

The case of Peter Mungett

Born out of the allegiance of the Queen, belonging to a sovereign and independent tribe of Ballan

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Abstract

This paper is concerned with the issue of the jurisdiction of the British colonial criminal law over Indigenous Australians, particularly in the area of serious offences such as murder and rape. In particular, the paper examines the attempted use in the 1860 case of *Regina v Peter* of the legal demurrer that the Aboriginal accused, known as Mungett or Mungit, a Marpeang buluk clansman of the Wathawurrung language group known by the name of Peter, was not subject to the jurisdiction of the court because he was not born a British subject and had never entered into allegiance to the British Queen. This paper complements previous studies on the issue of the amenability to British law by considering matters such as Mungett’s apparent knowledge of legal procedures and attempts to provide greater understanding of the cultural milieu within which he lived. The paper also examines the question of whether or not Wathawurrung traditional systems had survived sufficiently by 1860 to warrant Peter’s claim that he should be tried by his own people rather than the colonial courts.

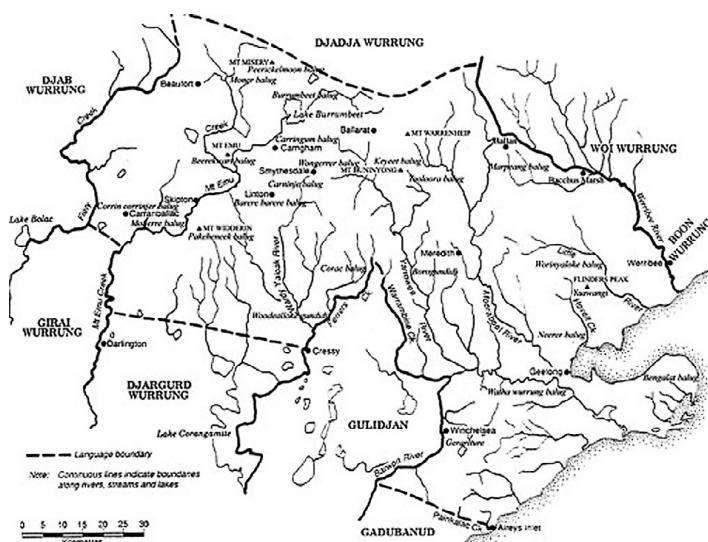
Introduction

This paper is concerned with the jurisdiction of the British colonial criminal law over Indigenous Australians, particularly in the area of serious offences such as murder and rape. In particular, the paper examines the attempted use in the 1860 case of *Regina v Peter* of the legal demurrer that the accused Aboriginal man was not subject to the jurisdiction of the court because he was not born a British subject and had never entered into allegiance to the British Queen. The paper also discusses some of the difficulties which the legal authorities found in dealing with this issue, even as late as 1860. The issue of the amenability to British law was a significant one in the early colonial period; it then largely disappeared from serious public consideration but has resurfaced since the 1980s in the context of land rights, native title, and the status of Aboriginal customary law.

Regina v Peter (henceforth *R v Peter*) has been known and referenced by historians with an interest in the issue of the jurisdiction of British law over Victorian Aboriginal people. The most detailed study has been by Simon Cooke, who provides a thorough examination of the origins, arguments, and outcomes of *R v Peter* and considers the implications of the arguments of counsel.[1]

This paper complements Cooke's study by considering matters such as Mungett's apparent knowledge of legal procedures and attempts to provide greater understanding of the cultural milieu within which he lived. It is hypothesised that Mungett's source of legal knowledge most probably came from local squatter Charles Griffith, an Irish trained barrister, who had been associated with Mungett's family and clan since 1841. The paper also examines the question of whether or not Wathawurrung traditional systems had survived sufficiently by 1860 to warrant Peter's claim that he should be tried by his own people rather than the colonial courts.

Peter, whose Aboriginal name was Mungett, was brought before the criminal sessions in Melbourne in February 1860 on a charge of rape of a child.[2] Mungett was a member of the Marpeang baluk clan whose lands extended over the Ballan and Bacchus Marsh areas (50–80 km west of Melbourne) of the Wathawurrung language group.[3] Mungett was found guilty on 20 February 1860 and the sentence of death was passed upon him. Execution, however, was deferred until after the argument before the full court on the special plea put in by Dr Mackay on his behalf.[4] Barry Bridges has discussed the prevalence of inter-racial sexual crimes in colonial New South Wales. The first execution of an Aboriginal man in Australia was that of Moowattin in 1812 for the rape of a white woman; Mickey Mickey was executed and Charley Myrtle was transported to Van Diemen's Land for life in 1835; and Paddy was executed in 1854. In cases of attempted rape, offenders commonly received two years' hard labour.[5]



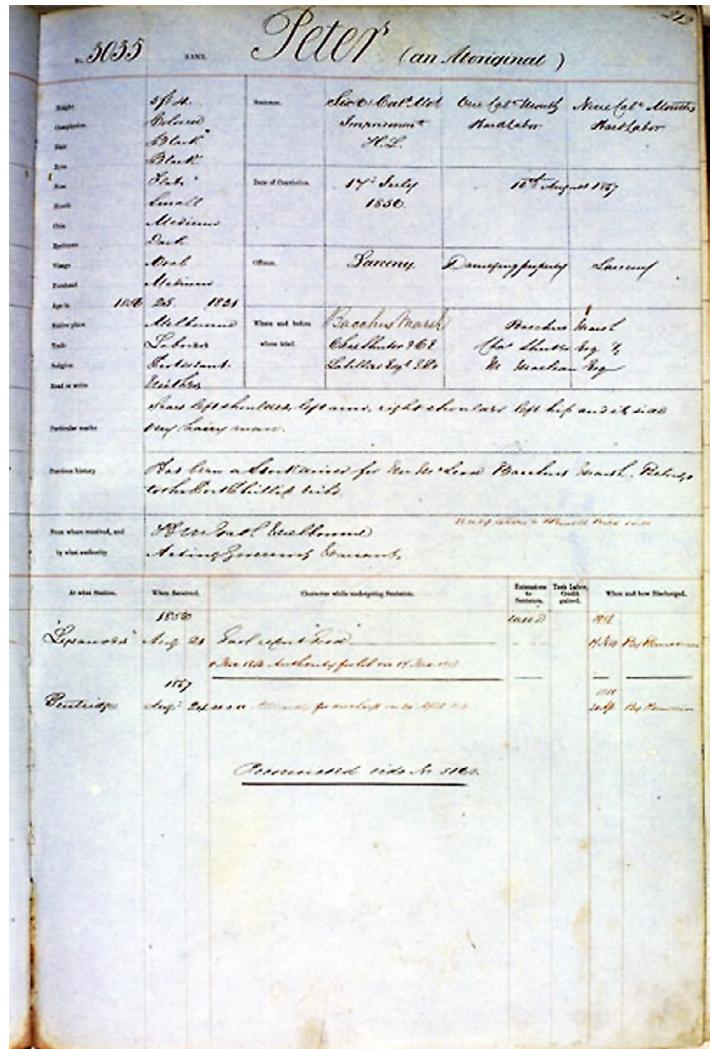
Wathawurrung language area and clans based on Clark 1990.
Reproduced courtesy of Ian D Clark.

Mungett refused to plea before the Melbourne Criminal Court on the grounds of his not being a British subject, and the case was subsequently heard by the Supreme Court of Victoria during June of 1860. Mungett was defended by Melbourne barrister Dr George Mackay, who was known at the Bar as 'the old Doctor' and had a reputation for being 'an unrivalled "chamber" lawyer' for the learned opinions he gave.[6] Mackay put in a plea to the effect that the court had no jurisdiction over Mungett as 'he was born out of the allegiance of the Queen, and belonged to a sovereign and independent tribe residing in the district of Ballan which had courts of their own, and to which alone he was answerable'.[7] In other words, 'Peter asserted that he lived under an existing Aboriginal sovereignty that he had never given up, and by which sovereignty he could be tried for the crime of which he was accused'.[8] The legal 'demurrrer' was ultimately unsuccessful and despite Mungett's plea of not guilty, he was convicted and sentenced to death, though this was later commuted to fifteen years imprisonment.

The assault which led to this conviction took place on 30 December 1859 near the Pentland Hotel, Bacchus Marsh. Arrested that evening he was confined in the Bacchus Marsh lock-up until 17 January 1860 when was then transferred to Pentridge. A statement of evidence from the victim's father Peter Garland was taken before justice of the peace Mordaunt Maclean in Bacchus Marsh on 31 December 1859. Other statements were taken from Isabella Garland (the victim), her mother Isabella Garland, Margaret Downey (a neighbour), Dr John Pearce Lane (a surgeon who examined the child), and Samuel Spencer Hanger (the landlord of the Pentland Hotel) on 12 January 1860 before justice of the peace Charles Shuter in Bacchus Marsh. Guardian of Aborigines William Thomas took Mungett's statement on 24 January 1860.

Mungett's life: a reconstruction

Some reconstruction of Mungett's life is possible through public records, newspapers and squatters' journals. According to a statement made to William Thomas, in 1860 Mungett went by two names and identified with the Wathawurrung people of the Ballan district. As recorded in Thomas's papers, he stated: 'My name Peter – white man call me that – the Ballan Blacks: Mun-gett'.[9] From his entry in the Victorian prison register we learn that Mungett was born circa 1831.[10] He was possibly one of a group of seven Wathawurrung clanspeople seen in March 1840 at Bacchus's station on the Werribee River by Edward Stone Parker, assistant protector of the Port Phillip Aboriginal Protectorate for the Loddon District.[11]



Mungett's prison register entry (Peter, an Aboriginal), number 3035, showing details of convictions for 1856 and 1857, PROV, VPRS 264/P0, Unit 5.

Among the group was Oondiat (Peter's father) who is listed in a census taken by Parker in August 1841.[12] Oondiat's father, Oondiat the senior, also known as Jack Mungit or 'Captain', is listed in several squatters' diaries as being a 'big man', clan-head or elder.[13] Bacchus Marsh squatter Charles Griffith, considered Jack Mungit to be 'the most civilized of them [his clan]' and allowed only Jack Mungit and his family to remain on Glenmore station.[14] In Emma von Stieglitz's sketch book spanning from 1839 to 1860 there is a sketch dated November 1852 titled 'Poor Mungit's grave Ballan'.[15] We believe this is Jack Mungit's grave.

Further corroboration that Mungett's country was the Bacchus Marsh region may be inferred from an inquest held into the death of Jimmy/Jemmy or James Mungett in April 1859, who is listed as being of the 'Bacchus Marsh tribe of Aborigines'.^[16] The relationship between

James Mungett and Peter Mungett is unclear, but it is presumed that they were siblings. The second piece of corroboration is the many visits his Bacchus Marsh clanspeople (Marpeang baluk clan) paid him when he was incarcerated in Pentridge prison. Thomas noted three occasions in January and February 1860 when he saw 'three Bacchus Marsh blacks, permit[ed] one to visit black in gaol'.[17]

Of the Marpeang baluk, Mungett's local group, we know that in 1840 Bacchus's men at Bacchus Marsh spoke well of them. John Gray on the upper Werribee River described them as 'a quiet tribe that assisted the settlers'.[18] By 1858 there were about 29 adults and 12 children at Bacchus Marsh who police magistrate Charles Shuter described as being 'in good health'. In 1857 a small supply of blankets, rugs, flour, tea, sugar, and tobacco was obtained from the government at the request of local resident Mrs Macleod and distributed by the clerk of the bench. Shuter noted that their principal means of living was through begging, although they only visited Bacchus Marsh once a year and were employed occasionally by settlers.

In 1860, Mordaunt Maclean and James Young were appointed local guardians by the Central Board for the Protection of Aborigines and a depot for the distribution of government rations was established at Bacchus Marsh. In the board's first report of 1861, Maclean noted that the Aboriginal people in the neighbourhood of Bacchus Marsh spent much of their time 'wandering about, generally in the vicinity of public houses. They occasionally sold a few fish, or wild fowl, and often performed corroborees for the amusement of white spectators, after which one of the party carried a hat round to receive contributions, and [Maclean] believed almost every penny they collected was expended on intoxicating liquors'.[19]

A valuable source of information about Peter Mungett are records relating to his criminal convictions held by Public Record Office Victoria. The first prison register entry records that Mungett had two prior convictions in July 1856 and August 1857 for larceny and damaging property (for which he was discharged in April 1858). A later entry contains information relating to the rape conviction which is the basis of this study. [20] In his response to a circular question of the 1858-59 Legislative Council Select Committee on the Aborigines, Charles Shuter referred to Mungett's earlier crimes, stating that he had 'been in this district three years, and the only instance of stealing I remember was by a very intelligent aboriginal, who spoke English fluently; he was convicted and imprisoned for petty larceny twice within the year. I think that he learned this habit from the Europeans.

I do not think it was his nature to steal'.[21] Mungett's prison record gives his age in 1856 as 25, his native place as Melbourne, and states his connection to the 'Port Phillip tribe'.[22] This connection is corroborated in Thomas's weekly reports during 1860, among which there is a note that mentions he knew Mungett from 'his frequenting Melbourne years back'.[23] Thomas added that he had given 'him advice but fear that he is a bad one' and also noted that Mungett 'had been a bullock driver at good wages'.[24] In Mungett's later prison register entry his religion is listed as Protestant (which again is corroborated by Thomas's journal which notes that Mungett was attending Protestant services whilst in Pentridge), and also records that he was illiterate, a claim that requires further scrutiny. [25] In terms of distinctive physical features, it is noted that he had 'scars left shoulder left arm, right shoulder, left hip', and that he was a 'very hairy man'. It is possible these scars were cicatrices, or ceremonial scarring commonly resulting from initiation ceremonies practiced by many Victorian Aboriginal people in the nineteenth century. The earlier entry in the prisoner register records that Mungett had 'been a stock driver for Mr McLeod of Bacchus Marsh'; [26] presumably a reference to Hector Macleod of Goodmans Creek with whom James Mungett was also associated.[27]

Mungett's later prison register entry, for his 1860 conviction of 'carnally abusing a child under age' in 1859, at times seems to contradict the earlier entry which records details of his 1856 and 1857 convictions (religion listed as 'pagan', 'breast and belly having scars'). More importantly, the later entry tells us a great deal about prison conditions and Mungett's attitude towards imprisonment. For instance, we learn that commencing in 1860, frequent misdemeanors such as 'quarreling' or 'has tobacco' caused him to have seven more days added to his incarceration. Mungett's lengthy list of transgressions against the prison regime included idleness, disobedience, taking a light, having a knife, insolence and having paper. There is one reference to being 'illegally at large', but there is no corresponding reference to the punishment he received for this.[28] Sadly, there are no photographs of Peter Mungett appended to either of his prison register entries.

Peter, an Aborigine

Height	5ft 7in	Colour	Dark brown
Complexion	Black	Hair	Black, fine & dense
Eyes	Black	Scars	None
Nose	Small	Date of Conviction	20 February 1860
Mark	Indistinct	Date of Conviction of previous offence	4th July 1860
Oris	Indistinct	Previous offences	Indiscriminate vagrancy
Eyesight	Fair	Offences	Seriously abusing a child under age
Vision	Fair	Where and When First	Skinners Creek Victoria 1860
Feet	Large	Periodic Marks	Scars and illegitimate scars on right side of face scar right foot scar right abdomen
Age in 1859	25	Previous History	Convicted 1857 to 1859
Native Place	Indonesia	Offences, Sentences, and mode of Treatment	Exemptions to original sentence
Trade	Cobbler	Offences	Time / Month / Days
Religion	Pagan	Sentences	
Food or Water	Bacon	Mode of Treatment	
Periodic Marks			
Previous History			

HALF-TIME REPORT

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Mungett's prison register entry (Peter, an Aborigine), number 5160, showing details of his 1861 conviction, PROV, VPRS 264/P0, Unit 8.

The legal status of Aboriginal people of Port Phillip

Questions about policies regarding the legal status of Aboriginal people of the Port Phillip District (which later became the Colony of Victoria) were vigorously debated in London, Sydney and Melbourne when squatters began their usurpation of Peter Mungett's country in 1837. When colonisation of the Port Phillip District began in earnest from 1835, the prickly issue of how to reconcile the rights of Aboriginal people and the wholesale dispossession of their land became a concern of imperial and colonial governments, and the public at large.

Prominent squatters who sought to pressure the colonial government to use ‘coercive measures’ so as to make Aboriginal people in the Port Phillip District ‘experimentally acquainted with our power and determination’[29] were reminded by the NSW colonial secretary that it was doubtlessly,

only of late years that the British public has been awakened to a knowledge of what is owing to these ignorant barbarians on the part of their more civilized neighbours; but a deep feeling of their duties does now exist on the part both of the Government and the public, as may be proved by reference to the many inquiries which have been lately instituted on the subject, and particularly by the unanimous address of the House of Commons to his late Majesty, adopted in July 1834, and by a Report of a Committee of the same House, made in the very last sitting of Parliament, both of which documents are of easy access to the public.[30]

However much pressure the colonial government was under by the Imperial Government to cede human and legal rights to Aboriginal people, they were equally pressured by squatters to protect their rights and interests. Imperial and colonial governments conceded to them believing it was ‘now too late’ to refuse military protection to squatters ‘after having taken entire possession of the country, without any reference to the rights of the Aborigines.’[31] In its desire to establish law and order in outlying squatting districts, the British Government advised the NSW governor that ‘all the natives inhabiting those territories [New Holland] must be considered as subjects of the Queen, and as within Her Majesty’s allegiance’. As a consequence, inquests were mandated in all cases where an Aboriginal person met with a violent death arising from conflict with European settlers.[32] To this end NSW Governor George Gipps issued an order on inquests, stressing the ‘equal right’ of Aboriginal people to the ‘protection and assistance of the Law of England’.[33] Moreover, a moral mandate was explicitly laid upon the colonial governor when exercising legal hegemony over the Aboriginal people of New South Wales as

it is impossible that the Government should forget that the original aggression was our own, and that ... you may calculate with the utmost confidence on the cordial support of the Crown in every well directed effort for securing to the aboriginal race of New Holland, protection against injustice, and the enjoyment of every social advantage which our superior wealth and knowledge at once confer on us the power, and impose on us the duty, of imparting to them.[34]

To assist in achieving this end the British Government established a comprehensive system of for an Aboriginal Protectorate at Port Phillip. This commenced in 1839 with the appointment of Chief Protector George Augustus Robinson and four Assistant Protectors, William Thomas, Charles Sievwright, Edward Stone

Parker and James Dredge. The protectors’ general instructions from London were to guard Aboriginal people ‘from any encroachments on their property and from acts of cruelty, oppression or injustice’.[35] Almost immediately William Thomas, the assistant protector in the Melbourne or Westernport district, along with many of his contemporaries, was scathing of the perilous legal position of Aboriginal people in colonial society. In his journal, Thomas lamented the failure of police to interfere on behalf of Aboriginal people, on one occasion exclaiming ‘Oh my God what an awful picture is society without protecting laws.’[36]

By way of example, in July 1839 Thomas enquired into the case of Korum (alias Jack), one of Mungett’s Wathawurrung countrymen (Tooloora baluk clan), who had been seriously assaulted by a drunken European settler. Thomas was appalled that ‘although the man was taken into custody, because the constable did not exactly see the blow given the Magistrate would not interfere.’ According to Thomas, the police magistrate ultimately dismissed the case ‘as it was aboriginal and the constable [had] not exactly [seen] the bludgeon fall on the black.’[37] Interestingly, Thomas provides us with some insight into how Korum perceived the legal efficacy of the colonial justice system:

I was sorry at this species of injustice as the black was a most quiet man and well liked by the whites. Poor fellow, as we both came out of the Police Office he [Korum] says to me, ‘No wooglewoogle, white man only drunk.’ He was afraid we were going to hang the man. Little thought he was getting off without even a reproof.[38]

Thomas, the other protectors and other non-Indigenous people living in close quarters with Aboriginal people were aware of the differences between Aboriginal customary law and British law with regard to crimes such as murder and rape. On occasion they were placed under great duress by knowledge of this difference and the tensions that it created. For example, William Thomas described in his journal the desperation and rage of an Aboriginal man seeking redress from Police Magistrate William Lonsdale for the detention of his wife by European men.[39] He also noted the difficulty in prosecuting a European man that Thomas had apprehended close to his tent raping a Boonwurrung woman in November 1839.[40] Thomas was mortified to discover repeatedly that he was unable to obtain any legal redress from authorities if it was considered ‘an Aboriginal affair’.[41]

The shortcomings of the British legal system as it applied to Aboriginal people as described by Thomas sprang largely from 'the blacks being incapacitated from taking an oath'. According to William Lonsdale, 'their mere statement in a legal point of view is of course of no avail'.^[42] This was a parlous state of affairs for both Aboriginal and non-Aboriginal people. The vexing issue of inadmissibility of Aboriginal evidence in a court had surfaced repeatedly among law enforcers, legal counsels, and the NSW colonial office, which in 1839 sought advice from WW Burton, a justice of the NSW Supreme Court. Burton replied that Aboriginal evidence had been rejected by NSW judges in cases where no interpreter could be found for the Aboriginal witness or it was considered the witness was 'ignorant of a Supreme Being'.^[43]

In September 1839, Governor Gipps introduced a new bill to the NSW Legislative Council to allow 'the aboriginal natives of New South Wales to be received as competent witnesses in criminal cases, notwithstanding that they have not at present any distinct idea of religion, or any fixed belief in a future state of rewards and punishments'.^[44] Gipps's motive was to prevent a repeat of cases where Aboriginal and non-Indigenous criminals had escaped justice due to the inadmissibility of evidence given by Aboriginal people. The Act was disallowed in London as it was perceived to be 'repugnant to the Laws of England'.^[45]

Twenty years later the issue still had currency for the government^[46] and the popular press, as seen in a report in the *Port Phillip Herald* of October 1858 concerning a murder trial where the victim and the murderers were Aboriginal.^[47] Dr Mackay, the counsel for the Aboriginal defendants in this trial, was later appointed counsel in the case of *R v Peter* after an application from Thomas to the attorney general.^[48] *R v Peter* caused a considerable stir in colonial and London legal circles^[49] and was widely reported in the Melbourne newspapers. The *Port Phillip Herald* printed three articles in February and one lengthy article in June 1860, and the *Argus* printed five articles in February and one article in June 1860. Interestingly, it was not the racial or sexual nature of the case (involving the rape of a six-year-old European girl by an Aboriginal man) that was the focus of newspaper attention, but its legal implications.^[50] B Bridges has discussed the distaste of the non-Aboriginal community for cases of inter-racial sexual crimes in colonial society.^[51] Unfortunately it is not possible to gauge local sentiment towards the sexual assault as copies of Bacchus Marsh newspapers for the pre-1866 period have not survived. The *Herald* in its initial

coverage of the case considered the defendant's plea to be above his understanding, observing that an Aboriginal man,

known by the name of Peter, [was] brought up at the Criminal Sessions yesterday, on a charge of abusing a child. He was defended by Dr. Mackay, who put in a plea to the effect that the court had no jurisdiction over him, as he was born out of the allegiance of the Queen, and belonged to a sovereign and independent tribe residing in the district of Ballan, which had courts of their own, and to which alone he was answerable. The plea, which was verified by an affidavit by Mr. Thomas, J.P., Protector of the aborigines, will be found at length in our Sessions report. We venture to say that Peter was not the least astonished person in court at the extraordinary acquaintance he was represented as possessing of the forms of law and the titular addresses of 'Our sovereign Lady the Queen, Defender of the Faith, and so forth.' In order to afford the Crown Prosecutor an opportunity of considering what course he should pursue, the trial was postponed, and the prisoner accordingly remanded.^[52]

The *Argus* in its coverage of the trial, and the *Herald* in subsequent reports, did not refer to Peter's understanding of the point in law being argued by his counsel and the case was duly referred to the Supreme Court of Victoria.

Mungett's plea of non-allegiance to the Queen

Both the *Herald* and the *Argus* reported in some detail the serious legal questions surrounding Mungett's plea of non-allegiance to the Queen and the citing of international precedents relating to the case:

Mungett, who is above informed against by the name of Peter, protesting that he is not guilty of the premises charged in the said information, for plea, nevertheless, saith that he ought not to be compelled to answer to the said information, because he saith that he is a native aboriginal of the island of New Holland, and born out of the allegiance of our Sovereign Lady Queen Victoria ... and that the said Mungett did never become subject to, or submit himself or otherwise acknowledge allegiance to, our said Lady the Queen; and that at the time when the said offence in the said information mentioned is therein supposed to have been committed, and long before that time and since, the said tribe was and is still governed by its own laws and customs. And the said Mun-gett further saith, that there is a certain Court held within and by the said tribe, and that all and singular offences of murder, rape, and other felonies committed within the said tribe by any native aboriginal of the said tribe, at the time last aforesaid, before and since, have been, were, and are, and of right ought to be, inquired of, heard, and determined in the said last mentioned Court within the said tribe, and not in any of the Courts of the said United Kingdom, or its dependencies, or any of them, or of the said colony of Victoria, and this the said Mun-gett is ready to verify; wherefore the said Mun-gett prays judgment of the said Court of our said Lady the Queen here, will further proceed upon the information against him, and that he may be dismissed from the Court hereof, and upon the premises.^[53]

Beginning on 17 February 1860, the *Argus* reported the legal consternation which a plea of non-allegiance had caused the colonial and British legal offices in the past, and how it revealed the inconsistencies and inadequacies of previous rulings:

His Honour asked if a similar case to the present had ever arisen in the colony. He had wished to consult the Chief Justice and Mr Justice Barry, who had a good deal of experience in these matters, having been for some time counsel for the aborigines, but he had not had the opportunity.

Dr Mackay had made inquiries, and found that a similar case had arisen before Mr Justice Willis, and had been argued at considerable length by Mr Justice Barry, as counsel for the aborigines. He could find no record, however, of judgment ever having been given in the matter.

Mr Martley could mention another instance somewhat similar, that had come before Mr Justice Williams at Ballarat; but in that case his Honour had ruled that the prisoner, having been for long associate of white men and left his tribe, the plea of avoidance on account of non-allegiance to Her Majesty was of no avail.[54]

The reference to Justice JW Willis is to his September 1841 ruling in a case concerning a Wathawurrung man known as Bonjon, who was accused of murdering another Aboriginal man.[55] Willis ruled that the court was not competent to decide on cases involving crimes committed by Aboriginal people upon an Aboriginal victim. Willis pointed out that the 'colony stands on a different footing from some others, for it was neither an unoccupied place nor was it obtained by right of conquest and driving out of natives, nor by treaty ...' He went on to argue that the frequent conflicts between colonists and Aboriginal people indicated that 'the Aboriginal tribes are neither a conquered people nor have they tacitly acquiesced in the supremacy of the settlers' and that they must therefore be defined not as full British citizens but 'dependent tribes governed among themselves by their own rude laws and customs'.[56]

One implication of the newspaper report of proceedings is the issue of the absence in 1860 of formal law reports which led to the court searching around for any living person (such as Redmond Barry, who had been defence counsel for Bonjon in 1841) who might remember and be able to testify about these earlier decisions. This is a point well made by B Kercher who has commented on the 'great paucity of law reporting in colonial Australia' owing to the fact that 'there were

no continuous law reports until the commencement of the thirteen volume series' entitled *Reports of Cases Argued and Determined in the Supreme Court of New South Wales*, covering cases decided between 1863 and 1879.[57]

Apart from the *Herald*, which expressed some initial concern with Mungett's ability to comprehend the address to the court, there seems little evidence that colonial newspapers conceived the special plea as fantastically absurd. Indeed, as shown by the work of Kercher and Cooke, the jurisdiction of colonial law over Indigenous Australians and the recognition of Aboriginal customary law had been an issue in New South Wales since 1829 (*R v Ballard*, and especially *R v Murrell 1836*, and *R v Bonjon 1841*).[58] The outcome of *R v Murrell* was the decision that Aboriginal people 'were fully responsible for their crimes under English law, even if the crime was committed against another Aborigine'.[59] Willis in *R v Bonjon* refused to follow the precedent set in *R v Murrell* and instead argued that Aboriginal people 'had their own law and that the British courts should be directed to observe it'. Bridges has noted that Willis's comments raised some doubts in some colonists' minds as to the amenability of Aboriginal people to the law, and that the press took notice of the matters he had raised. For example, the *Port Phillip Gazette* argued that while Willis had to relinquish the crazy notion that Aboriginal people could indulge in every kind of wickedness and barbarity among themselves yet at same time be made amenable in their dealings with Europeans. The newspaper urged the government to likewise accept the folly of governing Aboriginal people by British law. [60]

Wathawurrung customary law and cultural continuity

Mungett's plea was not only a challenge to the compulsion to bring Aboriginal people up under British law. The plea was also an assertion that Mungett had never acknowledged an allegiance to the Queen, that his tribe had its own laws and customs, and that it had a specific punishment for the crime of rape and attempted rape of a child. Furthermore, the plea asserted that Mungett be delivered up for traditional justice if there was a case to be heard against him, or if no case existed under such traditional justice that he be released immediately.

In Mungett's confidential statement to Thomas about the rape charge he does not dispute sexually interfering with the child, indeed he claims that he digitally raped her and was adamant on a number of occasions that he 'never touched her with my private [nineteenth century euphemism for penis] finding her too small'.[61] In Thomas's papers we gain some insight into Wathawurrung customary law regarding rape. He observes that in instances where a 'blackfellow violates or tries to violate, very young child – Girls father and old men talk about it, and father beats Young man over head with waddie – the Child is retained by the father till big enough, and then, given to the Young Black who tried to *Ber-ket-tun-ner*'.[62]

Peter Mungett did not want British legal protection; he wanted to live according to his own peoples' law. This raises the question of whether the society to which Peter belonged had survived to be able to consider his crime. It has already been established that Peter was a member of the Marpeang baluk local group that belonged to the Bacchus Marsh and Ballan districts within the Wathawurrung language area. From available census data and estimations of population, we know that some 29 adults and 12 children were recorded as living at Bacchus Marsh, and in 1862 some 33 Aboriginal people were listed as being resident at Bacchus Marsh. In terms of the Bacchus Marsh, Ballarat, Buninyong, and Mt Emu districts, the combined Aboriginal population in 1861 was estimated to be 255.[63]

Certainly, some 'traditional' practices were still being adhered to. As noted earlier, Mordaunt Maclean reported to the Central Board for the Protection of Aborigines that at Bacchus Marsh the local Aboriginal people occasionally sold a few fish, or wild fowl, and often performed 'corroboreys' for the amusement of Europeans, after which one of the party carried a hat round to receive contributions. Peter's father Jack Mungit had died before 1852. Although a leading man in the Marpeang baluk, he was not its *ngurungaeta* (clan-head or elder), that position was held by Worope, also known as Captain Malcolm, who was still alive in 1863. Other leading Wathawurrung *ngurungaeta* known to be alive in the early 1860s included 'King William' (Beerequart baluk clan), 'King Billy Phillips' (Burrumbeet baluk), 'King Billy' (Pakeheneek baluk), and 'King Johnathon' (Tooaura baluk).[64] When Peter Mungett asserted his people were able to consider his crime according to traditional Aboriginal law, it would have been Wathawurrung men of the stature of Worope who would have heard his case.

Mungett's relationship with William Thomas

William Thomas assumed a long-standing and sincere interest in Mungett's case, a fact acknowledged in many of the newspaper reports [65] and confirmed by frequent references in Thomas's and Mungett's private correspondences. At Pentridge prison on 24 January 1860 Thomas transcribed a confidential statement from Mungett about his version of the assault and rape. This clearly demonstrated both Mungett's firm trust in Thomas and Mungett's knowledge of legal confidentiality. 'Peter (alias Mun-gett)', Thomas noted, 'gives me the following statement, after stating to me *Marminar* [the Protectors and Thomas as Guardian were often referred to as *Marminata* or Father] I know you like Black fellows all about – me tell you no lies, you I know no tell another white man'. In his journal, Thomas records visiting Mungett on an almost daily basis and that he attempted to assure him all legal avenues for his defence were being pursued, encouraging him by saying 'I think I can get him Big one Wig to talk for him'.[66]

From Thomas's viewpoint Mungett was very intelligent, [67] understood the precepts of Christianity, and was remarkably adept at understanding some of the legal nuances, processes and avenues available to him. Thomas, as noted earlier had arranged with the chaplain at Pentridge to instruct or minister to Mungett upon him receiving his death sentence. Thomas informed the chaplain that Mungett 'has knowledge of a creator, where wicked and good go after death'.[68]

While awaiting the outcome of his appeal Thomas regularly visited Mungett in jail and kept him informed of the legal processes that were transpiring. Thomas noted Mungett's anxiousness and his 'critique of racism in the criminal justice system'.[69] On 8 May 1860 he noted in his diary that he visited Mungett in jail and told him 'that his case has not been argued by the three judges – he fears the delay is ominous ... he is very sensible and tells me that another is waiting like him, but he says white man death only recorded – but *he death* passed on him. I told him his crime tho' not death with blacks, is death with the whites.' A week later Thomas is able to relate to Mungett that the plea is in his favour regarding a remission of the death sentence. Thomas was impressed with Mungett's response, noting that 'he very sensibly replied I am afraid it will be heavy – In fact this black is as sensible and understands terms as correct as any white man of his age'.[70] Thomas's journal and reports for the period from January to April 1860 contain many references to Peter Mungett's anxious requests to receive appropriate representation.[71]

Between his sentencing in February and his appeal hearing in June 1860 further reports did not appear in the press. There was, however, a growing sense of unease reported when the appeal case progressed to the Supreme Court. The reportage of the trial took on the ever-more sombre tones of legal gridlock. Legal correspondents in June 1860 reported on the complexity of the case and the domestic and international precedents which the court heard in reference to *R v Peter*.[72] The judgement of the Supreme Court in *R v Peter* was tested in Victoria three months later when an Aboriginal man known as Jemmy or Jimmy (*R v Jemmy/Jimmy*) was tried in the Castlemaine Circuit Court for killing his Aboriginal wife. At that time, the question before the court was whether ‘in the absence of evidence that either of these natives had become civilized, or had changed their habits or mode of life so as to be supposed voluntarily to have submitted themselves to British Law’. Although the defence lawyer argued that a sovereign authority was able to sanction pre-existing laws and ‘to confine them in their operation to the race which was subject to them’ the court rejected this argument and confirmed the supremacy of its jurisdiction throughout the colony ‘and with regard to all persons within it’.[73] Cooke has provided a fuller analysis of this case.[74]

Peter Mungett’s death sentence was commuted to ‘15 years on the roads, first three years in irons, to serve one third beyond minimum’.[75] Mungett remained in Pentridge prison and he continued to correspond with William Thomas seeking his assistance. His letters to Thomas reveal a great deal about his grasp of the British legal system, as evidenced by the following letter dated 7 January 1861:

Pentridge Stockade
7 January 1861

Mr Thomas
Aboriginal Protector
Richmond

Sir, I would be very grateful if you could find time to come here to see me as soon as you conveniently could, as I have business of importance to consult you about, which I can only explain properly in a personal interview – By applying at the Inspector General’s Office in town you can procure an order to admit you into the Stockade at any time. With many apologies for troubling you, I remain

Your obedient servant
Peter Munget

Reg. No. 3035 [76]

At least three more letters were sent by Peter Mungett to Thomas asking and pleading with him to ‘do all he could’ on his behalf. The letters are remarkable, for all display the same degree of literacy and legal

knowledge, yet according to Mungett’s 1856 and 1860 entries in the prison register he could ‘neither read nor write’. Given that Mungett’s letters are written by three different hands it seems likely that Mungett enlisted the assistance of Mr Stoddart, the Pentridge chaplain in 1860, and also another person within the stockade to act on his behalf. Thomas noted that immediately after Mungett’s sentence of execution had been passed down he went to see Peter and observed ‘Peter is very cast down – I use influence to get him liberty from the solitary cell to the open condemned yard – Mr [illegible] who is also [illegible] anxious on behalf of the Aborg’s – states he [illegible] give him liberty in the yard ... make arrangements with Mr Stoddart the Chaplain of the jail for instructing Peter ...’[77] The following letter serves as an example of Mungett’s apparent erudition:

Pentridge Stockade
March 28th, 1863

Thomas Esq. Black Protector

Sir/- Having expected to hear from you for some time past relative to my liberation from here and not having heard whether you are interceding for me or not, I beg most respectfully to solicit that you will use your endeavour, to effect an early liberation for me. I have now been here upwards of three years which is a very long period to remain confined and during that period my conduct has been exemplary; and this ought in some measure to induce you to assist me as far as lay in your power.

Hoping you will send me a reply stating what I may expect, on this head as soon as convenient.

I remain Yours Respectfully

Black Peter Munget [78]

Thomas wrote in 1864 to his superiors with a hint of exasperation that ‘I have generally three letters from him during the year, all to the same purpose’. After this note our knowledge of Mungett is fragmentary. From notations on his entry in the prison register we learn that he was released from Pentridge on 25 February 1871 with a ticket-of-leave and that he was to depart for the County of Bourke and report at Mornington.[79] It is unclear why he would not be permitted to return to the Bacchus Marsh-Ballan region. Upon his release he ‘disappeared from official surveillance, remaining “illegally at large”’.[80] What became of Mungett is not known, although Cooke suggests there is some evidence that he returned to his country.[81]

Sources of Mungett's legal knowledge

As has already been observed, an interesting aspect of this case is the apparent legal knowledge of Mungett. Cooke has noted that Mungett's actions indicated that he had an understanding of English law. For example, it was his idea to retain counsel. During his second day in the Melbourne Gaol he dictated a letter to another prisoner 'soliciting Council [sic] to plead his case'. How did he know to ask for counsel? How did he gain this knowledge of English law? Cooke suggests it may have been restricted to knowledge that counsel was an important part of persuading the judge of one's case. He considers it less likely that Mungett had much to do with the argument put forward by his counsel. Cooke has noted that 'Peter certainly had some understanding of the rituals of the criminal law, and also understood the distinction between the "passing" of a sentence of death and the "recording" of death. His knowledge of the law appears to have been exceptional'.[82]

It is to be expected that Wathawurrung people had a considerable knowledge about the colonisers' laws and customs, especially as they related to sexual offences, considering their dealings in this sphere of law dated back to the first days of official occupation. [83] In addition, William Thomas frequently recorded his interactions with Aboriginal people incarcerated in Pentridge prison and also noted the occurrence of Aboriginal people visiting their kin. This frequent contact with colonial law and informal counsel from legal advocates such as Thomas would no doubt have informed Aboriginal communities and led to people such as Peter acquiring a good deal of knowledge about legal procedures available to them.

Peter certainly had gathered knowledge about colonial legal procedure through his own frequent dealings with the law and in all probability had accumulative knowledge of British legal rituals via his wider community's extensive dealings with law and punishment in Victoria.[84] Ballan police magistrate Charles Shuter had noted in official correspondence that Mungett was 'very intelligent' and that he 'spoke English fluently'. It is possible that he had been taken under his wing by Hector Macleod and his wife, for whom he had worked as a stock driver and bullock driver. Mrs Macleod had shown an interest in the welfare of the Marpeang baluk in 1857 seeking a government supply of rations. The other possibility is James and Jessie Young. James became a local guardian in 1860 and was instrumental in the establishment of early schools in the Bacchus Marsh district.



The Protector of Aborigines speaking at an Aboriginal encampment in the bush, pencil drawing dated 5 April 1843, possibly by William Thomas. R Brough Smyth Collection, La Trobe Library, State Library of Victoria. Reproduced with permission.

A more likely possibility, however, is Charles James Griffith (1808-1863), a squatter in the Bacchus Marsh district who had been associated with the Marpeang baluk since 1841. An Irish barrister, Griffith had studied at Trinity College at Dublin University, and graduated with a BA and MA. He immigrated to the Port Phillip District arriving on 31 October 1840 with close friend and partner James Moore (1807-95), who had also graduated with an MA in law.

Griffith was active in Aboriginal affairs in Port Phillip. In Melbourne, before leaving to visit some country stations, Griffith recorded in his diary that on 28 November 1840 he 'visited the natives accused of the murder of a shepherd at the gaol'. He also noted that they were 'the first natives whom I have seen'. On 13 December 1842 Griffith was one of three members of a board appointed to investigate the conduct of assistant protector William Le Souef who had replaced James Dredge in the Goulburn district.[85] The board was chaired by Commissioner for Crown Lands for the Geelong district GS Airey, and the third member was the coroner Dr WB Wilmot. Together with FA Powlett, Griffith conducted enquiries into the killing of two Aboriginal families who were sleeping beside a small tributary of Mustons Creek [86] on Smith's and Osbrey's Caramut run on 24 February 1842. The murders came to be known as the Lubra Creek massacre. Powlett and Griffith filed a report on their enquiries on 12 February 1843. Chief Protector George Augustus Robinson sent Griffith a note on 13 May 1843 regarding his assistance with the murder case. Two days later Griffith assisted Robinson with taking depositions from the Crown informant in the murder case, Christopher McGuinness.[87] In 1845, Griffith provided evidence to the NSW Select Committee into the Port Phillip Aboriginal Protectorate.[88]

Griffith was also associated with some of the key officials in the Western District of the Protectorate. [89] His circle of friends included Samuel Pratt Winter who was renowned as a ‘champion and protector of the black race’, and Redmond Barry, the Standing Counsel for the Aboriginal people of Port Phillip.[90] Soon after Griffith and Moore arrived in Melbourne, both men sent their law books to Redmond Barry ‘having promised him the use of them until we may require them ourselves’.[91] Michael Christie has noted that writers such as Edward Parker, Thomas McCombie, Charles Griffith, William Westgarth, George Rusden, and Edward Wilson provided the information, arguments and catch-cries necessary for the advancement of their cause. These were taken up by philanthropists, churchgoers, ethnologists, and a small group of ex-squatters, who were in sympathy with the Aboriginal cause.[92] What is important ‘about this group is that although they repudiated the racist claim that Aborigines were a type of non-men, whose extermination was a law of nature or a decree from heaven, they still believed that the Aborigines were inferior, and that it was therefore justifiable to take and “improve” their land in the interest of progress’. They professed the view that Aboriginal people ‘were not intrinsically inferior and that they could be civilised and incorporated into white society, and that their extinction was not inevitable’. From 1856 this group began to pressure the Victorian Government to do something for Victoria’s Aboriginal community, and urged the government to give top priority to the formulation of a positive Aboriginal policy.[93]

From 1841 Charles Griffith became intimately associated with Peter Mungett’s family when he acquired a pastoral run that centred on the Marpeang baluk clan estate. On 18 December 1840 while travelling to George Airey’s Lal Lal station, he met with his first natives ‘at large’ at a halfway house. Airey showed Griffith the Weiraby Vale run, which he had previously owned, albeit for six months. Weiraby Vale, Gorrockburkghap, or sometimes simply The Gully, was held by William McKenzie.[94] On 26 December 1840 Griffith and Moore purchased the run which they renamed Glenmore. The run comprised 55,000 acres (22,257 hectares) on the Parwan Creek; its northern boundary was the Werribee River, and the Little River formed part of its southern boundary.

Griffith’s first encounter with Mungett’s people, the Marpeang baluk and other members of the Wathawurrung, was on 1 February 1841 when he recorded that a number of them ‘came and settled here on Monday – they seem quite harmless’.[95] Griffith

noted on 5 February 1841, that the ‘natives are still “quambying” here as they style it – Jack Mungit has made his appearance – he is the most civilized of them and was useful to Mackenzie [the former owner of the station] in getting bark to roof his huts etc. They are not all of the same tribe and so have pitched their mimmis or huts apart from each other’. In another entry he noted that they had decided ‘to give no more flour to anybody but Jack Mungit whom we make work a little carrying water etc. However this have had no effect tomorrow we intend telling him that unless they go tomorrow no more flour for Jack’. Griffith noted ‘Captain Malcolm, as he is called, and Jack Mungit are the best known persons in this tribe they are men of apparently from 40-45 years of age’.

In 1844 Charles Griffith left for Ireland where he stayed for three years, returning to Port Phillip in 1847. [96] In 1852 Griffith was appointed a magistrate for Bacchus Marsh, and from 1856 until 1858 he served as a member of the Victorian Legislative Assembly. In February 1858 he visited Britain, and returned to Victoria in 1862.[97] During his first year in Dublin he wrote his treatise *Present State and Prospects of the Port Phillip District of New South Wales* which was published in 1845. In this publication Griffith mentions Jack Mungit, referring to as ‘an old black friend of mine’.[98] Griffith also wanted the question of Aboriginal land rights out in the open: ‘if we have no right to occupy the country, no course of subsequent dealing can, in the form of conscience, cure the original defect of title; and the sooner that we retrace our steps, and that every European departs from the shores of Australia the sooner shall we have shown a sincere regret for the injury we have already caused to the natives’.[99] Griffith referred to the challenge of framing a code of laws that afforded protection to the native and security to the settler at the same time. ‘To hold the balance even between the two, is, however, by no means an easy task; and our rulers have eluded to the difficulty: “Declare them,” say they, “in the fullest sense of the words, British subjects; give them the rights of British citizens, and the protection of British law”. But, before doing this, they should have reflected, that the laws which are well suited to a civilized people, living in fixed abodes, may be totally inapplicable to hordes of wandering savages ... And they should have considered what were their means of carrying the law into effect, in case their new subjects did not consider themselves bound by it’.[100]

Griffith offered several legal pathways that were open to the British government; one included the following:

to allow them to remain in their present wild state, and so to modify the English law as to make it more suitable to the circumstances in which they are placed. Such modifications to include the securing to them the benefit of legal assistance upon their being brought to trial – the doing away with the necessity of proving their capacity to understand the proceedings of the court, and to exercise their right of challenge – the making their evidence receivable in a court of justice, without proof of their belief in a future state of rewards and punishments – the declaration that they should only be held responsible, either as regards the settler or each other, for those offences against the laws of England, which are also offences against the law of nature, or clearly incompatible with the welfare of society, and which should be clearly and simply defined – and lastly, the denying them, under certain restrictions, that indulgence, with respect to their persons, to which (according to my view of English jurisprudence) they have not entitled themselves.[101]

I have my residence in a part of the country where the natives are perfectly harmless – that I have never lost a single sheep, or any thing else, through their means, but, on the contrary, have frequently availed myself of their assistance in recovering such as were lost, and in other ways, and that I have always lived on the best terms with them.[102]

Entries in Griffith's diary and in his published work confirm the intimate association between Griffith and Jack Mungett, a leading man in the Marpeang baluk. Mungett, and presumably his family, were permitted to reside at Glenmore. Through this association Griffith was able to gain considerable insight into 'traditional' Aboriginal social customs and practices, as reflected in his chapter on Aboriginal society in his 1845 publication, and the collection of Wathawurrung vocabulary in his 1840-1841 diary.

In Griffith's 1845 publication he discusses: his amusement at watching preparations for corroborees (p. 157); having witnessed corroborees (p. 158); having once been present at the commencement of a ritual fight between two tribes to enact punishment (p. 160); his enquiries regarding the outcome of the punishment 'from an old black friend of mine, Jack Mungit' (p. 161); and the notion of resuscitation of black men as white men (p. 165). During his first two years at Glenmore, Griffith's diary records three pages of Wathawurrung vocabulary [103] and two sketches of two Wathawurrung men – Koram and Perninul. All this is evidence that he was interested in Aboriginal people and that Aboriginal people were receptive to his interest in them.

Leading men in Aboriginal groups sought to maintain close relationships with the holders of the pastoral stations that formed on their ancestral lands. By maintaining positive relationships with those station holders who permitted them to be on their stations, the Aboriginal people were guaranteeing that they would be able to continue to maintain their relationship with their lands. Many leading men formed long-standing friendships with the holders of pastoral stations and by maintaining a relationship with these families the Aboriginal people were able to guarantee an ongoing relationship with their traditional estates. This is one possible way of understanding Jack Mungett's relationship with Charles Griffith. It is possible to find in the 1840s and later numerous examples of a close connection forming between the European station holders and the families of these leading Aboriginal men (for example, Barringtonbittarney at Nareeb Nareeb, Billy Leigh at Woolamanata, and Thomas Ware at Challicum and Blythevale).[104] Furthermore, several squatters across Victoria were known to have fostered an educational interest in Aboriginal youths – for example, Colin Campbell at Buangor gave the son of 'King William' of the Ngutuwul baluk 'a lesson in geography'.[105] During the first period at Glenmore (1841-44) before his first overseas absence, Griffith was a single man and although he married whilst in Ireland, he and his wife never had children. When Griffith purchased Glenmore, Peter Mungett was approximately 10 years of age. It is not that farfetched to imagine that Charles Griffith took an active interest in the welfare and education of young Peter Mungett, and it is probable that Griffith was the source of his knowledge of the British legal system.

Conclusion

Mungett's case was the second instance in which an Aboriginal prisoner before a Victorian court refused to plead, on the grounds of his not being a British subject and therefore subject only to Aboriginal customary law. This paper has assessed the doubts that existed in the British and colonial legal systems about jurisdiction over Aboriginal people by focusing on the importance of *R v Peter*, heard by the Supreme Court of Victoria in 1860. Although the case raised vexatious issues of the legal status of Aboriginal people and Aboriginal customary law, the special plea was overturned. The legal demurrer was ultimately unsuccessful and despite Mungett's plea of not guilty, he was convicted and sentenced to death, though later this was commuted to fifteen years imprisonment.

The paper highlights the legal implications of Aboriginal peoples' standing before British law and also uncovers noteworthy information about issues of nineteenth-century Aboriginal customary law in regards to rape and sexual assault, and a small but significant linguistic contribution to this sensitive topic.

Peter did not want British legal protection rather it was his wish to live according to his people's own laws; this paper has considered Mungett's cultural milieu and confirmed that the traditional Wathawurrung Aboriginal social and legal system was present sufficiently in 1860 to warrant his claim that he should be tried by his own people rather than the colonial court. Moreover, this discussion has identified that the unequal position of Aboriginal people in white society (at law) had not improved in over two decades. By way of example the authors have uncovered that Mungett's private statement of guilt about the sexual assault was deemed inadmissible despite the fact that the court ruled he was subject to British law. This inadmissibility is all the more striking in light of the evidence, such as Mungett's letters, private deposition and observations made by Thomas, that Mungett was seemingly cogent of the Christian notion of a 'Supreme Being'. This study complements Cooke's case notes published in 1999 by considering the cultural milieu in greater detail. Some attempt has been made to account for Mungett's apparent legal knowledge. Another issue that the case highlights is that of the paucity of legal reporting in colonial Australia which presented the Victorian legal authorities with considerable difficulty when dealing with this case in 1860.

Endnotes

- [1] Simon Cooke, 'Arguments for the survival of Aboriginal customary law in Victoria: a case note on *R v Peter* (1860) and *R v Jemmy* (1860)', *Australian Journal of Legal History*, Vol. 5, 1999, pp. 201-241; Henry Reynolds is one of the few historians to mention this case, see H Reynolds *Aboriginal Sovereignty Reflections on race, state and nation*, Allen & Unwin, Sydney, 1996, p. 73.
- [2] Tracing Aboriginal people through colonial public records is often difficult because of the variation in the spelling of traditional Aboriginal names and by the various non-Indigenous names that were often bestowed upon Aboriginal people by Europeans. Furthermore, Aboriginal people themselves sometimes assumed different names. Mungett was variously referred to as: 'Peter, an Aboriginal' in criminal trial briefs (see PROV, VPRS 30/P0, Unit 230, case number 2 of Melbourne Criminal Court, 15 February 1860); 'Peter Munget'; 'Black Peter', and 'Peter Mungit' in William Thomas's journals and in his correspondence with Mungett (see William Thomas papers, Mitchell Library MSS 214/5, item 3, microfilm CY 3128); and as 'Oondiat' in Assistant Protector Edward Stone Parker's reports (see PROV, VPRS 4410/P0, Unit 2, Item 53 – this can be accessed on the microfiche copy that is part of VPRS 4467).
- [3] See Ian D Clark, *Aboriginal languages and clans: An historical atlas of western and central Victoria, 1800-1900*, Melbourne, Department of Geography and Environmental Science, Monash University, 1990.
- [4] *Argus*, 21 February 1860, p. 5.
- [5] B Bridges, 'The Aborigines and the law: New South Wales 1788-1855', *Teaching history*, Vol. 4, No. 3, 1970, pp. 40-70.
- [6] Cooke, 'Arguments for the survival of Aboriginal customary law in Victoria', p. 203.
- [7] *Herald*, 16 February 1860, p. 4.
- [8] Cooke, 'Arguments for the survival of Aboriginal customary law in Victoria', p. 204.
- [9] William Thomas papers, Mitchell Library MSS 214/5, item 3, microfilm CY 3128.
- [10] Peter, an Aboriginal, PROV, VPRS 515/P0, Unit 5, prisoner number 3035.
- [11] Edward Stone Parker, statement of Aborigines fallen in with, January – March 1840, PROV, VPRS 12/P0, Unit 1 (this can be accessed as a microfiche copy as part of VPRS 4467).
- [12] Report of Edward Stone Parker, August 1841, PROV, VPRS 4410/P0, Unit 2, Item 53 (this can be accessed on the microfiche copy that is part of VPRS 4467).
- [13] George Hobler, diaries 1830-1851, State Library of Victoria, MS 9569.
- [14] Charles Griffith, diary 1840, State Library of Victoria, MS 9393, box 1125.

- [15] KR Von Steiglitz (ed.), *Emma von Steiglitz: Her Port Phillip and Victorian album*, captions by PL Brown, Fullers, Hobart, 1964, p. 26. Brown's caption suggests that the Mungett depicted in this sketch was a woman, however we have not uncovered any references to confirm that any Marpeang women ever had this name.
- [16] Inquest of James Mungett, 8 April 1859, PROV, VPRS 24/P0, Unit 65, Item 1859/329.
- [17] William Thomas, weekly report of Guardian of Aborigines, 16–22 January 1860, PROV, VPRS 2896/P0, Unit 4, A1860/368 (this can be accessed as a microfiche copy that is part of VPRS 4467).
- [18] Clark, *Aboriginal languages*, p. 323.
- [19] *ibid*, p. 301.
- [20] Peter, an Aboriginal, PROV, VPRS 515/P0, Unit 5, prisoner number 3035, and Peter, an Aborigine, PROV, VPRS 515/P0, Unit 8, prisoner number 5160. See also the capital case file of Peter (an Aboriginal), PROV, VPRS 264/P0, Unit 2.
- [21] Report from the select committee upon protection to the Aborigines together with the proceedings of the committee, in *Papers Presented to Parliament*, 1859–1860, Vol. 2, Victorian Government Printer, Melbourne, 1860, p. 183.
- [22] Peter, an Aboriginal, PROV, VPRS 515/P0, unit 5, prisoner number 3035.
- [23] William Thomas, weekly reports of Guardian of Aborigines, 30 January – 5 February and 20–26 February 1860, PROV, VPRS 2896/P0, Unit 4, B1860/591 and A1860/1007 (these can be accessed as a microfiche copy that is part of VPRS 4467). The reference to Mungett's country as 'Port Phillip tribe', which usually refers to Woiwurrung or Boonwurrung, is indicative of the rapid demographic decline that had occurred among Aboriginal people across the Port Phillip District in the preceding 25 years. By the 1850s non-Indigenous commentators including William Thomas rarely recorded the clan or even the language name of Aboriginal people, referring to Aboriginal people in broad geographical terms such as 'Murray Aboriginals' or 'Melbourne Blacks'.
- [24] William Thomas, weekly report of Guardian of Aborigines to President of Land and Works, 26 August 1857, available as microfiche copy as part of PROV, VPRS 4467/P0.
- [25] Peter, an Aborigine, PROV, VPRS 515/P0, Unit 8, prisoner number 5160; on 25 March 1860, In his journal (January – July 1860) Thomas noted 'I see him regularly seated with the Protestants at 11 for service – he said he understood some part[s]; William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128. On 30 January 1860, Thomas notes in his journal that an Aboriginal named Timothy accompanied Thomas on his regular visits to Pentridge, and that he 'reads again his New Testament' to Mungett and 'has a long conversation with prisoner Peter'. This could be evidence that Peter could not read but it is not conclusive. See William Thomas journal, Mitchell Library MSS 214/5, item 3, microfilm CY 3128.
- [26] Peter, an Aboriginal, PROV, VPRS 515/P0, Unit 5, prisoner number 3035.
- [27] Mungett noted to Thomas: 'I have been with Mr Frances for twelve months at the time [of the sexual assault] I have been with Mr Macleod and others for many months breaking in horses and working', William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128.
- [28] Peter, an Aborigine, PROV, VPRS 515/P0, unit 8, prisoner number 5160.
- [29] Phillip G King et al to Sir George Gipps, Sydney, 8 June 1838, in M Cannon (ed.), *Historical Records of Victoria*, vol. 2A, *The Aborigines of Port Phillip, 1835–1839*, Victorian Government Printing Office, Melbourne, 1982, p. 350 (henceforth HRV).
- [30] Colonial Secretary to Phillip G King and other memorialists, 23 June 1838, in HRV, vol. 2A, p. 353.
- [31] *ibid*.
- [32] Lord Glenelg to Sir Richard Bourke, 26 July 1837, in HRV, vol. 2A, p. 70.
- [33] NSW Government Gazette entry, 21 May 1839, in HRV, vol. 2B, *Aborigines and Protectors 1838–1839*, Victorian Government Printing Office, Melbourne, 1983, p. 754.
- [34] *ibid*, pp. 754–5.
- [35] Sir George Grey to Assistant Protectors, 6 February 1838, in HRV, vol. 2B, p. 377.
- [36] Journal of William Thomas, April–December 1839, in HRV, vol. 2B, p. 571.
- [37] *ibid*, p. 533.
- [38] *ibid*, pp. 532–3. Wugel wugel is the eastern Kulin word for string, obviously a reference to the hangman's rope or noose.
- [39] *ibid*, p. 561.
- [40] *ibid*, p. 559.
- [41] *ibid*, p. 562.
- [42] William Lonsdale to Colonial Secretary, 16 May 1838, in HRV, vol. 2A, p. 301.
- [43] WW Burton to Henry Labouchere, 17 August 1839, in HRV, vol. 2B, p. 759.
- [44] Sir George Gipps to Marquis of Normanby, 14 October 1839, in HRV, vol. 2B, p. 760.
- [45] *ibid*, p. 761.

[46] See The Aborigines, correspondence on the subject of crimes committed by the natives *inter se*, with an opinion of the Attorney General, in *Papers Presented to Parliament*, 1858, Vol. 1, Victorian Government Printer, Melbourne, 1858.

[47] 'Are the Aborigines British Subjects?', *Port Phillip Herald*, 19 October 1858, p. 5.

[48] Thomas to Commissioner of Land and Survey regarding Mungett, 28 January 1860, PROV, VPRS 2896/P0, Unit 4, B1860/527 (this can be accessed as a microfiche copy that is part of VPRS 4467).

[49] In his notes, William Thomas wrote during October 1860 that 'Dr Mackay informs me that Judge Pohlman tells him that the London Law Times – had a note of Peters trial February last – Says Dr Mackay is right & Court wrong – Dr Mackay says he is going to present Mungett to Queen's Privy Council', William Thomas papers, Mitchell Library MSS 214/5, item 3, microfilm CY 3128.

[50] In his role as Guardian of the Aborigines of Victoria, Thomas had acted as mediator on several occasions in the 1850s for Aboriginal people on charges of assault and rape involving European women. Thomas noted in his 1856 annual report for example that 'Harry another Sydney black is committed for trial for an assault and attempt on a White woman, subsequently tried and sentenced to two years hard labor on the roads', see William Thomas Guardian of Aborigines annual report to the Surveyor General, 31 December 1856, available as a microfiche copy as part of PROV, VPRS 4467/P0.

[51] Bridges, 'The Aborigines and the law', pp. 40-70.

[52] *Herald*, 16 February 1860, p. 4.

[53] *Argus*, 16 February 1860, p. 3.

[54] *Argus*, 17 February 1860, p. 7.

[55] See B Bridges, 'The extension of English law to the Aborigines for offences committed *inter se*, 1829-1842', *Journal of the Royal Australian Historical Society*, Vol. 59, Part 4, 1973, pp. 262-9; J Hookey, 'Settlement and sovereignty', in Peter Hanks and Bryan Keon-Cohen (eds), *Aborigines and the law: Essays in memory of Elizabeth Eggleston*, George Allen & Unwin, Sydney, 1984, pp. 1-18; Susanne Davies, 'Aborigines, murder and the criminal law in early Port Phillip', *Historical studies*, No. 313, 1987; Bruce Kercher, 'An unruly child: A history of law in Australia', Allen & Unwin, St Leonards, 1995; Bruce Kercher, 'Native title in the shadows: the origins of the myth of *Terra Nullius* in early New South Wales Courts', in G Blue, M Bunton and R Croizier (eds), *Colonialism and the modern world: Selected studies*, ME Sharpe, New York, 2002, pp. 100-19.

[56] Criminal trial brief for 'Queen versus Bon Jon' PROV, VPRS 30/P0, Unit 185, NCR 9; *Port Phillip Patriot*, 20 September 1841; MF Christie *Aborigines in colonial Victoria 1835-86*, Sydney University Press, Sydney, 1979, p. 113.

[57] See B Kercher, 'Recovering and reporting Australia's early Colonial Case Law: the Macquarie Project', *Law and history review*, Vol. 18, No. 3, 2000, pp. 1-5. 58. See Cooke, 'Arguments for the survival of Aboriginal customary law in Victoria'; RHW Reece, *Aborigines and Colonists Aborigines and Colonial Society in New South Wales in the 1830s and 1840s*, Sydney University Press, Sydney, 1974, pp. 118-19; B Kercher, 'R v Ballard, R v Murrell and R v Bonjon', *Australian Indigenous law reporter*, Vol. 3, No. 3, 1998, p. 410; B Kercher, 'Recognition of Indigenous legal autonomy in nineteenth-century New South Wales', *Indigenous law bulletin*, No. 7, 1998; B Kercher, 'The recognition of Aboriginal status and laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836', in AR Buck, J Laren, and NE Wright (eds), *Land and freedom law: Property rights and the British diaspora*, Ashgate, Dartmouth, 2001, pp. 83-102; A Hunter, 'The boundaries of colonial criminal law in relation to inter-Aboriginal conflict ('*Inter se* offences') in Western Australia in the 1830s-1840s', *Australian journal of legal history*, Vol. 8, 2004, pp. 215-36; R Smadlych, '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*, Vol. 8, 2004, pp. 237-83. Relevant cases may be consulted at Professor Kercher's website at <http://www.law.mq.edu.au/scnsw>, accessed 17 September 2009.

[59] Smadlych, p. 239.

[60] *Port Phillip Gazette*, 11 December 1841 cited in Bridges, 'The extension of English law to the Aborigines', p. 268.

[61] In his journal for January – July 1860, Thomas notes 'Peter alias Munget-Criminal 1860, Toe-yang rape [illegible] Mun-ner Finger Ber-ket-tun-ner', William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128.

[62] See Thomas journal for 1860, William Thomas papers, Mitchell Library MSS 214/5, item 3, microfilm CY 3128. It is possible that Ber-ket-tun-ner is the Wathawurrung word for rape or attempted rape of a young child, and if so is a valuable addition to the Wathawurrung lexicon.

[63] Clark, *Aboriginal languages*.

[64] *ibid*.

[65] *Herald*, 16 February 1860, p. 4.

[66] See Thomas journal January – July 1860, William Thomas papers, Mitchell Library, MSS 214/5, item 1, microfilm CY 3128.

[67] Thomas intimated on a number of occasions that while he abhorred Peter's crime he found Peter quite likeable and after spending an entire afternoon with him on 20 February 1860 noted that 'he is very intelligent', journal of January – July 1860, William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128.

[68] William Thomas, entry written 23 February 1860 in his journal January – July 1860, William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128.

[69] Cooke, ‘Arguments for the survival of Aboriginal customary law in Victoria’, p. 209.

[70] Thomas, journal January – July 1860, William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128.

[71] Guardian of Aborigines, weekly report of William Thomas, 27 February to 4 March 1860, PROV, VPRS 2896/P0, Unit 4, A1860/1248 (this can be accessed as a microfiche copy that is part of VPRS 4467).

[72] *Herald*, 29 June 1860, p. 6.

[73] *Argus*, 7 September 1860, p. 6(a).

[74] Cooke, ‘Arguments for the survival of Aboriginal customary law in Victoria’, pp. 213–23.

[75] Capital case file of Peter (an Aboriginal), PROV, VPRS 264/P0, Unit 2.

[76] Peter Mungit to Thomas, letter from Pentridge Stockade, 7 January 1861, William Thomas papers, Mitchell Library MSS 214/17, microfilm CY 3100.

[77] Capital case file of Peter (an Aboriginal), PROV, VPRS 264/P0, Unit 2; Thomas, entries for 22–23 February 1860 in journal January – July 1860, William Thomas papers, Mitchell Library MSS 214/5, item 1, microfilm CY 3128.

[78] Peter Mungit to Thomas, letter from Pentridge stockade, 28 March 1863, William Thomas papers, Mitchell Library MSS 214/19, microfilm CY 3104.

[79] Peter, an Aboriginal, PROV, VPRS 515/P0, unit 8, prisoner number 5160.

[80] Cooke, ‘Arguments for the survival of Aboriginal customary law in Victoria’, p. 212.

[81] *ibid*, p. 212. Cooke, ‘Arguments for the survival of Aboriginal customary law in Victoria’, notes that there is an oblique annotation in the prison register that Peter had returned to Bacchus Marsh. He disappeared five months after receiving his ticket-of-leave.

[82] *ibid*, p. 229.

[83] Before the arrival of magisterial authority at Port Phillip ‘an act of aggression ... committed upon one of the [Aboriginal, probably Wathawurrung] women’ led to a party of about 150 Aboriginal people ‘demanding redress’ for the crime of ‘abusing her person’. According to local colonist John Fawkner, the Aboriginal people seemed satisfied that the matter had been resolved to their satisfaction by sending the offender away from the community to Tasmania. See Gellibrand in TF Bride (ed.), *Letters from Victorian pioneers*, Heinemann, Melbourne, 1898, pp. 6–32. See also Fawkner diary, 12–15 February 1836 in CP Billot (ed.), *Melbourne’s Missing chronicle by John Pascoe Fawkner*, Quartet Books, Melbourne, 1992, p. 38.

[84] Guardian of the Aborigines, weekly report of William Thomas, 15–21 November 1858, PROV, VPRS 2896/P0, Unit 2, C1858/2206 (this can be accessed as a microfiche copy that is part of VPRS 4467). Thomas recorded that some Aboriginal people from Bacchus Marsh had visited Tara Bobby and Billy Logan at Pentridge.

[85] The Board of Inquiry met in June and July and reconvened in December 1843. On 30 December 1843, the board confirmed that Le Souef had misused his appointment by embezzling government funds, stores and rations, and by using Protectorate servants, equipment and land for his own profit. La Trobe subsequently dismissed Le Souef.

[86] See Ian D Clark, *Scars in the landscape: A register of massacre sites in western Victoria, 1803–1859*, Aboriginal Studies Press, Canberra, 1995, pp. 35–42.

[87] Ian D Clark (ed.), *The journals of George Augustus Robinson Chief Protector, Port Phillip Aboriginal Protectorate*, Vol. 3, Heritage Matters, Clarendon, 2000. A group of six Europeans comprised of Robert Whitehead, the licensee of the adjoining Spring Creek run, and several of his employees, and two employees of the Caramut run, attacked the Aboriginal families. Four women and a male child were killed. Griffith’s good friend Redmond Barry, standing counsel for the Aborigines, conducted the prosecution. Three of the men, Richard Hill, Joseph Betts, and John Beswick, were tried in July and August 1843 and found not guilty. Whitehead, Boursiquot, and Smith absented themselves temporarily from Port Phillip.

[88] New South Wales Legislative Council, *Report from the select committee on the Aborigines and protectorate with appendix, minutes of evidence, and replies to a circular letter*, Government Printer, Sydney, 1849, p. 17.

[89] Griffith visited the Mount Rouse Aboriginal protectorate station in July 1842 (see C Griffith, *Present state and prospects of the Port Phillip District of New South Wales*, William Curry, Jun. & Son, Dublin, 1845, p. 194). He refers to having conversed with Sievwright, the assistant protector, on the subject of cannibalism (p. 149). On 8 February 1842 James Moore married Harriet Watton, the daughter of Dr John Watton of Exford station (see B Osborn, *The Bacchus story: A history of Captain WH Bacchus, of Bacchus Marsh, and his son*, Bacchus Marsh & District Historical Society, Bacchus Marsh, 1973, p. 99). Watton had held Exford station on the Werribee River, sometimes known as Mount Cottrell, from 1839 until 1842 when he transferred ownership to Simon Staughton (p. 31). Exford adjoined Glenmore, and Watton's hut was near the confluence of the Toolam Toolern Creek and the Djerrwarrah Creek. Acheson French, who later married Anna Watton, one of Watton's daughters, was living at Exford in January 1841. French approached the Chief Protector George Robinson in January 1841 and applied for the position of assistant protector for the Goulburn district which had been vacated by James Dredge. This is another Aboriginal connection, for Dr Watton served as medical officer in charge of the Western District of the Port Phillip Aboriginal Protectorate from August 1842 until late 1849.

[90] PHH De Serville, *Port Phillip gentlemen and good society in Melbourne before the gold rushes*, Oxford University Press, Melbourne, 1980, p. 45.

[91] Griffith diary, 18 November 1840.

[92] Christie, *Aborigines in colonial Victoria*, p. 153.

[93] *ibid.*

[94] Osborn, p. 31.

[95] Griffith diary, 3 March 1841.

[96] Griffith, *Present state and prospects*, p. 103.

[97] C Woods, 'Charles James Griffith (1808-1863)', *Australian Dictionary of Biography*, Vol. 4, Melbourne University Press, Melbourne, 1972, p. 301, also available online at <<http://adbonline.anu.edu.au/biogs/A040341b.htm?hilite=griffith>>, accessed 28 October 2009.

[98] Griffith, *Present state and prospects*, p. 161.

[99] *ibid*, p. 168.

[100] *ibid*, p. 172.

[101] *ibid*, p. 188.

[102] *ibid*, p. 190.

[103] Griffith's 1840-1841 diary contains a glossary which includes a few words in the language of the Port Philip Corio Weirabee and Barabul tribes. These include tooan (flying squirrel), kol kol kolee (young man), yalluck (river), la (stone), kurrung or mimi (hut or breakweather), and borack (no).

[104] See Ian D Clark, 'That's my country belonging to me': *Aboriginal land tenure and dispossession in nineteenth-century western Victoria*, Ballarat Heritage Services, Ballarat, 2003, p. 155.

[105] Clark, *Aboriginal languages*, p. 136.