Class 2: Academic Writing and Integrity

Learning Objectives

- Understanding of the elements of an argument – (opinions, disagreements, descriptions, explanations, summaries) ✓
- Why footnote + AGLC 3rd ed + plagiarism ✓

Citing research

- Citing → demonstrate academic integrity + establish authority for argument/line of analysis
- 5 main categories of legal citation
    - Cases / legislation / journal articles / books / online sources

Cases

- Some cases reported in law report, others are 'unreported cases'
- To cite reported case:
    1. Name of party in italics eg. *Dietrich v R*
    2. Add year in brackets
        a. law report series organised by **volume number** put round brackets eg. (1992)
        b. law report series organised by **year** put square brackets
    3. Add the volume number of law report eg. 177
    4. Add law report series eg. CLR
    5. Add page number on which **judgment starts** eg. 292
    6. If quoting statement from judgment or referring to specific part of judgment, add pinpoint page number. This is preceded with a comma eg. 299
- *Dietrich v R* (1992) 177 CLR 292, 299
- To cite unreported case:
    1. Case name in italics
    2. Add year in square brackets
    3. Add court name
    4. Add judgment number
    5. Add date in round brackets
    6. Add pinpoint page
- *Quarmby v Keating* [2009] TASSC 80 (9 September 2009) 11

Legislation

- To cite act
    1. Title of act in italics
    2. Add year it was passed in italics
    3. Add jurisdiction in round brackets
    4. Add section number preceded by an s (ss 5-9 if referring to multiple sections)
- *Family Law Act 1975* (Cth) s 5
- To cite unreported bill:
    1. Same way, cept no italics
- Domestic and Family Violence Protection Bill 2011 (Qld)

Journal Articles

- To cite offline
    1. Begin with authors' full name
    2. If citation in footnote, first name precedes surname eg. Jon Crowe
    3. If citation in biblio, surname first eg. Crowe Jon

4. Add title of article in **quotation marks** and with each **word capitalised** eg. 'The Problem of Legitimacy in Mediation'
5. Add year of article's publication in brackets eg. (2008)
6. Add volume number of journal eg. 9
7. If there is an issue number, add with brackets with **no space** after volume eg. 9(1)
8. Add full title of journal in italics with each word capitalised eg. *Contemporary Issues in Law*
9. Add page number of journal on which article starts eg. 48
10. If quoting from article or referring to a page, add pinpoint number, preceded by comma eg. 48, 57

- Jonathan Crow and Rachel Field, 'The Problem of Legitimacy in Mediation' (2008) 9(1) *Contemporary Issues in Law* 48, 57
- <u>To cite online</u>
  1. Add URL angle brackets < >
- Kathy Douglas and Rachel Field, 'Looking for Answers to Mediation's Neutrality' (2006) 13 (2) *eLaw Journal* 177 <https://elaw.murdoch.edu.au/archives/issues/2006/2/elaw_Douglas%20and%20Field.pdf>

Class 9: Development of Anglo-Australian Law I

Learning Objectives

- Demonstrate an understanding of the international / CL principles which underpinned the assertion of sovereignty by the British Crown over NSW
- Demonstrate understanding of reception of English law principles into colonial law in NSW
- Appreciation of impact of reception of English law principles on Indigenous nations/laws
- Understanding of repugnancy crisis and how it was resolved/what legacy it left

Definitions

- Cession = land transferred to a colonial nation thru voluntary surrendering of rights by Indigenous ppl
- Colonisation = pre-twentieth century occupation of nation states by military rule and acquisition of sovereignty. 3 forms of colonisation, conquest, cession or occupation
- Feudalism = system of land holdings based on chain of tenure, with monarch ultimate owner of land, with series of grants/sub-grants in return for payment of taxes and provision of services
- Reception = the implementation of the colonial nation's law after occupation
- Westminster system = 3 arms of gov. judicature, legislature, executive

Aboriginal & Torres Strait Islander Origins

- Australia's legal history begins with laws/legal traditions of Indigenous Australians → lived for 40,000-60,000
- 'Aboriginal person' means any person who is wholly or partly descended from the original inhabitants of Australia
- 2.5% of pop is IA – 520,000
- Thousands of yrs before British settlement, Indigenous Australians had sophisticated system of law in place
- Tribal laws differ btwn communities
  - Passed on **orally** and is **relational**
  - **Governed** all aspects of their lives and integral part of society/religion/culture
- Social code of conduct comprising elements of law, spirituality, ceremony
  - Aligned somewhat to natural law
- In contrast to how religion – law/morals – law/social etiquette
- Under customary law, no concept of individual ownership of land
- Bcos of these differences, British did not recognise/acknowledge → thought them uncivilised/underserving of legal recognition with clearly defined written laws

    - English settlement in 1788 led to application of English law
- Raised issue whether English law should be applied to IA
    - *R v Murrell*, *Sydney Gazette*, 6 Feb 1836
        - Jurisdiction of NSWCA included IA, bcos NSW was held by occupation (not conquest/treaty). Thus lands that British had taken possession of, bound the King to protect all living parties on it.
    - Rationale behind *Murrell* decision
    - 1. Aus land was 'unappropriated by anyone' and thus was lawfully taken into 'actual possession by the King of England' → all laws apply
    - 2. Aboriginal ppl had no recognisable laws, but only 'practices' that are 'founded entirely upon principles…of vindication for personal wrongs and 'revenge'.
- However, can be argued that both IA and English systems have same legal function: to **regulate social relationships**
    - Both reflect moral norms and protect social structures
    - Altho the content of these norms/structures are diff in content, the role of the LS it the same
    - As the Western Australian Law Reform Commission (WALRC) (2006) observed: 'it is a defined system of rules for the regulation of human behaviour which has developed over many years'
    - This echoed the position of Justice Blackburn in 1971, who said in relation to the Yolngu legal system 'If ever a system could be called a "government of laws, and not of men", it is shown in the evidence before me': *Milirrpum v Nalco Pty Ltd* (1971)

Displacement of Indigenous Laws

- Occupation → automatic reception without need to negotiate treaty
    - Logic underlying this is colonised territory does not have pre-existing LS that colonising nation has to adopt
    - According to international law, requires finding of *terra nullius* – 'empty l and' – whereby land belonged to no one
    - Under IL, by following rules of "settling" → given legitimacy
- Legal ramifications:
- Law is declared settled and, British law, **as far as it is applicable** is automatically the law of Australia

- Conquered –recognised legal system, conquered through military power
- Ceded – recognised legal system, surrendered
- Settled – you don't even recognise that ppl have a claim to the land and you're taking it
    - No documentation or writing
    - Aboriginals did not have any agriculture, in a state of nature and did not have right to any land

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Class 5: Common Law and Equity

Learning Objectives

- Demonstrate understanding of origins of common law and trial by jury, writ system and forms of action
- Evaluate effect of the doctrine of precedent on development of both CL and equity

References

- History of CL and equity p 96

History of CL

- Prior to Norman Conquest in 1066, law in England consisted of **customary law**
    - Administered and interpreted according to local custom
    - Varied from regions

- 1066 – CL created when William of Normandy gained sovereignty of England → common to their realm
- Normans took over and set up the feudal system → a strong central government → delegate responsibility from the hierarchy (b4 just local communities)
    - During CL, appeals would go to King, but he got annoyed and thus delegated to Chancellor
- Initially, law courts only commenced through *writ of command* → then *standard writs*
- **Strict** procedure → if not ordinary, action could not be brought
    - Litigants frustrated that remedy only if action was 1 of a limited number of 'forms of action' recognised by court
- CL courts reluctant to recognise new forms of action bcos would be seen as form of **lawmaking** – something that was the function of the **monarch** and **not the courts**
- English citizens unable to obtain a remedy approach monarch and seek royal justice directly
    - Monarch delegated to Lord Chancellor → hears dispute and makes decision upon own ideas of fairness and justice
- Signing of Magna Carta, 15 June 1215 → against divine right of kings → beginning of system characterised by rule of law instead of autocratic authority of a sovereign

Precedent

- Precedent: When judge's base their decisions on past decisions
- Precedents area a series of past cases that are relevant to a particular legal issue
- Binding v. persuasive precedent (court hierarchy)

Origins of precedent

- Royal judges visited counties across kingdom, deciding matters on case-by-case basis according to relevant 'law' or custom in each area
- Used a 'jury' of ppl who knew facts/could explain law
- Over time, formed opinions on which laws were fair/just → preferred to apply these
- Aligned decisions with each other

Juries

- Origins of juries:
    - Local people who knew all of the issues → they investigated and explained how the town is run, utilising their local knowledge
- Juries today: they must not be bias → a fresh perspective and deal with the evidence

How did judicial independence come about?

- Citizens waiting for King's justice from travelling judges → stopped travelling to become institution
    - Ppl can travel to it
- The way for us to make the best decisions is for us to be separate from the king → demanded independence
- Us judges will have the right to make the final court

Why is precedent important?

- Inherent building block history of CL system → Treat like cases a like (Unlike Civil law, France/Germany)
- Strengths:
    - Legal development
        - Precedent facilitates development of coherent body of legal principles
    - Consistency
        - Decisions not merely arbitrary, courts use logic in applying law
    - Fairness
        - Precedents fairly available for all to read, transparent and fair
    - Certainty for people
        - Common law is a **source of a law**, very important – becomes law of the land

    - Creates efficiency
        - Both parties certain about law, they can efficiently negotiate
- Weaknesses:
    - Law may not reflect contemporary
        - May get **antiquated** → may have worked in 40s → being strict could make laws antiquated
    - Injustice
        - Every case diff – injustice only fixed with superior court
    - Those below HC are bound → all those judges must follow → **locked in**, **especially if decided at HC**
    - Time consuming for lawyers → maybe subtle difference btwn old cases → argument revolved around do we follow this
    - It can be quite rigid → when a bad decision is made, it will not just affect the people in front of them, but everyone thereafter until someone changes it
    - Recording down judgments → accessibility is essential
    - Multiple judgments
        - More than one judge, show diff lines of reasoning, which one do we use
- Originally started with judges travelling around → represented King, save his time

Writ system

- History:
    - For **semblance of order** to the courts – you must get a writ – or a royal order
    - Writ **defines** the crime and **what you need to prove**
    - If it is true, you can get **this much in compensation**
    - New writs for all of them for all different → they then tried to clamp down on it, system started to get quite rigid
- Form of action was attached to each writ
    - The form of action – mapping out the procedure that had to be followed

Why are writs important to law today???

- **Why are our courts so technical today???**
- The origins are the writ system → a lot of times it can be like a meeting → only you may talk and only you may see this document
- Every time you apply for court, you are asking for a writ – asking the court to intervene for justice
- The system never completely died away - Keeping the King's peac