

Australian Legal System ('Terra nullius' – Now)

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. judiciary, legislature, executive

Pre-colonisation

- Australia has always shied away from the concept that the continent was acquired by invasion or conquest.
- White settlers came to Australia with the notion of looking at land and to assess the way inhabitants were living e.g. whether they owned the land, their laws, population, family ties etc.
- Other countries under international law conquered their lands through conflict and enforced their legal system as they've conquered it - this is an example of conquered doctrine.
- The settled doctrine meant the land was free to be inhabited because it belonged to no one. The question of how the British acquired the sovereignty over Australia in the absence of conquest and treaty remains.

Inga Clendinnen (2003) 'Dancing with strangers'

- Cook reported that the natives showed no sign of ownership, which is a bias report because it was ownership as classified by westerners.
- Indigenous Australians didn't understand ownership the same way the white settlers perceived the principle of ownership.
- Natives had a collective sense of ownership with shared principles, which contrasts with the western's idea of ownership.
- This notion of ownership and absence of ownership as reported by Cook and other white settlers instigated the settled doctrine.

Behrendt et al (2009) 'Indigenous Legal Relations in Australia'

- 2 basic principles of the rule of law have been denied to aboriginal people consistently from the time of colonisation.
 1. laws should not be exercised arbitrarily.
 2. law should sustain a normative order and thereby contribute to the maintenance of law and order within communities.
- The cases of *R v Murrell* (1836) and *Wik Peoples v Qld* (1996) demonstrate the failure of courts to recognise Aboriginal law and custom → denied aboriginal peoples a fundamental way of maintaining social cohesion and reinforcing understood community standards of behaviour.