian Aboriginal Evidence Acts, circa 1839-1849’, *Australian Journal of Legal History*, Volume 8, Number 2, 2004, pp. 237-83 for a thorough discussion of Aboriginal Evidence Acts in colonial New South Wales, Western Australia, and South Australia.

¹⁰⁸ *Geelong Advertiser*, 23 January 1841, p. 2. (Emphasis in the original.)

¹⁰⁹ *ibid.*

¹¹⁰ McCorquodale. *Aborigines and the Law*, p. 20.

Disallowing Aboriginal evidence may have led to the two Aboriginal defendants in an 1823 case heard before the court of Criminal Jurisdiction being found not guilty although they admitted to carrying out the acts with which they were charged. Hatherly and Jackie told the commandant at Newcastle that they killed John M'Donald, the man formerly in charge of the Government's tobacco crops at Newcastle, and robbed his hut. However, there were no other witnesses to corroborate their story. While circumstantial evidence was strongly against them – they had been the last people seen with M'Donald and had been noticeably absent 'about their usual haunts' since his 'horribly mangled' body was found – Hatherly and Jackie could not be convicted on their own testimony. It is unclear from the surviving record as to whether this was because their evidence could not be admitted in court on the basis of their Aboriginality, or because their admissions to the commandant were self-incriminating. Possibly both reasons applied. In reporting the case, the *Sydney Gazette* stated that the men's acknowledgments of the 'foul transaction' could not 'legally ... be construed into a confession'. The case was considered to have been held 'under ... peculiar circumstances', an allusion to the men's Aboriginality and the attendant difficulties of trying Aboriginal men in the colonial law courts of early New South Wales.¹¹¹

The first case involving an Aboriginal defendant in the Supreme Court of New South Wales was heard in 1824, the year of the court's inception. Foley was charged with murdering a convict, Charles Tinkler, at Port Macquarie. As Tinkler survived long enough after receiving what proved to be a fatal spear wound to state that it was Foley's father who wielded the spear, Foley was acquitted. His acquittal

¹¹¹ R v Hatherly and Jackie 1823.

was aided by testimony to the effect that he ‘had ever conducted himself as a quiet inoffensive native, and was one of the last that could be supposed likely to perpetrate such a deed’.¹¹² This raises the question as to whether the outcome might have been different had Foley conformed more closely to the stereotype of the hostile native than that of the friendly, or in this case quiet and inoffensive, native.

Public debate flared up in 1827 in relation to a similar case that involved an Aboriginal man being released from custody after being held on a charge of killing a stock-keeper, Thomas Taylor, at Bathurst. A colonist insisted that ‘if ... the blacks of this Colony cannot be tried by our laws, it seems strange that we whites should be tried for hanging them [Aboriginal people]’.¹¹³ The commentator’s line of reasoning was that if the laws of England did not apply to Aborigines, then the laws of retaliation ought to come into force. The *Sydney Gazette* took issue with this attitude on the basis that white people, being civilised and accountable to God, inflicted punishments on people solely to prevent crime and not to exact revenge. Aboriginal people were described as wretched blacks who knew ‘no law but ... [their] passions’ and saw revenge as a virtue.¹¹⁴ Whiteness was therefore constructed in opposition to blackness and by virtue of its supposed superiority people considered to be white were imbued with the moral authority to:

bring them [Aboriginal people] to a knowledge of the laws of God and man, before we inflict punishment for breaches of those laws, or subject them to the mockery of a trial whose purport they cannot comprehend, and on which from the nature of their condition, they have no means of defence. As well might the savage beast of the forest be brought before the tribunal of the land, to answer for the blood he

¹¹² R v Foley 1824.

¹¹³ ‘Aboriginal Defendant’ 1827.

¹¹⁴ *ibid.*

had shed in his lair; and with equal propriety might be called upon for his defence.¹¹⁵

Concerns about the capacity of Aboriginal defendants to stand trial continued to be raised throughout much of the following decade. Later in 1827, Tommy *alias* Jackey Jackey was tried for the murder of Jeoffrey Connell. In presiding over the trial, Chief Justice Forbes told the court that Aboriginal people were ‘amendable in every essential point to be controlled by [English law]’ and, in cases involving murder, what he termed the ‘law of nature and of nations’ came into play.¹¹⁶ To ensure the trial took on some semblance of fairness, he appointed Threlkeld as well as Bungaree, a well-known Sydney Aboriginal identity, to interpret for Tommy.¹¹⁷ The need for two interpreters arose because Bungaree, not being Christian, was constrained from taking the required oath. Threlkeld, therefore, was the sworn interpreter while Bungaree was called on to perform the actual duty.

After hearing the evidence, the jury retired for a mere five minutes before returning a verdict of guilty. The notion of vengeance had been raised during the course of the trial, with Forbes claiming that ‘whosoever shed man’s blood, should pay his own in forfeit’.¹¹⁸ It is therefore unsurprising that he sentenced Tommy to be hanged. Forbes ordered that Tommy be conveyed to Bathurst to be executed near to the scene of the crime with the body afterwards to be dissected. The *Sydney Gazette* reported that staging the execution in Bathurst was intended to ‘operate as a warning

¹¹⁵ *ibid.*

¹¹⁶ *R v Tommy* 1827.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.* Similar sentiments were expressed in the *Australian* newspaper following the murder trial of Broger, who was also found guilty of killing a stockman and was subsequently hanged. The newspaper claimed that ‘murder merits death by the hands of the hangman’, citing the biblical passage *Genesis 9:6* ‘whose sheddeth man’s blood (unrighteously) by man, shall his blood be shed’. See *R v Broger* 1830.

to the tribes about that settlement'.¹¹⁹ The *Monitor* expressed its satisfaction of the outcome in 'the interests of national justice', but conceded that Connell's murder was not as bad as that committed by 'the Blacks' at Bathurst earlier that year.¹²⁰ It was said that the stock-keeper Taylor had 'all the fleshy parts' of his body cut off, 'part eaten then and there, and the rest carried away to be eaten another time'.¹²¹ Such was the extent of the colonists' sense of outrage in relation to Taylor's murder that several stockmen made a resolution to kill the Aboriginal prisoner who had been arrested, but not tried, for the crime following his release from gaol.¹²²

Early attempts to incorporate Aboriginal interpreters, albeit via a white go-between, into the colonial courtroom did not meet with a great deal of success. When Binge Mhulto was brought down from Moreton Bay in 1828 to stand trial for the murder of a white person, the Attorney General Alexander Baxter told Justice Dowling that he had not engaged an interpreter. He explained that this was because in the case involving Tommy, Threlkeld and Bungaree had been employed to translate and to put questions to the defendant but Tommy 'for reasons best known to the man himself' had declined to answer.

The vexed question as to whether Aboriginal defendants were entitled to be tried before Aboriginal jurymen was also taken up in *R v Binge Mhulto 1828*. Under the rule of law, a prisoner was entitled to be tried by a jury comprising one half of his own countrymen, implying that Aboriginal defendants' cases ought to be heard before a jury composed one-half Europeans and one-half Aborigines. However,

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *ibid.*; *R v Aboriginal Defendant 1827*.

Baxter argued that this would be almost impossible to effect given ‘the present untutored and savage state of the natives’ and the ‘present unlettered state of the black community’.¹²³ In any event, there is evidence to suggest that there may well have been prejudice against black men serving as jurors. In August 1834, a man by the name of Lynch – a ‘person of colour’ – was to be sworn as a juryman in Dowling’s court when the Solicitor-General asked him in what country he was born? Lynch replied, the British colony of Barbados. Lynch was challenged by the prisoners and discharged from jury service. Before he left the box, Dowling was at pains to say that ‘there was no objection whatever to him in point of *law*, on account of his being a man of colour – “such an objection,” said His Honour, “I would not tolerate for a moment in a British Colony”’.¹²⁴ While Lynch’s colour may not have been codified as an issue in law, it was certainly seen as a problem by the prisoners over whose fate he was to have helped preside, if not also by the Solicitor General himself.

In regard to Binge Mhulto, Dowling ultimately formed the opinion that if he ‘were to try this savage, in his utterly defenceless situation, I should be at once departing from the spirit and letter of the British law’.¹²⁵ Forbes may have been willing to let Tommy be hanged, but Dowling was not going to follow suit with Binge Mhulto. The Aboriginal prisoner did not necessarily walk free. Baxter wrote to the Colonial Secretary in relation to Binge Mhulto and another Aboriginal man, Willimore from Port Stephens, who in December 1828 were both being held in Sydney Gaol. In view of what he termed ‘the impracticability of enabling these men to take their Trials under all or any advantages of British Law or Justice’, the

¹²³ R v Binge Mhulto 1828.

¹²⁴ *Sydney Monitor*, 23 August 1834, p. 2. (Emphasis in the original.)

¹²⁵ R v Binge Mhulto 1828.

Attorney General recommended that the colonial administration forgo prosecution.¹²⁶

He suggested instead that the men be ‘removed to some part of the Colony distant from their former abodes’, foreshadowing transportation as a means of dealing with recalcitrant Aborigines and emulating the governors of earlier years who had banished Musquito, Bull Dog, and Duall. The Colonial Secretary’s approval of Baxter’s suggested course of action is annotated in the right hand margin of Baxter’s letter along with arrangements for their transfer.¹²⁷

The extent to which Aboriginal people might be considered to be under the protection of, and therefore answerable under, British law arose again in the Supreme Court in several cases over the following two years. In the first of these, Forbes presided over a case involving a crime committed *inter se*. An Aboriginal man known as Ballard or Barrett was arrested and charged with murder following the death of another Aborigine called Dirty Dick by the colonists. The killing resulted from a tribal dispute and was consistent with traditional forms of punishment. Forbes found that Aboriginal people who lived in town placed themselves ‘within the protection of the municipal law’ and if such a person were slain by an Aborigine, then the guilty party would be ‘amenable to our law’.¹²⁸ Likening the fights that took place to resolve tribal disputes to ancient English customs of going into battle, Forbes found that matters arising out of such ventures did not come under the jurisdiction of the Supreme Court of New South Wales. On that basis Ballard was discharged from

¹²⁶ Baxter to Colonial Secretary, 19 December 1828, 28/10171 4/2005, SRNSW.

¹²⁷ *ibid.*

¹²⁸ *R v Ballard or Barrett* 1829.

custody, although Forbes stipulated that he was not intending to set a precedent and would need to confer with his fellow judges should any similar cases arise.¹²⁹

The second and third cases were heard before Dowling, and involved Boatman *alias* Jackass and Billy Bulli who were tried separately on the same day in February 1832 for sheep stealing at the Hunter's River. Threlkeld interpreted for Boatman and Roger Therry was appointed to act as the man's defence lawyer. Therry raised an objection relating to the jurisdiction of the court, claiming that Aborigines were not subject to British laws, a matter that Dowling noted and put aside for the full bench to consider 'should it be necessary'.¹³⁰ Boatman was found guilty, and remanded in custody. Billy Bulli then appeared before the court charged with a similar offence involving sheep stealing. Therry raised the same objection with regard to the court's jurisdiction over Aboriginal people. After hearing evidence that the defendant had taken the sheep 'under an impression that they were of no value', the jury settled on a verdict of not guilty.¹³¹ In the belief that if a similar argument had been put to the jury in the first case they would have found Boatman not guilty, the Solicitor General declined to have the court impose any sentence on the man.¹³² Both Aboriginal prisoners were placed at the bar and were discharged by proclamation.¹³³

It was therefore against a backdrop of largely unresolved questions in relation to the court's jurisdiction over Aboriginal people that the 1834 trial of Jackey took

¹²⁹ R v Ballard or Barrett 1829.

¹³⁰ R v Boatman or Jackass and Bulleye 1832.

¹³¹ *ibid.* John Palmer testified that one hundred and twenty diseased sheep had been turned into the bush about eighteen months ago and were subsequently taken by Aborigines with 'no enquiry [being] made after them'. Palmer suggested that 'from this circumstance ... it [was] highly probable that they considered sheep of no value, and that they might take them wherever they might find them'.

¹³² *ibid.*

¹³³ *ibid.*

place. Over the preceding decade, arguments organised around racialised thinking had unfolded over whether Aboriginal defendants had the capacity to be tried in the colonial courts. The jurisdiction of the Supreme Court itself over matters involving Aboriginal people was called into question, as was the ability of Aborigines to distinguish between good and evil and, therefore, to understand charges against them or to provide sworn testimony. Attempts, albeit mostly unsuccessful, to circumvent some of these concerns included introducing court-appointed interpreters in cases involving Aboriginal defendants, drafting legislation to allow Aboriginal evidence, and questioning the right of such defendants to have their cases heard in front of a jury comprised at least in part of their peers. Debate ensued over the extent to which revenge ought to be exacted from Aborigines in relation to acts committed against white people. Motivations underlying sentencing were interrogated, particularly in relation as to whether vengeance or deterrence ought to prevail. Outrage over the inability or unwillingness to pursue the prosecution of some Aboriginal prisoners saw vigilante action threatened, while some members of the public applauded the exemplary execution of Aboriginal men. Notions of exiling Aboriginal men were raised in what might be termed an extra-judicial context, that is, beyond the courtroom walls. Jackey, though, was destined to become the first Aboriginal prisoner sentenced to transportation in the Supreme Court of New South Wales.

On 8 August 1834, Jackey appeared before Forbes and Dowling in the Supreme Court to answer a charge of wilfully murdering John Flynn ‘by wounding him with a spear at William’s River on the 3rd April last, of which wound he lingered until the 6th

following, and then died'.¹³⁴ Forbes asked Jackey by what jury he would be tried, to which the defendant answered 'black-fellows'.¹³⁵ As it had been established in *R v Binge Mhulto* 1828 that Aboriginal people were not considered competent jurymen, Jackey's request was declined. A uniformed soldier was shown to him to signify a military jury, but when he said 'no soldier' a civil jury was empanelled. Threlkeld was sworn in as the interpreter, while the Sydney-born, English educated lawyer George Nichols defended Jackey.¹³⁶

The Solicitor General put the case for the prosecution, during the course of which Nichols had the opportunity to cross-examine the witnesses. He learned that Rodwell, the leader of the punitive party and local constable, had not been issued with a warrant or any other legal instrument authorising him to arrest Aboriginal people residing at the camp near Mossman's farm. Nind, the surgeon who had attended the deceased, admitted that he was unable to say whether the inflammation that caused Flynn's death 'was occasioned from the wound itself, or caused from excessive travelling after it'.¹³⁷ Under cross-examination, Mackenzie confirmed that he had not issued a warrant to arrest any Aborigines. Nor had he heard any sworn testimony in relation to the alleged crimes they committed at Mossman's station. He observed that Jackey would not have 'the same means of understanding the nature of the proceedings brought against him, which a white man in his situation would have had'.¹³⁸ Jonathan Webster, a free man employed as a labourer at Mossman's station,

¹³⁴ *R v Jackey* 1834.

¹³⁵ *ibid.*

¹³⁶ *ibid.*; G. P. Walsh. 'Nichols, George Robert (1809 - 1857)', *Australian Dictionary of Biography*, Volume 5, Melbourne University Press, Melbourne, 1974, pp. 335-36.

¹³⁷ *R v Jackey* 1834.

¹³⁸ *ibid.*

told the court that he thought it possible that the deceased Flynn had been mistaken in his identification of Jackey as the man who had speared him. Webster claimed to have seen two men with raised spears, one of whom was the prisoner, but he was unclear about which one wounded Flynn.¹³⁹

Opening the case for the defence, Nichols told the court that it was ‘manifestly a mere mockery to call upon the prisoner to make his defence before persons by whom he could not be understood’.¹⁴⁰ The lawyer requested the court’s leave to address the jury on Jackey’s behalf, a step that would have been a departure from British law as it stood at the time. Forbes refused to set such a precedent. Nichols then argued that Jackey was entitled to his acquittal in point of law. Aborigines were ‘the primary tenants of this soil’ who ‘subsisted in the woods by fishing and hunting’, Nichols argued, and it was illegal for anyone ‘to disturb them in the possession of these natural rights’.¹⁴¹ The attack by the settlers, said Nichols, was not covered by a warrant, and could only be considered as an act of open warfare and therefore any actions arising from the affray were not indictable under civil law. Forbes responded that a sufficient case existed to be put to the jury.¹⁴²

The Solicitor-General enquired about the absence of any witnesses for the defence. Nichols’ response was to show the court the impossibility of presenting anyone who might speak favourably on Jackey’s behalf. He demonstrated this through calling to the witness stand another Aboriginal man, Biraban *alias* Johnny McGill. Threlkeld told the court that Biraban believed in the existence of a divinity

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

only on the missionary's say so. He was therefore a pagan and, as with any other Aboriginal witnesses that Nichols might have called, Biraban was precluded from taking the required oath. It was for the same reason that Biraban was present in Court officially as an assistant to the sworn interpreter, Threlkeld. Biraban was unable to be sworn in as the interpreter, although this was the function that he served.¹⁴³ Threlkeld later recorded in his private papers that the answers Biraban supplied to the court showed that 'his thoughts had been employed' on the subjects of 'an Oath, Truth, God, and Divine Punishment' and that he was 'not answering as a mere parrot'.¹⁴⁴ Threlkeld was reluctant to baptise Biraban as he believed his conduct 'was to be deplored with regard to drunkenness', especially given that Biraban had been cautioned about the evils of intemperance.¹⁴⁵ It was therefore Threlkeld's judgments about Biraban's apparent taste for alcohol rather than a lack of understanding of the nature of a Divinity and future state that explained Biraban's unbaptised state.

Biraban was a very well known personality both within the walls of the colonial courtroom where he accompanied Threlkeld on many occasions, and beyond the courtroom walls. He was brought up in the military barracks in Sydney where he received instruction in the English language and the Anglo-Gaelic name Johnny

¹⁴³ *Sydney Gazette*, 12 August 1834, pp. 2-3. As Bruce Kercher pointed out, in a later case, *R v Wombarty* 1837, Justice Burton disallowed the arrangement whereby Threlkeld acted as sworn interpreter while Biraban did the actual translating. Threlkeld had no knowledge of Wombarty's language and Biraban had only sufficient to elicit a statement from the man that the four white people he had been charged with murdering had been killed by other Aboriginal men in retaliation for two of their kin being locked up in gaol for spearing cattle. Because of the lack of a colonist sufficiently conversant in Wombarty's language who could be sworn in as the interpreter, the prisoner was allowed to go free. See *R v Wombarty* 1837, *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/Cases1836-37/html/r_v_wombarty__1837.htm>

¹⁴⁴ Lancelot Threlkeld. '8th Report: The Annual Report of the Mission to the Aborigines Lake Macquarie, for MDCCCXXXVIII', in Gunson (ed). *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 148.

¹⁴⁵ *ibid.*, p. 149.

McGill. As a young man, Biraban accompanied Captain Allman to Port Macquarie when the latter was sent to establish a penal station there in 1821. He performed services as a constable and black tracker, prior to becoming Threlkeld's principal informant from the mid-1820s onwards. When the Quaker missionaries George Walker and James Backhouse toured New South Wales they made Biraban's acquaintance and Backhouse described him thus:

McGill was dressed in a red-striped shirt, not very clean, a pair of ragged trowsers, and an old hat. Suspended from his neck, by a brass chain, he had a half-moon-shaped, brass breastplate, with his native and his English name, and a declaration of his kingly dignity, engraven upon it; his nose and part of his cheeks were besmeared with ruddle, but he had few cuttings upon his flesh.¹⁴⁶

Biraban was awarded a breastplate by Governor Ralph Darling in 1830 at the annual meeting of the tribes at Parramatta. The inscription read 'Barabahn, or MacGil, Chief of the Tribe at Bartabah, on Lake Macquarie; a Reward for his assistance in reducing his Native Tongue to a written Language'.¹⁴⁷ When Biraban died on 14 April 1846, he was remembered for the role he played as an 'assistant interpreter' at the Supreme Court, and was described as 'a living witness against the assertion of the French Phrenologists, "that the blacks of this colony were physically incapable of instruction, from organic malformation."' ¹⁴⁸

After Biraban stepped down from the witness stand in Jackey's case, Forbes addressed the jury with some concluding remarks. He told them Jackey was to be treated the same as any other of His Majesty's subjects principally because 'the enjoyment and protection of life is as much the law of nature as the law of

¹⁴⁶ James Backhouse. *A Narrative of a Visit to the Australian Colonies*, Hamilton, Adams, London, 1843, p. 379.

¹⁴⁷ Troy. *King Plates*, pp. 29-30.

¹⁴⁸ *Sydney Morning Herald*, 1 May 1846, p. 3.

England'.¹⁴⁹ He extrapolated this point: 'If in a newly inhabited country, there be no municipal law, then the law of nature comes into operation; for if it were not so, the law of retaliation or self-defence would be acted upon'.¹⁵⁰ Forbes's argument was that it was as much for the protection of the black community as of the white that the protection of the law was equally afforded to Aborigines.

Because of the provocation apparent in armed men pursuing Aborigines, the Chief Justice instructed the jury to consider a verdict of manslaughter rather than wilful murder. Despite doubts raised during Nichols' cross-examination, the jury found Jackey guilty and he was sentenced to transportation from the colony for the term of his natural life. The *Sydney Gazette* reported that 'the unhappy creature seemed totally unconscious of what was passing while he was being sentenced to perpetual exile.'¹⁵¹ Jackey and four other male convicts were sent to Van Diemen's Land on 20 September 1834 on the *Currency Lass*.¹⁵² He was described in the convict records as being 5'4" tall with a black complexion. On 29 October 1834, a little over a month following Jackey's arrival in Van Diemen's Land, the colonial surgeon certified the man's death.¹⁵³ It is quite possible that Jackey's body was given over to the surgeons for dissection as much curiosity was attendant on Aboriginal cadavers at the time.¹⁵⁴

¹⁴⁹ R v Jackey 1834.

¹⁵⁰ *ibid.*

¹⁵¹ *Sydney Gazette*, 2 September 1834, p. 2.

¹⁵² 'A Return of Five Male Convicts Embarked on the *Currency Lass* for Van Diemen's Land', CON13/6, p. 303, AOT.

¹⁵³ 'Jackey', CON 31/26, p.16, AOT.

¹⁵⁴ As the Colonial Hospital in Hobart Town was not required to keep detailed records of dissections until later in the nineteenth century it is not possible to confirm whether this was indeed Jackey's ultimate fate.

Complex and multiple interwoven factors contributed to Jackey's death at the Colonial Hospital in Hobart Town, Van Diemen's Land. These included the devastating impact of his removal from family and country, the march to Newcastle Gaol, and his incarceration in Sydney Gaol. However, the most immediate cause of death was likely to have been the deep wound on Jackey's leg caused by his leg irons. As Sen pointed out, 'irons caused abrasions which quickly became festering sores, leading to amputations, general debilitation, and not infrequently, death'.¹⁵⁵ In Jackey's case, the irons in which his legs were enclosed *en route* from Newcastle to Sydney had bitten through to the ankle bone. It is difficult to imagine that conditions within Sydney Gaol were conducive to such a wound healing. The processes that led to Jackey's death commenced, however, with the intrusion of colonists and the resultant depopulation and displacement of Aboriginal people.

Seen by the newcomers at best as potential trading partners and at worst as naked savages to be used as bogeymen or bush constables with which to threaten the Newcastle convict population, Aboriginal people at the Hunter Valley frontier were pushed to the margins. Unknown numbers died from introduced diseases while others succumbed following episodes of frontier violence. Their fringe dwelling existence became even more pronounced after the advent of the Australian Agricultural Company. Although the Company never took up its full quota of one million acres, it extended its influence over substantial tracts of country in the region. While Dawson found it expedient to employ Aboriginal people on an *ad hoc* basis, those who were not engaged by the Company or by the private landowners who followed were forced to retire to the hills. Aboriginal people living on the fringes of the new white-owned

¹⁵⁵ Sen. *Disciplining Punishment*, p. 94.

farms and stations were useful to colonists as they often willingly performed menial tasks. Those who retreated to the hills sometimes formed alliances with bushrangers who, like some of the squatters, encouraged Aboriginal people to commit criminal acts as the latter were not allowed to testify in court and could not therefore incriminate the instigators.

The white newcomers saw themselves as the owners of the land they had taken over and put under the plough. Their rights in the land were predicated on the notion that Aboriginal people were savages who wandered over the land failing to cultivate it or to form attachments to specific tracts of country. In the emerging colonial society structured along class lines, Aboriginal people were more often than not situated outside of and beneath the class structure and denied social mobility. Racialised as Other, Aboriginal people embodied the antithesis of what it was to be white, Christian, and civilised. Colonial perceptions of Aboriginal people deployed in justification of expropriating Aboriginal land spilled over into the courtrooms. Viewed as pagans, Aboriginal defendants like Jackey were not allowed to testify or to have their cases heard in front of a jury of their peers. Disingenuously categorised as British subjects, a status that resulted in their being liable to be sentenced to transportation, Aboriginal men brought to trial in the colonial courtrooms were clearly at a disadvantage. Jackey was unfamiliar with the English language, customs, and laws, and his kin could not appear as witnesses. These disadvantages were naturalised within the courtroom through the deployment of the figures of the 'untutored savage' and 'pagan'. Until Aboriginal people were civilised, it was conjectured, they lacked the capacity to provide testimony or to serve as jurymen.

Perversely, despite such views about Aboriginal incapacity, in many cases Aboriginal men were considered fit to stand trial and to be held answerable if not under English laws then at least to the laws of nature. To avoid such trials taking on the appearance of a mockery of justice, the colonial judiciary appointed interpreters to translate for Aboriginal defendants. This sleight of hand nevertheless contained a farcical element as only those considered to be Christians could take the required oath to be sworn in as the official interpreter yet more often than not white interpreters relied on an Aboriginal assistant to do much of the translating work for them.

The particularities of Jackey's case – the doubts over the identity of the man who threw the fatal spear, the dubious nature of the claim that the wound itself caused Flynn's death rather than his subsequent behaviour and treatment, and the provocation inherent in a posse of armed men riding into an Aboriginal camp at dawn – were unable to be fully examined in a court that allowed only one side of the story to be heard. With the tellers of the tales all being drawn from the colonising population, as were the jurymen, it is hardly surprising that Jackey was found guilty of manslaughter. While Jackey was the first Aboriginal man sentenced to transportation in the Supreme Court of New South Wales, he was far from being the last for whom such a punishment would prove tantamount to a death sentence.

Chapter Three

‘Until They Be Trained Like Children’: The Coercive Instruction of *Monkey and Others*

On 25 October 1834 sixty Aboriginal men descended on the property of Alfred Jaques at Brisbane Water and surrounded the house.¹ Jaques and his convict servant promptly barricaded themselves inside. When three of the would-be intruders demanded food and tried to enter the house Jaques responded by opening a window and presenting a double-barrelled piece. He told his assigned convict servant, William Rust, to take an adze and guard the doorway. As the Aborigines coo’ed, more assembled to make a combined force of about one hundred and fifty men armed with stones and spears. One of the Aboriginal men called Hobby boasted to Rust that ‘black fellow was best fellow’ and that ‘Black fellow master now rob every body – white fellow eat bandicoots and black snakes now’.² As the house was battered and Rust speared, Jaques decided to flee. ‘By dint of hard running’, the men reached the neighbouring farm and took refuge.³ Jaques’ house was ransacked, adding to the property losses he had already sustained at Aboriginal hands during the preceding

¹ Governor Arthur Phillip explored the Brisbane Water district in 1788 and 1789 but owing to difficulties in access settlement by the British was delayed until 1823. Charles Swancott describes the area as being ‘bounded on the east and south by the Pacific Ocean and the Hawkesbury River, to a point in the vicinity of Wiseman’s Ferry. The northern boundary runs across country below Lake Macquarie and the village of Wyee, to the Judge Dowling Range. This forms part of the western boundary with the old Great Northern Road running from Wiseman’s Ferry to Wollombi and Cessnock’. See Charles Swancott. *The Brisbane Water Story Parts 1 to 4*, Brisbane Water Historical Society, Booker Bay, 1953-61, Part 1, p. 13.

² See Justice Burton’s case notes for the trial of Hobby and Maitland Paddy held at Sydney in the Supreme Court of New South Wales on 5 August 1835. Hobby was found guilty of ‘robbery in the dwelling house of Alfred Hill Jaques’ and sentenced to ‘death recorded’, while Maitland Paddy was found not guilty. Justice Burton. *Notes of Criminal Cases*, 2/2420, Volume 19, pp. 4, 6, SRNSW.

³ *R v Long Dick, Jack Jones, Abraham, and Gibber Paddy 1835, 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/cases1835-36/html/r_v_long_dick__1835.htm>

nine months. In all, he estimated his losses at about £100.⁴ Jaques and his brother went to Sydney to apply to the Governor to send a police force to protect them from the 'native blacks' as they were reportedly 'terrified by the atrocities of those savages'.⁵ Some of the Aboriginal men had warned Jaques that they would return when the wheat was ripe and would spear the colonists. Perhaps as a gesture of defiance, in the interim they took the landlords' clothes and watches and wore the articles themselves. In an observation that stripped the Aboriginal contingent of any agency in organising the attacks on his and surrounding properties, Jaques observed that he thought they were encouraged to action either by 'prisoners of the crown' or bushrangers.⁶ While Aborigines and bushrangers reportedly worked together on some occasions, Jaques provided no evidence to support his viewpoint. Nor did he disclose any reasons as to why either convicts or bushrangers might have had an interest in inciting Aboriginal men to attack his property.

The attack on Jaques' farm was not an isolated incident. The same year, the Reverend Lancelot Threlkeld at Lake Macquarie reported that a party of around thirty Aboriginal men, 'the same party from Brisbane Water', attacked some of the Aborigines attached to his mission and 'plundered our huts, threw their spears, which nearly wounded two of our servants and fell in the yard where my wife and children were standing'.⁷ Provisions, clothing, and blankets were taken from the mission huts.

⁴ *The Australian*, 31 October 1834, p. 2.

⁵ *ibid.*

⁶ *R v Monkey and Others 1835, 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/cases1835-36/html/r_v_monkey__1835.htm >

⁷ Lancelot Threlkeld. 'Fourth Annual Report of the Aboriginal Mission at Lake Macquarie, New South Wales', 7 November 1834, *Australian Reminiscences & Papers of L E Threlkeld: Missionary to the Aborigines 1824-1859*, Niel Gunson (ed). Australian Institute of Aboriginal Studies, Canberra, 1974, p. 120.

Threlkeld observed that some of the Aboriginal men who stripped the huts of their contents ‘danced in the men’s clothes in defiance,’ signalling that what might be termed a political motivation and sensibility informed their actions.⁸ The missionary petitioned the Colonial Secretary Alexander McLeay to send mounted police to the district to dissuade Aborigines in the area from committing what he termed further depredations. In his letter to McLeay of 26 May 1834, he described the men who were committing ‘depredations’ throughout the district as ‘belonging to Newcastle, The Swamps, and these Parts’.⁹

In November 1834, the month of Threlkeld’s report, several groups of Aboriginal men including Mickie Mickie, Charley Muscle, and Toby approached John Lynch’s farm at Sugarloaf Creek west of Woy Woy in the Brisbane Water district. The Lynchs and their servants were alarmed to realise no women or children were accompanying the men. As the house and its occupants came under attack, Mickie Mickie told Lynch’s wife that she ‘must go with them and become his gin’.¹⁰ Eleven of the men armed with a fowling piece took the convict servant Margaret Hanshall about three miles away from the house ‘into the bush, where they kept her some hours, and all, severally perpetrated the crime of Rape’.¹¹ Lynch later told the Supreme Court that one of the Aborigines said that he wanted to take Lynch’s child ‘to do what he liked with’ and said that the man ‘also laid hold of my wife, and told

⁸ Threlkeld to F A Heley, 26 November 1834, *Australian Reminiscences & Papers of L E Threlkeld*, p. 255.

⁹ Threlkeld to MacLeay, 26 May 1834, *Australian Reminiscences & Papers of L E Threlkeld*, p. 255.
¹⁰ *Sydney Monitor*, 14 February 1835, p. 2.

¹¹ *R v Mickey and Muscle 1835, 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/cases1835-36/html/r_v_mickey_and_muscle__1835.htm>

me he wanted to take her into the bush to ravish her'.¹² Armed with a scythe, the settler attacked three of the Aboriginal intruders including a man who was carrying off Lynch's child. Lynch 'split his face and breast open', at which the man dropped the child and 'ran from the house screaming'.¹³ Lynch told the court he later heard one of the Aboriginal men died from wounds received during the raid.¹⁴

The Aboriginal protagonists in these and other Brisbane Water 'depredations' were classed as criminals. Those who were recognised and later captured were put on trial in the Supreme Court of New South Wales. Between February and August 1835, eight separate trials took place in relation to the attack on Jaques' dwelling house and his convict servant Rust, and on the property and persons of other settlers and convicts residing at or travelling through Brisbane Water. The various trials involved eighteen Aboriginal defendants, men known as Long Dick, Jack Jones, Tom Jones, Abraham, Gibber Paddy, Monkey, Little Freeman, Currinbong Jemmy, Major, Whip-em-up, Lego'me, Charley Muscle, Little Dick, Mickey, Toby, Old John, Hobby, and Maitland Paddy. These men represented just over ten per cent of the cohort allegedly involved in committing the offences. The further division of these men into smaller cohorts for the purposes of trial (grouped according to the charges brought against them) served to diminish further the officially recognised scale of conflict in which they were involved. The spatial and temporal separation affected through instigating criminal proceedings against them effectively transmuted their collaborative acts of resistance into a series of smaller scale criminal activities.

¹² *ibid.*

¹³ *Sydney Monitor*, 14 February 1835, p. 2.

¹⁴ *R v Mickey and Muscle* 1835. Lynch did not face any court proceedings in relation to the death of the Aboriginal man that he had attacked with his scythe.

This chapter commences with the premise that the collaboration apparent in the 1834 Aboriginal raids in the Brisbane Water district challenges one of the orthodoxies of Australian historiography. It then evaluates the strategies of intervention pursued by the colonial administration in relation to the outbreak of hostilities in the area. Several of the resultant court cases are discussed, as is the public debate about ‘the Aboriginal problem’ that intensified in the aftermath of what I have termed the Brisbane Water trials. The idea of exiling Aboriginal people to offshore islands was hardly by then a novel approach, but was one that took on a new sense of urgency and expediency during the 1830s and 1840s. Such a course of action was followed in relation to a cohort of Aboriginal prisoners sentenced to transportation during the Brisbane Water trials. Held captive within the convict system on Goat Island at Port Jackson, these men were subjected to a small-scale colonial experiment in coercive instruction similar to the regime Van Diemen’s Land Aboriginal people experienced at the Aboriginal Establishment on Flinders Island in Bass Strait from 1833 to 1847. It will be argued that those Aboriginal men who survived captivity on Goat Island ultimately subverted the power the state tried to exercise over their lives. The chapter concludes with a synopsis of what transpired following the release of the surviving captives and a précis of the significance of these outcomes.

As recently as 2002, John Connor, in his comprehensive military history of the Australian frontier, reinscribed the generally accepted view within Australian historiography that ‘the non-hierarchical organisation of Aboriginal society meant

that they were unable to unite against the invaders, and each Aboriginal group fought the British on its own.’¹⁵ Empirical evidence from the court cases that arose following Aboriginal attacks on Brisbane Water colonists during 1834 contradicts this view. The men that planned and carried out the attacks were not all members of the same group. Rather, they were from several ‘tribes’ that joined together for the express purpose of robbing the settlers.¹⁶ Some contemporary commentators like Threlkeld claimed that bushrangers were encouraging Aborigines in their ‘predatory expeditions’.¹⁷ Bushrangers had, according to Threlkeld, received some of the goods taken from the settlers by Aborigines and were comfortable in the knowledge that any Aboriginal evidence against them would be inadmissible in colonial law courts. Such an assertion, though, is just as likely to indicate Aboriginal initiative in establishing trading relationships with bushrangers as it is to imply that bushrangers organised Aborigines into raiding parties that were prepared to work under their instructions.

In other parts of Australia, inter-tribal collaboration against the settler population was also reported to have occurred. At the time of British settlement Aboriginal groups living in and around the site of present day Perth were reputedly at enmity with one another. However, during April 1833 two ‘tribes’, one under Midgegooroo and his son Yagan and the other led by Munday, united to ambush a party of settlers transporting provisions to Fremantle. The attack was one of a series

¹⁵ John Connor. *The Australian Frontier Wars, 1788-1838*, University of New South Wales Press, Sydney, 2002, p. 16.

¹⁶ R v Monkey and Others 1835.

¹⁷ Threlkeld. Fourth Annual Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 120.

in the area at the time during which both Aboriginal people and colonists lost their lives.¹⁸

Classic Aboriginal warfare was embedded in Aboriginal social structures and it therefore follows that it exhibited different features and priorities from European warfare. It involved small groups who were involved in formal battles, ritual trials, raids for women, and revenge attacks, rather than territorial battles of the type that took place in Western Europe.¹⁹ Inter-tribal collaboration in the Brisbane Water region demonstrates that Aboriginal social structures in the area underwent a process of adaptation following the colonial intrusion in the 1820s. Rather than ‘assert[ing] the superiority of one’s groups over neighbouring groups’ in the traditional manner described by Connor, neighbouring Aboriginal men united to assert their superiority over the settlers as indicated by Hobby’s afore-mentioned remarks to Rust.²⁰ This is also demonstrated through the symbolic inversion of colonial power relations evident in the confiscation of the Jaques brothers’ watches and clothing and their subsequent use as theatrical props.²¹ This regional unification represents a significant departure from the tactics of classic Aboriginal warfare, yet cultural continuity is also evident in facets of the campaigns such as the arsenal of weaponry deployed.

By 1834 there were about 315 colonists in the Brisbane Water district. The vast majority of these were male, with 144 of the 271 men being assigned convict servants. There were 44 females amongst the colonising population, and 8 of these

¹⁸ Tom Austen. *A Cry in the Wind: Conflict in Western Australia 1829-1929*, Darlington Publishing Group, Darlington, 1998, pp. 5, 12.

¹⁹ Connor. *The Australian Frontier Wars*, pp. 2-3.

²⁰ R v Monkey and Others 1835; Connor. *The Australian Frontier Wars*, p. 2.

²¹ R v Monkey and Others 1835.

were convict servants. Law and order in the district was upheld by a local constabulary comprising three men with an armoury of two muskets, two cutdown muskets, four pistols, one sword and scabbard, two bayonets and scabbards, 40 musket cartridges and 40 pistol cartridges.²² Following the Aboriginal attacks, resident settlers such as the Jaques brothers and absentee landlords like Sydney schoolmaster William Cape lobbied the Government to send in the mounted police and the military to strengthen their protection.²³ Connor suggests such responses provide evidence of the effectiveness of Aboriginal campaigns as they demonstrate that fighting had risen above a level with which local colonists could cope unaided.²⁴ Successive colonial governments were demonstrably willing to deploy the military against Aboriginal people, and Governor Richard Bourke followed suit when he deployed a 'liberal force of armed men' to the troubled district.²⁵ A description of the violence that ensued was published in the *Town and Country Journal* forty-three years later:

In the middle of the night, camp after camp was surprised and the occupants, men, women and children, shot down like native dogs. The poor friendly blacks fared no better than the others; and the whole affair was a horrible satire upon our civilization.²⁶

²² Swancott. *The Brisbane Water Story*, Part 1, pp. 22-3.

²³ *The Australian*, 31 October 1834, p. 2; Cape to McLeay, 28 October 1834, 34/7867, SRNSW.

²⁴ Connor. *The Australian Frontier Wars*, p. xxi.

²⁵ 'A Dreadful Sufferer.' 'The Blacks', *Sydney Herald*, 27 November 1834, p. 2. See also a reference to a military force being in the Brisbane Water District in a letter to the Colonial Secretary dated 7 November 1833 written from a correspondent in Maitland. The presence of the military caused some of the Brisbane Water men to go over to Wollombi near Maitland where they were said to be engaged in 'outrages' against colonists in the area. A reward of £10 each was posted for the capture of 'The Brisbane Water Chief', Joe the Marine, Jemmy Jackass, Charcoal, Charcoal's Brother, Bilo, Mickey, and Young Price. A convict absconder named John Newton was thought to be with the Aboriginal cohort and was also sought by the colonial authorities. See 34/8237 4/2251.2, SRNSW.

²⁶ 'Arcadia at Our Gates.' *Town and Country Journal*, 6 March 1875, pp. 379-80. It is interesting to note the persistence into the 1870s of the distinction between 'friendly blacks' and 'the others', or those considered hostile to the colonists.

While the activities of the military may have been looked back on shamefully by some in later years, at the time disgruntled colonists complained about the purported location of the troops and bickered over whether they had been deployed to the areas of greatest need. Arguments also ensued as to the actual numbers involved in committing the depredations. 'A Dreadful Sufferer' wrote to the *Sydney Herald* that an Aboriginal force had gathered from the Hunter River, Wollombi, Newcastle, and Port Stephens to supplement 'the straggling few belonging to Brisbane Water'.²⁷ They were, he stated, engaged in what he termed 'warfare'.²⁸ James Smith of Blue Gum Flats, on the basis of having been himself visited by 'the whole body of them', informed the *Sydney Herald* that 'A Dreadful Sufferer' had magnified the number involved.²⁹ Smith also protested that the criticism 'A Dreadful Sufferer' levelled against Lieutenant Owen (the officer in charge of the troops) and the local magistrates assisting him was uncalled for given:

the long, fatiguing, and almost constant marchings through this rough district with their troops, which they went through with as much alacrity and cheerfulness as they would a morning's parade, in pursuit of the greatly abused and injured Aborigines.³⁰

The large Aboriginal contingent at Brisbane Water was well aware of the movements of the soldiers as they marched about the district. Despite the presence of the military and mounted police, Aboriginal depredations continued and became increasingly audacious. On one occasion, they would not let a small contingent of soldiers land on the opposite bank of a river they were attempting to cross despite the latter being

²⁷ 'A Dreadful Sufferer.' 'The Blacks', *Sydney Herald*, 27 November 1834, p. 2.

²⁸ *ibid.*

²⁹ J. Smith. 'The Blacks of Brisbane Water', *Sydney Herald*, 25 December 1834, p. 2.

³⁰ *ibid.*

attended by a police guard.³¹ A correspondent reported that ‘outrages are actually committed in the face of the troops’.³² The *Sydney Herald* printed extracts from correspondence in which the unnamed writer claimed Aboriginal men went to Mr Bloodsworth’s farm only one hour after the departure of the troops sent to guard it. The contingent ransacked the house and speared the farmer’s stock. The author of the letter described himself as being ‘fatigued both in body and mind’ but was ‘off again at daybreak’ together with Owen and the magistrate Warner as news of the whereabouts of another Aboriginal camp had been received.³³

Meanwhile in Sydney public debate continued over what course of action might best be pursued to curb the actions taken against colonists and their property by the Aboriginal contingent assembled in the Brisbane Water district. This extended to discussions about strategies that might resolve what colonists saw as ‘the Aboriginal problem’ generally. One proposal was to send Aboriginal people to an offshore island, in a similar fashion to Bull Dog, Musquito, and Duall. In 1826 several magistrates ‘up the river’ from the missionary Threlkeld thought to persuade the Governor to send an Aboriginal man named ‘Billy the black’ to Norfolk Island.³⁴ According to Threlkeld, the man had already spent a considerable period of time in gaol.³⁵ In 1828 Binge Mhulto and Willimore were exiled to an unspecified distant part of the colony. In 1834, the year preceding the Brisbane Water trials, Jackey was

³¹ Cape to McLeay, 28 October 1834, 34/7867, SRNSW.

³² ‘Extracts’, *Sydney Herald*, 27 November 1834, p. 2. The unnamed correspondent may have been Donnison, a local Justice of the Peace who provided assistance to Lieutenant Owen. The *Sydney Monitor* reported an earlier spate of attacks that involved Bloodsworth’s and Hely’s farms. In its brief account published on 30 August 1834, it was stated that a party of mounted police sent to pursue the ‘native blacks’ had since returned.

³³ *ibid.*

³⁴ Threlkeld to Bannister, 16 August 1826, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 93.

³⁵ *ibid.*

sentenced to transportation for life and sent to Van Diemen's Land following his trial in the Supreme Court of New South Wales.

Proposals mooted following the Brisbane Water trials extended the concept of exile beyond the realms of exemplary punishment through suggesting that the Aboriginal population of New South Wales in its entirety be sent to an offshore island. Interest in this approach was probably triggered by news of the removal of most of the remaining Aboriginal population of Van Diemen's Land to Flinders Island and the concomitant relief experienced by the Vandemonian colonists.³⁶ On 31 October 1834 Cape, who frequently complained of insufficient action on the part of the colonial administration to curb Aboriginal attacks on colonists, informed the Undersecretary to the Colonial Office that:

I did hear but I can hardly believe it, that Jonathon Warner Esq. [a magistrate] has given orders for Constables and the men sent after the ignorant Blacks to shoot them, this would be going to the other extreme. I hope they may all be moved to some distant land as in the sister colony.³⁷

Donald Meinig went as far as to describe the strategy of moving 'weaker "tribal" peoples' whose lands are 'coveted by the stronger expanding people' to small reserves of land as 'common imperial strategy'.³⁸ Such a strategy entailed making the tribal peoples dependent on the imperial power for essential supplies and put such 'captive peoples ... under enormous pressures to change themselves into a people

³⁶ See, for example, N J B (Brian) Plomley. *Weep in Silence: A History of the Flinders Island Aboriginal Settlement*, Blubber Head Press, Hobart, 1987; Lloyd Robson. *A History of Tasmania: Volume One*, Oxford University Press, Melbourne, 1992; Henry Reynolds. *Fate of a Free People*, Penguin, Ringwood, 1995; Ian McFarlane. *Aboriginal Society in North West Tasmania: Dispossession and Genocide*, PhD Thesis, University of Tasmania, Tasmania, 2002; Lyndall Ryan. *The Aboriginal Tasmanians*, Queensland University Press, St Lucia, 1981.

³⁷ Cape to Harrington, 31 October 1834, 34/7958, SRNSW.

³⁸ Donald Meinig. 'Territorial Strategies Applied to Captive Peoples', *Ideology and Landscape in Historical Perspective: Essays on the Meanings of Some Places in the Past*, Alan Baker and Gideon Biger (eds). Cambridge University Press, Cambridge, 1992, pp. 131-32.

more closely conforming to the dominant patterns of the conquering power'.³⁹

Elements of coercion as well as expediency in terms of relieving the colonising population of the indigenous presence are evident in the views of the *Sydney Herald* correspondent 'A Dreadful Sufferer'. This anonymous letter writer shared Cape's views. Indeed, from the style and tone of his correspondence, it seems likely that the correspondent was none other than William Cape himself. 'A Dreadful Sufferer' claimed to have:

already informed His Excellency the Governor, that our districts, before stated, are nearly in the same troubled state as that of the Sister Colony in 1829 and 1830, as regards the blacks; that in order to save the shedding of blood in warfare so precarious ... it would be a most humane act to remove them from the above most injured districts to some remote island or distant land ... To effect this good purpose, I would suggest to His Excellency, that the annual grant, upwards of £1000 per annum, said to be for the tuition and better management of the Aborigines ... [be appropriated] for the present year, to the final removal of the blacks to some peaceable island.⁴⁰

Despite the extremely high death toll amongst Aboriginal people at Wybalenna – by 1842 more than one hundred and fifty people of the two hundred exiled to Flinders Island had died – the popularity of the idea of exiling mainland Aboriginal people to offshore islands persisted well into the later decades of the nineteenth century.⁴¹

In 1841, the *Geelong Advertiser* advocated exiling Aborigines to islands for what was termed 'training':

Every day confirms us in the opinion that the natives ought to be removed from the everyday scenes of civilised life *until they be trained like children*, by constraint and persuasion, to be able to perform their duties in society; and the most effectual means of

³⁹ *ibid.*, p. 132.

⁴⁰ 'A Dreadful Sufferer', 'The Blacks', *Sydney Herald*, 27 November 1834, p. 2.

⁴¹ John Stokes. *Discoveries in Australia with an Account of the Coasts and Rivers Explored and Surveyed During the Voyage of HMS Beagle in the Years 1837, 38, 39, 40, 41, 42, 43, T and W* Boone, London, 1846, p. 283. See also Chapter Six of this thesis.

accomplishing this, would be to form a settlement on one of the Australian islands, to which as many as possible of the blacks ought to be removed.⁴²

The notion that one offshore island could serve such a purpose indicates that more than half a century after the first fleet landed at Botany Bay at least some colonists remained ignorant of the actual numbers of Aboriginal inhabitants populating the land they were in the process of expropriating.

Despite some popular sentiment that Aborigines *in toto* would be better off shipped offshore, or more precisely perhaps that the colonists would be better off if the Aboriginal population were sent into exile, in 1834 the colonial administration had a sufficiently difficult time apprehending the dozen or so men identified as ringleaders in the depredations against the Brisbane Water settlers. Financial incentives were offered to encourage colonists to risk pursuing and capturing the wanted Aboriginal men. In November and December 1834, the Government gazetted a reward of £10 per Aboriginal 'ringleader' in the 'various Robberies and other Outrages' committed in the Brisbane Water district.⁴³ In ever-lengthening lists, the wanted men were identified by their English names with the December advertisement including annotations such as 'Brothers, and very bad characters' and 'always carries a gun'.⁴⁴ A man named 'Old John' was said to be a 'Bad character, and father to Abraham and Paddy', two younger men also wanted by the colonial authorities.⁴⁵

The character assessments and kin relationships proffered by the Colonial Secretary,

⁴² *Geelong Advertiser*, 23 January 1841, pp. 2-3. (Emphasis in the original.)

⁴³ *New South Wales Government Gazette*, 19 November 1834, p. 811; *New South Wales Government Gazette*, 26 November 1834, p. 825; *New South Wales Government Gazette*, 17 December 1834, p. 881.

⁴⁴ *New South Wales Government Gazette*, 17 December 1834, p. 881.

⁴⁵ *ibid.* It is not clear whether the Colonial Secretary was reckoning these relationships in accordance with Aboriginal kinship systems or had deduced them in accordance with Western notions of biological descent.

Alexander McLeay, demonstrate a degree of familiarity between the colonists and these Aboriginal men. The absentee landlord Cape, whose son farmed at Brisbane Water and who had an overseer looking after his own farming interests in the district, claimed that ‘the ringleaders ... are all men who have lived for years among the white people, and speak English fluently’.⁴⁶ Hobby and his brothers who were known as Molly Morgan and Little Jack, also ‘very bad characters’, were amongst the alleged offenders.⁴⁷ Hobby was certainly known to some of the settlers and as recently as the start of the year he, like Duall and Jackey, had been thought of as a ‘friendly native’. In January 1834, Sarah Mathew accompanied her surveyor husband to the Brisbane Water district where, according to her diary entry for Thursday 23 January, ‘the overseer at Wyoming, sent one of our Black friends, Mr “Hobby,” with the horse for me; and the waggon for our baggage speedily followed’.⁴⁸ A year later, the visiting magistrate Jonathon Warner described Hobby as ‘quite a young man ... [he is] one of the most adventurous and has been an active leader amongst the blacks in the robberies in this district’.⁴⁹ According to Warner, Hobby’s brothers were also involved in the Brisbane Water robberies, but these men ‘owing to their knowledge and habits of the white people, together with their activities and general manoeuvres, have not yet been captured’.⁵⁰ The police constables were at a distinct disadvantage in the bush where men such as Morgan and Little Jack could utilise their superior

⁴⁶ Cape to MacLeay, 29 October 1834, 34/7915, SRNSW.

⁴⁷ *New South Wales Government Gazette*, 17 December 1834, p. 881.

⁴⁸ Olive Havard. ‘Mrs. Felton Mathew’s Journal’ in *Royal Australian Historical Society Journal*, Volume 29, Part 3, 1943, p. 189.

⁴⁹ Swancott. *The Brisbane Water Story*, Part 1, p. 23.

⁵⁰ *ibid.*

local knowledge and skills to evade capture by the whites with whose practices they had become familiar through observation and experience.⁵¹

The possibility of receiving a substantial reward for capturing those on the wanted list encouraged some amongst the settler population to go to great lengths in order to secure a captive. Under the guise of distributing blankets amongst Aboriginal people at Threlkeld's mission station, the overseer William Clarke captured the wanted man Emu when one of Threlkeld's assigned servants alerted him to Emu's identity through the prearranged signal of a handshake.⁵² As Emu fled, Clarke shot and wounded him. Clarke tied Emu up and placed him in a boat, then forced the prisoner to row himself and his captor to Newcastle where the Aboriginal man was put in the Gaol.⁵³ A dispute erupted over the distribution of the reward money as Clarke, who had allegedly promised Threlkeld's servant £5 for tipping him off as to Emu's identity, kept the full £10 reward.⁵⁴ Threlkeld found the entire episode very vexing. He visited Emu in Newcastle Gaol and asked that the man's irons be removed. The missionary also arranged for Emu to be admitted into the Gaol hospital to have his wounds attended. Threlkeld certainly did not approve of Clarke's covert operation to capture Emu so he dismissed the man from his service.⁵⁵

On 15 January 1835, Warner wrote to the Colonial Secretary about a police operation carried out nine days earlier to capture several of the sought after

⁵¹ *ibid.*, pp. 22-4; Aboriginal names identified in Blair and Fenton. 'Darkinjung: Our People NSW Supreme Court 1820s - 1840s', p. 135.

⁵² Threlkeld to MacLeay, 20 June 1835, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 256.

⁵³ Threlkeld to MacLeay, 22 May 1835, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 121.

⁵⁴ Threlkeld to MacLeay, 20 June 1835, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 256.

⁵⁵ Threlkeld to MacLeay, 22 May 1835, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 121.

Aboriginal ringleaders. A constable and three colonists concealed themselves inside a hut that some of the wanted Aboriginal men were known to frequent. When six of the men entered the hut a scuffle ensued and Jack Jones was shot in the neck. During the affray, three Aborigines escaped through a hole in the slabs. The wounded Jones together with Jago and Nimbo were conveyed to the nearest lockup at Brisbane Water.⁵⁶

Drawing on Frantz Fanon's metaphor, Jeannine Purdy described the lockup or police station as 'crucial to the maintenance of the divided world of a colonial regime'.⁵⁷ She argues that the lockup is a site of 'legal violence', one of the instruments of the state through which the colonised are kept in what is perceived to be their place.⁵⁸ At times, Aboriginal prisoners were able to subvert the power of the state imbued in the colonial lockup through escaping from captivity. Jones, Jago, and Nimbo took this course of action on the day of their ambush and arrest. Jago and Nimbo, who were handcuffed together, worked in unison to seize the constable William Smith as he brought water to their cell. Jones struck the constable a blow to the head. Jago and Nimbo struggled with Smith for about twenty minutes, allowing Jones to make his escape, although the wounded man was eventually recaptured and later put on trial.⁵⁹ In his letter to the Colonial Secretary, Warner sought advice about the manner in which the men who had arrested 'the blacks' were to be rewarded in light of the prisoners' subsequent escape. He bemoaned the fact that leg irons were

⁵⁶ Swancott. *The Brisbane Water Story*, Part 1, p. 24; Aboriginal names identified in Blair and Fenton. 'Darkinjung: Our People NSW Supreme Court 1820s - 1840s', p. 135.

⁵⁷ Jeannine Purdy. 'Postcolonialism: The Emperor's New Clothes?', *Social Legal Studies*, Volume 5, Number 3, 1996, p. 405.

⁵⁸ *ibid.*

⁵⁹ *R v Long Dick, Jack Jones, Abraham, and Gibber Paddy*, 1835.

unavailable as they were already being used on three Aboriginal prisoners *en route* to Sydney. Aboriginal prisoners, according to Warner, 'are very determined and consequently require more caution to be looked after than white prisoners'.⁶⁰ He could have added that Aboriginal people were not used to incarceration as a form of punishment; they had not been socialised into accepting it as a valid means of maintaining social control.

Gradually some of the Aboriginal men taken captive in relation to the events in the Brisbane Water district began to arrive in Sydney where they were lodged in gaol to await their various trials.⁶¹ Such arrivals were sometimes noted in one or other of the local newspapers. The following report that appeared in the 4 April 1835 edition of the *Sydney Monitor* probably referred to several of the men charged with robbing Jaques' house, as four were tried for this offence before the Supreme Court in April 1835:

On Thursday, two native blacks arrived in Sydney, ironed, in charge of a constable, committed to take their trials for several robberies perpetrated at Brisbane Water; their heads were not cropped, and both were nearly in a state of nudity.⁶²

States of undress of Aboriginal people inevitably gave rise to comment and often opprobrium in the colonial press. As Clare Anderson pointed out in the context of colonial India, when faced with a society that differed from their own the British

⁶⁰ Swancott. *The Brisbane Water Story*, Part 1, pp. 24-5.

⁶¹ Some details regarding the capture of some of the prisoners and their delivery to Sydney Gaol are recorded in Browne to the Colonial Secretary, 16 February 1835, 35/1304 4/2289.4, SRNSW; and Wilson to the Colonial Secretary, 24 January 1835, 35/573 4/2293.4, SRNSW.

⁶² *Sydney Monitor*, 4 April 1835, p. 2.

employed ‘various mechanisms’ in their attempts to understand the ‘Other’.⁶³

Anderson stated that the clothing worn by individuals and groups was one such mechanism. Dress, or conversely a state of undress, was one of the markers of visible difference that distinguished the colonial subject from the European population. It became a ‘means through which racialized social boundaries were established’ and policed.⁶⁴

While the Aboriginal prisoners’ hair was not cut while they were held in the local lockup, it was cropped as a matter of course once they were incarcerated in Sydney Gaol. This generated problems for the witnesses who were required to swear as to the identity of the prisoners when they were present in court. When nine of the men were put on trial on in the Supreme Court before Burton and a military jury on 11 February 1835 charged with ‘burglary in the dwelling-house of Mr. Alfred Hill Jaques’, confusion abounded.⁶⁵ Threlkeld, who was present as the officially sworn interpreter, said that the men ‘looked alike and had changed since the time of these events’.⁶⁶ Further uncertainty surrounded the men’s names for ‘they were sometimes called by the place where they were born, and sometimes by the place where they reside’.⁶⁷ Problems in correctly identifying the alleged offenders led to Little Dick, Charley Muscle, Little Freeman, Lego’me, and Major being found not guilty although they were remanded in custody to face further charges.⁶⁸ Whip-em-up, Monkey, Tom Jones, and Currinbong Jemmy were convicted and subsequently appeared before

⁶³ Clare Anderson. ‘Fashioning Identities: Convict Dress in Colonial South and Southeast Asia’, *History Workshop Journal*, Issue 52, 2001, pp. 153-54.

⁶⁴ Anderson. ‘Fashioning Identities: Convict Dress in Colonial South and Southeast Asia’, pp. 153-54.

⁶⁵ R v Monkey and Others 1835.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ Justice Burton. *Notes of Criminal Cases*, 2/2418, Volume 17, p. 35, SRNSW.

Burton for sentencing.⁶⁹ The justice told them that he ‘had heard of many atrocities committed on the natives by the whites’ although his enquiries into the matter had not produced any evidence of the defendants having been given any such provocation by the settlers.⁷⁰ While the crime of which they had been convicted was ‘according to the English laws ... punishable with death’, Burton found that there was room for mercy.⁷¹ He therefore passed a sentence upon them of ‘death recorded’ at which, according to a report in the *Sydney Monitor*, ‘the prisoners all expressed their tears of death’.⁷² In light of their tearful response, it is not apparent whether the Aboriginal men thus sentenced comprehended the nature of their punishment. The sentence of ‘death recorded’ was a formality and prisoners under this sentence were not condemned to be hanged. Bruce Kercher explains it as:

a formal sentence of death without an intention that the sentence would be carried out ... If the judge thought that the circumstances made the offender fit for the exercise of Royal mercy, then instead of sentencing the offender to death, he could order that judgment of death be recorded. The effect was the same as if judgment of death had been ordered, and the offender reprieved.⁷³

Given that sentences of ‘death recorded’ were usually commuted into transportation for life, the prisoners had sufficient reason to shed tears anyway. The *Australian* also reported the trial, concurring with the *Sydney Monitor* that the Aboriginal defendants

⁶⁹ *ibid.*

⁷⁰ *R v Monkey and Others* 1835.

⁷¹ *ibid.*

⁷² *ibid.*; *Sydney Monitor*, 14 February 1835, p. 2; Having been recaptured, Jack Jones was forwarded to Sydney Gaol and put on trial before Justice Dowling in the Supreme Court of New South Wales. He also faced a charge of committing robbery at the dwelling house of Alfred Jaques. The jury retired for five minutes before finding him and his co-defendants Long Dick, Abraham, and Gibber Paddy guilty. They were sentenced to ‘death recorded’. See *R v Long Dick, Jack Jones, Abraham, and Gibber Paddy* 1835.

⁷³ *R v Monkey and Others* 1835.

presented ‘a melancholy sight’.⁷⁴ Its report of the sentencing of these men encapsulates the moral dilemma faced by the colonists:

it could not but occur to us, that, the prisoners being as ignorant as beasts, it was almost a mockery to bring them to the unintelligible formality of a trial ... The observations made by His Honor in passing sentence were not intended, of course, to have any influence upon either the prisoners or their countrymen; on the contrary, His Honor expressed a hope that it would be generally received amongst them that the five prisoners had been put to death – thus preserving one great end of punishment, and that not at the expense of an outrage upon humanity.⁷⁵

The Quaker missionary James Backhouse who was travelling through New South Wales with George Washington Walker at the time of the court hearings bemoaned the fact that ‘one of the barbarous, white evidences, stated in open court, that he considered the Blacks as no more than the beasts of the field’.⁷⁶ Backhouse elaborated that this ‘sentiment [is] too prevalent among many of the Whites of the Colony’.⁷⁷ While the presiding judge may have found such a view abhorrent, the *Australian* found no difficulties in promulgating what was clearly a widely accepted way of thinking about Aborigines. It was, however, difficult to reconcile such a view with the practice of putting Aborigines on trial and the outcomes that often resulted.

The legal dilemma involved in bringing Aboriginal people before the court to answer charges deriving from English laws had been resolved in relation to the commission of offences against the white inhabitants of the colony by the late 1820s. In *R v Binge Mhulto* 1828, the Attorney General and Dowling had agreed that ‘the Aboriginal inhabitants of the Colony are most certainly amenable to all the

⁷⁴ *Australian*, 13 February 1835, p. 2.

⁷⁵ *ibid.*

⁷⁶ James Backhouse. *A Narrative of a Visit to the Australian Colonies*, Hamilton, Adams, London, 1843, p. 387.

⁷⁷ *ibid.*

consequences of punishment which the English law affixes'.⁷⁸ Dowling, like others after him, argued that Aborigines whom he characterised as 'miserable outcasts' were entitled to the protection of British law but were also obliged to fulfil their responsibilities under the law.⁷⁹ In order to try Aborigines in a way that was in keeping with the 'spirit and the letter' of British law, Dowling found that it was necessary to provide Aboriginal defendants with an interpreter.⁸⁰ Such was the case, rationalised Dowling, in India where 'trials of this sort are a common occurrence'.⁸¹ The blanket-clad Binge Mhulto who was described in the *Australian* as being 'in a state of near nature' was remanded in custody for want of a suitable interpreter.⁸² As staging a trial seemed to involve insurmountable difficulties, it was recommended that he simply be sent into exile.⁸³

The presence in the courtroom of Threlkeld as the sworn interpreter, despite the fact that his 'assistant' Biraban performed much of the required translating, was essential to the Brisbane Water trials. The figure of Threlkeld salved the moral conscience of the judiciary and provided the legal mechanism through which the practice of trying Aborigines under laws that were foreign to them was legally justified. As Backhouse observed, the judge 'was glad, that through the medium of a respectable Missionary, their causes were capable of being pleaded in that Court'.⁸⁴ The implications of some of the defendants probably having been amongst the party of men who had attacked Threlkeld's mission station were overlooked. The

⁷⁸ R v Binge Mhulto 1828.

⁷⁹ *ibid.*

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid.*; Baxter to Colonial Secretary, 19 December 1828, 28/10171 4/2005, SRNSW.

⁸⁴ Backhouse. *A Narrative of a Visit to the Australian Colonies*, p. 387.

nineteenth-century colonial law courts were not imbued with twentieth-century sensibilities when it came to assessing potential conflicts of interest.

On 12 February 1835, the day after Burton heard *Monkey and Others*, Threlkeld's and Biraban's attendance was required at the Supreme Court for three further trials involving four Aboriginal defendants. The prisoners faced charges that also arose out of several of the previous year's conflicts at Brisbane Water. One of the defendants, Lego'me, was indicted for 'highway robbery, and putting in bodily fear Patrick Sheridan, at Brisbane Water, on the 18th January last'.⁸⁵ Lego'me opted to be tried by a military jury. Once the jury was empanelled, the court heard that as Sheridan, a ticket-of-leave settler in the Brisbane Water district, travelled along a road Lego'me and several other men armed with spears surrounded him and asked for tobacco. Lego'me threw a spear that landed at Sheridan's foot, then reached into the man's pocket to take his pipe. Sheridan and Lego'me, who were already acquainted with each other, engaged in a brief conversation. In cross-examining Sheridan, the defence counsel Roger Therry asked him 'if he was not aware that he had been a squatter for some time on Legome's ground, and had frequently committed great depredations on his kangaroos?'⁸⁶ Sheridan answered that he 'believed the ground belonged to the Government, and, as for kangaroos, he had something else to do than to look for them'.⁸⁷ As the *Sydney Herald* observed in reporting the trial, Sheridan 'did not seem to understand the nature of the question'.⁸⁸ The jury was not

⁸⁵ R v Lego'me 1835, *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/cases1835-36/html/r_v_lego_me__1835.htm>; Lego'me's trial being conducted before a military jury is recorded in the *Australian*, 17 February 1835, p. 2.

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid.*

sympathetic to Therry's argument, and returned a verdict of guilty. The defendant was sentenced to transportation for seven years for 'stealing a pipe from the person, value one penny'.⁸⁹

Little Dick was convicted in the Supreme Court on the same day as Lego'me of 'robbing the dwelling house of Mr. William Bloodsworth, and putting the inmates in bodily fear, by presenting his spear at them'.⁹⁰ Because of the serious nature of the conviction, Burton formally recorded a sentence of death against Little Dick although it was his intention that the prisoner would be transported for life.⁹¹ Toby, who also appeared before Burton on 12 February 1835, was found guilty of 'robbery in the house of John Lynch of Sugar Loaf Creek' and also received the formal sentence of 'death recorded'.⁹² The *Australian* reported that an unnamed Aboriginal defendant was found guilty of 'robbing the house of Patrick Murick at Wollombi' and likewise was sentenced to death recorded.⁹³ This is a reference to Little Freeman who was found guilty of 'stealing in a dwelling house and putting in fear' following the robbery of sheets, blankets, shirts, and trousers belonging to Monks from the house of George Palmer.⁹⁴ The information prepared in relation to this case stated that Little Freeman 'did steal, take and carry away one Patrick Monks then to wit, at the time of committing the felony aforesaid'.⁹⁵ Whip-em-up, sentenced to transportation after being found guilty of robbing Jaques' dwelling house, was also involved in the attack

⁸⁹ *ibid.*; *Sydney Monitor*, 14 February 1835, p. 2; *Sydney Gazette*, 14 February 1835, p. 2; Lego'me's name is recorded as Leggamy or Liggamy in some sources.

⁹⁰ *Sydney Gazette*, 14 February 1835, p. 2.

⁹¹ *ibid.*

⁹² *Australian*, 17 February 1835, p. 3.

⁹³ *ibid.*

⁹⁴ *R v Little Freeman* 1835. *Informations and Other Papers*, 11 February 1835, T41, Bundle 45, SRNSW.

⁹⁵ *ibid.*

on Monks. Monks' wife Sarah testified that Whip-em-up 'was the person in the party who gave her the greatest ill-usage'.⁹⁶ While Little Freeman had been found not guilty of robbing Jacques' dwelling house, he was sentenced to death recorded in relation to the above charges regarding the attack on the property and person of Monks. Interestingly, both Toby and Little Freeman were described in the information prepared in relation to their respective cases as 'an aboriginal native labourer'.⁹⁷ This implies that they might have been involved in working for the colonists or could be read as signifying a class distinction and classification.

At the time of the Brisbane Water trials, the *Australian* covered the trial of five unnamed Aboriginal men for murdering a shepherd near Brisbane Water. The newspaper claimed the trial was 'a melancholy sight, and called up feelings of a painful nature; it could not but occur to us, that, the prisoners being as ignorant as the beasts, it was almost a mockery to bring them to the unintelligible formality of a trial'.⁹⁸ It is possible that the men referred to were the defendants in the case *R v Monkey 1835* who were found guilty of burglary in the dwelling house of Jaques and that the newspaper has simply reported the charge incorrectly. The *Australian* noted that the sentence passed was one of 'transportation for life to Van Diemen's Land' where it was thought, 'they will not be suffered to exist long amongst the aborigines' of that colony owing to the 'universal feeling of animosity' that was considered to prevail towards Aboriginal peoples who were strangers to each other.⁹⁹

⁹⁶ *Sydney Monitor*, 14 February 1835, p. 2.

⁹⁷ *R v Little Freeman 1835. Informations and Other Papers*, 11 February 1835, T41, Bundle 45, SRNSW; *R v Toby 1835. Informations and Other Papers*, 11 February 1835, T41, Bundle 43, SRNSW.

⁹⁸ *Australian*, 13 February 1835, p. 2.

⁹⁹ *ibid.*

Van Diemen's Land colonists thought local Aboriginal tribes were 'perpetually engaged in conflicts between rival tribes' and that some of the local tribes were 'more skilled in the arts of war, [and] more treacherous' than their neighbours.¹⁰⁰ Animosity towards 'Sydney Aborigines' on the part of Van Diemen's Land Aboriginal people was considered to have arisen owing to the employment in 1829 of a cohort referred to as the Sydney blacks to assist colonist John Batman's roving party to capture local Aboriginal people.¹⁰¹ The trackers from New South Wales were from the same area as Monkey and his cohort. Such was the success of Batman's venture in the eyes of the colonists that Pigeon and Crook, from New South Wales, along with a local Aborigine known as Black Bill, were each given a land grant of one thousand acres by Lieutenant-Governor George Arthur of Van Diemen's Land.¹⁰²

News of the outcome of the Brisbane Water trials was published in the Van Diemen's Land newspapers. The *Launceston Advertiser* reprinted an article from the *Sydney Monitor* that suggested the convicted men were to be sent to 'an island in Bass's Straits', presumably an allusion to Flinders Island where the Van Diemen's Land tribal remnants were living in exile at the Aboriginal Establishment at Wybalenna.¹⁰³ The *Hobart Town Courier* published a report reprinted from the *Sydney Herald* that purportedly conveyed the men's response to their sentencing:

The native blacks who have received sentence of transportation to Van Diemen's Land have expressed – in their ignorance of the manner in

¹⁰⁰ Henry Melville. *The Van Diemen's Land Annual for the Year 1832*, Henry Melville, Hobart Town, 1832, p. 131.

¹⁰¹ See Alastair Campbell. *John Batman and the Aborigines*, Kibble Books, Malmsbury, 1987, pp. 25-44.

¹⁰² 'Government Notice No. 186, Colonial Secretary's Office, 17 September 1830', *Hobart Town Gazette*, 18 September 1830, p. 262.

¹⁰³ *Launceston Advertiser*, 26 March 1835, p. 4.

which they will be disposed of, supposing that they will be turned adrift into the woods – extreme fear of being destroyed by the Aborigines of that colony, in revenge for the assistance which six of them rendered to the military and police in pursuing them about two years ago, having volunteered their services from this colony for that purpose.¹⁰⁴

This report explicitly ties in Aboriginal fears regarding their safety with the notion that local Aboriginal people would exact revenge for the role played by the countrymen of the New South Wales' cohort in helping the military and police against the Van Diemen's Land Aborigines. It demonstrates that the Aboriginal convicts had little or no appreciation of the nature of the convict system within which it was proposed they would be held captive. It also shows that the men did not realise that the tribal remnants from Van Diemen's Land were no longer on the mainland but were living in exile offshore. Given the suggestion that the Aboriginal convicts thought they would be turned loose into the bush, it must be supposed that they were not aware that sending them to Flinders Island was a possible option. In reproducing the articles relating to the sentencing to transportation to Van Diemen's Land a cohort of Aboriginal men considered dangerous to the welfare of colonists, neither the *Launceston Advertiser* nor the *Hobart Town Courier* passed any comment as to the propriety or otherwise of the punishment.

In Sydney in the aftermath of the Brisbane Water trials, public debate intensified over the justice of trying Aboriginal defendants in accordance with the colonists' law and about the punishments meted out to those found guilty. The *Australian* considered it unproblematic to try Aboriginal people according to the English law imported and adapted by the settlers. There was, according to the

¹⁰⁴ *Hobart Town Courier*, 20 March 1835, p. 2.

Australian, ‘nothing to excuse outrage on their parts’.¹⁰⁵ It stated that ‘our *usurpation*, as it is sometimes termed, of the soil, has been attended with no outrage or violence upon them’.¹⁰⁶ The *Australian* conceded that there ‘may have been ... the occasional inattention to humanity and justice which has in other countries invariably followed the collision of the sons of civilization with those of nature’.¹⁰⁷ It also voiced the question that was on many of the settlers’ minds; ‘how are these outrages to be stopped?’¹⁰⁸ According to the newspaper, it had been proposed that Aboriginal people be tried and punished at the scene of their crime and in front of their countrymen. This, it was considered, would prove to be a greater deterrent to other Aborigines than removing the alleged offenders to Sydney for trial.¹⁰⁹ Drawing on remarks made by Burton during the Brisbane Water trials, the *Australian* proposed that:

it is not the forms of the trial that form the impression – it is their removal from their tribe for ever, and the idea that will prevail amongst them that they have been put to death; their execution at Brisbane Water could scarcely have a greater effect upon their minds than the dim uncertainty of their fate, which will, perhaps, preserve the circumstances as a tradition, long after the lives of the present generation.¹¹⁰

¹⁰⁵ *Australian*, 17 February 1835, p. 2.

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ In keeping with this mode of thinking, in August 1835 Governor Bourke sought to have Charley, an Aboriginal man convicted of murder, hanged in chains at the scene of his crime. Confusion surrounded the legality of the proposed punishment partly because it had not formed part of the original sentence and also because the laws that allowed this form of punishment had been abolished in England, although the applicable statutes were at that stage yet to be adopted in New South Wales. Consequently, Charley was ‘hanged in the normal way’ at Dungog. See the notes to *R v Monkey and Others* 1835. Threlkeld attended Charley in Sydney Gaol and accompanied him by river steamer to Dungog where, he stated, ‘we walked to the gallows through an escort of Military’. The ‘useful though unpleasant’ duties associated with the 1835 Brisbane Water trials had, Threlkeld said, taken up three months of the year. See Threlkeld. ‘Annual Report of the Aboriginal Mission at Lake Macquarie New South Wales 1835’, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 121.

¹¹⁰ *Australian*, 17 February 1835, p. 2.

The implication that transportation could supplant the scaffold is indicative of a gradual shift that was taking place between 1760 and 1840 in the way nation states deployed power to manage their populations. According to Michel Foucault, in the mid-nineteenth century the spectacle of the scaffold as an expression of the power that punished gave way to a new disciplinary regime intent on producing what he termed docile bodies. Bodies were trained and kept under surveillance in state institutions, such as schools, hospitals, military regiments, and prisons, so that behaviours constructed as society's norm became internalised. The docile body is governed through a constant process of self-surveillance. Anybody who deviated from society's norms was incarcerated in the prison or the mental asylum and retrained before being allowed to re-enter society. Initially transportation was touted as being a useful tool for managing Aboriginal people as it produced what I have termed the inexplicably absent body. However, transportation and incarceration were also state instrumentalities through which the docile Aboriginal body could be produced.¹¹¹

The 'great sensation over the whole territory' that followed these trials and the May 1835 trial *R v Long Dick, Jack Jones, Abraham, and Gibber Paddy* arising from the robbery at Jaques occupied column inches in the sections set aside in Sydney newspapers for letters to the editor.¹¹² A Maitland-based regular correspondent to the *Sydney Gazette* who used the *non-de-plume* 'Nemo' wrote to the newspaper on 23 June 1835 calling for an enquiry into the causes underlying Aboriginal actions against

¹¹¹ Michel Foucault. *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan, Penguin Book, London, (1977), 1991.

¹¹² *Sydney Gazette*, 27 June 1835, p. 2.

colonists. 'Nemo' rebutted a suggestion on the part of the *Australian* that it was false to assume that colonists' abuses of Aboriginal women were in part to blame for Aboriginal violence against them. He claimed that while 'the debauched, disgusting wretches who frequent the purlieus of Sydney' might not be jealous of white men using their wives, 'amongst the unsophisticated savages in the interior, a different sentiment is engendered and their wives ... are as dear to these, as the relatives of Europeans are to them'.¹¹³ The contrast he drew between Aboriginal fringe-dwellers in Sydney and those at the frontier is striking. While 'Nemo' was advocating for Aboriginal rights, in keeping with his times he did not locate the apparently degraded condition of Sydney Aborigines within the context of the impacts of colonisation and dispossession.

'Nemo' considered those who interfered with Aboriginal women at the frontier, and thus inflamed the men to violence, to be insolent convicts who took up positions with 'gentleman squatters' living 'out of the reach *almost* of a magistrate'.¹¹⁴ This situation, hoped 'Nemo' would be redressed through the assignment system having been recently amended so that only those who owned or rented land would be able to receive assigned servants. In arguing for greater understanding towards, and justice for, Aboriginal people 'Nemo' raised the question as to whether Aboriginal men would not be justified in spearing a white man for abducting Aboriginal women following the hanging of an Aboriginal man for his part in assaulting a white woman?

¹¹³ *ibid.*

¹¹⁴ *ibid.* (Emphasis in the original.)

The *Australian* endeavoured to dismiss ‘Nemo’s’ argument on the basis that Aboriginal people did not form domestic ties for life and that ‘chastity was no characteristic of these people’.¹¹⁵ The newspaper elaborated and dismissed the popular notion that the ongoing conflict stemmed from the colonists having taken over Aboriginal hunting grounds and severely diminished the stocks of kangaroo, leading to Aboriginal people taking the colonists’ sheep. Its grounds for dismissing this argument were that ‘the Opposum and Guana are their staff of life’, and that it was a safer and easier option for Aboriginal people to kill a sheep than a possum.¹¹⁶ On the basis of such dubious claims, the *Australian* advocated the necessity of taking prompt and early action against Aboriginal people engaged in hostilities at the frontier to force them to behave more peaceably towards colonists.

While public debate raged, Governor Richard Bourke took steps to arrange the transportation of the Aboriginal defendants in the Brisbane Water trials who were sentenced to death recorded or transportation to Van Diemen’s Land. He wrote to Arthur on 14 February 1835 with the following proposal:

I have been obliged to apprehend and bring to trial several of the Aboriginal Natives for robbery, rape and other crimes. One poor wretch is to suffer capitally for Rape, and there are eight whose sentences are commuted to transportation for life. I propose to send them to V.D. Land if you have no objections. They are more than half civilized and will make decent herdsmen. If for any cause with which I am unacquainted in that it would not lead to their advantage or to the tranquillity of the colony that I should send them to V.D. Land I

¹¹⁵ *Australian*, 3 July 1835, p. 2.

¹¹⁶ *ibid.*

should thank you to let me know. I will keep them here until I receive your reply.¹¹⁷

Bourke's suggestion that the Aboriginal convicts could make 'decent herdsmen' may have been inspired, in part, by the employment of some Aboriginal men in a similar capacity by the Australian Agricultural Company.¹¹⁸ It is probable that his thinking was also grounded in his prior experience as Acting Governor of the Cape Colony, a position Bourke held from March 1826 until September 1828.¹¹⁹ While at the Cape, Bourke had first hand experience of the people who had been 'known to generations of European sailors, travellers, writers and colonists as "Hottentots"'.¹²⁰ Known today as Khoena or Khoi, these people had, at the time of European contact, 'an intense involvement with their cattle'.¹²¹

As Noël Mostert explained, when the Dutch and later the British colonised the Cape of Good Hope the Khoena inhabitants were dispossessed of their land and their cattle. Khoena who survived the colonial intrusions were, by the mid-nineteenth century, mostly working for the colonists as forced labourers. Their skills in raising the sleek cattle that had first attracted Europeans to the Cape were exploited by farmers descended from the Dutch and British colonists who, a British Parliamentary Committee in 1836 was told, treated the Khoena with severity and contempt.¹²² The notion that the figure of the indigenous herdsman might usefully be transplanted from

¹¹⁷ Governor Richard Bourke to Lieutenant-Governor George Arthur, 14 February 1835, *Arthur Papers*, Volume 8: Correspondence with Sir R. Bourke, 1831-6, Reel 3, A2168, Law Library, University of Tasmania.

¹¹⁸ Mark Hannah. 'Aboriginal Workers in the Australian Agricultural Company, 1824-1857', *Labour History*, Issue 82, 2002, pp. 17-33.

¹¹⁹ Hazel King. *Richard Bourke*, Oxford University Press, Melbourne, 1971, pp. 74, 123.

¹²⁰ Noël Mostert. *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People*, Pimlico, London, 1992, p. 33.

¹²¹ *ibid.*, p. 35.

¹²² *ibid.*, p. 277.

the Cape to New South Wales (that at the time included Van Diemen's Land) as implied by Bourke in his letter to Arthur is one instance amongst many of the cross-fertilisation of ideas between the British colonies in the eighteenth and nineteenth centuries.

The 'Aboriginal natives' referred to in Bourke's letter to Arthur were Lego'me, Toby, Whip-em-up, Currinbong Jemmy, Tom Jones, Little Freeman, Monkey, Little Dick, and Charley Muscle. Muscle was indicted for 'committing a rape on one Margaret Hanshall, on the 5th of November last', together with Mickey Mickey.¹²³ Their trial was presided over by Burton on 12 February 1835, the same day many of the other Brisbane Water defendants appeared before the Supreme Court. During the trial, Hanshall claimed to have been assaulted by eleven men but 'from the strong resemblance the blacks bear to each other' she was able to identify only two of them, Mickey and Muscle.¹²⁴ The latter she failed to recognise on first seeing him in gaol, and later identified him solely on account of his apparently having whiter teeth than his companions. When questioned, the Lynchs attested to having seen Mickey carrying off their servant, but were unable to confirm Muscle's involvement. The jury retired for half an hour before returning to the courtroom to have Hanshall put back in the witness box where she swore positively as to Muscle's identity. When the jury returned a guilty verdict against both defendants, Burton

¹²³ R v Mickey and Muscle 1835, *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/cases1835-36/html/r_v_mickey_and_muscle__1835.htm >

¹²⁴ *ibid.*

‘passed the sentence of death on them both, to be executed on such day as His Excellency the Governor shall be pleased to appoint’.¹²⁵

The process that led to Muscle’s death sentence, particularly the dubious testimony presented to the Supreme Court, sufficiently outraged an onlooker that later the same day he wrote to the *Sydney Herald* under the *non-de-plume* ‘AM. JUS’.¹²⁶ The broader concerns expressed in his letter attest further to the moral dilemma trials involving Aboriginal defendants posed in the minds of some colonists. Referring to doubts within colonial society over ‘forcibly possessing themselves of the territories of another people’ and ‘forcing our Laws on the Aborigines of this Country’, the correspondent asserted that ‘we are bound to be conciliative in the former, and most lenient in the latter’.¹²⁷ While agreeing that some crimes are punishable in any society, ‘AM. JUS’ reminded the *Sydney Herald*’s readers that Aborigines brought before the colonial courts stood ‘on a footing the law did not contemplate’.¹²⁸ On seeing Mickey and Muscle standing before the bar in the Supreme Court, he recollected feeling ‘the awkward, embarrassing doubt, how far the Juridical Forms of a highly civilized people were applicable to the rude savage’.¹²⁹ ‘AM. JUS’ objected in particular to Muscle being sentenced to death on the ‘uncorroborated evidence of one person’ who, when she had first seen him at the time of her attack, had been ‘in a

¹²⁵ *ibid.* Hanshall’s name appears in some records as Hansall. Charley Muscle was also known as Charley Myrtle or Murphy. Toby, described as being ‘of the Ilalaung tribe’, was tried on 12 February 1835 before Burton and a civil jury in relation to the same incident. He was found guilty of assaulting Mr. John Lynch at Sugar-loaf Creek, Brisbane Water and was remanded for sentence. See the *Sydney Monitor*, 14 February 1835, p. 2.

¹²⁶ Bruce Kercher has suggested that AM.JUS was perhaps either Roger Therry or Sydney Stephen, both well known lawyers at the Supreme Court. See Bruce Kercher, *Outsiders: Tales from the Supreme Court of NSW, 1824-1836*, Australian Scholarly Publishing, North Melbourne, 2006, p. 55.

¹²⁷ ‘AM. JUS’, ‘Letter to the Editors’, *Sydney Herald*, 16 February 1835, p. 2.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

half stupefied state' owing to the extenuating circumstances.¹³⁰ The correspondent supported his argument with an appeal to common knowledge illustrated by an account drawn from his own experience immediately following the trial:

Every white resident in the Colony will readily acknowledge the difficulty – nay, often the impossibility of recognizing blacks whom they may have frequently seen. Indeed, in this very case, another person and myself, saw these two prisoners pass us in the street after the trial, among some other black prisoners, and we disagreed as to their identity.¹³¹

'AM. JUS' also raised the concern that if Muscle were to be hanged an innocent man, his tribe would know it and this would cause them to deride the 'unerring justice of our polished scales' as well as provide them with cause to retaliate against the settlers.¹³² Such concerns probably influenced the Executive Council's decision to grant a reprieve to Muscle.¹³³

In a departure from the usual convention, Muscle and the other Aboriginal prisoners on remand in Sydney Gaol were, at Threlkeld's suggestion, made to witness Mickey's execution. Apparently this was only the second occasion on which an Aborigine had been hanged in Sydney. Consequently, it was reported in the *Australian* to have 'attracted a considerable crowd'.¹³⁴ The newspaper questioned the procedure, stating that it was 'difficult either entirely to approve or to condemn the decision of the Government' to hang Mickey.¹³⁵ The *Australian* pointed to possible extenuating circumstances. What the colonists considered to be rape was 'a custom

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ The Executive Council decided to reprieve Muscle at Executive Meeting 26. See Tim Castle. 'Capital Punishment Database', *Francis Forbes Society for Australian Legal History*, accessed on 12 October 2007 at <<http://research.forbessociety.org.au/>>

¹³⁴ *Australian*, 6 March 1835, p. 2.

¹³⁵ *ibid.*

amongst these ... savages; this is the first step in their courtship – and it is hopeless to expect to inspire them with our estimation of offences of this nature, till they participate with us in the blessings of knowledge’.¹³⁶ While the newspaper’s interpretation of Aboriginal customary practice was somewhat crude, it is nevertheless consistent with the anthropologists Ronald and Catherine Berndt’s description of female initiation practices in parts of the south east of the continent:

A girl may not know when her marriage is to be consummated, although her parents and other relatives may have come to some arrangement about it. She may go out food-collecting as usual, perhaps with an older woman, and be seized by a group of men comprising her future husband and several others whom he calls ‘brother’; she therefore calls them husband too, and they have temporary rights of access to her before she finally settles down in her husband’s camp.¹³⁷

As Aboriginal evidence was not admissible in court, it is not possible to do more than speculate as to the extent to which such customary practices informed the actions of Mickey and the men accompanying him. Evidence is available, however, as to the reactions of Mickey’s companions when they were forced to participate in his execution as onlookers. Threlkeld described them as having ‘pale visages’.¹³⁸ Their ‘trembling muscles’, he said, ‘indicated the nervous excitement under which they laboured at the melancholy sight’.¹³⁹ Biraban, who had accompanied Threlkeld to the execution, exclaimed ““When the drop fell, I thought he should shed his skin!” (like a snake).’¹⁴⁰ Prior to witnessing this event Aboriginal people had apparently thought that being sent to gaol ‘was a matter of joke’.¹⁴¹ Threlkeld therefore suggested that

¹³⁶ *ibid.*

¹³⁷ Ronald Berndt and Catherine Berndt. *The World of the First Australians*, Ure Smith, Sydney, (1964) 1977, pp. 180-81.

¹³⁸ Threlkeld. 5th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 122.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

any Aborigines under confinement when executions were being carried out ought to be made to watch the hangings. In a Foucaultian sense, the executions would function as ‘the very ceremonial of justice being expressed in all its force’ and, as such, were postulated by Threlkeld to be the ultimate deterrent in dissuading Aborigines from continuing their attacks on colonists.¹⁴²

Threlkeld’s understanding of Aboriginal attitudes towards gaol was similar to ‘Justitia’s’, a frequent correspondent to *The Maitland Mercury*. ‘Justitia’ stated in a letter dated 27 March 1843 that Aborigines looked on the Government with contempt and ‘describe the *buggere tricki* meted out in Newcastle and Sydney gaols – no work and plenty of clothes and food’.¹⁴³ In what could be read as an early example of ‘the Stockholm Syndrome’, whereby captives identify and empathise with their captors, some Aboriginal people were said to have become so fond of their gaolers that they were reluctant to leave the confines of the prison upon their discharge. The following account appeared in John West’s *History of Tasmania* published in the middle of the nineteenth century:

Some captives, taken by Mr Batman, were lodged in the gaol: they became strongly attached to the javelin man: they were treated by the gaoler with studious compassion, and they *left the prison with tears!*¹⁴⁴

Within the colonial context, some Aboriginal men who underwent periods of incarceration gained at least some impression of the coloniser’s urge to civilise them and the role that gaol played in this process. The following episode involving an

¹⁴² Foucault. *Discipline and Punish*, p. 34.

¹⁴³ *Maitland Mercury*, 1 April 1843, pp. 3-4.

¹⁴⁴ John West. *The History of Tasmania with Copious Information Respecting the Colonies of New South Wales, Victoria, South Australia, &c.*, (Launceston, 1852), reprint, Angus & Robertson, Sydney, 1971, p. 328. (Emphasis in the original.)

incident between William Speed who lived at Ourimbah in the Brisbane Water district and his Aboriginal employee known as Charley illustrates this point:

A Myall, (wild desert black), Old Conkleberry Charlie, was in the bad books with the boss one day, who told him to “run away Charlie, you’re only a bloody Myall”. Charlie got very indignant and corrected “Me no Myall, Boss, me been breakum stone along Wyndham gaol”.¹⁴⁵

Swancott rounded off this anecdote with the exclamation ‘He’d been civilized!’¹⁴⁶

This phrase neatly encapsulates Charlie’s understanding of the purpose of the gaol’s disciplinary regime and the outcome sought in relation to Aboriginal inmates.

Read in conjunction with Warner’s views regarding the different treatment that he considered necessary for Aboriginal prisoners, the above observations on Aboriginal views of incarceration demonstrate the ambivalent responses of Aboriginal inmates to imprisonment. Threlkeld’s and ‘Justitia’s’ comments in particular tell the reader as much about their attitudes as they reveal about the subject. They also highlight the disparities between Western and Aboriginal cultural practices in relation to the treatment meted out to those who transgressed societal norms.

When Governor Bourke returned from a visit to Twofold Bay early in April 1835 two letters dated 12 March 1835 from Lieutenant-Governor Arthur awaited him. One was an official letter updating the Governor on the latest English news and the other was perhaps a private letter in regard to Bourke’s proposal to send the cohort of Aboriginal convicts from New South Wales to Van Diemen’s Land. While Arthur’s letter regarding the Aboriginal convicts is not extant, the matter was discussed at

¹⁴⁵ Swancott. *The Brisbane Water Story*, Part 4, p. 67.

¹⁴⁶ *ibid.*

some length at the Executive Council meeting held in Hobart Town on 31 March 1835, the minutes of which have survived. Arthur and the five other members of his Executive considered that ‘the reception of these savages would not fail to be embarrassing to the Local Government’.¹⁴⁷ The Executive’s embarrassment was predicated on the fact that they saw no means of sending the Aboriginal convicts into service under the assignment system or putting them to labour in the public works. It also thought that incarcerating these Aboriginal men ‘might probably considering their former habits bring on disease and perhaps ensure their premature dissolution’.¹⁴⁸ Jackey’s death in the Colonial Hospital in Hobart Town less than six months’ earlier may have informed this supposition.¹⁴⁹

The Executive Council considered that sending the convicts from New South Wales to Flinders Island, the location to which the Van Diemen’s Land tribal remnants had been removed, as the most preferable option. But as the men were criminals, and would be ‘compulsory settlers’, the Executive feared that ‘they would endeavour to incite discontent among those who had gone there voluntarily’.¹⁵⁰ The penal station at Port Arthur was also considered as a possible place of incarceration, but this site was generally reserved for those considered to be amongst the worst offenders. The Executive concluded that to send the Aboriginal convicts to Port Arthur would be problematic on two counts. First, it would result in their being treated more harshly than ordinary convicts transported from New South Wales.

¹⁴⁷ ‘At a Council Held at the Council Room Hobart Town on the 31st day of March 1835’, *Minutes of the Proceedings of the Executive Council*, Reel EC4/3, pp. 408-09, AOT.

¹⁴⁸ *ibid.*

¹⁴⁹ ‘Jackey’, CON 31/26, p. 16, AOT.

¹⁵⁰ ‘At a Council Held at the Council Room Hobart Town on the 31st day of March 1835’, *Minutes of the Proceedings of the Executive Council*, Reel EC4/3, pp. 408-09, AOT.

Second, the Executive considered the Aboriginal convicts to be of all persons ‘best fitted by their former habits to elude the vigilance of the Guards and to teach the other Convicts how to do so likewise’.¹⁵¹ Interestingly, the geographical isolation of the Port Arthur penal station at Tasman’s Peninsula coupled with the heavy surf that broke upon the coast were seen as facilitating the potential of the Aboriginal-taught convicts to escape and avoid being retaken. Thus the very attributes that were often seen as desirable in a landscape surrounding a penal institution were on this occasion viewed as being distinctly disadvantageous.

Another option available to the Executive Council was to put the Aboriginal convicts to work on a road gang. This, however, was dismissed on account of it being seen as certain to ‘ensure their absconding into the woods’.¹⁵² It was thought that Van Diemen’s Land colonists would, given their experiences with local Aboriginal people, ‘entertain strong apprehensions of the outrages which a hostile mob of Aborigines consisting of nine persons might easily perpetrate before they could be retaken’.¹⁵³ Allowing Aboriginal convicts from New South Wales to be sent to Van Diemen’s Land would, in the Executive’s opinion, ‘be the more grievously felt as the residents in the interior were now congratulating themselves upon the successful result of the measures which had been adopted for the conciliation and removal of the Native Blacks of Van Diemen’s Land’.¹⁵⁴ After debating the matter at some length as well as considering and dismissing a range of available options, the Executive Council determined that it would be extremely inconvenient to allow the Aboriginal

¹⁵¹ *ibid.*

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

convicts to be shipped to Van Diemen's Land. Arthur conveyed the Executive Council's views on the matter to Bourke.¹⁵⁵

Bourke responded to Arthur in a private letter dated 6 April 1835, telling the Lieutenant-Governor of Van Diemen's Land that he was writing to 'release you from any apprehension of seeing our Aboriginal black transports. I have disposed of them otherwise than by a visit to your Colony'.¹⁵⁶ The Governor exiled Monkey and his kinsmen to Goat Island and had them subjected to a disciplinary regime of penal routine, hard labour, and Christian instruction. He engaged a Wesleyan Methodist catechist, George Langhorne, who had prior missionary experience at the Cape Colony, on a salary of £100 per annum to instruct the convicts working in irons on Goat Island, those incarcerated on the prison hulk *Phoenix* moored nearby, and the 'eight Aboriginal black natives ... placed on Goat Island under a sentence, commuted from that of death, passed by the Supreme Court for outrages committed on some of the Colonists of the district of Brisbane Water'.¹⁵⁷ Langhorne was charged with the task of teaching the Aboriginal convicts 'elements of the Christian Religion' as well as the English language.¹⁵⁸ In a different context, Krishna Kumar has pointed out that colonial discourses on education 'implied a morally superior teacher and a society whose character was in need of reform'.¹⁵⁹ Such an understanding prevailed in New South Wales as well as in England where the Home Government approved of the

¹⁵⁵ This letter is not extant.

¹⁵⁶ Bourke to Arthur, 6 April 1835, *Arthur Papers*, Volume 8, Mitchell Library, State Library of New South Wales, Sydney, Reel CY2139.

¹⁵⁷ Bourke to Secretary of State, *Historical Records of Australia* [hereafter *HRA*], Series I, Volume XVII, p. 718. It is unclear as to why Bourke mentioned eight Aboriginal convicts when there had been nine intended for Van Diemen's Land. Possibly one of the men had already died in custody prior to the rest of the cohort being sent to Goat Island.

¹⁵⁸ *ibid.*

¹⁵⁹ Krishna Kumar. *Political Agenda of Education: A Study of Colonialist and Nationalist Ideas*, Sage Publications, New Dehli, (1991), 2004, p. 44.

measures adopted in relation to the Goat Island prisoners. The arrangements were in accord with both governments' aims to achieve 'the moral improvement of that unfortunate race' of Aboriginal people.¹⁶⁰

The idea that in order to civilise the natives, one had first to teach them to speak English informed encounters between the British and indigenous people on other continents. In observations on aspects of North American colonial contact, Randall Kennedy cited the following statement: '... one commissioner of Indian Affairs declared in 1887 that "the first step to be taken toward civilization, toward teaching the Indians the mischief and folly of continuing in their barbarous practices, is to teach them English language"'.¹⁶¹ Kennedy refers to the process that commences with the notion of teaching the natives English as 'coercive assimilation'.¹⁶² Similar thinking influenced British approaches to 'civilising the natives' in India. In his 'Minute on Indian Education' of 2 February 1835, Thomas MacAulay described the dialects spoken by Indian 'natives' as being devoid of literary and scientific information and 'so poor and rude' that 'intellectual improvement ... can at present be effected only by means of some language not vernacular amongst them'.¹⁶³ For MacAulay, English stood as being the language that was 'pre-eminent even among the languages of the west' and was 'the language of two great European communities which are rising, the one in the south of Africa, the other in Australasia; communities

¹⁶⁰ Lord Glenelg approved the expenditure and stated that Langhorne's salary was to be 'defrayed by the Commissary from the Funds applicable to Convict charges'. See Glenelg to Bourke, 12 October 1835, *HRA*, Series I, Volume XVIII, p. 159; Secretary of State to Bourke, *HRA*, Series I, Volume XVII, p. 207.

¹⁶¹ Randall Kennedy. *Interracial Intimacies: Sex, Marriage, Identity and Adoption*, Pantheon, New York, 2003, p. 48.

¹⁶² *ibid.*, p. 48.

¹⁶³ Thomas MacAulay. 'Minute on Indian Education', 2 February 1835, accessed on 21 July 2006 at <<http://www.english.ucsb.edu/faculty/rraley/research/english/macaulay.html>>

which are ... becoming more important, and more closely connected with our Indian empire'.¹⁶⁴ MacAulay argued that it would be 'manifestly absurd' to educate Indian boys in their own languages and systems as the British meant to alter these before the youths reached manhood.¹⁶⁵ MacAulay's sense of the pre-eminence of the British Empire and the innate superiority of the English language and British systems of knowledge was shared with many other colonials and infected them with an irrepressible urge coercively to assimilate 'our natives'.

Penny van Toorn situated this phenomenon within an Australian context:

Western philosophers and ethnologists imagined that contemporary Indigenous societies were relics of a bygone age ... positioning ... Indigenous peoples as 'where Europeans once were' made the assimilation of Aboriginal people look like an historical short cut, a mere speeding up of an allegedly natural, inevitable evolutionary process. In Australia, this belief justified the introduction of policies designed to transform Indigenous people, culturally and biologically, into whites. Colonial government and church authorities viewed literacy as a tool of assimilation, an effective means of hastening the 'inevitable' progress of 'primitive' peoples into the modern white Western world.¹⁶⁶

In colonial New South Wales the penal station became the site *par excellence* for the state in its endeavours to produce the civilised native. The potential to succeed where that other great colonial instrumentality for producing the civilised native, the mission station, was failing was encapsulated in two key advantages that the penal station had over the mission. Aboriginal people exiled to the penal station were captives in every sense of the word. The heavy irons they were made to wear on their legs, the extent of surveillance to which they were subjected, the cellular walls that enclosed them at

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ Penny van Toorn. *Writing Never Arrives Naked: Early Aboriginal Cultures of Writing in Australia*, Aboriginal Studies Press, Canberra, 2006, p. 12.

night and, in the case of Goat Island, the sea that surrounded them made escape almost impossible. The suspension of any legal rights that Aboriginal captives had notionally been entitled to claim as free British subjects meant, as Satadru Sen explained in a different colonial context, that ‘the state’s power to coerce, to manipulate, and to experiment was relatively unimpeded by its own constructed limits’.¹⁶⁷

Apart from the broader public debates over whether it was just to bring Aboriginal people before the law courts and how best to dissuade them from attacking colonists, the colonial government’s intended treatment of those Aborigines consigned to captivity following the Brisbane Water trials was also the subject of public scrutiny and criticism. The *Australian* denounced the Governor’s plan on the grounds of the unkindness as well as the unlikelihood of its succeeding:

To teach religion and literature to these poor wretches is absurd – the one it is impossible that they should understand – the other cannot be accomplished without putting a force upon the inclinations of the adults, to which they would never submit, or else removing them when of the tenderest age from their natural guardians, which involves cruelty to one party, and no lasting benefit to the other; experience shews that where young children have been so removed and trained up, the presence of their kindred has had the invariable effect of inducing them to exchange the trammels of civilization for the unconstrained freedom of their native habits.¹⁶⁸

Rather than attempting to civilise the natives, the *Australian* argued that separating them from the settler population would result in ‘the grand remedy’ being accomplished more rapidly than by any other means.¹⁶⁹ The tendency of Aboriginal people to reject the supposed advantages of civilised life to return to their former

¹⁶⁷ Satadru Sen. *Disciplining Punishment: Colonialism and Convict Society in the Andaman Islands*, Oxford University Press, Oxford, 2000, p. 89.

¹⁶⁸ *Australian*, 6 March 1835, p. 2.

¹⁶⁹ *ibid.*

cultural practices was understood to be a lack of capacity to become civilised rather than an informed and reasonable choice.¹⁷⁰

During the interim period in which it was understood that the Aboriginal prisoners were to be sent to Van Diemen's Land, the *Australian* balked at the notion that the men were to be subjected to a regime of harsh physical punishment and prison discipline:

It has been supposed by some persons, but we have reason to believe without foundation, that these poor wretches are to be worked in irons – or at least subjected to some form of 'prison discipline'; the idea is too monstrous for belief; we are persuaded that not only useless and uncalled for severity will be avoided, but that all that can be done to render their situation bearable, will be the aim of both Governments.¹⁷¹

Despite the misgivings expressed in the *Australian*, it was Bourke's intention to have the men worked in irons for two years on Goat Island and housed in the prison hulk *Phoenix* that lay at anchor nearby.¹⁷² By day, the Aboriginal prisoners were taken off the hulk to be put to work on Goat Island cutting stone 'under charge of one of their own kindred'.¹⁷³ Sandstone was required for the construction of the powder magazine that Backhouse and Walker observed was nearly finished at the time of their visit in 1836. Most of the two hundred men on the island, Backhouse noted, laboured in irons while a further two hundred housed in the prison hulk *Phoenix* were worked in chains on the island.¹⁷⁴ Penal labour, according to Foucault:

is intrinsically useful ... it is a principle of order and regularity; through the demands that it imposes, it conveys, imperceptibly, the

¹⁷⁰ *ibid.*

¹⁷¹ *Australian*, 17 February 1835, p. 2.

¹⁷² George Langhorne to the Colonial Secretary, 30 August 1835, Reel 2204, Bundle 4/2322.2, SRNSW.

¹⁷³ *Australian*, 1 May 1835, p. 3.

¹⁷⁴ Backhouse. *A Narrative of a Visit to the Australian Colonies*, p. 457.

forms of a rigorous power; it bends bodies to regular movements ... it imposes a hierarchy and a surveillance that are all the more accepted, and which will be inscribed all the more deeply in the behaviour of the convicts, in that they form part of its logic.¹⁷⁵

Occupying the convict, argued Foucault, instils 'habits of order and obedience'.¹⁷⁶ As well as working the men's bodies, it was the Governor's intentions that their minds be exercised in such a way as to have them embrace western cultural mores. To this end, the Aboriginal convicts received daily instruction from Langhorne, who also conducted regular services every Sunday as well as what he termed a 'Sabbath School'.¹⁷⁷

Their harsh existence as prisoners of the Crown took its toll on the Aboriginal inmates. During their first year of captivity, several of the Aboriginal convicts died. Ironically Muscle, whose name is recorded as 'Charley Myrtle' and whose death sentence had been reprieved, died on the morning of 6 July 1835.¹⁷⁸ An inquest was performed on his body and the coroner concluded that the deceased 'Died by the Visitation of Divine Providence'.¹⁷⁹ The following month, Langhorne reported 'with deep regret' the death of 'one of the most promising of the Black Prisoners' who died in the General Hospital mid-August 1835 of dysentery after having 'been for some months previously in a state of declining health'.¹⁸⁰ Based on the testimony of the other Aboriginal captives, the missionary had formed the opinion that the unnamed deceased convict was probably innocent of the crime for which he was imprisoned. He described the man as:

¹⁷⁵ Foucault. *Discipline and Punish*, p. 242.

¹⁷⁶ *ibid.*

¹⁷⁷ Langhorne to the Colonial Secretary, 4 June 1836, Reel 2004, Bundle 4/2322.2, SRNSW.

¹⁷⁸ Sheriff's Office to the Colonial Secretary, 6 July 1835, 35/5095 4/2298, SRNSW.

¹⁷⁹ Sheriff's Office to the Colonial Secretary, 9 July 1835, 35/5167 4/2298, SRNSW.

¹⁸⁰ Langhorne to the Colonial Secretary, 30 August 1835, Reel 2204, Bundle 4/2322.2, SRNSW.

A pattern to the others for his good conduct of which perhaps patience under suffering and a strict adherence to the hulk were not the least remarkable features – and I would add – his apparent firm reliance upon a Saviour's atonement for pardon and Salvation, towards the close of his mortal career.¹⁸¹

Based on his observations of the man, Langhorne held out hopes that he was 'perhaps among the first ... of the New Holland Tribes gathered in to the Kingdom of God'.¹⁸²

Before the year ended, yet another of the Aboriginal convicts succumbed to the deprivations of life in captivity. In a letter dated 31 December 1835 addressed to the Reverend Richard Hill in Sydney, Langhorne mentioned the death of an unnamed Aboriginal convict – a 'very intelligent man and remarkable for his good behaviour on all occasions'.¹⁸³ By February 1836, Langhorne told Hill that the remaining Aboriginal convicts were 'exceedingly depressed in Spirits' and that they did 'not receive the instruction with the cheerfulness that formerly characterised their conduct when engaged with me'.¹⁸⁴ The missionary reported that their situation was 'a great drawback'.¹⁸⁵ The minds of the Aboriginal prisoners, he wrote to Hill, were 'constantly irritated by the sight of their irons, and the guard placed over them'.¹⁸⁶

Despite the detrimental impact of convict life on the Aboriginal inmates, by the end of 1835 another Aboriginal man had been sent to join them on Goat Island. On 17 April 1835 the colonial botanist and superintendent of the Sydney Botanic Garden, Richard Cunningham, who was accompanying Sir Thomas Mitchell's

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ Langhorne to the Reverend Richard Hill, 31 December 1835, Mitchell Library, State Library of New South Wales, Sydney, Add. 117. The two unnamed Aboriginal convicts who died in custody along with Charley Muscle or Myrtle were Leg'ome and Currinbong Jemmy. See the register of convict deaths and burials compiled by the Principal Superintendent of Convicts Office, Fiche No. 749-751, 4/4549, SRNSW.

¹⁸⁴ *ibid.*

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

Darling River expedition, had wandered away from his travelling companions at the Bogan River beyond Bathurst. When the remains of his belongings and his dead horse were later discovered, Cunningham was presumed murdered by Aboriginal people.¹⁸⁷ The Mounted Police subsequently arrested three Aborigines ‘from beyond the Wellington [Mission] Station’ in relation to Cunningham’s alleged murder, two of whom managed to escape from custody.¹⁸⁸ The remaining captive was sent to Goat Island, where Langhorne had a severely limited capacity to communicate with him. The man was unable to speak English, and the other Aboriginal convicts could communicate with him only through using signs.¹⁸⁹

Late in 1836, the Attorney General sent Threlkeld to Goat Island to question Cunningham’s alleged murderer by which point the other Aboriginal captives were sufficiently versed in the man’s dialect to translate for the missionary. The man, who gave his name as Purimal, had also learned some of what Threlkeld described as ‘broken English’.¹⁹⁰ In the ensuing discussion, Purimal denied involvement in Cunningham’s murder, naming instead two other men who he alleged carried out the crime. Suspicion had fallen on Purimal as he had readily guided the search party seeking Cunningham to the remains of the man’s material possessions. Because of a lack of evidence, Purimal was not put on trial, but was nevertheless detained on Goat Island. Langhorne, who described Purimal as being about twenty-five years old and displaying a ‘free, open and intelligent countenance’ drew on a vocabulary provided

¹⁸⁷ Vivienne Parsons. ‘Cunningham, Richard (1793 - 1835?)’, *Australian Dictionary of Biography*, Volume 1, Melbourne University Press, Melbourne, 1966, pp. 268-69.

¹⁸⁸ *HRA*, Series I, Volume XVIII, pp. 235-37.

¹⁸⁹ Langhorne to Hill, 31 December 1835.

¹⁹⁰ Threlkeld, 6th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 133. The prisoner’s name also appears as ‘Boorimul’ and ‘Boromil’ in colonial correspondence.

to him by the missionary Watson at the Wellington Valley mission station to assist him in their communications.¹⁹¹ He perceived that considerable advantage might be had through befriending the ‘exceedingly docile’ Purimal who, Langhorne hoped, might be willing to introduce the missionary and promote his works amongst his own people should the occasion to do so ever arise.

His visit to Goat Island afforded Threlkeld the opportunity of assessing the progress that the remaining Aboriginal prisoners were making. He later reported that ‘under the superintendence of Mr Langhorne they were improving fast in their English reading’.¹⁹² Langhorne told him that ‘on asking the Blacks who made all things, one of them immediately to his surprise replied, God! and on being further questioned as to his source of knowledge he replied it was at Lake Macquarie’.¹⁹³ This gratified Threlkeld and demonstrated to him and his wider colonial audience that the Aboriginal prisoners were closing the substantive gap between their former selves and the normative behaviour demanded of British subjects. Plans were already afoot to close this gap even further. With their sentences about to expire, the surviving Aboriginal convicts were to be transferred to Threlkeld’s mission station at Lake Macquarie to undergo further coercive instruction and where they would ‘be considered free’ as long as they remained at or near the missionary’s residence.¹⁹⁴ The Colonial Secretary wrote to Threlkeld to convey the Governor’s wishes that the missionary ‘should reason with them’ and ‘endeavour to put them in huts upon land’

¹⁹¹ Langhorne to Hill, 1 February 1836.

¹⁹² Threlkeld. 5th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 122.

¹⁹³ Threlkeld to Parker, 15 November 1836, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 132.

¹⁹⁴ Threlkeld. 5th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 122.

near him.¹⁹⁵ The Governor hoped that the punishment and training that the Aboriginal men underwent whilst at Goat Island would coerce them to comply with the English-derived laws of the land. It was further anticipated that they might dissuade other Aboriginal people from contravening colonial edicts. Bourke was interested to learn ‘whether the instructions and advice Mr Langhorne has given to them will induce them to pursue any less savage mode of life than that to which they were formerly accustomed’.¹⁹⁶ To this end, Threlkeld was instructed to provide regular reports on his endeavours in regard to the cohort of Aboriginal convicts.

On Tuesday 15 November 1836, eight Aboriginal convicts from Goat Island accompanied by Langhorne arrived at Threlkeld’s mission station. The cohort of prisoners comprised those surviving captives from the Brisbane Water trials and probably Purimal as well. A contingent of local Aboriginal people led by Biraban guided the party from Goat Island to Threlkeld’s mission where the missionary ‘heard their lessons’.¹⁹⁷ The Brisbane Water prisoners could ‘repeat the Lord’s prayer in their own Language, and three could read’, Threlkeld wrote to the Reverend William Parker, Secretary to the Society for Promoting Christian Knowledge.¹⁹⁸ ‘It was very pleasing’, he declaimed, ‘and I was much gratified’.¹⁹⁹ Threlkeld showed the prisoners a large hut where it was proposed they should live. He planned to build a small boat for their use, and put it to them that they ought to ‘have a seine to fish [and] should send their produce salted to Sydney’ to be disposed of through

¹⁹⁵ Colonial Secretary to Reverend Lancelot Threlkeld, 9 November 1836, *Historical Records of Victoria* [hereafter *HRV*], Volume 2A, p. 156.

¹⁹⁶ *ibid.*

¹⁹⁷ Threlkeld to Parker, 15 November 1836, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 132.

¹⁹⁸ *ibid.*

¹⁹⁹ *ibid.*

Threlkeld's agent.²⁰⁰ In return, the men would be able to procure rations of flour, tea, sugar, and clothing whilst in Sydney, but were prohibited from buying alcohol or tobacco. They were not to leave the mission without a pass authorising them to do so. Threlkeld noted that 'to all this they appeared cordially to agree', providing him and Langhorne with 'much gratification on the prospect of carrying into effect a plan long contemplated'.²⁰¹

The missionaries' gratification was short lived. The men were no more enamoured with the missionaries' plans for them than Aboriginal people at Sydney Cove had been with the fishing village Macquarie established for them. Named 'Elizabeth Town' after his wife, the village formed part of the Governor's failed endeavours to civilise the natives.²⁰² Their feigned acquiescence to Threlkeld's proposal lulled the missionaries into a false sense of security that was necessary to allow their Aboriginal charges from Brisbane Water to escape during the night following their arrival. Leaving most of their clothes behind them in the hut they had been designated, the men absconded. Threlkeld described his and Langhorne's 'sad mortification' the following morning when, on calling them to their morning lessons and instructions, the missionaries found that 'every individual had disappeared!'²⁰³ Word later filtered back to Threlkeld that the former Aboriginal captives had returned to the Brisbane Water district.

²⁰⁰ Threlkeld. 6th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 133.

²⁰¹ Threlkeld to M'Leay, 17 November 1836, *Australian Reminiscences & Papers of L. E. Threlkeld*, pp. 258-59.

²⁰² Governor Darling to Right Hon. W. Huskisson, Enclosure No. 2, Mr E S Hall to Sir George Murray, 26 November 1828, *HRA*, Series I, Volume XIV, p. 597.

²⁰³ Threlkeld to M'Leay, 17 November 1836, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 259.

The Governor's hopes that the men could be reasoned with and that their time spent in captivity would dissuade them from recidivism were in vain. In December 1839, Toby was back in court. This time, he appeared at the Maitland Quarter Sessions with an Aboriginal co-defendant, Murphy, to face a charge of 'high-way robbery on the person of Thomas Cottrell, at Maitland, on the 21st of October last'.²⁰⁴ Cottrell had apparently been lucky to survive the attack on his person, 'having received two spear wounds in his arm, whilst two others pierced a tree close to him'.²⁰⁵ Four Aboriginal men were involved in the attack, only two of whom were recognised by Cottrell.²⁰⁶ While almost all Aboriginal defendants brought to trial were well known to their prosecutrix, this suggests that was a function of the necessity of avowing to the prisoner's identity as well as reflecting the intimacy of life at the frontier. The two men who Cottrell failed to recognise remained at liberty. The Chairman of the Quarter Sessions, after consulting with the judges and the Governor, sentenced Murphy and Toby to ten years' transportation to Van Diemen's Land, although the prisoners were sent to a penal island at Port Jackson instead.²⁰⁷

Toby, who was described as having been 'recently released from Goat Island where he was undergoing punishment for a similar offence', was obviously not dissuaded by his earlier penal experience from committing further offences against colonists.²⁰⁸ He told the court that he 'perfectly understood the meaning of the indictment', indicating that Toby realised his actions contravened colonial law and

²⁰⁴ *Australian*, 19 December 1839, p. 2.

²⁰⁵ *Australian*, 12 December 1839, p. 2.

²⁰⁶ *Australian*, 19 December 1839, p. 2.

²⁰⁷ *Australian*, 21 December 1839, p. 3.

²⁰⁸ *Australian*, 19 December 1829, p. 2.

could therefore lead to prosecution and punishment.²⁰⁹ Not only was he willing to take such a risk on his own account but he was also happy to be involved with three of his countrymen in committing what the colonists saw as the offence of highway robbery. Bourke's hopes that the men released from Goat Island would influence other Aboriginal men from taking action against colonists' persons and property did not come to fruition. Instead, both Toby and Murphy served time on Cockatoo Island, the Goat Island establishment having been moved there in the interim.²¹⁰

Another of the Aboriginal men, according to Threlkeld's account, had on his return home reverted to what the missionary considered to be his former practices:

One Black of the number sentenced to work in irons at Goat Island had previously shot several females and chopped in pieces others with his tommyhawk. – On his return from confinement he joined his tribe sat with them around a fire in the bush, seized a woman, was about to despatch her, when a black started up and cleft his skull with a hatchet, whilst another was buried in his heart.²¹¹

This tale bears a close resemblance to the stories about Musquito who was said to have committed violent acts against both Aboriginal and white women. Such narratives take on the flavour of colonial myths, adding to a repertoire of accounts that served to justify colonisation on the basis of native inferiority.

After leaving Goat Island, Langhorne had instructions to proceed to the Port Phillip District following a brief sojourn at Threlkeld's mission station. Two of the Aboriginal prisoners from Goat Island whose sentences were yet to expire were designated to accompany Langhorne. It was the Governor's intention that Langhorne

²⁰⁹ *ibid.*

²¹⁰ H. H. Browne to Colonial Secretary, 28 December 1850, 191/50 4/3379 with enclosure 'A Return Shewing The Number Of Aboriginal Natives Who Have Been Received On Cockatoo Island From The 1st Of January 1839 To The 16th December 1850' prepared by Charles Ormsby, Superintendent, 50/12485 4/3379 SRNSW.

²¹¹ Threlkeld. 6th Annual Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 133.

would establish an Aboriginal village at Port Phillip, a plan with which the young missionary was not particularly enamoured. He was well aware of the failure of similar initiatives and cautioned against forcing Aboriginal people ‘all at once into an artificial mode of living’ with which they were not acquainted.²¹² English village life, Langhorne wrote to the Governor, was ‘diametrically opposed’ to the ‘natural habits’ of Aboriginal people.²¹³

Langhorne did not lament the loss of his intended Aboriginal companions following their escape, telling Bourke ‘I do not consider I have sustained any loss by their defection, it not being probable that they would have remained with me after the term of their legal sentence of imprisonment had expired’.²¹⁴ He was, however, concerned to make appropriate arrangements for Purimal to be returned to his home district prior to the missionary’s departure for Port Phillip. Langhorne wrote to the Colonial Secretary on 15 December 1836 stating that an Aboriginal man called Piper was willing to accompany Purimal to Bathurst. Langhorne saw this as a good opportunity to repatriate Purimal ‘without either trouble or expense’.²¹⁵ Annotations on Langhorne’s letter indicate that the plan to have Piper act as an escort was initially approved, although it was proposed that Purimal be sent to William Watson, the missionary at Wellington Valley, rather than to Bathurst.²¹⁶ Further enquiries were made into Piper’s suitability to assume responsibility for Purimal’s return. As Piper had recently accompanied the deputy surveyor, Samuel Perry, on one of his

²¹² Langhorne to Bourke, 26 November 1836, *HRV*, Volume 2A, p. 157. The Port Phillip District is the present day State of Victoria.

²¹³ *ibid.*

²¹⁴ *ibid.*

²¹⁵ Langhorne to the Colonial Secretary, 15 December 1836, 36/10534 4/2367.2, SRNSW.

²¹⁶ *ibid.*

expeditions, Perry was asked to proffer his opinion. He wrote to the Colonial Secretary that ‘altho’ Piper is very honest I could not recommend him for the charge in question’.²¹⁷ Alternative arrangements were put in place to return Purimal to Wellington Valley *via* Bathurst under civil guard.²¹⁸ Watson later complained that he had been given no instructions as to what to do with Purimal, who arrived at his mission station in January 1837. He was at a loss to know whether the man was to be kept under restraint, or recaptured should he take to the bush. The missionary was of the opinion that Purimal, ‘if uninterrupted by other Aborigines’, might be perfectly content to remain at the mission house.²¹⁹ In any case, annotations on Watson’s letter indicate that it was not the Governor’s intent that the liberated man be kept under restraint once repatriated to Wellington Valley.²²⁰

Two years after the Aboriginal convicts were transferred off Goat Island, the Conciliator of Aborigines in Van Diemen’s Land, George Augustus Robinson, visited the place that seemed to have become something of an imperial curiosity at the time. On the morning of 15 September 1838, he set out for the island with three companions. Robinson noted in his journal that ‘the arrangement at Goat Island is very clean’ and made some approving remarks about the superintendent.²²¹ The man told him that the Aboriginal prisoners from Brisbane Water, while there, ‘had learnt to cut stone well’.²²² Robinson seemed interested in their progress from the point of

²¹⁷ Samuel Perry to the Colonial Secretary, 20 December 1836, 36/10797 4/2367.2, SRNSW.

²¹⁸ As per annotations on Perry’s letter. Samuel Perry to the Colonial Secretary, 20 December 1836, 36/10797 4/2367.2, SRNSW.

²¹⁹ William Watson to the Colonial Secretary, 16 January 1837, 37/1169 4/2367.2, SRNSW.

²²⁰ *ibid.*

²²¹ Plomley (ed). *Weep in Silence*, p. 585.

²²² *ibid.*

view that it provided evidence of Aboriginal capacity to take instruction. He also noted in his journal that Langhorne had taught the captives, and had been intending to take them with him to the Port Phillip District. According to Robinson's version of events, Langhorne had mistakenly allowed the captives to visit relatives at Brisbane Water whilst *en route*, at which juncture the men had 'very properly run away'.²²³ The Conciliator appeared not to have been aware of the arrangements that had been put in place for most of the men to be temporarily housed at Threlkeld's mission, nor of the circumstances surrounding their escape.

Robinson's journal entries while in Sydney demonstrate his interest in Aboriginal prisoners and also provide some insights into their management at a time contemporaneous with the aftermath of the Brisbane Water trials. On 3 September 1838, Robinson called on some Aboriginal prisoners from Sydney and the Port Phillip District at Sydney Gaol, a place he described as 'a dungeon' and 'a miserable hole'.²²⁴ While at the gaol, he also saw the gallows on which two Aboriginal prisoners had been hanged.²²⁵ Robinson stated in his journal that the week prior to his visit eight Aboriginal prisoners had been released from Sydney Gaol and sent to the Benevolent Asylum. When he went to visit them there, he learned that six of the former prisoners had absconded while two 'had been taken out and sent on board of the *Prince George* revenue cutter by the Governor's orders to make sailors of them', a measure Robinson considered 'absurd and unjust'.²²⁶

²²³ *ibid.*

²²⁴ *ibid.*, p. 582.

²²⁵ *ibid.*

²²⁶ *ibid.*

The criminalisation of the Aboriginal defendants in the Brisbane Water trials of 1834 was to have facilitated a process of inclusion in the wider colonial society paradoxically achieved through exclusion from the state's polity during a period of preparatory training. By the end of 1836, the experiment in coercive assimilation that began in the local lockup and in Sydney Gaol, continued on Goat Island, and concluded at Threlkeld's mission station at Lake Macquarie was deemed to have failed. Those Aboriginal men who had not succumbed to death resulting from their exposure to the harsh disciplinary regime of penal incarceration and missionary instruction had subverted the state's attempts to reform them through affecting their escape. Threlkeld's contemporaneous assessment of this outcome is illuminating:

The mere mechanical external operation of human instruction, is too transitory in its effects to calculate upon, as was clearly exemplified in the Aborigines confined at Goat Island, who whilst under coercive instruction, rapidly advanced in their respective attainments of reading, writing and arithmetic, repeating prayers, singing hymns, and the art of cutting stone, in which they exhibited much skill; but when removed from under restraint, proved to Man, that coercive religious instruction is of no moral avail, however much we may deceive ourselves with specious appearances of success during compulsory education.²²⁷

Once the Aboriginal prisoners were freed from the surveillance of the prison guard who oversaw them and the iron chains that weighed heavily on their bodies, they immediately sought to free themselves from the intellectual chains with which their captors sought to bind their minds. Whether they agreed with Conkleberry Charlie's view that breaking stones in gaol meant they were no longer 'myalls' (or 'wild blacks') is not recorded, but when some of the former prisoners were asked to engage in stone-cutting in return for payment they refused on the grounds that it had been

²²⁷ Threlkeld, 8th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 144.

their punishment.²²⁸ Despite being in a position to exercise agency when it came to making informed choices about their work practices and their engagement or otherwise in the colonists' economy, the steady increase in settler numbers led to more Aboriginal men being criminalised as they asserted themselves. Aborigines who actively opposed British colonisation through attacking the colonists and their property, or who sought recompense for use of their land and resources, were increasingly brought before the colonial law courts and held accountable for their actions in accordance with English laws with which they were not conversant.

²²⁸ Swancott. *The Brisbane Water Story*, Part 4, p. 67; Threlkeld. 8th Report, *Australian Reminiscences & Papers of L. E. Threlkeld*, p. 144.

Chapter Four

‘Crimes of the Most Atrocious Description’: Criminalising Aboriginal Defendants at the Maitland Circuit Court

On Tuesday 12 September 1843 a party of Hunter Valley gentlemen ‘in carriages, gigs, and on horseback’ escorted His Honor Mr Justice Stephen and his entourage into the town of Maitland.¹ The gentlemen then ‘waited upon’ the Judge ‘in his lodgings at Cox’s Hotel’.² In accordance with convention, Stephen attended divine service at St Peter’s Church the following morning. The theatricalities that marked the Judge’s arrival were a forerunner to the staging of the main event. Two hours later than usual to allow for having attended church, Stephen took his seat upon the bench at the Maitland Circuit Court at half past eleven o’clock to read Her Majesty’s proclamation against vice and immorality. His presence in the courtroom so soon after attending divine service reinforced a symbolic link between church and state and imbued Stephen with a moral authority derived from the Christian bible. Assuming a mantle of divine decree was pertinent to his practice as a puisne judge as in this role he was invested with the power to determine whether those who transgressed the laws of the land would continue in life or be put to death.

The pomp and ceremony surrounding Stephen’s arrival in Maitland emulated the ritual surrounding the visits of judges to the towns in England where assizes were held.³ With its elements of precedence and continuity, re-enacting this ritual created a visual allusion to the extension of the rule of law over the English colonies. As

¹ *Maitland Mercury*, 16 September 1843, p. 2.

² *ibid.*

³ Peter King. *Crime, Justice, and Discretion in England, 1740-1820*, Oxford University Press, New York, 2000, pp. 334-35.

Stephen and his entourage travelled across country and entered both church and courtroom, they symbolised as well as enacted the transplantation of English justice into the Australian colonies over-riding indigenous systems of lore and law in the process.

Once Stephen had empanelled the jury and fined those who had failed to attend for jury service, he told the court that he was pleased to observe that of the thirty-nine prisoners listed for trial, only eight of their number was 'of the class originally free'.⁴ Twenty-four were either convicts or were free by servitude, whilst the remaining seven defendants were 'of our benighted and unfortunate aboriginal or native population'.⁵ He then addressed the jury in relation to the unusually distressing character of the crimes listed in the calendar:

The crimes imputed to the seven aboriginals, I regret to say, are, if you shall believe the witnesses, of the most atrocious description; such indeed, as in two at least of the cases, should the unhappy men be found guilty, to preclude all expectation of hope or mercy in this world ... It must be remembered that the prisoners labour under unusual and peculiar disadvantages; which you will do honor to yourselves in labouring to counteract, by even more than your ordinary care and caution.⁶

Having positioned Aboriginal people as a disadvantaged underclass, the Judge reaffirmed their status as British subjects thus reinforcing the rationale that underpinned and served to justify Aboriginal appearances before the colonial law courts. In the courtroom, asserted Stephen, 'the same measure of justice, and in the same scales' applied to all alike 'whatever the offender's colour'.⁷ For the sake of Aborigines themselves as much as for the sake of the lone stockkeeper or stockman,

⁴ *Maitland Mercury*, 16 September 1843, p. 2.

⁵ *ibid.*

⁶ *ibid.*

⁷ *ibid.*

the same ‘severe but just’ punishments would be meted out as those visited upon transgressors within the settler population. ‘Humanity’, affirmed the judge, required that such a course of action be followed.⁸

At the time these trials were staged, the circuit courts were newly constituted and were expected to deliver considerable benefits to the inhabitants of New South Wales’ outlying regions. Using the anticipated benefits as a benchmark, this chapter assesses the ways in which innovations unique to the circuit courts functioned to further disadvantage Aboriginal defendants and facilitate their criminalisation, thus providing a conduit into the convict system. Initially the chapter provides a brief overview of the backdrop against which the actions that led to the Aboriginal arrests took place. This demonstrates that the broader context was one of frontier conflict, a point that is critical to reading these men’s actions as constituting what can be understood in today’s terminology as political activism and resistance. A synopsis of the convoluted process through which circuit courts were eventually instituted in New South Wales is provided to highlight serious divisions between successive colonial governors and the judiciary in order to dispel notions of a colonial administration that always worked in concert. The chapter then focuses on the trials of the Aboriginal defendants at the September 1843 Maitland circuit court. It concentrates in particular on the factors specific to the circuit courts that, it will be argued, were instrumental in facilitating the criminalisation of these men, a pre-condition to the transportation of the majority of them. It will become evident as the chapter progresses that while transportation was an option available to colonial judges in sentencing people born in the colonies, it was sometimes neglected in favour of

⁸ *ibid.*

more permanent means of dispatching those considered incorrigible. In particular, it will be suggested that Stephen may aptly be described as the ‘hanging judge’ as he condemned all the Aboriginal defendants to judicial execution. Those men subsequently transported had their sentences commuted by the Executive.

In the early 1840s colonists in New South Wales considered the original inhabitants of the land to be waging a war against them. Nineteenth-century historian, journalist, and poet Roderick Flanagan described a ‘simultaneous aggressive movement of the aborigines throughout the entire colony [of New South Wales] and along its boundaries’ that commenced in 1842.⁹ Dubbing this ‘The “Rising” of 1842-4’, Flanagan stated this action that continued for two to three years ‘belongs to the history of the country’ and wrote:

For more than two years the warfare which the blacks waged upon the stations situate (sic) along the boundaries of the colony, from one extreme to the other, was universal, implacable, and incessant. So simultaneous, indeed, and so general was the movement that, did we not know from the habits and conditions of the blacks that such a thing would be impossible, a belief would have been encouraged that the onslaught of the aborigines on the lives and property of the settlers was the result of a perfect organization, effected with all the aids of negotiation, secret intrigue, and general assemblies. From Wide Bay to Port Phillip the organization seemed to extend, and scarcely a day elapsed without tidings reaching the city of some remote station being driven in, some flock driven away or speared, some shepherd or hutkeeper being wounded or killed. To add to the horror excited in the minds of the people on the several stations by the alarming situation in which they found themselves placed, tribes of blacks who had hitherto lived on the most peaceful or friendly terms with the whites became all at once transformed into their most bloodthirsty enemies, while other tribes, hitherto unknown or unheard of within the limits of the colony,

⁹ Roderick Flanagan. *The Aborigines of Australia*, Edward F. Flanagan and George Robertson and Company, Sydney, 1888, p. 130.

came in from the wilderness to join in the war which their brethren were waging.¹⁰

Flanagan's analysis provides a rationale for the colonists' failure to acknowledge any organisation on the part of the Aboriginal combatants. He made it clear that it was colonists' perceptions of the 'habits and conditions of the blacks' that led them to denounce as impossible any idea of co-ordinated military action on the part of Aborigines, even though the available evidence strongly indicated 'perfect organization' of the 'simultaneous' and 'general' movement along the length of the New South Wales frontier.¹¹ In light of extensively revised understandings of the 'habits and conditions' of Aborigines, read from a present day perspective such evidence strongly indicates a comprehensive and co-ordinated campaign waged by disparate Aboriginal groups throughout the length of New South Wales who came together for the express purpose of driving away colonists in the outlying districts.¹²

Reports of Aboriginal activity in the Hunter Valley throughout 1842 include accounts of 'a mob of blacks amounting to several hundreds ... wandering on the McIntyre River committing depredations at their pleasure', Aborigines driving off an entire herd of cattle from a station, and numerous attacks on stock.¹³ The *Hunter River Gazette* described 'various outrages' as having been committed by Aboriginal

¹⁰ *ibid.*, pp. 130-31.

¹¹ *ibid.*

¹² See, for example, John Connor. *The Australian Frontier Wars, 1788-1838*, University of New South Wales Press, Sydney, 2002; Ian Keen. *Aboriginal Economy and Society: Australia at the Threshold of Colonisation*, Oxford University Press, South Melbourne, 2004; Ann McGrath (ed). *Contested Ground: Australian Aborigines Under the British Crown*, Allen & Unwin, St Leonards, 1995; Henry Reynolds. *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin, Ringwood, 1981, *Dispossession: Black Australians and White Invaders*, Allen & Unwin, Sydney, 1989, *With The White People*, Penguin, Ringwood, 1990, *The Law of the Land*, Penguin, Camberwell, (1987, 1992), 2003, and *Fate of a Free People*, Penguin, Ringwood, 1995.

¹³ *Hunter River Gazette*, 19 March 1842, p. 2.

men on colonists' properties in the district 'ever since the period at which we were placed in a position to become acquainted with them'.¹⁴ Calling for a harder line to be adopted against them, the newspaper warned that if the Government did not 'interfere to prevent it, those subjected to such repeated loss and annoyance are likely to become so exasperated that the utter extermination of the blacks will most probably be the consequence'.¹⁵ From letters written by correspondents, the newspaper extrapolated that 'the natives had conducted their operations so systematically, and on a scale so extensive, as augured not only the utmost confidence in their strength, but an intimate knowledge of the weakness of their opponents, whose force was altogether insufficient to cope with them'.¹⁶ As well as corroborating Flanagan's assessment of the hostility of colonial relations at the New South Wales frontier in the early 1840s, this article demonstrates that while the author acknowledged the organisation and strength of Aboriginal numbers, he saw it as being only a matter of time before the local police force must be augmented to impose the rule of law on the truculent Aborigines. Failing this, local settlers were likely to take matters into their own hands and extermination, he suggested, was the most likely outcome.

The strategies employed by Aboriginal men against colonists in the Hunter Valley and the squatters encroaching on the adjacent Liverpool Plains continued into 1843, the year of the arrests of the Aboriginal defendants who are the subject of this chapter. In January 1843, a large party of Aborigines attacked C. Doyle's station in the Mooney district, taking three horses and driving off the entire herd of 500 head of

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

cattle. Earlier the men had taken another horse, meaning that the loss of four horses cost Doyle £129. They also killed one of Doyle's stockmen and severely wounded another who, it was thought, would not recover. Huts were destroyed in the attack, and six months' supplies were taken from the station. In a letter to Doyle, his son reported that the workers were in no doubt as to Aboriginal motivations as they were 'coming opposite to the hut and daring the men to go out, saying they had killed all the horses, and would kill or drive all the white fellows off the Mooney, M'Intyre, and Barwin Rivers'.¹⁷ Their intentions could hardly have been clearer. The younger Doyle added that Aboriginal men had driven away 1,100 head of cattle from Messrs. Eaton and Onus who resided in the same district.¹⁸

A resident at the Big River wrote to the *Maitland Mercury* in January 1843. His correspondence provides a useful précis of a resident's understanding of such attacks. Writing about how a stockman was speared at Beddington's station at the Big River, the anonymous correspondent reported that the perpetrator was considered to have been a 'civilized black'. He complained that:

what was a peaceable and safe part of the country two years ago, is now, from want of proper measures [on the part of the Government], and from depredations being allowed to pass unheeded and unpunished, becoming most alarming and dangerous: our cattle are destroyed, and our men murdered, with impunity, while we must stand passive observers, and witness the destruction of our property, or run a very good chance of losing our lives, either by the gallows or the spear.¹⁹

¹⁷ 'Namoi River', extract of a letter from Mr. B. Doyle, of the Namoi, to his father, C. M. Doyle, Esq., dated 19 January 1843, *Maitland Mercury*, 28 January 1843, p. 2.

¹⁸ *ibid.*

¹⁹ *Maitland Mercury*, 21 January 1843, p. 4. The reference to the gallows is an allusion to the outcome of the trials following the Myall Creek massacre following which seven 'white' men were hanged for the murder of Aboriginal people.

He wrote that the previously ‘quiet Blacks’ of the Namoi ‘are turning out and killing cattle at Rocky Creek’.²⁰ The Big River correspondent speculated that ‘if the blacks intend adopting this system of warfare it will be impossible that either ourselves or our men can move from our huts without the utmost danger, and of course, under such circumstances, our herds will fall an easy prey to them’.²¹ He pointed out that the Aborigines were well aware of what they were about, stating that ‘an intelligent black’ had outlined their strategy to him whereby they would ‘destroy all the horses, and thus disable the men from attending to the cattle’.²² The correspondent was in no doubt that a type of warfare was being waged deliberately and strategically against colonists in the vicinity, with Aboriginal attacks being carried out on stock, buildings, supplies, and on the settlers and their servants. Already, he wrote, ‘the herds have suffered severely from Mr. Gally’s downwards – my own, Mr. Crawford’s, and Mr. Beddington’s’.²³ The previous correspondent, Doyle, stated that the same Aborigines who killed Beddington’s stockman crossed over into the Mooney district and tried to attack the sheep on his father’s run. They were deterred by the presence of an armed shepherd.²⁴ The anxious Hunter Valley colonists awaited a response to their representations to the Government for protection from the Aborigines. These examples typify Aboriginal activities in the Hunter Valley and beyond during this period in the region’s history. Significantly the sorts of activities carried out were of the type described by Flanagan, that is, attacks on hutkeepers, shepherds, and stock and can be understood as having constituted acts of frontier warfare.

²⁰ *ibid.*

²¹ *ibid.*

²² *ibid.*

²³ *ibid.*

²⁴ ‘Namoi River,’ *Maitland Mercury*, 28 January 1843, p. 2.

As the following synopses demonstrate, the events that led to charges being laid against the Aboriginal defendants who appeared before the Maitland Circuit Court in September 1843 were consistent with the *modus operandi* followed by Aboriginal strategists throughout the region, albeit complicated in the first example by an episode of internecine conflict. The first of the attacks that resulted in criminal charges being preferred took place in February 1843 at brothers Robert and Helenus Scott's *Stanhope* station about twenty miles from Maitland in the Hunter Valley.²⁵ This incident provides an intriguing vignette of the verbal thrust and parry that characterised some frontier encounters. The main players were two Wonnarua men known as Melville and Harry (or Long Harry); two free settlers, Anastasia Doyle and Mary Keough, sisters who travelled out from England on the *Sir Charles Napier* in 1842 and who were married to shepherds at the station; nine-month old Anastasia Doyle and three-month old Michael Keough; nine-year old Patrick Cavenagh, a visitor; and Edward Thompson, an assigned convict servant who arrived in the colony in 1835 on board the *Lady Nugent* after being sentenced to transportation for life.²⁶

²⁵ Trained at Lincoln's Inn in London, Robert Scott was a magistrate and lawyer and participated fully in Exclusivist society in colonial New South Wales. Following what has been termed his 'injudicious and somewhat arrogant defence of the Myall Creek murderers', Scott was removed from the magistracy in 1838. Partly predicated on his pre-eminent social standing, his ignominious fall from grace reflected the stance adopted by the then newly arrived Governor George Gipps who was determined to make an example of those who unlawfully killed Aborigines. For biographical notes on both Scott brothers, see Nancy Gray. 'Scott, Helenus (1802 - 1879)', *Australian Dictionary of Biography*, Volume 2, Melbourne University Press, Melbourne, 1967, pp. 428-29; Nancy Gray. 'Scott, Robert (1799? - 1844)', *Australian Dictionary of Biography*, Volume 2, Melbourne University Press, Melbourne, 1967, pp. 428-29.

²⁶ James Wilson-Miller. *Koori, a Will to Win: The Heroic Resistance, Triumph and Survival of Black Australia*, Angus & Robertson, Sydney, 1985; *Depositions Related to Murders Committed by Blacks*, 43/2053 4/4562.5 SRNSW; 'Horrible Outrage Committed By The Blacks', *Maitland Mercury*, 11 February 1843, p. 2.

According to Mary Keough's deposition, Melville's and Harry's traditional country was 'principally Lamb's Valley, Bolwara, Lower Patterson, & Wallaroba'.²⁷ Both men were 'tall' and 'stout', and Harry was readily recognisable as 'the left leg [is] much burnt & has lost the big toe & two small toes & the top joints of the two middle toes – his right foot is also much burnt'.²⁸ Melville was said to be about 5'10" tall, 'pockmarked, the left eye smallest' and had 'two gins one of them a half-caste'.²⁹ On 11 February 1843 at around nine o'clock in the morning 'a portion of the Paterson tribe headed by ... "Melville" and "Harry"' surrounded *Stanhope* station.³⁰ Harry and Melville approached the shepherd's hut where the Keough and Doyle families and Thompson lived, and where the boy Cavenagh was visiting. Lighting their pipes, they asked after the absent shepherds. Thompson knew Harry and Melville as they had visited the hut before. In the course of conversation, Melville asked Thompson:

whether he came to the colony as an immigrant, or a prisoner, and when he replied that he came as a prisoner they said it was well for him, as prisoners were obliged to come here against their will, but the immigrants came of their own accord, to rob the black man of his land and gave him no food, and that they (the blacks) would pay them (the immigrants) off for it.³¹

This line of questioning indicates what might be termed a political awareness on Melville's part, as he clearly realised that the basis on which immigrants came to New South Wales varied. Some were compelled to come, often against their will, while others chose to emigrate of their own accord to, as Melville saw it, 'take all

²⁷ *Depositions Related to Murders Committed by Blacks*, 43/2053 4/4562.5, SRNSW.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ William Collins. 'Melville and Harry', article submitted to Alex Morrison, *The Budget*, Singleton, 1895, A6725(ix), The Percy Haslam Collection, University of Newcastle Library.

³¹ *Maitland Mercury*, 11 February 1843, p. 2.

land, and give nothing for it'.³² Melville's statement provides further evidence that some Aboriginal people drew a clear distinction between convicts and free settlers, a point that has been discussed earlier in this thesis.

As Thompson continued to converse with the men, it became clear to him that Melville knew a £5 reward had been posted for his capture. He was suspected of killing the children of another colonial family and was, in conjunction with Harry, also believed to have killed an Aboriginal boy on Charles Boydell's nearby station.³³ Tensions rose when Melville and Harry asked Thompson if he could lend them a musket 'to shoot wild ducks'.³⁴ After walking a short distance from the hut to eat some bread, the men returned and told Thompson to give up all that he had in the hut. The watchman handed over his meagre supply of tobacco as Melville 'expressed his determination to ravish the women'.³⁵ He told the watchman that 'white fellows have black gins, and now black fellows have white gins'.³⁶ This statement is open to being read in a number of ways. It suggests that there was an element of reciprocity, if not retribution, in the attack. It could indicate sexual curiosity on Melville's part. In any case, Thompson distracted Melville while the two women climbed out the back window and ran up a hill, but the diversion was only temporary. Melville and Harry followed the fleeing women. At this point, the women and the Aboriginal men tested each other's mettle, with the men asking why the women were running? Doyle responded that they were 'picking up sticks to bake a cake', and momentarily

³² *Maitland Mercury*, 16 September 1843, p. 3.

³³ *Sydney Morning Herald*, 19 September 1843, p. 2.

³⁴ *Depositions Related to Murders Committed by Blacks*, 43/2053 4/4562.5, SRNSW.

³⁵ *ibid.*

³⁶ *Maitland Mercury*, 16 September 1843, p. 3.

diverted the men's attention by shouting that some stockmen were approaching.³⁷ In the ensuing confusion Doyle concealed herself and her baby behind the chimney of the hut where she remained hidden from Melville who continued to search fruitlessly for her.³⁸

Harry stayed with Keough, Thompson, and the children, threatening to run them through with a spear if any of them moved. On his return from searching the hut, Melville brought with him all the blankets and other property and falsely claimed to have killed Doyle and her baby. Shortly afterwards, Melville took Keough into a nearby gully and 'ravished her' and urged Harry to do likewise.³⁹ Harry declined. Melville killed the boy Patrick Cavenagh by beating him over the head with his waddy, and then struck the infant Michael Keough in his mother's arms until baby and mother fell to the ground. The men continued to beat them, allegedly shouting 'you bl...dy white b.....s hang Black fellows now'.⁴⁰ Afterwards, Thompson accompanied Doyle and her baby to a neighbour's to report the events. On their return to the hut, they found the two children dead and Keough almost lifeless. The woman eventually recovered sufficiently to provide a sworn statement as to the events that had transpired.⁴¹

Five days after the attack at *Stanhope* station, George Hobler saw a group of about thirty to forty 'blacks, from the Glendon, Patrick's Plains, and Sugarloaf tribes' assemble at the Hunter River.⁴² For unspecified reasons, he considered their aim to be

³⁷ *Depositions Related to Murders Committed by Blacks*, 43/2053 4/4562.5, SRNSW.

³⁸ *ibid.*

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *Hunter River Gazette*, 12 March 1842, p. 4.

the apprehension of Harry and Melville who were known to visit an Aboriginal camp on a small island in the middle of the river. As Hobler and his family looked on, the men he later described as the 'hostile blacks' formed two parties and fired upon the island using spears as well as five or six muskets. Those camping on the island fled to the opposite bank, and proceeded to fight the intruders. The action lasted about one hour, even spilling over into Hobler's garden. When it became apparent that neither Harry nor Melville was present at the scene, Jemmy, a man Hobler thought to be the 'chief of the divers', decided to retire to Port Stephens to 'enlist that tribe in his cause' following which 'the whole matter should be settled with the spear and the waddie'.⁴³ Hobler's position as a bystander is one of many such examples of Aboriginal and colonial unfolding in the same spatial and temporal zones but in completely separate 'places'. The Aboriginal battle, in part, took place in what the colonist saw as his front garden, but those engaged in the fighting went about their business seemingly oblivious to Hobler's presence. Hobler, who later provided the published account of the action, did not at any time indicate that he held any fears for his family's safety and wellbeing. This kind of juxtaposition is in keeping with a phenomenon Jan Critchett observed. Critchett described how she increasingly 'gained an impression ... of two races living side by side' as she 'read the diaries, journals and letters of the pioneers'.⁴⁴

In a letter to the Colonial Secretary forwarded with the witnesses' depositions, *Stanhope* co-owner and Justice of the Peace Helenus Scott noted that 'the active pursuit after the murderers ... has been continued by the Glendon, Merton, Maitland,

⁴³ *ibid.*

⁴⁴ Jan Critchett. *A 'Distant Field of Murder': Western District Frontiers 1834-1848*, Melbourne University Press, Melbourne, 1990, p. 2.

and Wallombi (sic) Blacks and by the Mounted Police' and that 'the Glendon blacks are still active in the pursuit'.⁴⁵ The motivations behind Jemmy's extensive hunt for Harry and Melville is not immediately apparent. It is possible that he may not have approved fully of their actions against the settlers. Pressures brought to bear in a situation of colonial contact could also have influenced his actions, actions that might best be understood within the paradigm of internecine conflict. Internecine conflict was a feature of pre-contact Aboriginal societies, with violence sometimes escalating into situations that have been described as 'feuds' involving reciprocal acts of violence. Such feuds were sparked by serious incidents such as wife stealing or killings, and could carry on over several generations.⁴⁶ The possibility of a long-standing feud cannot be ruled out in this case. Neither, though, can a pre-condition of animosity be confirmed. A study of a hunter-gatherer society, the Ju/wasi in South West Africa, who became sedentary after colonial contact illustrated that under changing conditions similar to those experienced by Aboriginal groups in the Hunter Valley, conditions of overcrowding and malnutrition unsurprisingly led to a marked increase in violence. The increased level of internecine violence was exacerbated by alcohol.⁴⁷ Alcohol was not directly implicated in Jemmy's pursuit of Melville and Harry, but contributed to internecine conflict in the Hunter Valley during the early colonial period. A report in the *Hunter River Gazette* described Aboriginal people as 'perambulating the town for the greater part of the day, in the course of which they

⁴⁵ *Depositions Related to Murders Committed by Blacks*, 43/2053 4/4562.5, SRNSW.

⁴⁶ Stephen Reyna. 'A Mode of Domination Approach to Organized Violence', *Studying War: Anthropological Perspectives*, S. P. Reyna and R. E. Downs (eds). Langhorne, Pennsylvania, 1994, pp. 38-9.

⁴⁷ Elizabeth Thomas. 'Management of Violence Among the Ju/wasi of Nyae Nyae: The Old Way and A New Way', *Studying War: Anthropological Perspectives*, S. P. Reyna and R. E. Downs (eds). Langhorne, Pennsylvania, 1994, pp. 78-80.

had managed, as usual, to become intoxicated'.⁴⁸ A scene followed in which they 'concentrated their forces in Bulwer-street, and commenced a scene of noise and outrage more intolerable than anything of the kind we have ever previously witnessed'.⁴⁹ The police arrested the 'ringleaders', although the newspaper observed that those supplying alcohol to the 'wretches' ought to be sought out and fined.⁵⁰ The tone of this report implies that by 1842 excessive consumption of alcohol leading to violence amongst Aboriginal groups was a regular event, and also indicates the degree of moral outrage that this incited within the colonising population. A similar report in April 1843 described the 'children of the wilds' being about the town 'armed with spears, waddies, boomerangs, and clubs'.⁵¹ The *Maitland Mercury* found the practice of supplying alcohol to Aboriginal people reprehensible, and described in detail a fight that had broken out amongst some of the women. On this occasion, other Aboriginal people intervened to end the violent confrontation.⁵²

Internecine conflict was exacerbated by instrumentalities of the colonial state. This is demonstrated by the way in which a party of police, responding to a rumour as to the whereabouts of Harry and Melville, went out to Wallis's Creek near Maitland and returned with an Aboriginal man who was apprehended on the basis of 'his manner and the trepidation he displayed'.⁵³ The man's anxious response to the presence of the armed party of police led them to believe that he knew something of the matter. Only after he was taken into town and recognised as 'a man well known in

⁴⁸ *Hunter River Gazette*, 29 January 1842, p. 3.

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *Maitland Mercury*, 1 April 1843, p. 2.

⁵² *ibid.*

⁵³ *Maitland Mercury*, 25 February 1843, p. 2.

Maitland, and one to whom not the slightest suspicion could be attached' was he released from custody.⁵⁴ This incident demonstrates the vulnerability that at least some Aboriginal people felt in response to the police whose presence symbolised and actualised the power that the colonial state could exercise over their bodies. Possibly groups like those led by Jemmy felt compelled to try and extract men wanted by the colonists from the midst of other groups to hand them over to the authorities. Through undertaking to do so, they were better able to protect themselves and their families from the angst of the police and local settlers. Their actions are, however, open to being read in a number of different ways and caution needs to be exercised so as to avoid being overly deterministic in analysing these events. For example, it needs to be allowed that some Aboriginal people may have disagreed with strategies employed by other Aboriginal protagonists and could have actively chosen to turn them in to the police. It has also been suggested elsewhere that contact with the colonising population allowed some groups to conceive new strategies for dealing with old adversaries, using the colonial police and other interested parties as innovative weapons in ongoing internecine conflicts.⁵⁵

After almost a month at large following the attack at *Stanhope* station, Harry and Melville were finally arrested after an armed struggle on Hog Island in the Paterson River. Bobby, an Aboriginal man, had alerted police as to their probable whereabouts. Acting on this information, the chief constable set out with a party of ticket-of-leave holders as assistants to capture the fugitives, relying on Bobby's

⁵⁴ *ibid.*

⁵⁵ See, for example, R H W (Bob) Reece, 'Inventing Aborigines', *Aboriginal History*, Volume 11, Number 1, 1987, p. 22

tracking skills to determine the exact whereabouts of the two wanted men.⁵⁶ When they were located Melville and Harry were described in terms reminiscent of English representations of the American frontier as having ‘raised their usual war whoop’.⁵⁷ After a one-hour armed confrontation, the men were taken captive and were positively identified. The editor of the *Maitland Mercury* described Melville as ‘the most ferocious looking black I have ever seen in the country’.⁵⁸

Despite Bobby’s pivotal role in capturing Melville and Harry – local magistrates described him as ‘the man mainly instrumental in their capture’ – the Aboriginal tracker was unsuccessful in his petitions to obtain any portion of the promised reward.⁵⁹ According to the magistrates Johnstone and Boydell, Bobby ‘several times applied [for the reward] having partly acted as he did under the promise of something if successful’.⁶⁰ They wrote to the Colonial Secretary asking that the matter be brought to the notice of the Governor in the hope that he would give some recognition to Bobby which, according to the magistrates, would ‘greatly encourage’ him ‘in pursuing the same course’ should further issues arise in relation to Aboriginal aggressions in the district.⁶¹ Despite the men’s lobbying, the request was declined. Their letter is annotated in the margins ‘I regret I have no funds out of

⁵⁶ Johnstone and Boydell to the Colonial Secretary, 2 October 1843, 43/7456 4/2624.2, SRNSW.

⁵⁷ *Maitland Mercury*, 18 March 1843, p. 3. See, for example, Elbridge Brooks. *The Story of the American Indian: His Origin, Development, Decline, and Destiny*, D. Lothrop Company, Cornhill, 1887, p. 185; Annie Abel. *The American Indian as Participant in the Civil War*, Scholarly Press, Michigan, 1972, p. 31; John Frost. *Thrilling Adventures Among The Indians: Comprising the Most Remarkable Personal Narrative of Events in the Early Indian Wars as well as of Incidents in the Recent Indian Hostilities in Mexico and Texas*, J. W. Bradley, Philadelphia, 1849, p. 414.

⁵⁸ *Maitland Mercury*, 18 March 1843, p. 3.

⁵⁹ Johnstone and Boydell to the Colonial Secretary, 2 October 1843, 43/7456 4/2624.2, SRNSW.

⁶⁰ *ibid.*

⁶¹ *ibid.*

which I can give him a reward'.⁶² It is unclear as to whether the author of this marginalia meant that he has no funds out of which reward moneys might be paid to Aboriginal recipients, or if he had no funds available to pay the promised reward at all.

In the aftermath of the events at *Stanhope* station, various local personalities who lived there claimed the place to be haunted. Writing more than half a century later about these events, the son of the one-time station manager stated:

There were when my father took possession of the place [in 1846] various rumours that it was haunted. One story was that the previous manager, Mr Hetherington, now deceased ... was frequently by some supernatural agency carried out of his hammock of a night; another was that at night a child could be heard crying close by or near the house.⁶³

The writer of this piece, William Collins, claimed that neither he nor his family members had experienced any 'nocturnal visitations' during their two-year residency.⁶⁴

Like Harry and Melville, the action engaged in by another of the Aboriginal defendants who appeared before Justice Stephen at the September 1843 Maitland circuit court was consistent with the patterns of frontier warfare evident at the time. Described as having a withered leg from which feature his descriptive Aboriginal name was derived, Therramitchee (literally 'small leg') was well known to colonists around Cogo in the Hunter Valley. With another eight or nine men, Therramitchee was allegedly involved in an attack on a hut at a Mr. McLeod's farm at Cogo during which two of the four white inhabitants were killed. The events were said to have

⁶² *ibid.*

⁶³ Collins. 'Melville and Harry', p. 2.

⁶⁴ *ibid.*

taken place on 9 February 1837, almost six years' prior to Therramitchee's arrest. It was alleged that Therramitchee and his cohort had approached the men's hut on the pretext of obtaining a drink of water and then used the opportunity to rush into the hut and attack its inhabitants. One of the men, John Spokes, received a blow to the head that knocked him to the ground. Two other men, John Pocock and another called Somerville, were attacked as they lay in their beds before being hauled to the ground and struck with waddies and a boomerang. Both men died of their wounds. A fourth man, Lennox, fought back against the intruders. Spokes, who the Aboriginal men mistakenly thought was dead, managed to escape, outrunning his pursuers and raising the alarm. When he and others returned to the scene, the hut had been stripped of all its contents bar the beds. Therramitchee apparently vanished from the district around Cogo for some years after the attack, but was eventually located living in an Aboriginal camp on a Major Innes's farm. Notably, his discovery resulted from information being provided as to his whereabouts by 'some blacks of another tribe'.⁶⁵ Therramitchee was taken into custody and charged with the wilful murder of John Pocock.

A similar *modus operandi* is evident in the events that led to the arrests of Jacky Jacky, Fowler, and Sorethighed Jemmy. On 4 May 1843, these three Aboriginal defendants were among a group of around sixteen men who broke into watchman Patrick Carroll's hut near the McLeay River, 107 miles from Port Macquarie. Carroll was employed by Messrs. Betts, Panton, and Kerr and shared the hut with some shepherds who were out with the flocks at the time of the attack. When the men entered the hut, Carroll unsuccessfully tried to appease them by offering

⁶⁵ *Maitland Mercury*, 16 September 1843, p. 2.

them sugar, flour, and tea. Jacky Jacky and Fowler both struck at Carroll with weapons he later described as tomahawks.⁶⁶ Their weapon of choice is of some interest. When an unnamed 'fine looking Aboriginal black ... chained around the neck' was brought before a magistrate to answer charges of murder and cattle spearing, the *Hunter River Gazette* described how Aboriginal men:

generally were allowed to escape for want of an interpreter, and are not brought to trial (as white men have been, and executed, for similar offences), but are turned adrift well clothed and with tomahawks given to them.⁶⁷

Such men, according to the author of the article, might have been mistakenly led to believe that their actions were meritorious owing to the material goods bestowed upon them. It was suggested that after being released their conduct was 'generally worse than ever'.⁶⁸ Fowler may have been one such man as Carroll claimed prior knowledge of his 'bad reputation' and had kept an eye on Fowler when he entered the hut.⁶⁹

When Carroll escaped from his tomahawk-wielding assailants, he was hotly pursued by four of them including Sorethighed Jemmy. So-named because he sported a large unhealed sore on his leg, Sorethighed Jemmy tried to strike the fleeing Carroll on the head. As Carroll raised his hands to protect his head, the tomahawk slashed his

⁶⁶ *ibid.*, pp. 2-3.

⁶⁷ *Hunter River Gazette*, 29 January 1842, p. 3. Allowing Aboriginal prisoners to go free for want of a suitable interpreter was a relatively common phenomenon. The best-known example of such an outcome is probably the case involving Port Phillip District personality Koort Kurrup. Arrested by Henry Dana and his Native Police on 31 August 1844, Kurrup was held in gaol for sixteen months before finally being released from captivity as his trial could not proceed for want of an interpreter. See 46/2561 4/2724 SRNSW. See also Protector William Thomas to the Resident Judge Roger Therry, 14 May 1845, 46/2561 4/2742, SRNSW, in which a number of cases brought before the Supreme Courts in Sydney and Melbourne where Aboriginal defendants were discharged because of the lack of an interpreter are also mentioned.

⁶⁸ *ibid.*

⁶⁹ *Maitland Mercury*, 16 September 1843, pp. 2-3.

hand and throat. He then fell to the ground and feigned death. Eventually, his dog came up and stood over him, howling, at which point he correctly assumed that the Aboriginal men had gone. With some considerable effort, Carroll made it back to the hut where he later described having ‘got a drink of water ... more of it came out at the hole made by the tomahawk’ than went into his stomach.⁷⁰ When the shepherds returned to the hut in the evening, they found Carroll in a very poor state. A surgeon, Henry John Madden, was called to attend to the man, and later described him as having been:

in a very weak and exhausted state; he had a deep and incised wound on his neck, which nearly divided the windpipe; the gullet was partially injured; he had also a wound on the right temple, which penetrated to the bone, and a contused wound on his hand. He was in a highly dangerous state; and so continued for nine days.⁷¹

Six weeks expired before Carroll recovered from his injuries. In the meantime, the ‘outrage’ was reported to the commissioner of crown lands, Robert Massey Esq., on 6 May 1843. Massey issued warrants for the arrests of Jacky Jacky, Fowler, Sorethighed Jemmy, and Pothooks and sent two troopers in pursuit of them. Massey himself started out after the protagonists the following day and was in the company of a trooper, James Smith, when on 30 May they came across Fowler and Sorethighed Jemmy in camp. Fowler laid claim to a waistcoat found at the camp that Carroll later identified as his property. Jacky Jacky was arrested three weeks later by a stockman, and joined Fowler and Sorethighed Jemmy in gaol. Jacky Jacky faced a charge of wounding Patrick Carroll with a tomahawk on the throat with intent to kill him. Fowler and Sorethighed Jemmy faced lesser charges of being present, aiding and

⁷⁰ *ibid.*

⁷¹ *ibid.*

abetting.⁷² The month following the arrests, the *Maitland Mercury* referred to the ongoing ‘serious depredations’ in the district and mentioned the capture of ‘three of the most notorious’ Aborigines.⁷³ According to the newspaper report, it was rumoured that three other Aboriginal men were shot in the affray preceding the arrests. Fowler was mentioned by name, and described as ‘a desperate character, supposed to have been concerned in some murders at Gogo [sic] some years back’.⁷⁴ The suggestion here is that he may well have been one of the men with Therramitchee when Pocock and Somerville were killed, although no charges were preferred against Fowler in relation to this earlier event. It was probably considered sufficient that he already faced the possibility of capital conviction in relation to the attack on Carroll.

An Aboriginal man known as Tom *alias* Kambago also appeared before Stephen at the Maitland Circuit Court in September 1843. On 24 April of the same year Tom speared a shepherd, William Vant, who was an employee of Mr David Archer at Durrandurra near Moreton Bay. Just back from taking some young lambs from his hut out to the ewes, Vant was stoking up his fire outside his hut as Tom’s spear struck him below the shoulder blade. Another Aboriginal man allegedly tried to spear Vant in the bowels, but the shepherd grabbed the spear in his hand and told his assailants that he was not scared of them. On hearing this, the men ran off. Vant took five days to recover from the spear wound. Tom, who was later apprehended, was charged with ‘wounding William Vant in the back with a spear, with intent to kill him’.⁷⁵

⁷² *ibid.*

⁷³ *Maitland Mercury*, 17 June 1843, p. 4.

⁷⁴ *ibid.*

⁷⁵ *Maitland Mercury*, 16 September 1843, p. 2.

While they were remanded in custody Harry, Melville, Therramitchee, Jacky Jacky, Fowler, Sorethighed Jemmy, and Tom would have been housed in Maitland Gaol, an establishment whose accommodations were described as ‘wretched’ and where they most likely experienced ‘indiscriminate confinement among a crowd of prisoners accused of every species of offence’.⁷⁶ Such were the inadequacies of the local penitentiary that by 1843 those condemned to hang were shipped to Newcastle to be housed in accommodations considered more suitable to their ‘unhappy circumstances’.⁷⁷ The gaol at Maitland was particularly crowded. As well as the Aboriginal prisoners, there were twenty-three other men listed to appear before His Honor during the circuit court hearings. A further twenty-four men and two women were confined within the Gaol awaiting the court of Quarter Sessions; four men were to be moved to other stations; three men and six women were gaoled under sentences of hard labour; one male and one female were confined as debtors; eleven more males were under confinement; one male witness was housed in the gaol; and ten females were waiting for assignment. In total, there were 71 males and 20 females in Maitland Gaol, while the deteriorating health of a further five males and three females had seen them admitted to the local hospital.⁷⁸

Legislation passed in England in 1828 provided for the establishment of circuit courts in New South Wales, yet wrangling within the colony substantially delayed their institution. A decade of bickering and subterfuge had taken place as successive colonial governors engaged in a power struggle with the judiciary over who held the

⁷⁶ *Hunter River Gazette*, 12 March 1842, p. 3.

⁷⁷ *ibid.*

⁷⁸ *Maitland Mercury*, 26 August 1843, p. 3.

authority to convene circuit courts. During August and September 1829, the Supreme Court adjourned to the towns of Bathurst, Windsor, and Maitland. Darling reported to the Secretary of State that the impudent judges ‘continue to think they were competent to adjourn the Sittings of the Supreme Court as might be convenient’.⁷⁹ He enclosed copies of correspondence from Forbes in which the Chief Justice claimed: ‘We did not intend to propose holding Circuit Courts ... but merely to adjourn our Criminal Sittings from Sydney to such Places, as, under the present state of the Criminal Business of the Colony, we could most conveniently obtain the Attendance of Witnesses and Prosecutors’.⁸⁰ Darling was not persuaded by Forbes’ rhetoric, and undermined the Chief Justice by listing the costs incurred. Expenditure such as the £77 15s 0d for five days’ at Maitland, including ‘Dinner given to the Magistrates and Gentry, attending the Judge’ was not going to impress the Secretary of State.⁸¹ Nor was the total account of £397 14s 5d. The Secretary of State considered the Chief Justice to have been indulging in ‘verbal subtlety’, and concurred with Darling that the judges could not hold what were in essence Courts of Circuit of their own accord.⁸² With circuit courts effectively banned until such time as an Order in Council allowed for their establishment, the Governor was instructed to obtain the opinion of the judges as to whether it would be expedient for such an Order to be decreed.⁸³

⁷⁹ Governor Ralph Darling to Sir George Murray, 8 October 1829, *Historical Records of Australia* [hereafter *HRA*], Series I, Volume XV, p. 194.

⁸⁰ Darling to Murray, 8 October 1829, [Enclosure No. 3], Chief Justice Forbes to Darling, *HRA*, Series I, Volume XV, p. 195.

⁸¹ Darling to Murray, 8 October 1829, [Sub-enclosure], *HRA*, Series I, Volume XV, p. 198.

⁸² Murray to Darling, 16 May 1830, *HRA*, Series I, Volume XV, p. 475.

⁸³ *ibid.*

Darling did not respond to Murray's letter for almost a year, by which time Viscount Goderich had replaced Murray as Secretary of State. Addressing Goderich on 8 April 1831, the Governor conceded the necessity for the court to be able to sit outside of Sydney, but claimed it was inappropriate to institute fixed periodical circuits. He suggested that the expenses incurred to the public purse in holding circuit courts 'would in a very short time ... greatly exceed that which is incurred by bringing Witnesses to Sydney'.⁸⁴ He also argued periodical circuit courts would entail increased spending on suitable accommodation for the court and on providing 'proper Jails ... on an adequate Scale, as the Prisoners would be kept for Trial in the Country instead of being sent to Sydney as at present'.⁸⁵ Darling enclosed a letter of 31 December 1830 written by the Chief Justice and assistant judges of the Supreme Court conveying their opinion. This letter is not extant, but as Darling made his own arguments in the body of his letter it seems that the judges and the Governor remained at odds.⁸⁶

The discord between successive governors and the colonial judiciary was naturally a matter of concern to officials in the Colonial Office. Bourke, who had replaced Darling as Governor the previous year, received a letter from London dated 30 March 1832 and signed by Goderich that read in part:

It cannot be concealed that ... good understanding, which is so essential to the interests of the Colony, has not for some time existed between the Governor of New South Wales and the Heads of the Law in that Settlement, frequent disputes having arisen which ... have tended to lower the authority of the disputants. Each party has

⁸⁴ Darling to Viscount Goderich, 8 April 1831, *HRA*, Series I, Volume XVI, p. 235.

⁸⁵ Darling to Goderich, 8 April 1831, *HRA*, Series I, Volume XVI, p. 235.

⁸⁶ *ibid.*

manifested a desire to expose the errors of the other, in a manner which could not fail to be very prejudicial to the Public Service.⁸⁷

It must have been a great relief to Colonial Office officials when it became apparent that the new Governor and the judges concurred on significant legal issues such as the need for circuit courts and trials by civil jury. Bourke requested on 6 February 1832 that Goderich obtain an Order in Council under which circuit courts might be instituted. While the Governor and the judges agreed on the need for such courts, they continued to contest the basis on which they might be convened:

The Chief Justice appears to entertain some doubt of there being a power vested in His Majesty to delegate to any local authority the right to fix the times and places at which Circuit Courts are to be held ... [T]his very eminent Lawyer seems to entertain a very great jealousy of local authority, and to claim for his Court a total Exemption from that subordination to the Executive, which the Constitution of England has wisely provided.⁸⁸

While Bourke believed that the authority to hold circuit courts was vested in the Governor, he did not share Darling's belief that such courts lacked economic viability. In 1831, ninety criminal matters originating in the Districts of Maitland, Bathurst, and Argyle but heard in Sydney had cost £1,805 0s 8d in witnesses' allowances. Bourke claimed that 'half yearly Circuits to those three Districts, together with allowances to witnesses attending there' would 'not amount to that sum'.⁸⁹ At his inaugural meeting with the Legislative Council on 19 January 1832 Bourke said that within the coming year he anticipated an Order in Council to allow for the institution of circuit courts throughout the colony. Yet such courts were not

⁸⁷ Goderich to Governor Richard Bourke, 30 March 1832, *HRA*, Series I, Volume XVI, p. 581. Many of the despatches signed by the Secretary of State were drafted by one or other of the Colonial Office employees and Charles Currey suggests the author of this letter was the Colonial Office under-secretary Robert Hay. See Charles Currey. *Sir Francis Forbes: The First Chief Justice of the Supreme Court of New South Wales*, Angus and Robertson, Sydney, 1968, p. 399.

⁸⁸ Bourke to Goderich, 6 February 1832, *HRA*, Series I, Volume XVI, pp. 516-17.

⁸⁹ Bourke to Goderich, 22 February 1832, *HRA*, Series I, Volume XVI, p. 527.

authorised until 29 August 1839 when finally they were instituted under statutes 2 & 3 Vic., c.70 drafted by Stephen.⁹⁰

In April 1841, Stephen rode to Berrima accompanied by the High Sheriff, Crown Solicitor, and a Clerk of Arraignment. The Justice's purpose was to open the first circuit court to be held at Berrima following the successful passage of the legislation that legitimated their institution. Berrima, like Maitland, was one of the towns to which Stephen and his circuit court would regularly travel. He saw this inaugural event as providing 'the most convenient opportunity for addressing to those Gentlemen, and through them to the Magistracy and the Inhabitants of the Districts a few observations naturally suggested by the occasion'.⁹¹ Stephen congratulated the community on the establishment of the circuit court. While he thought the initial costs involved could alarm many, Stephen argued that this would be outweighed by the considerable advantages that would accrue to such outlying communities. The supposed advantages described by Stephen provide a pertinent benchmark against which to measure the experiences and outcomes for the Aboriginal defendants who appeared before him at Maitland in September 1843.

Stephen situated the circuit courts firmly within the context of English tradition. He described how 'anciently, the decision of cases was left to persons from the "vicinage", as it was called, or, in other words, to Juries in the neighbourhood of the transaction, whatever it might be, because they were supposed personally to have

⁹⁰ Martha Rutledge. 'Stephen, Sir Alfred (1802 - 1894)', *Australian Dictionary of Biography*, Volume 6, Melbourne University Press, Melbourne, 1976, pp. 180-87.

⁹¹ *Australian*, 17 April 1841, p. 2.

the most accurate knowledge of the facts'.⁹² While local jurymen were no longer selected on the basis of their presumed knowledge of 'the facts', Stephen suggested that under the new system of circuit courts 'an acquaintance with the character of the parties, and of witnesses, and with localities of various kinds' would aid the local jurymen to arrive at 'a just conclusion, on the questions which he may have to determine'.⁹³

Another significant advantage of holding trials near where the alleged crimes had been committed was 'the effect produced, or which this system is calculated to produce on the minds of prisoners, and their associates in crime'.⁹⁴ Stephen elaborated how the impact of the conviction, sentence, and punishment was all the greater for having been observed firsthand. To 'hear of the sentence by report only', Stephen told the court, 'diminished the beneficial effect'.⁹⁵ Assembling together with one's neighbours to participate in the execution of justice, whether as accused, jurymen, or observer, extended general knowledge of the laws in force in the colony and imbued them with what Stephen described as a 'moral force'.⁹⁶

An obvious advantage also accrued to individuals who would no longer have to endure the substantial expense and inconvenience of leaving their properties for extended periods to travel to Sydney for court hearings. Nor would they have to send their servants 'amongst the temptations and debaucheries of an over-grown town' separated from their homes 'by a three or four days journey'.⁹⁷

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ *ibid.*

⁹⁵ *ibid.*

⁹⁶ *ibid.*

⁹⁷ *ibid.*

While Stephen was an unabashedly enthusiastic advocate for the circuit courts that he had helped establish, the advantages he detailed at a community and individual level applied solely to the colonists. When it came to Aboriginal people, Stephen elaborated his understanding of the points at which they intersected with the colony's legal framework as follows:

If they [Aborigines] offend against each other, our laws will take cognisance of the wrong; if the white man injures or aggrieves them, the same laws will, I trust and believe, be found to afford them redress; and, when they are guilty of offences against their white brethren, by those same laws must they be tried and punished.⁹⁸

The English-derived colonial law was, according to Stephen, colour blind. The Justice theorised this as resulting in 'equal justice' being administered to all peoples considered to be British subjects, including Aboriginal people. Yet, as the following case studies demonstrate, reality was at odds with this ideal.⁹⁹

The first of the Aboriginal defendants brought before Stephen at the September 1843 Maitland circuit court was Therramitchee. He faced charges relating to the murder of John Pocock at Cogo some six years earlier. His trial was held on Thursday 14 September. During the course of the brief trial, the Attorney General told the court that 'the same Creator who had written upon the heart of every white man "Thou shalt do no murder," had engraved the same commandment upon the heart of every human being, whether black or white'.¹⁰⁰ In making this assertion the Attorney General reinforced the paradigm of Christianity within which the trial took place, a context that had already been established when Stephen attended divine service

⁹⁸ *Maitland Mercury*, 16 September 1843, p. 2.

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

before court and that was affirmed as each witness took an oath on the bible before giving evidence. Given that it was extremely unlikely Therramitchee had a working knowledge of the ten commandments, the Attorney General assuaged any possible concerns on the part of the jury by alluding to ‘laws’ that Aboriginal people had ‘amongst themselves for the punishment of murderers’, although he did not elaborate what such punishments might entail.¹⁰¹ He encouraged the jury to deal with the case ‘precisely in the manner as they would do if the prisoner at the bar was a white man’, thus asking them to ignore Therramitchee’s subject position as an Aboriginal man and removing any possibility of his action officially being interpreted as an act of inter-racial warfare.¹⁰²

In a similar vein, the barrister Purefoy addressed the jury ‘at considerable length’ urging them not to allow ‘any prejudice to exist in their minds on account of the colour or character of the prisoner, in consequence of the late outrages which have been committed by some of his countrymen’.¹⁰³ He was asking them to do the seemingly impossible, for the jury was comprised of local people with first hand knowledge of the events alluded to either having heard about them by word of mouth or through having read about them in the newspapers. Some of the jury may also have been involved in hunting for the various alleged perpetrators, and could have been signatories to a petition to the Government in which demands were made for something to be done about the problems colonists were having in dealing with disaffected Aborigines.¹⁰⁴ Failing to have gained the requested support from the

¹⁰¹ *ibid.*

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ *Maitland Mercury*, 4 February 1843, p. 2.

Government, local men may have been tempted to take matters into their own hands. Reaching a guilty verdict in cases involving Aboriginal defendants provided colonists with a lawful means of dealing with what they saw as ‘the Aboriginal problem’, whereas taking action beyond the courtroom walls carried with it the threat of the hangman’s noose or a fatal spear wound. The 100% conviction rate of Aboriginal defendants who appeared before Stephen at the September 1843 Maitland circuit court suggests at least a willingness, if not an enthusiasm, on the part of the jurymen to have local Aboriginal men capitally convicted.

In Therramitchee’s case, there had been only one material witness to the alleged murder that took place six years earlier. Despite the fact that the victim Pocock survived for thirty hours after the attack and may have died for want of proper medical attention, the jury returned a guilty verdict. Silence was demanded in the court while Stephen donned his black cap and passed the sentence of death upon Therramitchee. When the sentence was explained to him, Therramitchee is said to have shaken his head and exclaimed ‘bail me’.¹⁰⁵

Later on the day of Therramitchee’s trial, Tom or Kambago appeared at the circuit court to answer a charge of ‘wounding William Vant in the back with a spear, with intent to kill him, on the 24th of April last, at Durrundurra’.¹⁰⁶ The defence counsel Purefoy argued that under the statute *1 Victoria, c.85, s.2* Tom was entitled to be acquitted as the law required the wound to be shown to have been dangerous to life. Purefoy argued that the evidence tendered to the court did not show that to have been so in this case. Stephen would not entertain Purefoy’s argument, and nor would

¹⁰⁵ *Maitland Mercury*, 16 September 1843, p. 2.

¹⁰⁶ *ibid.*

he allow the point to be decided by the jury. Instead, he overruled Purefoy's objection and claimed that if the wound was inflicted by the prisoner with the intent to kill, regardless of whether or not the wound was dangerous to the victim's life, then that was sufficient to constitute a capital offence. It took the jury only a few minutes to return a verdict of guilty against Kambago and sentence of death was then passed upon him. When Kambago was asked if he had anything to say, he told the court through his interpreter that he 'did not do it – white people told lies'.¹⁰⁷

At ten o'clock the following morning, Friday 15 September 1843, the Justice resumed his seat at the bench. Three Aboriginal defendants were placed at the bar. Jackey Jackey was charged with 'wounding Patrick Carroll with a tomahawk on the throat, with intent to kill him, at the McLeay River, on the 4th May last', while Fowler and Sorethighed Jemmy faced charges of 'being present, aiding and abetting'.¹⁰⁸ Patrick Carroll was the first witness called. He positively identified the prisoners as Jackey Jackey's right arm was bent and unable to be straightened, and Sorethighed Jemmy, as mentioned, had a large sore on his thigh. Jackey Jackey's arm and Jemmy's thigh were exhibited to the court as proof of their identities. The court heard that Carroll had enjoyed a happy prior relationship with the defendants. Testimony was also given about the nature and circumstances of his injury and the length of time it took for him to recover from his wound. The commissioner of crown lands at the McLeay was called on to testify about the issuing of warrants for the defendants' arrests and the apprehension of the prisoners. As the case drew to a close, both Purefoy and Stephen addressed the jury only briefly. During his summing up,

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*, p. 3.

Stephen ‘highly complimented’ Massey ‘on the promptitude which he had exhibited in the apprehension of the prisoners’.¹⁰⁹ Such an observation from the judge could have left no room for doubt in the minds of the jurymen as to the outcome he was anticipating. Unsurprisingly the jury immediately returned a guilty verdict. When this was interpreted to the prisoners they all denied that they had committed any offence.

Stephen sentenced all three men to death. The rationale underpinning the punishment he imposed was that hanging provided the ‘most humane course which (sic) could be adopted both towards the blacks, and towards the unprotected stockmen and shepherds’.¹¹⁰ He pointed to the ‘necessity of making examples of them’.¹¹¹ This is consistent with Mark Finnane and John McGuire’s observation that the ‘final penalty of the law’ was ‘perceived by the colonizers as the ultimate instrument in educating “untutored savages” in the rule of law’.¹¹² In a society where executions *per capita* were more commonplace than at the imperial centre, during the nineteenth century more than one hundred Aboriginal men were judicially executed because of their ignorance – or deliberate flouting – of the English-derived colonial laws.¹¹³

Harry and Melville were next to take the stand in Stephen’s circuit court. They stood indicted for ‘the wilful murder of Michael Keoghue, by beating him on the head, on the 4th February last, at Stanhope’.¹¹⁴ No charges were laid in relation to the Mulcahey children that one of the men was supposed to have murdered some time previously, nor with regard to the Aboriginal person allegedly killed by Melville at

¹⁰⁹ *ibid.*

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² Mark Finnane and John McGuire. ‘The Uses of Punishment and Exile: Aborigines in Colonial Australia’, *Punishment and Society*, 3.2, 2001, p. 281.

¹¹³ *ibid.*

¹¹⁴ *Maitland Mercury*, 16 September 1843, p. 3.

Charles Boydell's station in the district.¹¹⁵ The defendants pleaded 'not guilty' in what was later reported as being 'good English'.¹¹⁶ The watchman Thompson was the first witness that the prosecution called. He provided a detailed account of the conversations that had taken place between him and the two men and described at length the attacks that followed. Keough and Doyle were called and they, in turn, corroborated Thompson's testimony. The appearance in court of the woman Keough as a witness startled the defendants. As Collins later described:

While these rascals were on trial, they were driven into terrible state of consternation when Mrs Keough entered the witness box to give her evidence. They ... had left her for dead by several heavy blows from a "nulla nulla", of of [sic] their brutal weapons of warfare, and how she came to life again they could not make out. They would first look at her in a most frightened like manner, then at each other, and then "gabber" together in their own "gibberish", and thus they went on until she left the witness box.¹¹⁷

Harry and Melville's reactions to the witness Keough demonstrate that they had been isolated from their local knowledge networks whilst in captivity as they clearly had not heard that the woman had survived. Their reaction also indicates they were ill prepared for their trial. They had not been properly informed prior to the hearing as to what witnesses were to be called by the prosecution.

After hearing the evidence against him, Melville 'vehemently protested that he was innocent' and proceeded to cross-examine all the witnesses.¹¹⁸ He claimed that he had not been present at *Stanhope* on the day in question. Instead, he said, he had 'never been in that part of the country; he did not know either of the women; and

¹¹⁵ *Maitland Mercury*, 11 February 1843, p. 2.

¹¹⁶ *Maitland Mercury*, 16 September 1843, p. 3.

¹¹⁷ Collins. 'Melville and Harry', p. 2. (Emphasis in the original.)

¹¹⁸ *Maitland Mercury*, 16 September 1843, p. 2.

as for Harry he had fits, and could not go about at all'.¹¹⁹ Melville told the court that Harry's medical condition meant that he lived a life confined to camp where he relied on Melville to keep him fed on bush foods such as kangaroo and wallaby. Harry told the court that he was 'murry bad; not say much; had fit, and couldn't walk about'.¹²⁰ He also protested his innocence. In his address to the jury, their counsel Purefoy urged them to consider their verdict 'calmly and dispassionately' notwithstanding the 'atrociousness of the crime'.¹²¹ Nevertheless, the jury immediately returned a 'guilty' verdict, and like the five Aboriginal defendants whose cases had already been heard, Melville and Harry were sentenced to death. When he handed down the sentence, Stephen described the act of which they had been found guilty as being 'more the act of fiends than that of men' and told them that they could not expect any mercy.¹²² As the condemned men were being removed from the courtroom, Melville told Stephen that he was murdering him.¹²³

Several weeks after their sentencing, the *Maitland Mercury* noted that the order for the execution of Melville and Harry had been received by the local police magistrate, Edward Denny Day, and would be carried out at midday on Wednesday 18 October 1843 outside the walls of the East Maitland Gaol.¹²⁴ The execution was to be staged only one day after the hanging at Newcastle of a white man convicted of killing a constable. The timing of this event resulted in an administrative problem. Maitland did not have a drop of its own and had to rely on the apparatus being

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

¹²⁴ *Maitland Mercury*, 14 October 1843, p. 3.

conveyed up the river from Newcastle, but the local river steamer was scheduled to sail prior to the hanging of the white man. To overcome this hiccough in the proceedings, the local sheriff undertook to pay the operator of the steamer £10 to delay sailing until after the execution at Newcastle had taken place. That way, the required apparatus could be shipped up the river along with Melville and Harry who were to be forwarded from Newcastle Gaol to Maitland to be executed. The sheriff informed the Colonial Secretary as to the arrangements he had put in place.

Annotations in the margin of the letter show that the additional expense was authorised, but that the sheriff was to be informed that he might have spared the £10 expense had he applied to delay the Aboriginal hangings by a day. No consideration was given to the possible impact that such a delay might have had on the psyches of the condemned men.¹²⁵

While they were confined in Newcastle Gaol, the Aboriginal inmates under sentences of death were amongst those being ‘most assiduously attended by the Reverend Chaplain and Mr. Stewart’, although *Maitland Mercury* feared that ‘the poor aborigines will obtain very little religious instruction for the want of interpreters’.¹²⁶ The men were said to be ‘all of different tribes’, and only Melville was known to speak some English.¹²⁷ When the executions finally took place, a large crowd gathered outside the walls of Maitland Gaol to witness the event. Several Aboriginal people were present. The local newspaper printed a detailed description of the theatrics that included the requisite endorsement of colonial justice delivered by the attending minister on the prisoners’ behalf. He told the gathered crowd ‘Melville

¹²⁵ Sheriff to the Colonial Secretary, 14 October 1843, 43/7395 4/2631 SRNSW.

¹²⁶ *Maitland Mercury*, 30 September 1843, p. 3.

¹²⁷ *ibid.*

and Harry acknowledge that the Governor had done right in taking their lives, and die confessing the crime they have committed'.¹²⁸ The public spectacle of the hanged Aborigines was recapitulated in the columns of the local newspaper:

The clergymen then left the unhappy men, and in a few minutes the bolt was drawn and the drop fell. Harry struggled for a long time, and appeared to suffer a great deal. Melville being a heavier man died sooner, though it was some time before the quivering in his limbs subsided.¹²⁹

Avid attention was paid to the bodily signs of the hanging men to ascertain to what extent the mantle of Christianity and therefore civilisation had been assumed. The machinations of the bodies of the condemned revealed to the colonial gaze the extent to which the prisoner enjoyed a clear conscience – a sign of their being repentant.

A week later, 'the extreme penalty of the law' was inflicted on Therramitchee in front of the gaol at Port Macquarie 'for the murder of John Pocock and others'.¹³⁰ Described as being able to 'speak English tolerably well', Therramitchee was attended to by the Reverend John Cross and was 'very attentive to the Revd. Gentleman'.¹³¹ A military guard attended the proceedings, as did all the prisoners from the barracks as well as the ironed gang. Despite the best efforts of the local policeman who 'held out every inducement to them', Aboriginal people would not attend the execution.¹³² They 'appeared very much frightened', and only one Aborigine who frequently came into the settlement could be coerced into watching his countryman hanged.¹³³ It was hoped, however, that the hanging would act as a

¹²⁸ *Maitland Mercury*, 14 October 1843, p. 3.

¹²⁹ *ibid.*

¹³⁰ Police Office Port Macquarie to the Colonial Secretary, 28 October 1843, 43/7968 4/2624.6, SRNSW.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.*

sufficient deterrent in relation to any further ‘depredations’ by Port Macquarie Aborigines.¹³⁴

In the meantime, the death sentences imposed on the remaining four Aboriginal prisoners were rescinded by the Governor and his Executive Council and were commuted instead to sentences of transportation. The *Maitland Mercury* reprinted a brief item on the matter from the *Australian*:

Respite. – His Excellency has been pleased to respite, for the present, Tom, alias Kambargo, Jackey Jackey, Sorethighed Jemmy, and Fowler, all aboriginal natives, and sentenced to death at the last Maitland Circuit Court. There is also an order for their removal from Newcastle gaol to Sydney gaol.¹³⁵

Fowler, Jackey Jackey, Tom, and Sorethighed Jemmy (incorrectly recorded as ‘Southighed’ Jemmy) arrived at the penal station on Cockatoo Island in Sydney Harbour on 1 November 1843 where they remained until 17 April the following year.¹³⁶ At that point, they were forwarded to Darlinghurst Gaol to await their removal on the *Governor Phillip* to the harsh penal station at Norfolk Island.¹³⁷ Their proposed transfer was in accordance with Gipps’ February 1844 decision that:

doubly convicted Offenders (or those who, having originally come to New South Wales as transported felons, have been convicted of any second transportable offence in the Colony) may be sent, at the discretion of the Governor of New South Wales, either to Norfolk Island or Tasman’s Peninsula; and I propose to send the *worst* of them to Tasman’s peninsula, the *best* to Norfolk Island; and, of persons convicted in New South Wales of a first transportable offence, I propose that the *best* shall be sent to Van Diemen’s Land and the *worst* to Norfolk Island, following the distinction which is henceforth

¹³⁴ *ibid.*

¹³⁵ *Maitland Mercury*, 14 October 1843, p. 3.

¹³⁶ ‘A Return Shewing the Number of Aboriginal Blacks Who Have Been Received on Cockatoo Island From the 1st of January 1839 to the 16th December 1850’ [hereafter referred to as the Ormsby Return], 28 December 1850, 50/12485 4/3379, SRNSW.

¹³⁷ *ibid.* In July 1824, Earl Bathurst had instructed Sir Thomas Brisbane to re-open a penal station at Norfolk Island ‘for the purpose of employing there the worst class of convicts’. See Bathurst to Brisbane, 22 July 1824, *HRA*, Series I, Volume XI, p. 321.

to prevail in England, namely, that Prisoners convicted of heinous offences, whose sentence may be at least for terms of 15 years, shall be sent to Norfolk Island, the remainder to the ordinary Probation Gangs of Van Diemen's Land.¹³⁸

Under Gipps' proposal, 'the worst of the singly convicted' were sent to Norfolk Island, indicating that this cohort of Aboriginal convicts was considered to be the worst of characters.¹³⁹ Despite their apparent reputations as dangerous convicts, the men's sentences were reduced from transportation for life to two years confinement.¹⁴⁰ Jackey Jackey's fate after his confinement at Norfolk Island is unclear. Likewise, Sorethighed Jemmy vanished from the colonial record after his arrival in Van Diemen's Land on the *Mermaid* in 1846.¹⁴¹ These men are just some of the many Aboriginal convicts for whom, ironically, life within the convict system led to the death from which they had been reprieved.

Fowler and Tommy also spent two years on Norfolk Island before arriving in Hobart Town on the *Lady Franklin* on the 19th of June 1846.¹⁴² They were sent to join a work gang at Darlington probation station on Maria Island. Less than a month later, the two men were back in the Prisoners' Barracks in Hobart, from whence they were returned to New South Wales on the brig *Louisa*.¹⁴³ After a brief stay at Hyde Park Barracks, where they were authorised to receive rations, Fowler and Tommy were to be sent back to their respective districts.¹⁴⁴ On 28 September 1846, the Principal Superintendent of Convicts was informed by the Colonial Secretary's

¹³⁸ Gipps to Stanley, 23 February 1844, *HRA*, Series I, Volume XXIII, pp. 417-18.

¹³⁹ *ibid.*, p. 4118.

¹⁴⁰ Colonial Secretary to the Principal Superintendent of Convicts, 17 April 1844, Reel 1053, 4/3691, p. 241, SRNSW.

¹⁴¹ CON 22/6, p. 497, AOT.

¹⁴² CON 17/1, p. 176-77, AOT.

¹⁴³ CON 37/3, pp. 669-70, AOT; CUS36/1/347, AOT.

¹⁴⁴ Colonial Secretary to the Principal Superintendent of Convicts, 21 September 1846, Reel 1054, 4/3692, p. 175, SRNSW.

Office that approval had been granted for their return to Port Macquarie and Moreton Bay respectively 'at an expense not exceeding two pounds fifteen shillings, to be defrayed out of Colonial Funds'.¹⁴⁵

Fowler and Tommy were forwarded to Van Diemen's Land during a period over which the second penal station at Norfolk Island was gradually being closed down and the convicts shipped to Van Diemen's Land.¹⁴⁶ The administration of Norfolk Island had officially shifted from New South Wales to Van Diemen's Land 29 September 1844.¹⁴⁷ As part of the preparations for this transfer and the relocation of convicts, a register was compiled in August 1844 of all the convicts sent to Norfolk Island from New South Wales.¹⁴⁸ Jackey Jackey, Fowler, Sorethighed Jemmy and Tom *alias* Kambago's names appear on this register, as does Micky Micky's. The latter had been transported to Norfolk Island after commutation of a death sentence received during the March 1844 Maitland circuit court for 'having assaulted William Sinclair with a spear, at Sandy Creek, on the 10th October, 1843, with intent to murder him'.¹⁴⁹ Micky Micky's fate beyond August 1844 is unknown.

In comparison with other defendants appearing before Stephen at the September 1843 Maitland circuit court, the punishments meted out to the Aboriginal defendants were harsher and more politically driven. Intended to dissuade other Aboriginal men from

¹⁴⁵ Colonial Secretary to the Principal Superintendent of Convicts, 28 September 1846, Reel 1054, 4/3692, p. 178, SRNSW.

¹⁴⁶ The removal of prisoners to Van Diemen's Land was carried out gradually as initially the rapid influx of convicts caused administrative and practical difficulties. See Gipps to Stanley, 23 February 1844, *HRA*, Series I, Volume XXIII, p. 418.

¹⁴⁷ Stanley to Gipps, 10 November 1843, *HRA*, Series I, Volume XXIII, p. 215.

¹⁴⁸ Alphabetical Register of Convicts Secondarily Transported from New South Wales to Norfolk Island and Remaining There in August 1844, CON148, AOT.

¹⁴⁹ *Maitland Mercury*, 16 March 1844, p. 2; *Maitland Mercury*, 19 March 1844, p. 2.

partaking in violent actions against the colonists who had intruded onto their lands, the sentences reflected political and personal biases that were evident before, during, and after the trials. Another element influencing the sentencing was undoubtedly the level of angst and outrage expressed by local colonists who were growing increasingly alarmed at the level of Aboriginal action against them. They were also vocal about the apparent lack of will on the part of government to do anything about it.

One of the principal advantages Stephen prophesied for the circuit courts was that having ‘an acquaintance with the character of the parties, and of witnesses, and with localities of various kinds’ would result in fairer trials.¹⁵⁰ This was demonstrably not the case when it came to trying Aboriginal defendants before locally convened law courts. A combination of factors ensured that the Aboriginal defendants appearing before Stephen in the September 1843 Maitland Circuit Court could not receive ‘fair trials’ in accordance with the judge’s yardstick or any other measure of what might constitute a fair trial. Such factors included conflicting views about ownership of the land, colonists’ frustration over the hangings of ‘seven white men’ for killing Aborigines, perceptions of an apparently misguided philanthropy on the part of colonial authorities that saw many apprehended Aboriginal men walk free, as well as colonial constructions of Aboriginal identity as inherently murderous and treacherous.

In April 1843 the *Maitland Mercury* published a demand that the Government ‘awaken from its lethargy, and shake off the effects of that dose of sickly sentimentality which has relaxed its energy’ and do something about the ‘series of

¹⁵⁰ *Australian*, 17 April 1841, p. 2.

determined, deliberate, and well concerted depredations committed by [the blacks]’.¹⁵¹ Asserting that ‘this is our country by right of discovery and conquest’, the editor described how settlers had been encouraged to leave an overburdened Britain and move to these distant shores.¹⁵² Their expectations, he wrote, were that they would come under the full protection of British law and that this law would be extended to protect their lives and properties. He went on to state that:

we have no wish to wage a war of extermination against the wandering tribes of this continent. We are willing to recognise the inhabitants as British subjects ... but we are not willing to grant them a licence to do evil with impunity; we are not satisfied that the slayer of a black man should be pursued with unfaltering resolution, and that the blood of our own brethren should be spilled upon the earth, should cry aloud for judgment, and that our own government should turn a deaf ear to the cry.¹⁵³

The frontiersmen, who saw themselves as caught between two equally intractable enemies (the Government and Aborigines), were as firm in their belief as to their inalienable rights to the land as the original inhabitants were in their determination to evict the unwelcome intruders from their traditional country.

In a letter to the editor, regular correspondent *Justitia* to the event that had taken place five years earlier that is now known as the Myall Creek massacre.¹⁵⁴ Given the tumultuous times in which he was writing, *Justitia* found it ‘painful ... to reflect that some time ago seven white men suffered the penalty of the law for a

¹⁵¹ *Maitland Mercury*, 8 April 1843, p. 2.

¹⁵² *ibid.*

¹⁵³ *ibid.*

¹⁵⁴ *Maitland Mercury*, 1 April 1843, p. 4. For the trials held in the aftermath of the Myall Creek Massacre, see *R v Kilmeister* (No. 1) 1838, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 March 2006 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_kilmeister_no_1_1838.htm> and *R v Kilmeister and Others* (No. 2) 1838, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 March 2006 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_kilmeister_no_2_1838.htm>

murder on the blacks', an outcome that was 'a severe shock to the squatters'.¹⁵⁵ He claimed there were many stories of murder being committed on white men by Aborigines, and that there were those who had once been 'very vindictive against the whites who were executed' who had since become 'great sufferers [at the hands of Aborigines]' and were thus convinced of the error of their former views.¹⁵⁶ This suggests that one of the unintended outcomes of having hanged the Myall Creek murderers was that some amongst the settler population became increasingly unwilling to tolerate a relatively lenient approach towards Aboriginal people who contravened colonial law, particularly in relation to crimes against property and crimes against the person.

Quaker missionaries James Backhouse and George Washington Walker, who travelled extensively in New South Wales during the 1830s, also discerned the magnitude of the shift in attitude that some colonists underwent:

Persons who, before they emigrated would have shuddered at the idea of murdering their fellow-creatures, have, in many instances, wantonly taken the lives of the Aborigines. And many of those who have desired to cultivate a good feeling toward them, have found them such an annoyance, as to have their benevolent intentions superseded by a desire to have these hapless people removed out of the way.¹⁵⁷

As time wore on, many amongst the colonists became increasingly willing to take matters into their own hands. Colonial attitudes towards 'the Aboriginal problem' are neatly encapsulated in a contemporaneous poem, 'The Monstrous Boy', treating the movement of squatters north from the Hunter Valley onto the adjacent Liverpool Plains:

¹⁵⁵ *Maitland Mercury*, 1 April 1843, p. 4.

¹⁵⁶ *ibid.*

¹⁵⁷ James Backhouse. *A Narrative of a Visit to the Australian Colonies*, Hamilton, Adams, London, 1843, p. 558.

“Land of Beef!” said the Squatter bold,
 “Though all the blacks betray’d me,
 A stockyard shall my cattle hold –
 My pistols, too, shall aid me.”

This poem was published at a time during which local colonists bemoaned the way in which their Government left them largely to their own devices when it came to dealing with the actualities of living in a situation of unresolved frontier conflict. A petition to the colonial Governor in November 1842 signed by squatters from the Liverpool Plains, New England, and the adjoining districts had sought unsuccessfully (in the eyes of the petitioners) to have the Governor act as vigorously in defence of the lives of whites as he did in protecting the lives of the blacks. The *Maitland Mercury* speculated that despite ‘the expense that would be incurred’ in curtailing Aboriginal action against the colonists, it would be preferable to nip the problem in the bud than ‘to allow it to gather strength’.¹⁵⁸ The frustrations of these frontiersmen were compounded by the seeming unwillingness of the law courts in Sydney to take action to subdue the troublesome Aborigines. A correspondent from the McIntyre River told the region’s readers that:

My old friend the native black, whom I took to the Peel [police], and who was committed, but as usual was allowed to go at large without being tried, is now on the river again, and also two of the fourteen that were sent down for trial shortly after.¹⁵⁹

In what was ascribed to ‘mistaken philanthropy’ on the part of colonial authorities, Aborigines often escaped receiving convictions in the law courts due to what some colonists saw as ‘trifling difficulties’ like the lack of suitable interpreters.¹⁶⁰ In an editorial written in March 1842, the *Hunter River Gazette* warned that if the

¹⁵⁸ *Maitland Mercury*, 4 February 1843, p. 2.

¹⁵⁹ *Hunter Valley Gazette*, 12 February 1842, p. 3.

¹⁶⁰ *Hunter Valley Gazette*, 19 March 1842, p. 2.

Government did nothing to prevent the ‘wholesale plunder’ that had characterised the district in the preceding six months, then ‘those subjected to such repeated loss and annoyance are likely to become so exasperated that the utter extermination of the blacks will most probably be the consequence of delaying them redress’.¹⁶¹ The squatters were well and truly primed to take matters into their own hands and anyone from amongst their number serving on a jury hearing cases against Aboriginal defendants was unlikely to be sympathetic.

Dissatisfaction continued well into the following year. In April 1843, the editor of the *Maitland Mercury* called for a public meeting to be convened so that ‘the leading men connected with the grazing interests in the northern districts’ could write to the Governor detailing the ‘grievances’ under which they laboured.¹⁶² Aboriginal men were said to be ‘continuing their depredations ... with a degree of system and perseverance which promises ere long to relieve the government from the trouble of interfering in the matter’, implying that there would soon be no white people left for the government to protect.¹⁶³ The *Maitland Mercury* called for local ‘stockholders and others’ to stage a ‘public demonstration’ in an endeavour to provoke the government into providing some form of redress.¹⁶⁴

The jurymen who heard the trials of the seven Aboriginal defendants at the September 1843 Maitland circuit court were drawn from amongst the ranks of the generally disaffected landowners in the district. By the time the men were placed at the bar, the jurymen would have been well acquainted with their alleged crimes

¹⁶¹ *ibid.*

¹⁶² *Maitland Mercury*, 1 April 1843, p. 2.

¹⁶³ *ibid.*

¹⁶⁴ *ibid.*

through direct experience, word of mouth, or the columns of the local newspaper. It had even been intended, perhaps unwittingly, that the jury would include Charles Boydell who was none other than the man upon whose station Harry and Melville were alleged to have killed a 'black boy' in relation to which Boydell had posted a reward for their capture.¹⁶⁵ For unspecified reasons, Boydell absented himself from jury service and was fined £5 for having done so.¹⁶⁶ What set the Aboriginal defendants apart from others whose alleged crimes also received a generous public airing prior to their trials was the nature of the charges against them and the broader context within which their alleged crimes were committed. These men stood indicted as members of an Aboriginal 'race' that colonists, and indeed the presiding judge himself, intended to subdue by means of utilising the occasion of punishing the few as an example to their many countrymen. The ways in which Aboriginal suspects were depicted in the columns of the local newspaper would have impacted significantly on the views and attitudes of the jurymen and the broader community from within whose ranks they were drawn.¹⁶⁷ In the colonial courtroom, the continuing emphasis placed on overlooking the colour of Aboriginal defendants as they stood before the bench indicted with the murder of white people and with aiding and abetting belies the very impossibility of doing so.

The other principle advantage that Stephen saw accruing to local communities from holding circuit courts was the 'effect produced, or which this system is

¹⁶⁵ *Sydney Morning Herald*, 19 September 1843, p. 2.

¹⁶⁶ *Maitland Mercury*, 16 September 1843, p. 2.

¹⁶⁷ As well as regularly being described as murderers, depredators, and treacherous, Aboriginal suspects were at times also the subject of cruel and mocking commentaries such as this one included in a report on the state of the local gaol: 'Among this number [of prisoners] is His Grace the black Duke of Wellington, who is to be tried on a charge of injuring Her Majesty's white lieges'. *Hunter River Gazette*, 5 February 1842, p. 3.

calculated to produce on the minds of prisoners, and their associates in crime'.¹⁶⁸

Meting out punishments locally, he anticipated, would discourage others in the vicinity from committing similar acts to those carried out by the recipients of colonial justice. This takes on a particular significance when dealing with Aboriginal defendants in the colonial law courts within a broader context of frontier warfare. Stephen's observation can be extrapolated to suggest that staging the executions of Aboriginal men locally was supposed to discourage Aboriginal people from taking up arms against the colonists. As Vic Gatrell demonstrated, 'executions ... were mounted *for* the people, and the crowd's function was to bear witness to the might of the law and the wickedness of crime and to internalize those things'.¹⁶⁹ Yet evidence indicates that such events may have had entirely the opposite effect from that intended.

Three months after Melville and Harry were hanged, the *Maitland Mercury* printed a brief article under the headline 'Black Fellow's Notion of English Law' which read, in part, as follows:

We have heard that a few days ago as a person who resides in East Maitland was out shooting in the bush ... he came across two black fellows, one of whom said to him, "Well, white fellow, what news?" "Oh, not much," replied the other. "B'lieve," says the black, "they hang black fellow in Maitland lately." "Oh, yes," says the white. "Did him kick much?" enquired the black. "Oh, yes," says the white, "murry much, too much." "Then," rejoined the blacks, attempting to lay hold of the man, "come along, you b_ white b_, we hang you."¹⁷⁰

The white informant attributed his lucky escape to his having been armed. This episode suggests that Meville's and Harry's executions did more to mollify those who

¹⁶⁸ *Australian*, 17 April 1841, p. 2.

¹⁶⁹ Vic Gatrell. *The Hanging Tree: Execution and the English People 1770-1868*, Oxford University Press, Oxford, 1994, pp. 90-1. (Emphasis in the original.)

¹⁷⁰ *Maitland Mercury*, 11 November 1843, p. 3.

had petitioned the government for action – and to reinforce the rule of law in their eyes – than it did to persuade local Aboriginal people to refrain from taking militant actions against colonists.

Knowledge about the judicial executions of Melville and Harry obviously spread throughout local Aboriginal networks. It is less clear to what extent local Aborigines were *au fait* with the disparities of outcomes for Aboriginal defendants at Stephen's September 1843 Maitland circuit court in comparison with the outcomes for other defendants, or to what extent they were aware of transportation as an alternative. All the Aboriginal defendants were found guilty, compared with only 40% of the other defendants. The following charts illustrate the range of offences and the sentences handed down in relation to non-Aboriginal defendants:

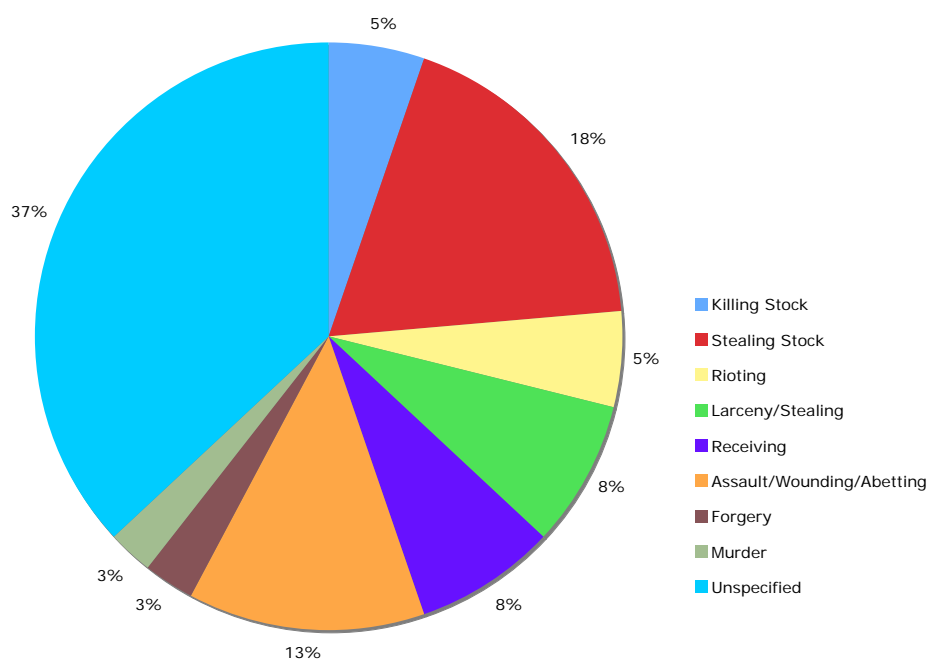


Figure 2: Alleged Offences (Non-Aboriginal Defendants),
Maitland Circuit Court, September 1843.

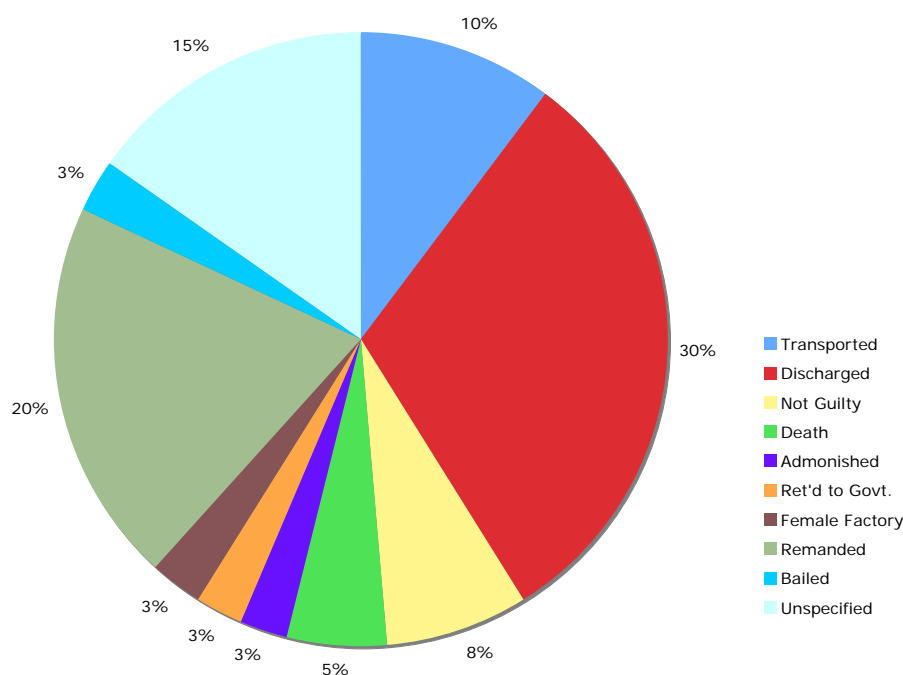


Figure 3: Sentences and Outcomes (Non-Aboriginal Defendants),
Maitland Circuit Court, September 1843.

The marked disparity evident in the sentences handed down is not fully explained through recourse to the differences in magnitude of the charges faced. Michael Kelly was the sole non-Aboriginal defendant who faced a murder charge. His trial, which related to the death of a man that had occurred during election riots, lasted for ten hours. Stephen was at pains to point out to the jury the distinction between murder and manslaughter. After retiring for ten minutes, the jury found Kelly was guilty of the lesser charge of manslaughter.¹⁷¹ This meant that Kelly avoided the death penalty. He was instead sentenced to seven years transportation.¹⁷² Christopher Cooper and George Boddy were charged with shooting with intent to kill William

¹⁷¹ *Maitland Mercury*, 19 September 1843. p. 1.

¹⁷² *Sydney Morning Herald*, 22 September 1843, p. 4.

Hurley. As with the Aboriginal defendants, Stephens sentenced them to be hanged.¹⁷³ After being held in gaol for several months following the circuit court, Cooper and Boddy were forwarded to Sydney as the Governor commuted their capital punishments to transportation for life.¹⁷⁴ Thus the only prisoners to hang following the September 1843 Maitland Circuit Court hearings were Melville, Harry, and Therramitchee.

Local jurymen may have taken only a matter of minutes to hand down their guilty verdicts in the cases involving the seven Aboriginal defendants at the September 1843 Maitland circuit court, but Stephen was almost indecently hasty in donning his black cap to pronounce death sentences upon them. Several factors in his personal and professional background strongly indicate that Stephen was far from dispassionate when it came to what he saw as the ultimate solution for the 'Aboriginal problem'. Interestingly, his attitude towards Aboriginal people was quite at odds with that of other members of his illustrious family that included the renowned humanitarian and Under-Secretary of the Colonial Office James Stephen, as well as a number of other high profile colonial lawyers and administrators. One could speculate that his views might, at least to some extent, have been shaped by experiences during his formative years in the place of his birth, the West Indies.

Born on 20 August 1802, the young Alfred Stephen was sent to England to be educated in Devonshire. He returned to his birthplace, St. Christopher, where he resided for some years before going back to England to read law. In 1823 he was called to the bar at Lincoln's Inn; the following year he set sail for Van Diemen's

¹⁷³ *Maitland Mercury*, 23 September 1843, p. 2

¹⁷⁴ *Maitland Mercury*, 25 November 1843, p. 3.

Land. On his arrival in Van Diemen's Land, Stephen took up the position of solicitor-general. Ten days' later he was appointed as the colony's crown solicitor.¹⁷⁵

Stephen's arrival in Van Diemen's Land coincided with a marked increase in conflict between Aboriginal people and colonists, a period that has since become known (and contested) as 'the Black War' (1824-1831). The conflict was eventually resolved to the satisfaction of the colonists with the gradual expulsion of all the remaining Aboriginal inhabitants from the main island to Flinders Island in Bass Strait. In 1830, Lieutenant-Governor George Arthur approved a quasi-military operation, 'the Black Line', with the intention of rounding up all the remaining Aboriginal people in Van Diemen's Land and corralling them in Tasman's Peninsula to the east of Hobart Town.¹⁷⁶

At a public meeting held in Hobart Town on the eve of the Black Line operation, the solicitor-general Stephen – acknowledged by Keith Windschuttle as a supporter of extermination – made an extraordinary statement regarding the island colony's original inhabitants.¹⁷⁷ He declared that since Aborigines had waged war upon the colonists:

you are bound to put them down. I say that you are bound to do, in reference to the class of individuals who have been involuntarily sent here, and compelled to be in the most advanced position [convict stockmen in remote areas], where they are exposed to the hourly loss of their lives. I say ... that you are bound upon every principle of justice and humanity, to protect this particular class of individuals, and

¹⁷⁵ Martha Rutledge. 'Stephen, Sir Alfred (1802 - 1894)', *Australian Dictionary of Biography*, Volume 6, Melbourne, Melbourne University Press, 1976, pp. 180-87.

¹⁷⁶ See, for example, Ian McFarlane. *Aboriginal Society in North West Tasmania: Dispossession and Genocide*, PhD Thesis, University of Tasmania, Tasmania, 2002; Lyndall Ryan. *The Aboriginal Tasmanians*, Queensland University Press, St Lucia, 1981; Henry Reynolds. *Fate of a Free People*, Penguin, Ringwood, 1995; Keith Windschuttle. *The Fabrication of Aboriginal History: Volume One, Van Diemen's Land, 1803-1847*, McLeay Press, Paddington, 2002.

¹⁷⁷ Keith Windschuttle. *The Fabrication of Aboriginal History: Volume One, Van Diemen's Land, 1803-1847*, McLeay Press, Paddington, 2002, pp. 344-45.

if you cannot do so without extermination, then I say boldly and broadly, exterminate!¹⁷⁸

It is remarkable that a man occupying such a lofty position in public life in colonial Van Diemen's Land would be prepared to go on the public record endorsing the extermination of the island's original inhabitants should it prove impossible to otherwise deter them from continuing to clash with the colonists and the military. While, as Windschuttle pointed out, Stephen may have been speaking as a private individual at the public meeting held in Hobart Town in October 1831, it is difficult to divorce his publicly stated position from the thinking that informed his everyday practice as the colony's principal legal officer. While Stephen was the Solicitor General in Van Diemen's Land, an Aboriginal woman was murdered at Emu Bay when she was part of a group being pursued by some colonists. When Lieutenant-Governor George Arthur sought Stephen's advice about whether to prosecute, the Solicitor General claimed that there was confusion over whether common law or martial law prevailed at the time of the killing. He claimed that a trial ought not to be held because it could 'result in indiscriminate murders under Martial Law, or, if Common Law were held to run, colonists would hesitate before going out in Capture-Parties, when a death might very well bring them to the gallows'.¹⁷⁹ In public life in Van Diemen's Land, as in private life, Stephen endorsed the extermination of Aboriginal people. A decade after the Black Line operation in Van Diemen's Land, Stephen was certainly acting as an official representative of the colonial state and its legal instrumentality when he handed down death sentences for all of the Aboriginal

¹⁷⁸ *Colonial Times*, 24 September 1830, p. 3.

¹⁷⁹ Michael Levy. *Governor George Arthur: A Colonial Benevolent Despot*, Georgian House, Melbourne, 1953, p. 102.

defendants who appeared before him in the Maitland Circuit Court in September 1843. It was also in an official capacity that he voiced his opinion on what ought to be done about an Aboriginal prisoner in the Port Phillip District two years' later.

The difficulty of trying Aboriginal men in the absence of a suitable interpreter was debated at length throughout 1845 in relation to a case concerning Koort Kirrup. Kirrup was remanded in custody in Melbourne Gaol for sixteen months on a charge of having murdered station owner Donald McKenzie and his shepherd at the Portland Bay District in 1842. Both the Resident Judge Roger Therry and the Superintendent of the Port Phillip District, Charles La Trobe, kept up a regular correspondence with their Sydney superiors, seeking advice and assistance with regard to Kirrup's case.¹⁸⁰ They hoped the Legislative Council might enact legislation to provide for the trial of Aboriginal men who were considered akin to the 'deaf and dumb' in their inability to comprehend legal proceedings for the want of an interpreter.¹⁸¹ Gipps became increasingly irritated through having the matter brought repeatedly to his attention and had the matter referred to his Attorney General. Plunkett responded that after having consulted with the Solicitor General they had formed the view that:

we cannot advise the introduction into the Legislature of any Bill to meet this and other similar cases. ... [W]e may add our conviction that the Colonial Legislature which in the Session of 1844 rejected the Evidence of Aborigines to be taken in certain cases with a view to their protection against the white population, would be at least equally indisposed to sanction a departure from the ordinary rules of British Law to the prejudice of the weaker and more defenceless class of Her Majesty's Australian Subjects.¹⁸²

¹⁸⁰ See the special bundle of correspondence held at 46/2561 4/2742, SRNSW.

¹⁸¹ Attorney-General Plunkett to the Colonial Secretary, 5 August 1845, 46/2561 4/2742, SRNSW.

¹⁸² Plunkett to the Colonial Secretary, 2 January 1846, 46/2561 4/2742, SRNSW.

Unsurprisingly, the Chief Protector of Aborigines for the Port Phillip District, George Augustus Robinson, and Assistant Protector, William Thomas, raised concerns in relation to Kirrup's lengthy incarceration. Thomas was particularly worried that his work in schooling Kirrup with a view to the man becoming fit to take his trial was damaging his credibility with other Aboriginal people. He feared that similar work undertaken in relation to other Aboriginal defendants had 'gone already beyond the instructions of Her Majesty's Government' and had caused Aboriginal people to regard him 'with suspicion'.¹⁸³ Robinson visited Kirrup at Melbourne Gaol on a number of occasions, observing that 'Koort Kirrup would be a fool to learn English if he knew he was to be hanged'.¹⁸⁴ While men like Robinson, Thomas, Plunkett, Therry, and La Trobe struggled with the issue over what course of action might best be pursued in relation to Kirrup, Robinson recorded in his private journal 'Went to court, saw judge on Koort Kirrup ... Alfred Stephen, Chief Judge and Knight, Sydney. Stephen said Koort Kirrup ought to be hanged'.¹⁸⁵ Once again, Stephen showed no compunction in advocating the extermination of an Aboriginal man allegedly involved in attacking the persons of colonists. The 'hanging judge' certainly seems a fitting epithet for Stephen, at least in relation to Aboriginal defendants.

In conclusion, despite judicial expectations that the institution of circuit courts would result in fairer trials owing to local jurymen being *au fait* with the locations,

¹⁸³ Assistant Protector William Thomas to Resident Judge Roger Therry, 14 May 1845, 46/2561 4/2742, SRNSW.

¹⁸⁴ George Augustus Robinson. Monday 30 June 1845, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Four: 1 January 1844 – 24 October 1845*, Ian D. Clark (ed). Heritage Matters, Clarendon, 1998, p. 317.

¹⁸⁵ Robinson. Saturday 19 July 1845, *Journals, Volume Four*, pp. 321-22.

personalities, and events being debated at trial, the outcomes of the September 1843 Maitland Circuit Court demonstrate that such expectations were not fulfilled in relation to Aboriginal defendants. Instead, the circuit court became a conduit through which Aboriginal men were delivered into the convict system, in these instances by an Executive that ameliorated the death sentences meted out to four of the seven men. Within the courtroom, Aboriginal men whose actions were constructed as criminal acts rather than being interpreted as politically motivated acts of war were widely considered to be treacherous and murderous savages by the very men called on to declare their guilt or innocence. Local jurymen, generally alarmed and frustrated by an apparent lack of Government willingness to address the 'Aboriginal problem', were quick to take matters into their own hands as was evidenced by the speed at which they returned a guilty verdict in the case of each of the Aboriginal defendants. Exhortations from legal counsel to ignore the defendants' 'colour' were unrealistic given the socio-political realities of the time, including inflamed feelings following the hangings several years earlier of 'seven white men' in relation to the Myall Creek Massacre.

These particular trials were further complicated through being presided over by a colonial judge who had gone on the public record declaring his support for the, to use his word, 'extermination' of Aboriginal people. Stephen had no hesitation in donning the black cap in these cases and imposing the sentence of death upon each of the unfortunate men. This indicates that whim operated at crucial moments in the judicial system, with the fate of Aboriginal defendants being influenced not only by the personal views of their juries but also by the standpoint of the presiding judge.

Staging executions locally did not achieve the desired impact of subduing local indigenous populations. While the refusal of Aboriginal people around the Port Stephens area to attend the hanging of Therramitchee was interpreted by local authorities as being due to their being 'frightened', there could be a myriad of reasons behind their reluctance to become spectators at this publicly staged event. Evidence from the other side of the frontier indicates that Aboriginal people who heard about the hangings of their countrymen sought vengeance – an attitude that is more in keeping with Aboriginal notions of reciprocity than colonial notions that judicial executions could function as a legitimate form of deterrence.

Chapter Five

‘A Sentence Of Early Death’: The Exemplary Sentencing of Aboriginal Men Transported from the Port Phillip District

When permanent white settlement commenced in the Port Phillip District in the 1830s, people and ideas that had circulated within, and sometimes well beyond, other parts of New South Wales flowed into the district. It was possible, for example, to find the catechist and former overseer of Aboriginal convicts at Goat Island, the Reverend George Langhorne, taking lunch with George Augustus Robinson, formerly the Conciliator of Aborigines in Van Diemen’s Land.¹ Colonists brought their families, servants, and stock with them as well as extensive cultural baggage; religions, philosophies, monetary and economic systems, social hierarchy, and a version of English law adapted to colonial circumstances. The Port Phillip District became a crucible within which many of the civilising initiatives of the preceding decades were reintroduced. Developed from an earlier idea in Van Diemen’s Land, an extensive mosaic of Aboriginal protectorates was instituted with four assistant protectors being given vast tracts of country to oversee. Robinson, as Chief Protector, was a conduit between colonial authorities and the assistant protectors. He and his entourage also undertook extensive journeys within the Port Phillip District.²

Aboriginal inhabitants and the newcomers found themselves adapting through necessity to changing circumstances wrought through living in a situation of early colonial contact. At times this descended into protracted episodes of frontier conflict

¹ See, for example, George Augustus Robinson. Wednesday 6 March 1839, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume One: 1 January 1839-30 September 1840*, Ian D. Clark (ed). Heritage Matters, Clarendon, 1998, p. 14.

² Robert (Bob) Reece. *Aborigines and Colonists: Aborigines and Colonial Society in New South Wales in the 1830s and 1840s*, Sydney University Press, Sydney, 1974, pp. 136-38.

as some Aboriginal groups utilised tactics described by at least one contemporary colonial commentator as ‘guerrilla warfare’ against the colonists.³ Colonists also used violent means to disperse the original inhabitants. At other times, efforts were made by colonists to include Aborigines within their expanding domains and by Aboriginal people to incorporate colonists into their kinship systems. This was sometimes affected through local clans recognising a white person as the reincarnation of one of their long dead kin.⁴ While responses varied from place to place and over time, the outcome throughout the Port Phillip District was remarkably consistent. As squatters pushed well beyond the boundaries of the initial settlement, the numbers of indigenous peoples dwindled rapidly until after three decades there were only remnants of the original tribal groupings remaining.⁵

This chapter demonstrates that early colonial contact often resulted in collisions, some of which led to the prosecution of Aboriginal men in the Melbourne-based Court of the Resident Judge at Port Phillip of the Supreme Court of New South

³ C. B. Hall to Superintendent Charles La Trobe, 6 September 1853, *Letters from Victorian Pioneers: Being A Series of Papers on the Early Occupation of the Colony, the Aborigines, etc., Addressed by Victorian Pioneers to His Excellency Charles Joseph La Trobe, Esq., Lieutenant-Governor of the Colony of Victoria*, Thomas Bride (ed). R. S. Brain, Government Printer for the Trustees of the Public Library, Melbourne, 1898, p. 222. See also Henry Melville’s observation that Aboriginal people in Van Diemen’s Land waged a guerrilla war. Henry Melville. *Australasia and Prison Discipline*, J. Effingham Wilson and Chas. Cox, London, 1851, p. 368.

⁴ Henry Reynolds. *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin, Ringwood, 1981, pp. 32-9.

⁵ See, for example, Ian D. Clark. *Aboriginal Languages and Clans: An Historical Atlas Of Western And Central Victoria, 1800-1900*, Department of Geography and Environmental Science, Monash University, 1990, pp. 40-1 for stock losses amongst the settlers at Port Fairy and for mutual killings, also for some stations suffering no losses, and for an assertion that at Kilgour’s station, ‘Tarrone’, the overseer had provided flour laced with arsenic to local Aborigines; see p. 94 for detail about Aborigines endeavouring to incorporate Europeans into their socio-economic structure through recognising them as reincarnated kinsmen; see p. 95 for an assertion that ‘undue severities’ on the part of settlers on Djab Wurrung lands provoked retaliations from the indigenes; see p. 239 for an example of a settler, Hamilton, buying ‘three man traps’ to use against Jardwadjali people. Clark also gives a thorough explication of the estimated numbers of the various clans during the early years of colonial contact and demonstrates the rapid demographic decline that followed. Hall to La Trobe, 6 September 1853, *Letters from Victorian Pioneers*, p. 222.

Wales. It is argued that when Aboriginal defendants were brought before the colonial law courts their cases often resulted in persecution rather than prosecution. Colonial judges such as William à Beckett imposed what some considered particularly harsh punishments upon those Aboriginal men who appeared before them for sentencing. Imposing exemplary sentences was as much about convincing the white population of the efficacy of forwarding troublesome Aborigines to the law courts to be dealt with as it was about curbing the actions of Aboriginal people.⁶ In conjunction with the dismal failure of colonial initiatives to ‘civilise the Aborigines’, ongoing Aboriginal resistance fuelled a growing willingness on the part of the colonial judiciary to intervene into Aboriginal lives and, particularly in the aftermath of the Myall Creek trials, to place increasing numbers of Aboriginal men before the bar in the criminal courts. Such trials, when they went ahead, were considered farcical by some contemporary commentators.⁷ Nevertheless, such proceedings resulted in at least fourteen Aboriginal men from the Port Phillip District being sentenced to transportation.

The first case pertains to a large cohort of Aboriginal prisoners from within whose ranks ten men were made examples of in the courtroom. It illustrates how such cases became sites of contestation not only between colonists and Aborigines, but also amongst the various vested colonial interests. The second case, *R v Jacky Jacky 1844*, demonstrates a nascent willingness on the part of the colonial authorities to intervene in matters solely involving Aboriginal people. The next case, involving

⁶ See in particular à Beckett to Lonsdale, 6 January 1847, 47/28 4/2779.3 SRNSW.

⁷ See, for example, the *Geelong Advertiser and Squatters' Advocate*, 7 August 1845, p. 3, where the Supreme Court trial of Yanem Goona was described as ‘another legal farce relative to his capacity to comprehend the nature of the proceedings, and understand the details of the evidence’.

Yanem Goona or 'Old Man Billy Billy', demonstrates how Aboriginal people were expected to conform solely to colonial ideas of what constituted 'becoming civilised' and highlights the penalties that could be applied when Aboriginal men took the initiative to replicate colonial infrastructure. It also touches on the role of the Native Police. The fourth case involving Koombra Kowan Kunniam concerns actions understood by colonists to be 'larceny'. It further illuminates Aboriginal/colonist relations in the Port Phillip District and also facilitates some discussion of colonial responses to, and representations of, Aborigines. As with the preceding cases, the final case relating to Warrigal Jemmy occurred within a paradigm of frontier conflict. It involved an alleged crime against the person. Unusually for Aboriginal convicts, Warrigal Jemmy and Koombra Kowan Kunniam spent some years in the convict system prior to their respective deaths in custody. Both are atypical in that they were utilised as assigned convict servants. Warrigal Jemmy is also one of only three Aboriginal convicts who absconded from captivity in Van Diemen's Land.⁸

On Friday 9 October 1840 a large group of 'Goulburn blacks' arrived in Melbourne to supplement a Waverong contingent gathering to avenge a spearing by some Watowerong. While this was a matter that need not have directly concerned colonists, the latter were nevertheless unsettled. Such was the level of disquiet that the Superintendent of the Port Phillip District Charles La Trobe called a meeting at the home of the Divisional Commander of the Port Phillip District's Mounted Police, Lieutenant F. B. Russell, to plan an attack on the Aboriginal camp. George Augustus

⁸ The others being Maitland Harry whose case was discussed in the introduction and Billy Roberts whose case is mentioned later in this chapter.

Robinson attended the meeting, as did Major Samuel Lettsom of the 80th Regiment. Debate ensued. Despite Robinson's suggestion that warrants ought to be issued for the arrests of any alleged offenders, the military decided to attack the Aboriginal camp early the next morning.⁹ It was surrounded by the military and police, with most of the people being removed to a stockade at the prison barracks.¹⁰ An eyewitness was 'shocked at the cruelty of the military and police'.¹¹ Another observer described how women, the old, and the infirm were 'goaded with bayonets by the soldiers and hit with the but (sic) end of their muskets or cut by the sabres of the native police'.¹² About three hundred Aboriginal men, women, and children were taken prisoner. La Trobe told the Chief Protector his officials 'were drafting out the worst characters'. Thirty-five men and boys were later 'chained by the leg, two together, and lodged in gaol'.¹³

On Wednesday 14 October, Robinson noted in his journal 'natives unwell in gaol' and later reported their ill health to the Superintendent.¹⁴ La Trobe convened a 'board of inspection' whose members heard from the Aboriginal inmates that 'they should all die'.¹⁵ During the inspection, the Aboriginal prisoners questioned their confinement asserting that they 'did not steal sheep or bullocks', which was the

⁹ Robinson. Saturday 10 October 1840, *Journals, Volume Two*, p. 6.

¹⁰ A number of the prisoners escaped from their confinement, demonstrating that Aboriginal people did not submit passively to colonial incarceration. Further attesting to this is a remark made by the Assistant Protector William Thomas who in a footnote to his entry dated 23 May 1839, referred to an Aboriginal man known as Tully Marine who, together with two other Aborigines, was confined in Melbourne Gaol several years earlier and had 'set it on fire'. Tully Marine was possibly the same man who was listed as being a 70 year-old widower belonging to the Wavorong tribe in a census taken in the Western Districts in 1839. See the journal of Protector of Aborigines William Thomas, *Historical Records of Victoria: Vol. 2B 'Aborigines and Protectors'*, Michael Cannon (ed). Government Printing Office, Melbourne, 1983, p. 526.

¹¹ Robinson. Sunday 11 October 1840, *Journals, Volume Two*, p. 7.

¹² *ibid.*

¹³ *ibid.*

¹⁴ Robinson. Wednesday 14 October 1840, *Journals, Volume Two*, p. 11.

¹⁵ Robinson. Wednesday 21 October 1840, *Journals, Volume Two*, p. 18.

charge they faced.¹⁶ The local commissariat officer, Captain Charles Howard, had been heard to comment ‘what is to be done with them? I think the best way would be to hang them all!’¹⁷ Such views were shared by some of the white prisoners in Melbourne Gaol who, when Robinson visited on another occasion, ‘made use of very sinister and approbious (sic) language as I went passed them bloody (sic) blacks wished them all hung’.¹⁸ These perspectives on Aboriginal culpability could not be further removed from each other, and highlight the gulf between Aboriginal and colonial perceptions in relation to crime, guilt, and punishment.

The following month an Aboriginal prisoner told Robinson that he and his fellow inmates had not stolen sheep from Peter Snodgrass’s station at Muddy Creek, as charged, but received the carcasses by way of exchange. He explained Snodgrass’s men ‘take black women then give them [Aboriginal men] sheep’ in exchange for the women’s sexual favours.¹⁹ While such exchanges accorded with Aboriginal traditions of exchange and diplomacy, within a colonial paradigm they were beyond the pale. Eventually the men remaining in gaol went to trial early in the following year to face charges related to sheep stealing.²⁰ Robinson listed the ten defendants:

Names Original	Names adopted or conferred by settlers
1. Nan.der.mile	Mr John
2. Lo.gir.ma.koon	Jaggy Jaggy
3. a) Pine.jin.goon, b) My.tit	Napoleon

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Robinson. Monday 26 October 1840, *Journals, Volume Two*, p. 21.

¹⁹ Robinson. Monday 16 November 1840, *Journals, Volume Two*, p. 30.

²⁰ Over time some of the Aboriginal prisoners were released from Melbourne Gaol, including a cohort of twenty men on 16 November 1840. See Robinson. Monday 16 November 1840, *Journals, Volume Two*, p. 29. See also *Geelong Advertiser*, 21 November 1840, p. 3.

4. a) Coro.in.you.lit, b) Un.mo.ware.in*	William
5. a) Mor.er.mal.loke, b) Yar.mer.bo.pe	William
6. Pee.beep	Mr Malcolm
7. Tar.roke.nun.nin	Harry
8. Larm.bid.er.ruc	Billey
9. Wile.gurn	Mr Murray
10. War.wo.rong	Mr Murray

* Gave his name also as Wine.der.rer.gun²¹

Gipps was yet to appoint a permanent Resident Judge in Melbourne and engaged in considerable administrative manoeuvring to enable a court to be convened for the trial to go ahead. The Governor was particularly keen to have the Aboriginal cases dealt with as rapidly as possible, but was also anxiously awaiting news about the Aboriginal Evidence Act 1839 that required (but did not receive) Royal Assent.²² Eventually, the men were tried before the Court of the Resident Judge at 11 o'clock on the morning of Wednesday 6 January 1841, appearing before a crowded court in 'check shirts, fustian trousers, and jackets'.²³ The 'totally unfit and incompetent' interpreters failed to communicate the nature of the evidence to the Aboriginal defendants, leading the Chief Protector to denounce the trial as 'a farce ... got through with indecent haste'.²⁴ After a few minutes' consideration, the jury decided that only one of the men, Warworong, was not guilty. The remainder awaited sentencing while the different colonial stakeholders vigorously debated the length of

²¹ Robinson. Monday 16 November 1840, *Journals, Volume Two*, p. 31.

²² Gipps to La Trobe, 12 December 1840, *Gipps-La Trobe Correspondence*, p. 52.

²³ Robinson. Wednesday 6 January 1841, *Journals, Volume Two*, p. 51.

²⁴ *ibid.*, p. 52.

time for which they ought to be exiled.²⁵ After some debate, the men were sentenced to ten years transportation.²⁶

Less than a week after sentencing, the Aboriginal convicts were put on board the cutter *Victoria* to be taken out to the brig *Vesper* that was due to set sail for Sydney. Gipps had recommended to La Trobe that 'the best punishment' for the men, if found guilty, would be 'imprisonment in Sydney'.²⁷ They could join the 'few Blacks' that Gipps already had confined at Cockatoo Island.²⁸ However, through a series of events that would 'verily immortalize ... the authorities of Melbourne' in relation to their 'management of the blacks', the men's destinies lay elsewhere.²⁹ While thirteen white male convicts and one female convict were placed in the hold of the *Victoria*, the nine Aboriginal convicts remained on deck, still wearing leg irons but with their handcuffs removed. The newspaper report stated that 'on their way down the river the people on board the cutter amused themselves by terrifying the blacks, telling them that they would be hanged on their arrival at Sydney'.³⁰ When the vessel tacked within a short distance of land the ironed Aboriginal men leapt overboard. The guards opened fire following which 'two were seen to sink to rise no more'.³¹ Van Diemen's Land Aboriginal trackers later found evidence that three of the men had made it to land.³²

Tarrokenunnin was wounded during the escape and was taken back into custody. Robinson visited him in Melbourne Gaol where the prisoner corroborated

²⁵ *ibid.*

²⁶ *Geelong Advertiser*, 9 January 1841, p. 3.

²⁷ Gipps to La Trobe, 24 October 1840, *Gipps-La Trobe Correspondence*, p. 48.

²⁸ *ibid.*

²⁹ *Geelong Advertiser*, 23 January 1841, p. 3.

³⁰ *ibid.*

³¹ *ibid.*

³² *ibid.*

earlier newspaper reports as to the underlying cause of the debacle. He told Robinson that ‘white men told the natives they were going to Sydney to be hung, natives plenty frightened and jump overboard. All natives dead in water’.³³ However, an official enquiry found nothing other than conflicting accounts and counter accusations being exchanged between the military and civil authorities.³⁴

In February 1841, Gipps reprimanded La Trobe for his involvement in instigating an enquiry, telling him privately that ‘in matters of this sort where there has been a loss of life, the less the Ex. Govt. interferes the better’.³⁵ La Trobe agreed, but stressed that he entertained anxieties about Aboriginal cases owing to the ‘ignorance & indecision’ of the Protectors and the ‘indisposition’ of the local magistracy to become involved owing to blurred lines of responsibility.³⁶ Gipps also wrote to Lord John Russell, distancing himself somewhat from the actions of Lettsom in arresting the ‘Goulburn Blacks’.³⁷ While he emphasised that ‘a considerable number of these Goulburn blacks could be identified as the perpetrators of many outrages’, thereby justifying the arrests and deaths that followed, Gipps claimed that Lettsom had ‘departed in some degree from the Instructions which I had given to him’.³⁸ He claimed, though, that as Lettsom had acted in accordance with La Trobe’s orders, Gipps himself had conveyed to the Major his ‘approval’ of the soldier’s conduct.³⁹ This, in turn, distanced Gipps from La Trobe’s decision to allow three hundred Aboriginal people to be taken into custody in one fell swoop.

³³ Robinson. Wednesday 20 January 1841, *Journals, Volume Two*, p. 59.

³⁴ *Geelong Advertiser*, 23 January 1841, p. 3.

³⁵ Gipps to La Trobe, 6 February 1841, *Gipps-La Trobe Correspondence*, p. 57.

³⁶ La Trobe to Gipps, 16 February 1841, *Gipps-La Trobe Correspondence*, p. 62.

³⁷ Gipps to Lord John Russell, 3 February 1841, *HRA*, Series I, Volume XXI, p. 209.

³⁸ *ibid.*

³⁹ *ibid.*, p. 210.

Tarrokenunnin was evidently released from Melbourne Gaol sometime during the year. Robinson recorded a visit from the man in his private journal on 28 September 1841. He stated that Tarrokenunnin visited him along with ‘Bullert, a Sydney native’, and that the former had let him know that ‘all the Goulburn blacks were saved when they escaped the Victoria cutter’.⁴⁰

In late 1843, an Aboriginal man from the Port Fairy area of the Port Phillip District known as ‘Little Tommy’ accompanied a wool dray to Melbourne.⁴¹ He, like many of his contemporaries, had attuned himself to the new labour and economic systems introduced by the colonists. As Fred Cahir pointed out, ‘a substantial body of evidence’ indicates a greater extent of inter-cultural economic activity between the indigenes and settler population than has generally been acknowledged.⁴² Such activity extended well beyond ‘the occasional use of Aboriginal labour and sexual services’.⁴³ To facilitate his return home, Little Tommy arranged to work for a Merri River settler James Cosgrove and his wife who needed someone to help drive their bullock team.

Little Tommy joined the Cosgroves’ at the Wardy Yallock inn (near the present day town of Cressy) and proceeded with them as far as Manifold’s station

⁴⁰ George Augustus Robinson. Tuesday 28 September 1841, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Three: 1 September 1841-31 December 1843*, Ian D. Clark (ed). Heritage Matters, Clarendon, 1998, p. 8.

⁴¹ ‘Koenghegulluc’, Clark. *Aboriginal Languages and Clans*, pp. 179-80.

⁴² Fred Cahir. ‘Dallong – Possum Skin Rugs: A Study of an Inter-Cultural Trade Item in Victoria’, *The Journal of Public Record Office Victoria*, No. 4, ISSN 1832-2522, accessed on 15 March 2007 at <www.prov.vic.gov.au/provenance/no4/DallongPrint.asp>

⁴³ *ibid.*

near Lake Colac.⁴⁴ It was at that point in the journey, on the 20th or 21st of January 1844, that a group of twelve to fourteen Koenghegulluc warriors noticed him and began to follow the Cosgroves' dray. As these men were looking to retaliate against someone from his tribe for the death of their kinsman Eurodap alias Tom Brown, Little Tommy was under direct threat from them. The Cosgroves' servant, a 'Sydney native from Yass Plains' called Bill, told them that the men intended to kill Little Tommy.⁴⁵ As his plight became apparent, the Cosgroves put Little Tommy on a mule so that he might try to outrun his attackers. As he had not learned to ride, he was soon overtaken by the Koenghegulluc and killed. The Cosgroves remained bystanders. They and their stock remained unharmed by the Koenghegulluc warriors. Bill was likewise ignored.⁴⁶ This was consistent with the custom of 'payback' or retributive killing.

The attack on Little Tommy provides a vignette of classic Aboriginal society functioning in accordance with longstanding traditions despite the then recent overlay of colonial society. The two worlds met at certain points, but outside of those interstices, life carried on as always as also demonstrated by the following event that took place a month after Little Tommy's death:

A pitched battle between the Upper and Lower Goulburn blacks on the one side, and the Yarra Yarra and Barrabool blacks on the other, was fought on Thursday last, in Mr. Ryrie's suburban allotment on the outskirts of Collingwood. The fight continued without intermission for several hours, and several of the combatants were wounded, four severely, without any attempt being made on the part of the authorities to put a stop to the affray ... The cause of the quarrel, we understand,

⁴⁴ This may have been an inn known as The Golden Fleece Inn or The Frenchman's Inn probably operated by Frederick Duverney at the Wardy Yallock Crossing. See Ian Clark's editorial comments about this inn in his edited version of Robinson's *Journals, Volume Three*, p. 62.

⁴⁵ R v Jacky Jacky 1844, VPRS, 30/P/O, Unit 3, File 1-4A-1.

⁴⁶ *ibid.*

was the atrocious murder of a young Goulburn black, by some of the Yarra Yarra tribe, at Mr. Charles Manton's station, near Western Point, some months since.⁴⁷

The conflict in Ryrie's yard was eventually resolved when townsfolk interceded and took some of the wounded Aboriginal men to a nearby hospital. Interestingly, while colonial observers understood the 'battle' to have arisen due to an earlier killing, their analysis did not extend to interpreting it within a framework of indigenous justice.⁴⁸

Just as Aboriginal people sometimes made use of colonial institutions like the hospital and engaged actively in trade making use of the introduced monetary system, they also found it expedient to adopt certain Western technologies. Hence Little Tommy was killed using technologies drawn from both his classic culture and the newly imposed colonial society. As well as being speared eight times, he was shot in the head. Later, this led to some confusion in the minds of the participants as to who had actually delivered the fatal wound.⁴⁹ Eventually one of the Koenghegulluc men, Jacky Jacky, appeared in the Court of the Resident Judge to answer a charge of 'feloniously and wilfully and of his own malicious aforethought killing and murdering one Little Tommy an aboriginal native by spearing him in the body'.⁵⁰

Perhaps because Little Tommy had been in the company of the Cosgroves, the colonial authorities took an interest in the matter of his death. The authorities sought the alleged perpetrators, and news of Jacky Jacky's subsequent arrest travelled as far as Melbourne. The following extract from Robinson's personal journal provides a

⁴⁷ *Melbourne Weekly Courier*, 10 February 1844, p. 3.

⁴⁸ *ibid.*

⁴⁹ *Melbourne Weekly Courier*, 18 May 1844, p. 3. See also Clark. *Aboriginal Languages and Clans*, pp. 179-80.

⁵⁰ R v Jacky Jacky 1844, VPRS, 30/P/O, Unit 3, File 1-4A-1.

rare insight into the informal networks through which news relating to Aboriginal prisoners travelled:

On Wednesday 3 April, met Mr and Mrs Manifold in Cashman shop, said a Black belonging to the Jarcoorte at their station was in custody at Geelong – charged with murder of a Black from Port Fairy at Mr Manifold's – this Black boy killed at Manifold's was in revenge for the murder of Eurodap Tom Brown – Charley the Jarcoort who travelled with me was subsequently killed by the Port Phillip Natives in retaliation.⁵¹

Robinson's account reinforces the notion that Little Tommy's murder was a retaliatory killing, and reveals that yet another killing took place in relation to the original feud. It also demonstrates that colonists were aware of the paradigm within which the killing took place. Despite the tribal context within which Little Tommy's death occurred, legal proceedings were instituted against Jacky Jacky.

In a significant departure from the usual practice, at the preliminary court hearing held in Geelong evidence was admitted from an Aboriginal witness. Bill, the Cosgroves' servant, made his mark on his sworn deposition and was permitted to take the following oath: 'I know that it is wicked to tell a lie, I will tell the truth'.⁵² According to Bill, the Koenghegulluc men asked him 'what blackfellow' they had with them, and then declared 'we kill him directly'.⁵³ Bill told the court that he recognised Jacky Jacky as one of the men who had speared Little Tommy and that he had seen another man known as Long Bill shoot Little Tommy.⁵⁴ On the basis of the sworn statements provided by Cosgrove and Bill, the Geelong Bench committed

⁵¹ Robinson. Thursday 4 April 1844, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Four: 1 January 1844 – 24 October 1845*, Heritage Matters, Clarendon, 1998, p. 34.

⁵² R v Jacky Jacky 1844, VPRS, 30/P/O, Unit 3, File 1-4A-1.

⁵³ *ibid.*

⁵⁴ *ibid.*

Jacky Jacky to stand trial at the Court of the Resident Judge in Melbourne for an offence committed *inter se*, that is, for an act carried out by one Aboriginal man against another.

For the first half-century of British colonisation the authorities had chosen not to intervene (at least in a legal sense) in matters solely involving Aboriginal people. In the 1830s, there were a series of landmark cases that ultimately resulted in the colonial judiciary deciding it had the authority to intervene in internecine conflict. One such case brought before the courts was instigated at the request of Bowen Bungaree whose intermediary, the Reverend Lancelot Threlkeld, told the Attorney General that Bungaree's people wanted the alleged murderers of their countryman Jabbingee to be 'tried by the English'.⁵⁵ The significance of the resultant court case, *R v Murrell and Bummaree 1836*, did not escape the participants. Justice Roger Therry noted that it was 'the first of the sort ever brought before the Supreme Court of New South Wales' and therefore 'would be a precedent for future proceedings in like cases'.⁵⁶ Therry elaborated colonial opinion, stating that 'until recently it has been the general opinion of the Public and of one or two of the Judges, that the Aboriginal Blacks were not amendable [sic] to British law, excepting when the aggression was made on a white man'.⁵⁷ After some debate, the court reversed

⁵⁵ Threlkeld to Attorney General, 'Blacks Request That Jack Congo Murrell Should Be Tried By The English', February 1836, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 18 October 2006 at <<http://www.law.mq.edu.au/scnsw/Correspondence.41.htm>>

⁵⁶ *R v Murrell and Bummaree 1836*, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 18 October 2006 at <http://www.law.mq.edu.au/scnsw/cases1835-36/html/r_v_murrell_and_bummaree__1836.htm>

⁵⁷ *ibid.*

Forbes' decision in *R v Ballard* 1835 and decided instead that its jurisdiction extended over Aboriginal people who committed offences *inter se*.⁵⁸ This was despite the defence counsel Mr Sydney Stephens' plea, described by the *Sydney Herald* as 'ingenious and puzzling', that although Windsor (the location at which the murder was committed) was within the 'territory of Great Britain', the nature of its occupation was such that it did not compel Murrell to be answerable in the colonial law courts for any offence committed against his countryman.⁵⁹ The argument that he elaborated became, as Bruce Kercher has pointed out, 'the founding precedent for the application of what is now know (sic) as *terra nullius* in Australia'.⁶⁰ Stephen's argument included the following salient points:

It was laid down in 1st Blackstone, 102 ... that land obtained like the present, were not desert or uncultivated, or peopled from the mother country, they having originally a population of the own more numerous than those who have since arrived from the mother country. Neither could this territory be called a conquered country, as Great Britain never was at war with the natives; it was not a ceded country either; it, in fact, came within neither of these, but was a country which had a population having manners and customs of their own, and we had come to reside among them, therefore in point of strictness and analogy to our law, we were bound to obey their laws, not they to obey ours. The reason why subjects of Great Britain were bound by the laws of their own country was, that they were protected by them; the natives were not protected by those laws, they were not

⁵⁸ A year preceding the Murrell case, Chief Justice Forbes presided over a case in which an Aboriginal man known as Ballard had killed another Aboriginal man. He found that the court did not have any jurisdiction over matters solely involving Aborigines. See *R v Ballard or Barrett* 1835, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/Cases1829-30/html/r_v_ballard_or_barrett__1829.htm> Ballard was released from gaol and returned to Port Macquarie from whence he set sail the following year to work as a blacktracker in Van Diemen's Land, helping the colonial authorities to locate 'hostile natives'. See Bruce Kercher. *Outsiders: Tales from the Supreme Court of NSW, 1824-1836*, Australian Scholarly Publishing, North Melbourne, 2006, p. 58. Presumably Ballard was related to the Aboriginal prisoners intended for Van Diemen's Land but sent to Goat Island instead who, as mentioned, were fearful that Van Diemen's Land Aboriginal people would exact revenge on them for the work their kinsmen carried out there as blacktrackers.

⁵⁹ *Sydney Herald*, 16 May 1836, p. 3.

⁶⁰ Kercher. *Outsiders*, p. 59.

admitted witnesses in Courts of Justice they could not claim any civil rights, they could not obtain recovery of, or compensation for, those lands which had been torn from them, and which they had held probably for centuries. It therefore followed they were not bound by laws which did not at the same time afford them protection.⁶¹

Chief Justice Forbes conceded that the plea was ‘a very ingenious one’ and sought advice from his Attorney General who responded that the laws of Great Britain did not allow recognition of any ‘independent power’ within a British territory.⁶² The British Parliament, he said, had ‘entered and exercised rights’ over the country for a ‘long period’ under the Act 9 *Geo. 4 c. 83* and this legislation afforded the court jurisdiction over all offences committed within the territory defined therein. It not being possible to ‘know any distinctions between Natives and Europeans’, such jurisdiction was held to extend over the matter in question.⁶³ Despite Stephen’s proposal that Murrell was willing to stand before his Aboriginal accusers and ‘be exposed to such and so many spears as the friends and relatives of the said Jabbingee ... may think proper to hurl and throw against the body of him’, Forbes determined that the trial would go ahead.⁶⁴ This raised many questions as to the possibility of holding a fair trial, how evidence from Aboriginal witnesses could be allowed, and what might comprise a fairly constituted jury (should it, for example, comprise at least half Aboriginal members, such as was the case when foreign nationals appeared before the law courts in Britain?).⁶⁵ Not least of these concerns was whether and to what extent such proceedings would be intelligible to the accused.

⁶¹ R v Murrell and Bummaree 1836.

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

When the case was finally heard, Murrell and his co-defendant Bummaree requested a ‘Jury of Blackfellows’.⁶⁶ This request was declined, and a civil jury was empanelled. With Stephen lying sick in bed, Mr Windeyer was called to act as defence counsel. He had no witnesses to produce, and continued to argue that the defendants had no case to answer. The jury agreed with Windeyer, and returned a verdict of not guilty.⁶⁷ Following this, Murrell was released as was another prisoner, Bummaree, as it was considered that the information pertaining to the latter’s case was so similar – and the evidence the same – that the matter could be expected to conclude in the same fashion.⁶⁸

Although Therry considered that *R v Murrell and Bummaree 1836* set the precedent for such cases, when a case solely involving Aboriginal people was brought before the Court of the Resident Judge in Melbourne in 1841 Justice Willis did not consider himself ‘bound by the opinion of either Mr. Chief Justice Forbes, Mr. Justice Burton, or Mr. Chief Justice Dowling’.⁶⁹ Instead, Willis discoursed at length on cases involving colonial interactions as well as on the nature of British settlements in comparative colonies, such as those on the North American continent and in New Zealand. For Willis, in *R v Bonjon 1841*, the principal question was ‘whether the English law can be legally applied ... or ... *can I legally exercise any jurisdiction,*

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.* In the footnotes to this case, Bruce Kercher identified a similar case in 1834 that did not end up going to trial. In this earlier case, two men known as Quart Pot and Numbo had been held in gaol on a charge of murdering another Aborigine. It was held at that time that Aborigines ought to be allowed to use their own punishments, whether for murder or any other crimes committed *inter se*.

⁶⁹ *R v Bonjon 1841, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 12 October 2006 at <<http://www.law.mq.edu.au/scnsw/cases1840-41/cases1841/R%20v%20Bonjon,%201841.htm>>

*with reference to any crimes committed by the aborigines against each other?*⁷⁰

Willis considered that the ‘neglected’ and ‘oppressed’ state of Aboriginal people rendered them ‘more worthy of the judicature of a Roman Senate than of an obscure and single colonial Judge’.⁷¹ His recourse to antiquity is interesting in that he was drawing on an idealised Western classical tradition that was probably surpassed in age and continuity by classic Aboriginal conflict dispute mechanisms. However, the colonial judiciary had not formed favourable impressions of indigenous justice systems in the Australian colonies. For example, in his notes to *R v Murrell 1836*, Justice Burton described Aboriginal law as being ‘consistent with a state of the grossest darkness & irrational superstition ... founded entirely upon ... the wildest and most indiscriminatory notions of revenge’.⁷²

In *R v Bonjon 1841*, Willis’s dilemma lay in determining the boundaries over which his jurisdiction might be reasonably extended. He summed this up eloquently: ‘The fair and lovely face of justice, if urged beyond her legal boundary, assumes the loathsome and distorted features of tyranny and guilt’.⁷³ He postponed resolving his dilemma through deciding that Bonjon could be tried for the alleged murder of Yammowing (the crime for which he had been arrested and imprisoned on 25 August 1841 by the Police Magistrate of Geelong and two Justices of the Peace), but that the question of jurisdiction would remain open for further consideration. Ultimately, the Crown Prosecutor decided not to proceed with the trial immediately and Bonjon was

⁷⁰ *R v Bonjon 1841*. (Emphasis in the original.)

⁷¹ *ibid.*

⁷² *R v Murrell 1836*.

⁷³ *R v Bonjon 1841*.

remanded in custody. When the court was in session the following month Bonjon was discharged.⁷⁴

When Jacky Jacky appeared before Judge Jeffcott on Tuesday 23 April 1844 in the Court of the Resident Judge, the question of jurisdiction was no longer an issue. In response to information about ‘the Murders perpetrated by the Natives of the different Tribes on each other’ contained in the 1842 Report of the Wesleyan Missionary Society’s Mission to the Aborigines in the District of Geelong, Lord Stanley had written to Gipps to dispel any notion that the local government ought not interfere.

With reference to one of the cases cited in the Report, Stanley stated:

I cannot admit an unprovoked murder committed on a Woman living under the protection of our Missionary Establishment to be one of the Customs with which we cannot interfere; and it is to be the duty of the local Government to use its utmost influence to counteract such an opinion and to check so barbarous a custom.⁷⁵

The intention of the Home Government could not have been made any clearer. The colonial judiciary was to intervene in matters solely involving Aboriginal people, particularly when such matters involved what the colonists considered to be murder.

Once Jacky Jacky was brought to the bar, it was found that the Assistant Protector appointed in relation to his ‘tribe’ was not present in court. Usually the Assistant Protector acted as the interpreter whenever an Aboriginal defendant assumed to be under his care appeared in court to answer to charges preferred against

⁷⁴ *ibid.* See also Clark, *Aboriginal Languages and Clans*, p. 275, where Clark discusses ‘constant war’ between Wada wurrung clans and matrilineal clans of the Gulidjan ‘centred around disputes over marriage arrangements’. Clark cites Yammowing’s murder by Bonjon to be an example of this form of conflict. Yammowing was a Guraldjin balug male whose wife the defendant Bonjon (a Wada wurrung balug clan member) sought to procure for himself. At p. 332, Clark also mentions that Bonjon resided with Foster Fyans for four years and accompanied the magistrate on many of his excursions in the Western District.

⁷⁵ Lord Stanley to Gipps, 29 September 1843, *HRA*, Series I, Volume XXIII, p. 165.

him by the colonial authorities. Mr. Barry, standing counsel for Aborigines, told the court that he had thought Jacky Jacky could speak English but had since been informed otherwise. After some debate about the irregularities in Jacky Jacky having been questioned without an interpreter present, it was suggested that another Aborigine in attendance, a man known as Billy, could act as an interpreter as he:

could talk English a little; he believed there was a God; bad man went up into the sky. Upon further consideration – it was good man who went up into the sky, and a bad man must go down to the devil.⁷⁶

On the basis of this rather confused regurgitation of Christian scripture, Billy was passed over as a suitable interpreter. Anxious to dispel ‘an impression’ that had ‘gone abroad that Aborigines are not liable to the same punishment, and are under a different protection from British subjects’, Jeffcott reprimanded the Crown Prosecutor ‘whose duty it was’ for failing to procure an appropriate interpreter.⁷⁷ It was solely the ‘impossibility of communicating between the prisoner and the jury’ that saw Aboriginal prisoners stood down, according to Jeffcott, rather than any desire on the part of the law to differentiate between Aboriginal offenders and those from the settler population.⁷⁸ Jacky Jacky was stood down and remanded in custody.

Almost a month later, on Wednesday 15 May, Jacky Jacky was once again placed at the bar in the Court of the Resident Judge and was indicted for ‘the wilful murder of an aboriginal boy named Little Tommy, by wounding with a spear at Wardy Yallock, on the 22nd January last’.⁷⁹ He also faced a second count of ‘aiding

⁷⁶ *Geelong Advertiser*, 29 April 1844, p. 3.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ *Melbourne Weekly Courier*, 18 May 1844, p. 3.

and abetting' Long Bill in committing the murder.⁸⁰ When Jacky Jacky was instructed to enter his plea, he told the court 'another one black fellow killed him'.⁸¹ This statement was taken to be a plea of 'not guilty' and was also considered to provide sufficient proof of Jacky Jacky's capacity to understand the proceedings for the trial to proceed. The Reverend Francis Tuckfield was sworn in as the official interpreter while Mr. Barry acted as defence counsel. Despite Jacky Jacky's plea of 'not guilty' the jury found him guilty as charged, but saw fit to recommend mercy 'on the ground of his ignorance of the habits of civilized life'.⁸² Jeffcott then donned the black cap and passed sentence of death upon Jacky Jacky, but stipulated that he would 'forward the recommendation of the jury to the Governor' in the anticipation that the capital punishment would not be administered.⁸³ In accordance with the expectations of both Judge and Jury, Jacky Jacky's sentence was commuted to transportation for life to Van Diemen's Land where the colonial administration apparently did not object to receiving him.⁸⁴

Jacky Jacky was about thirty years old when he arrived in Hobart Town on the *Flying Fish* on 27 January 1845. His convict record states: 'Transported for wilful murder on one Tommy an Aboriginal Native stated this offence killing a black boy on

⁸⁰ *ibid.*

⁸¹ *ibid.*

⁸² *ibid.*

⁸³ *ibid.*

⁸⁴ In 1835 Lieutenant-Governor Arthur and his Executive had declined to accept a cohort of Aboriginal convicts from New South Wales as explained in Chapter Three, and as per 'At a Council Held at the Council Room Hobart Town on the 31st day of March 1835', *Minutes of the Proceedings of the Executive Council*, Reel EC4/3, pp. 408-09, AOT. As almost a decade had passed, colonial memory and the attendant fears about the possible threat recalcitrant Aborigines posed had doubtless faded. Sending Aboriginal convicts singularly to the island was also far less likely to provoke opposition in Van Diemen's Land than Bourke's earlier proposal to ship eight or nine men there.

Mr Manifold's Estate. States it was not him that did it. Alic did it'.⁸⁵ Tuckfield also identified Blind-Eyed Alic as the organiser of the attack on Little Tommy.⁸⁶ In his Annual Report for 1845, Robinson was most likely alluding to this case and comparing it with Koort Kirrup's when he wrote:

The want of aboriginal evidence has been long felt in all cases where the natives have been concerned; they have complained and with reason of unequal justice. In cases inter se one native per chance with a tribe where a depredation is committed if seen by a white is punished, another notorious for cruelty and numbers of his murders escapes if a white is not there, hence to the surprise of their own race the Australian 'thugs' remain with impunity whilst the comparatively innocent and in some instances really so are punished.⁸⁷

Jacky Jacky was probably considered a dangerous prisoner, as he was shipped from Hobart Town to Norfolk Island. In 1825, the then Governor of New South Wales, Sir Thomas Brisbane had directed Lieutenant-Governor George Arthur 'to forward here [Sydney] for the purpose of being sent to that [Norfolk] Island, such desperate characters as he considered dangerous or insecure in Van Diemen's Land'.⁸⁸ His transfer was also in accordance with Gipp's February 1844 proposal that the 'worst of the singly convicted' convicts from New South Wales be sent to Norfolk Island.⁸⁹ Such was the harshness of the punishment inflicted on him that Jacky Jacky died in custody on Norfolk Island eight months after his arrival.⁹⁰

⁸⁵ CON37/2, p. 437, AOT.

⁸⁶ Tuckfield 31/1/1844 in VPRS 19, cited in Clark. *Aboriginal Languages and Clans*, pp. 179-80.

⁸⁷ George Augustus Robinson. 1845 Annual Report, *The Papers of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Four: Annual and Occasional Reports 1841-1849*, Ian D. Clark (ed). Heritage Matters, Clarendon, 2001, p. 101.

⁸⁸ Brisbane to Bathurst, 7 September 1825, *HRA*, Series I, Volume XI, p. 811.

⁸⁹ Gipps to Stanley, 23 February 1844, *HRA*, Series I, Volume XXIII, pp. 417-18.

⁹⁰ CON37/2, p. 437, AOT.

Between 1838 and 1840 the lands adjacent to the Grampians occupied by neighbouring peoples of Djab Wurrung and Jardwadjali were subject to what Ian Clark has termed a ‘squatting invasion’.⁹¹ Clark suggested that the first Europeans that Jardwadjali are likely to have encountered would included the party of squatters from Van Diemen’s Land led by Edward Henty who established ‘Muntham’ station near present day Casterton in 1836, and the expeditionary party led by Thomas Mitchell that passed through their country in July and August 1836.⁹² The white intrusion resulted in violence, with between thirty and forty men of the Konongwootong gundidj clan of Jardwadjali being killed by the Whyte brothers in March 1840, and the clan that had occupied the land taken over by Henty, the Darkogang gundidj, was also virtually destroyed by 1841.⁹³ Both Djab Wurrung and Jardwadjali engaged in what was later described by a settler who lived in the area between 1841 and 1842 as ‘guerrilla warfare’. Nearby Mt. Arapiles – a natural fortress – provided an ideal base from which to launch their attacks.⁹⁴

While Jardwadjali and Djab Wurrung actively resisted white encroachment onto their lands, primarily through depriving the squatters of large numbers of their stock and flocks, they were also astute observers of colonial practices. As early as 1840, reports began to emerge highlighting ways in which they were adopting new practices, particularly in relation to animal management. Blending their traditional practices with methods adapted from observing squatters at work, Djab wurrung were found to have constructed an extremely well built bush fence to enclose the numerous

⁹¹ Clark. *Aboriginal Languages and Clans*, p. 94.

⁹² *ibid.*, p. 238.

⁹³ *ibid.*, p. 239.

⁹⁴ Hall to La Trobe, 6 September 1853, *Letters from Victorian Pioneers*, p. 222.

sheep they had taken from 'Trawalla', a station owned by Kirkland and Hamilton.⁹⁵

In a similar way to which a kangaroo would have been dealt with, they also broke the legs of the sheep to prevent them from straying, thus keeping the animals in close proximity for when they might be required for food. As Clark has pointed out, most of these stock thefts resulted in the perpetrators being tracked down and, in cases where the individuals involved were not located, 'the whole clan would be punished in a later reprisal'.⁹⁶ He suggests that the guiding principle informing such action on the part of squatters was 'when an offence was committed by unknown individuals, the group to which they belonged would be made to suffer'.⁹⁷ Nevertheless, the following account involving a Jardwadjali man known as Yanem Goona *alias* Old Man Billy Billy demonstrates that the opposite was also true. That is, if a group was known to have committed a certain action, then any individual from that group could be held accountable and given an exemplary punishment even if their part in the events could not be proven.

In June 1845, La Trobe wrote to the Colonial Secretary informing him that a petition had been received from some stockholders in the Wimmera 'shewing the exposed position of the stations in that locality, and the losses which they have already sustained from aggressions on the part of the natives, and further, calling upon me for protection'.⁹⁸ La Trobe added that he had already sanctioned detachments of the Native and Border Police being sent to the region 'during the ensuing winter months', with Henry Dana taking a force to be stationed in the

⁹⁵ Clark. *Aboriginal Languages and Clans*, p. 95.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

⁹⁸ La Trobe to the Colonial Secretary, 13 June 1845, 45/4355 4/2741, SRNSW.

neighbourhood of Mt. Arapiles.⁹⁹ In their petition to La Trobe, a copy of which he enclosed for the Colonial Secretary's information, the stockholders described how they:

having brought their stock from the settled Districts with the intention of quietly and inoffensively locating themselves on the River Wimmera, find from the aggressions of the Aborigines (who have no way been molested or interfered with) that their own and their servants lives are endangered, and that by the carrying off of their stock by the Natives; that without protection from the Government being afforded them, that they must either be ruined or remove their stock.¹⁰⁰

Some of their number, Messrs. Baillie and Hamilton, had already lost about eight hundred sheep and lambs, while others including their neighbour Major Firebrace had also been affected.¹⁰¹ The petitioners described the impossibilities of recovering their stock. The sheep's legs were often broken, and in any case the squatters found the scrub or mallee to be 'almost impenetrable'.¹⁰²

The Colonial Secretary's frustration arising from this and similar representations from the Port Fairy District to the south is apparent in his annotations in the margins of a contemporaneous letter from La Trobe where he observed that licences were not to be granted for the occupation of lands 'beyond the reach of Protection', and that granting licences 'for Lands so densely occupied by Aborigines must of necessity expose the stock to depredations, and the lives of their servants as well as those of the Aborigines to destruction'.¹⁰³ People living in these areas did not, however, consider their locations to be 'remote' and some people such as Port Fairy

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ According to Robinson, flock losses in the Wimmera in 1843 had been attributed to Hamilton and his men deliberately making local Aboriginal people aware that orders had been received that they were not to be 'molested' for taking sheep. It was claimed that 'ever since the natives have been most troublesome'. See Robinson. Tuesday 11 April 1843, *Journals, Volume 3*, p. 149.

¹⁰² La Trobe to the Colonial Secretary, 13 June 1845, 45/4355 4/2741, SRNSW.

¹⁰³ La Trobe to Colonial Secretary, 1 July 1845, 45/4745 4/2741, SRNSW.

magistrate William Campbell simply interpreted the Aboriginal attacks on stock as arising through their having ‘acquired a taste for beef, in preference to their natural food’, rather than viewing it as the actions of a people wanting to expel settlers who, in Campbell’s own words, ‘were unable to find unoccupied country for their herds’.¹⁰⁴ The squatters at the Lower Wimmera and the residents at Port Fairy seemed unable or perhaps unwilling to view themselves as trespassers on another people’s land.

News of the unrest at the Wimmera spread at least as far north as Maitland, several thousand miles’ away, with the *Maitland Mercury* reprinting a report from a Melbourne-based newspaper in which it was claimed that colonists’ servants were leaving them ‘fearing to risk their lives longer in such a dangerous vicinity’.¹⁰⁵ Not ‘love or money’ could procure replacements. The loss of servants had serious economic consequences for the colonists, and was a matter that the local benches took seriously. Earlier in the decade, during a time at which ‘the Blacks still continue[d] to molest the settlers in various parts of the district,’ the *Geelong Advertiser* reported an unsurprising scarcity of shepherds.¹⁰⁶ It told a cautionary tale about a shepherd who had broken a verbal employment contract, thinking that it was not binding, only to be punished by the local Bench when caught.¹⁰⁷ Some Aboriginal people were inventive in addressing the scarcity and put themselves forward as potential employees in the stead of white servants:

In our advertising columns will be found an announcement, as novel as it is pleasing, that the aborigines of the Lake Colac tribe are ready to

¹⁰⁴ Campbell to La Trobe, 22 July 1845, 45/1370 4/2741, SRNSW.

¹⁰⁵ *Maitland Mercury*, 10 January 1846, p. 2.

¹⁰⁶ *Geelong Advertiser*, 1 May 1841, p. 2.

¹⁰⁷ *ibid.*

undertake the charge of cattle, on terms, in addition to shepherding the flock of sheep already in their possession.¹⁰⁸

Perhaps news of Aboriginal involvement in similar roles with the Australian Agricultural Company had travelled along the extensive Aboriginal trade network that criss-crossed the continent.

When Henry Dana and the Native Police went to the Wimmera in 1845, the contingent was drawn from the force that had been instituted in 1842 in the Port Phillip District. Mooted a decade and a half earlier in the Bigge Report, the possibility of investing Aboriginal men as native constables became an actuality as the Port Phillip District was opened up to white settlement. This model of law enforcement went through three different and distinct incarnations in the Port Phillip District with Aboriginal Police Corps being instituted in 1837, 1839, and 1842. In her comprehensive study of the Native Police Corps, Marie Fels suggested that the impetus to form such a force arose from the need to redress the significant problem of runaway convicts.¹⁰⁹ Although Aboriginal-European conflict may not have been at the forefront of the minds of Governor Bourke and the Port Phillip District administrator Captain William Lonsdale, the native police came to be a devastatingly effective instrument used by the colonial authorities against other Aboriginal people.

In July 1845, Dana wrote to La Trobe about an armed encounter that he and his men had had with a group of Jardwadjali of the Choorite balug clan. The events leading up to this encounter, told from the perspective of local settler Thomas Baillie, were detailed in a sworn statement enclosed with Dana's letter. Baillie and his

¹⁰⁸ *Maitland Mercury*, 5 October 1844, p. 4.

¹⁰⁹ Marie Fels. *Good Men and True: The Aboriginal Police of the Port Phillip District 1837-1853* Melbourne University Press, Melbourne, 1988, pp. 3, 7.

business partner Hamilton occupied land near a lake situated about fifteen miles from Mt. Arapiles. On Thursday 10 July 1845 while Baillie and his shepherd were attending to sheep on a run about two miles from his hut ‘several Natives rushed from the Forest and took away the whole flock’.¹¹⁰ The station owner and his shepherd pursued the men and recovered some of the sheep.

Baillie’s business partner, Hamilton, went over to the neighbouring property to fetch Dana and his Native Police who were temporarily housed there. Dana described to La Trobe how he and his men, with some difficulty, picked up the tracks of the sheep and followed them into the scrub. After travelling about 30 miles, they ‘came up with a number of sheep with their legs broken’ and found two hundred sheep ‘in a bush yard’.¹¹¹ They also found ‘the Natives with a number of sheep in their possession’.¹¹² According to Dana, the men he described as natives ‘uttered a Yell and commenced threatening us with their spears’.¹¹³ In the course of the ensuing action, Dana explained that ‘the Ringleader of the party was cut down after a long resistance, by Yupton a Corporal of the Native Police and made a prisoner of; he is badly wounded. I have ordered him to be marched to Melbourne as soon as his wounds will permit’.¹¹⁴ The ‘ringleader’ referred to by Dana was Yanem Goona, also known as Yanengoneh (‘spring from the earth’) or Old Man Billy Billy.¹¹⁵ Dana justified opening fire upon the Choorite Balug men, killing at least three while

¹¹⁰ Dana to La Trobe, July 1845, 45/1379 4/2741, SRNSW.

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ *ibid.* For the English interpretation of Yanem Goona’s name, see Rose to La Trobe, *Letters from Victorian Pioneers*, p. 148.

wounding others, by stating that his party had been in considerable danger with his men and horses being at risk from the natives.¹¹⁶

Several aspects of this encounter are particularly interesting. Like the neighbouring Djab wurrung, Choorite balug had adapted farming technologies to their own purposes, combining the yarding of sheep with the traditional practice of breaking animals' legs as a form of tethering. While the colonisers were intent on 'civilising the Aborigines' and had encouraged them to take up farming as early as the failed experiment at Parramatta discussed earlier in this thesis, Aborigines who took up farming and stocked their yards with flocks stealthily acquired from the settlers and squatters were condemned rather than celebrated as converts to pastoralism. As with the settlers and squatters, Dana constructed himself and his force as being at risk from Aboriginal men who were seen as being the sole aggressors.

Rather than seeing the 'Wimmera natives' as particularly aggressive, Robinson found during his 1845 visit to the area that they were 'not numerous nor vicious' and suggested that the troubles in the district had arisen as 'old hands from the Grampians (to use a colonial phrase) had been among them, and were the principal perpetrators'.¹¹⁷ La Trobe had sent the Chief Protector to the Wimmera at the same time Dana was there. Robinson recorded that *en route* to the Wimmera, the Native Police openly boasted that they 'were not going to take prisoners but to shoot

¹¹⁶ Dana to La Trobe, July 1845, 45/1379 4/2741, SRNSW.

¹¹⁷ George Augustus Robinson. Australia Felix. Report of a Journey of 1100 miles to the tribes of the N. W. and Western Interior by G. A. Robinson Esq. 1845, *Papers, Volume 4*, p. 46. The phrase 'old hands' was used to refer to emancipated convicts. See Godfrey Mundy. *Our Antipodes; Or, Residence and Rambles in the Australian Colonies: With a Glimpse of the Gold Fields*, Richard Bentley, London, 1852, p. 93.

as many of the blacks as they could'.¹¹⁸ Their self-representation contradicts Dana's official description of their intentions and actions. A similar boast was voiced by the man Robinson referred to as 'my Native policeman Boroke' who at a 'native camp ... at the Wando':

swaggered about before the frightened Natives with his sword or big knife riding on his arm: "What for steal sheep? By and by plenty policemen, all Black policemen, wade yaal yal, kill him all Blackfellow steel (sic) sheep, Kort Karip quamby gaol, by and by hang him, Kort Karip kill him too much white fellow."¹¹⁹

Three weeks' earlier, Boroke had 'amused the men at McPherson's out station by telling them stories of the police shooting blacks, dragging Koork Karrup through the water with roap (sic), plenty cry, Native Police laugh'.¹²⁰ Robinson labelled the listeners 'blackguards' for having responded 'oh give him blankets, tommyhawk, bread, no hang him, only let him go'.¹²¹ The man referred to on both occasions by Boroke was Koort Kirrup, a leader of the Pallapnue gundidj clan of the Dhauwurd wurrung or Gundidjmarra, a contemporary of Yanem Goona's with whom he was housed in Melbourne Gaol.¹²²

In reporting the loss of Baillie's and Hamilton's sheep, the *Maitland Mercury* observed that 'the tribe who committed this serious depredation is the same which Messrs Powlett and Dana at different times thinned of its fair proportions in a skirmish with the black rascals'.¹²³ This attests to the ongoing and brutal nature of the conflict between colonial authorities and colonists in the vicinity of Mt Arapiles and

¹¹⁸ The boasting by Dana's men took place at Parker's station on the Loddon as mentioned in Parker to Robinson, 4 September 1845, in correspondence file VPRS 46/89, SIC.

¹¹⁹ Robinson. Wednesday 23 April 1845, *Journals, Volume Three*, p. 281.

¹²⁰ Robinson. Thursday 3 April 1845, *Journals, Volume Four*, p. 270.

¹²¹ *ibid.*

¹²² See Chapter 4, footnote 67, for a brief synopsis of Koort Kirrup's case. For his clan affiliation, see Clark, *Aboriginal Languages and Clans*, p. 71.

¹²³ *Maitland Mercury*, 14 June 1845, p. 4.

the willingness of the central administration to continue to turn a blind eye to Aboriginal casualties. When news of Yanem Goona's arrest was reported in the *Maitland Mercury* he was described as 'a most ferocious-looking fellow'.¹²⁴

Yanem Goona's committal hearing was reported by the *Geelong Advertiser* on 7 August 1845 where a conversation between the prisoner and the Bench was reproduced in order to highlight the farcical nature of the proceedings:

Yesterday he was brought before the bench of magistrates presiding for the district ... The prisoner who is almost grey with age, noticed little that took place, and did not upon being questioned, appear to understand one word of English ... At the conclusion of the examination the Bench went through the usual form of asking the prisoner what he had to say in his defence?

Billy – Borack!

Bench – Can you say anything why we should not commit you to take your trial?

Billy – Borack!

Bench – It is our duty to commit you to take your trial.

Billy – Yes!

and Billy was accordingly removed to the gaol, there to await the representation of another legal farce relative to his capacity to comprehend the nature of the proceedings, and understand the details of the evidence.¹²⁵

Yanem Goona was charged in the Court of the Resident Judge on 17 October 1845 with 'having on the 10th of July last, stolen fifty wethers, fifty ewes, and fifty lambs, the property of Mr. Bailey and another, of Colkennett, in the District of Port

¹²⁴ *Maitland Mercury*, 23 August 1845, p. 4.

¹²⁵ *Geelong Advertiser*, 7 August 1845, p. 3. Thomas Bride provided a translation for 'borack', stating that it means 'no, not so'. See Bride (ed). *Letters From Victorian Pioneers*, p. 225.

Phillip'.¹²⁶ Richard Buckett, who claimed to have lived within fifty miles of Yanem Goona's clan during the preceding three years, was sworn in as the interpreter. During the trial, the Standing Counsel for Aborigines Mr. Redmond Barry raised the issue of acquainting the prisoner with his right to challenge the jury. Therry responded that he did not consider that to be of much importance. It could not be supposed that any of the gentlemen who had to try the case could have any personal feeling against the prisoner, who was an entire stranger to them, he being 'nothing more than a wild man of the woods'.¹²⁷ Bailey and Dana appeared as witnesses for the prosecution. No defence witnesses were called. Gurner, the Crown Prosecutor, produced a license demonstrating that Bailey and Hamilton had depastured stock in the Wimmera. Because Gurner failed to show how Bailey and Hamilton were connected with the licence, Therry directed the jury to acquit Yanem Goona as 'there had not been sufficient evidence adduced to bear out the information'.¹²⁸ The interpreter explained the situation to the prisoner.

The determination to gain a conviction was such that Yanem Goona was remanded in custody overnight and appeared in court again the following day on a new sheep stealing charge. This time, the jury returned a guilty verdict even though none of the witnesses called in the case positively identified the prisoner as having been personally involved in committing the alleged crime.¹²⁹ Controversially, Therry found 'that if this black was a member of the community where the sheep were found altho (sic) he had no hand in the actual stealing or killing, yet as a member of that

¹²⁶ *Melbourne Courier*, 17 October 1845, p. 2.

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *Melbourne Courier* (Extraordinary), 17 October 1845, p. 1.

community was equally guilty.¹³⁰ As the various colonial officials present made accusations against each other in relation to the previous day's botched trial, Yanem Goona was sentenced to ten years' transportation to 'Old Man Cruel' (as Robinson put it) or Van Diemen's Land.¹³¹

Yanem Goona's name was included in a list of prisoners sentenced to transportation furnished to the Colonial Secretary by the chief clerk at the Principal Superintendent of Convicts Office on 14 November 1845.¹³² He arrived in Van Diemen's Land on 29 December 1845 where he was described as being a 'pagan' who could not read or write.¹³³ Measuring 5' 5" in height, the colonial scribe who recorded his particulars observed a 'man of color' with a round head and 'greyish' hair and whiskers.¹³⁴ His eyes and eyebrows were described as 'black', and his nose 'flat' and mouth 'wide'.¹³⁵ Yanem Goona is recorded as having been a married man, and his occupation was set down as 'labourer'.¹³⁶ Required to serve a three-year period of probation, he was sent to join a convict gang stationed at Norfolk Island.¹³⁷ According to a visitor's account, 'whenever he mentioned the Grampians [Yanem Goona] invariably cried from the thought of home'.¹³⁸ This behaviour is typical of a particular illness 'validated within Aboriginal culture' and described by David Vicary

¹³⁰ Clark, *Aboriginal Languages and Clans*, p. 244.

¹³¹ Robinson, Saturday 18 October 1845, *Journals, Volume Four*, p. 336.

¹³² Principal Superintendent of Convicts Office to the Colonial Secretary, 14 November 1845, 45/8329 4/2681, SRNSW.

¹³³ CON37/2, p. 588, AOT.

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ *ibid.*

¹³⁸ Rose to La Trobe, *Letters from Victorian Pioneers*, p. 148.

and Tracy Westerman as ‘*longing for, crying for, or being sick for country*’.¹³⁹ They describe this sickness as following ‘the same symptom base as clinical depression’.¹⁴⁰ They state that the underlying cause of this illness is ‘removal from their country, place of dreaming, or spirit for extended periods of time’.¹⁴¹ Less than two years after his arrival on Norfolk Island, an ailing Yanem Goona was transported back to Van Diemen’s Land where he arrived on 18 August 1847. After spending the night in the prisoners’ barracks in Hobart, he was forwarded to Saltwater River, near Port Arthur, to complete the remainder of his three years probation. Just over a year later, he died in the nearby hospital for convict invalids at Impression Bay on Tasman’s Peninsula.¹⁴²

While Yanem Goona was in Melbourne Gaol pending his transportation to Van Diemen’s Land, Koombra Kowan Kunniam *alias* Cornigobernock was arrested on the grounds that ‘he did on the 19th day of October last, feloniously break and enter the dwelling house of Mr. D. Brazel, situate on the Murrabool River in the Geelong district, and steal therefrom 10lbs. of beef, value 2s.’.¹⁴³ As he came from the ‘Burrabool District’ near Geelong, Kunniam was probably a Wada wurrung balug clan member of the Wada wurrung, as was Bonjon (mentioned above). Clark identified this clan’s approximate location as the Barrabool Hills.¹⁴⁴ The Wada wurrung balug experienced very early colonial contact in the Port Phillip District as it

¹³⁹ David Vicary and Tracy Westerman. “‘That’s Just The Way He Is’: Some Implications of Aboriginal Mental Health Beliefs”, *Australian e-Journal for the Advancement of Mental Health*, 3.3, 2004, p. 5.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² CON37/2, p. 588, AOT.

¹⁴³ *Melbourne Courier*, 23 January 1846, p. 2.

¹⁴⁴ Clark. *Aboriginal Languages and Clans*, p. 311.

was this clan that adopted William Buckley. Buckley, a white convict who had absconded from the short-lived Sorrento settlement on 27 December 1803, was considered by the Wada wurrung balug to have been a reincarnation of their deceased kinsman Murrangurk. He lived as a member of the clan until July 1835 when he contacted three white men camped at Indented Head and made what was termed a return to civilisation. George Langhorne subsequently recorded Buckley's memoirs.¹⁴⁵

The wider language group within which the Wada wurrung balug clan was situated, the Woi wurrung, was the group with whom early settler John Batman negotiated a land deal that was later disallowed. By August 1835, just a few months after the Batman treaty was concluded with Woi wurrung and Bun wurrung clan heads, a ration station had been established at the site of present day Geelong from which supplies of flour and potatoes were dispensed to Aboriginal people. Early relations between the incoming colonists with their stock and local Aborigines remained cordial during the first year of contact, but armed conflict broke out following the murder of a Wada wurrung balug clan head, Curacoine or Kurakoi, on 17 October 1836. The alleged murderer, John Whitehead, was put on trial in the Supreme Court in Sydney where he was found not guilty.¹⁴⁶ The month following Whitehead's trial, two white people were killed in revenge for the murder of Curacoine.¹⁴⁷ This marked an increase in the intensity of Wada wurrung resistance to

¹⁴⁵ *ibid.*, pp. 277-80.

¹⁴⁶ *R v Whitehead* 1837, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 21 March 2007 at <http://www.law.mq.edu.au/scnsw/Cases1836-37/html/r_v_whitehead__1837.htm>; see also Clark. *Aboriginal Languages and Clans*, p. 281.

¹⁴⁷ *ibid.*

the colonial intrusion. According to Michael Christie, in June 1837 a contingent of Wada wurrung descended on a station belonging to William Yuille at Murgheboluc ‘dispersing the shepherds and plundering the huts’.¹⁴⁸ Such was the ferocity of the Wada wurrung resistance that forty-six settlers wrote letters to the Governor seeking protection from Aborigines.

By March 1839, people of the Wada wurrung language group had come under the ‘protection’ of two of the Assistant Protectors of Aborigines with Edward Parker having been allocated the Loddon, or North Western District, and his colleague Charles Sievwright being put in charge of the area around Geelong, the Western District. Later that year, reports were circulating of Wada wurrung raids on some of the colonists’ outstations. The Wada wurrung men were armed with muskets and fowling pieces.¹⁴⁹ At times, colonists were known to have provided arms to some Aboriginal people to engage in battles against other Aborigines. On 1 July 1839, the Reverend Benjamin Hurst informed Robinson that William Roadknight had provided muskets to some Aborigines living around Melbourne so that they might kill the Barrabool Aborigines.¹⁵⁰ It is against this backdrop that the following events transpired.

On Monday 19 October 1845, Koombra Kowan Kunniam and four other ‘blackfellows’ came to the house of Mr. D. Brazel, situated on the Murrabool River near Geelong. The house was a small wooden dwelling built by Brazel on land

¹⁴⁸ Michael Christie. *Aborigines in Colonial Victoria 1835-86*, Sydney University Press, Sydney, 1979, p. 60.

¹⁴⁹ Clark. *Aboriginal Languages and Clans*, p. 283.

¹⁵⁰ Robinson. Monday 1 July 1839, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume One: 1 January 1839-30 September 1840*, Ian D. Clark (ed). Heritage Matters, Clarendon, 1998, p. 55.

belonging to Charles Dennys. While Brazel and his wife, Margaret, were not Dennys's servants, he allowed them to live on a portion of his property. Margaret Brazel later described in court how the party of Aboriginal men arrived at the door to their hut at around sunrise and forced their way inside. Kunniam, who Brazel identified to the court, was armed with a gun that was taken from him by one of his comrades, fired into the air, and then returned to him. The men took two shillings' worth of salt beef before pointing at one of the Brazel children and stating 'plenty of fat!'.¹⁵¹ The mother took this observation to mean that the men intended to eat one of her children.

As Lynette Russell pointed out in relation to the Eliza Fraser narratives that circulated following the 1836 shipwreck of the *Stirling Castle* on Fraser Island, cannibalism 'was considered to be the defining characteristic of the savage'.¹⁵² Russell remarked on how stories about Aboriginal cannibalism circulated widely throughout much of the nineteenth century, something she suggests was 'culturally prefigured' for in the minds of the white settlers, Aboriginal people were considered to live 'in unquestioned proximity to an animal state'.¹⁵³ Sensationalised reports of Aboriginal cannibalism circulated throughout the Port Phillip District during the early days of colonial contact. Several tales were published by the *Geelong Advertiser* and were used to support its argument that English law was superior to Aboriginal justice. The newspaper claimed that:

¹⁵¹ *Melbourne Courier*, 23 January 1846, p. 2.

¹⁵² Lynette Russell. 'The Representations of Savage Life', *Constructions of Colonialism: Perspectives on Eliza Fraser's Shipwreck*, Ian McNiven, Lynette Russell, and Kay Schaffer (eds). Leister University Press, London, 1998, p. 56.

¹⁵³ *ibid.*, p. 57.

The English law sentences a murderer ‘to be hanged, and his body given for dissection’. The blacks condemn him ‘to be speared, and his body to be eaten’. The same sentence is put into force against their LUBRAS for their inconstancy.¹⁵⁴

The supporting evidence included a story of several Aboriginal women being killed and eaten ‘within the last few days’ at one of the Assistant Protector’s stations with it being rumoured that the ‘shameless ... blacks ... even offered one of the feet as a tit-bit to the Protector himself’.¹⁵⁵ Another tale involved an Aboriginal man who had purportedly killed a shepherd. After being discharged in court and released from gaol, he was ‘tried, convicted, and speared by an assembly of the Barrabool tribe’ and ‘afterwards eaten by his judges and executioners’.¹⁵⁶ Such stories bolstered the colonists’ claims – enabling them to maintain the moral high ground in relation to their intrusion and their imposition of colonial law on Aboriginal people – but also frightened impressionable minds like Margaret Brazel’s.

The remark made by Kunniam and his companions is also clearly open to being interpreted as providing justification for their taking of the salt beef. Obviously the child was exhibiting signs of being well enough fed in that it looked plump. The removal of the salt beef might therefore be affected without causing undue hardship to the family who were clearly not starving. The comment about the child appearing to have plenty of fat, taken in conjunction with the removal of the food, could also be read as a criticism of hoarding a stockpile of food above and beyond what might be considered strictly necessary for the family’s immediate requirements. Such stockpiling was at variance with practices within traditional Aboriginal societies

¹⁵⁴ *Geelong Advertiser*, 8 May 1841, p. 2.

¹⁵⁵ *ibid.*

¹⁵⁶ *ibid.*

where notions of sharing and reciprocity prevailed. Despite the ambiguity inherent in the remark ‘plenty fat!’ Brazel was so convinced of the men’s cannibalistic intentions that she coo’ed loudly to attract help. This action precipitated the men’s departure, at which point she described them as ‘letting the child’s head fall bump on the floor’, indicating that they must have picked the infant up at some stage during the encounter.¹⁵⁷ Dennys, the settler on whose farm the Brazels had built their hut, later captured Kunniam. On a subsequent visit to the hut vacated by the Brazels, the property owner found that the door showed obvious signs of having been broken. The hut had been fired some time later, an act that Dennys attributed to Aborigines.¹⁵⁸

When Kunniam appeared before the Resident Judge in Melbourne on 21 January 1846, it was Assistant Protector William Thomas who was sworn in to act as the interpreter. Redmond Barry was the defence counsel. Therry was happy to concur with Barry’s argument that as ‘the property was not properly described as laid down in 7 Carrington v. Payne, King v. Rawlins’ the case must be considered solely in terms of larceny.¹⁵⁹ This, said Therry, ‘would be a safer course’.¹⁶⁰ The jury returned a guilty verdict, following which Kunniam was remanded in custody to await sentencing. On being informed of the outcome of his trial, Kunniam is reported to have exclaimed ‘Borack!’ ‘Borack!’ which translates as ‘no, not so!’¹⁶¹ The following week he was sentenced to seven years’ transportation.¹⁶²

¹⁵⁷ Russell. ‘The Representations of Savage Life’, pp. 56-7.

¹⁵⁸ *Melbourne Courier*, 23 January 1846, p. 2.

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² *Melbourne Courier*, 2 February 1846, p. 3.

Four months after sentencing, Kunniam arrived in Van Diemen's Land on the *Flying Fish*. A full description of him was prepared providing the necessary information to be circulated in the event that he should abscond. Kunniam, who was allocated the convict number 625, was estimated to be about twenty-five years old and stood at 5'5¾" tall.¹⁶³ The authorities saw him as having a black complexion, large head, black curly hair that was cut close to his head, no whiskers, a round visage and a low forehead. His forehead was dominated by bushy eyebrows that overhung his black eyes.¹⁶⁴ He had a large nose and mouth, thick lips, and a small chin.¹⁶⁵ Described as being a 'pagan' who could 'neither read nor write', his trade was listed as 'labourer'.¹⁶⁶

Kunniam was initially assigned to a gang stationed in the far south east of the island at Southport, where he was to serve one year of his sentence engaged in hard labour. On completion of his twelve month stint, he was returned to the prisoners' barracks in Hobart where he arrived on 19 June 1847. Three months later Kunniam was admitted briefly to hospital, but within several days had been forwarded to Jerusalem (present day Colebrook) to the north of Hobart to join a road gang housed at a probation station there. Seven months later, on 14 April 1848, Kunniam was again admitted to hospital. This time, his stay was lengthier. It was not until 17 November 1848 that he was considered to be sufficiently well to be forwarded to the Launceston Hiring Depot in the north of the island. From there, Kunniam was sent into service with a settler, Mr. Buesnel of Patersons Plains near Launceston, where he

¹⁶³ CON 37/3, p. 625, AOT.

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

commenced work on 28 December 1848. His health continued to fail him, however, and just four years into his seven year sentence he was once again admitted to hospital.¹⁶⁷ Koombra Kowan Kunniam died at Impression Bay, at Tasman's Peninsula.¹⁶⁸ He left behind a widow, Tooturook, later identified as residing at the Native Police headquarters, Narre Narre Warren, presumably as the wife or concubine of one of the men stationed there.¹⁶⁹

At the same time Kunniam was engaged in hard labour at Van Diemen's Land, Warrigal Jemmy was brought before the recently appointed Resident Judge William à Beckett and a civil jury in the Court of the Resident Judge at ten o'clock on the morning of Saturday 17 October 1846. He was called to the bar to face five charges relating to an incident that had taken place almost three months earlier at the Lower Loddon. These charges were 'unlawfully, maliciously, and feloniously wounding John Forrester, with a spear with intent to murder him, at the Lower Loddon, on the 28th July; the second count charged him with committing the offence with intent to maim; the 3rd count with intent to disfigure; the 4th count with intent to disable, and the 5th count with intent to do grievous bodily harm'.¹⁷⁰

Prior to his court appearance, Warrigal Jemmy earned a notorious reputation amongst early colonists at the Lower Loddon, some of whom had, in turn, earned at least an equally notorious reputation amongst local Aboriginal people. In a letter dated 29 September 1853 to La Trobe, A. M. Campbell explained that he arrived in

¹⁶⁷ *ibid.*

¹⁶⁸ *ibid.*

¹⁶⁹ Fels. *Good Men and True*, p. 269.

¹⁷⁰ *Melbourne Argus*, 20 October 1846, p. 3.

the area in 1844 and returned there with his stock the following year. At the time, another settler, Mr. E. B. Green had 'had to vacate for about twelve months on account of the hostility of the blacks'.¹⁷¹ Campbell, however, described himself as having 'cultivated a friendly feeling with the natives'.¹⁷² Despite this apparently cordial relationship, when Campbell was away in Melbourne obtaining a depasturing license, local Aborigines 'enticed' Jack, his Aboriginal servant, away from the station and killed him.¹⁷³ Campbell also received a less than friendly visit from a party of 'seven strange blacks' who approached his hut.¹⁷⁴ On going down to the nearby river, Campbell decided to turn around prior to bending over to obtain some water. He described how he saw:

one of the natives (Warrigal Jemmy, afterwards transported for life) following me a few yards behind, with my own axe uplifted and clasped in both hands. I fixed my eye upon his, walked deliberately up to him, and gently took hold of the axe, which he quietly relinquished.¹⁷⁵

Campbell walked back to his hut with Warrigal Jemmy, 'conversing with him, as if he had done nothing to excite my suspicion'.¹⁷⁶ He later explained that he had not revealed the details of this incident to his white and Aboriginal employees until about two years after the event had transpired. It is probable that Campbell's revelation coincided with the arrest of Warrigal Jemmy. His observation to La Trobe that the man was transported for life demonstrates Campbell's awareness of the trial's outcome. Men he described as 'the natives of this place' told Campbell that they

¹⁷¹ Campbell to La Trobe, 29 September 1853, *Letters From Victorian Pioneers*, p. 143. It is possible that this is the same A. Campbell who served as a Magistrate at Port Fairy during the preceding decade.

¹⁷² *ibid.*, p. 144.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

¹⁷⁶ *ibid.*

thought Warrigal Jemmy had intended to kill him.¹⁷⁷ In mitigation, they also explained to Campbell that it was not, in their view, a premeditated attack on Warrigal Jemmy's part, but rather a matter of his having 'acted from impulse'.¹⁷⁸

The squatter on whose station Warrigal Jemmy committed the offence for which he was later arrested was James Cooper or Cowper. Cooper had taken up land near the junction of the Loddon and Murray Rivers in 1845, naming his station 'Boramboot'. Correspondence from the Crown Commissioner, Frederic Armand Powlett, criticised Cooper as the squatter had not appointed 'an experienced overseer', in the absence of which Cooper's shepherds had taken to exercising liberties with local Aboriginal women.¹⁷⁹ They encouraged Aborigines to visit their huts through providing them with food. Once they had established relations with the women, Cooper's shepherds stopped giving the men any food and it was this according to Powlett that resulted in the men starting to take the sheep.

Fearful of local Aboriginal men, Cooper's shepherds ensured that they were armed at all times. A spate of violent incidents took place, including one incident in which the shepherds fired upon a group of unsuspecting Aborigines. This episode took place in May 1845 after Cooper's shepherds had enticed the men with offers of food to come across a river, only to shoot at them while they paddled their canoe. At least one man, Bimbite, is recorded as having died as a result of this attack. Cooper's shepherds further misled the Aboriginal men by claiming to be working for a nearby squatter, Curlewis, and in reprisal for this attack Curlewis suffered stock losses

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ Michael Cannon. *Black Land, White Land*, Minerva, Port Melbourne, 1993, p. 221.

amounting to about £6000.¹⁸⁰ In October 1845, an altercation took place between one of Cooper's shepherds and a couple of Aboriginal men who had attacked a sheep and broken the animal's back. Blows were exchanged, and the shepherd, William Britton, shot the men's dog. Several days later, on 8 October 1845, Britton and another shepherd named Henning did not return with their flocks in the evening. Britton's body was subsequently found 'naked with spear wounds, opened, and his entrails taken out, and beaten about his face and head apparently with a tomahawk, and his ears cut off'.¹⁸¹ Henning's body was found some time later and was in a similar condition.

Early the following year, William Dana and his police were sent to the area to 'pacify it', to use the contemporary euphemistic term. On 1 February 1846, in an engagement with a large group of about two hundred Aborigines, they shot 'one hundred rounds of ball cartridge' amongst them.¹⁸² Dana later reported that he noticed several Aborigines had died, and speculated that many more were wounded. In response to this serious incident, La Trobe sent George Augustus Robinson to the vicinity to investigate what had transpired, and also ordered Henry Dana to the district with 'Captain McLaughlan ... two white police, three black' to reinforce the contingent headed up by his brother, William.¹⁸³ The local protector, Parker, accompanied Robinson but was unable to obtain any further information about the situation from Aborigines or squatters. William Dana, the only white man present at

¹⁸⁰ Campbell to La Trobe, 29 September 1853, *Letters from Victorian Pioneers*, p. 145.

¹⁸¹ Cannon. *Black Land, White Land*, p. 221.

¹⁸² *ibid.*, p. 222.

¹⁸³ George Augustus Robinson. Saturday 4 April 1846, *The Journals of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Five: 25 October 1845 – 9 June 1849*, Ian D. Clark (ed). Heritage Matters, Clarendon, 2000, p. 16.

the February incident, informed Robinson that he and his party 'were attacked by the natives whilst patrolling the banks of the river'.¹⁸⁴ They had fired upon the 'natives' and when some were shot the rest disappeared 'among the reeds'.¹⁸⁵

In August 1846 another party of border police was dispatched to the troubled district, led by Sergeant William Johnson. They discovered Warrigal Jemmy at 'Bael Bael', George Curlewis' head station, and arrested him. The prisoner resisted arrest by trying to stab Johnson with a pair of sheep shears but was overcome by the border police. On searching his belongings, Warrigal Jemmy was found to be carrying a carbine and some pistols.¹⁸⁶ The specific events that led to criminal charges being laid against him were detailed in four witness statements, including one sworn by the shepherd John Forrester. On 28 July 1846, Forrester had been attending his employer Cooper's flock of sheep at the Lower Loddon when he was 'startled by feeling a spear thrown which passed through the tail of my coat'.¹⁸⁷ The surprised shepherd was confronted by a number of Aboriginal men, including Warrigal Jemmy who threw a second spear at him. The spear, having first struck the lock of the shepherd's gun, entered his vest and shirt. As the point of the spear had been broken on contact with the gun, it did not enter Forrester's flesh but nevertheless caused a graze on the right side of his body.¹⁸⁸ Forrester later said in court that, because he had been afraid that the Aboriginal contingent might kill him, he decided not to discharge his firearm. Another spear was aimed at him, following which the 'blacks rushed the sheep' and

¹⁸⁴ Robinson. 'Brief Report of an Expedition to the Aboriginal Tribes of the Interior Over More Than Two Thousand Miles of Country During the Five Months Commencing March to August 1846', *Papers, Volume Four*, p. 55.

¹⁸⁵ *ibid.*

¹⁸⁶ *Maitland Mercury*, 24 October 1846, p. 1.

¹⁸⁷ R v Warrigal Jemmy 1846, VPRS 30/P/O, Unit 5, File 1-28-8.

¹⁸⁸ *ibid.*

took forty from the flock of 1,900.¹⁸⁹ The *Melbourne Argus* reported these events under the headline ‘Attempt at Murder and Robbery’. This firmly situated the action within the context of criminal activity rather than frontier warfare, a paradigm that was further reinforced through the way in which the newspaper report omitted any mention of the violent clashes between Cooper’s shepherds, local Aboriginal men, and native police that preceded this particular incident.¹⁹⁰

Warrigal Jemmy was brought before the District Bench to face the charges enumerated above in relation to this incident and was remanded in custody until 10 October 1846, pending further evidence from the station where the alleged incident had taken place. Robinson recorded in his private journal that he attended a meeting with the Mayor ‘on black native prisoner (Warragil)’ on Friday 18 September 1846.¹⁹¹ According to Robinson, a native policeman had been called on to act as Warrigal Jemmy’s interpreter during the initial examination of the prisoner. Although Robinson also indicated that Warrigal Jemmy was to be ‘examined on the 10th finally’, it was actually Monday 12 October 1846 when he was committed to stand trial in the Court of the Resident Judge.¹⁹²

Warrigal Jemmy was tried before the Resident Judge William à Beckett and a jury of twelve male settlers on Saturday 17 October 1846. The Crown Prosecutor assisted by Sydney Stephen mounted the case for the prosecution. On having the charges read out to him, and being called on to plead, Warrigal Jemmy told the court

¹⁸⁹ *Melbourne Argus*, 22 September 1846, p. 2.

¹⁹⁰ *ibid.*

¹⁹¹ Robinson, Friday 18 September 1846, *Journals, Volume Five*, p. 111.

¹⁹² *ibid.*, pp. 111, 115.

‘borac me do it; nother black fellow.’¹⁹³ His denial of the charge, coupled with the suggestion that another Aboriginal man had in fact been the perpetrator of the alleged crimes, demonstrates that Warrigal Jemmy had a sufficient understanding of his situation within the colonial court to cast doubt on whether he had been correctly identified as the offender. The official interpreter, Assistant Protector Parker, nevertheless informed the court of the impossibility of conveying to the prisoner his right of challenge. It was agreed that the standing counsel for Aborigines, Redmond Barry, could exercise that right on behalf of Warrigal Jemmy. The jury was sworn in without anyone being challenged and, after hearing the evidence, they found the prisoner guilty on the last four of the five counts brought against him. Warrigal Jemmy was sentenced to transportation for life to Van Diemen’s Land.¹⁹⁴

On the same day that he was sentenced, 17 October 1846, an indent was prepared at the Port Phillip District naming the prisoner as ‘Warrigle Jemmy’ and giving his native place as being the ‘Loddon River’.¹⁹⁵ Described as a ‘labourer’, his year of birth was estimated to be 1820, making him about twenty-six years old at the time sentence was passed upon him.¹⁹⁶ He measured 5'9" tall, and the colonial scribe who noted his particulars recorded his complexion and hair as ‘black’ and eyes ‘brown’.¹⁹⁷ He noted that the prisoner had fourteen scars across his shoulders.¹⁹⁸ It is likely that these scars were cicatrices formed during the period of initiation that he would have undergone during the transition from boyhood to manhood. His charge,

¹⁹³ *Melbourne Argus*, 20 October 1846, p. 3

¹⁹⁴ *ibid.*

¹⁹⁵ Convict Indent for ‘Warrigle Jemmy’, 47/453 4/2779.3, SRNSW.

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

¹⁹⁸ *ibid.*

conviction, and sentence were also recorded on the indent, as was his status as ‘an aboriginal black native of the District of Port Phillip’.¹⁹⁹ This indent was the legal instrument that enabled Warrigal Jemmy’s labour to be transferred officially from the Port Phillip District of New South Wales to Van Diemen’s Land.

Perhaps it was in view of his anticipated participation in public works and private employment that Warrigal Jemmy, as with all other Aboriginal convicts for whom indents and convict conduct records survive, was recorded as being a ‘labourer’ when it would seem apparent that he at least had never held any such position. In the act of sentencing him to transportation, the Resident Judge not only deprived Warrigal Jemmy of his freedom and his connections with kin and country, but he also appropriated his labour for the use of the British Crown. Warrigal Jemmy therefore underwent a transformation from being an individual relatively free to engage in the economic pursuits of his tribe, albeit pursuits that were at times harmful to the colonial economy (sometimes deliberately so), to becoming a unit of production to the colonists in terms of the labour that he could provide.

Although sentence had been passed on Warrigal Jemmy, and despite the indent having been prepared, at first it was not apparent as to whether it would be carried into effect. Like any sentence passed in the colonial law courts, appeal could be made to the Executive Council. The initial correspondence seeking a mitigation of the sentence was written by the Assistant Protector stationed at the Loddon River, Edward Parker. In a letter dated 12 December 1846 identifying the prisoner as ‘Warrengil (sic) Jemmy otherwise Keetnurnin’, Parker asked the Chief Protector that

¹⁹⁹ *ibid.*

he be allowed to submit a statement to the Executive Government.²⁰⁰ He made the point that the prisoner had been ‘convicted on the evidence of one man’.²⁰¹ Parker called into question the man’s ability to have correctly identified Warrigal Jemmy as the prosecution witness, Forrester, had claimed in his evidence that he was speared from behind by a man standing at some distance from him.

To provide them with a more complete understanding of the context within which the alleged crime had occurred, the Assistant Protector saw fit to inform the Executive Government that there was ‘intense prejudice and strongly hostile feeling existing on certain stations on the Murray against the natives’.²⁰² He suggested that such hostility could result in prosecution witnesses being easily swayed into not being ‘very scrupulous’ when it came to ‘swearing to the identity of a black’.²⁰³ Such an attitude, according to Parker, would be bound to earn an employee favour with their employer or provide them with an opportunity to ‘gratify revenge’ against local Aborigines.²⁰⁴ Mr. Cooper’s station was afforded particular criticism by the assistant protector who described it as having ‘been particularly in a disorderly state ... the men being of bad character, and under no proper control’.²⁰⁵ Such were the shocking conditions on Cooper’s property that it had come to the attention of Commissioner Powlett. Demonstrating the differentiation between the treatment various colonists meted out to Aborigines and correlating that with Aboriginal strategies in a given locale, Parker elaborated in relation to Cooper’s station that:

²⁰⁰ Parker to Robinson, 12 December 1846, 46/1896 4/2779.3, SRNSW.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ *ibid.*

At the two adjoining stations of Messrs. A. Campbell and McAllum no injury has been done either to or by the natives since their formation, while on Mr. Cooper's place from its first establishment, mutual hostility existed, and the first homicide occurring in this part of the country was that of a native shot by a shepherd of Mr. Cooper's.²⁰⁶

He submitted that the sentence passed upon the prisoner was 'unusually severe', being 'the severest that could be inflicted' under the circumstances.²⁰⁷ Parker suggested that the 'natives' might have intended to intimidate rather than to murder the shepherd, Forrester, and Parker indicated he believed that to have been 'the opinion of several of the jurymen' who had sat on the case.²⁰⁸ The Assistant Protector advocated 'commuting the prisoner's sentence to imprisonment for a limited time', prophesying accurately that 'transportation for life in the case of the prisoner is in effect a sentence of early death'.²⁰⁹ From his personal observations of the prisoner and his tribe, Parker was able to offer his professional opinion that the prisoner's 'return after two or three years' imprisonment to his country and people 'would ... as he is a man of remarkable quickness and intelligence be productive of much good, in the warning it would afford to the other natives'.²¹⁰

With La Trobe absent in Van Diemen's Land, Robinson forwarded the Assistant Protector's letter to Acting Superintendent William Lonsdale on 28 December 1846. Robinson endorsed Parker's request that Warrigal Jemmy's sentence be commuted to 'a limited period'.²¹¹ Parker's lengthy submission, however, elicited a scathing rejoinder dated 6 January 1847 from à Beckett who declared that he was:

²⁰⁶ *ibid.*

²⁰⁷ *ibid.*

²⁰⁸ *ibid.*

²⁰⁹ *ibid.*

²¹⁰ *ibid.*

²¹¹ Robinson to Lonsdale, 28 December 1846, 46/1896 4/2779.3, SRNSW.

yet to learn that it is necessary to vindicate the propriety of any sentences to the Assistant Protectors ... or that those gentlemen, upon every occasion of punishment following the conviction of an Aboriginal, are justified, if it should not accord with their own notions, in addressing themselves to the Executive in the character rather of appellants against the Judge, than of Petitioners for the Mercy of the Crown.²¹²

Continuing in this vein, the Resident Judge wrote a lengthy justification of his handling of the case, rebutting all the points that Parker had raised. In particular, he stated that if the conditions on Cooper's station were as Parker had alleged, and provided such conditions might have led to the prosecution witness's evidence being 'actuated by ill feeling towards the Aboriginal', then the Assistant Protector ought to have informed the defence counsel.²¹³ Forrester could then have been cross-examined accordingly. In relation to what the jurymen might have thought, à Beckett pointed out that they had acquitted Warrigal Jemmy on the capital charge, but had nevertheless found him guilty on the four remaining charges. Had they doubted Warrigal Jemmy's intention in casting the spear, then they could not have arrived at a guilty verdict without violating their oath. The Resident Judge justified the sentence by stipulating that 'it is sufficient to say that it is a sentence which I, in my discretion, believed to be my duty to pass'.²¹⁴ He declared that he intended the sentence of transportation for life to be exemplary and denied that it could be considered 'severe', stating that:

Warringel (sic) Jemmy was one of a Tribe of 50 whose manifest design was assembling together, at the time of the attack by the prisoner was spoliation and murder, and for this tribe to learn that their captured comrade had been punished only with temporary

²¹² à Beckett to Lonsdale, 6 January 1847, 47/28 4/2779.3, SRNSW.

²¹³ *ibid.*

²¹⁴ *ibid.*

confinement, would I think, be but an encouragement to them to carry their design into effect at some future period.²¹⁵

In the same letter, à Beckett elaborated his views on conditions in the colony and the difficulties of bringing Aboriginal men to justice:

The Aboriginals of this Colony are a race, who, from whatever cause it may arise are in fact, found in frequent collision with the settlers, and to such an extent in some parts, that the life and property of the latter, are in a constant state of insecurity. Reports are from time to time authenticated of the most wanton attacks on the flocks and herds of the squatters, and of the mutilation and murder of those charged with their care, but in hardly one instance out of a hundred, have the offenders been brought to justice. The difficulty of identity, of capture, of detention and safe conduct for hundreds of miles, the expense and inconvenience of bringing witnesses the same distance, and finally the probability of the prisoner's discharge, as in the case of Koort Kirrup, from the want of an Interpreter – All this goes far to render the law but a nominal protection for the settlers against the incursion of the blacks, and operates upon the blacks themselves, who are quite intelligent enough to be aware of these obstructions to their punishment, as an incentive and encouragement to persevere, when once commenced, in their career of pillage and murder.²¹⁶

The Resident Judge reasoned that such circumstances tempted the 'distantly located' colonist to 'take the law into his own hands'.²¹⁷ This was not an unreasonable supposition, as even Magistrate William Campbell from Port Fairy had indicated that colonists 'may be obliged to have to recourse to bloodshed, in defence of his life and property'.²¹⁸ This being so, à Beckett saw it as being as much a matter of policy as it was of law that once an Aboriginal prisoner was successfully tried and convicted, he ought to be given a sentence that was seen to be 'exemplary', and that would 'instil terror' into those who lived 'in daily fear of encountering similar evidence'.²¹⁹ In this

²¹⁵ *ibid.*

²¹⁶ *ibid.*

²¹⁷ *ibid.*

²¹⁸ Campbell to La Trobe, 22 July 1845, 45/1370 4/2741, SRNSW.

²¹⁹ à Beckett to Lonsdale, 6 January 1847, 47/28 4/2779.3, SRNSW.

way, colonists would be appeased and more inclined to look to the law for recourse against Aboriginal men who attacked their persons, property, and stock. At no stage did à Beckett openly acknowledge that the ‘incursion of the blacks’ that he railed against had its inception in the intrusion of colonists into country that was already densely populated by indigenous inhabitants whose ancestors had resided there for many generations.²²⁰ Nor did he give any credence to Parker’s argument that Warrigal Jemmy’s sentence was likely to result in premature death. He did not dignify that prognostication with any response. à Beckett concluded that Warrigal Jemmy’s sentence was both necessary and exemplary, and he found that it was not possible for him to ‘conscientiously recommend any mitigation’.²²¹

When he was in receipt of all three letters, Parker’s, Robinson’s, and à Beckett’s, Acting Superintendent William Lonsdale forwarded them to the Colonial Secretary’s Office in Sydney with a covering letter dated 8 January 1847. Lonsdale told the Colonial Secretary that the remarks he had solicited from à Beckett in response to Parker’s letter fully addressed the concerns raised by the Assistant Protector. He added that he ‘considered Mr. Parker has attempted to advocate the cause of the Blackman in a very unjustifiable and inconsiderate manner’.²²² Annotations dated 27 January in the margin of Lonsdale’s letter indicate that the Colonial Secretary concurred with the judge, finding that ‘the allegations of Mr. Parker do not appear to be supported by the facts of the case’.²²³ It was considered that mitigating the sentence ‘would be offering an inducement to the white people to

²²⁰ *ibid.*

²²¹ *ibid.*

²²² Lonsdale to Colonial Secretary, 8 January 1847, 47/20 4/2779.3 SRNSW.

²²³ *ibid.*

take summary revenge in every case of aggression from the blacks'.²²⁴ Despite Parker's concerted efforts, Warrigal Jemmy's sentence was not commuted and he was transported to Van Diemen's Land for life.

He arrived in Van Diemen's Land on board the *Flying Fish* on 10 May 1847. When his details were recorded on disembarking, the colonial authorities in Hobart viewed him differently from their colleagues across Bass Strait. Instead of seeing brown eyes, they saw 'black'.²²⁵ Surprisingly for an Aboriginal convict, the colonial scribe annotated 'Roman Catholic' on his record, whereas almost all other Aboriginal convicts were considered to be pagans (the other notable exception was Billy Roberts, *alias* Samboy or Jimboy, recorded as being 'Protestant').²²⁶ Warrigal Jemmy, considered to be 'stout made', was required to engage in hard labour for a period of three years and was initially stationed at Lymington to the south east of Hobart to whence he was sent on 20 May 1847.²²⁷

Prior to Warrigal Jemmy's arrival, Billy Roberts (an Aboriginal convict sentenced to transportation for life in the Supreme Court of New South Wales in Sydney for assaulting 'one Fanny Hasselton, by striking her on the head with a tomahawk') had been allocated to the work gang at Lymington to serve thirty months hard labour.²²⁸ On arriving from Sydney on 18 April 1847 on board the *Waterlily*, Roberts was recorded as being 5'9" tall, aged about thirty, with a 'black' complexion, a 'large, long' head, 'black woolly' hair, and 'bushy black' eyebrows.²²⁹ His nose

²²⁴ *ibid.*

²²⁵ CON37/3, p. 912, AOT.

²²⁶ *ibid.*

²²⁷ *ibid.*

²²⁸ *Sydney Morning Herald*, 29 December 1846, p. 2; *Atlas*, 2 January 1847, pp. 8-9; CON37/3, p. 864, AOT.

²²⁹ CON 37/3, p. 864, AOT.

was considered to be ‘flat, large’, and his mouth ‘large’ as well.²³⁰ He was found to have lost his front tooth in his upper jaw (this implies he had been through initiation rites), and carried scars in the centre of the forehead, over his right eyebrow, and on his right cheekbone. He was clearly in ill health, as by 22 April 1847, just four days after arriving in Hobart, he was admitted to the Hobart Colonial Hospital, one of three admissions he underwent during the remainder of the year.²³¹

Warrigal Jemmy and Billy Roberts, whose places of origin were separated by a couple of thousand miles, may well have heard about each other’s existence within the convict system in Van Diemen’s Land prior to being sent to the same work gang at Parsons Pass near Buckland (north east of Hobart Town) in April and May 1848 respectively.²³² Less than a month after Roberts’ arrival at Parsons Pass, the two Aboriginal convicts and another man, Thomas Jones (tried at the Salop Assizes in England on 18 March 1842), absconded from their work gang.²³³ Roberts had already been disciplined for ‘breaking out of barracks at night’ almost a year earlier and had committed several other offences during the course of the preceding year, one of which had resulted in his being sentenced to fourteen days solitary confinement.²³⁴ Jones’ conduct record catalogues an extensive list of misdemeanours ranging from insolence and using profane language to making false statements to avoid work. He had also been found with three files in his possession some three years earlier without being able to furnish an acceptable explanation. After Jones had repeatedly denied

²³⁰ *ibid.*

²³¹ *ibid.*

²³² CON 37/3, pp. 864, 912, AOT.

²³³ CON33/33, p. 8039, AOT.

²³⁴ CON 37/3, p. 864, AOT.

having the files, his probationary period had been extended by six months.²³⁵ Unlike his fellow absconders, Warrigal Jemmy had no blemishes on his conduct record up until the time of his escape from custody.²³⁶ The Registrar's Office of the Convict Department advertised a reward of '£2, or such lesser sum as may be determined upon by the convicting Magistrate' for each of the three in *The Hobart Town Gazette*.²³⁷

Before a fortnight had expired, Warrigal Jemmy was apprehended and lodged in Longford Gaol in the north of the island. He was transferred to the Prisoner's Barracks further north in Launceston where he arrived on 11 July 1848, before being sent to Port Arthur the following month. He was ordered to labour in chains and put on a diet of bread and water as punishment for having absconded from Parsons Pass.²³⁸ Warrigal Jemmy demonstrated the veracity of earlier official concerns about the inappropriateness of Port Arthur as a location for Aboriginal convicts through escaping briefly from the penal station. He was listed as being apprehended in *The Hobart Town Gazette* dated 20 February 1849.²³⁹ In 1852 and 1853, he was hired out to G. McSheen of Liverpool Street, P.B. and H. Cooley of Macquarie Street, and McRobie of Macquarie Street, all resident in Hobart. He was eventually issued with a ticket of leave on 19 May 1854, and was granted a conditional pardon on 12 June 1855. This meant that he would remain free whilst residing beyond his place of origin, but was prevented from returning home to 'the scene of his crime'. Just six

²³⁵ CON33/33, p. 8039, AOT.

²³⁶ CON37/3, p. 912, AOT.

²³⁷ *Hobart Town Gazette*, 27 June 1848, p. 568.

²³⁸ CON37/3, p. 912, AOT.

²³⁹ *Hobart Town Gazette*, 20 February 1849, p. 130.

days after receiving his conditional pardon, Warrigal Jemmy was admitted to the Hobart Colonial Hospital where he died, aged about 35, on 30 June 1855.²⁴⁰

Following the escape from Parsons Pass, Roberts' apprehension was gazetted on 19 September 1848.²⁴¹ He, too, was sent to Port Arthur in August 1848 where he was sentenced to four days solitary confinement on 7 December of the same year for using threatening language. A number of other offences were recorded against him in the year that followed, including an attempt to strike an overseer. Following another serious incident in February 1850, an assault on a fellow prisoner, Roberts served thirty days solitary confinement before being sent to Norfolk Island the following month. He died on Norfolk Island later that year, on 23 July 1850, aged about 34.²⁴²

Jacky Jacky, Yanem Goona, Koombra Kowan Kunniam, Warrigal Jemmy, and Billy Roberts all fulfilled Parker's prophecy that transporting Aboriginal men was tantamount to delivering a sentence of early death. It is unlikely that their deaths were ever communicated to the men's families or to those formerly charged with their 'protection', for in his 1848 Annual Report to the Superintendent to be forwarded to the Home Government Robinson asked:

whether or not it would be desirable for the Government to be informed respecting the Aborigines already transported, in order to mark the effect of the punishment that the same might be made known through the Department to the tribes generally, and especially to their connections and friends, for I have been pained when applied to, that I was unable to afford the slightest information respecting their relations not even whether they were living or dead.²⁴³

²⁴⁰ CON37/3, p. 912, AOT.

²⁴¹ *Hobart Town Gazette*, 19 September 1848, p. 837.

²⁴² CON 37/3 p. 864, AOT.

²⁴³ Robinson. 1848 Annual Report, *Papers, Volume Four*, p. 156.

Robinson's enquiry further demonstrates colonial intentions that the sentences handed down to Aboriginal defendants be exemplary. Whether through a lack of communication or by deliberate strategy, the production of absent bodies caused concern and consternation amongst those most closely connected to the transported men.

Despite Parker's concerns about the probable outcome, the colonial judiciary clearly felt bound to impose severe sentences upon those Aboriginal men who were brought to trial. Underpinning exemplary sentencing was their concern to demonstrate to colonists that the law courts would deal harshly and effectively with Aboriginal men engaged in 'depredations' against their persons, property, and stock. Through doing so, the colonial judges sought to ensure that colonists would be less inclined to deliver summary justice to Aborigines and more inclined to avail themselves of the legal mechanisms of redress provided under the auspices of the colonial state. Examples abound of white people taking the law into their own hands to the peril of their Aboriginal victims, and losses of life on both sides of the frontier were substantial as the colonial intruders made inroads into the Port Phillip District. The number of casualties was always skewed in favour of the white newcomers, however, as not only were they equipped with superior weaponry but their numbers kept increasing as more arrived by ship and overland, whereas Aboriginal numbers were in decline after populations were ravaged by introduced diseases and depleted following the appropriation of their ancestral lands.

Some contemporary commentators seem to have been genuinely surprised that local Aboriginal people should attack their stock and flocks, imagining this to

stem primarily from the natives having acquired a taste for the flesh of cattle and sheep. Others were quick to deny that they had interfered with Aborigines in any way, the subtext being that some Aboriginal attacks were known to be reprisals against white men who had unsanctioned and/or unreciprocated relations with Aboriginal women. Yet others recognised that they were being exposed to a type of guerrilla warfare and sought protection from their government as a result. As efforts to civilise Aborigines in accordance with white dictates failed, Aboriginal adaptations to white ways of doing things, particularly in regard to the keeping of purloined livestock, met with disapproval from white observers. Such was the extent of opprobrium towards Aborigines and the fear of financial ruin on the part of the squatters that retribution could be, and was, exacted from clansmen who were not necessarily involved personally in committing depredations on the stockkeepers' animals. As was demonstrated in the case of Yanem Goona, such an approach was not confined to the squatters' runs at a distance from civilisation, but was also taken up in the colonial courtroom where one man could be held responsible for actions that he may not have committed personally simply because he was a member of the community involved.

Permanent white settlement in the Port Phillip District took on its own characteristics, such as the inception of the Native Police, a measure that had a profound impact on localised Aboriginal resistance to the colonial intruders for those engaged in resistance lost the advantages inherent in their superior bush skills. With the assistance of the Native Police, men and the animals they had taken from the squatters' runs could be tracked for miles through the mallee that often appeared

impenetrable. Those who feared Aboriginal resistors as savages and cannibals were quick to call on the Native Police to come and protect them from the ‘myall’ or ‘wild’ blacks.

Dividing the district up arbitrarily into Aboriginal Protectorates was also peculiar to the Port Phillip District, however, it was a measure that contributed to official bickering and was doomed to fail. As well as visiting various Aboriginal prisoners in gaol and interpreting for them in court, the Protectors sometimes became advocates for greater leniency in sentencing. Nevertheless, their concerns were expressed during a time at which colonial hearts had hardened following the hanging of seven ‘white’ men in the wake of the Myall Creek massacre. As the case involving Jacky Jacky demonstrated, white settlement at Port Phillip also coincided with a time during which the colonial judiciary were beginning to justify increasing interventions into the lives of Aboriginal people, giving themselves the authority to intervene in matters alleged to have been ‘crimes’ committed *inter se*. Against this broader backdrop, and in a situation of sustained and widespread frontier conflict, the voices of the Protectors were all too readily drowned out. While their original sentences were not as severe as those initially imposed in the Maitland Circuit Court by Justice Alfred Stephen, few of the Aboriginal men transported from the Port Phillip District ever returned home.

Chapter Six

‘Under the Very Eye of Authority’: Aboriginal Deaths in Custody on Cockatoo Island

When the heavily ironed Tarrokenunnin and his fellow prisoners jumped overboard in January 1841 to avoid hanging in Sydney with which convicts on the cutter *Victoria* had fallaciously taunted them, they successfully made their escape.¹ Ironically, had they arrived safely at their intended custodial destination they would probably all have died.² Cockatoo Island, the ‘convict black-hole of New South Wales’, had already become home to a number of Aboriginal convicts who Governor George Gipps hoped ‘may receive instruction there that may ultimately be advantageous to them’.³ His optimism was misplaced for several reasons. Cockatoo Island had a reputation for providing a different type of ‘education’ from that which Gipps envisaged. As Godfrey Mundy explained:

Cockatoo, like ... [Norfolk Island] may be considered as a college for rogues, of which New South Wales and Van Diemen’s Land are merely preparatory schools. The members must have matriculated, graduated, and become professors, in order to be entered on the books. A “little go” in vice will scarcely entitle to residence!⁴

Most of its three hundred or so residents were men under sentence for offences committed within New South Wales or ‘regular incurables, doubly and trebly convicted’

¹ *Geelong Advertiser*, 23 January 1841, p. 3. See Chapter Five.

² Governor George Gipps to Superintendent Charles La Trobe, 24 October 1840, *Gipps-La Trobe Correspondence 1839-1846*, Alan Shaw (ed). Miegunyah Press, Melbourne University, 1989, p. 48. Between 1 January 1839 and 16 December 1850 the death rate for Aboriginal convicts transported to Cockatoo Island was 64%. See Visiting Magistrate H. H. Browne to the Colonial Secretary, 28 December 1850, 191/50 4/3379 SRNSW with enclosure ‘A Return Shewing the Number of Aboriginal Natives who have been Received on Cockatoo Island from the 1st Of January 1839 to the 16th December 1850’ prepared by George Ormsby, Superintendent, 50/12485 4/3379, SRNSW [hereafter Ormsby Return].

³ Godfrey Mundy. *Our Antipodes; Or, Residence and Rambles in the Australian Colonies: With a Glimpse of the Gold Fields*, Richard Bentley, London, 1852, p. 102; Gipps to La Trobe, 24 October 1840, *Gipps-La Trobe Correspondence*, p. 48.

⁴ Mundy. *Our Antipodes*, p. 112.

who had been transferred there from Norfolk Island.⁵ The taunting Tarrokenunnin and his fellow Aboriginal captives received from the small cohort of other convicts intended for Sydney suggests that the latter were not particularly amendable to the presence of Aboriginal convicts. Gipps' optimism ought also to have been tempered by the spectacular failure of the experiment in the coercive instruction of Aboriginal convicts at Goat Island several years' earlier.⁶ But most problematic of all, the mortality rate exhibited by Aboriginal convicts at Cockatoo Island was even higher than it had been at Goat Island.⁷ Being sentenced to transportation to Cockatoo Island truly gave Aboriginal convicts just cause to expect 'death in its most horrible form'.⁸

This chapter has a particular focus on Cockatoo Island as a place of incarceration for Aboriginal men. It argues that the middle decades of the nineteenth century heralded a shift in the management of the 'Aboriginal problem'. A series of cases are discussed that resulted in Aboriginal men being transported as convicts to the island. The purpose of this discussion is twofold. It elaborates an explanatory framework for their presence at the penal station, and also illustrates how the transition from the early days of contact to settled townships began to be reflected in the use of vagrancy legislation to manage an Aboriginal presence that was considered undesirable. After accounting for the presence of Aboriginal convicts on Cockatoo Island, the chapter engages with the nascent mid-century official recognition of Aboriginal deaths in custody as an issue that required

⁵ *ibid.*

⁶ See Chapter Three.

⁷ Ormsby Return.

⁸ *R v Sandy 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 June 2007 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_sandy__1839.htm>

some form of redress. Attention is paid to colonial explanations for, and reactions to, the extraordinarily high death rate suffered. The policy formulated to ameliorate the situation is considered, as is its efficacy. Finally, several cases beyond Cockatoo Island are mentioned to demonstrate how official recognition of the issue was utilised by both Aboriginal and white advocates in petitioning the Governor for the amelioration of custodial sentences. The cases in this chapter are set against a backdrop of significant changes within and beyond colonial New South Wales, including the cessation of transportation to New South Wales and the transfer of convicts from Norfolk Island to Cockatoo Island. Using Cockatoo Island as a repository for Aboriginal prisoners is also viewed within an intellectual current whereby those charged with their civilisation and protection advocated for islands to be set aside as penal stations for Aboriginal offenders.

On 6 July 1840, the Secretary for War and the Colonies, Lord John Russell, wrote to Gipps to confirm that transportation to New South Wales would formally cease as from 1 August 1841. The colony had been omitted from an Order in Council that listed the places to which convicts could be transported.⁹ Pressure at home from humanitarians and from disaffected colonists who were vociferous that New South Wales ought to ‘be freed from the stain, which Transportation has impressed upon it’ combined to influence the Home Government’s decision.¹⁰ Following the recommendations in the Molesworth Report, the assignment system had already been phased out and the numbers of transports

⁹ Lord John Russell to Gipps, 6 July 1840, *HRA*, Series I, Volume XX, p. 700. Van Diemen’s Land continued to be a destination for convicts throughout the following decade, with the island excluded from being a designated penal colony in the Order in Council passed on 29 December 1853.

¹⁰ Gipps to the Marquess of Normanby, 23 November 1839, *HRA*, Series I, Volume XX, p. 401.

from England decreased.¹¹ Those convicted locally were no longer sent to Norfolk Island, but were instead ‘confined in some other part of the Colony’ or employed in road gangs.¹² This arrangement was as expedient as it was ideologically driven, for by March 1839 Gipps had found that the Norfolk Island penal station ‘was so full, that we could not ... send another man there, so crowded was every building’.¹³ With the end of transportation to the colony having already been foreshadowed by the changes implemented following the Molesworth Report, news of its demise produced ‘but little excitement’ in New South Wales.¹⁴

The attention of both the imperial and colonial governments shifted from Norfolk Island to the islands in Sydney Harbour as potential sites for the incarceration of those men considered to be the worst offenders. Early on, Pinchgut Island had been used as a place of confinement.¹⁵ From 1833 to 1839, ironed gangs were worked on Goat Island.¹⁶ Gipps favoured the islands of Sydney Harbour for ‘doubly convicted men’ over the more distant outposts such as Norfolk Island, Port Macquarie, Wellington Valley, and Moreton Bay as the latter had been situated far from the seat of Government and were therefore seldom visited by higher colonial officials.¹⁷ By 1839, with the exception of the penal station at Norfolk Island, the tyranny of distance meant that it had ‘been found expedient

¹¹ The Molesworth Report contained the findings and recommendations of the House of Commons Select Committee on Transportation 1837 that was chaired by William Molesworth. Gipps was informed of the changes that were to be instigated arising out of this report in a letter from Normanby dated 11 May 1839. See *HRA*, Series I, Volume XX, p. 152.

¹² Normanby to Gipps, 11 May 1839, *HRA*, Series I, Volume XX, p. 153.

¹³ Gipps to Lord Glenelg, 8 July 1839, *HRA*, Series I, Volume XX, p. 217.

¹⁴ Gipps to Normanby, 23 November 1839, *HRA*, Series I, Volume XX, p. 400.

¹⁵ Catherine O’Carrigan. ‘Cockatoo Island: An Island of Incarceration in Sydney Harbour’, *Islands of Incarceration: Convict and Quarantine Islands of the Australian Coast*, John Pearn and Peggy Carter (eds). The Australian Society of the History of Medicine, Amphion Press, Brisbane, 1995, p. 61.

¹⁶ *ibid.*

¹⁷ Gipps to Lord Glenelg, 8 July 1839, *HRA*, Series I, Volume XX, p. 217.

to abandon them all'.¹⁸ Russell wrote to Gipps on 6 July 1840, instructing him that Goat Island ought to be used as a repository for men convicted within New South Wales.¹⁹ Goat Island had, however, by that stage become as Gipps had already explained to Lord Glenelg 'quite unfit for the purposes contemplated by Your Lordship, as there is on it a large Magazine of Gun Powder'.²⁰ He had instead formed a new convict establishment on Cockatoo Island.

In a letter to Glenelg dated 8 July 1839, Gipps touted the advantages of Cockatoo Island. It was 'surrounded ... by deep water, and yet under the very eye of Authority' and lay only one and a half miles from Goat Island, which had for the past three or four years been considered 'the best conducted establishment in the colony'.²¹ Following the completion of the Goat Island powder magazine there were no further public works to be carried out there, meaning that convict labour was no longer required. The island itself was also too small to cater for the large body of convicts that required housing. Being larger, Cockatoo Island was a suitable replacement for the Goat Island establishment that was in the throes of being broken up.²² Russell informed Gipps in a letter dated 13 May 1840 that the proposed expenditure with regard to providing convict accommodation on Cockatoo Island met with the approval of the Treasury officials.²³

Described as a 'natural hulk', the rocky triangular-shaped Cockatoo Island is 'situated about two miles above Sydney, just where Port Jackson narrows into the creek called Parramatta River, and about a quarter of a mile from either shore'.²⁴ At the time

¹⁸ Gipps to Lord Glenelg, 8 July 1839, *HRA*, Series I, Volume XX, p. 217.

¹⁹ Russell to Gipps, 6 July 1840, *HRA*, Series I, Volume XX, p. 700.

²⁰ Gipps to Glenelg, 8 July 1839, *HRA*, Series I, Volume XX, p. 218.

²¹ *ibid.*, pp. 217-18.

²² Gipps to Russell, 8 July 1839, *HRA*, Series I, Volume XX, p. 218.

²³ Russell to Gipps, 13 May 1840, *HRA*, Series I, Volume XX, p. 628.

²⁴ Mundy. *Our Antipodes*, p. 111.

news of plans for the new convict establishment became public, the island was rumoured to be 'without water' and to 'abound with snakes'.²⁵ Even though the land area of Cockatoo Island was only about forty acres, it was still said to provide 'places where a man might effectually conceal himself for days together, notwithstanding the strictest search'.²⁶ Nevertheless, Cockatoo Island was considered to be the ideal place to house convicts considered to be amongst the most hardened in the colony.²⁷ The first prisoners to arrive were sixty convicts transferred in chains under military guard from Norfolk Island. They were put to work digging a well and quarrying stone for 'the erection of the New Circular Wharf'.²⁸ Gipps claimed that the sandstone island was comprised of 'very excellent Building Stone' and that it 'may be ultimately made to supply this material to Sydney in the same way that the Penitentiary at Sing Sing supplies Building Stone to New York'.²⁹ Indeed, Roger Parker claimed that Cockatoo Island became 'the most important convict prison in the colony' soon after its 1839 inception.³⁰

As well as being important in terms of its productive potential and its capacity to house those considered amongst the worst of the colony's offenders (although this capacity was soon outstripped), Cockatoo Island was also a significant site of incarceration for Aboriginal convicts. It had long been advocated that not only Aboriginal prisoners but the Aboriginal population in its entirety ought to be rounded up and exiled to offshore

²⁵ *Sydney Gazette*, 23 December 1839, p. 2.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ Governor George Gipps to Lord John Russell, 8 July 1839, *Historical Records of Australia* (hereafter *HRA*), Series I, Volume XX, pp. 216-18.

³⁰ Roger Parker. *Cockatoo Island*, Thomas Nelson, West Melbourne, 1977.

islands.³¹ As the nineteenth century progressed, several men charged with the task of overseeing the Christianisation, civilisation, and protection of Aboriginal people called for specific islands to be reserved as penal stations for Aboriginal prisoners. The one time Conciliator of Aborigines in Van Diemen's Land and, later, Chief Protector of Aborigines in the Port Phillip District, George Augustus Robinson, was one such advocate. Despite, or maybe because of, the high death toll exhibited by Aboriginal people, as late as 1848 Robinson continued to argue for such provision to be made:

In previous reports I have referred to the severity of the punishment of Transportation to the Penal Settlements of Van Diemen's Land as applied to the Aborigines of this Province [the Port Phillip District]. The Aborigines are Her Majesty's subjects and are amenable to our Laws, and liable to their punishments but they are deprived, in consequence of their legal disabilities of their benefit. ... [A]s they are now situated and until a code suited to their state and condition be introduced, all that can be done is to mitigate their punishment ... I have therefore thought it my duty to suggest, whether it would not be desirable to elect one of the Islands in Bass's Straits, as an asylum or penal settlement for all the Aboriginal delinquents of the Australian Colonies instead of, as heretofore, being deported to Van Diemen's Land to commix with the worst descriptio of European Offenders.³²

It seems remarkable that Robinson continued to recommend removing Aboriginal people to an island in Bass Strait, particularly given his first hand experience of the extraordinarily high death toll amongst Van Diemen's Land Aboriginal people exiled to Flinders Island.³³ Yet at the time Robinson was also witnessing the rapid decline in the Aboriginal population at the Port Phillip District, reporting in 1849 that it was 'melancholy to think upon their fate, the vast decrease that has taken place ... since the

³¹ See Chapter Three where such notions are further elaborated.

³² George Augustus Robinson. 1848 Annual Report, *The Papers of George Augustus Robinson, Chief Protector, Port Phillip Aboriginal Protectorate, Volume Four: Annual and Occasional Reports 1841-1849*, Ian D. Clark (ed). Heritage Matters, Clarendon, 2001, pp. 155-56.

³³ See Chapter Three.

formation of the colony only thirteen years [earlier]'.³⁴ According to the Chief Protector's estimate, the number of Aboriginal people in the Western District alone had halved as a direct result of colonial contact. He may not, therefore, have had cause to consider that exiling Aboriginal people to islands would have any greater impact on their life expectancy.³⁵

In any case, rather than thinking back to the human catastrophe at Wybalenna on Flinders Island, Robinson cast his vision to the west for inspiration. In an idealised tract written in 1845, he stated that:

The position of the aboriginal natives convicted of crime in these colonies is painful contrasted with those at Swan River and would seem to require interference. At Western Australia an island is appropriated exclusively to their use and judging from the reports of the Rottnest establishment the best results have been realized, could a similar boon be conceded to the aborigines convicted of crime in these colonies banishment instead of a curse would be a blessing and expatriation an advantage.³⁶

Far from being the panacea that Robinson thought it to be, Rottnest Island proved to be a bold, yet failed, experiment in providing a more humanitarian prison for Western Australia's Aboriginal prisoners than the 'cold stone prisons at Perth, Albany and Fremantle'.³⁷

The men consigned to Rottnest Island (there were no women sent there) were required to work six mornings each week, but were allowed the afternoons off for hunting. Sunday mornings were put aside for prayers. While the regime was less severe than that under which Aboriginal convicts laboured on the eastern seaboard, the men

³⁴ Robinson. 1849 Annual Report, *Papers, Volume Four*, p. 174.

³⁵ *ibid.*

³⁶ Robinson. 1845 Annual Report, *Papers, Volume Four*, p. 101.

³⁷ Neville Green and Susan Moon. *Far From Home: Aboriginal Prisoners of Rottnest Island 1838-1931*, Dictionary of Western Australians, Volume X, University of Western Australia Press, Nedlands, 1997, p. 16.

were nevertheless treated with undue harshness. In 1840, Governor Hutt had cause to order the Superintendent Henry Vincent to desist from using the cat-o'-nine-tails on Aboriginal prisoners. In contrast with Aboriginal defendants appearing in the courthouses of New South Wales, most inmates had been gaoled for offences such as sheep stealing, theft, and tribal disputes. As Neville Green and Susan Moon pointed out, the sentences imposed on the Aboriginal inmates at Rottnest Island were of a severity that belied the seriousness of the crime.³⁸

The higher colonial and imperial officials considering Robinson's report were probably not fully aware at the time of how bad conditions on Rottnest Island became for its Aboriginal inmates. But objections had already been raised to the idea of sending convicts *per se* to any of the islands in Bass Strait. In response to a proposal that King Island might be used as a penal station, Gipps told Normanby that:

With respect to King's Island or any other island in Bass Straits, I am disposed to think that the facility of escape from them would form an almost insuperable objection, these Straits being more frequented with shipping than any other part of the neighbouring seas.³⁹

Given Gipps' views on the unfeasibility of far flung penal stations and his concomitant endorsement of the islands in Sydney Harbour, particularly Cockatoo Island, it was unlikely that anyone aside from Robinson himself would seriously entertain the Chief Protector's proposal to send Aboriginal offenders to an island in Bass's Strait.

Robinson's insistence that Aboriginal convicts would be better off housed separately from other convicts seems never to have been seriously entertained. The Reverend Christopher Eipper posited a similar arrangement in an 1846 report. The Brisbane Town missionary suggested that several penal establishments ought to be set up for Aboriginal

³⁸ *ibid.*, p. 18.

³⁹ Gipps to Normanby, 23 November 1839, *HRA*, Series I, Volume XX, p. 402.

people. He saw such places as holding out the potential for missionaries to work amongst the heathen.⁴⁰

As with Robinson's representations on the matter, Eipper's submission was also never acted upon although churchmen were allowed to minister to the Aboriginal convicts confined to Cockatoo Island. This, however, was not without its attendant difficulties. During 1843, the right to minister to the Aboriginal convicts confined to Cockatoo Island was hotly contested between ministers of the Protestant and Roman Catholic churches. The Roman Catholic Archbishop claimed that the convicts came to his minister the Reverend Mr Young 'of their own accord and unsolicited', and had been instructed by him over '*many weeks*'.⁴¹ One of the Aboriginal convicts had been under instruction for almost three months and was considered to be nearly ready for baptism.⁴² However, in the interim the Protestant minister, the Reverend Dr Steele, had received permission from Gipps to instruct the men. When the Catholic Archbishop registered his objection, the New South Wales Colonial Secretary, E. Deas Thompson, told him that Young ought not to have begun instructing the men without permission from the Government. He also stated that the Governor would not change his mind on the matter as:

he could have no difficulty in deciding that, being Her Majesty's subjects and under custody of the Civil power, they ought to be instructed in the Religion of Her Majesty, which is also the Religion of the Empire.⁴³

⁴⁰ Leslie Skinner. *Police of the Pastoral Frontier: Native Police 1849-59*, University of Queensland Press, St Lucia, 1975, p. 9.

⁴¹ Stanley to Gipps, 17 July 1844, *HRA*, Series I, Volume XXIII, [Enclosure No. 1], [Sub-enclosure] Copy Correspondence between The Most Reverend Dr. Polding, Archbishop of Sydney, V. A., and E. Deas Thompson, Esquire, Colonial Secretary, No. 1, Polding to the Colonial Secretary, 28 December 1843, p. 678. (Emphasis in the original.)

⁴² *ibid.* The unnamed convict referred to was the man known as Fryingpan whose case is discussed below. See Gipps to Stanley, 31 January 1845, *HRA*, Series I, Volume XXIV, p. 231.

⁴³ Stanley to Gipps, 17 July 1844, *HRA*, Series I, Volume XXIII, [Enclosure No. 1], [Sub-enclosure] No. 2, Colonial Secretary to Polding, 5 January 1844, p. 678.

Dissatisfied with this response, the Catholic Archbishop objected on the grounds that the civil power ought not to interfere in religious matters.⁴⁴ The Governor referred the matter to the Colonial Secretary in London, Lord Stanley, who called on Gipps to furnish him with a report on the matter.⁴⁵ This communication is particularly significant as it demonstrates that the British authorities were aware that Aboriginal men had been incorporated into the convict system. Notably, such knowledge did not result in any questions being raised from Britain as to the propriety of indigenous men being held captive and made to labour as convicts.

In his response to Stanley, Gipps pointed out that the cohort of Aboriginal convicts referred to by the Catholic Archbishop could not have been under Young's instruction for 'more than a very few days' as they had not been conveyed to Cockatoo Island until 1 November 1843.⁴⁶ Just nine days later, on 10 November 1843, the Cockatoo Island Superintendent Charles Ormsby, had sought clarification from the Visiting Magistrate, J. Long Innes, about who ought to minister to the Aboriginal convicts as he was faced with competing claims from the Reverends Steele and Young. 'Both Reverend Gentlemen', Ormsby told Innes, 'appear dissatisfied with me for not compelling the Aborigines to attend their respective places of worship'.⁴⁷ Innes had forwarded Ormsby's enquiry to Gipps after the Governor had already made his decision

⁴⁴ *ibid.*

⁴⁵ Stanley to Gipps, 17 July 1844, *HRA*, Series I, Volume XXIII, [Enclosure No. 2], Under Secretary Hope to Mr James Smith, 17 July 1844, *HRA*, Series I, Volume XXIII, p. 679.

⁴⁶ Gipps to Stanley, 31 January 1845, *HRA*, Series I, Volume XXIV, p. 231. In this dispatch, Gipps refers to a cohort of four Aboriginal convicts who had been tried at Maitland and received into the Sydney Gaol (Darlinghurst) on 18 October 1843. These convicts were Sorethighed Jemmy, Fowler, Jacky Jacky, and Tom *alias* Kambago, whose cases were discussed in Chapter Four. He also mentions an Aboriginal convict who had been on the island slightly longer, mentioning him by name as Fryingpan. See footnote 43 above.

⁴⁷ Gipps to Stanley, 31 January 1845, *HRA*, Series I, Volume XXIV, [Enclosure No. 2], Ormsby to Innes, 10 November 1843, p. 232.

that the Protestant minister ought to be allowed to instruct Aboriginal convicts at Cockatoo Island.⁴⁸ But as Gipps told Stanley, his decision would have been the same in any case.⁴⁹

In 1839, the year of its inception, the first and largest cohort of Aboriginal convicts arrived on Cockatoo Island. The five Kamilaroi/Gamilaraay men, Sandy, Billy, Jemmy, Cooper, and King Jackey were the defendants in *R v Sandy and Others 1839*, a case that arose out of an episode of frontier conflict. The men were suspected of murder following the suspicious disappearance of two convict shepherds. However, the charge was later downgraded to robbery because of the impossibility of identifying the body of one of the deceased. No trace was found of the second shepherd. The defendants were indicted for ‘stealing one waistcoat, the property of the Queen, two carbines, three pistols, seven blankets, one waistcoat, a quantity of gunpowder, six bullets, and a quantity of flour, the property of John Browne, John Hector and Edward Trimmer, from their dwelling-house at the new station, between the Gwydir and Namoi Rivers, on the 16th March’.⁵⁰

The ‘new’ station at which the alleged crime occurred was established that very same month as the co-owners found it ‘necessary ... from the great increase of their sheep and cattle’ to supplement their original landholding on the Liverpool Plains.⁵¹ The hut that housed the convict shepherds and their overseer was built adjacent to a creek where ‘fifty or sixty blacks’ usually camped, a group that belonged to a larger contingent

⁴⁸ Gipps to Stanley, 31 January 1845, *HRA*, Series I, Volume XXIV, [Enclosure No. 1] Innes to the Colonial Secretary, 11 November 1843, p. 231.

⁴⁹ Gipps to Stanley, 31 January 1845, *HRA*, Series I, Volume XXIV, p. 231.

⁵⁰ *R v Sandy and Others 1839*.

⁵¹ *ibid.*

estimated to comprise five to six hundred people.⁵² The events that led to charges being brought against the five Aboriginal defendants occurred primarily at the point when their land was being usurped. Legally, the outlying location of the station where the alleged offences were committed became problematic territory and led to an objection being raised by the defendants' court-appointed counsel, Richard Windeyer. He observed that the events had transpired 'two hundred miles beyond the boundary of the Colony which in the ordinary acceptation of the term must be beyond the jurisdiction of the Court'.⁵³ This objection was not upheld.

Sandy, Billy, Jemmy, Cooper, and King Jackey had been taken into custody in late March by Commissioner of Crown Lands Mayne who 'decoyed' the prisoners 'into his tent' to apprehend them.⁵⁴ Given that Mayne, in his capacity as Commissioner, was also considered to be a 'partial protector' of Aboriginal people, his actions call into question his capacity to act in either office. While the convergence of two such official positions in the one body might have been convenient in terms of scarcity of personnel, it did little to ensure that Aboriginal interests would be represented let alone protected. Mayne was nevertheless credited with having restored peace to the then newly 'settled' area between the Gwydir and Namoi Rivers that was described as having been in 'open war' prior to his arrival in the district.⁵⁵ He was also lauded by Chief Justice Dowling, who presided over the Supreme Court hearing on 16 August 1839, for having successfully brought the Aboriginal defendants before the Court, something that the

⁵² *ibid.*

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

judge described as something that seldom occurred despite there being not infrequent reports of ‘many acts of outrages committed by them’.⁵⁶

Dowling attributed some of the difficulties involved in bringing Aboriginal defendants before the law courts to there being ‘unfortunately, not the same facility for identifying a black, that there is a white; they are all naked, and to an eye not used to black people, it is impossible to see the difference’.⁵⁷ The Chief Justice, though, also claimed that the comparative difficulties experienced in apprehending Aboriginal people constituted ‘the only difference’ between them and white people.⁵⁸ He had already made the point at a pre-trial hearing on 29 May 1839 that ‘if these people are protected by the English law, we must take care to protect the whites against them – there must be no distinction’.⁵⁹ This, as in other cases involving Aboriginal defendants, was the basis on which the trial eventually proceeded.

The five defendants had been held in gaol for five months awaiting trial because of the lack of a suitable interpreter. Eventually a John Haggard or Haggart, a servant, was sworn as the interpreter although he professed an incomplete knowledge of the men’s language. Sandy, Billy, Jemmy, Cooper, and King Jackey entered a plea of ‘not guilty’. In response to a question as to whether they would prefer to be tried by a civil or a military jury, they, like contemporaneous Aboriginal defendants, stated that they ‘did not like soldiers’.⁶⁰ A civil jury was therefore sworn, as was the interpreter, Haggard. Doubt was expressed within the courtroom as to the interpreter’s capacity to fulfil his role.

Dowling told the Attorney General that he must deal with the Aboriginal defendants ‘the

⁵⁶ *ibid.*

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *ibid.*

same as with a deaf and dumb man'.⁶¹ He was also at pains to remind the jury that they must deal with the prisoners 'exactly if they were white men placed in the same unfortunate condition'.⁶²

The case against the defendants was complicated by rumours circulating throughout the wider community about the murder of the convict shepherds whose hut the men were charged with having robbed. On the grounds that the alleged murders 'could scarcely be separated' from the robbery of the shepherds' hut, details of the event were provided to the court.⁶³ The packed courtroom heard that on returning to the hut on 17 March 1839 from a trip to obtain fresh supplies, Alexander Taylor suspected something was amiss. A search uncovered the remains of a man, but as these were not in a fit condition to be identified positively no murder charges could be laid against the defendants. The court was nevertheless provided with a descriptive account of the grisly find:

the bones found about forty rod from the hut were naked, putrid, and broken to pieces; the skull had several wounds on it, and a hole in the forehead, evidently done with a spear; the bones were quite green and apparently now stripped of the flesh; the thigh bones were broken and the marrow taken out.⁶⁴

The Attorney General made it clear to the jury that the sole reason that the defendants stood before the court indicted with robbery rather than murder was that the remains could not be positively identified. This, he said, was 'the reason why the prisoners had not been put on their trial for a more serious offence'.⁶⁵ The description of the remains provided to the court with its references to a spear wound and bone marrow being taken

⁶¹ *ibid.*

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ *ibid.*

⁶⁵ *ibid.*

would have left no doubt in the minds of the men of the jury and the onlookers that Aboriginal men, most likely those standing at the bar, were responsible for the man's death.

Although the court had been told that it was impossible to tell whether the remains belonged to a white or black man, the spectre of cannibalism was raised through the description of flesh having been stripped from the bones and the marrow removed. It was insinuated that this had indeed been the remains of one of the unfortunate convict shepherds, with the jury being further unsettled by the news that nothing at all had been found of the second shepherd. The Attorney-General observed that the defendants had up until the point of the overseer's departure been on good terms with the white men and had been 'treated with confidence'.⁶⁶ They had also 'shewed that they were not inferior in intelligence to many white men'.⁶⁷ Treachery could not have been more clearly implicated to the packed court.

Having been privy to this information both within the official confines of the courtroom and through the unofficial rumours circulating widely throughout the colony, the jury were then directed 'against allowing any out-of-doors observations which might have reached their ears, to influence them in the consideration of the case'.⁶⁸ The charge, they were reminded, was 'simply that of robbery, unconnected with that of murder about which much had been said, and stated in evidence, from which it could scarcely be separated'.⁶⁹ The instruction was, to say the least, contradictory.

⁶⁶ *ibid.*

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.*

Because of the impossibility of the court receiving Aboriginal evidence, nobody could be tendered to attest to the defendants' claims that they had received the stolen property found in their possession from two other Aboriginal men. The six-hour trial therefore concluded with the jury retiring for half an hour, and returning a guilty verdict. The defendants were sentenced to ten years transportation to Cockatoo Island in Sydney Harbour at which they seemed 'greatly depressed', exhibiting countenances that displayed 'a most woebegone and wretched expression, as if expecting death in its most horrid form'.⁷⁰ On having it explained to them that they 'would be sent across the sea for ten summers', the men 'brightened up' and were discerned to have even smiled.⁷¹ With it thus being arranged that the men would be absent for a considerable period, the Attorney General expressed the hope shared by so many of the colonial authorities that their punishment 'when it is made known to their tribe, will have a salutary effect'.⁷²

When the men's trial was reported in the *Australian*, the newspaper revealed that it appeared likely 'a gang of bushrangers were abroad' at the time at which the events had taken place and that the second convict shepherd, missing and presumed by some to be dead, may have 'joined the bushrangers who are still at large'.⁷³ This was deduced, in part, from the fact that horses and tack had been taken illegally from the station, none of which was found in the possession of the Aboriginal defendants. Also, as the newspaper was at pains to point out:

Much stress was laid upon the bones being broken and marrow-less, by which it might be inferred that the murderers of the [first] man had eaten

⁷⁰ *Sydney Gazette*, 22 August 1839, p. 2.

⁷¹ *ibid.*

⁷² *R v Sandy and Others* 1839.

⁷³ *Australian*, 17 August 1839, p. 3.

his [the second man's] body; but with all their faults, it has never yet been insinuated that the natives in any part of the colony are cannibals.⁷⁴

The absence of the second shepherd left it open to conjecture as to whether he had taken up bushranging or had otherwise been disposed of by unidentified assailants.

Sandy, Billy, Jemmy, Cooper, and King Jackey were transported to Cockatoo Island on 3 October 1839 where it was recorded that they had been sentenced transportation for five years rather than ten.⁷⁵ This suggests that the Governor may have seen fit to reduce their respective sentences by half. When they arrived at the island, the Aboriginal convicts were probably put to work hewing stone for use at various construction sites around Sydney. They might also have been involved in digging silos, twenty of which were eventually constructed. These 'excavations in the solid sandstone rock [were] shaped like a large bottle' and each had the capacity to hold 'up to 5,000 bushels' of wheat.⁷⁶ The colonial engineer Colonel George Barney, described by Parker as 'one of the most distinguished of Sydney's early builders', planned and oversaw their construction.⁷⁷ Any convicts considered insufficiently productive during the course of the working day as they hewed away at the sandstone with their hand tools were denied meals and left in the silos until their work rate increased.⁷⁸ The harsh regime at the penal institution took an extraordinarily high toll on the first of its Aboriginal inmates. Within two months of their arrival on Cockatoo Island all five Aboriginal convicts were dead. On 17 November, Sandy and Billy died in the General Hospital. Less than two weeks

⁷⁴ *ibid.*

⁷⁵ Ormsby Return, 50/12485 4/3379, SRNSW.

⁷⁶ Parker. *Cockatoo Island*, p. 2.

⁷⁷ *ibid.*

⁷⁸ *ibid.*

later, on 30 November, Cooper and King Jackey died at the same location, as did Jemmy on 27 December 1839.⁷⁹

While most of the Aboriginal convicts transported to Cockatoo Island died within a very short time of their arrival, not all did. The year following the deaths of Sandy and his cohort, three more Aboriginal convicts, Murphy, Toby, and Tallboy *alias* Jackey arrived at the station to serve sentences of transportation ranging from three years to life. The experience of one of these men, Murphy, was most unusual as he survived the harsh conditions at the establishment long enough to be released from custody when his sentence expired on 11 February 1843. He was sent to Hyde Park Barracks pending his transfer back to Maitland.⁸⁰ Perhaps his prior experience at Goat Island better enabled him to cope than his fellow Aboriginal inmates.⁸¹ Toby, who arrived at Cockatoo Island with Murphy on 11 February 1840, was less fortunate. He died in custody just over half way through his three-year sentence on 3 December 1841.⁸²

Evidently Murphy's period of incarceration at a penal station under conditions harsh enough to result in the deaths of the vast majority of Aboriginal convicts did not deter him from recidivism. He was arrested again in 1846 for a series of acts construed as larceny. He was forwarded to Cockatoo Island not, however, for any crime but because he was a 'rogue and vagabond'.⁸³ This marks a significant shift in the way in which Aboriginal people in outlying townships were policed, excluded from mainstream society, and sent into captivity. Contemporaneous with Murphy's arrest, complaints

⁷⁹ Ormsby Return, 50/12485 4/3379, SRNSW.

⁸⁰ *ibid.*

⁸¹ See Chapter Three.

⁸² Ormsby Return, 50/12485 4/3379, SRNSW.

⁸³ *Maitland Mercury*, 31 October 1846, p. 2.

proliferated in Maitland from white residents who were concerned about ‘pilfering and other annoyances perpetrated by the aborigines’.⁸⁴ One such annoyance related to colonists’ perceptions about the conduct of Aboriginal people who frequented the town:

We have been frequently disgusted at the number of naked blacks strolling about the streets of Maitland, and we are glad to find that this outrage upon public decency has at length been taken notice of by the proper authorities. Orders have this week been issued to the constables to apprehend such of the blacks as are found in a state of nudity in the streets of the town, and place them in the lockup, afterwards to be dealt with by the bench of magistrates.⁸⁵

These instructions were issued to the local police in October 1843, and three years later were extended to provide for the arrest of ‘all aborigines who may be found loitering around the premises of any townsfolk’.⁸⁶ By October 1846, Aboriginal people were effectively excluded from the township itself, as any frequenting the streets of Maitland were likely to be arrested and brought before a bench that had avowed to deal ‘rigorously with them under the Vagrant Act’.⁸⁷

Passed by the Executive Council in 1835, ‘An Act for the Prevention of Vagrancy and for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, and Incurrible Rogues, in the Colony of New South Wales’ (hereafter referred to as the Vagrant Act) cited the ‘expediency’ of providing for the prevention of vagrancy and punishment of idleness in the colony.⁸⁸ The numerous modes of behaviour deemed offences under the Act included ‘being found in or upon any dwelling-house, ware-house,

⁸⁴ *ibid.*

⁸⁵ *Maitland Mercury*, 7 October 1843, p. 3.

⁸⁶ *Maitland Mercury*, 31 October 1846, p. 2.

⁸⁷ *ibid.*

⁸⁸ 6 GUL. IV. No. 5 & 6, ‘An Act for the Prevention of Vagrancy and for the Punishment of Idle and Disorderly Persons, Rogues and Vagabonds, and Incurrible Rogues, in the Colony of New South Wales, 1835’, *Acts and Ordinances of the Governor & Council of New South Wales, and Acts of Parliament Enacted for, and Applied to, the Colony, with Notes & Index*, Thomas Callaghan (ed). William. J. Row, Government Printer, Sydney, 1844.

coach-house, stable, or out-house, or in any inclosed yard, garden, or area, for any unlawful purpose'.⁸⁹ It was also considered an offence under the Vagrant Act for anyone to be seen 'wilfully and obscenely exposing his or her person in any street, road, or public highway, or in the view thereof, or in any place of public resort'.⁹⁰ This provided the legal mechanism under which 'naked Aborigines' could be punished by local magistrates. Under the provisions of the Act, Aborigines became vulnerable to arrest not only by local police, but also by any member of the public who found their behaviour threatening or otherwise offensive. 'Any person whatsoever' could lawfully apprehend someone considered to be committing an offence against the Act and convey them to the nearest Justice of the Peace.⁹¹

Such an approach was consistent with similar initiatives in other colonies of the British Empire. For example, legislation was enacted at the Colony of the Cape of Good Hope in May 1834, when Acting Governor Wade decided to do something about the 'idle and vagabondizing life' that Khoena led according to colonists' perceptions.⁹² As Richard Elphick and Hermann Giliomee observed, Khoena, like slaves, 'were deeply inspired by the ideologies of free labour and equalization' that were circulating in the colony in the late 1820s.⁹³ As legislation was introduced progressively in the 1830s to emancipate slaves, increasing numbers of Khoena labourers deserted their colonial masters. Colonists 'typically' viewed this 'unwillingness to work' as constituting

⁸⁹ *ibid.*

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² Noël Mostert. *Frontiers: The Epic of South Africa's Creation and the Tragedy of the Xhosa People*, Pimlico, London, 1992, p. 637.

⁹³ Richard Elphick and Hermann Giliomee. 'The Origins and Entrenchment of European Dominance at the Cape, 1652-c.1840', *The Shaping of South African Society, 1652-1840*, Richard Elphick and Hermann Giliomee (eds). Wesleyan University Press, Connecticut, 1989, p. 555.

vagrancy.⁹⁴ The emancipation of slaves added impetus to the colonists' desire to institute a legal mechanism to maintain control over both indigenes and slaves, as did the perennial labour shortage experienced in the colony.

The Vagrant Act became the first major piece of legislation put before the newly constituted Legislative Council at the Cape. The Council comprised both official and unofficial members, and it was with the full support of the latter (who outnumbered the officials) that the bill was enacted. In essence, the legislation allowed local officials to send anyone regarded as a vagrant to work as a forced labourer at a local farm or to perform public works. Such minor officials have been described by Mostert as being 'invariably hostile' to Khoena people, rendering them more than likely to utilise their powers to impose a new form of bondage over the indigenes.⁹⁵ Unsurprisingly, the Vagrant Act resulted in 'panic' and 'alarm' amongst Khoena.⁹⁶

As at the Cape, it was local officials – the constabulary – who arrested Murphy on 28 October 1846 when he was found taking some bottles from the back of a local pub three years after his release from Cockatoo Island. He was taken into custody and listed to appear at the Maitland Quarter Sessions to be held on Monday 12 October 1846. Described in the *Maitland Mercury* as 'one of the native denizens of the soil, who rejoices in the Milesian cognomen of Murphy', he was described as having shaken his waddy at the publican who disturbed him before having 'retired in a most dignified manner' only to be apprehended later the same day.⁹⁷ When Murphy was brought before

⁹⁴ *ibid.*, p. 556.

⁹⁵ Mostert. *Frontiers*, p. 638.

⁹⁶ *ibid.*

⁹⁷ *Maitland Mercury*, 31 October 1846, p. 2.

the Police Bench on the morning following his arrest, he was sentenced under the Vagrant Act to six months imprisonment with hard labour.

Murphy 'received his sentence with the utmost resignation', having already served time in various local lockups, Newcastle Gaol, and on Cockatoo Island.⁹⁸ It was suggested in the *Maitland Mercury* that during these previous stints in prison Murphy had 'no doubt discovered that the beef and bread of those establishments are better than the scanty and precarious diet of the bush'.⁹⁹ This remark taken in the context of the overall disparaging tone of the article relating to his arrest and appearance before the Police Bench is indicative of the attitude that shaped the writer's perceptions. The foods of civilised life and the predictability of their availability were naturalised as a superior prospect when seen through Aboriginal eyes than the uncertainty of subsistence in the bush.

A similarly disparaging tone was evident in an 1842 report in the *Hunter River Gazette* where, in addition to its regular report on the state of Newcastle Gaol, it mentioned that amongst the prisoners was 'His Grace the black Duke of Wellington, who is to be tried on a charge of injuring Her Majesty's white lieges'.¹⁰⁰ This could be read as an indictment on a judicial system that considered Aboriginal people to be subjects of the British Crown, or might just as readily be construed as mocking the notion of equality between Aborigines and colonists. Whatever the case, the Duke of Wellington appeared at the Maitland Assizes on Friday 11 March 1842, together with Fryingpan who faced a charge of spearing cattle. Because the interpreter was unable to travel down in time for

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *Hunter River Gazette*, 5 February 1842, p .3.

their cases to be heard, both defendants were remanded in custody.¹⁰¹ Wellington's case was heard at the September 1842 Maitland circuit court, where he was 'indicted for killing a cow, the property of Mr. William Scott, of Richmond'.¹⁰² Scott's overseer, George Bull, told the court that it had been policy in the district to 'conciliate the natives' through allowing them to kill the occasional bullock to indulge their fondness for beef.¹⁰³ While this strategy initially met with some success, Bull stated that tensions had risen to the point that he considered the contingent of eight hundred Aborigines in the region to be at 'open warfare with the settlers'.¹⁰⁴ In the month preceding Wellington's trial, Aboriginal men had killed two male colonists, while another two had barely escaped with their lives. At the same time, the occasional slaughter of a beast for Aboriginal consumption had been replaced by wholesale economic sabotage:

lately they had killed beasts from mere wantonness, in some instances only cutting out the tongues, and making no use whatever of the carcasses. Whole flocks (sic) had been treated in this manner ... [T]hey had also slaughtered several hundreds of bullocks and a flock of maiden ewes, consisting of 497, all but 13.¹⁰⁵

Aboriginal tactics were described by Bull as involving a lookout being placed near the stockmen's huts as an attack was carried out, with the man rendered liable to punishment if a lack of vigilance led to his companions' actions being detected. Such punishment involved the deficient lookout being 'exposed to have a number of spears thrown at him by all his fellows'.¹⁰⁶ Chief Justice Dowling, before whom Wellington's case was tried, was particularly interested in ascertaining whether Aboriginal people 'had any conception

¹⁰¹ *Hunter River Gazette*, 19 March 1842, p. 3.

¹⁰² *Sydney Morning Herald*, 14 September 1842, p. 2.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid.*

of right to property'.¹⁰⁷ Bull assured Dowling that the men knew exactly what they were about when they attacked the colonists' stock and flocks. It may have been this assurance that influenced Dowling to impose a sentence of ten years transportation upon Wellington. This was an unusually severe punishment for killing one cow that, despite the obvious context of ongoing frontier conflict within which Wellington's action took place, was the offence of which he was found guilty. When he was called on to state why he ought not to be punished for his offence, Wellington 'merely grinned in the judge's face, and denied the charge'.¹⁰⁸ As Dowling handed down his sentence, the defendant was said to have 'laughed outright, as if he considered it all a very fine joke'.¹⁰⁹

While Wellington may have displayed a defiant attitude towards colonists both at the frontier and in the courtroom, his spirit was broken through being held in confinement. He arrived on Cockatoo Island on 15 October 1842 to serve a reduced sentence of three years transportation, reflecting the moderating influence of the Executive who would have found his initial sentence excessive.¹¹⁰ Just over six months into his sentence, Wellington died in the General Hospital on 31 May 1843.¹¹¹ Fryingpan's case was delayed until the March Assizes where he also faced a charge of 'killing a cow with intent to steal the carcass, the property of Mr. William Scott'.¹¹² Once again, Scott's overseer Bull was the only witness. He described having come across Fryingpan together with five or six of his companions who were engaged in the act of cutting up a freshly slaughtered cow, one of seven killed on the same day. Fryingpan and

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid.*

¹¹⁰ Ormsby Return, 50/12485 4/3379, SRNSW.

¹¹¹ *ibid.*

¹¹² *Maitland Mercury* (Supplement), 22 March 1843, p.1.

his cohort were portrayed as ‘treacherous savages’ as Bull explained that they had hailed him with the word ‘coolon’ to imply friendship, only to throw spears at him once he came within range.¹¹³ The overseer had chased them off by brandishing his gun at them. Although the alleged event had taken place almost four years earlier, on 20 August 1839, Bull claimed to be certain of Fryingpan’s identity and involvement in the alleged crime. The charge of killing a cow was clearly intended to deprive the man of his liberty. Fryingpan had initially been arrested for spearing a man, but when that could not be proved against him the charge was changed to one of having killed a cow. This strategy on the part of the prosecution paid off as he was found guilty and sentenced to ten years transportation.¹¹⁴ As in Wellington’s case, the sentence was later reduced to three years.¹¹⁵ Fryingpan arrived on Cockatoo Island on 17 April 1843, where he served almost eleven months of his sentence before dying in custody on 9 March 1844.¹¹⁶

Unlike Fryingpan and Wellington, Murphy evidently survived his 1846 sentence of hard labour but cumulatively his imprisonment took a toll on his health. On Wednesday 1 July 1852, he was arrested and brought before the Police Bench charged with ‘stealing a bundle’.¹¹⁷ Referred to in the *Maitland Mercury* as ‘an aboriginal whose name has frequently figured in our police reports’, Murphy had on this occasion been accused of taking a bundle of clothing and groceries belonging to a man named Riley at a local inn.¹¹⁸ When the publican asked Riley if the bundle was his, Murphy ran from the pub and into a nearby paddock where he was pursued and captured by a local constable.

¹¹³ *ibid.*

¹¹⁴ *ibid.*

¹¹⁵ Ormsby Return, 50/12485 4/3379, SRNSW.

¹¹⁶ *ibid.*

¹¹⁷ *Maitland Mercury*, 7 July 1852, p. 2.

¹¹⁸ *ibid.*

He was sentenced to twelve months hard labour and sent to Parramatta Gaol. On 13 May 1853, the visiting justice of the Gaol wrote to the Colonial Secretary in relation to Murphy's health. He reported that it was the medical officer's opinion that his health was such that 'further confinement would be attended with danger'.¹¹⁹ An annotation in the margin of the letter made it clear that Murphy was to 'be discharged when well enough'.¹²⁰ It seems, however, that he never became well enough.

Tallboy *alias* Jackey arrived on Cockatoo Island later in the same year as Murphy and Toby. He disembarked on 11 September 1840, having been sentenced to life imprisonment for being an accessory to the murder of a stock-keeper, Frederick Harrington, a former employee of the late Reverend Samuel Marsden.¹²¹ Tallboy appeared in the Supreme Court of New South Wales before Mr Justice Stephen on 12 August 1840 charged with having murdered Frederick Harrington 'by inflicting several deadly wounds on his head, by striking him with a tomahawk' and also with being an accessory to, and aiding and abetting in, the said murder.¹²² As with the trial involving Sandy, Billy, Jemmy, Cooper, and King Jackey, it would have been nigh on impossible for a white jury to separate this case from a broader context of violent frontier conflict and to view it with any sort of impartiality. The station where the alleged crime had been committed, a run belonging to a Mr James Walker in the district of Cassilis on the

¹¹⁹ Visiting Justice David Forbes to the Colonial Secretary, 13 May 1853, 53/4389 4/3198, SRNSW.

¹²⁰ *ibid.*

¹²¹ Ormsby Return, 50/12485 4/3379, SRNSW.

¹²² *R v Tallboy 1840, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 June 2007 at <<http://www.law.mq.edu.au/scnsw/cases1840-41/RvTallboy,1840.htm>>

Liverpool Plains, was at Myall Creek. In opening the case, the Crown Prosecutor Roger Therry pointed out to the jury that:

The present was only one of many outrages that had been committed on the whites by the aborigines in that distant part of the colony... [I]t was a well-known fact that not only the property of the settlers in the distant parts of the colony had been assailed by them, carried off (sic), and wantonly destroyed, but a number of whites had from time to time fallen victim to the savage fury of the blacks. It was only twelve months since, not less than seven white men had been tried for, convicted, and executed for having been concerned in an outrage on the blacks.¹²³

Therry was alluding to the cases *R v Kilmeister (No. 1) 1838* and *R v Kilmeister and Others (No. 2) 1838* that had arisen out of the event that has since become known colloquially as the Myall Creek Massacre, the first of which involved eleven defendants, all of whom were acquitted.¹²⁴ After the second trial, public outrage that seven ‘white’ men had been hanged for killing Aboriginal people reached such a level that the Government foreclosed on retrying the remaining four prisoners.¹²⁵ Such strength of sentiment must have been almost impossible to set aside when Tallboy appeared before the Supreme Court of New South Wales less than a year later, charged with being an accessory to the murder of a white man from the same area.

Tallboy, who was fluent in four Aboriginal languages and who the court was told could converse in ‘broken English’, was provided with William Jones as an interpreter.¹²⁶ Through this intermediary, Tallboy informed the court that he was not guilty of the alleged crime, that two other ‘black-fellows ... did it’, and that those same two

¹²³ *ibid.*

¹²⁴ *R v Kilmeister (No. 1) 1838, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 March 2006 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_kilmeister__no_1__1838.htm> ; *R v Kilmeister and Others (No. 2) 1838, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 March 2006 at <http://www.law.mq.edu.au/scnsw/Cases1838-39/html/r_v_kilmeister__no_2__1838.htm>

¹²⁵ *ibid.*

¹²⁶ *R v Tallboy 1840.*

Aborigines had since died.¹²⁷ A series of white witnesses swore positively to Tallboy's identity and declared that he had been amongst a group of six or so Aboriginal men seen around the hut of the late Harrington immediately prior to the man's death. In summing up, Stephen cautioned the jury 'against being led away by anything that had fallen from Mr Therry about seven white men having been executed for an outrage, of which it had been stated they had been guilty against the blacks'.¹²⁸ He stressed that there 'was but one law for the black man as well as the white', and elaborated further the benefits arising from this, as he saw them, for Aboriginal people.¹²⁹

According to Stephen, the 'laws should be strictly enforced' in punishing Aboriginal people when they committed outrages against whites, because any failure to do so could result in white people, 'by not knowing justice was done', becoming 'influenced by a spirit of revenge' and going on to commit one crime after another against Aboriginal people.¹³⁰ After having heard the judge's exhortations, the jury retired for half an hour and returned a verdict of not guilty in relation to the charge of murder, but guilty on the second count of aiding and abetting. Tallboy was remanded in custody to give Stephen time to consult with his fellow judges as to the propriety of passing a sentence of death as opposed to merely 'death recorded', noting that whether the sentence was carried into effect or not would depend on the outcome of representations made to the Governor on the prisoner's behalf. On 12 August 1840, Tallboy appeared before Stephen for sentencing and heard that he was to 'be taken to the place whence you came and from thence to such place of execution, at such time as the Governor shall appoint,

¹²⁷ *ibid.*

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ *ibid.*

there to be hanged by the neck until you are dead, and may God have mercy on your soul'.¹³¹ The judge's address and sentence having been interpreted to Tallboy, he responded by again denying his guilt and observing that 'he did not know what it was that *bit* the black men to make them kill the whites'.¹³²

Tallboy's death sentence was commuted by the Executive Council to transportation for life, following which he was sent to Cockatoo Island. The following year, in a letter dated 19 November 1841 sent to the Principal Superintendent of Convicts from the Colonial Secretary's Office, it was stipulated that 'the Secretary of State has signified Her Majesty's Pleasure of a Pardon being granted to the Prisoner [Tallboy, or Jackey at Cockatoo Island] on condition of being confined for life at Cockatoo Island'.¹³³ Depending on his subsequent behaviour, it had already been mooted that Tallboy might eventually 'safely be restored to liberty'.¹³⁴ Gipps had suggested in a letter dated 19 September 1840 to Russell that the discipline and instruction that Tallboy would receive on Cockatoo Island was likely to result in his subsequent good conduct and prepare him for potential release. On that basis, Russell confirmed that Her Majesty authorised 'further mitigation of punishment' if by 'subsequent good conduct' Tallboy 'should shew himself worthy of that indulgence'.¹³⁵ Despite Gipps' optimism in relation to Tallboy's potential reformation and release, the man died in the General Hospital before the Governor's letter was delivered to London. Tallboy's date of death is recorded as 28 November 1840.¹³⁶

¹³¹ *ibid.*

¹³² *ibid.* (Emphasis in the original.)

¹³³ Colonial Secretary to the Principal Superintendent of Convicts, 19 November 1841, Reel 1053, 4/3689, p. 276, SRNSW.

¹³⁴ Russell to Gipps, 26 April 1841, *HRA*, Series I, Volume XXI, p. 337.

¹³⁵ *ibid.*

¹³⁶ Ormsby Return, 50/12485 4/3379, SRNSW.

In the same month that Tallboy died, a man known as Billy, *alias* Neville's Billy, described as being 'from the Lachlan' was put on trial before Chief Justice Dowling in the Supreme Court of New South Wales in Sydney charged with 'killing a white man named John Dillon at Ullabalong, by spearing him, on 29th of February last'.¹³⁷ The trial took place on 4 November 1840, with an umbrella maker from Sussex Street, Sydney, being sworn as the interpreter. The man, William Jones, was a former convict who – by virtue of receiving a ticket-of-leave – now lived in the city, but had previously resided for about eight years near the banks of the Castlereagh River three hundred miles away where he learned to speak some of Billy's language. Following the charge being interpreted to him by Jones, Billy pleaded not guilty and alleged that it was other Aboriginal men who had killed Dillon.

In opening the case against the defendant, the Attorney General acknowledged that Aborigines took their trial 'at a disadvantage', particularly in relation to not being allowed to call other Aborigines as witnesses.¹³⁸ He told the court that it 'also frequently happened in cases of aggression by Aborigines, that the first offence was given by the whites, by their carrying off the gins of these blacks and otherwise annoying them'.¹³⁹ He was, however, satisfied that this had not been the case in relation to the circumstances leading up to the spearing of Dillon. The victim had in fact been known to be kind to Aborigines, providing Billy with bread and milk on the morning that the latter had allegedly speared him. Billy was also said to have been the happy recipient of another

¹³⁷ R v Billy 1840, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 1 June 2007 at <<http://www.law.mq.edu.au/scnsw/cases1840-41/RvBilly,1840.htm>>

¹³⁸ *ibid.*

¹³⁹ *ibid.*

‘particular kindness’ as a settler called Jackey Neville who resided near Bathurst had given him some clothing by dint of which he had afterwards been given the appellation Neville’s Billy.¹⁴⁰

The two witnesses called by the prosecution were both border police, the first being William Jackson who although at his own admission could ‘neither speak nor understand’ the language of ‘the blacks’, claimed never the less to have had ‘much intercourse’ with them.¹⁴¹ Jackson, who was posted with Mr Cosby, a Commissioner of Crown Lands stationed about 24 miles from Yass, told the court that he had heard from Dillon’s own lips as the man lay dying that Neville’s Billy was the person who had speared him. Dillon, a free man who had resided at the station only about six weeks and was thought to be ‘on friendly terms’ with local Aborigines, attributed the attack to his being unable to meet further Aboriginal demands for bread and milk after having fed Billy.¹⁴² Following Dillon’s death, Jackson, together with another border policeman William Power, and six or seven stockmen rode out for ten days unsuccessfully seeking the fugitive. Eventually a ‘tame black’ called Old Ben offered to ‘bring him in’, following which Billy acknowledged ownership of the spear that was the alleged murder weapon.¹⁴³ Old Ben’s motivations are unclear, but perhaps he was pressured to comply by the border police. When Billy was asked ‘what for you tumble down Waddy Monday?’ (the nickname bestowed upon Dillon by local Aboriginal people owing to the white man having a wooden leg), he allegedly told the Border Police that he had

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

¹⁴² *ibid.*

¹⁴³ *ibid.*

committed the act at the urging of several other men, Billy, Paddy, Puckamulloi, Woagli, and Pialla.¹⁴⁴

When the next border policeman gave evidence, he suggested to the court that Billy spoke English ‘pretty well’.¹⁴⁵ Power also claimed that Billy had some years previously seen several men being hanged in Bathurst and had enquired as to whether he was to be dealt with in the same way. This information was tendered to the court as further evidence of the defendant’s guilt, but nevertheless reveals some knowledge on Billy’s part as to how white justice worked in the colony. It also demonstrates that he drew a correlation between the fate of those earlier prisoners and his own predicament. In any case, Billy refuted Power’s claims, stating that the border policeman ‘told lies of him’.¹⁴⁶ This closed the case for the prosecution, following which Mr Broadhurst who had been appointed by the court to defend the prisoner spoke of ‘the strong feeling which was known to exist in the Colony against the blacks’ and urged the jury to ‘try the case dispassionately and without prejudice’, a seemingly impossible task.¹⁴⁷

In his summing up, Dowling pointed out to the jury some of the disadvantages faced by Aboriginal defendants. Reminding the jurymen of their status as ‘intelligent, British subjects’, he told them that they were:

called on called on to administer justice to a savage, who was ignorant of the language, laws, and customs of civilized life; and called on them to mark the situation in which the prisoner and the judges were placed in such trials; by a fiction of law he was amenable to British law. He was accused of the murder of a British subject, a white man, one of a race of men who had seized on his native land; he was by fiction of law, a British subject, and as such was entitled to be tried by his peers, his equals; were the jury his equals? Did they know his language, his habits, or his

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

¹⁴⁷ *ibid.*

customs? He took his trial under many disadvantages, so much so, that he was not in a situation to conduct his own defence - he could not even instruct his counsel; he might have witnesses, but they, by a legal technicality, not being christians, would not be admitted to give evidence, and therefore it was that he said the prisoner took his trial under great disadvantages; it was in fact a one-sided trial.¹⁴⁸

Echoing Broadhurst, Dowling instructed the jurors to 'lay aside all prejudices' and to pay attention solely to the evidence.¹⁴⁹ He suggested that the evidence put before them was inconsistent with that usually tendered to support cases involving murder, but instead 'depended entirely on the frail memory of two illiterate men' whose testimonies showed some discrepancies.¹⁵⁰ Having been pretty much provided by the Chief Justice with grounds on which they might have dismissed the case, the jury nevertheless returned a guilty verdict after having retired for half an hour to consider the case. Billy was remanded in custody to await sentencing.

On 7 November 1840, Billy appeared in the Supreme Court of New South Wales before Dowling for sentencing. The Chief Justice told him that:

you, a wild aboriginal native of New South Wales, having been convicted by a jury of civilized Englishmen of the crime of wilfully murdering one of their countrymen, are now to receive the judgment of the white-man's law for your offence.¹⁵¹

Consistent with the thinking of the time, Dowling called Billy 'one of the wild children of the woods' and described him as having been 'moved and seduced by the instigation of the devil' to murder Dillon.¹⁵² While acknowledging the prisoner's ignorance of God and

¹⁴⁸ *ibid.*

¹⁴⁹ *ibid.*

¹⁵⁰ *ibid.*

¹⁵¹ *ibid.*

¹⁵² *ibid.*

Christian laws, he nevertheless held Billy accountable for his actions that were ‘contrary to the law of nature’.¹⁵³

In Dowling’s own estimation, while theoretically it might have seemed sound to construct Aboriginal people as British subjects, in practice this approach had become ‘incongruous [in] ... its application’.¹⁵⁴ He lamented the vast distance on the scale of humanity which must of necessity separate the ‘wandering houseless man of the woods’ from ‘the civilized European’, a distance he viewed as ‘immeasurable!’¹⁵⁵ Bound as he was by the letter of the law, Dowling had little option other than to sentence the prisoner to be hanged by the neck until his body was dead. Any mercy that Billy might subsequently be shown would be God-given in relation to his eternal spirit, or dispensed by the Governor standing in for the person of the Queen in relation to his earthly body.

Gipps chose to exercise the royal prerogative of mercy in relation to Neville’s Billy. In a letter from the Colonial Secretary’s Office dated 19 November 1841, the Principal Superintendent of Convicts was notified that Billy, who had been sentenced to death for murder, was instead to be granted ‘a conditional pardon’ with the terms being that he be ‘confined for three years on Cockatoo Island in Port Jackson’.¹⁵⁶ Neville’s Billy is recorded as having been received on Cockatoo Island on 13 February 1841.¹⁵⁷ Ironically, having escaped the hangman’s noose, Billy’s imprisonment had within two months resulted in his death. He died in the General Hospital some time during the month of April 1841.¹⁵⁸

¹⁵³ *ibid.*

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ Colonial Secretary to the Principal Superintendent of Convicts, 19 November 1841, Reel 1053, 4/3689, p. 276, SRNSW.

¹⁵⁷ Ormsby Return, 50/12485 4/3379, SRNSW.

¹⁵⁸ *ibid.*

Like Neville's Billy, a case involving an Aboriginal defendant known as Darby was set against a backdrop of sporadic frontier conflict. When Philip Gidley King, in his capacity as a Justice of the Peace, wrote to the Colonial Secretary to advise him of Darby's 'atrocious conduct' in relation to the alleged rape of Elizabeth Lindsay, he mentioned in the same letter that throughout the previous year 'the blacks in this vicinity' had 'been in a most troublesome state'.¹⁵⁹ He considered that local Aboriginal people had 'become more daring' after their 'late repulse of the Mounted Police at the Manning River'.¹⁶⁰ The Justice of the Peace complained of 'pilfering' by Aboriginal people, suggesting that they would 'repeat their brutal practices until murder ensues, unless some active measures are taken to prevent it'.¹⁶¹ He informed the Colonial Secretary that a £10 reward had been posted for Darby's capture and asked that a further reward be offered. In response to this request, official instructions ordering out the Mounted Police to seek Darby were issued on 19 February 1848. In addition, a reward of £26 or a conditional pardon was posted for the man's 'capture and lodging in safe custody'.¹⁶²

Darby was eventually captured and appeared before Mr Justice Dickinson in the Maitland Circuit Court on 11 September 1848. Having heard the prosecutrix's testimony, Mr Purefoy who had undertaken 'to watch the evidence on behalf of the prisoner' called into question her ability to 'identify a black whom she said she had never spoken to before, nor had seen by himself'.¹⁶³ She had seen him only in a group of Aborigines on a few previous occasions. The judge instructed the jury to be aware of the possibility that

¹⁵⁹ Philip Gidley King to the Colonial Secretary, 16 February 1848, 48/22884/2817, SRNSW.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² Colonial Secretary to the Commandant at Port Stephen, 19 February 1848, 48/2288 4/2817, SRNSW.

¹⁶³ *Maitland Mercury*, 13 September 1848. p. 2.

Elizabeth Hinton (*nee* Lindsay) may have been mistaken in regard to the prisoner's identity but affirmed that she had given her evidence 'very clearly and in a very becoming manner'.¹⁶⁴ Following the 'guilty' verdict, the judge advised the court that prisoners found guilty of rape were no longer subject to the death penalty. Because of this consideration, and also because of the prisoner's Aboriginality, he handed down a sentence of 'death recorded' rather than execution. Dickinson explained to the court that he 'did not think the prisoner's education and opportunities could have fitted him for an early death'.¹⁶⁵ The judge also 'thought the example of such a being losing his life was more likely to excite commiseration and pity than to act as a warning'.¹⁶⁶ Dickinson's views in this regard exhibit a shift away from earlier judicial and administrative thinking that rationalised Aboriginal hangings on the basis that staging such events might prove to be an effective deterrent.

Darby was remanded in custody in Newcastle Gaol. The gaoler wrote to the High Sheriff in Sydney on 16 November 1848 to enquire what he was supposed to do with the prisoner.¹⁶⁷ A few weeks later, Darby was transported to Cockatoo Island where he arrived on 6 December 1848 to serve fifteen years on a road gang.¹⁶⁸ The following year, on 12 May 1849, the visiting magistrate to Cockatoo Island H. H. Browne J.P. wrote to the Native Police Office to state that Darby had died on Cockatoo Island the previous afternoon 'of natural causes'.¹⁶⁹ He had 'been an inmate of the hospital for some time',

¹⁶⁴ *ibid.*

¹⁶⁵ *ibid.*

¹⁶⁶ *ibid.*

¹⁶⁷ Gaoler, Newcastle Gaol to High Sheriff, Sydney, 16 November 1848, 48/12910 4/2826.3, SRNSW.

¹⁶⁸ Ormsby Return, 50/12485 4/3379, SRNSW.

¹⁶⁹ Browne to Native Police Office, 12 May 1849, 49/4630 4/2839.3, SRNSW.

and as there were no suspicious circumstances surrounding his death the necessary steps had been taken to arrange the internment of his body.¹⁷⁰

Near the end of the year of Darby's death, the Native Police Office informed the Colonial Secretary of the recent death of Jemmy, another Aboriginal convict at Cockatoo Island. Penned by the Visiting Magistrate to Cockatoo Island, H. H. S. Browne, the short note dated 5 December 1850 stated that Jemmy had 'been a patient in the hospital for some weeks' and was said by the surgeon O'Brien to have 'died from natural causes'.¹⁷¹ Perhaps Browne's letter triggered memories of similar recent events as it served as the catalyst for an official investigation into the extent of Aboriginal deaths in custody on Cockatoo Island. In the margins of the letter, the Colonial Secretary wrote an annotation instructing a public servant to 'ask for a return of the number of Aboriginal Natives that have died on the Island during the last five years specifying the cause of death and of year'.¹⁷²

As requested, Browne provided the Colonial Secretary with a return prepared by Superintendent Charles Ormsby at Cockatoo Island dated 16 December 1850 demonstrating that of the nineteen Aboriginal convicts transported to the island between 1 January 1839 and 16 December 1850, twelve died on Cockatoo Island or in hospital in Sydney. Four convicts, Fowler, Southighed [sic] Jemmy, Jackey Jackey, and Tom had been forwarded to Darlinghurst Gaol where they were lodged pending a transfer to Norfolk Island. Billy Roberts *alias* Samboy had already been transferred to Van

¹⁷⁰ *ibid.*

¹⁷¹ Browne to Native Police Office, 5 December 1850, 181/50 4/3379, SRNSW.

¹⁷² See annotation dated 7 December 1850 on Browne to Native Police Office, 5 December 1850, 181/50 4/3379, SRNSW.

Diemen's Land, and Murphy had completed his sentence. Tommy remained on Cockatoo Island at the time at which the return was prepared.¹⁷³ The following chart graphically represents these outcomes:

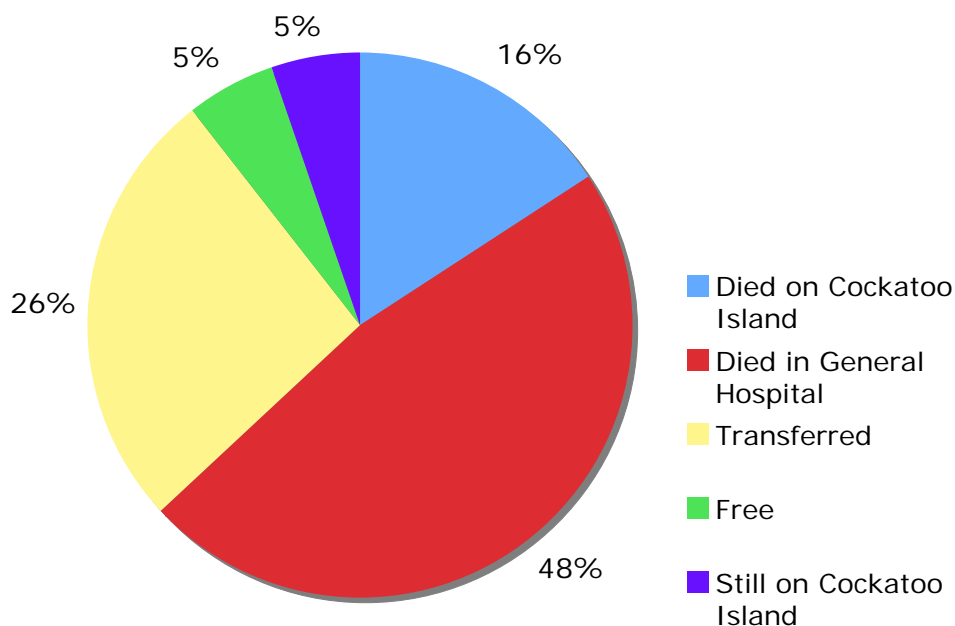


Figure 4: Outcomes for Aboriginal Convicts, Cockatoo Island, 1 January 1839 – 16 December 1850.

While Aboriginal deaths in colonial custody were not a new phenomenon, the concentration of such a proportionately large cohort of Aboriginal convicts on one penal island was out of the ordinary in New South Wales. This was the compelling factor that finally raised administrative awareness about, and concerns for, the men's plight. The statistics provided by Ormsby were sufficiently shocking for the Colonial Secretary to issue immediate instructions for a board comprising medical personnel associated with Cockatoo Island to be assembled to 'consider some alternative which would be less

¹⁷³ Browne to Colonial Secretary, 28 December 1850, 191/50 4/3379, SRNSW, with enclosure, Ormsby Return 50/12485 4/3379, SRNSW.

destructive to the lives of these people than ... confinement on Cockatoo Island appears to be'.¹⁷⁴ Evidence suggests that no meliorating alternative was implemented in the decade that followed.

The authorities' concern would also have been exacerbated by the disproportionately high number of deaths amongst Aboriginal convicts when compared with their colonial counterparts. For example, as the following graph illustrates, the Aboriginal death rate at Cockatoo Island within the first year of sentence was almost ten times higher than that for the cohort of non-Aboriginal male convicts shipped to Van Diemen's Land between 1840 and 1844:

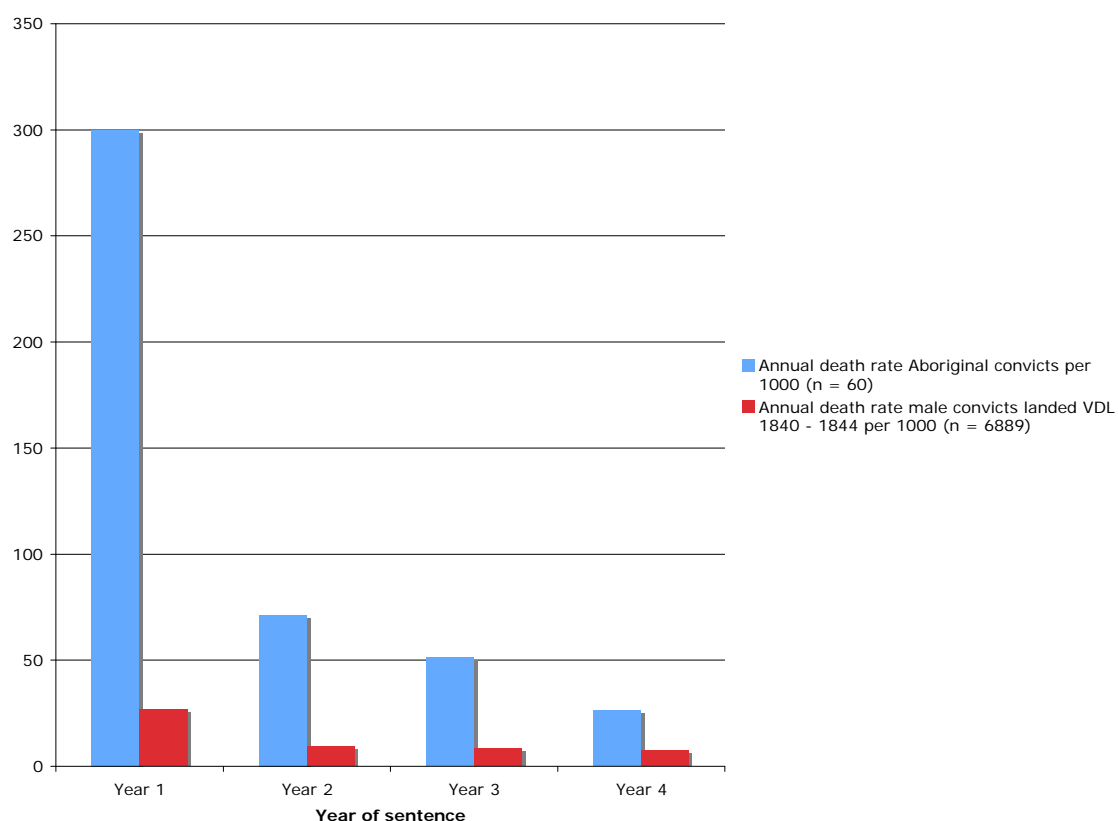


Figure 5: Comparative Death Rates for Aboriginal and non-Aboriginal Male Convicts¹⁷⁵

¹⁷⁴ *ibid.*

The significantly higher death rate amongst Aboriginal convicts clearly did not escape the attention of the colonial authorities. By the time that they were notified of Jemmy's death, there was no doubt in the minds of those charged with the task of overseeing Aboriginal convicts that confinement was very dangerous to their health. In submitting Ormsby's return, Browne observed that it was 'quite conclusive that the confinement of Aboriginal Blacks in the ordinary Penal Establishments seriously affects their Health and Constitution and leads ultimately to disease and death'.¹⁷⁶ He noted that as it was customary to remove seriously ill prisoners to the General Hospital, few of the Aboriginal convicts were shown to have died on Cockatoo Island itself. Yet there was no doubt that their declining health profiles and subsequent deaths were the outcome of having been held in captivity there.¹⁷⁷

In February 1851, the Medical Adviser to the Government Dr Patrick Hill wrote to the Colonial Secretary in relation to 'mortality amongst the Aborigines at Cockatoo Island'.¹⁷⁸ He enclosed a letter from Browne reporting two further deaths as well as a letter from the health officer, Dr. O'Brien, writing in his capacity as surgeon, Cockatoo Island.¹⁷⁹ Hill informed the Colonial Secretary that he had met with Browne and O'Brien 'to consider the subject of the mortality amongst the Aboriginal natives who have been confined on Cockatoo Island during the past five years for criminal offences'.¹⁸⁰ The three men shared the opinion that the high mortality rate was not predicated on any factors specific to Cockatoo Island such as climate or 'situation', but was attributable

¹⁷⁵ The data pertaining to non-Aboriginal male convicts transported to Van Diemen's Land has been supplied by Hamish Maxwell-Stewart.

¹⁷⁶ Browne to Colonial Secretary, 28 December 1850, 191/50 4/3379, SRNSW.

¹⁷⁷ *ibid.*

¹⁷⁸ Dr Patrick Hill to the Colonial Secretary, 22 February 1851 (with enclosures), 51/2048 4/3379, SRNSW.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

instead to ‘the fact of their having been confined’.¹⁸¹ They suggested the deaths probably would have occurred ‘in any other locality’ given that it ‘is a well known fact that savages do not bear captivity but pine and dies in any situation’ of incarceration.¹⁸²

Hill, Browne, and O’Brien concluded that shifting Aboriginal prisoners from Cockatoo Island to other sites of incarceration ‘would be useless’ in terms of ameliorating the high death rate, they recommended instead that they be divided into two distinct classes of men and treated differently:

In cases where the offence has been of a grave and serious character and where the liberation of the culprit would tend to endanger society, we believe the evil must be submitted to, in minor cases it might be a consideration for the Executive whether a mitigation of sentence might not be granted when the health is observed to break down.¹⁸³

The likely deaths in custody of Aboriginal men convicted of more serious offences were seen as an unfortunate but unavoidable evil. Under the framework proposed by Hill, Browne, and O’Brien, only those considered to present a lesser threat to society might be considered for early release as a means of avoiding probable death.

The Colonial Secretary did not concur with Hill, Browne, and O’Brien’s distinction. Instead, he decided that the best course of action was to ‘direct the visiting surgeon to watch carefully the state of any Aboriginal prisoner who may be sentenced to Cockatoo Island or any of the other gaols in the colony’.¹⁸⁴ In cases where ‘longer confinement is likely to endanger their lives’, the visiting surgeon was to be instructed to ‘immediately report their cases’.¹⁸⁵ On 25 March 1851, he approved an official circular

¹⁸¹ *ibid.*

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ See the Colonial Secretary’s annotations on Hill to the Colonial Secretary, 22 February 1851, 51/2048 4/3379, SRNSW.

¹⁸⁵ *ibid.*

drafted four days earlier by the Medical Adviser who then forwarded it to ‘the visiting surgeons at the gaols of Sydney, Parramatta, Goulburn, Bathurst, Maitland, and Brisbane’.¹⁸⁶ It read:

The attention of the Government having been drawn to the mortality which has been found to prevail amongst Aborigines of this Colony when confined for any length of time in gaols or other places of imprisonment, I am instructed by His Excellency the Governor to request that you will watch carefully the state of health of any Aborigines who may be imprisoned in ____ Gaol, and that you will immediately report, through the Visiting Justice, the case of any Aboriginal Native whose life you may consider to be endangered by longer confinement in order that the necessary steps may be taken for his liberation if the circumstances of the case may seem to justify such a step.¹⁸⁷

The official circular did not go so far as to draw the kind of distinction made in Hill’s initial recommendation, but nevertheless hinted at such a consideration where it referred obliquely to whether ‘the circumstances of the case’ could be seen as justifying liberating an Aboriginal man otherwise likely to die in custody.¹⁸⁸ To what extent such ‘circumstances’ referred to the nature of the offence of which the person had been convicted, and/or to their state of health, is a matter of speculation. In any case, the interpretation of this instruction would have varied depending on the recipient’s own sensibilities. Culpability and the capacity for reformation was also predicated along racial lines – a person’s perceived biological make up being inextricably tied in the colonial mind to character traits that were considered to be innate and possibly immutable. This point is elucidated particularly well in official correspondence relating to a case involving an Aboriginal man known as Peter.

¹⁸⁶ Circular, 20 March 1851, 51/2048 4/3379, SRNSW.

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

Aged about twenty in 1851, Peter was described by the Reverend Thomas Sharpe of Bathurst as being a 'very quiet' person 'who appears very wishful to have his soul saved'.¹⁸⁹ Sharpe was visiting Peter under very trying circumstances given that the former was being held in custody under sentence of execution handed down during the Bathurst Circuit Court for rape and assault. The minister's words were reproduced in a letter written by the missionary William Watson from the Apsley Aboriginal Mission petitioning the Governor and Executive Council to consider mitigation of Peter's sentence. The missionary presented personal details relating to the death of the prisoner's parents and brother in conjunction with more general comments about such cases in the hope that 'some means may be adopted for satisfying the demands of justice and at the same time saving the life of the unhappy youth'.¹⁹⁰ Watson posited that it would be more instructive and inhibiting to local Aboriginal people if 'some other severe punishment' were substituted for executing Peter as 'they would have a living evidence before them of the painful consequences of crime'.¹⁹¹

While Watson attributed Peter's predicament in part to his personal circumstances and also to the bad influence of the worst characters amongst the colonists, Mr Justice Therry evinced quite a different perspective. In his report to the Governor on the case, he naturalised Peter's situation by recourse to colonial discourses about Aboriginal inferiority, stating that 'unquestionably ... even the most intelligent of the Aboriginal Natives are removed from even the most uneducated persons of the British race [by] ... many degrees of intelligence'.¹⁹² Referring to what he saw as their 'defective

¹⁸⁹ Watson to FitzRoy, 4 March 1851, 51/2470 4/2929, SRNSW.

¹⁹⁰ *ibid.*

¹⁹¹ *ibid.*

¹⁹² Justice Roger Therry to the Colonial Secretary, 10 March 1851, 51/2471 4/2929, SRNSW.

intelligence', Therry asserted that Aborigines were 'persons who reflect very little, and who carry facts in their minds but for a short time'.¹⁹³ He did however concur with Watson's suggestion that to commute Peter's death sentence to some other punishment would be instructive to other Aborigines, although he was 'at a loss to suggest' a suitable alternative.¹⁹⁴

Therry sought to ascertain more about Peter's character, indicating some degree of individualisation in what was otherwise a highly racialised discourse. In particular, he was interested to know whether it might be possible 'to ascertain whether there have been other complaints or instances of his having assaulted other women for similar purposes'.¹⁹⁵ The difficulties in acquiring such knowledge, though, were held to be considerable owing to 'the great reluctance' on the part of white women 'to acknowledge such an intimacy with an Aboriginal'.¹⁹⁶ Having determined that no white men had been hanged for raping Aboriginal women, he naturalised this through claiming that incidences of Aboriginal men raping white women were 'like to be of far more frequent occurrence' than *vice versa*. He ignored the problem of Aboriginal women being unable to testify in court. This, combined with the extreme difficulties of bringing such a case before a white jury, would have made such action nigh on impossible should any Aboriginal women have had the knowledge and inclination to pursue such matters in accordance with English rather than tribal law.¹⁹⁷

On 4 March 1851, the Executive Council met to consider Peter's case. 'After mature deliberation', the Council decided that the sentence of death would be carried out

¹⁹³ *ibid.*

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

¹⁹⁷ *ibid.*

‘in Bathurst on Friday the fourth day of April’.¹⁹⁸ This, in fact, though proved to be very difficult to arrange. In a letter dated 11 March 1851, the Colonial Architect Edmund Blacket revealed that he had ‘experienced very much difficulty’ in having the gallows built as the workmen were throwing ‘many ... obstructions ... in the way of its construction’.¹⁹⁹ Blacket anticipated further problems in relation to ‘its conveyance and erection at Bathurst’, and proposed circumventing any issues by hiring men from Sydney to perform the task.²⁰⁰ To what extent the workers’ reluctance stemmed from an increasing aversion to hangings generally, as opposed to the scheduled execution of an Aboriginal man, is unclear, although there was likely to be little public sympathy for the plight of an indigene convicted of raping a white woman.

Following representations from a lawyer, the Executive Council ordered a stay on execution for a fortnight to allow the case to be brought before the Supreme Court.²⁰¹ Therry and his fellow judges found no merit in the legal arguments put to them, but noted that the rescheduled execution was due to take place on Good Friday and could not be carried into effect on that date.²⁰² When the case was brought before the Executive Council it was decided that as a second reprieve had become necessary Peter would ‘be pardoned on condition of his being kept to hard labour on the roads or other public works for the term of fifteen years, and for the first three years of the said term to hard labour in

¹⁹⁸ Proceedings of the Executive Council on the 10th March 1851 relative to the Capital conviction of ‘Peter’ an aboriginal native convicted of Rape at the Bathurst Circuit Court, Minute No. 51/10 4/2932, SRNSW.

¹⁹⁹ Colonial Architect Blacket to the Colonial Secretary, 11 March 1837, 51/2494 4/2932, SRNSW.

²⁰⁰ *ibid.*

²⁰¹ Proceedings of the Executive Council on the 25th March 1851 relative to a letter from Mr. James Green Attorney at Law with respect to the Capital conviction of ‘Peter’ an aboriginal at the Bathurst Circuit Court for rape, Minute No. 51/12 4/2932, SRNSW.

²⁰² Justice Roger Therry to the Colonial Secretary, 7 April 1851, 51/3450 4/2932, SRNSW.

irons'.²⁰³ A brief note recorded that 'it is concluded that the Prisoner is to be worked on Cockatoo Island until further notice'.²⁰⁴ Within three months of his arrival on Cockatoo Island, Peter was dead. Suffering from 'inflammation of the lungs and liver', he was moved to the island's hospital on 16 July 1851 where his life expired at half past nine o'clock on the morning of 2 August 1851.²⁰⁵

Despite the cessation of convict transportation to New South Wales in 1841, and in the face of mounting evidence of the extraordinarily high death toll amongst Aboriginal convicts, Aboriginal men continued to be sent as prisoners to Cockatoo Island well into the 1850s. Unsurprisingly, the mortality rate of such prisoners remained high. During this period, the new administrative preoccupation with preventing Aboriginal deaths in custody, where possible and as circumstances allowed, permeated the custodial system on which it was focused rather than the judicial system. This manifested in a number of ways. These include a heightened expectation of care on the part of colonial officials sometimes resulting in anomalous decisions, authorities petitioning for the release of ill prisoners, and petitioning from at least one Aboriginal prisoner seeking to have his sentence mitigated on grounds of illness.

Following official recognition of the issue of Aboriginal deaths in custody, persons charged with the care of Aboriginal prisoners were subject to increased scrutiny. For example, when the Visiting Magistrate to Cockatoo Island reported that an Aboriginal convict, Joseph Milay, had died in the hospital on the island at six o'clock on

²⁰³ Proceedings of the Executive Council on the 7th April 1851 relative to the commutation of the sentence of death passed upon 'Peter' an aboriginal at the late Bathurst Circuit Court, for rape, Minute No. 51/14, 51/3608 4/2932, SRNSW.

²⁰⁴ Note determining Peter to be sent to Cockatoo Island, 51/3608 4/2932, SRNSW.

²⁰⁵ Police Office Sydney to the Colonial Secretary, 4 August 1851, 51/7598 4/2942, SRNSW.

the morning of 6 May 1853, questions were immediately raised as to whether there had not been ‘some general rule applicable to the care of Aboriginal criminals’?²⁰⁶

Instructions were issued directing the Visiting Surgeon to prepare a ‘special report’ to explain why the instructions issued in the March 1851 circular appeared not to have been adhered to in this case.²⁰⁷

The Superintendent of Cockatoo Island responded on 29 May 1853, claiming that the only official correspondence held in his files in relation to such matters was a letter dated 7 January 1851 in which the Colonial Secretary had announced the establishment of a board of enquiry, a point that was confirmed in a letter from George West, the Visiting Surgeon to Cockatoo Island.²⁰⁸ In an annotation on West’s letter, the point was made that the 28 March 1851 circular had been sent to the Visiting Surgeons at the respective gaols and the then medical adviser Hill. The Governor considered that as the Visiting Surgeon to Darlinghurst Gaol was one and the same person as the Visiting Surgeon to Cockatoo Island, the man ought to have been ‘aware of the Instructions as applying equally to all Aboriginal Prisoners wherever the place of their imprisonment might be’.²⁰⁹ This viewpoint was conveyed to him in a letter dated 28 June 1853 together with another copy of the circular.²¹⁰ West responded on 2 July 1853, explaining how the original circular had been ‘immediately upon its receipt placed amongst the official letters in the Gaol Hospital’ where it had since been relocated and brought to the attention

²⁰⁶ Visiting Magistrate, Cockatoo Island to the Colonial Secretary, 6 May 1853, 53/1938 4/3379, SRNSW.

²⁰⁷ See annotations on the letter from the Visiting Magistrate, Cockatoo Island to the Colonial Secretary, 6 May 1853, 53/1938 4/3379, SRNSW.

²⁰⁸ Superintendent, Cockatoo Island to the Colonial Secretary, 29 May 1853, 53/1938 4/3379 SRNSW; Visiting Surgeon George West to the Colonial Secretary, 30 May 1853, 53/4773 4/3379 SRNSW.

²⁰⁹ See annotation on the letter from West to the Colonial Secretary, 30 May 1853, 53/4773 4/3379 SRNSW.

²¹⁰ Colonial Secretary to West, 28 June 1853, 53/4773 4/3379, SRNSW; see also the note regarding the necessity of enclosing a copy of the March Circular for Dr West, 53/5878 4/3379 SRNSW.

of the relevant medical personnel.²¹¹ Deaths of Aboriginal convicts were no longer going to pass unnoticed and unremarked, with the colonial authorities from the Governor down raising questions about such incidents and apportioning blame to more minor officials.

Increased vigilance and concern for the wellbeing of Aboriginal prisoners sometimes led to anomalous decisions. Two men known as Peter and Stupid Tommy who were tried at Goulburn on 21 December 1854 had been sentenced to three years on a road gang with the first year to be served in irons. The men were sent to Cockatoo Island. They later requested tickets-of-leave to be issued to allow them to reside in the district of Bong Bong.²¹² Only one of the men, Stupid Tommy, was eligible to receive his ticket as an indulgence under local regulations. He was however retained on Cockatoo Island so as not to separate the two Aboriginal prisoners. Presumably this outcome was predicated on the basis of concerns for Peter's well being. Questions were then raised about the conduct of both prisoners whilst confined to the island, as it was recognised that the Crown was 'acting illegally by retaining a man who ought to be free', probably to determine whether it might have been feasible to release Peter as well.²¹³

That the increased awareness of, and concern with, the impacts of incarceration on Aboriginal prisoners was reflected in the changing behaviour of colonial officials is further demonstrated by considering briefly a case involving another Aboriginal prisoner on Cockatoo Island. By 1858, the Visiting Surgeon was writing to the Colonial Secretary to inform him of the ill health of an Aboriginal convict, Billy Morgan, rather than waiting for a possible death to eventuate. According to West's letter dated 24 April 1858, Morgan

²¹¹ West to the Colonial Secretary, 2 July 1853, 53/1507 4/3379, SRNSW.

²¹² Inspector General of Police and Chairman of the Convict Classification Board Mayne to the Colonial Secretary, 7 June 1856, 56/5325 4/3328, SRNSW.

²¹³ File notes relating to Stupid Tommy and Peter, 56/7541 4/3337, SRNSW.

was suffering from pleurisy, a condition that he had previously been hospitalised for on four occasions.²¹⁴ Further enquiries on the part of the Governor revealed that the man had arrived on Cockatoo Island on 7 June 1856 after being found guilty of murder and sentenced at the Bathurst Circuit Court on 22 March 1856 to fifteen years on a road gang with the first three years to be served in irons. Morgan's conduct whilst confined on Cockatoo Island was described as 'good'.²¹⁵

On 22 May 1858, West wrote to the Visiting Magistrate to Cockatoo Island to inform him that Morgan, having previously been discharged from hospital to convalesce, had once again been admitted 'laboring under a similar attack of the lungs' two days earlier.²¹⁶ The Visiting Surgeon was of the opinion that 'his life will be endangered by longer confinement on the Island'.²¹⁷ This report was forwarded to the Colonial Secretary, with the Visiting Magistrate's suggestion that the only course of action was to retain Morgan in hospital as 'were he to be let out his death could be certain'.²¹⁸ This level of official care and concern for the wellbeing of an Aboriginal convict was unprecedented prior to the 1850s.

Concern for the well being of Aboriginal prisoners extended beyond the confines of Cockatoo Island. Several cases concerning men confined to Darlinghurst Gaol, where the Visiting Surgeon was the same man who attended to the prisoners at Cockatoo Island, demonstrate the increasing attention being paid to their health after 1850. These three cases involving Jackey Mamlan, Jemmy, and Davy *alias* Shandy further illuminate some of the impacts of incarceration on the lives of Aboriginal prisoners. The first of these

²¹⁴ West to the Colonial Secretary, 24 April 1858, 58/5878 4/3379, SRNSW.

²¹⁵ Superintendent, Cockatoo Island to the Colonial Secretary, 27 May 1858, 58/5878 4/3379, SRNSW.

²¹⁶ West to the Visiting Magistrate, Cockatoo Island, 22 May 1858, 4/3379, SRNSW.

²¹⁷ *ibid.*

²¹⁸ Visiting Magistrate Cockatoo Island to the Colonial Secretary, 27 May 1858, 58/1938 4/3379, SRNSW.

men, Mamlan, was reported by West on 15 March 1856 to be complaining of headaches but otherwise free of disease. He was, however, 'very low spirited, and whenever he can withdraw himself from observation he is crying and lamenting the death of his comrade', symptoms that West read as being 'premonitory of illness of a serious nature'.²¹⁹ Based on these observations, the Visiting Surgeon concluded that if Mamlan was 'kept in confinement it will be likely to send fatality to him'.²²⁰ On these grounds, Mamlan's early release from Darlinghurst Gaol was approved.

It is possible that similar symptoms were displayed by Jemmy, an Aboriginal prisoner who, being unable to raise the sureties required of him when he was bound over to keep the peace, had been confined to Darlinghurst Gaol in October 1859 for menacing a nine-year old boy with a stick. At the start of the following month, on 2 November 1859, Jemmy was ordered to be removed to the Lunatic Asylum at Tarban Creek as he was certified insane by the colonial authorities. His removal was authorised by the sheriff under the second section of the Act of Council, 7. *Vic., No. 14*, under which section a judge's sanction was unnecessary.²²¹ It is unclear from the extant records as to the nature of the behaviour Jemmy exhibited that troubled the colonial observers, and whether his apparent insanity predated his incarceration in Darlinghurst Gaol.

Later in the same year as Mamlan's release, Davy, who had been sentenced to two years labour in Darlinghurst Gaol after being found guilty of robbery when he appeared at the Supreme Criminal Court in Sydney also fell ill. On 21 June 1856 the Sheriff informed the Colonial Secretary that Davy had been 'ill for the last month' and was

²¹⁹ West to the Colonial Secretary, 15 March 1856, 56/2517 4/3317, SRNSW.

²²⁰ *ibid.*

²²¹ Sheriff to the Colonial Secretary requesting an order for the admission of Jemmy an Aboriginal into the Lunatic Asylum, in accordance with the 2nd section of the Act of Council, 7 *Vic., No. 14.*, 59/5701 4/3411, SRNSW.

housed in the hospital at Darlinghurst Gaol.²²² Predicated on the Visiting Surgeon's opinion that 'further imprisonment will be the cause of his death', Davy's early release from gaol was also officially sanctioned.²²³ These cases are of particular interest as they further demonstrate some of the impacts on the mental health of Aboriginal men subjected to captivity, often described in colonial records as 'pining away', as well as indicating a colonial propensity towards removing such men from gaol whether sending them to freedom or to the mental asylum.

In addition to an upsurge in correspondence from colonial administrators in response to the official circular of March 1851, evidence also suggests that some Aboriginal prisoners became active in pleading their own causes. On 13 November 1854, an Aboriginal man known as Mickey petitioned Sir Charles Fitzroy to 'most humbly request' the Governor to mitigate the two-year sentence imposed upon him the previous year.²²⁴ The petition was 'not forwarded in the usual way' as it omitted details such as where the prisoner had been tried and where he was currently confined.²²⁵ However, annotations on the document indicate that on 2 September 1853 at Bathurst Mickey had been convicted of 'wounding a female' and confirmed his sentence to three years hard labour at Bathurst Gaol.²²⁶ Mickey did not write the petition himself and nor did he sign the document. It was endorsed by D. R. MacDonald and Geoffrey M. Cox, both justices of the peace, and striking similarities between MacDonald's signature and the

²²² Sheriff to the Colonial Secretary, 21 June 1856, 56/5601 4/3329, SRNSW.

²²³ *ibid.*

²²⁴ Mickey to Governor Fitzroy, 13 November 1854, 54/9863 4/3408, SRNSW.

²²⁵ See annotations on the petition from Mickey to Fitzroy, 13 November 1854, 54/9863 4/3408, SRNSW.

²²⁶ *ibid.*

handwriting throughout the rest of the petition indicate that he was in fact the scribe, if not the compositor, of the petition.²²⁷

Mickey's petition conformed to the conventions of the day in terms of the phraseology and obsequious register adopted in addressing the Governor. It is impossible to speculate as to the extent to which he was actively involved in scripting the document, yet the contents are illuminating. In the petition, one of the major mitigating factors put to the Governor was that the female victim was a 'woman of colour' who was 'of notoriously bad character'.²²⁸ The petitioner also observed that the 'prosecutrix was originally brought up with the blacks, my companions' and suggested she 'would never have preferred the charge against him but at the instance (sic) of her Husband, a white man'.²²⁹ Finally, Fitzroy was asked to:

take into your favourable consideration the fact of so severe a sentence as two years imprisonment upon one who has all his life been accustomed to live without a home, and range free and unfettered wheresoever his inclination might lead him.²³⁰

Whether these points arose through Mickey having internalised colonial stereotypes, or simply conveyed the standpoint of MacDonald as the writer, they nevertheless demonstrate that, despite the precedent established in *R v Murrell 1836*, an impression remained that crimes committed *inter se* were not as serious as those perpetrated by Aboriginal people against colonists. It also mobilised long-standing colonial concerns, albeit in the 'noble savage' genre, that there was something inherently amiss in locking up Aboriginal men who had once wandered freely over the land living an apparently uncomplicated and unfettered life.

²²⁷ Police Office Mudgee to the Colonial Secretary, 26 December 1854, 55/161 4/3408, SRNSW.

²²⁸ Mickey to Fitzroy, 13 November 1854, 54/9863 4/3408, SRNSW.

²²⁹ *ibid.*

²³⁰ *ibid.*

The next year, following a change in Governor from Fitzroy to Denison, Mickey petitioned again. The Aboriginal prisoner made his mark at the bottom of the short document dated 16 May 1855 in which Denison was beseeched to mitigate Mickey's sentence in view of his having already served two years and three months in confinement and having been of good conduct throughout. The character of the prosecutrix was further attested to negatively and it was pointed out that since preferring charges against Mickey she had been 'twice committed to Gaol under the Vagrant Act'.²³¹ The Chaplain at the Gaol, Thomas Sharpe, supported Mickey's petition, describing his conduct as 'very exemplary'.²³² Sharpe wrote that 'he appears mild, quiet and very obedient'.²³³ He also cautioned the Governor that Mickey's health was 'suffering from long imprisonment'.²³⁴ It was the Chaplain's impression that 'long confinement ... causes among the Aborigines a kind of melancholy and great depression'.²³⁵

In October 1855, Mickey commissioned Sharpe to write a third petition that was then forwarded to the Governor by Palmer, the Visiting Justice to Bathurst.²³⁶ Palmer likewise endorsed Mickey's petition, citing the man's good conduct whilst under confinement. He also expressed concerns for the prisoner's health. While stating that it had not deteriorated to the point where a medical certificate could be obtained, Palmer observed that he was 'fully aware that the Aborigines when once their spirits became depressed (as his are) very soon pine away and sink'.²³⁷ Yet another petition followed on

²³¹ Mickey to Governor Denison, 16 May 1855, 55/4679 4/3408, SRNSW.

²³² Chaplain Thomas Sharpe to the Colonial Secretary, 18 April 1855, 55/4679 4/3408, SRNSW.

²³³ *ibid.*

²³⁴ *ibid.*

²³⁵ Sharpe to the Colonial Secretary, 18 April 1855, 55/4679 4/3408, SRNSW.

²³⁶ Visiting Justice Palmer to the Colonial Secretary with attached endorsement from Sharpe, 26 October 1855, 55/11060 4/3408, SRNSW; Mickey to Denison, undated, 55/11060 4/3408, SRNSW.

²³⁷ Palmer to the Colonial Secretary (enclosure), 26 October 1855, 55/11060 4/3408, SRNSW

19 July 1856 and this time Mickey's release from custody was secured.²³⁸ A combination of factors including the nature of the crime and alleged race and character of the victim, perceptions of Mickey's behaviour whilst in custody, and concerns for his health and the wellbeing of Aboriginal inmates led to the eventual mitigation of his sentence.

In conclusion, the mid-nineteenth century heralded a transition in colonial attitudes towards the criminalisation and incarceration of Aboriginal people. The end of the transportation era for New South Wales and the gradual closure of its penal stations saw the beginnings of a shift whereby Aboriginal people began to be sent to gaol rather than being exiled to penal islands. Yet throughout the two decades after transportation to New South Wales officially ended, Aboriginal men continued to be sent as convicts to perform hard labour on Cockatoo Island. While men such as Robinson and Eipper lobbied for a discrete island or penal station to be set aside for their exclusive use, Aboriginal convicts were instead intermingled with those considered at the time to be society's worst offenders. Given the extent of the taunting received by some *en route* to Cockatoo Island, it is unlikely that these convicts were well-disposed towards having Aboriginal men in their midst. The hopes held out by Gipps for Aboriginal convicts' education and improvement never eventuated. Wrangling between different interested parties coupled with the men's rapid demise once in custody resulted in Cockatoo Island becoming yet another failed experiment in the civilisation of Aboriginal people.

As with earlier trials, many of the men whose cases formed the basis of this chapter were charged with criminal offences that had arisen out of their actions of

²³⁸ Mickey to Denison, 19 July 1856, 56/616 4/3408, SRNSW.

resistance to colonial intrusion. These men were sentenced to punishments that were designed to serve as exemplars to their respective communities so as to dissuade their countrymen from committing similar acts. This formed part of the rationale as to why death sentences ought to be reprieved and substituted with periods of hard labour within the convict system and in the colonial gaols. However, Aboriginal men transported as convicts throughout the first half of the nineteenth century had reached maturation with cultural frameworks where incarceration was not the norm. Being contained within convict establishments and gaols inevitably led to a rapid deterioration in their health, usually closely followed by death.

Aboriginal deaths in custody were attributed to a range of reasons of a physical, mental, and spiritual nature. Lung conditions like tuberculosis and pneumonia as well as related illnesses such as pleurisy saw many of these men confined to hospital, sometimes on multiple occasions. Confinement whether within the prison cell or hospital ward was inevitably associated with depression, referred to by colonial authorities as pining away. Such ill health was in some cases exacerbated by the harsh treatment meted out to Aboriginal prisoners during their apprehension and conveyance to gaol. Some received injuries during the process from which they never recovered. Separation from kin and country also took its toll, as did a change in diet to prison fare.

As changes in the transportation system preceding its discontinuance saw more men confined on Cockatoo Island, Aboriginal convicts and the officials charged with their care were subject to increased levels of surveillance as their spatial separation from the metropolitan centre was drastically reduced. This also reduced the temporal separation as correspondence could be exchanged within much shorter timeframes.

Centralising convicts on Cockatoo Island saw a greater concentration of Aboriginal convicts held in the same place over a relatively short period of time. This, in turn, led to colonial officials in offices as high as the Governor becoming aware of the extraordinarily high mortality rate suffered by Aboriginal prisoners. Official instructions were issued in an effort to ameliorate this problem. While this resulted in some Aboriginal men being kept in hospital or discharged early from custodial sentences because their health had deteriorated markedly, it had no impact in the colonial courtrooms where prison terms continued to be imposed on Aboriginal defendants.

The end of the 1840s marked a major turning point in the metropolitan centre in terms of addressing Aboriginal deaths in custody, yet it also heralded a new era in regional towns such as Maitland and Bathurst. As frontier conflict gave way to townships in so-called pacified districts, charges faced by Aboriginal defendants began to change. Aboriginal men and women began to be actively excluded from townships through the strategic deployment of the Vagrant Act under which they were criminalised as rogues and vagabonds. A situation therefore resulted whereby in Sydney orders were being given to release ailing Aboriginal prisoners from gaol to return them to towns from which they were becoming increasingly marginalised and excluded.

During the 1850s, at least one Aboriginal prisoner took matters into his own hands and utilised the nascent official colonial awareness of the plight of Aboriginal men in custody successfully to negotiate his own release, albeit with the support of authoritative colonial figures. While increasing numbers of ailing Aboriginal prisoners found their freedom on the basis of their ill health after their plight had been officially recognised, arguably too little was done for them too late. Some men found incarceration

so challenging that they ended up being removed to the lunatic asylum while still others were too ill to be released from the prison hospital. Ironically, many Aboriginal defendants were reprieved from the hangman's noose only to die within weeks or months of being shipped to Cockatoo Island, a place that truly deserved its nineteenth-century descriptor, 'the convict black-hole of New South Wales'.²³⁹

²³⁹ Mundy. *Our Antipodes*, p. 102.

Conclusion

Throughout the first half of the nineteenth century, a specific manifestation of racial ideology converged with the imposition of the rule of law over Aboriginal people in New South Wales. These factors produced the phenomenon of Aboriginal convicts, a cohort that has until now been the subject of remarkably little study. Empirical evidence has demonstrated that at least sixty Aboriginal men were incorporated into the convict system at places as far a field as Norfolk Island and Van Diemen's Land and as close to Sydney as the penal islands at Port Jackson.

The mechanisms by which Aboriginal men were exiled changed over time yet three distinct phases are discernable: the banishment of male 'hostile natives' at the behest of the Governor during the early decades of colonial contact; sentences of transportation (or death sentences commuted to transportation) handed down in the colonial courtroom to Aboriginal men for 'crimes' arising out of frontier conflict; and a mid-century transitional period when vagrancy legislation started to be utilised to incarcerate Aboriginal men and women living on the fringes of outlying townships. A small number of Aboriginal men were incorporated into the convict system without any due process being adhered to at all, while at least one was illegally held in captivity beyond the expiration of his sentence.

The *ad hoc* nature of Aboriginal inclusion in the convict system reflected the extemporised nature of the penal colony itself. As Bruce Kercher observed, the colony was based on 'a number of contradictory elements, [including] bits of formal English law, the policies of the British government and its legal advisers, the governors' orders and proclamations, the practices of convicts and their masters, [as well as] the decisions

of colonial judges'.¹ Some of these policies and practices changed according to the whims of the personnel occupying pertinent offices at any given moment. Personal whim on the part of the judiciary played a part in determining the destiny of Aboriginal men whose fate came to rest in their hands, with their capriciousness being heavily influenced by racial thought.

Self-congratulatory views of what was termed the Anglo-Saxon race were enunciated with particular clarity in an article printed in the *Maitland Mercury* in 1847. Saxons were declared to be 'the ruling race', a position attained by virtue of 'its energy', to which it owed 'first, its liberty; secondly, its progress in science, literature, and commerce; and thirdly, its extensive dominions'.² Britain was described as 'the foremost power in the world', a position construed to be a natural manifestation of 'the Saxon character'.³

Set against such gratifying characterisations of the colonising population was the image of the uncivilised, inferior, and idle savage. Many within colonial society subscribed to, and circulated, unfavourable views of the colony's Aboriginal inhabitants. For example, Sergeants Stapleton and Bennett caused an uproar in Melbourne when, on Monday 10 April 1843, they engaged in a brawl to settle 'a ticklish point' as to the 'merits of their respective commands'.⁴ Stapleton of the white police took exception when Bennett, who was in charge of a 'squadron of mounted black beetle', suggested that his Native Police were the equal of their white counterparts.⁵ Public outrage generated by

¹ Bruce Kercher. 'Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700-1850'. *Law and History Review*, Volume 21, Issue 3, 2003, pp. 583-84.

² *Maitland Mercury*, 13 February 1847, p. 4.

³ *ibid.*

⁴ *Melbourne Times*, 15 April 1843, p. 2.

⁵ *ibid.*

this event did not relate to whether Aboriginal people were the equal of whites. Indeed, the *Melbourne Times* described Stapleton as being ‘very naturally horrified’ at such a suggestion.⁶ Instead, it was the decision by the police to hold the inquiry into the matter behind closed doors that attracted the opprobrium of the press.

People ranging from ministers of the cloth to hutkeepers at the frontier recorded unflattering observations of indigenes. Aboriginal people were sometimes portrayed in animalistic terms and were situated either on the very lowest rungs of the social ladder, or placed outside of the class structure altogether. Some descriptions of them were preceded by an apology, indicating that the imagined white, and therefore civilised, readership could consider itself sullied by such lurid details. However, circulating caricatures of Aborigines was critical to the colonial state in naturalising the rapid decline in indigenous population numbers, and in legitimating their displacement. This had very real consequences for Aboriginal people in that it denied Aboriginal men due recognition as martial enemies, although the centrality of contestation over land to ongoing frontier conflict was acknowledged.

As discussed throughout this thesis, because Aboriginal men who engaged in acts of resistance against colonists in New South Wales were treated as criminals rather than martial foes, a number were consequently incorporated into the convict system. The actual numbers tried and convicted, however, were more often than not scarcely indicative of the scale of Aboriginal militant action that had led to their arrests. In instances involving large scale conflict where men numbering in the dozens or hundreds and drawn from several tribes mounted attacks on colonists, or were perceived to be posing a threat, only about ten *per cent* were taken into custody to face criminal charges.

⁶ *ibid.*

As well as being expedient in terms of upholding the mythology that New South Wales was a settled colony, having Aboriginal men come under the jurisdiction of the police rather than the military was predicated, in part, on the basis of the men's alleged inability to co-ordinate an effective resistance against the colonial intrusion. As nineteenth-century commentator Roderick Flanagan remarked:

the warfare which the blacks waged upon the stations [in 1840-42] ... was universal, implacable, and incessant. So simultaneous, indeed, and so general was the movement that, **did we not know from the habits and conditions of the blacks that such a thing would be impossible**, a belief would have been encouraged that the onslaught of the aborigines on the lives and property of the settlers was the result of a perfect organization, effected with all the aids of negotiation, secret intrigue, and general assemblies.⁷

Flanagan's observation neatly encapsulates the ambiguities evident in colonial attitudes towards Aboriginal people. Despite a plethora of empirical evidence to the contrary, the colonists' investment in the belief of their own superiority was such that notions of Aboriginal inferiority and difference were conveniently upheld. This is consistent with Homi Bhabha's assertion that 'an important feature of colonial discourse is its dependence on the concept of 'fixity' in the ideological construction of otherness'.⁸ Such ambiguities are further illustrated through the way in which Aboriginal men, while 'othered', also theoretically enjoyed ostensibly the same status as all other members of colonial society as British subjects. This, too, contributed to the denial of their capacity to be a martial foe. In 1839, Governor George Gipps declared that:

As human beings partaking of our common nature – as the Aboriginal possessors of the soil from which the wealth of the country has been principally derived – and as subjects of the Queen, whose authority extends over every part of New Holland the Natives of the Colony have an

⁷ Roderick Flanagan. *The Aborigines of Australia*, Edward F. Flanagan and George Robertson and Company, Sydney, 1888, pp. 130-31. (My emphasis.)

⁸ Homi Bhabha. *The Location of Culture*, Routledge, London, 1994, p. 95.

equal right with the people of European origin to the protection and assistance of the Law of England.

To allow either to injure or oppress the other, or to permit the stronger to regard the weaker party as aliens with whom a war can exist, and against whom they may exercise belligerent rights, is not less inconsistent with the spirit of that Law, than is at variance with the dictates of justice and humanity.⁹

In Gipps' schema, the weaker party to whom he referred comprised Aboriginal people who, while they were acknowledged as the original owners of the soil on which the colony was being built, were viewed by some colonists as interlopers on lands that had once been their sole preserve. Squatters, pushing at and beyond the boundaries of settlement, exhibited a tendency to take care of what they saw as their 'Aboriginal problem' in ways that were decidedly at odds with colonial law. This partially accounts for the relatively low number of Aboriginal convicts. An unknown number of Aboriginal men became the victims of 'summary justice' dispensed mercilessly at the frontier; their cases were never heard in the colonial courthouses of New South Wales.

Colonial discourses of Aboriginality inflected the ways in which the judiciary perceived and dealt with Aboriginal defendants. The colony's first Judge Advocate Richard Atkins' views about the resemblance between 'man in his lowest condition' and 'large and small orang-outangs' informed his decision in the early years of the colony that Aboriginal men ought not to stand trial for fear of making 'a mocking of Judicial Proceedings'.¹⁰ Half a century later, Alfred Stephens' passionate outburst at a public meeting during which he touted the necessity of exterminating Aboriginal people if they could not be captured

⁹ *Sydney Monitor*, 29 May 1839, p.2.

¹⁰ Richard Atkins. 'The New South Wales Journal of Richard Atkins', *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 11 November 2005 at <http://www.law.mq.edu.au/scnsw/html/atkins_1792.htm>; 'Atkins' Opinion on the Treatment of Natives', *HRA*, Series I, Volume V, p. 504.

revealed an attitude towards indigenes that doubtless influenced his later sentencing decisions. All of the Aboriginal defendants who appeared before him at the September 1843 circuit court at Maitland were condemned to death by hanging.

In his reminiscences, the then retired Chief Justice Roger Therry (counsel to the Attorney-General during the trials resulting from the Myall Creek massacre) revealed similar racial bias. Questioning the basis on which men ought to be enfranchised, Therry raised the spectre of men recently discharged from the colony's gaols being allowed to vote at an election. Then he delineated what he thought to be an even worse scenario:

a wild black fresh from the Bush, with whose intelligence a gorilla might well vie, if he but reside six months in a district, has an equal right to vote with the wealthiest and most intelligent commoner in the land. ... Several of the half-caste inhabitants of New South Wales ... have been placed on the electoral roll under the universal manhood suffrage system. These persons are known to be imbued with the wandering habits, and follow the forest life, of the aboriginal parent. When required on the day of the election at the polling booth, they may probably be found up a gum tree, chasing an opossum, or cooking a kangaroo in the bush of Australia. As no property is required to qualify a man either to vote or to be a *Représentant de people*, "The Honourable Billy, the black fellow," from Illawarra, or the Honourable "Moon-eyed Jemmy," from the Clarence, may enter the House of Assembly, and rise to be a minister of state.¹¹

Consistent with his contemporaries, Therry viewed Aboriginal people to be grossly inferior to the colonial population, with such inferiority being embedded in their genetic make up. Because of their allegedly low intelligence and lack of religious precepts, he considered Aboriginal defendants as 'objects of great commiseration', particularly in instances where they were condemned to death.¹² Like his fellow judges, Therry advocated equality of all before the law but admitted that Aboriginal men 'suffer[ed] loss of life for offences for which the white man only suffers transportation or hard labour on

¹¹ Roger Therry. *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, (London, 1863), reprint, Sydney University Press, Sydney, 1974, p. 459.

¹² *ibid.*, p. 287.

the roads'.¹³ Discrepancies in sentencing on the basis of perceived racial characteristics also contributed to the relatively low number of Aboriginal convicts; the colonial judiciary preferred to sentence Aboriginal men to death rather than transportation.

Just as colonists viewed and described Aboriginal people using race-based theories and classificatory systems, indigenes also described and categorised the intruders. Sometimes distinctions were drawn between those who came freely – and were therefore held to be personally responsible for expropriating land – and those who were compelled to relocate to the colonies as convicts, with the latter being treated more leniently by militant parties of Aboriginal men. More subtle distinctions were sometimes made between various classes of convicts. For example, more benevolent treatment was meted out to convicts employed under the auspices of the Australian Agricultural Company around Newcastle than to other convicts in the area.

At times, Aboriginal men deployed whiteness as a racial marker as part of a discursive strategy that emphasised difference and identified individuals as belonging to a population with which they were at enmity. This was demonstrated, for example, through Aboriginal men in the vicinity of Maitland accosting a colonist who ventured in the bush, addressing him as a 'white fellow', and threatening to hang him in retaliation for the judicial executions of two of their countrymen.¹⁴ On another occasion, Billy Roberts – an Aboriginal man being tried for assaulting a colonial woman – told the court in his defence that hers was the first white blood that he had spilled.¹⁵ This demonstrated a degree of political astuteness on his part, and an awareness of the broader significance

¹³ *ibid.*, pp. 286-87.

¹⁴ *Maitland Mercury*, 11 November 1843, p. 3.

¹⁵ *Sydney Morning Herald*, 29 December 1846, p. 2.

attached to acts of inter-racial violence within a context of frontier conflict. Because of an over-riding desire on the part of the colonial administration and judiciary to assert and maintain the rule of law in the colony, and to dissuade colonists from taking the law into their own hands, specific strategies were deployed within the law courts to facilitate the trials of Aboriginal defendants.

Notwithstanding a propensity on the part of some to favour the death sentence, the notion that Aboriginal people were British subjects and ought therefore to be treated the same as everyone else facilitated their banishment and transportation by successive colonial governors and the colonial judiciary. While holding trials that resulted in the transportation of Aboriginal men was justified on the basis of the sameness of all British subjects, paradoxically such performances were staged in ways that reinscribed colonial notions of Aboriginal difference. After initial uncertainty about their status, by the middle decades of the nineteenth century Aborigines had ‘as a matter of legal theory’ become subject to the laws and punishments brought to New South Wales by the colonists.¹⁶

Coming under the protection of the British Crown and therefore under the auspices of colonial law meant, as Alex Castles has pointed out, that ‘the burdens for the Aborigines ... tended to far outweigh the advantages which some of the higher-minded colonial administrators believed might follow from this’.¹⁷ They faced ‘insuperable difficulties’ when embroiled in legal proceedings, whether as plaintiffs or defendants.¹⁸ Not only were they unfamiliar with the English-derived laws under which they were tried, they were also not *au fait* with colonial courtroom practices and procedures. Many

¹⁶ Alex Castles. *An Australian Legal History*, The Law Book Company Limited, Sydney, 1982, p. 516.

¹⁷ *ibid.*

¹⁸ *ibid.*, p. 523.

spoke little or no English. The colonial courtroom therefore became the site of a phenomenon delineated by Frantz Fanon in which:

Every colonized people – in other words, every people in whose soul an inferiority complex has been created by the death and burial of its local cultural originality – finds itself face to face with the language of the civilizing nation; that is, with the culture of the mother country.¹⁹

To facilitate the trials of Aboriginal men, court interpreters sufficiently competent in the defendant's language were engaged to explain the nature of the charges and evidence to them as well as to elicit their pleas and responses to sentencing. Such was the importance of this mechanism that some men were retained in custody well beyond a legally acceptable period and yet others discharged when a suitably qualified interpreter was unable to be found. In an act of colonial ventriloquism, in some instances Aboriginal men were used to provide the necessary translations within the courthouse while a white man acted as the officially sworn interpreter. As well as exhibiting some concern for the disadvantaged Aboriginal prisoners, such arrangements were put in place to assuage concerns that colonists might otherwise perceive such events to be farcical.

For a range of reasons extending beyond the lack of availability of an interpreter, not all Aboriginal men taken into custody were subsequently put on trial. Some escaped soon after being taken into captivity, while others successfully negotiated their own release. Others died as a result of injuries inflicted during their arrest, or received while being marched sometimes hundreds of miles to the nearest township at which their case could be heard. For those Aboriginal defendants whose cases eventually went to trial, most had learned enough about the ways in which the legal system operated to know that they ought to plead 'not guilty' to charges brought against them in the criminal courts.

¹⁹ Frantz Fanon. *Black Skins, White Masks*, (originally published in French under the title *Peau Noire, Masques Blancs*, Editions Du Seuil, Paris, 1952), Pluto Press, London, 1986, p. 18.

Some, though, remained naïve enough to breach this convention. In a case heard before Chief Justice Dowling in the Supreme Court of New South Wales in Sydney on 9 November 1840, seven Aboriginal men from the vicinity of the Macquarie River faced charges of cattle stealing. Six of the defendants denied the charges, but the seventh, Tommy Boker, ‘said the beef was good’.²⁰ It was later claimed in court that Aboriginal men other than those seen consuming the beef had actually been responsible for killing the beasts. There was some confusion over whether Aboriginal defendants could understand the notion of having received stolen property, and doubts were entertained as to the legality of the charges they faced. The jury returned a verdict of ‘not guilty’, following which:

The seven Aborigines were then placed at the bar, and told that if they or any of their tribe were found spearing the cattle of white men, they would be taken up and hanged. They said they would hunt for kangaroos and opossums (sic) for themselves, and if they saw any black men spearing cattle they would bring them prisoners to the white men.²¹

This further illustrates the point made by Therry that Aboriginal defendants were more likely to suffer capitally than white defendants convicted of the same crimes, as cattle duffing often resulted in sentences of transportation for non-Aboriginal prisoners. It also demonstrates the colonial tendency to endeavour to coercively instruct a small group of Aboriginal people with a view to having them disseminate colonial precepts amongst their kin. In this particular instance, after having given an undertaking to convey any recalcitrant Aborigines to colonial authorities and expressing a desire ‘to get back to their

²⁰ R v Dundomah and Others 1840, *Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 18 December 2004 at <[http://www.law.mq.edu.au/scnsw/cases1840-41/RvDundomah, 1840.htm](http://www.law.mq.edu.au/scnsw/cases1840-41/RvDundomah,1840.htm)>

²¹ *ibid.*

old ground', the seven Aboriginal prisoners were discharged to the local Benevolent Asylum to await their repatriation.

As well as the presence of interpreters who acted as conduits between the colonial judiciary and Aboriginal defendants, other markers of Aboriginal difference within the colonial courthouses were apparent. These were significant, and included their inability to sit as jury members or to provide sworn evidence. The former situation was ascribed to their unlettered state, while the latter circumstance arose through Aboriginal people being considered pagans and therefore lacking the capacity to take the required oath on the Christian bible.

On some occasions, when given the choice between a civil or military jury, Aboriginal defendants requested a jury of blackfellows.²² Despite some debate ensuing as to whether Aboriginal people ought to be treated as aliens and therefore be seen as entitled to a jury comprised fifty *per cent* of their countrymen, Aboriginal defendants were universally denied the possibility to have their cases heard before a jury of their peers. This was in part because Aboriginal people were considered to be British subjects, and therefore in law no distinction was to be drawn between them and other British subjects, but also because Aboriginal people were not considered to be sufficiently civilised as to be able to discharge the duties required of jurymen. A further complication was the incapacity of Aboriginal people to swear the oath required of either jurymen or witnesses.

²² See, for example, *R v Binge Mhulto 1828, Decisions of the Superior Courts of New South Wales, 1788-1899*, Bruce Kercher (ed). Division of Law, Macquarie University, Sydney, accessed on 15 October 2007 at <http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_binge_mhulto__1828.htm>; and *R v Jackey 1834, 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/Cases1834/html/r_v_jackey__1834.htm>

As Kercher suggested, excluding Aboriginal people from providing evidence in court ‘encouraged the continued reprisals between Aborigines and the colonists ... When whites stuck together, their superior weaponry was matched by the legal tool of this rule of evidence and reinforced by the general cultural gap between blacks and whites’.²³ As well as fomenting inter-racial violence, contemporary commentators such as the missionary Lancelot Threlkeld suggested that the incapacity of Aboriginal people to provide evidence in court contributed to alliances between bushrangers and Aborigines. In his opinion, at times the former incited the latter in their ongoing attacks against the persons and property of settlers.

On at least one occasion, following the extension of colonial law over cases solely involving Aborigines – or crimes committed *inter se* – Aboriginal evidence was admitted at a local courthouse for the purpose of indicting another Aboriginal man on a charge of murdering an Aborigine.²⁴ This is indicative of a distinction being drawn between cases involving intra-racial as opposed to inter-racial violence, as unsworn Aboriginal testimony was never considered to be admissible as evidence against a colonial defendant.

Following a failed attempt in 1839 on the part of the New South Wales legislature to provide for the admissibility of Aboriginal evidence, the situation was finally remedied in 1876. The ‘Evidence Further Amendment Act 1876’ (40 Vic. No 8) provided for a declaration to be made in lieu of an oath so that Aboriginal people could finally provide

²³ Bruce Kercher. *An Unruly Child: A History of Law in Australia*, Allen & Unwin, St Leonards, 1995, p. 16.

²⁴ R v Jacky Jacky 1844, VPRS, 30/P/O, Unit 3, File 1-4A-1.

evidence in the colony's law courts.²⁵ This, however, came after the point at which transportation had ceased.

The rationales underpinning the punishments meted out to Aboriginal convicts by the colonial governors and later by the judiciary were also predicated on the basis of difference. Colonial law provided nominal protection for colonists and Aboriginal men alike. Because of the difficulties encountered in bringing Aborigines to trial, it was considered that a colonist situated at a considerable distance from the nearest township could well be tempted to 'take the law into his own hands'.²⁶ Through imposing harsh penalties, members of the judiciary such as à Beckett found it expedient to impose an 'exemplary' sentence that would 'instil terror' into the defendant's compatriots and persuade colonists of the efficacy of the colony's law courts in dealing with Aboriginal offenders.²⁷

Transporting Aboriginal men was also touted as providing a more efficacious punishment than judicial executions. It was anticipated that in the absence of a corpse, the men's compatriots would be left forever wondering what had become of them. However, there is scant evidence to suggest that Aboriginal people generally were any more responsive to transportation as an exemplary punishment than they had been to other coercive means to have them conform more closely to the behaviours desired of them by the colonising population. Aside from a few enquiries in the Port Phillip District from family members as to the fate of their kinsmen, and an apparently quieter period in the Brisbane Water District following the transportation of a cohort of Aboriginal men,

²⁵ McCorquodale. *Aborigines and the Law*, p. 20.

²⁶ à Beckett to Lonsdale, 6 January 1847, 47/28 4/2779.3, SRNSW.

²⁷ *ibid.*

indigenous actions against colonial intruders continued to occur. Aiming to subdue local indigenes through transporting those considered ringleaders was therefore an intended rather than an evidentiary outcome.

Notions of Aboriginal difference informed the treatment of Aboriginal men within the carceral systems. Aboriginal people were already struggling against what they perceived to be the anomalies of the state and were also not socialised to accept incarceration as one of its legitimate functions. It was widely recognised that they would endeavour to escape from captivity at any given opportunity. Some Aboriginal men successfully escaped colonial custody, while others died in the process of trying. Chains, sometimes fastened around a man's neck, and leg irons were regularly used when transporting Aboriginal prisoners between gaols to prevent them from absconding. Wounds resulting from the imposition of such restraints contributed to the premature death of some Aboriginal convicts.²⁸

Within the convict system, the reinscription of Aboriginal difference is evident from the earliest years of exile when Aboriginal convicts were put to work as blacktrackers in Van Diemen's Land during the 1810s. Such notions of difference also informed the Van Diemen's Land Executive Council's decision in 1835 not to accept a cohort of Aboriginal convicts from New South Wales. Having already dealt with its own 'Aboriginal problem' through a combination of extermination and expulsion, the Van Diemen's Land administration was not willing to accept what it saw as an influx of Aboriginal criminals. When this particular cohort was sent instead to the prison hulk adjacent to Goat Island at Port Jackson, colonial notions of their difference were further

²⁸ See, for example, *R v Jackey* 1834.

underlined through concerns that expense and effort might be wasted on tutoring them in English ways to which some colonists thought they would never become accustomed.

Similar notions of difference were evident when disputes broke out between clergy of different denominations over who ought to have the task of converting the savages to their religion. Missionaries as well as men appointed as protectors of Aborigines also advocated for those viewed as Aboriginal criminals to be sent to discrete locations or exclusive penal islands where they could then be ministered to with a view of achieving conversions and civilising the natives.

By the middle of the nineteenth century, colonial officials from the Governor down eventually acknowledged the significantly higher rate of Aboriginal deaths in custody compared with non-Aboriginal male convict deaths. Explanations by contemporary observers such as Therry associated the high death rate with the restrictions imposed on what were perceived to be the wandering habits of the savages:

The natives, condemned by our tribunals, seldom endure the restraint incidental to sentences of close confinement. Their lives have been spent in roaming their native forests, and, when condemned to imprisonment or labour on the roads, in a few months they pine away and die.²⁹

The explanatory framework was therefore race-based and, when viewed from a present day perspective, was misguided. Nevertheless, a policy was implemented under which Aboriginal convicts were kept under increased surveillance with a view to securing their early release should their health appear to be endangered through longer confinement. This demonstrates that the higher echelons of the colonial administration drew a distinction between Aboriginal convicts and other convicts. However, a significant

²⁹ Therry. *Reminiscences of Thirty Years' Residence in New South Wales and Victoria*, p. 287.

shortcoming was evident. The policy pertained solely to the treatment of Aboriginal people within the carceral system and therefore had no impact on the judiciary. Colonial judges continued to send Aboriginal men to Cockatoo Island throughout the two decades following the official cessation of transportation to New South Wales in 1841 where their mortality rate remained extraordinarily high.

Ironically, the few ailing Aboriginal men who secured a premature release from custody were usually returned to areas around the same townships from which Aboriginal people were increasingly being marginalised and excluded. The middle of the nineteenth century was a period of transition in terms of the prosecution and persecution of Aboriginal people. Aboriginal men continued to be charged with crimes arising out of activities that would today be described as constituting political resistance, yet at the same time both Aboriginal men and women in New South Wales began to face charges under vagrancy laws. Dispossessed Aboriginal men and women living on the outskirts of the larger, outlying townships began to be gaoled as rogues and vagabonds.

Preliminary materials consulted during the course of this research indicate that the application of vagrancy legislation to Aboriginal people is a pertinent topic for further investigation. Early indications suggest that the application of vagrancy legislation to Aboriginal people extended beyond confinement within colonial gaols. For example, it was used to facilitate the surveillance and exclusion of Aboriginal people in and around towns.

While this thesis has written Aboriginal convicts into Australian historiography, there remains scope to situate this relatively small yet significant cohort within a broader

comparative perspective. Maori and Khoena men from New Zealand and the Cape Colony respectively were also exiled to the Australian penal colonies. Further research has the potential to illuminate some of the differences in approaches taken by different colonial administrations in the management of their respective indigenous populations through the application of transportation and other sentencing options.

Intriguingly, preliminary research has revealed that Khoena convicts had many more transgressions recorded on their Van Diemen's Land convict conduct records within the same period than either their Maori or Aboriginal contemporaries. It is possible to speculate that this phenomenon could be linked to the Khoena convicts' status as twice-colonised people. Further investigation is required to ascertain why Khoena convicts demonstrated a greater propensity towards committing transgressions than their New South Wales or New Zealand counterparts.

It has also become evident in the course of this research that Maori convicts were treated very differently within the convict system from either Aboriginal or Khoena convicts. Despite New Zealand intentions to have the men sent to one of the harshest penal stations, Van Diemen's Land authorities bowed to local public pressure and shipped them instead to the probation station at Maria Island. While in residence there, they were kept separately from other convicts, put to work tending vegetable gardens, and overseen by a man conversant with Maori language. Despite having been sentenced to transportation for life, most of the Maori were repatriated to New Zealand after serving only just over a year in captivity.³⁰ Paying further attention to this cohort provides the

³⁰ See John Tattersall. *Maoris on Maria Island: Punishment by Exile*, Hawke's Bay Art Gallery and Museum, Napier, 1973; and 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.

potential to compare and contrast racial attitudes both within and between the colonies of New Zealand and Van Diemen's Land. Initial impressions indicate that colonists in Van Diemen's Land constructed Maori quite differently from colonists in New Zealand, and perhaps utilised these differing constructions as a basis from which to compare favourably their own treatment of indigenes with that meted out by their neighbours across the Tasman Sea.

The esteem in which Maori convicts were held remains evident today as, most unusually for any convict, a headstone dedicated to the memory of Hohepa te Umuroa who died on Maria Island stands in the small colonial cemetery there.³¹ No such monuments exist dedicated to any of the Aboriginal convicts who died in captivity. Despite speculation in the *Australian* following the Brisbane Water trials that 'removal from their tribe forever' would result in the uncertainty of the fate of Aboriginal convicts ensuring that their stories would be preserved 'as a tradition, long after the lives of the present generation', these men have until now been forgotten.³²

³¹ Hohepa te Umuroa's remains were repatriated to New Zealand in 1988. See Hopkins. "Fighting Those Who Came Against Their Country", p. 67.

³² *Australian*, 17 February 1835, p. 2.

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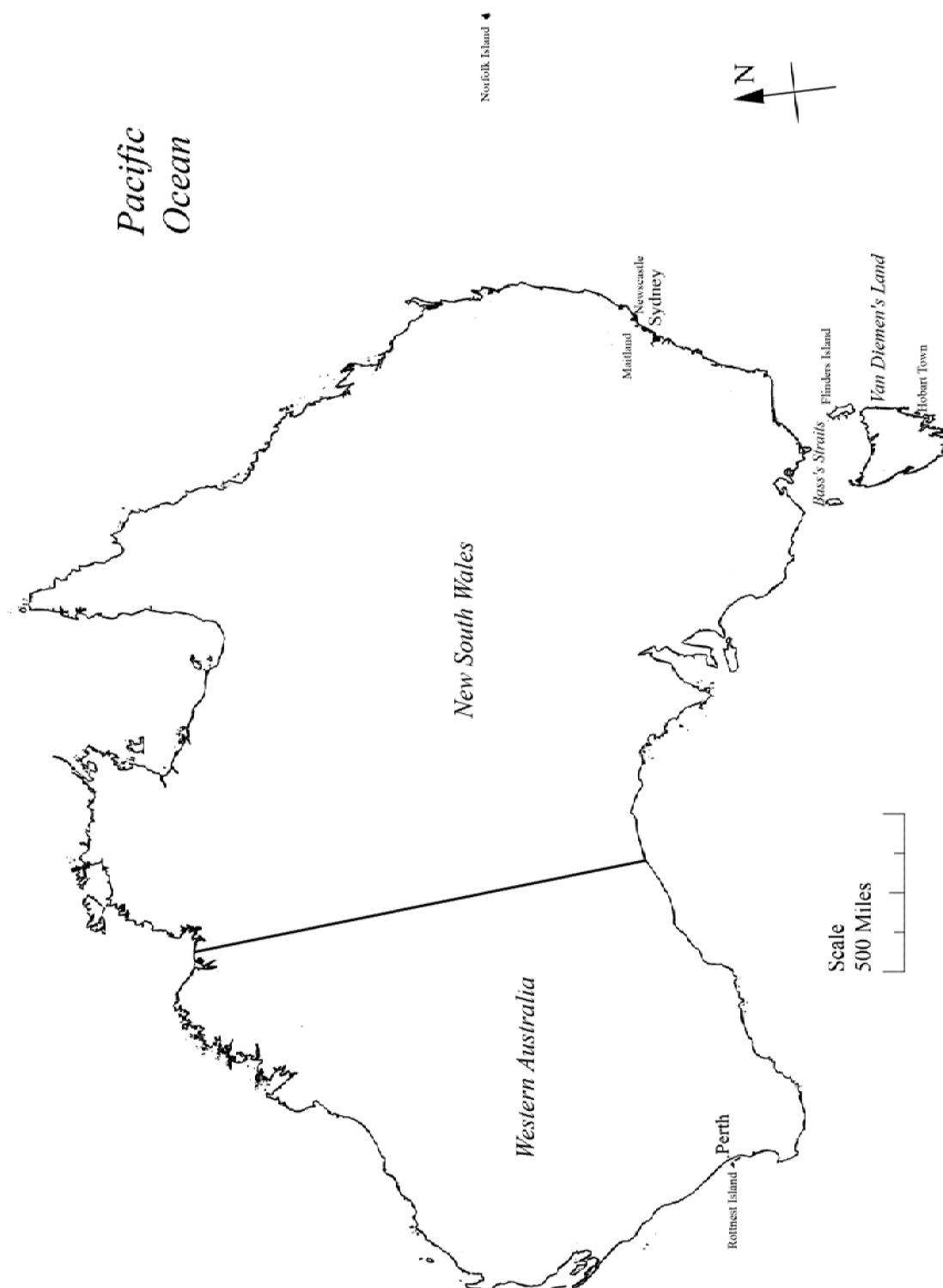
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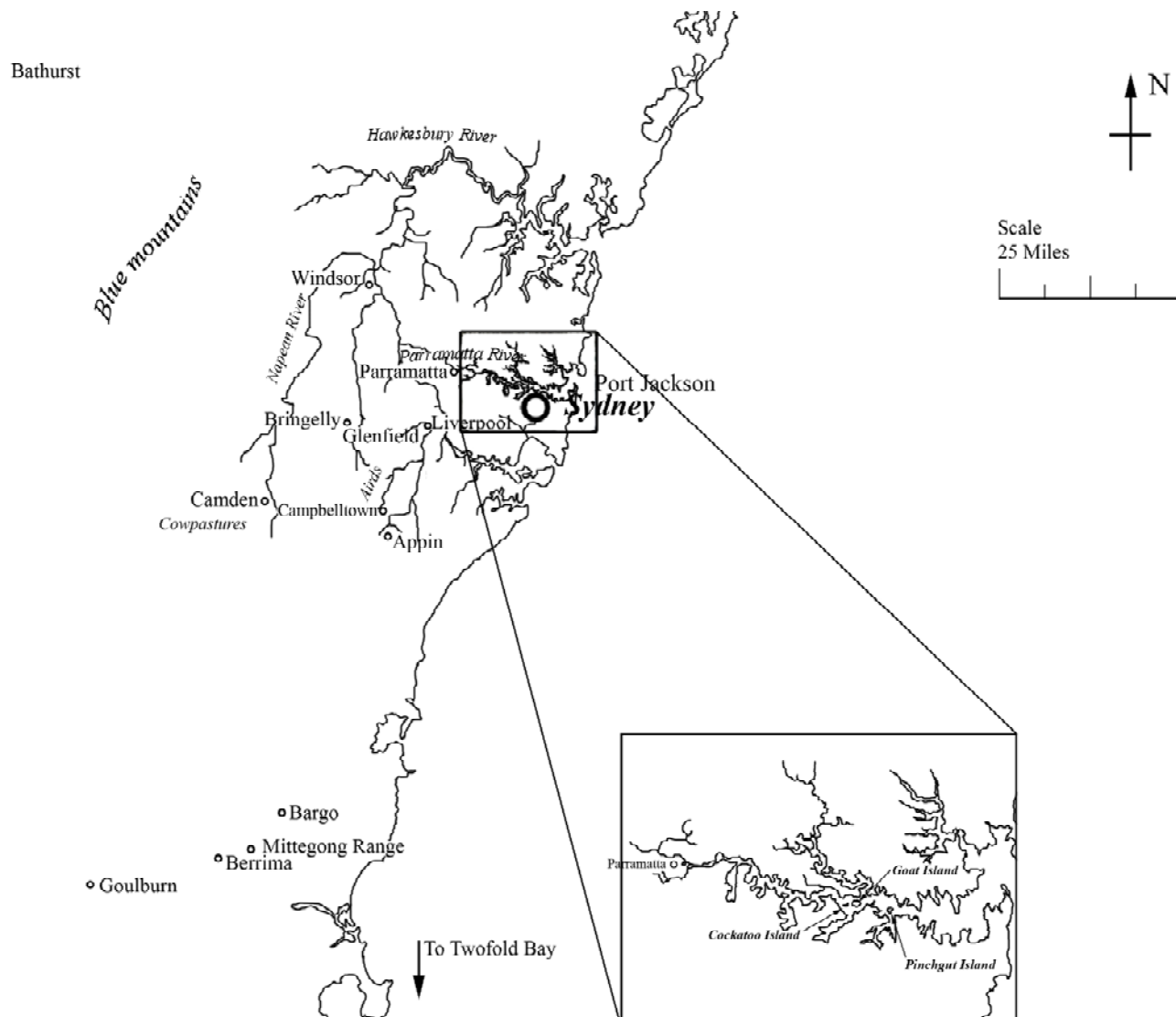
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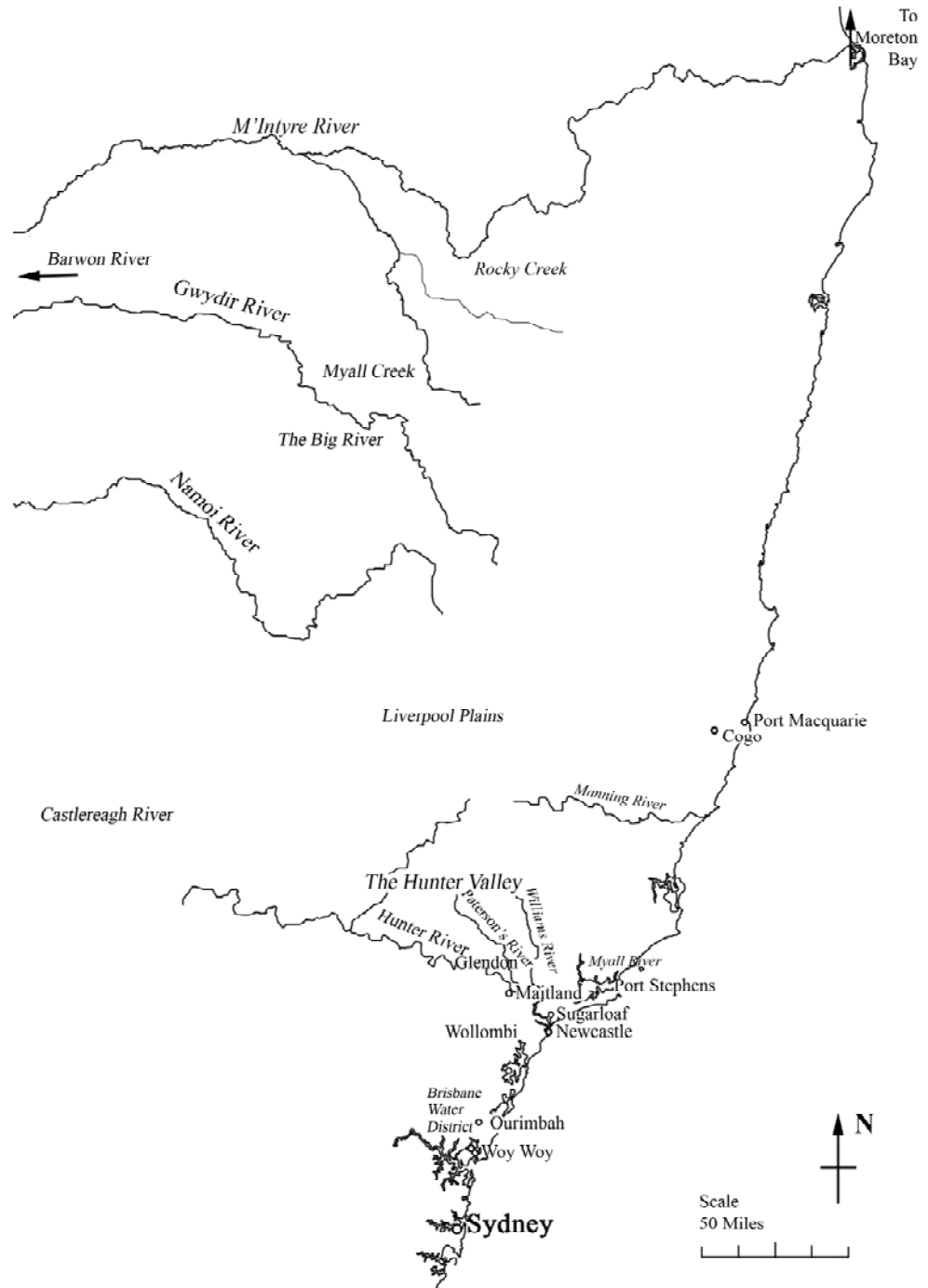
New South Wales Including Norfolk Island and Van Diemen's Land



Sydney, the Cowpastures, and the Penal Islands at Port Jackson



Brisbane Water District, Newcastle, and Maitland



Port Phillip District of New South Wales

