

Editors' Introduction

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The editorial project we set for ourselves was to assemble a legal history of Australia. As this continent has been occupied by human communities for more than 60,000 years, this is, of course, an impossible task. We have approached it cautiously and partially. The chapters in this volume explore encounters of laws, people and place in Australia since 1788. They address at least three distinct aspects of this broad topic. One concerns the complex unfolding of Australian settler law in the shadow of the British Empire. It begins with the fundamental tenet of British imperial law – that English law applied in settled colonies to the extent that it was appropriate to local circumstances and conditions.¹ Many of the chapters in the volume go on to explore the employment and adaptation of inherited laws and ideologies for the legal project of settler nation-building after federation. A second aspect of the broad theme of encounter concerns interaction between settler law and First Nations people: it concerns ways in which and the extent to which introduced and adapted laws were applied to Aboriginal and Torres Strait Islander peoples. The third, most difficult and undeveloped aspect explores the possibility of meaningful encounter between First Laws and settler legal regimes in Australia. A number of chapters explore the limited space provided by Australian settler law for respectful encounters, particularly in light of the High Court's particular concerns with the fragility of Australian sovereignty.

We owe special thanks to Professors Shaunnagh Dorsett and Kirsty Gover who helped enormously in planning and troubleshooting this volume. It could not have happened without their enormous kindness, collegiality and generosity.

¹ For a recent discussion of the adaptation in the British Empire, see Lisa Ford, *The King's Peace: Empire and Order in the British Empire* (Cambridge, MA: Harvard University Press, 2021). For the law of reception, see, Alex Castles, 'The Reception and Status of English Law in Australia' *Adelaide Law Review* 2 (1963): 1–31; B. H. McPherson, *The Reception of English Law Abroad* (Brisbane: Supreme Court of Queensland Library, 2007), 235–55.

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We originally set out to create a counterpart to the three-volume *Cambridge History of Law in America*, edited by Michael Grossberg and Christopher Tomlins. However, we have ended up in a very different place. The *Cambridge Legal History of Australia* is distinctive in its sustained attention to the encounter of First Peoples and their laws with settler law. Second, we have attempted to bring into the project a large number of Indigenous scholars – lawyers, historians, anthropologists and activists, involved in both understanding and assessing settler-Indigenous legal engagement in Australia and actively building local governance structures. Third, by conceiving of Australian legal history as a three-way encounter between English, Australian and Aboriginal and Torres Strait Islander legal regimes, we make the point that all legal systems are porous, particularly when they co-exist in the ‘social field’.² *The Cambridge Legal History of Australia* contributes to the understanding of the nature and limits of legal plurality and pluralism as explanatory frameworks for legal history at the local, national and transnational/imperial level.

This *Cambridge Legal History* is not only innovative in its focus on legal encounter: its approach to legal history is also decidedly interdisciplinary. The chapters that focus on the law of Aboriginal and Torres Strait Islanders in particular, have a theoretical or empirical cast: they describe unfolding institution-building efforts, future projects and principles of lawfulness. Other chapters focus on the development of legal doctrine and the substance of the law as historical phenomena worthy of attention in their own right. Yet others adopt a more ‘socio-legal’ stance that understands law as an interwoven set of rules and practices that are crafted and unfold in social, political and temporal contexts. By and large, these differences are only of degree and emphasis. Historically sensitive study of the nature and substance of law is necessarily located in various temporal contexts that reflect distinct moments in a community’s legal life. On the other hand, the socio-legal and historical approaches in this volume do not ignore or discount the norms and rules created by judges and legislators but seek, rather, to highlight the political, economic and social conditions in which they were made and applied. In short, we aspire to bypass barriers between different understandings of law – as normative social practice, as a body of doctrine, and as politics. Law is all these things and more. Its history is integral to histories of society, economics, politics and so on.

2 Sally Falk Moore, ‘Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study’ *Law and Society Review* 7 (1973): 719–46.

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The Plan of the Book

Of our three themes of encounter, the first – between English legal traditions and the project of Australian settlement and nation-building – receives most attention in this volume. David Lieberman argues in his framing chapter that in the late eighteenth century, English legal culture was characterised by a complex interaction between, on the one hand, an undigested mass of inherited institutions and rules of court-focused 'common law'; and, on the other, legislative attempts to update that inheritance by statute in the light of changed social, economic and political circumstances both at home and in British colonies scattered around the globe. In his chapter, Bruce Kercher shows that in New South Wales, adaptation of English law to local conditions, including the fact of a convict majority and the reality of settler-Indigenous violence, was an inevitable feature of law and its administration in the colony from the very start. Focusing on the theme of adaptation, Mark Lunney tells the story of civil wrongs, taking us from early colonial days well into the twentieth century. He finds the ongoing process of adaptation masked by a rhetoric of 'one common law' for the whole Anglosphere and a judicial tradition of what he calls 'British race nationalism'.

David Roberts's chapter on early criminal law shows that the penal purpose and population of the colony of New South Wales presented a raft of problems for the administration of justice and the maintenance of discipline in the colonial period. Colonial authorities saw the need for a simplified and more coercive system of law for the colony that fitted awkwardly with metropolitan legal reforms. The pursuit of this dual goal produced tension, compromise and chaotic informality that the authorities were slow to address. Andy Kaladelfos and Alana Piper trace the history of criminal law beyond the colonial period into the twentieth century, noting both major transformation – in relation to criminal process, for instance – but also continuity in, for example, the use of the prison as a major instrument of state power.

After the need to keep order, the settler state's highest priority was the allocation and use of land. The story begins with the obvious fact that the First Peoples already occupied, used and managed the land within a complex framework of religious and cultural beliefs, and social norms and expectations. At first, as Lisa Ford and David Roberts point out, appropriation of land by settlers, in total disregard of the interests and claims of First Peoples, was a fact of colonial life, a mix of opportunism and force; only later did the settlers formalise and (in their own eyes) legitimise systematic dispossession

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by adopting the fiction of *terra nullius*. Maureen Tehan shows that, in the course of the nineteenth century, settler land law evolved in various ways that modified and departed from the highly technical and arcane English law the settlers had brought with them. Some of these changes were prompted by the facts of First Peoples' continued presence on and use of the land of which they had been 'dispossessed'. Tehan argues, for example, that repudiation of the *terra nullius* myth in the late twentieth century shook the theoretical foundations of land law in Australia, placing an adapted doctrine of land tenure at its centre. Title to land is, of course, inextricably tied up with its use. Ruth Morgan and Judith Jones point to a sharp contrast between the interests of settlers in exploiting the land and the concept of caring for Country, on which First Peoples' law, culture and praxis is based. They suggest that the settlers' focus on development has almost always impeded Australia's genuine engagement with environmental imperatives.

Alongside issues of crime, law and order, and of land ownership and use, various chapters explore other sites of adaptation of English law to Australian circumstances. The centre of gravity of Diane Kirkby's chapter on labour law is the contract of employment, which she tracks from convict labour regimes to the gig economy. She also explores distinctively Australian approaches such as the system of compulsory arbitration. Anne O'Brien contrasts family and kin-based models of welfare characteristic of Indigenous societies with the imported English model of state provision combined with elements of social control. She argues that the imported approach worked quite well for settlers but much less well for First Peoples, among whom it has caused significant social and economic disruption and degradation. On the other hand, at the start of this century, she also detects increasing dissemination of First Peoples' ideas of well-being which, she hopes, may contribute to addressing the welfare challenges of what she calls 'the post-work future'. Alecia Simmonds's account of the history of conjugality chronicles shifting settler practices and values that have established marriage as the dominant legal form but have also brought increasing tolerance and recognition of other types of intimate relationship. Hers is not just an Australian story but one that tracks similar changes within Western societies.

Kathy Bowrey focuses on copyright. Copyright law, she tells us, concerns the production and circulation of commodities that have helped define Australian culture. Through a case study of artist and illustrator, May Gibbs, the chapter tracks the slow emergence of Australian copyright law from its English and imperial cocoon; and, through a case study of the life and

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work of Albert Namatjira, it explores the impact of race on Australian copyright law.

Chapters in Parts II and III tell stories of the development of settler government, politics and public law. Building on Kercher's account of the first years of colonial settlement, Ann Curthoys and Jessie Mitchell trace the transition from remote rule by the metropolitan authorities in Britain to local self-government, a shift that occurred in most colonies in the 1850s. They find that self-government was implemented in different ways in the various colonies, with varying consequences for class and gender relations. The authors also explore the negative impacts of colonial self-government on Aboriginal sovereignty and self-determination. The six settler colonies came together in the federated Commonwealth of Australia in 1901. Brendan Lim traces the emergence of quasi-federal arrangements in the later nineteenth-century British Empire and chronicles the encounter of Australian constitution-makers with American federalism and constitutionalism. Lim speculates that in the flexibility and adaptability of Australian federalism may be found fruitful approaches to constitutional recognition of First Peoples. On the other hand, Kirsty Gover and Eddie Cubillo argue that the constitutional mischaracterisation of First Peoples in racial terms continues to present a significant obstacle to the realisation of their aspirations for self-determination and self-governance.

Nation-building is a multi-faceted activity. One facet involves the definition of membership. In his chapter, Rayner Thwaites analyses Australian membership statuses in the period since Federation: British subject, non-immigrant, citizen and non-alien. Australia's halting move away from the centrality of membership in the British Empire towards a more distinct and self-sufficient national citizenship lies at the centre of this story. This historical trajectory overlaps with the operation and long, slow demise of the White Australia policy. The chapter also analyses current issues challenging and changing our understanding of Australian citizenship, including the recent ruling of the High Court that Aboriginal Australians have a relationship with the continent that is not bound by citizenship: accordingly, Aboriginal non-citizens are not vulnerable to deportation.

Though a key characteristic of nation-building since the late eighteenth century has been the inclusion in written constitutions of bills of rights, as Frank Bongiorno notes, this is not true of Australia. However, from early colonial days settlers, including convicts, had a well-developed sense of their civil and political rights as freeborn Britons. These rights were not extended to First Peoples. Through the first half of the twentieth century, the British

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basis of rights claims remained dominant in Australia; but from the 1940s, Australia was gradually drawn into an international human rights order in a manner that strengthened the ability of marginalised groups to make rights claims through appeals to international standards and covenants. Cheryl Saunders's chapter brings together various strands of these stories by exploring a framing concept of constitutionalism, the sometimes-distinctively Australian approach to polity and nation-building, and the challenges it faces in the twenty-first century.

In contrast to the focus in these chapters on the importation of European technologies of governance into Australia, their development by settlers, and the largely negative impacts of settler nation-building on Australia's First Peoples, Miranda Johnson and Cait Storr explore Australia's role as an agent as well as a product of empire. They track Australia's attempt to colonise the Pacific – a late nineteenth- and twentieth-century project that shapes Australia's continuing influence in the region. In this context, it may be observed that significant aspects of the relationship between settler Australia and its imperial parent remain post-colonial. Relations between settler Australia and its First Nations have not yet made the transition from the colonial to the post-colonial. Coel Kirkby brings these various threads together into a story of encounter between settler Australia and three different worlds. The first world is that of the ancient and ongoing history of international relationships between First Nations, and the unfinished business of relations between them and the settler state. The second world is the British Empire, a global state that aimed to impose a single legal order over its imperial jurisdictions. The third world is the international system of sovereign states that covers the globe today. Law is a prominent feature of each of these encounters and the tensions they embody.

Much important historical work has addressed the second strand of this volume: the encounter of Aboriginal and Torres Strait Islanders with Australian settler law. The chapters in this strand draw together elements of an already rich historical literature about entanglements of First Peoples with settler law, including projects as diverse as Mark Finnane's and Heather Douglas's agenda-setting work on persistent plurality in Australian criminal law,³ and Amanda Nettelbeck's foundational work on the interplay of policing and protection.⁴ Genocide, dispossession and assimilationist

3 Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (London: Palgrave Macmillan Limited, 2012).

4 Amanda Nettelbeck, *Indigenous Rights and Colonial Subjecthood: Protection and Reform in the Nineteenth-century British Empire* (Cambridge: Cambridge University Press, 2019).

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'protectionism' preoccupy a number of the chapters in this volume. They tell big stories of settler law's dispossession of Indigenous peoples, exercises of criminal jurisdiction, the violence of protection regimes, the legal assault on Aboriginal and Torres Strait Islander families and their demands for civil rights.

One of the most heart-breaking of these contributions is the chapter on Indigenous families by Terri Libesman, Katherine Ellinghaus and Paul Gray. These authors explore ongoing settler state violence against Aboriginal and Torres Strait Islander families from first contact to contemporary child welfare interventions. Such interventions have been authorised by laws and policies that have forcibly separated children from their families and communities legally and illegally, and separated kin by exerting control over where Aboriginal people could live, whom they could marry, and how their identity was legally defined. Amanda Nettelbeck's chapter traces the tortuous interface of Aboriginal Australians with protection and welfare regimes in Australian legal history. She traces Australia's history of protection, from its nineteenth-century origins as a program designed to build Indigenous peoples' status as British subjects, to its twentieth-century expressions as a legally empowered system of state guardianship that granted state governments wide-ranging powers of control over Indigenous lives, purportedly for their own good. Mark Finnane explores the interface of settler criminal law with Aboriginal Australians since 1836 – a topic of immense contemporary importance as Aboriginal Australians are among the world's most incarcerated populations. In tracking the long history of Aboriginal criminalisation from nineteenth-century debates about the admissibility and translation of their evidence to more recent patterns of prosecution and punishment, Finnane shows that, over time, the legal system's professed principles of justice and fairness have compounded discrimination against and disadvantage of Aboriginal Australians.

In their chapter on 'Civil Rights and Indigenous People', Gary Foley and Crystal McKinnon explore several key moments in the Aboriginal and Torres Strait Islanders' crusade to end discriminatory laws in Australia. They track the formation of the Aborigines Progressive Association in 1837, and its role in launching a national movement for civil rights in Australia, culminating in the Constitutional Referendum in 1967 that destroyed the exclusive power of states to legislate for Aboriginal and Torres Strait Islander people. But, as Foley and McKinnon note, the end of formal discrimination did not transform the lives of many Aboriginal Australians and, by the 1960s, Indigenous

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participants struggled to have their voices heard in the civil rights movement. A new generation of activists combined some of the tenets of the US Black Power movement with demands for recognition for the special group rights of First Peoples, a foundational shift that underpins a range of contemporary demands, spanning land rights and constitutional recognition. In her wide-ranging and deeply researched reflection on the volume's attempt to foreground the encounter of settler laws with Aboriginal people and their law, Shino Konishi emphasises the ongoing struggle of Indigenous people to reckon with the ideology of *terra nullius* and the ongoing impact of discriminatory law.

The third aspect of encounter in this volume, between settler society and law on the one hand and Aboriginal and Torres Strait Islander legal systems on the other, is, perhaps, the most difficult and elusive of the three to explore in a *Cambridge Legal History*. Aboriginal and Torres Strait Islander law and legal cultures are dynamic and adaptive both in their own right and in their encounter with settler-colonial law and culture.⁵ However, as Mary Spiers Williams points out, they are difficult for settler scholars and officials to see. There are several reasons for this. First, although the British settlers did eventually classify Australia as *terra nullius*, in practice, from the start, they realised (and for a good while accepted) that Australian Indigenous communities had their own laws. However, settler law has long marginalised and refused to engage meaningfully and substantively with Indigenous law and legal traditions. As Pueblo judge Christina Zuni Cruz noted, 'suppression of Indigenous legal traditions was, and in many cases continues to be, a formal policy objective of many nations in their attempts to assimilate Indigenous peoples'.⁶ Second, while much of the substance of English law and Australian law is embodied, more or less determinately and accessibly, in written documents, most Aboriginal and Torres Strait Islander laws are not. Though some of our

5 See Carwyn Jones on the difficulty of disentangling internal dynamism and forced legal change in Māori legal orders: Carwyn Jones, 'Whakaeke I Nga Ngaru: Riding the Waves: Maori Legal Traditions in New Zealand Public Life', in Lisa Ford and Tim Rowse (eds), *Between Indigenous and Settler Governance* (New York: Routledge, 2012), 174–86, 176. On the syncretism of Indigenous laws, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 28; and John Borrows, 'Heroes, Tricksters, Monsters, and Caretakers: Indigenous Law and Legal Education' *McGill Law Journal* 61, no. 4 (2016): 815.

6 Christina Zuni Cruz, 'Law of the Land – Recognition and Resurgence in Indigenous Law and Justice Systems', in Benjamin J. Richardson, Shin Imai and Kent McNeil (eds), *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009), 319.

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more creative historians, along with anthropologists, archaeologists and Indigenous legal scholars, are finding ways to fill the gaps and fissures of the written archive with the reality of living law, most are still subject to its tyranny.⁷ Third, the Australian continent houses hundreds of Indigenous peoples and nations, each with distinctive legal traditions, whose members live in widely varied contexts – rural, urban and suburban – in all parts of the Australian landmass. This multi-national order generates significant plurality of laws and legal systems, many of which are closely kept within communities, or entrusted only to certain people within a community.⁸

Despite this complexity, native title and many statutory land rights regimes grapple with Aboriginal and Torres Strait Islander laws. A significant number of chapters in this volume explore the lopsided nature of that encounter, most demonstrating that the nooks and crannies provided for First Law in Australian settler law are not adequate to structure meaningful engagement. Amanda Kearney's chapter exploring the Yanyuwa encounter with Northern Territory statutory land shows how the processes of parsing First Law to support land claims works its own colonial alchemy. Shaunnagh Dorsett (with Shaun McVeigh) has elsewhere explored the grudgingly created place for legal encounter in statutory native title law.⁹ Jason Behrendt and Sean Brennan show in their chapter that all regimes based on historical claims-making in Australia place narrow limits on what counts as recognisable Indigenous law in that encounter. These chapters, on Aboriginal title to land, form a particularly illuminating set because they cut across English legal heritage, its Australian variants, and the laws and practices of Australia's First Peoples. Kirsty Gover and Eddie Cubillo explore the challenges faced by Aboriginal and Torres Strait Islander peoples determined to fill the awkward spaces left for Indigenous representation in governance bodies, many designed more to tame than to empower Indigenous voices, while Tim Rowse and Jennifer Green show how Arrernte people have mobilised mundane legislative instruments, including heritage law, to exercise some halting jurisdiction over settler development on Country.

7 Ann Laura Stoler, *Along the Archival Grain: Epistemic Anxieties and Colonial Common Sense* (Princeton, NJ: Princeton University Press, 2008), 27–55.

8 Kirsty Gover, 'Legal Pluralism & Indigenous Legal Traditions', Paul Schiff Bierman (ed.), *The Oxford Handbook of Global Legal Pluralism* (Oxford: Oxford University Press, 2020) 847–75, 861.

9 Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking', *Melbourne University Law Review* (2012–2013): 470–93.

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These stories of encounter include remarkable (if fragile) successes, as Daryle Rigney, Denis Rose, Alison Vivian, Miriam Jorgensen, Steve Hemming and Shaun Berg show. Building on their own principles of governance, but also responding to the pressures of institutional encounter, the Ngarrindjeri and Guditjamara peoples have formed and transformed local institutions, asserting control over land management in and around their Country, emerging as significant interlocutors of government. In such encounters, as Kirsty Gover observes, ‘arguably the political arrangements devised by Indigenous peoples and settler states (governing the allocation of power and property) have outpaced much canonic Western legal theory’.¹⁰ However, as Dorsett notes in this volume, the Australian High Court strives constantly to close down larger conversations about First Law and sovereignty. For example, when, in 2020, the High Court decided (in the *Love-Thoms* case) that Aboriginal Australians who were non-citizens could not be deported because their connection to Australian land and waters survived any ‘assertion of sovereignty’, the minority fretted that the decision might conjure ‘the kind of [Aboriginal] sovereignty . . . rejected by *Mabo*’. The court’s repeated insistence on perfect sovereignty is very modern, peculiarly mired in the anxieties of Australian settler-colonialism, and imperilled by the compelling claims of the litigants in the *Mabo (No. 2)* and *Love-Thoms* cases.

Meanwhile, understanding First Laws in their own right, rather than as matters of fact to be proved for the purposes of Australian law, presents ethical and methodological challenges. As a result, few chapters in our volume take this on and none of the chapters on this subject treats First Law as purely a matter of history. When this volume was originally conceived, we thought it might be possible to make Aboriginal law legible by accounting for it in established categories, including family law (which has been discussed recently by Ann McGrath) and criminal law (which Douglas and Finnane and others have discussed).¹¹ However, in her chapter, Mary Spiers Williams alerts us to the risks and perils of such a project. In her discussion of a similar attempt to account scientifically for Cheyenne law by using ‘cases of trouble’, Zuni Cruz argues that to present the contents of Indigenous law in social-scientific taxonomic terms is decidedly ‘Eurocentric’ and therefore ‘useful but problematic’.¹² The key risk that such a project

¹⁰ Gover, ‘Legal Pluralism & Indigenous Legal Theory’, 860.

¹¹ Ann McGrath, *Illicit Love: Interracial Sex and Marriage in the United States and Australia* (Lincoln: University of Nebraska Press, 2015); Douglas and Finnane, *Indigenous Crime and Settler Law*.

¹² Cruz, ‘Law of the Land’, 317.