

The Doctrine of *terra nullius*

Terra nullius is a Latin phrase meaning land belonging to no one.

The English interpreted this as land which is unoccupied or unsettled in the European sense, that is without houses or cultivated pastures – the local people had not developed towns, roads or farms and displayed no social structure of government.

The doctrine of *terra nullius* was really no more than an eighteen-century convention of European international law – it being held that any land which was unoccupied or unsettled could be acquired as a new territory by a sovereign State, and that the laws of that State would apply in the new territory.

The English government used this so-called doctrine to claim Australia and set up a penal colony in which English law applied. The Doctrine ignored the rights and customary laws of Aborigines and Torres Strait Islanders. The settlers, moreover, generally had a lack of understanding of, and disregard for, these customary laws.

Methods of acquiring territory:

For European powers, there were four internationally recognised ways of acquiring new territories in the seventeenth and eighteenth centuries. They were through inheritance; by conquest; by purchase; and through settlement.

Inheritance

James II inherited Scotland from his father when he became king in 1685.

Conquest

A conquered country was one that was overtaken by another.

The English conquered India through force. However, in international law, or custom, the consequence of conquest was that local law applied unless overruled by English law. Therefore, England had to take local Indian law into account when governing India as a colony of the British Empire.

Purchase

England purchased a number of territories in North America, such as Louisiana from France and New Mexico from Mexico. England lost these colonies as a result of the American War of Independence.

Occupation or Settlement

A settled country was one that was uninhabited and thus available for occupation by another. By 1670, English **jurists** were talking of English colonists acquiring unoccupied territory. The Laws of England stated that English Law applied immediately on the occupation of deserted and uncultivated land by English subjects. Unoccupied land was declared to be *terra nullius* and English colonists going to a new unoccupied territory took with them '...only so much of the English law as is applicable to their own situation and condition of any infant colony'.

New South Wales was colonised (settled) as an unoccupied territory, or *terra nullius*, by the British, even though Aboriginals and Torres Strait Islanders lived on the land. This was because they”

- had not occupied the land in the European sense; and
- had no recognised social structures in the European sense.

The fact that the indigenous peoples already occupying the land were largely **nomadic**, and therefore had no use of townships, roads and farms only reinforced the English view that there was no social organisation in New South Wales.

The Second **Commission** to Captain Arthur Phillip from King George III, in 1797, acknowledged that Aboriginal peoples lived in New South Wales and makes a very clear distinction between natives and subjects, which implied that Aboriginal peoples were not considered to be the king’s subjects:

The history of white settlement saw systematic destruction of indigenous cultures and the extinction of many local peoples. Because the land has been declared *terra nullius*, almost no regard was held for the customary laws and the rights of Aborigines and Torres Strait Islanders. The High Court decision in *Mabo v. State of Queensland* (1992) 107 ALR 1 overthrew the belief that Australia was *terra nullius* when the English occupied it in 1788.

This High Court decision recognised that the Indigenous Australians had native title to land. To have native title means to have the right to live on it and use it for traditional purposes.

REVIEW QUESTIONS

1. What does the term *terra nullius* mean?
2. Explain what is meant by the Doctrine of *terra nullius*.
3. How did the use of this doctrine affect Aboriginal customary law?
4. Name 4 ways that European county or state could acquire new territory in the 17th and 18th centuries.
5. Why did the British colonists choose to acquire Australia through occupation?
6. What does it mean to have **native title** to land?
7. a) When was the Doctrine of *terra nullius* overthrown, or declared **invalid** in Australia?
b) What High Court landmark decision was involved in this event?