

# Topic 1 – History of the Australian Legal System

## Introduction

There are 3 main legal systems that have existed in Australia:

- Aboriginal Law / Customary Law – Aboriginals were nomadic (lived off the land) and each tribe observed detailed rules of conduct. This is known as customary law (tribal)
  - Customary law was different from modern Australian law in the following ways:
    - Entirely oral → were no systems of writing in tribes
    - Law did not change → handed down to next generation without alteration
    - There was no individual ownership of land (the whole tribe owned that particular piece of land)
    - No formal legal institutions (lawyers and courts) → disputes were settled in tribal meetings led by elders.
  - Despite these differences, customary law was recognised as a genuine legal system in 1971
  - Court Case – The first land case rights
    - Grove Land Rights case – the northern territory government had to decide if the Yolngu people held legal rights over the land which the government wanted to lease out for mining. If they did hold legal right was it sufficient to prevent operation of mining leases?
      - Decision of court – Supreme court decided that customary law could not defeat and that all land became the property of the British crown in 1788 excluding native interest (later overruled via Mabo)
      - Importance to Business – After this decision → widespread attention in Australia → Pressure was placed on the federal government to take further action to protect rights of Aboriginals → Royal Commission → Enactment of the Aboriginal Land Rights Act 1976 (Cth). We learn that legal proceedings are not the only means of change.
- English Law – Arthur Philip the governor of Australia enforced English law (Same that was then in force in England) and Customary law was not recognised in any way
  - Early Years of NSW – Initially a penal colony (Prison settlement) housing convicts from the first fleet. → the colony ran as an open air prison for the first 30 years → the colony was an autocrat (own dictator) and therefore convicts lacked the legal protections they would have had in England.
    - 1823 – Supreme court of NSW, 1824- First legislative body in NSW, 1833- Introduction of Jury trials. 1840 prisoners stopped coming
    - Court Case – one legal system or two?
      - Murder at Windsor – Until 1830's aboriginals were not recognised by the people or the legal system. In 1836 Jack Murrell appeared before a NSW Supreme court for the murder of another aboriginal man at Windsor. → he asked to be tried under tribal law not British laws as British laws had no application to him as a native man (interesting)
      - Legal issue: Could Murrell be tried before it? Were aboriginal people bound by the laws of NSW?

- Decision of Court: Supreme court decided that Aboriginal people were indeed bound by the laws of NSW. -> he stood trial before a jury but acquitted (not guilty) and set free.
- Importance to Business – Established that there was only one legal system operating in Australia. There can only be one legal system in existence in AU the common law system.
- Colonial Self-Government – NSW Still dominated by English law because of:
  - Most laws in the colony were English Law (even though NSW had their own courts and parliaments)
  - Courts obliged to follow decisions of English Courts.
  - NSW parliament was forbidden from enacting any new law inconsistent with English law.
  - In 1850 the British parliament provided the colonial parliaments to enact their own constitutions. NSW enacted Constitution Act 1855 → this was a two house parliament with a lower house.
  - In 1865 – Colonial laws no longer need to be consistent with British laws (at this time there were 6 AU colonies each with their own Government system)
- Colonial Difficulties:
  - Hard to travel from one colony to another. E.g. a train from Melbourne to Sydney meant having to change trains (different track width)
  - Trade between colonies restricted as colonies charged taxes
  - Defence of colonies was not assured as Brittan was remote.
- Australian Law – Colonies would have to a free to a federal constitution
  - A **Constitution** is a written document that sets out the powers of a government
  - First constitution presented to colonial governments in 1891 (not well received colonies all had issues)
  - A **Referendum** is a poll at which electors vote for or against a proposal to change the way in which they are governed. (Majority vote)
  - Referenda was held in each colony, by 1901 all colonies had passed referenda to support a national government.
  - The Commonwealth of Australia came into force on January 1<sup>st</sup> 1901.
  - Note: this did not result in legal independence form Britten. → Au courts still bound by decisions of British courts.
  - 1986 – Legal independence achieved when both parties agreed to remove all remaining power of the UK to legislate AU. → AU now legally independent
  - Aboriginal Rights under AU Law
    - Aboriginals wanted customary law rights and Land rights.
    - Aboriginal Rights under Customary law – Only common law is enforceable and if aboriginals live under their tribal low they may risk prosecution
    - Court case: Customary Law
      - The Palin Turkey – An aboriginal man convicted of killing a bird that you cannot kill based on Queensland law. His tribe had a custom to kill and eat wild birds
      - Legal issue: Could his actions be excused under the laws of Queensland? if so his conviction should not stand.
      - Decision of Court – he had no intention of breaking the law even though it he killed the bird. Was not convicted.

