

**Bruce Kercher, *An Unruly Child: A History of Law in Australia*, Sydney: Allen & Unwin, 1995.**

It is not uncommon for Australian legal history to be seen in the light of the Constitutional milestones such as the *Colonial Laws Validity Act* 1865, the *Statute of Westminster* 1931 and the *Australia Acts* 1986 and for these to be used as evidence of a gradual, somewhat orderly movement towards Australian autonomy. But Bruce Kercher in *An Unruly Child* has taken a different view. He suggests that, like a wayward child, the law in Australia did not always behave in the manner determined by its parent although independent tendencies in infancy were sometimes curbed as it grew older.

Kercher argues that from the outset administration in Australia was more centralised than in England and land ownership more widespread and that this, coupled with the need to adapt the legal system to a penal society in which there was also an Aboriginal presence which could not be ignored, saw the law in Australia faced with issues which set it apart from England.

Kercher's research has uncovered the earliest surviving record of a civil action by an Aborigine, a sailor who, in 1811, alleged he had not been paid and, after a complaint to Macquarie, had the matter dealt with (unsuccessfully for the complainant) by a magistrate. That the matter was heard in a court at all shows despite the doctrine of *terra nullius*, it was possible for some Aborigines apparently to come within the law, yet as Kercher argues, had the complainant not been Aboriginal the matter would have been before the superior court, the Court of Civil Jurisdiction. Kercher suggests, "*terra nullius* was a genteel way to sweep the great injustice under the carpet", but as he also argues, colonial society was often not genteel and the debate about the legal position of Aborigines was sometimes conducted by guns.

The record of the first legal action in the new colony is interesting in itself and for what it demonstrates about the need to adapt the legal system to its penal surroundings. In 1788, convicts, Henry and Susannah Kable, sued the master of one of the first fleet vessels for the loss of their luggage on the long voyage from England. Under English law as condemned felons Henry and Susannah were dead at law, but the colony's first Judge-Advocate, David Collins, decided to ignore the common law and award them £15 damages. For 30 years *Kable v Sinclair* shaped much of the character of the colonies, until 1820 when the local courts adopted the English position that convicts could neither sue nor hold property. But this action came too late. By 1820 there had grown up a sizeable body of emancipists unwilling to give up that which they had held and as we know it was from this group that there was early agitation for representative government.

There were of course many forces shaping Australian legal history during the nineteenth century, the push for representative government

just one. Kercher also describes the tensions between the press and the use of criminal defamation laws; the role of judicial review and the division among the judges about the nature of law and law making and whether the principles or the detail of English law ought to be applied.

If the nineteenth century is the story of ambiguity and tensions, the title of Kercher's penultimate chapter, "Creeping towards legal independence, 1901-1960", suggests a slower pace and only little change. The backgrounds and Anglophile education of the bar and the judiciary throughout this period are suggested as factors in this. With Biggles and Enid Blyton as childhood reading and fireworks on Empire Day, the notion of the judiciary finding a spiritual home in Europe is presented. Nevertheless there were some notable developments including powerful dissenting opinions in the High Court of Justices Isaacs and Evatt and the profound influence of Sir Owen Dixon prepared to prefer the High Court's own decisions to those of the House of Lords.

The final chapter considers the influence of many of the High Court judges since the 1960's together with formal steps towards independence particularly in the ending of appeals to the Privy Council. Kercher acknowledges the striking role played by the Mason High Court noting we know what the High Court judges did under Sir Anthony Mason but not yet why and he calls for a biography of the former Chief Justice. This writer can only agree. If we are to understand our recent legal history, we need to appreciate the values which have shaped it. We can point to striking departures from English law but yet not be sure to where we are heading.

Kercher has written an account of our legal history which challenges certain preconceptions. His work deserves a wide audience even if there may be some who will not agree with all his conclusions.

**Anne Finlay**