"Common Law" (New Entry) *The Australian Encyclopaedia.*

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THE AUSTRALIAN ENCYCLOPAEDIA

"COMMON LAW" (NEW ENTRY)

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1. Definition: "Common law is decisional or judge-made law. It is the part of the law progressively created and adapted by judges to ensure a coherent system of law capable of providing answers to every legal question, and thus enabling the judicial system to discharge its function of settling disputes": *Groves v The Commonwealth* (1982) 150 CLR 113 at 134-135. "The [common] law does not consist of particular cases but of general principles, which are illustrated and explained by these cases": *The King v Bembridge* (1783) 99 ER 679 at 681.

The *unwritten common law* is part of the law of Australia. It is distinct from the *written statute law* enacted by federal, state and territory legislatures. Like statute law, once the common law is expressed and applied by a judge in a particular case, it too becomes written in the record of the court. The written opinions collected in law books may become precedents to bind or guide later courts in solving analogous problems. The common law is different from subordinate legislation made by officials or delegated bodies such as local government authorities. It is only made by the judges. Traditionally, the common law is also distinct from the laws of *equity*, also made by the judges sitting in Equity Courts -

nowadays divisions of the general courts. The laws of equity were developed in England by the Chancellors and the Chancery judges to soften the rigidities of the common law and to bind individuals to the duties of conscience to act faithfully and conscientiously.

There a two types of common law: (1) the *general common law* where the courts develop the law upon a case by case basis; and (2) the *common law of statutes* where judges develop principles to fill the gaps in legislation so that it may operate efficiently: *Groves v The Commonwealth* (1982) 150 CLR 113 at 135.

2. <u>Origin:</u> The origin of the common law in Australia is the common law of England. It has come to be accepted that Australia was *settled*, as opposed to *conquered* or *ceded*. See the decision of the High Court of Australia in *Mabo v The State of Queensland* (1992) 175 CLR 1 at 34f. The common law of England was thus brought to Australia by the settlers, unqualified by any treaty or other felt duty to the local inhabitants who preceded the settlers.

Settlement by "right of occupancy" of "desert uninhabited" country carried with it the laws of England to govern and protect settlers and any native people alike. However, only such law "as [was] applicable to their own situation and the condition of an infant colony" was received into a colony so acquired. See Blackstone, *Commentaries*, Bk 1, Ch 4, pp 106-108; *Duggan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 604.

The *inhabited* territory of New South Wales was, as a matter of *law*, treated as a "desert uninhabited" country upon

the basis that the condition of the indigenous people before the British settlement was "barbarous" or the territory was "practically unoccupied, without settled inhabitants or settled law". See *Mabo v The State of Queensland* (1992) 175 CLR 1 at 36-37.

Ultimately, s 24 of the *Australian Courts Act* 1828, an Act of the Imperial Parliament of Westminster, affirmed that, as of 25 July 1828, the common law applicable in the colonies of New South Wales and Tasmania (then being the effective limits of British settlements in the Australian continent) was the common law of England at that time. From the original territory of New South Wales, the colonies of Queensland and Victoria were later formed. The English common law was similarly applied to them. The colonies of Western Australia and South Australia were settled in 1829 and 1836 respectively. The same consequence followed. Thus, for all practical purposes, the English common law was received by the various Australian colonies between 1828 and 1836. The basic contemporaneity of this reception of the English common law provides a relatively uniform body of common law applicable throughout Australia.

<u>3. An independently developing common law:</u> "Australian [common] law is not only the historical successor of, but is an organic development from, the law of England". So held the High Court of Australia in *Mabo v The State of Queensland* (1992) 175 CLR 1 at 29. Even earlier, in 1967 it was recognised both in Australia, and by the Judicial Committee of the Privy Council to which Australian appeals still then lay, that the common law of Australia could develop independently

of English precedent. See *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221; [1969] AC 590 (PC). From 1968 onwards the more independent development of the Australian common law was encouraged by the limitation upon, and later the abolition of, appeals to the Privy Council in London. See *Privy Council (Limitation of Appeals) Act* 1968 (Cth); *Privy Council (Appeals for the High Court) Act* 1977 (Cth). Finally, in 1986 the *Australia Acts* made it clear that Australian law was entirely free of any last vestiges of control in the United Kingdom.

This chronicle can, however, be misleading. The establishment of a separate Federal nation, with its own sophisticated and able court system, led over the course of the 20th Century to a growing independence of legal thought. The growth of local legislation throughout Australia, with its own peculiarities, inevitably led to a gradual drift away from the detail of the English common law in many areas. Nevertheless, the basic system of the Australian law remained, and still is, the "gift of the common law of England". See *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 at 263.

<u>4. Development and Change:</u> Any rule of the common law applicable in Australia can be abolished, changed, elaborated or developed by valid state and federal legislation. Similarly, courts with appropriate power can, by judgments in particular cases, change or develop the common law. But, despite the formal recognition of the independence of the common law of Australia, until about the 1980s the common law of Australia usually reflected the common law of England as it

was developed from time to time. English cases tended to be quoted and followed, without question, as if stating the law of Australia.

In 1978, in *State Government Insurance Commission v Trigwell* (1978) 142 CLR 617, the majority of the High Court of Australia expressed the view that settlement of Australia after 1788 brought with it the "fabric" of the common law, not just "shreds" or "patches" of it. Upon this basis, despite changes in circumstances so as to render apparently unsuitable for export some of the old rules of the English common law, such rules were still held to be applicable to modern Australia until legislatively repealed or changed. This was held to be the case even where the old common law rule was not applicable immediately upon settlement in 1788 because of the then conditions of the colony. In such a case, the old common law rule was said to have lain "dormant" until the circumstances arose in which that law could be applied. The High Court expressed the view that, even where a common law rule was unsuitable to modern times, its rejection and replacement was the function of the legislatures and not the court. The reason for this judicial reticence was explained on the footing that the courts were not accountable to the people and were unable to offer the checks and balances and consultation facilities available to the legislature.

In 1989, in *Halabi v Westpac Banking Corporation* (1989) 17 NSWLR 26, a question arose as to whether an Australian court had power to declare a common law rule obsolete where the legal and social foundation for it had fundamentally changed. One judge held that a court could so declare. What

judges made their successors could unmake if justice or changed social circumstances in Australia so required. But two judges (the majority) held that there was no such power where the common law rule was "settled". Nevertheless, one of the majority added that such rules and principles might be further developed or incorporated into wider judicial principles. It is in this way, by "elaboration" not frank abolition, that judges quite frequently, in effect, change established principles of Australia's common law.

In 1992, in *Mabo v The State of Queensland* (1992) 175 CLR 1, the High Court of Australia recognised that its "duty to declare the common law of Australia" did not extend to the adoption or rejection of principles if, in so doing, it "would fracture the skeleton of principle which gives the body of our law its shape and internal consistency". Upon this basis, where a question arises as to whether a particular common law rule ought be maintained as part of the common law of Australia "it is necessary to assess whether the particular rule is an *essential* doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturing".

In the 1980s and 1990s, the High Court of Australia, like other high Australian courts began with greater resolution to change or reject long applied rules of the English common law which had hitherto been unquestioned as stating the law, even when frequently criticised as anachronistic or otherwise unjust. Some examples include: the rejection of the doctrine of privity of contract in, at least, insurance contracts

(*Trident General Insurance Co Ltd v McNeice Bros Pty Ltd* (1988) 165 CLR 107); the adoption of a "rule of practice" requiring judicial warning to juries about the dangers of police "verbals" (*McKinney v The Queen* (1991) 171 CLR 468); the rejection of the notion that parties to a marriage give an irrevocable lifelong consent to sexual intercourse by a spouse (*The Queen v L* (1991) 174 CLR 379); the rejection of the long standing rule precluding recovery of money paid as a result of a mistake of law (*David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353); the adoption of a new requirement that, in the absence of exceptional circumstances, a judge should stop a criminal trial where an indigent accused has, without fault, been unable to obtain legal representation (*Dietrich v The Queen* (1992) 67 ALJR 1 (HC)); and the rejection of the doctrine of *terra nullius* and the recognition of a form of native land title (*Mabo v The State of Queensland* (1992) 175 CLR 1).

The last-mentioned decision, *Mabo*, in particular quickly became a household word throughout Australia after 1993. It brought home to the Australian people and their leaders, perhaps as rarely (if ever) before, the scope of the judicial power to make new law. It is this power which is a special feature of the common law system of justice. It is the reason why the common law's highly adaptable features have survived the end of the British Empire throughout the world, including Australia. The common law is a world-wide legal system. It still has many common fundamental legal principles. There is a growing willingness to use the experience of judges in different countries, besides England, in solving analogous

problems which legislators have not, or not adequately, addressed. As well, the decisions of Australian courts, expounding the principle of the common law of Australia, are now increasingly used in other countries to assist in the solution of common problems.