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The Distinctiveness of Australian Law

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Introduction

The title of this book refers to law and justice. In an ideal legal system, these would go together automatically, but we do not live in an ideal world. However, much of the development of the Australian legal system has arisen out of people's desire for justice—their attempts to change the legal system when justice has not been served by the law. This book is based on the belief that justice should be served by the law and that law should always be considered from the standpoint of those with a passion for justice. Australian law sometimes meets that goal, but sometimes fails. One of the basic principles of justice in law is the doctrine known as 'the rule of law'. The rule of law means that all people are subject to the law and can rely on the law to set the bounds within which other people and governments can operate. That is, the rule of law can operate to prevent the arbitrary abuse of power. Societies which do not have the rule of law suffer greatly, as the examples in the concluding chapter of this book show.

Australian law has developed from the traditions of the English common law, but it is not a mere outcrop of English law. The particular conditions the colonists found and the demands of a developing country have created a distinctive system of law. This chapter introduces some of the characteristics of our legal system—both those which can only be explained by reference to history and those which are indigenous to Australia. We begin with a story.

Henry and Susannah Kable

The Kables met in Norwich jail in 1786. Henry had been convicted of theft along with his father and uncle, who were hanged. Henry's sentence was commuted to transportation because he was only seventeen. Susannah had been convicted of theft of clothes. Henry and Susannah fell in love but the prison authorities refused to allow them to marry, even though Susannah became pregnant. Susannah's sentence was transportation and she was ordered to be placed on the 'Alexander' of the First Fleet, travelling to Australia in 1787. When the turnkey (prison officer), Simpson, delivered her to the ship, the captain refused to take her six-week-old baby boy because there were no papers for him. The turnkey was horrified at what he saw as a sentence of death for the baby, and, taking the infant, rode across England to the home of the Colonial Secretary, Lord Sydney. There he refused to move until Lord Sydney would see him. Turnkeys being of low class, Lord Sydney's butler refused to admit Simpson, so Simpson waited outside until he could catch his Lordship's attention. When he finally spoke to Lord Sydney, he persuaded him not only to allow the baby to go with his mother, but also to allow the mother and father to marry—and for Henry's transportation destination to be changed from America to the new colony.

This is a great story, but it has a significance for Australian law which may not yet be apparent. The fuss created by the turnkey while he waited for Lord Sydney led to newspaper coverage and a large collection to be raised. The sum of £20 was collected for the couple and deposited with the ship's captain for safekeeping. The money was there when the ship stopped at Rio de Janeiro and at Capetown, but on landing at Sydney it had vanished. Henry and Susannah were convicts. In English law that meant they were 'civilly dead' and unable to bring an action against the captain who had been responsible for their property. But in Sydney they were allowed to bring an action against the captain, and they won. This was the first civil action in Australian law. Henry and Susannah Kable went on to become leading citizens in the new colony. Henry became Constable of Petersham and a wealthy businessman; Kable Street in Sydney's financial district is named after him. They are buried in Windsor Cemetery.

(This story is told in several places but this version relies mostly on D Neal, *The Rule of Law in a Penal Colony*, Cambridge University Press, 1991.)

English or Australian law?

Many of the traditions of English law—including the arguments about the vicarious liability of the captain, which came from maritime law, and the arguments about property and possession, which made up a large part of English law—can be seen within the civil

action brought by the Kables. But we also discern a departure from English law in that convicts were allowed to sue. In England at the time, people who had been sentenced to death were regarded as attainted, or ‘civilly dead’. They therefore could not sue any other person, but somehow the Kables were allowed to do this. At the same time some larger concepts of English law—the idea that even captains, who are ‘kings’ of their ships, should not be able to break the law with impunity, and the idea that all persons deserve the protection of the law—were allowed to overcome the rule that convicts may not sue. Was this because Governor Phillip thought the new colony would not work at all if the majority population (the convicts) were unable to use the law? This demonstrates a faith in the idea of the rule of law which was profoundly important in the development of the new colony. Did Phillip have a vision of the new colony transcending its convict origins? We cannot know, but the story demonstrates the flexibility and pragmatism of the common law which is Australia’s heritage.

For a long time it was fashionable to treat Australian law as a mere derivative of English law. There was no study of the history of the Australian legal system, and the words ‘legal history’ meant English legal history. It was assumed that Australian law was merely English law transplanted. However, this view is now being challenged. The work of legal historians such as David Neal and Bruce Kercher has demonstrated that Australian law was different and distinctive from the start.¹ It appears to be as inaccurate historically as it is today to say that English and Australian law are the same. However, it is clearly true that when Henry and Susannah Kable and the rest of the First Fleet arrived in Australia on 26 January 1788, they brought with them a culture of law which was extremely important for the development of the new country and impacted profoundly on the people who already lived on the continent.

A snapshot of the current Australian legal system

The legal system in Australia today is a complex web of relationships and methods of dispute resolution which can be daunting to the outsider. It is impossible to understand the complexities of this legal system without knowledge of its history. It is worth noting that it was only by an accident of a few days or weeks that the settlement or occupation of New South Wales in 1788 was English, not French. The fact that the new inhabitants were English meant it was English culture which dealt the blow to the Aboriginal inhabitants from which they have been struggling to recover. Some of the characteristics which derive from that English heritage include the following.

1 D Neal, *The Rule of Law in a Penal Colony*, Cambridge University Press, 1991; B Kercher, *An Unruly Child: A History of Law in Australia*, Allen & Unwin, Sydney, 1995; B Kercher, *Debt, Seduction and Other Disasters: The Birth of Civil Law in Convict NSW*, Federation Press, 1996. Australian legal history like this drew on the seminal work of Alex Castles, who almost single-handedly began the discipline. See A Castles, *An Australian Legal History*, Law Book Co, 1982.

A system of representative democracy using parliaments to make laws

All the Australian jurisdictions—Commonwealth, state and territory—use systems in which people vote for representatives, who then sit in parliaments to make laws. The majority party in the lower house of parliament forms the government. Australia's parliamentary democracy is largely based on the English form of government. Its philosophical context is that of Western liberalism. Thus Australian parliamentary government is based on ideas of individual liberty and limits on governmental power in order to prevent the abuse of power. We discuss ideas about parliamentary power in chapter 5, and how they operate in the Australian legal system today in chapters 8 and 9.

A legal profession divided either formally or informally into solicitors and barristers

The basic separation of the legal profession into solicitors, whose role is to advise clients and manage their affairs, and barristers, whose role is advocacy in the court, is significant in Australian law, even though many jurisdictions have rejected a rigid division between the two branches of the profession. For centuries, judges were chosen from the advocacy branch; only in the late twentieth century was this rule occasionally broken in Australia by the appointment of solicitors or legal academics to the judiciary. How the profession developed is discussed in chapters 4 and 16.

A 'common law' system

This term has three meanings: 'common law' can mean the law derived from the English legal system. That is, it refers to the system of law. Common law legal systems exist in Australia, New Zealand, the USA, Canada and India, as well as some other countries which had colonial links with Britain. This usage contrasts it with other legal systems, such as the civil law systems based on Roman law. Civil law countries include Scotland, France, Switzerland, Greece, Spain, Germany, Thailand and Taiwan. Civil law systems are broadly characterised as inquisitorial (as opposed to the adversarial characteristics of the common law) and use codes as the basic form of law rather than judicially decided cases. See the table of different legal systems in chapter 2. We will discuss the differences between inquisitorial and adversarial systems in chapter 11.

Another sense of the phrase 'common law' relates to the way law is made in our system. It refers to the fact that judges make law which is based on decided cases (precedents) and develop sets of legal principles which emerge from the judgments in decided cases. Sometimes this is called 'case law'. In our legal system, when judges decide cases they are required to give their reasons in writing. The legal reason for which they came to their decision in the case is called the *ratio decidendi*. This forms a precedent which later cases

must follow if they are decided by a judge in a court lower in the same hierarchy. This is known as the doctrine of precedent, and we consider it in chapters 13 and 14. This source of law is distinguished from the other main source of law in our legal system: legislation or statute. Legislation is made by parliament and it may include acts and regulations. We consider legislation in detail as a form of law in chapter 15. Sometimes Constitutions are also in the form of legislation. The Commonwealth Constitution of Australia had its original form in an Act of the United Kingdom Parliament, the *Commonwealth of Australia Act 1900* (UK).

Yet a third meaning of the phrase ‘common law’ refers to particular branches of law. In our law, there is a division based on the difference between the law which grew from the medieval royal courts (‘the courts of common law’) and other areas of law, particularly the law which grew from the medieval Lord Chancellor’s role (‘equity’). Within private law, or the law between persons, equity is theoretically distinct from the common law. It developed almost concurrently with the law of the royal courts, in a separate court over which the Lord Chancellor presided: the Court of Chancery. Common law in this sense is also distinguished from a number of other specialised areas of law which are distinct from both law and equity: for example, matrimonial causes law (marriage and divorce); admiralty law; trade practices law; and bankruptcy. In chapter 11, we consider the various ways law is classified.

As a legal system	Common law		Civil law	Islamic law, etc.
As a source of law	Common law	Legislation		
Within private law	Common law	Equity		

Decision-making in courts after an adversarial trial

The adversarial nature of our courts partly relates back to the historical ‘trial by battle’, which was brought to England by the Normans. Nowadays the battle is verbal, but in the Middle Ages the battle was real, carried out on horseback or on foot with sword and mace, and ending with the cry of ‘Craven!’ by the one who yielded. The person who lost was regarded as having been proved wrong in their assertions about, for example, the theft of an object. They would then be sentenced to death or exiled. Trial by battle continued to be technically available until a somewhat surprised court was faced with it in *Ashford v Thornton* (1818) 1 B & Ald 45. It was quickly abolished by statute: 59 Geo III c. 46 (Abolition of Appeals of Felony and Trial by Battle).

Trial by battle was overtaken by jury trial during the time of Henry II (1154–89). The early juries were chosen from neighbours of the parties to the cases, and their job was more like detection in some ways—their role was to make enquiries and decide what the

truth of the matter was. To control attempts to influence juries, the custom of sequestration (locking away) of the jury developed, and juries could be confined without food or drink until they came to their verdict. Juries had to decide the material facts. In order to decide which facts were material, the judges had to determine what the law was. They did this by the process of pleading, which was a method of arguing about what the jury was supposed to try. By contrast, modern juries determine the facts after they have heard the evidence in the trial. In chapter 3, we examine the development of the jury.

A court system for dispute resolution

The use of courts for deciding disputes comes to us with this heritage, and the division of subject matter among the courts can also be explained only by that heritage. In Victoria, the Supreme Court includes the Commercial and Equity Division, Common Law Division and Criminal Division in its Trial Division. In South Australia, the Court also has a Land and Valuation Division, in Western Australia they also separate out Admiralty, and in New South Wales, the Court is divided into Common Law and Equity Divisions. All these divisions reflect in some way the substantive division of law in the historical English context. The courts and their jurisdiction are considered in chapter 12.

The distinctiveness of Australian law

The characteristics noted above all derive from the English antecedents of our law. But our legal system has other characteristics distinct from those English antecedents.

A federal system made up of a Commonwealth and states and territories

Australia became a Federation in 1901 after a significant period of bargaining and consultation among the states. New Zealand was part of this and only removed itself in 1892; Western Australia very nearly did not join the Federation. A federal system is a way of separating the powers of different bodies of government. This was a pragmatic solution to the existence of separate dominions or sovereign states with some common problems, including immigration and trade, and we examine this in chapter 9.

Some (limited) recognition of Indigenous customary law

In 1992, when *Mabo v Queensland (No 2)* (1992) 175 CLR 1 was decided, the courts recognised for the first time that the legal fiction that Australia was *terra nullius*, a land held by no one, was untrue. The High Court of Australia held that native title to land could exist separately from the common law and based on Indigenous customary law. Although the recognition this gave to native title has been partly eroded by statutory modification, the case marks a significant moment in Australian legal history. It was one form of recognition

of Indigenous customary law. Other forms of recognition of Indigenous customary law are ad hoc, but do exist: for example, in the criminal justice system in the Northern Territory, punishments for crime may be carried out on a customary basis rather than under the common law in certain cases; and there have been cases where damages have been assessed differently because of customary law.² Customary law marriage is recognised as marriage, and certain aspects of Indigenous heritage have been protected by statute. The situation is not satisfactory, but the legal system is not entirely oblivious to the Indigenous inhabitants of the country. We consider some of these issues in chapters 6 and 10.

The recognition of Indigenous customary law can go to the very heart of the legal system, as the case *R v Wedge*, which is extracted below, shows. This case gives you an opportunity to begin to read the judgments from which the common law is made. It considers many of the issues which are important to the development of our legal system, including the question of what law came to Australia with the British and how it impacted on the original inhabitants. Consider what the issues the judge had to decide were before he could come to his ultimate conclusion that the court did have jurisdiction (the right to decide) in this case.

The art of reading cases

The art of case reading is one of the most significant common-law lawyer skills.

A case on its own is not very informative. The question you should ask yourself is: what does this case add to what I already know about the law in this area? Case reading is a spiralling process: every time you go back and read the case, you find more. Therefore you should never think your brief (summary note) of a case is final. Do a rough brief before class. After discussion has confirmed, illuminated or altered your view of it, redo the brief.

One way to brief a case

- 1 **Read it all through** without writing anything down.
- 2 **Read it again.**
- 3 **Write the citation:** Write the case name and citation accurately. Make sure you have the name of the court and the date. Also add your text reference or reference in your notes so you can find it again.
- 4 **Facts of the case:** You should leave this blank or merely sketched in at this stage, and come back to it. The material facts can only be established once you are clear about the issues in the case.
- 5 **Remedy sought:** What did the plaintiff/applicant/appellant want?

2 For example, *Napaluma v Baker* (1982) 29 SASR 192; *Dixon v Davies* (1982) 17 NTR 34; *Namala v Northern Territory* (1996) 131 FLR 468 (NTSC).

- 6 **Prior proceedings:** What happened in the court or courts below?
- 7 **Arguments of the parties:** Establishing the arguments will help you decide what the legal issues are.
- 8 **Grounds of appeal:** These may have been established by the arguments. These are another indicator of the legal issues.
- 9 **Issues:** What are the legal issues the court has to decide?
- 10 **Outcome or decision:** Who won the case? Was the appeal allowed or denied?
- 11 **Legal reasoning:** The process of reasoning used by the judge (or judges) to come to their decision. Trace their arguments through.
- 12 **Ratio decidendi:** The *ratio decidendi* is the principle of law or the legal reason which was necessary for the court to come to its decision. It should be the answer to the question posed by the legal issue(s).
- 13 **Obiter dicta:** *Obiter dicta* are other things the judges said which were of interest but were not necessary to the decision made.
- 14 **Notes:** Make notes about what difference this case made to your knowledge of this area of law, how the case is significant, and so on.

This type of case brief is very useful and can be applied to cases where there is one judgment and then again for cases where there are multiple judgments. The following table offers a way to keep a record of multi-judgment cases.

Briefing a case with multiple judgments

- 1 Follow the steps for briefing the case above.
- 2 To compare the judgments with each other create a table like this:

	Issue One	Issue Two	Issue Three	Outcome
Judge One				
Judge Two				
Judge Three				
Judge Four				

	Issue One	Issue Two	Issue Three	Outcome
Judge Five				
Judge Six				
Judge Seven				

This then allows you to compare what each judge decided on each issue.

You can then come to a conclusion about what the *ratio decidendi* is for this case.

Generally, the safest *ratio decidendi* is the narrowest legal rule of the majority outcome. We discuss this further in chapter 13.

R v Wedge

[1976] 1 NSWLR 581

Supreme Court of New South Wales, 25 June 1976

[Wedge, an Aboriginal man, had been indicted for murder of another man, who was also Aboriginal. The accused argued that the court did not have jurisdiction over the case because he and the victim were both Aboriginal and should be dealt with by customary law.]

RATH J:

On 15th June, 1976, an indictment was presented against James Leslie Wedge for murder, and, upon his arraignment, he pleaded that this Court had no jurisdiction. After hearing argument, I decided that there was jurisdiction.

Mr Miles, who appeared for the accused, said that his understanding of the plea of lack of jurisdiction was that the accused was a member of the Aboriginal race of Australia, and that the Court had no jurisdiction to try a member of that race for a crime alleged to have been committed in the State of New South Wales.

The Crown Prosecutor, Mr Job, submitted that there was no evidence that the accused was an Aborigine, and that it was not obvious that he was a member of that race. I ruled that I would hear argument upon the plea, on the assumption that the accused was an Aborigine, and would consider the question of the race of the accused, if I found that the plea was otherwise good in substance. It was submitted on behalf of the prosecution that the decision of this Court in *R v Murrell* (1836) 1 Legge 72 was clear and binding authority that there was no substance in the plea of lack of jurisdiction ...

On behalf of the accused two arguments were put in support of the submission of lack of jurisdiction. Firstly, it is said that the Aboriginal people were and still are a sovereign people, and as such are not subject to English law. Secondly, it is said that, even if the Aborigines are not a sovereign people, the English colonists brought with them only so much of English law as was applicable to their circumstances, and this law affected only British settlers *inter se*. Both of these arguments depend on the premise that the colony of New South Wales was not founded by settlement. As to the first argument, it is said that the acquisition of New South Wales 'by the British in the presence of the Aboriginal people' does not conform with any of the three methods of acquisition recognised in English law, namely conquest, cession and settlement: *Blackstone's Commentaries*, vol I, p 107. In support of the second argument, it is urged that the Aboriginal people were neither regarded nor recognised as British subjects or citizens. As against the view that New South Wales was acquired through settlement it is said that, if New South Wales had been so acquired, then English law would have extended to all its inhabitants, and that law would have required compensation to be payable to the Aboriginal people for the lands taken from them by the English colonists; and yet the recent 'lands rights' case denied the right of the Aboriginal people to compensation for the land taken by the colonists: *Millirrpum v Nabalco Pty Ltd* (1971) FLR 141. For the proposition that, upon an acquisition by settlement, the Aboriginal people are entitled to compensation for land taken from them by the colonists, reliance was placed on the decision of the Privy Council in *Nireaha Tamaki v Baker* [1901] AC 579, a case dealing with Maori land rights in New Zealand.

Quite apart from the authority of *R v Murrell*, the propositions advanced for the accused are untenable. There is the express authority of the Privy Council that New South Wales was acquired by settlement. In *Cooper v Stuart* (1889) 14 App Cas 286, Lord Watson, in giving the opinion of the Privy Council in a case involving a Crown grant made in New South Wales in 1823, said:

The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class. In the case of such a Colony the Crown may by ordinance, and the Imperial Parliament, or its own legislature when it comes to possess one, may by statute declare what parts of the common and statute law of England shall have effect within its limits. But, when that is not done, the law of England must (subject to well-established exceptions) become from the outset the law of the Colony, and be administered by its tribunals. In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail, until it is abrogated or modified, either by ordinance or statute. The often-quoted observations of Sir William Blackstone (1 Comm 107) appear to their Lordships to have a direct bearing upon the present case. He says:

'It hath been held that, if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every English subject, are immediately there in force (Salk 411,666). But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to the condition of an infant Colony; such, for instance,

as the general rules of inheritance and protection from personal injuries. The artificial requirements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance of the established Church, the jurisdiction of spiritual Courts, and a multitude of other provisions are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what time and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the decision and control of the King in Council; the whole of their constitution being also liable to be new-modelled and reformed by the general superintending power of the legislature in the mother country’.

Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all the laws in force in England must apply to an infant Colony of that kind. If the learned author had written at a later date he would probably have added that, as the population, wealth, and commerce of the Colony increase, many rules and principles of English law, which were unsuitable to its infancy, will gradually be attracted to it; and that the power of remodelling its laws belongs also to the colonial legislature.

So far as the application of English law to New South Wales is concerned, the observations of Lord Watson as to the gradual attraction of English law to the Colony are to be read in the context of s 24 of the *Australian Courts Act 1828*: see *Quan Yick v Hinds* (1905) 2 CLR 345; *Mitchell v Scales* (1907) 5 CLR 405. For present purposes the particular significance of the judgment of the Privy Council is that it classifies the settlement of New South Wales in the category described by Blackstone as ‘an uninhabited country ... discovered and planted by English subjects’. Lord Watson would have been fully aware of the presence of the Aborigines in New South Wales at the time of settlement, and in fact he refers to a tract of territory practically unoccupied, without settled inhabitants or settled law. In his view, it is not the presence of an Indigenous population that is significant for classification, but the absence of settled inhabitants and settled law. Blackstone himself does not appear to have used the words ‘uninhabited country’ as connoting no native population, but as meaning a country in which there was no cultivation.

Immediately prior to the passage quoted by Lord Watson, Blackstone says (1 Comm pp 106, 107): ‘Plantations or colonies, in distant countries, are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother-country; or where, when already cultivated, they have been either gained by conquest, or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound.’ As Lord Watson said, in the case of a colony founded by settlement, the law of England (subject to well-established exceptions) becomes from the outset the law of the Colony, and is administered by its tribunals. That law of England is the only law which those tribunals then recognise and apply. Thus it seems evident that, as New South Wales, in legal theory, was founded by settlement, there was only one sovereign, namely the King of England, and only one law, namely English law. In the case of New South Wales, the instructions from the King to Governor Phillip expressly provided for the protection of the native people. They became the subjects of the King and as such subjects they were not only entitled to the protection of the law, but became liable for breach of the King’s peace in accordance with the law. Governor Phillip’s ‘Instructions’, dated 25th April, 1787 (see ‘Historical Records of Australia’, Series 1, vol 1, pp 13, 14), contain the following provision in

respect to the native population: 'You are to endeavour by every possible means to open an intercourse with the natives, and to conciliate their affections, enjoining all our subjects to live in amity and kindness with them. And if any of our subjects shall wantonly destroy them, or give them any unnecessary interruption in the exercise of their several occupations, it is our will and pleasure that you do cause such offenders to be brought to punishment according to the degree of the offence. You will endeavour to procure an account of the numbers inhabiting the neighbourhood of the intended settlement, and report your opinion to one of our Secretaries of State in what manner our intercourse with these people may be turned to the advantage of this colony'. This passage does contrast 'our subjects' with 'the natives', and there may well have been both uncertainty and ambivalence in the official attitude; but in law the 'natives' were in the King's territory, and under his sovereignty.

The case of *Nireaha Tamaki v Baker* is not an authority supporting a general proposition (applicable to New South Wales) that, upon an acquisition by settlement, the Indigenous inhabitants are entitled to compensation for land taken by the colonists. The principles of that case apply only to the special case of the Maoris in New Zealand, and dealt with native rights expressly recognised by statute. It is not an authority for a proposition that native rights have in law any existence apart from statute. This special position of the Maoris, and the basis in statute, appear in the following passage in the opinion of the Privy Council. Dealing with the contention that there was no customary law of the Maoris of which courts of law could take cognizance, Lord Davey, delivering the opinion of the Privy Council, said: 'Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the *Native Rights Act*, 1865, by saying (as the Chief Justice said in the case referred to) that 'a phrase in a statute cannot call what is non-existent into being'. It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By the 5th section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose'. So far as New South Wales is concerned the legal position relating to land is stated by Isaacs J in *Williams v Attorney-General for New South Wales* (1913) 16 CLR 404 as follows: 'So we start with the unquestionable position that, when Governor Phillip received his first Commission from King George III on 12 October 1786, the whole of the lands of Australia were already in law the property of the King of England'. Windeyer J put the position precisely, in *Randwick Corporation v Rutledge* (1959) 102 CLR 54, when he said: 'On the first settlement of New South Wales (then comprising the whole of eastern Australia), all the land in the colony became in law vested in the Crown'.

For these reasons, this Court has jurisdiction to try the accused on this indictment, whether he is an Aborigine or not, and whether the deceased named in the indictment is an Aborigine or not. The same result flows from a consideration of the case of *R v Murrell*, but, having regard to the fact that that case was decided one hundred and forty years ago, it seemed proper to show that the principle of that case is in conformity with the law as it has been pronounced in later years.

The Court in which I have presided in this trial is the same Court as decided *R v Murrell*. The Supreme Court of New South Wales has had an unbroken tradition since the third Charter of Justice was proclaimed in Sydney on 17 May 1824. As a single justice of the Court, I am bound by the decision of the three justices in *R v Murrell*, just as I should be by a decision at the present time of the Court of

Criminal Appeal, which is composed of justices of the Court exercising its appellate criminal jurisdiction: *Gammage v The Queen* (1969) 122 CLR 444, per Barwick CJ. The Court of Criminal Appeal itself is not bound to follow the decision in *R v Murrell*; but I venture to say it would not lightly reverse an historic decision that has stood for nearly one and a half centuries. The headnote of the case, which correctly states the effect of the decision, reads: 'Aboriginals within the boundaries of the Colony are subject to the laws of the Colony, and there is no difference between an offence committed by them upon a white man and an offence upon another Aboriginal'. The accused, an Aboriginal, was indicted for the murder of another Aboriginal, and entered a demurrer to the indictment. Counsel for the accused made submissions in support of the demurrer which were in substance the same as the submissions made to me. The demurrer was disallowed, and the judgment of the Court, delivered by Burton J, was reported as follows: '1st That although it might be granted that on the first taking possession of the Colony, the Aborigines were entitled to be recognised as free and independent, yet they were not in such a position with regard to strength as to be considered free and independent tribes. They had no sovereignty. 2nd The Government proclamation laid down the boundary of the Colony, within which the offence of which prisoner was charged, had been committed; the boundaries were Cape York in 10° 37' South, Wilson's Promontory in 39° 12' South, including all the land to the eastward and the islands adjacent. 3rd The British Government had entered and exercised rights over this country for a long period: Australian Courts Act 9 Geo 4 c 83. 4th Offences committed in the Colony against a party were liable to punishment as a protection to the civil rights of that party. If a similar offence had been committed at home, he would have been liable to the Court of King's Bench. 5th If the offence had been committed on a white, he would be answerable, was acknowledged on all hands, but the Court could see no distinction between that case and where the offence had been committed upon one of his own tribe. Serious causes might arise if these people were allowed to murder one another with impunity, our laws would be no sanctuary to them. For these reasons the Court had jurisdiction in the case'.

The first three grounds are an assertion of the sovereignty of the King, and a denial of any other sovereignty, and the legal basis for this assertion and denial are further developed in the earlier part of the present judgment. The fourth ground is expressed in elliptic language. The sense of it is this: 'Offences committed in the Colony against a party were liable to punishment as a protection of the civil rights of that party. If a similar offence had been committed at home, the person committing the offence would have been liable to the Court of King's Bench'. So read, the two sentences express two important principles: firstly, that the civil rights of all subjects of the King in New South Wales, whether 'white' or Aboriginal, were equally entitled to the protection of the criminal law; and, secondly, that the jurisdiction of the Supreme Court of New South Wales extended to all persons in New South Wales, just as the jurisdiction of its counterpart in England, the Court of King's Bench, extended to all persons in England. This latter proposition was no more than a statement of the Court's jurisdiction as it was established by s 3 of the *Australian Courts Act 1828*.

The first sentence of the fifth ground is a further assertion, from another viewpoint, that all persons in the Colony were equally amenable to the criminal law. The second sentence, whilst having a suggestion of expediency, is fundamentally an assertion that the King's peace extended throughout the Colony.

It seems to me that all the reasons of the Court in *R v Murrell* are as valid today as they were when judgment in that case was given on 19 February 1836.

For these reasons, the plea of lack of jurisdiction failed.

LAW IN ACTION: NOTES AND QUESTIONS

- 1 What cases did Rath J consider in coming to his conclusion? Which cases seemed to be most important?
- 2 What were the material facts of the case? ('Material' facts are those which are necessary to support the legal reasoning in the case, or in other words, those which could make a difference to the legal outcome.)
- 3 In your opinion, was the outcome of the case just?
- 4 What was the legal reason for Rath J's decision? (This is known as the *ratio decidendi*. It is the part of the case which forms a precedent.)

An organic development

In *Mabo No 2*, the case which established that the common law could recognise the existence of native title property rights based on Indigenous customary law, Brennan J said:

In discharging its duty to declare the common law of Australia, this court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency. Australian law is not only the historical successor of, but is an organic development from, the law of England ... [O]ur law is the prisoner of its history.

To study the English and Australian history of the Australian legal system is not to treat it as merely derivative, but, as Brennan J said, to see it as an organic system, which is developing. The Australian legal system is distinctive. The laws differ from the English laws; the systems differ as well. However, in order to best look towards the future, Australian law first looks back at its history.

The themes of this book

This book considers some of the important foundational questions and beliefs relating to Australian law. These include:

- the importance of the rule of law for the restraint of power;
- the belief that law is a cultural activity which is best understood through social and historical context; and
- the view that the legal system is a complex system which needs to be understood from many perspectives—the institutions, the personnel, the rules, the processes all give different answers to the question 'What is the law?' or 'What is the legal system?'

The book is divided into five parts. Part One, 'Australia's Legal System in Focus', gives an overview of the current legal system and its place in the world. Part Two is called

‘The English Heritage’. It refers to the cultural understandings, assumptions and practices which the colonists brought with them from England, in other words, the relevant legal and cultural history. In Part Three, we consider the impact of that cultural heritage on two groups—the colonists who arrived on the ships, and the Aboriginal people who were already here and who were dealt a terrible blow by it. Part Three shows us the interesting paradox that the English heritage was used by the convict colonists with triumphant effect in creating a more egalitarian society than the one they came from, while at the same time denying the Aboriginal inhabitants’ very existence. In Part Four, we turn to look at the movement towards independence—how the link with the colonial masters was loosened and then jettisoned. In Part Five, we examine the way legal institutions in action both draw on the past and develop their own momentum.

Most people who read this book will be beginning law students who are engaged in the task of learning to ‘think like a lawyer’. The five parts of the book are designed to help relate the material to the Australian context and give continuity to what is a wide range of different ideas. The materials have been chosen to provide an accessible mix of secondary and primary materials. ‘Thinking like a lawyer’ involves learning the patterns of argument that lawyers use. Typically, these appear in cases and statutes. But to be a good lawyer requires a deeper intellectual and critical understanding of the law and the context within which it operates. This is what the book seeks to provide.