When South Australia was founded in 1836, the British government was pursuing a new approach to the treatment of Aboriginal people that it hoped would avoid the violence that marked earlier Australian settlement. The colony’s founding Proclamation declared that as British subjects, Aboriginal people would be as much ‘under the safeguard of the law as the Colonists themselves, and equally entitled to the privileges of British subjects’. But could colonial governments provide the protection that was promised?

Out of the Silence explores the nature and extent of violence on South Australia’s frontiers in light of the foundational promise to provide Aboriginal people with the protection of the law, and the resonances of that history in social memory. What do we find when we compare the history of the frontier with the patterns of how it is remembered and forgotten? And what might this reveal about our understanding of the nation’s history and its legacies in the present?

Robert Foster’s and Amanda Nettelbeck’s In the Name of the Law: William Willshire and the Policing of the Australian Frontier was described as ‘a book that deserves to be on the reading list of any guide to essential reading in Australian history.’ Their first book with Rick Hosking, Fatal Collisions, was described as ‘groundbreaking’ and ‘an important contribution to current thinking about frontier histories’.

Front cover illustration: Edward Snell, ‘Blacks on the way to Adelaide in custody, Yorke Peninsula, 22 June 1850’. Courtesy State Library NSW.
Robert Foster is Associate Professor in the School of History & Politics at the University of Adelaide. Amanda Nettelbeck is Professor in the School of Humanities at the University of Adelaide. Their previous co-authored books, also published by Wakefield Press, are *Fatal Collisions: The South Australian Frontier and the Violence of Memory* (with Rick Hosking, 2001) and *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (2007).
Out of the Silence

The History and Memory of South Australia’s Frontier Wars

Robert Foster and Amanda Nettelbeck
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In this book we revisit some of the events we first addressed in Fatal Collisions: the South Australian Frontier and the Violence and Memory; it has been necessary to do so because these events form an integral part of the more comprehensive analysis of the trajectory of the South Australian frontier which is undertaken here.

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In 1835 Britain’s House of Commons established a Select Committee to inquire into the conditions of Aboriginal people in British settlements. Chaired by the evangelical politician Sir Thomas Fowell Buxton, famed for his role in the abolitionist movement, the Select Committee was symptomatic of a building reformist politics over the past decade as Britain sought to reconcile the economic strength of its empire with an increasing sense of humanitarian duty towards Aboriginal peoples across its colonies.¹ The Committee’s report of 1837 was forthright in its condemnation of past British policy toward ‘the uncivilized nations of the earth’. This had been a policy that had not only sacrificed many thousands of lives, it stated, but continued to have disastrous consequences for Aboriginal peoples:

Too often, their territory has been usurped; their property seized; their numbers diminished; their character debased; the spread of civilization impeded. European vices and diseases have been introduced amongst them, and they have been familiarized with the use of our most potent instruments for the subtle if violent destruction of human life, viz. brandy and gunpowder.²

The Select Committee’s report spoke strongly of rights. Aboriginal peoples had a ‘plain and sacred right’ to their soil, and Europeans had not only intruded upon that soil, but had then punished the original inhabitants for presuming to ‘live in their own country’.³ But although it issued a compelling reminder of the wilful neglect of Aboriginal rights across Britain’s colonies, the Select Committee’s report refrained from acknowledging the sovereignty of the Aboriginal peoples of Australia, whose political and social systems it regarded as being too ‘destitute’ to warrant that status. Instead, it argued, these peoples must be secured ‘the due observance of Justice’ through the extension of ‘civilisation’ and ‘Christianity’.⁴ The 1837 report illuminated a paradox at the heart of colonial endeavour in Australia from this time onwards, for although its language of humanitarian liberalism challenged a

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history of British settlement in which Aboriginal rights had been usurped, it did not fundamentally challenge Britain’s continuing possession of new territories.5

At the same time as the Select Committee was conducting its inquiries into the effects of colonisation on Aboriginal peoples across Britain’s empire, plans were evolving to establish the new colony of South Australia, which was formally proclaimed on 28 December 1836. South Australians now know this day as Proclamation Day, and celebrate it every year with a ceremony at the ‘Old Gum Tree’ near the beach-side suburb of Glenelg. This is the place where the colony’s inaugural governor Captain John Hindmarsh read ‘The Proclamation of South Australia’ and formally announced British possession.

The Proclamation was a remarkable document for the fact that, despite being one of the legal instruments by which Aboriginal sovereignty was overturned, well over half of it was devoted to the question of the rights and welfare of Aboriginal people and, in particular, their status as British subjects. In insisting upon this principle, the Colonial Office was mindful of the violence that had marked earlier Australian colonies, and was determined that the unequivocal extension of British legal rights to Aboriginal people would not only be a humane intervention but also a means of deterring the kind of settler excesses that had occurred elsewhere. In this respect the importance of South Australia’s Proclamation lay not only in what it claimed to offer Aboriginal subjects of the Crown, but in the caution it offered to its European ones. As British subjects, Aboriginal people were unambiguously ‘under the Safeguard of the law’, and any ‘acts of violence or injustice’ toward them would be punished ‘with exemplary severity’.6

The nature and extent of frontier violence after 1836, and the degree to which the law operated to provide Aboriginal protection as British settlement unfolded, are therefore significant questions not only in understanding the character of South Australian settlement but also in analysing more broadly the terms on which British settlement in Australia took place after the 1830s. Having established authority over previously sovereign peoples, could colonial governments fulfil the promise of providing them with legal protection as British subjects, a promise which formed the moral underpinning of the assertion of British sovereignty?

The Australian frontier and the rule of law
Until this time in the Australian colonies, the treatment of Aboriginal people under British law had been marked by ambiguity and vacillation.7 Although
the principle that Australia was settled rather than conquered implicitly suggested that Aboriginal people were British subjects from the moment of British occupation, their relation to British law was ‘largely a matter of chance’. The early instructions to governors in Van Diemen’s Land and New South Wales to attempt ‘conciliation’ with Aboriginal people were framed as a matter of intention rather than as a legal imperative. As a result, occasional efforts to afford Aboriginal people protection under the law were, for at least the first fifty years of British settlement in Australia, ‘certainly not the general rule’. Given that Aboriginal people could neither give evidence in a court of law nor be expected to understand its proceedings, the only course, according to New South Wales’ early Judge Advocate Richard Atkins, was ‘to pursue and inflict such punishment [on them] as they merit’. Atkins’ blunt assessment describes the broad shape of early Australian settlement. After an outbreak in the Bathurst region of New South Wales in 1824, in which the Wiradjuri had killed seven stockmen, Governor Brisbane declared martial law west of the Blue Mountains. Governor Arthur also employed this strategy on several occasions, most famously in August of 1830 when authorising the ‘Black Line’, his attempt to drive all the Aborigines from the settled districts. Though perhaps desirous of conciliating where possible, there is little sign that the Governors of Australia’s earliest colonies felt obliged to treat Aboriginal people as subjects of the Crown.

Interestingly, Tim Castle has shown that of the 363 executions that took place in New South Wales in the decade before 1836, only four of the executed were Aboriginal men; the vast majority were male convicts, not only indicating that convict crime rather than frontier violence was regarded as the most significant threat to social order, but also demonstrating the legal uncertainty that pertained well into the 1830s about the amenability of Aboriginal people to British criminal law. A case that seemed to clarify the status of Aboriginal people took place in New South Wales in 1836, the same year that saw the foundation of South Australia. This was the murder trial of R. Vs Murrell, in which the New South Wales court decided that an inter se case where one Aboriginal man had killed another was within its legal jurisdiction to try under British criminal law. However, the court’s reluctance to find Murrell guilty indicated continuing uncertainty about the treatment of Aboriginal people as British subjects, and despite the precedent set in taking this case to trial, judges elsewhere across Australia’s colonies continued for at least the next decade to express doubt that their courts held jurisdiction over Aboriginal peoples – peoples who not only shared no understanding of British law, but had shown no sign of submitting to it.
Perhaps the most telling marker of continuing ambiguity about Aboriginal people’s status in the eyes of the law is that across Australia’s colonies, very few Europeans were brought to legal account over the course of the nineteenth century for the murder of Aboriginal people. The execution in 1838 of seven white men for the Myall Creek massacre in New South Wales – in defiance of considerable public pressure to acquit them – was an exception to the more enduring rule that the law ‘nearly always failed … to protect Aboriginal subjects’. Indeed, shortly after this event, Governor Gipps declined to prosecute New South Wales police who had shot dead a dozen or so Aboriginal people in a frontier clash in order to avoid offending the volunteer police force.

In the Port Phillip district (later Victoria), Aboriginal protection under the law proved equally elusive. Susanne Davies has shown that between 1841 (when the district had its first resident judge) and 1847, five Aborigines were hanged for the killing of Europeans, despite doubts about their capacity to understand the proceedings and the inadmissibility of their testimony in court. In the same period, the death sentence of an Aboriginal man tried for murdering another Aboriginal was commuted, indicating the judiciary’s discomfort at invoking British law in *inter se* cases and continuing legal doubt about the status of Aboriginal people as British subjects. In contrast, only two cases in colonial Victoria saw Europeans tried for the murder of Aboriginal people, and in both cases the defendants were acquitted. To put this in perspective, Richard Broome has argued that Aboriginal fatalities on Victoria’s pre-1850 frontier can be calculated at 700 or more.

In colonial Queensland, too, judicial punishment was directed more concertedly against Aboriginal and other non-European people, and even after capital punishment reform which prohibited executions as public spectacle, Aboriginal people continued to be gathered together to witness the hanging of their countrymen as an educational example and deterrent against ‘committing outrages upon settlers’.

The ‘lawful violence’ practiced against Aboriginal people in colonial Queensland from the time of its separation from New South Wales in 1859 is perhaps best exemplified by the notoriously violent operations of the Native Police. In working to secure European settlement through the second half of the nineteenth century on Queensland’s northern and western frontiers, the corps of the Native Police worked through an implicit legal contradiction: on the one hand, Aboriginal people were in theory British subjects due the protection of the law; on the other hand (as Queensland’s Aboriginal Commission noted in 1875), ‘without an armed force the frontier settlement could not be maintained’.
Western Australia might suggest a different pattern in so far as, like South Australia, it promised Aboriginal protection under the law not just as a vacillating ‘afterthought’ but as a foundational principle. When Lieutenant-Governor Stirling proclaimed Western Australia as a British colony in June 1829, he stated (though without quite the definite force of intention expressed by Governor Hindmarsh in proclaiming South Australia in 1836) that anyone behaving in a ‘fraudulent, cruel or felonious manner’ towards Aboriginal people would ‘be liable to be prosecuted and tried for the offence as if the same had been committed against any other of His Majesty’s subjects’. Again, however, the historical record suggests that in Western Australia ‘both courts and the colonial government [realised] that Aborigines could not really be treated as British subjects’, and exercised a mixture of ‘legal and illegal remedies’ in responding to Aboriginal ‘crime’ well into the 1840s. And though technically British subjects, Aboriginal people would be policed on Western Australia’s remote northern frontiers with deadly force until the early twentieth century, while in contrast it proved virtually ‘impossible’ to investigate settlers for crimes against Aboriginal people.

Bruce Kercher has noted that South Australia would seem most likely amongst Australia’s colonies to have an effective rule of law because, unlike other Australian colonies, a clear judicial system was established there ‘almost from the beginning’. As he puts it, legal ‘amateurism’ defined the first decades of New South Wales justice, as well as justice in the early Moreton Bay settlement under New South Wales’ jurisdiction before Queensland’s separation in 1859; Port Phillip had no resident judge until 1841 or Supreme Court until its separation from New South Wales in 1851; and although Western Australia had a civil court from 1832, its judges were ‘flexible about the application of English law’ until a Supreme Court was established in 1861. However, although South Australia’s judicial structure may have been clearly established from the outset, implementing a rule of law on the frontiers of settlement proved to be altogether another matter.

Given that South Australia was distinctive in its explicit promise to protect Aboriginal people under the law, the history of how its settlement took place, and of Aboriginal resistance to it, has remained surprisingly under-researched in the historical scholarship of Australia’s frontiers. Likewise, although there is some excellent scholarship addressing the relationship between Aboriginal people, police and the law in colonial Australia, there has been surprisingly little sustained analysis of the practical processes by which Aboriginal people were brought under the authority of the colonial state. This book considers the ways in which these processes
unfolded across the evolving frontiers of South Australia, and examines how
governments and settlers dealt, in policy and in practice over the course of
decades, with Aboriginal resistance to incursions upon their land. While
these reveal a set of specific policing strategies and administrative mecha-
nisms (with varying levels of effectiveness), they also demonstrate a process
of wheels repeatedly being re-invented, most particularly because there was
no global Aboriginal resistance but rather the singular response of dozens of
Aboriginal nations faced with invasion of their lands.

Despite the foundational principle that Aboriginal people were to be
considered British subjects under the law – a principle intended to set South
Australia apart from the violence that had marked other Australian colo-
nies – through the second half of the nineteenth century a unifying theme
concerning the colony’s governors and administrators was whether and
how Aboriginal people were in fact amenable to the rule of law. In 1863
South Australia’s Police Commissioner Major P.E. Warburton responded to
Aboriginal attacks against settlers in the colony’s north by dispatching more
mounted troopers and ammunition to the district. When the Protector of
Aborigines protested against these ‘war-like preparations’, the Commissioner
responded angrily that the police were ‘directed to endeavour to secure the
legal punishment of these offenders, but this is next to impossible – These
savages cannot be made to understand our Laws whatever pains we may
take to teach them… they will not yield to the covenants of the Law whilst
they have the least power of resistance’.31 On the one hand, the Police
Commissioner was duty-bound to uphold the principle of the rule of law,
which required the protection of Aboriginal peoples as British subjects; on
the other, he knew his primary task in managing the frontiers of European
settlement was to suppress Aboriginal resistance.

In this study we use the term ‘frontier’ to refer to that phase of European
settlement from the time when settlers first intruded into Aboriginal country
to the point when colonial authority over Aboriginal people was effectively
established. In this respect South Australia’s were pastoral frontiers, driven
further and further inland by settlers in search of fresh grazing land for
their sheep and cattle. South Australia’s frontiers incorporated not only the
largest territory amongst Australia’s colonies but also the longest-lived and
most protracted struggles for British settlement because until 1911 it included
within its jurisdiction the Northern Territory, which only earnestly began
to fill with settlers from the 1870s after the establishment of the Overland
Telegraph Line. In a detailed sense, however, our history of how these fron-
tiers were managed concludes in the 1870s when the limits of good grazing
land within South Australia’s current northern borders were reached; from that time to the end of the nineteenth century, the patterns by which the Central Australian frontier evolved would prove to be relentlessly repetitive of those that had emerged between the 1840s and the 1870s further south.32

The frontier phase in most regions was typically characterised by Aboriginal resistance to the invasion of their lands, which took the form of attacks on settlers, their stock and their property. Aboriginal resistance was met in turn by an assertion of European force designed to suppress that resistance. As Henry Reynolds has argued in regard to Aboriginal sovereignty, a key characteristic of the Australian frontier – one that proved to be as true of South Australia as of Australia’s earlier colonies – was the uncertainty of Britain’s effective occupation: if a rule of government ‘extends as far as … its administrative machinery is in efficient exercise’, then in Australia, British sovereignty was only of ‘a qualified and limited order’.33 In this respect the frontier phase, as Julie Evans has argued, highlights the ‘unsuitability’ of the rule of law, which remained insecure until such a time as the Aboriginal peoples it purported to protect had been dispossessed.34 Tom Griffiths has made a similar point somewhat more bluntly: it was in the very nature of the frontier ‘to undermine the rule of law and the legal method’.35

Remembering the frontier
The question of whether and how a rule of law operated on Australia’s frontiers has been central to recent critiques of frontier historiography. In his controversial book The Fabrication of Aboriginal History, Keith Windschuttle argued that, with some notable exceptions, most of the violence of Australia’s frontiers occurred in the context of legitimate police actions; colonial authorities were dealing with Aboriginal criminality, not warfare. The ideal of the rule of law, which assumed that Aboriginal peoples would be protected and if need be punished as British subjects, was certainly central in the thoughts of British policy-makers at the same time the colony of South Australia was being planned, but how did it translate into practice? A close examination of how the settler frontier evolved ‘on the ground’ and how it was policed suggests that not only was the rule of law an ideal impossible to implement but that, perversely, the often genuine attempts to impose it undermined its effectiveness by diminishing settlers’ faith in its capacity to protect their interests, and encouraging their own forms of ‘frontier justice’.36

This question is critical to the issue of how frontier conflict between Aboriginal people and Europeans has been recorded and remembered. In 1968 W.E.H. Stanner famously observed the remarkable absence of
Aboriginal people from twentieth century histories of Australia. Although his insight is largely true of the national histories produced at that time, the very prominence of the idea risks obscuring a much more complex, ever-evolving, and often contradictory story of remembrance. As Tom Griffiths has astutely observed, Australia’s was a ‘strange frontier’ of ‘fear and distain’, not easily conceivable in terms of ‘a romance of campaigns and heroes’. In large measure, this can be traced back to the foundational fiction that Aboriginal people were protected as British subjects and that, by association, Australia was settled rather than conquered. In reality the colonial state, as well as settlers, were required to use force to secure the lands they claimed and affect the subjugation of Aboriginal people to state authority. Wars were fought, but these were wars that could not generally be openly acknowledged. The inherent tension between Aboriginal people’s nominal status as subjects of the Crown and the lived experience of violent dispossession shaped the way frontier conflict was reported and remembered.

The records of European settlement leave little doubt that war was being levied against Aboriginal people to dispossess them of their lands and ensure their subjugation to state authority. Governors and Police Commissioners, Mounted Police and settlers understood this fact full well, and they also understood the tension between this reality and the ideal that a rule of law prevailed. A good deal of the violence that occurred on Australia’s frontiers happened beyond the reach of metropolitan surveillance and before the arrival of police and colonial officials whose task it was to uphold the law. Privately recorded accounts of conflict suggest that frontier clashes often went officially unreported, and if news of them did come to the notice of attentive officials, time, distance, and settler solidarity made them difficult to prove. Settlers were often caught between a desire to record their experiences and a reluctance to incriminate themselves. This tension can be seen in the written records of settlers, especially in a euphemistic language that recorded, while at the same time masked, the violence of the frontier: the ‘Natives were dispersed’, for instance, or perhaps they were ‘taught a lesson’. These forms of language, writes Tom Griffiths, ‘reveal that many colonists accepted murder in their midst; but they reveal, too, an awareness that it could not be openly discussed’.

South Australia presents a particularly useful case for examining at closer range the historical memory of Australian settlement and its counterpart of Aboriginal dispossession because, from amongst all of Australia’s former colonies, it has always cherished a reputation for the humanitarian treatment of Aboriginal people. South Australia prides itself on its ‘sense of difference’.
Perhaps the most comprehensive examination of this idea remains Douglas Pike’s 1957 work *Paradise of Dissent*, a history of the colony’s first thirty years which focuses on its social, political and economic foundations. Pike explores the qualities that set the Province apart: foremost among them was that it was a colony free of the ‘convict stain’; it was a planned colony, built on Wakefield’s theory of systematic colonisation; and it was a colony predicated on liberal ideals of religious and political freedom. The idea that it was a colony more liberal in its approach to the treatment of Aboriginal people came to adhere to this overarching idea of ‘difference’. The origins of this claim can be traced to the colony’s founding documents: the Letters Patent, which acknowledged prior Aboriginal title to the land, and the Proclamation, which undertook to place Aboriginal people under the protection of the rule of law as British subjects. These were innovations of the British Colonial Office rather than ones welcomed by South Australia’s founders, yet even by the late nineteenth century they became seen as emblematic of the colony’s ‘benevolent intentions’ toward its Aboriginal subjects.

Yet despite its often covert face, and despite the fact that it has more recently emerged as an apparently ‘hidden’ history, the story of frontier conflict has never disappeared – at least entirely disappeared – from public view. In contrast to W.E.H. Stanner’s famous conception of the ‘great Australian silence’, which expresses the exclusion of the story of Aboriginal dispossession from Australia’s ‘textbook’ history throughout most of the twentieth century, local historical narratives have always kept the story of Aboriginal and European conflict in view. In the memoirs of settlers, in published local histories, and in memorials and commemorative tributes to the past, the history of a violent frontier is something that may be remembered with partiality, but is never quite forgotten. The events of the past, and the questions of how they were recorded and remembered, are not separable ones but are inexorably linked, and those links maintained in memory. Aboriginal peoples have always remembered the violence of their dispossession; but South Australia’s settler-descended communities have also always engaged with this aspect of their history, although its forms have shifted and changed through time.

Our society, writes philosopher Janna Thompson, is an ‘intergenerational community’ of institutions and moral relationships that ‘persist over time and through a succession of generations’, and its ‘moral and political integrity’ relies upon ‘its members accepting transgenerational obligations and honouring historical entitlements’. This conception of society as an intergenerational community informs our approach to this history and underpins
our concern with the nexus between history and memory. What do we find when we compare the recoverable history of the frontier with the patterns of how it is both remembered and forgotten? What, in turn, might this suggest about the status of our nation’s history, as well as its legacies in the present? These questions are the subject of this book.