

Development of australian law

[Parts of the World](#), [Australia](#)



Western culture refers to the societal structures and norms that arose from Ancient Greece and spread throughout Europe. This included the ways their governments were run and how their legal systems developed. Australia, being a colony of the British Empire, was heavily influenced by the concepts and institutions established under English government and law, which had a profound impact on how the state, especially that of New South Wales, and federal legal systems were originated and developed, based on what was relevant to the new colony and what was not.

Origin of English Law To understand how the English legal system had an influence on the concepts and institutions in the Australian legal system, it must first be known how it was established and developed. The Battle of Hastings in 1066, which saw the Normandy takeover by William the Conqueror, saw a change in the way England was ruled, and the further development of the Feudal System to English society. The King argued that he was above all law, whilst Parliament refuted this claim.

What followed was centuries of fighting that saw the legal system develop and gain power over the monarchy in order to Magna Carta. The Magna Carta was a 1215 document that King John was forced to sign by his Curia Regis, or King's court, as he had been abusing his powers. Restrictions were placed upon the amount of arbitrary power the King had, as well as outlines for the court systems. Its main purpose was to show that it was possible to put limitations upon the King and for the court to have some control over the ruling of the country.

It was Woolworth who said "[T]he gaining of Magna Carta closes one period in the history of English law and begins another. It closes the period during which the law is plucked by the power of the crown alone, and it begins the period which will end in the establishment of a Parliament, with power to take some share in the making a development of the law. " This movement which gave power to the King's court was a founding component in the English constitution, which helped establish a Parliamentary system, and therefore is important in the Australian legal system.

Similarly to England, Australia's parliamentary and court systems are separate entities to the monarchy, with these institutions being able to govern themselves outside of the Governor-General or Governor's capacity, thus showing the influence that the English legal system has. Royal Prerogative One problem faced by the King, parliament and courts was where one's power started and stopped. According to common law, the King was not above the law, however, the monarchy argued that he was above all law, and could delegate tasks to others.

However, under the case of Prohibitions these issues were discussed and findings set out the limitations each of arm of the law. These findings have influenced the concepts and institutions that were established in the Australian legal system, and how much power each of arm of government has and what this entails, again proving that the concepts and institutions of the English legal system are embedded in Australia. Separation of Powers Separation of powers refers to the government being divided into three arms- the Executive (defining the legislation).

The parliament and courts argued that nobody, including the King, was above the word of the law. In England, in *Bantam's Case*, the ruling against the orders of the King gave way to the notion that the courts had power over the monarchy. However, it wasn't until the reign of Charles I without a parliament from 1629-1640 and the subsequent events that this idea was cemented in law. Upon losing the Civil War against parliament in 1649, Charles I was tried for superseding the parliament and excessively taxing the people once he ran out of funds.

He was the first European monarch to be tried without first being deposed, and this was an historical event in Western law. His defense being that he was King, and therefore above court jurisdiction, however he was found to be guilty and sentenced to death. England was then ruled without parliament, known as an interregnum period, between 1649 and 1660. After this period, Charles II was asked back to be head of the monarchy by the parliament, however was placed under strict limitations that saw his powers restricted, and played a founding role in the idea that nobody was above the law.

These actions thus saw the establishment of a separation of powers, a concept that has been put into place in the Australian legal system as well. Separation of powers is an integral part of the Australian legal system, as it stops any one branch of government gaining arbitrary power over the people. Discovery of Australia *Terra Annulus*, meaning land belonging to no one, is a term used to describe a new found land that gives permission for colonization.

This meant that those native to Australia, with the land being declared terra nullus were stripped of any land rights or legal rights. This meant that the British were able to colonise the land, and formed their own society, that saw the brutal treatment of Aborigines and the planned destruction of their culture. This gave way to the formation of the Australian legal system as it is known today, as the English had free reign to build society as they saw fit.

Development of Australian Parliamentary System Like England, the established ways of state and federal parliament were based on a institutional framework- a set of guidelines as to how run parliament and how power is distributed. The Australian Constitution and its state counterparts are the guidelines upon which the federal and state legal systems are based. This includes a Governor, whom acts as a representative of the Queen, showing how the English idea of a Head of State was still instilled in the Australian legal system.

Like England, the New South Wales Government - as well as the six other states bar Queensland, Northern Territory and the Australian Capital Territory - and the Australian Federal Government has a bicameralism system of parliament. Bicameralism is to have two houses of parliament, in Australian state and federal these are the upper house - Senate - and lower house - House of Representatives. These are similar to the English House of Lords (Upper House) and House of Commons (Lower House).

This concept was brought from England to Australia, where the lower house is voted in by the people and these are the ones who propose legislative change, whilst the upper house is decided from within government, must

also pass any proposed bills and can keep a balance and check of power from the elected government, to ensure that arbitrary power is not gained. The Western legal traditions from England were new colony. Development of Australian Legislation Much of early Australian legislation was based upon English law, as it was the founder of the colony.

However it was Blackstone who said that English law would only apply in the new colony as long as it was applicable to the context, under new circumstances. The idea that to move forward as a colony, that some laws would need to be changed to promote growth, can be seen in the Cable Case, where Henry Cable was labeled as a 'laborer' and as a 'new settler of this place' instead of a 'free settler', and treated to the legal rights of those without criminal records, which was against English Law which found anyone with a criminal record to be civilly dead, that is, to have no legal rights.

This landmark case gave almost all the right to obtaining legal help, a fact that was important in a colony made up of majority of convicts, so that in the future there could be social and legal development. This landmark case also saw the Australian legal system as being able to hold its own, and that it could make laws outside of English law. Although this may be the case, English ideals and trustees used still remain an integral part of the legislation process.

Conclusion Western legal tradition, or essentially English law, built the foundations upon which the Australian legal system was formed. The concepts and institutions used in the practice of governing and the making of legislation have been taken from that of English ways, however, Australian

federal and state has developed its own legislation as it has seen fit in order to appease the people of the place, and not those in England. One cannot deny however, that the English legal traditions are ingrained in the New South Wales and Australian legal systems.