AUSTRALIA

*200 INTRODUCTION

The principles of British Constitutional law was the basis of the legal system in Australia. It has been stated in Blackstone's Commentaries that English laws are the "birthright of every subject." Therefore a "settled" colony such as NSW acquired all of the current common law and statutory law of England which was applicable to the "situation and condition of the infant colony". This is part of the "birthright" law of a settled colony.

Today, almost 200 years later, these early principles haunt the validity of current Australian law.

The inherited law was based on medieval concepts. The possibility of establishing a new, streamlined, and more relevant law was submerged by the legal profession's elitism in transplanting all the anachronisms, absurdities, and fictions of medieval English law onto the virgin continent.

*201 A "SETTLED" CONTINENT

English law applicable to "settled" colonies was different from that law applicable to "conquered" colonies. Australia was regarded as res nullius (a thing which has no owner) and the aborigines as having no legal status. Therefore from the first settlement in 1788 English law applicable to the colony of NSW was that law applicable to a settled colony. This assumption was complicated by the military nature of the settlement, and that at the date of settlement not all of the continent had become effectively under the control of the British Government.

However, the attitude of the British Government, Governors of the colony, local legislatures, as well as early legal pronouncements supported the view that NSW was a settled colony and the British subjects inherited all English law applicable at the date of settlement.

*202 BRITISH PARLIAMENT AS SOVEREIGN

Acts passed by the British Parliament which directly applied to NSW are known as Imperial Acts. For example, 27 Geo III c2 (1787) was an Imperial Act which established the first settlement at Sydney Cove. The general commands of the British Parliament was the law and therefore, the British Parliament was the sovereign of NSW.

Although the established English law at the date of settlement was the inherited law of the colony, in fact the British subjects were denied the full operation of English law. This was because of the special nature of the colony being a repository of convicts, and the freemen being the military. It was not until the establishment of a local legislature, and a complete law system that the rights of British subjects in the new colony approached that of their kinsmen in England.

*203 THE LEGAL PROCESS IN THE EARLY YEARS

By direction of an Imperial Act the Governor was granted supreme and arbitrary powers for that law not covered by the Imperial statute. Imperial legislation made no attempt to provide for every detail of NSW law. It could not provide a complete legal code for the new Colony. The application of the residue law was in the hands of the Governor. Therefore the first court system was designed for the needs of an "open" gaol.

Some of the inherited common law principles operated in Australia from the first settlement but others were contrary to Parliamentary direction, or lapsed through the lack of any instititional means to apply them.

For example, the initial court system was determined by the Imperial Act; 27 Geo III c2 and The First Charter of Justice for NSW.

*204 27 GEO III c2 and THE FIRST CHARTER OF JUSTICE FOR NSW

The Imperial Act established a Criminal Court for the Colony and The First Charter of Justice for NSW in 1787 provided for civil justice.

The Act and Charter provided the following legal system;

(1) Minor criminal and civil charges could be dealt with by Justices of the Peace.

(2) Phillip was granted power to appoint the above justices, and other officers necessary to "put the law into execution".

(3)The establishment of a Vice-Admiralty Court, and Courts Martial.

(4) The Court of Criminal Judicature for major crimes

(5) The Court of Civil Jurisdiction for major civil actions.

(6) No appeals for criminal cases but appeals allowed to the Governor,and then the Privy Council on civil cases.

The two major courts were the Court of Criminal Judicature and The Court of Civil Jurisdiction.

*205 THE COURT OF CRIMINAL JUDICATURE

This court was authorised by statute and The First Charter of Justice. The First Charter of Justice described the Courts as follows;

> "And whereas it is necessary that a Court of Criminal Jurisdiction should also be established within the Colony or Settlement aforesaid with Authority to proceed in a more Summary way than is used within this Realm according to the known and Established Laws thereof; And Whereas, by An Act of Parliament passed in this present Year of Our Reign" and ,
>
> "...Wee do hereby create, direct and constitute the said Court of Criminal Jurisdiction to be a Court of Record; And that our said Court of Criminal Jurisdiction shall have all such powers as are incicent to a Court of Record by the Laws of that part of Our Kingdom of Great Britain called England".

However despite the directions above that the Court should encompose the then current English law and procedures this could not be done because;

(1) The directed summary nature of the judgments

(2) The appointment of a Judge-Advocate instead of a Judge.

(3) The lack of a trial by jury

(4) Limited avenues of appeal

(5) The members of the court belonged to His Majesty's forces.

The Court consisted of ;

> "..Our Judge Advocate for the time being, together with such six Officers of our Sea and Land Service as our Governor,..shall, ...convene from time to time for that purpose."

*206 THE COURT OF CIVIL JURISDICTION

The Court of Civil Jurisdiction and the minor criminal courts were established by way of Royal Prerogative.

Royal Prerogative

Royal Prerogative is a residue power left with the Crown after the ascendency of Parliament as having paramount power. It is used as authority for administrative practices necessary where there is legislative gaps.

The jurisdiction of the Court was laid down in The First Charter of Justice as follows;

(1)"..full power and Authority to hold plea of, and to hear and determine in a Summary way all pleas, concerning Lands, Houses, Tenements and Hereditaments, and all manner of interests therein, and all pleas of Debt, Account or other Contracts, Trespasses, and all manner of other personal pleas whatsoever".

(2)" And Wee do further Will, Ordain and Grant to the said Court full power and Authority to Grant probates of Wills and Administration of the personal Estates of Intestates dying within the place or Settlement aforesaid".

(3) To consider complaints in writing "..by any person or persons against any other person or persons residing or being within said place, of any Cause of Suit..."

The Court consisted of;

"...the Judge Advocate for the time being, together with two fit and proper persons, Inhabiting the said place, to be appointed from time to time by Our Governor...".

Although no appeals were allowed in criminal cases there was provision for civil appeals to the Governor, and then to the Privy Council where "the debt or thing in demand shall exceed the value of £300".

The British authorities did not provide for any jurisdiction in equity. The first formal grant of equity jurisdiction was not until 1814.

*207 COURT OF VICE-ADMIRALTY AND COURTS MARTIAL

Court of Vice-Admiralty

Was established under Letters Patent in 1787 to try cases of breaches of maritime law on the high seas and "..and also throughout all and every sea shores publick streams ports fresh waters rivers creeks amd arms of the sea as of the rivers and coasts whatsoever of the said Territory called New South Wales..."

Courts Martial

These courts were established to try military personnel for breaches of military discipline. They were a common part of garrison life in the Colony but,as a general rule did not exercise jurisdiction over convicts or civilians.

*208 THE MINOR COURTS

The First Charter of Justice provided authority for the Governor to establish the minor courts in the Colony.

The Justices were provided with "the same power to keep the peace, arrest, take Bail, bind to good behaviour, Suppress and punish Riots, and to do all other Matters and Things... as Justices of the peace have within... England within their respective Jurisdictions". In these courts summary justice was administered for minor offences.

*209 DISSATISFACTION WITH THE EARLY LAW

The early law in NSW did offer access to settlers and convicts to a resemblance of the legal processes in England. But dissatisfaction with the courts soon became apparent particularly from the free settlers who believed they were denied their birthright of English law.

Criticisms of the early law were as follows;

Court of Criminal Jurisdiction

(1) The Court was really a military tribunal. Because the Court consisted of at least six officers of the armed services they tended to favour their own class in legal decisions. Further this class had no legal training in criminal law which was even more untenable as there was no right of appeal on criminal cases.

(2) There was not the availability of that British birthright; Trial by jury.

(3) The Governor had the absolute power to appoint members of the court to sit with the Judge Advocate. This led to allegations of bias and favour in the appointments.

(4) There was no right to challenge a member of the Court even though he may have a vested interest in the outcome of the trial.

(5) Lack of an appeal process

Court of Civil Jurisdiction

(1) The above criticisms concerning the appointment of members of the Court by Governor applied to the Civil courts.

(2) Lack of trial by jury

(3) Criticism of the right of appeal to the Governor who was not legally qualified.

(4) By 1810 the Court was not sufficiently specialised or qualified to deal with the large number of legal actions which had arisen because of the expanding mercantile community in the Colony.

Both Courts suffered from a lack of regular advocates, and solicitors, and an inability to use the more sophisticated processes available in England. For example, there was no provision for the joining of third parties in an action.

Because of general dissatisfaction with the legal process, in the Report of the Select Committee on Transportation of the House of Commons, 1812 most of the above criticisms were made of the administration of justice in the Colony. A number of reforms were incorporated in The Second Charter of Justice for NSW, 1814.

*210 THE SECOND CHARTER OF JUSTICE FOR NSW 1814

The following summarises the changes to Colonial law brought about by The Second Charter;

(1) The Criminal jurisdiction remained intact

Civil Jurisdiction

(2) The Court of Civil Jurisdiction was abolished and replaced by a Supreme Court.

(3) The new Court had the status of a Court of Record with a Judge appointed by Commission.

(4) No provision for trial by jury

(5) The Judge is joined on the bench by two lay magistrates appointed by the Governor.

(6) The jurisdiction of the new Court included common law, equity, power to grant probate, and letters of administration.

(7) A new intermediate Court , The Governor's Court was established with a civil jurisdiction limited to actions in which the money or property in dispute did not exceed £50.

The new Court consisted of a Judge-Advocate and "two fit and proper persons" appointed by the Governor.

(8) New rules on Appellate Proceedings:

Appeals were only allowed to the Governor where the "debt or thing in demand" exceeded £300 except that were the Judge of the Supreme Court had differed in opinion with the magistrates. Appeal could not be made to the Privy Council unless the sum being claimed was £3,000 or more and the appellate lodged double that amount as security.

*211 THE IMPORTANCE OF THE SECOND CHARTER

As with The First Charter , The Second acknowldged that the English legal process should apply in Australia where practical.

The law of equity was now part of Australian law, and the courts no longer dealt with common law actions in a "summary way".

The new Supreme Court became the senior Court in Australia with appellate jurisdiction until the development of full benches in the other States' Supreme Courts. Therefore the embryo of Australian law was created.

*212 NEW DEMANDS FOR REFORM

The reforms of 1814 were too piecemeal and incomplete for the first generation of native-born Australians of the 1820's. Together with the settlers and emancipists they pressed for major changes to the legal system particularly in the workings of the courts, and the introduction of trial by jury for criminal cases.

The British Government appointed J T Bigge to undertake an intensive investigation into the administration of the Colony. He presented Parliament with a Report on The Administration of Justice and which formed the bases of the legal reforms in The Third Charter of Justice in 1823.

*213 THE THIRD CHARTER OF JUSTICE 1823 AND 4 GEO IV C96

This Charter was the most important single legal stage in Australian law. It was introduced by statute; 4 Geo IV c96 as well as The Charter. The reforms represented a complete break with the past and establish ed a legal system with close English parallels.

Basic to the discontent was the demand for trial by jury.

*214 TRIAL BY JURY

The introduction of regular/ Trial by Jury was still not achieved. Instead the following stopgap reforms were introduced;

(1) The Supreme Court criminal cases were to be heard by a judge and a jury of seven commissioned officers of the armed services. However it was now possible to challenge the prospective officer jurors.

(2) For Supreme Court civil cases;

Questions of fact were to be tried by the Chief Judge and two Justices of the Peace (termed assessors).

Where both parties agreed on the facts and the value of the action was £500 or more then the case was heard before a jury of twelve as in England.

*215 OTHER REFORMS INTRODUCED BY THE THIRD CHARTER OF JUSTICE

Other important reforms introduced by The Charter were;

(1) A New Supreme Court

Both the old Supreme Court and the Governor's Court were replaced by a new Supreme Court with extended jurisdiction.

The extended hurisdictions included the power to deal with probate of wills, the administration of intestate's property, the guardianship of infants and the control of their estates, the power to deal with insolvancy, and jurisdiction over Admiralty matters.

(2) Circuit Courts Established

Executive action established Circuit Courts of the Supreme Court, and similar to the circuit courts in England (s12). Their jurisdiction covered criminal and civil matters similar to that of the Supreme Court.

(3) Inferior Courts established

The inferior court structure was modelled on that in England as follows;

Court of General or Quarter Sessions ; Could deal with minor criminal matters in a summary manner, and convicts could be dealt with in a more arbitrary manner than could freemen.

This court later became known as The Court of Petty Sessions.

Court of Requests; Had authority to deal with civil suits involving sums of less than £10. This court was known in England as "a poor man's Court of Equity).

(4) Appeals: The Court of Appeals of the Colony of NSW

There was no fundamental change to that before 1823.

Appeal was still to the Governor who was enjoined to convene The Court of Appeals of the Colony of NSW.

Appeals to the Privy Council were allowed for when £2,000 was the value of the subjcet of litigation. The severe security requirements of he Second Charter were relaxed.

*216 THE IMPORTANCE OF THE THIRD CHARTER

Although the reforms were meant as transitory measures only they laid a stronger base for the development of Australian law based similar to that available in England. However there were still important differences;

(1) Criminal trials were still not subject to full and regular trial by jury.

(2) Important civil cases were still not subject to a regualr trial by jury.

(3) The initiation of public prosecutions were fully in the hands of the Attorney-General.

*217 THE AUSTRALIAN COURTS ACT 1828 : 9 Geo IV c83

Although this Act was only meant as a temporary measure and largely re-enacted the 1823 provisions, it put Australian law on a more stable legal footing and became the embryo of future Asutralian law. It provided that all laws and statutes in force within the realm of England on 25/7/1828 should be applied in the administration of justice in NSW. The far-reaching effect of this Act is well illustrated in the modern case R v Wright; ex parte Klar (1971). It established the "English" element of Australian law and at the same time introduced the following reforms;

(1) Appeals

The 1828 Act dropped the provision of 1823 dealing with appellate proceedings before the Governor.

(2) Juries

The Act only granted greater autonomy to the Governor, and the Legislative Council to introduce the more extensive use of juries at some time in the future.

In fact the 1828 Act took away the use of regular juries in The Court of Quarter Sessions. These were instituted by the Supreme Court following an oversight in the 1823 legislation. The 1828 Act laid down that the juries of the Court of Quarter Sessions were to constituted in the same way as for trial in the Supreme Court.

Military Juries; Military juries were to remain for another eleven years before they were finally abolished. Regular juries were denied because of the obstinacy of the Legislative Council. The Juries Act, 1832 allowed non military juries where the accused could show that the Governor or any member of the executive Council is the plaintiff or has a personal interest in the case. The Legislative Council in 1833 finally granted freemen a full right to choose a civilian jury for their trial in the Supreme Court, and the Court of Quarter Sessions.

However the availability of Military Juries was not abolished until 1839.

In 1842 the use of assessors in the civil jurisdiction of the Supreme Court was finally abolished. Provision was made for the trial of common law actions with 4 jurors (petit juries) unless either party required a jury of twelve (grand jury).

(3) Power to the Legislative Council over the Inferior Courts

The 1828 Act vested the Legislative Council with powers to determine the workings of the Court of Requests, and the Court of Quarter Sessions.

In 1829 the Council empowered magistrates to depart from normal proceedings when dealing with convicts.

Court of Quarter Sessions; The Court exercised traditional jurisdiction for magistrates sitting "out of sessions" or in the Court of Petty Sessions. Petty Sessions became the common name in the early 1830s. The Court had jurisdiction over small debts.

Court of Requests; Commissioners of the Court were appointed in 1842. The Court had jurisdiction over civil claims involving £10 or more.

A major revision of the inferior courts in 1846 resulted in the Court of Petty Sessions taking over the jurisdiction of the Court of Requests except in the County of Cumberland. The Court was finally abandoned in the 1850s.

*218 THE DEVELOPMENT OF THE SUPREME COURT

By 1827 the Supreme Court had three judges. These were required to deal with more specialised areas of law arising from the larger and more mercantile community in NSW. The procedures of the Court closely mirrored that in England but Australia was fortunate to have Sir Francis Forbes as a Chief Justice. Forbes was a reformist, was largely responsible for the drafting of the legislation enabling The Third Charter of Justice, and his suggested reforms were largely incorporated in the Australian Courts Act in 1828. "Forbes Rules" for the Supreme Court were streamlined and advanced for the time. He provided that the Court's proceedings were "to be commenced and continued in a distinct and separate form".

Therefore from the early years clear distinctions were drawn between criminal, common law, ecclesiastical, exchequer, and equitable jurisdictions. S12 of an Amendment Act of 1840 confirmed the clear distinction between equity and other law. The Supreme Court's jurisdiction in Equity was to be vested in one judge of the "Equity Branch of the Supreme Court". This clear distinction remained in NSW law until recent times although England and other common law countries successfully fused the juridictions with reform legislation passed in the 19th century.

Appellate Function

Following the establishment of a Supreme Court at Port Phillip the NSW Court assumed the mantle of Australia's appellate tribunal. The important case R V Magistrates of Sydney (1824) Sydney Gazette 21.10.1824 showed that the Court had been vested with all the English power to review and clarify issues relating to the administration of justice in the Colony. In R v Hodges & Lynch (1844) Legge 201 Dowling CJ held that the Supreme Court had the power of "correcting and examining all manner of errors in fact and in law, of all justices, in their judgments, process and proceedings ".

Review of Criminal Matters

The Supreme Court's power to review criminal cases grew through the use of the writ system for example, the Writ of Certiorari (A command to a lower Court to "certify" to the higher court some matter of a judicial character).

By 1840 appeals became referable by a single judge to all three judges sitting together. Legal points could also be referred to what became known as the Full Court or the Full Bench of the Supreme Court.

In 1849 reforms in English criminal law were introduced into Australia. The Legislative Council directed that a Court after a case had been reserved to it could remit the case back to the inferior court and a new judgment delivered according to the superior court's ruling.

*219 ENGLISH LAW REFORM AND AUSTRALIA

During the first half of the 19th century Bentham and other law reformers in England abolished many of the antiquated Medieval court practices that were cluttering up the English law courts.

Many of these reforms were adopted by way of legislation in Australia. The 1828 Imperial Australian Courts Act made British statutes as at 25.7.1828 applicable to NSW. Therefore as at that date a large number of England's legal reforms were applicable to Australia.

Because Australian law closely paralled English law the reforms could be readily incorporated into the Australian system by way of legislation. However the dependence upon English reformers meant that an absurd situation was reached were because of the lead time, superseded reforms were introduced into Australia before the contemporary reform measure was finally introduced.

*220 INFERIOR COURTS REFORMS

Creation of Dsitrict Courts

Following the reform of the English County Courts, the Court of Requests was finally abolished in 1858 upon the creation of District Courts.

NSW District Courts had a jurisdiction over claims involving sums up to £200. They were presided over by legally trained magistrates instead of lay magistrates. Where the value of the dispute was greater than £25 juries could be empanelled to determine questiosn of fact.

However, questions of law was determined only by the judge. Paid legally trained judges were to become an important part of Australian law.

Court of Quarter or Petty Sessions

Reforms were also made to the Court of Quarter Sessions. The District Court judges were appointed as Chairmen of the Court of Quarter Sessions within their respective districts. The Chairman was to be the "sole judge at the trial of all criminal issues in such courts". Jurisdiction was extended to include "all crimes and misdemeaners not punishable by death".

Vice-Admiralty Courts

These old Courts were still part of the Australian court structure. Finally in 1911 the Vice-Admiralty jurisdiction was vested with the Supreme Court after enabling British legislation passed in 1890.

*221 SUPREME COURT REFORMS

The English Judicature Act reforms of the 1870s were introduced into all Australian states except NSW. NSW did not finally adopt all of these reforms until the late 19th century and early/20th century. Typical lead time is illustrated by the law on divorce. The British Parliament authorised the colonies to adopt the English legislation on divorce in 1858. However NSW did not pass legislation covering divorce until 1872 and then after seven attempts. Other reforms were as follows;

Equity

During the period 1852 and 1853 three statutes were passed which introduced a number of reforms in the Equity Branch of the Supreme Court. Simplified procedures were introduced for initiating equitable claims and further equitable dealimgs. The Court was empowered to exercise functions that were previously the province of common law.

Common Law

The English 1823 reforms were adopted in 1852.

The important remedy of injunction (formerly the sole province of equity) could be issued at common law in 1857.

Similarly defences which before could only be pleaded in equity could now be pleaded at common law.

The above reforms tended to bring equity and common law together.

*222 RESULT OF THE ADOPTION OF ENGLISH RE FORMS

After the adoption of the English reforms during the second half of the nineteenth century and the early half of the twnetieth century meant that during the Federation period the legal systems of England and Australia were very similar. It was not until the establishment of the High Court, a new Australian identity, and particularly the independence of the High Court from the Privy Council in the 1970s that Australian law became noticeably distinct and in one or two areas superior to the law in England.

However the English element of A ·ralian law is still woven into our legal fabric. This will be shown by an examination of the elements to follow.

A description of Australian law at the turn of the century is provided by W. J. V. Windeyer as follows;

> "The law of England had become unquestionably the law of New South Wales. The colony had become a free colony of the Empire on its way to attaining a full measure of self-government. The Supreme Court was one of the King's ordinary courts of justice, with jurisdiction similar to the courts at Westminster".

(~ Lectures on legal History, TLB, (1974) P 313)

*223 ELEMENTS OF AUSTRALIAN LAW

The law in Australia can be subdivided into 4 elements ;

(1) The Imperial element

(2) The English element

(3) The State element

(4) The Federal or Commonwealth element

To understand the relative importance of the elements it is necessary to consider the concept of sovereignty.

*224 SOVEREIGNTY

The dominant school of law in Australia and England is the Positive School. The theory of positivism in law was developed by two law reformers J.Bentham and J.Austin. Austin said of the positive approach;

> "Every positive law, or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons to a member or members of the independent political society wherein that person or body is sovereign or supreme" "The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence", ed HLA Hart (p193)

The United Kingdom Parliament is the sovereign in England. The law in force is shown by the UK Parliament passing an Act which becomes a command issued by the sovereign body and which it intends to be obeyed.

This idea also applies to Acts passed by previous Parliaments. Positivism states that these have the authority of the sovereign because the UK Parliament has not amended or repealed those Acts. This is an implied authority.

*225 SOVEREIGNTY AND THE COMMON LAW

Acts passed by the sovereign Parliament which cover areas of common law supersede the common law. Judges use the Act as legal authority instead of court case precedents.

Applying positivism the common law only exists so far as Parliament will tolerate it. Therefore what it tolerates it impliedly commands.

*226 DELEGATED AUTHORITY

The concept of delegated authority is most important in Asutralian law. For example, Orders in Council of Her Majesty's Privy Council

are treated as commands of the sovereign because authority is given to the body with delegated legislative powers from some Act of Parliament. Further, the Parliament implies the legilsation of the delegate as it does not supersede or revoke the delegate's authority.

*227 POSITIVISM IN NSW

Positivism has influenced the early law of NSW. Sir Francis Forbes the first Chief Justice was a Benthamite and was instrumental in the making of the Imperial legislation 4 Geo IV c96 (NSW Act) and The Australian Courts Act 1828 (9 Geo IV c83).

Therefore, from these early constitutional instruments there was the unquestioned assumption that the sovereign for NSW was the British Parliament.

*228 THE IMPERIAL ELEMENT

The Imperial element in NSW law today are the Imperial Acts of the British Parliament which are directed to the Colony. For example, 4 Geo IV c96 and 9 Geo IV c83.

Also delegated legislation passed by British institutions such as the Privy Council under the authority of an Imperial Act, and powers held over the colony by the British Crown under the same authority (or under prerogative powers recognized under common law)

*229 THE ENGLISH ELEMENT

The Imperial legislation made no attempt to provide for all the law in NSW. After the Imperial element the administrative law was left to the Common Law doctrines of England.

Further, the settler inherited so much of the general law of England which could be applied to the new colony. Therefore the inherited law included those English statutes as well as the common law of England which could be applied to NSW.

The position of the inherited law was clarified by 9 Geo IV c83 . S23 provided that all the laws and statutes in force in England as at 25.7.1828 should be applied to the administration of justice, so far as it could be applied.

Therefore the English element of law has a starting point of 25.7.1828 and there is no need to determine the English element applicable in 1788. As a result Australia was able to inherit the law reforms of the Benthamites in English legislation. For example, Sir Robert Peel's Acts for the reforms of criminal law.

The English element has important ramifications on the law today. The effect has been rationalised by the passing of the Imperial Acts Application Act ,1969 (NSW). This Act overcame a number of problems of which English legislation could apply to NSW by classifying the inherited English Acts as follows;

(1) Those which did not require to be fully re-enacted but contained provisions of continuing value which could be re-enacted in some form as NSW legislation.

(2) Those that were impracticable to re-enact but should be continued in their ancient form.

(3) Those of no continuing value and should be repealed.

Because of the Imperial Acts Application Act questions of whether or not a particular English statute could be applied in NSW in 1828 will no longer arise. However the application of the Common Law part of the English element is more difficult.

Common Law

Common law is judge made law which lives and grows in the hands of judges. It is developed by the fiction that a judge does not enact the common law at a given time, but authoritatively declares it as having been from time immemorial.

Therefore when a new common law doctrine supersedes the old doctrine, the judge does not state that the old doctrine has ceased or become "out of date" but that it was "wrong" or wrongly declared to have been the true common law.

Therefore the 1828 date is not really relevant for the application fo common law doctrines in Australia. Australian courts have generally followed the English common law decisions but there is evidence of an Australian common law being develped.

An important use of the common law is for the interpretation of statutes in NSW and Australia.

*230 THE STATE ELEMENT

The State element are the NSW statutes and the court decisions which interprete the statutes. NSW legislation is delegated legislation because the powers of the local legislative bodies were derived from Imperial legislation beginning with 9 Geo IV c83 and culminating with the Constitution Statute; 18 and 19 Vic c54.

*231 THE FEDERAL OR COMMONWEALTH ELEMENT

The federal element in Australian law is increasing in importance.

The Commonwealth of Australia was brought into existence by an Imperial Act; The Commonwealth of Australia Consitution Act (63 & 64 Vic c12).

The Australian Constitution is s9 . S5 states amongst other things that the Act and all laws made by the Federal Parliament under the Constitution are binding on the courts, judges, people of every state, and every part of the Commonwealth notwithstanding anything within state laws.

The Act including the Constitution are part of the Imperial element of Australian law. But the Australian Government has delegated authority so that Federal Acts of Parliament represent the Federal element in Australian law. Authority is derived from the Imperial Parliament.

The Australian Constitution; Since the Constitution was part of an Imperial Act it can be amended or withdrawn at any time by the British Parliament. It never has, and probably never will be amended by that body.

However there have been six amendments by referendum as allowed under the Act.

Statute of Westmenster; This was "An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930". The Federal Parliament finally adopted the Statute on 3.9.1939 the date of the outbreak of war with Germany. It was passed to assuage fears and doubts on the validity of the proposed wartime emergency regulations.

The Statute stated that no law passed by the Federal Parliament after 3.9.1939 is invalid on the grounds of repugnancy to any Imperial Statute or delegated legislation, any more than to any other provision of English law.

Therefore the Act did not free the NSW Parliament from the effects of the Colonial Laws Validity Act and the Federal Parliament cannot alter the Constitution at will and enlarge Federal powers.

S4 states that the UK Parliament purports to abandon paramount legal authority over the Federal Parliament and that no Act passed by the UK Parliament after 3.9.1939 shall apply to Australia unless it has been expressly declared in the Act that Australia has

requested and consented to its enactment.

However applying positivist theories to the Statute it is obvious that the UK Parliament cannot abandon it's own sovereignty by itself passing a Statute to that effect. The UK Parliament can amend or repeal the Statute at any time. The Privy Council stated in British Coal Corp v R /1935/ AC 500;

> "It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains inherently unimpaired: indeed the Imperial Parliament could, as a matter of abstract law, repeal or disregard s4 of the Statute."

The powers of the Federal Government are stated in the Constitution for example, defence. Therefore all other powers not stated remain the province of the state governments for example ,education. Where state legislation conflicts with Federal legsilation and the subject matter is with the powers of the Commonwealth, the Federal laws are paramount.