



# Teacher Reference Document 9



AUSTRALIAN  
CONSTITUTION  
CENTRE

Unit 2: How British laws and principles, including the rule of law, were brought to Australia by the First Fleet in 1788 and their impact on Aboriginal and Torres Strait Islander peoples – Year 4 - Civics and Citizenship (C & C) Strand: Laws and Citizens

Topic 4.2: A conflict of laws and perspectives

## Terra Nullius –what was its effect on Aboriginal and Torres Strait Islander peoples?

During the age of colonisation, the ‘great powers’ of Europe, including Britain, France, Belgium, Spain, Portugal and the Netherlands, sent out ships to explore new lands and to claim them as part of a colonial Empire. This brought them great riches through trade, access to natural resources (eg gold) and the growing of food and products (eg sugar, spices, cotton and rubber) on ‘plantations’, using poorly paid local labour or slaves.

If a land was unoccupied, colonising it was relatively straight-forward. It was just a matter of occupying or ‘settling’ the land with your own people, and living off the land (while preventing any other colonial power from settling it). Sometimes settlements failed due to a lack of fresh water or food. But in most cases well-prepared settlers were successful in starting a new community in their new land. When a land was settled, the British colonists brought their own laws with them, and those laws applied in the colony, if they were applicable.

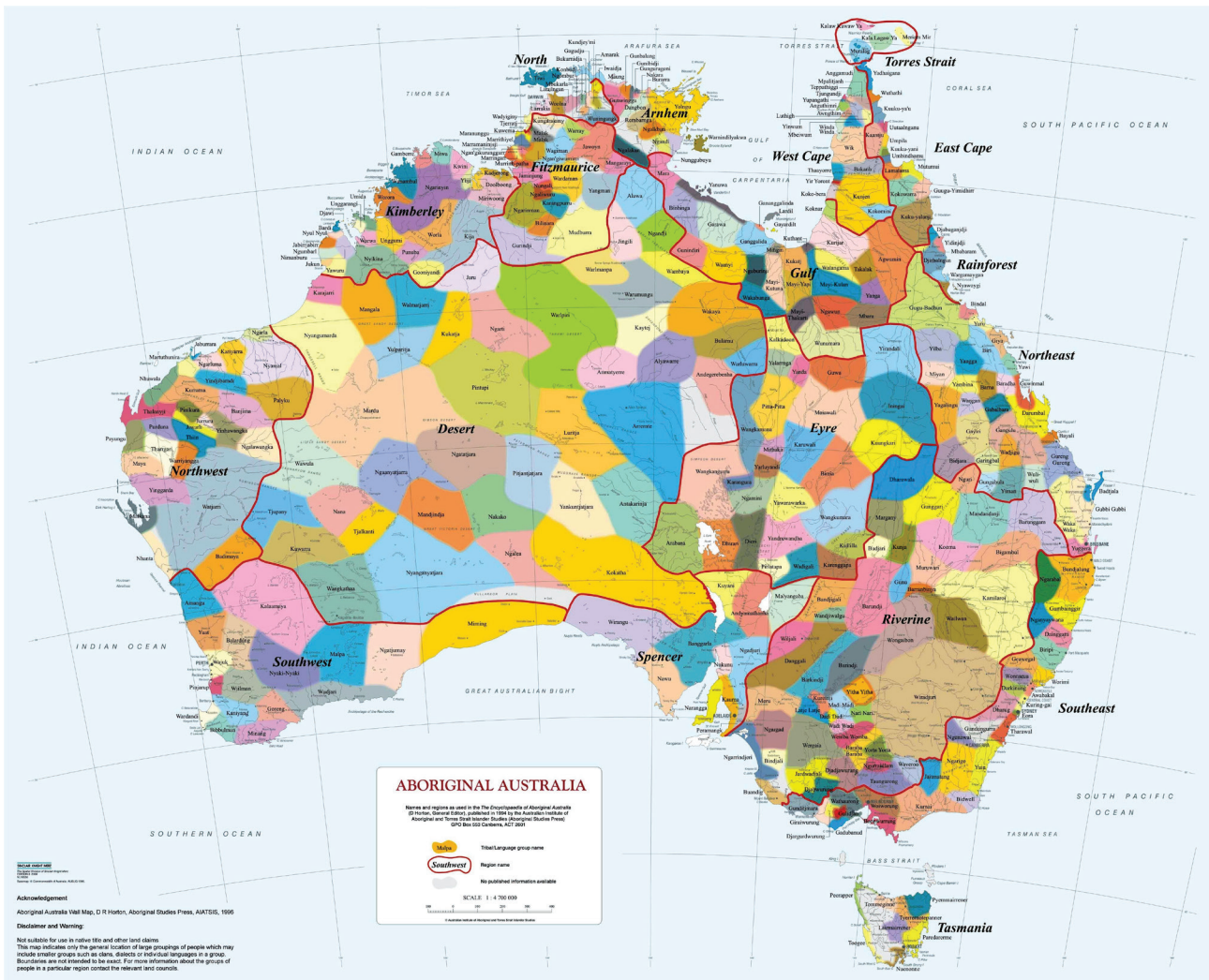
Most land, however, was already inhabited. Sometimes colonists took it by conquest. This could be done by battles or wars, or by occupying the land and excluding the existing inhabitants by force, making them move elsewhere or live on controlled reserves. In a conquered colony, the existing law of the local people continued to apply until such time as it was altered by the conqueror – whether by a legislature established in the colony, or by a Governor or by the application of British statutes.

In some cases, where there were already local communities with governments or recognised leaders, who controlled and lived on the land, control was transferred to the colonists by way of ‘cession’. This involved the local people, through their leaders or government, formally ceding (i.e. giving up) control of their land to the Empire, in exchange for something, such as money, resources or protection from other colonial powers.

For example, the Chiefs of the people of [Fiji](#) ceded the sovereignty of the Fiji Islands to Queen Victoria in 1874. They did so to promote trade and industry, law and order and to obtain the protection of the British Crown from other colonising forces. In New Zealand, the [Treaty of Waitangi](#) was signed in 1840 by New Zealand Chiefs, recognising Māori land rights but also ceding ‘sovereignty’ to the British. (Note that while the version in English referred to sovereignty, the Maori translation was ‘[governance](#)’, resulting in a dispute about precisely what had been ceded.)

In contrast, Australia was treated by the British as ‘terra nullius’ which means ‘land belonging to no one’. It did not mean that the British treated Australia as uninhabited. The British knew that Aboriginal and Torres Strait Islander people lived there. But they regarded them as nomadic and not having ownership of particular plots of land. The consequence was that when Australia was ‘settled’ by the British, it was treated not only as giving the British sovereignty (i.e. the power to control it by law), but also full ownership rights to all land and waters. The British did not recognise Indigenous pre-existing sovereignty and ownership of the land. How could this be?

The British judged the situation from their own fairly narrow perspective. The two things that counted for them were land use and governance.



The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) map of Indigenous Australia. David R Horton © Source: AIATSIS

When deciding whether land was 'owned' they looked at whether it was 'cultivated' (i.e. farmed), fenced or had structures built on it. Their notion of owning land was about tilling the soil, excluding others from it and building things on it. When it came to governance, the British recognised pyramidal structures, with a leader at the top, such as a Chief, and others who obeyed, in accordance with a system of law. Indigenous peoples in New Zealand and Fiji, for example, had the kinds of tribal chiefly systems of governance that were recognisable to the British. They also built structures and used land in a way that was sufficiently familiar to the British for them to be treated as the owners of the land with whom treaties could be negotiated.

It was different for the Indigenous peoples of Australia. They did not have a chiefly system of government. There were elders of each separate Indigenous nation, but the governance system tended to be flatter and based more on building consensus than imposing laws from above. This may explain why the British did not recognise the Aboriginal and Torres Strait Islander peoples as sovereign peoples with whom they could negotiate.

When it came to land use, the British regarded Aboriginal and Torres Strait Islander peoples as nomadic hunter-gatherers who roamed across land but did not 'own' it in a way the British could recognise. But they were wrong. Aboriginal and Torres Strait Islander peoples were not nomadic and had strong spiritual ties with their Country.

Another difference was timing. The Indigenous peoples of Fiji and New Zealand had the advantage of dealing with colonial powers much later, in the nineteenth century, when ideas about treaties and the rules of settlement, cession and conquest were more developed. They also had the advantage of a common language and smaller distances to travel, so they were better able to bargain collectively on behalf of their peoples. This was much harder to achieve in a country as large as Australia with so many different Indigenous languages and groups.

Because the British colonists did not recognise Indigenous land ownership or sovereignty, they treated the land as *terra nullius*. Before the [Mabo Case](#), the British and Australian courts also treated Australia as 'terra nullius'.



For example, in 1889, in a case called *Cooper v Stuart*, a British court referred to the Colony of New South Wales as 'without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions'. But that statement was clearly wrong. It was finally corrected by the High Court in the *Mabo Case*.

In *Mabo*, the High Court accepted that Australia could not be classified as 'terra nullius'. Clearly the Indigenous peoples of Australia in 1788 had a form of governance, a system of laws and a form of land ownership. Justice Brennan said: 'Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted'.

The High Court accepted that, from a legal point of view, Australia was a 'settled' colony, even though some argue it was more like a conquest – given the frontier violence. While Mabo's lawyers did not dispute that Australia was 'settled', this remains a hotly disputed question today, from a political point of view.

Eddie Mabo at his home on Mer, Murray Islands.  
Source: National Archives of Australia

The High Court also accepted that when Australia was settled, the existing legal rights of Aboriginal and Torres Strait Islander peoples with respect to land and waters were recognised by the 'common law' (i.e. a system of law developed and recognised by courts) and would continue to exist until overridden by statutes (i.e. laws passed by Parliament). This is the 'native title' that was recognised by the High Court in *Mabo* and which continues to be claimed and exercised today.

Thanks in part to the *Mabo* case, today we have a much better understanding of the strong spiritual and cultural connection between Aboriginal and Torres Strait Islander peoples and their 'Country', being their traditional lands and waters. We also have more open minds to different types of governance, ownership and belonging. It is now accepted, by the highest court in the land, that Australia was never 'terra nullius'. Aboriginal and Torres Strait Islander peoples did have legal rights to their Country, many of which rights survive today and are recognised by the courts.





## Topic 4.2 Lesson Five (a)



AUSTRALIAN  
CONSTITUTION  
CENTRE

# Terra Nullius- 'land belonging to no one'.

### Time/Lesson

- 1 hour

### Learning Goal

To understand the legal implications of terra nullius – what it means and what its effect was on Indigenous Australians when the First Fleet arrived.

### Rationale

In order to understand why the British treated Australia as “terra nullius” and how this impacted upon Aboriginal and Torres Strait Islander people, students need to develop empathy for both the British and the Indigenous populations.

### Success Criteria

Students make connections with the arrival of the First Fleet, the claiming of the land “terra nullius” and the impact on Indigenous peoples. They empathise with the various people involved in the situation to draw conclusions about the emotional impact upon them.

### Teaching Reference Document:

TRD 9 Terra Nullius – What was its effect on Aboriginal and Torres Strait Islander Peoples?

In contrast, Australia was treated by the British as ‘terra nullius’ which means ‘land belonging to no one’. It did not mean that the British treated Australia as uninhabited. The British knew that Aboriginal and Torres Strait Islander people lived there. But they regarded them as nomadic and not having ownership of particular plots of land. The consequence was that when Australia was ‘settled’ by the British, it was treated not only as giving the British sovereignty (i.e. the power to control it by law), but also full ownership rights to all land and waters. The British did not recognise Indigenous pre-existing sovereignty and ownership of the land. How could this be?

### Resources

- Image from tuning in – either preprint in large format or project onto a board.
- Empathy map ([4.2. Lesson 5a. Resource 1](#))

### Tuning In

- Display the following image on a large board while playing story depicting the arrival of the First Fleet from the perspective of an Indigenous person.



Captain Arthur Phillip at the raising of the British flag at Sydney Cove  
Source: [State Library of New South Wales](#)

- Link to story from Indigenous Perspective (to be played while above picture is displayed):  
<https://aso.gov.au/titles/documentaries/first-australians-episode-1/clip2/>

## Teacher Instruction

- Refer back to the previous lesson and draw attention again to the “Instructions for Governor Phillip”. Note specifically that:

The Commission and the Instructions provided both for the creation of a convict settlement largely run by the military, and a civilian community that was intended to grow over time and develop a British model of Government. Little consideration was given to the impact that any of this would have on the Aboriginal peoples to whom the land belonged.

The amount of land claimed in the Commission by the British was enormous – greater even than the area claimed by Cook. It went from the tip of Cape York to the bottom of Tasmania, and west to about half-way across Australia, in the middle of what is now South Australia and the Northern Territory.

- Model and complete a co-constructed empathy map from the perspective of Captain Arthur Phillip. (See guidance from Indigenous teachers under extension.)

## Group/Independent Learning

- Brainstorm how Aboriginal people may have felt when the British arrived, raised their flag and started occupying their land.
- Draw particular attention to the previous learning on the strong spiritual attachment that Aboriginal peoples have to their Country.
- Explain the empathy map activity:
  - o Set the scene by explaining that students will imagine what life was like for an Indigenous person.
  - o Let the students choose if they would like to imagine life for an Indigenous man, woman or child.
  - o Spend some time having students discuss how that person may live and the role that they play in their society and community.
  - o Complete empathy map.

## Wrapping it up

View: <https://www.youtube.com/watch?v=OiQ8YHDfySA>

- Discuss – Why students think that Aboriginal and Torres Strait Islander peoples have had to fight for legal recognition of their rights to their land and waters long after the arrival of the First Fleet.

Extended discussion questions:

- Why did the British consider that the land in Australia belonged to no one?
- Is it fair to judge the actions of the British colonists based on our current knowledge of Indigenous law, culture and land use? Why or why not? Should the British have tried harder to understand? Were there language barriers? Did people ignore the truth because it was inconvenient, or did they genuinely believe Indigenous groups were nomadic?

## Differentiation

### Support

Help students with some detail and sentence starters for the empathy map. Provide a word bank.

### Extension

As the empathy map is a high-level thinking activity extension students are naturally catered for in extracting a greater depth of information and emotion.

## **Note from Indigenous Teachers Regarding Empathy Map Activity Guidance:**

Empathy tasks such as ‘Walking in someone else’s shoes’ can raise risks in the classroom and teachers should only engage in such activities if they are confident of being able to support affected students. Students and their families may have been directly or indirectly affected by historical and intergenerational traumas, such as membership of the Stolen Generations. Engaging in these tasks can be confronting and (re)traumatising or overly simplified. Students not affected by such experiences may still find the learning activity confronting and traumatic. It may not be appropriate to expect all students to have the skills needed to empathise with the historical-cultural content.

## Assessment strategies

The empathy map activity can be assessed as a part of a portfolio of work.

### HASS Knowledge and Understanding

	A	B	C	D	E
<b>Knowledge and Understanding</b>	<b>thorough</b> description of the experiences of an individual or group in the past	<b>detailed</b> description of the experiences of an individual or group in the past	<b>description</b> of the experiences of an individual or group in the past	<b>partial description of the experiences of an individual or group in the past</b>	<b>fragmented description of the experiences of an individual or group in the past</b>

### HASS Skill – Communication

	A	B	C	D	E
<b>Skills – Communication</b>	<b>purposeful</b> presentation of ideas, findings and conclusions in a range of communication forms with <b>considered</b> use of <b>relevant</b> discipline-specific terms and appropriate conventions	<b>informed</b> presentation of ideas, findings and conclusions in a range of communication forms using <b>relevant</b> discipline-specific terms and appropriate conventions	<b>presentation</b> of ideas, findings and conclusions in a range of communication forms using discipline-specific terms and appropriate conventions	<b>partial</b> presentation of ideas, findings and conclusions in a range of communication forms using <b>aspects</b> of discipline-specific terms and appropriate conventions	<b>fragmented presentation of ideas, findings and conclusions in a range of communication forms using everyday language</b>



AUSTRALIAN  
CONSTITUTION  
CENTRE

## Empathy Map

### Empathy Map – Walking in someone else’s shoes.

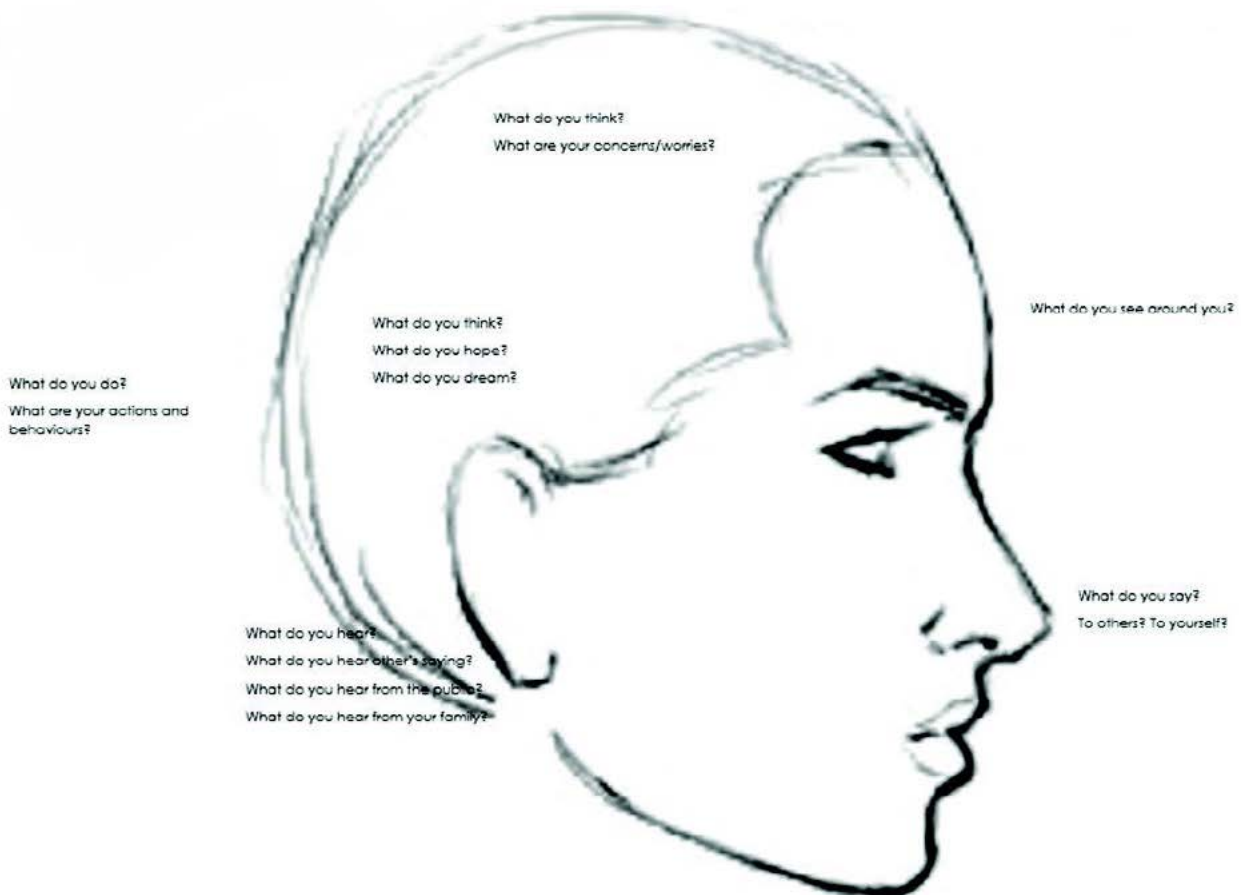
Your Name:

Your Person:

What is your role in this situation?

What decisions do you need to make?

**The situation:** It is 1788 and Captain Arthur Phillip has arrived with the First Fleet in Australia. He is holding a ceremony to raise the British flag and claim sovereignty over New South Wales. He claims that all the land is now owned by the British Crown and he does not recognise the rights of the local Aboriginal people to their lands and waters. You are an Aboriginal person watching the ceremony.





## Topic 4.2 Lesson Five (b)



AUSTRALIAN  
CONSTITUTION  
CENTRE

# Terra Nullius: How did British laws impact on Aboriginal people?

### Time/Lesson

- 1 hour

### Learning Goal

To identify some of the rules and laws in the past, both Indigenous pre 1788 and the British laws brought on the First Fleet. To understand why someone might break those laws, and the punishments that were enforced at that time. Students will learn that both the British and Indigenous peoples had their own systems of government and laws, and that the colonial government applied their laws to Indigenous peoples.

### Rationale

To understand the 'rule of law' and how it can be applied to ensure a fair and equitable society. How did the High Court in the *Mabo case* (1992) reverse the doctrine of terra nullius.

### Success Criteria

Students can identify that the principle of the 'rule of law' means that the law applies to everyone - but this was problematic when the one law being applied was the British law. Students recognise that the understanding of the law can change over time, as was seen by the *Mabo* case where the doctrine of terra nullius was overturned.

### Resources

- Smartboard with access to PowerPoint to guide discussions
- Whiteboard, Whiteboard markers
- Talking ball/talking stick
- Resource #1 for each student
- Teacher Reference materials

### Assumed Prior Learning

Students' understanding of general rules and laws observed by themselves, family members and people they know. Some prior knowledge about the First Fleet, conditions in England during the 1700s and colonisation may be assumed, due to HASS curriculum links.

### Teaching Reference Documents:

[TRD 9 Terra Nullius – What was its effect on Aboriginal and Torres Strait Islander Peoples?](#)

### Tuning In

#### Activate Prior Knowledge

- Teacher revisits previous lessons, by referring back to the display of 'thoughts' around rules and laws, and the 'big juicy questions' that students have posed about rules and laws.
- Teacher displays the question 'What impact did British laws have on Aboriginal peoples?'
- Teacher explains to the students that the students are going to look at an image drawn a long time ago, and are going to try to understand what the artist was trying to communicate to his audience.



### Teacher Instruction

- Teacher allows students an opportunity to look carefully at copies of the image, asking the students to think carefully about it, and try to work out what it is about. (Note: some of the images are confronting - support students.)
- Teacher then gives students a copy of (4.2. Lesson 5b. Teacher Resource 1), asking them to label what they think is happening at each level of the picture.
- Students share their ideas with their triad groups. Why were these laws explained by way of a picture rather than a written law? Think about differences in language and literacy at the time.

### Group/Independent Learning

- Class gathers together to discuss what this picture tells us about the British principle of the rule of law. Is it saying that people will be punished for injuring or murdering another person, regardless of the race of the criminal or the victim? In practice, do you think the law always applied to everyone equally, or was this an ideal that was not always met?
- Students work independently to answer the following questions (4.2. Lesson 5b. Teacher Resource 2):
  - o Even if the law applied equally to all, it was a British law that applied, not an Aboriginal law. What approaches could the British have taken to respecting the existing system of government and laws of the local Aboriginal peoples?
  - o What are some examples of when the different laws might have clashed?
  - o Could British and and Aboriginal laws have co-existed? Why/why not?

### Wrapping it up

- Teacher displays the image again. It says that it was a proclamation by Governor Davey, of Tasmania, in 1816, but we now believe it was authorised by Lieutenant-Governor Arthur in 1829. This was at a time of great conflict between Aboriginal people in Tasmania and the colonists. It is trying to encourage both sides to live together in harmony and promises them they will be treated equally by the law. About 100 of these paintings were made by convicts, after an outline had been pricked into the wood, and the boards were hung in towns and areas where Aboriginal people lived.
- Teacher asks the students: Do you think it worked?
  - o Do you think the law was applied equally to Aboriginal people and the colonists?
  - o Why was this message communicated by pictures? Is this a good way to explain laws?
- Students sit in a circle, and using a talking ball/stick, spend time explaining: 'I have learnt...'
- Look at the questions posed in the first lesson and ask students if they have managed to answer any of the questions during today's lesson.
- Add any new words to the Classroom Word Wall.

### Support

Students who have difficulty with writing could work with a teacher aide or peer to guide writing, or scribe for them.

### Assessment strategies

There are plenty of opportunities to draw upon HASS skills in this lesson, and this can be observed through a whole class checklist (4.2. Lesson 5b. Teacher Resource 1) or individual Assessment Rubric that is used throughout the entirety of the unit (4.2. Lesson 5b. Teacher Resource 2).

**Extension:** Consider the question posed in TRD 9: "The British did not recognise Inigenous pre-existing sovereignty and ownership of the land. How could this be?" Prepare a 3-5 minute speech to answer this and present to the class.



AUSTRALIAN  
CONSTITUTION  
CENTRE

# What impact did British laws have on Aboriginal peoples?



AUSTRALIAN  
CONSTITUTION  
CENTRE

What do you think this  
image is about?

What is each of the different  
levels of the picture trying  
to say?





AUSTRALIAN  
CONSTITUTION  
CENTRE



←

←

←

←



AUSTRALIAN  
CONSTITUTION  
CENTRE

# Rule of Law

The rule of law means that the law applies to everyone, including people in government. No one is so important that they can ignore the law. List the laws below that may have clashed between the two systems of government.

Indigenous Laws and Customs	British Laws and Customs





AUSTRALIAN  
CONSTITUTION  
CENTRE



This was an image issued by Lieutenant-Governor Arthur in Van Diemen's Land (Tasmania) around 1829 during the height of the conflict to explain that British law would apply equally to the colonists and Aboriginal people.





AUSTRALIAN  
CONSTITUTION  
CENTRE

What approaches could the British have taken to respect the Aboriginal system of government and their laws?

What are some examples of when the different laws clashed?

Could British and Indigenous laws have co-existed? Why/why not?





AUSTRALIAN  
CONSTITUTION  
CENTRE

# HASS Skills Observations

Name of Student	Interact with others with respect to shared points of view (ACHASSI080 - Scootle)	Record, sort and represent data and the location of places and their characteristics in different formats, including simple graphs, tables and maps, using discipline-appropriate conventions (ACHASSI075 - Scootle)	Interpret data and information displayed in different formats, to identify and describe distributions and simple patterns (ACHASSI078 - Scootle)	Draw simple conclusions based on analysis of information and data (ACHASSI079 - Scootle)	Present ideas, findings and conclusions in texts and modes that incorporate digital and non-digital representations and discipline-specific terms (ACHASSI082 - Scootle)





# HASS Skills Rubric

		A	B	C	D	E
Questioning	Pose questions to investigate people, events, places and issues (ACHASSI073 - Scootle)					
Researching	Locate and collect information and data from different sources, including observations (ACHASSI074 - Scootle) Record, sort and represent data and the location of places and their characteristics in different formats, including simple graphs, tables and maps, using discipline-appropriate conventions (ACHASSI075 - Scootle) Sequence information about people's lives and events (ACHASSI076 - Scootle)					
Analyzing	Examine information to identify different points of view and distinguish facts from opinions (ACHASSI077 - Scootle) Interpret data and information displayed in different formats, to identify and describe distributions and simple patterns (ACHASSI078 - Scootle)					
Evaluating and Reflecting	Draw simple conclusions based on analysis of information and data (ACHASSI079 - Scootle) Interact with others with respect to shared points of view (ACHASSI080 - Scootle) Reflect on learning to propose actions in response to an issue or challenge and consider possible effects of proposed actions (ACHASSI081 - Scootle)					
Communicating	Present ideas, findings and conclusions in texts and modes that incorporate digital and non-digital representations and discipline-specific terms (ACHASSI082 - Scootle)					