

AUSTRALIA 1788:

HOW 'CONVICT' WAS IT AND HOW 'FREE'?

Investigating the beginnings of the Rule of Law in Australia

*A classroom unit for Year 9 Australian History and
Year 8 Civics and Citizenship*

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TEACHER GUIDE

Australia 1788: How 'convict was it' — and how 'free'?

has been developed for the Australian Curriculum for

History at Year 9	Civics and Citizenship at Year 8
<i>Making a Nation:</i> - Key people, events and ideas in the development of Australian self-government and democracy	<i>Laws and citizens:</i> - How laws are made in Australia through parliaments (statutory law) and through the courts (common law) and - The types of law in Australia, including criminal law and civil law, and the place of Aboriginal and Torres Strait Islander customary law



It is a way of exploring the way the British system of law, part of Australia's British and Western Civilisation heritage, was established in Australia. In doing so, decisions had to be made about the place and role of existing Indigenous laws within the new system, and the place of all people — Indigenous, convict, official and settler — within the new system.

The resource involves five distinct investigations that together help students understand how the Rule of Law was applied to Australia, and its impacts. The investigations are:

Investigation 1

How did Britain claim ownership of Australia?

Investigation 2

What is a gaol? A decision-maker exercise

Investigation 3

What does the First Fleet tell us about Australia as a gaol or a free society?

Investigation 4

What does a court case tell us about Australia as a gaol or a free society?

Investigation 5

Were the Indigenous people and their law recognised as part of the new society?

IN THE CLASSROOM

The resource can be used in full, or in parts.

It can be used by individual students, or small groups.

It can be used as a whole class activity, or as an enrichment or home activity one.

The whole activity should take about 80 minutes to complete all elements, depending on the nature of the class, and the emphasis and timing decided on by the teacher.



THE LANDING of the CONVICTS at BOTANY BAY

Investigation 1

How did Britain claim ownership of Australia?

This investigation allows students to work through key information about the legal basis of British sovereignty over Australia. Students see the international law that was applied at the time, and realise that while people knew Australia was inhabited, they believed that the Indigenous people did not occupy and work the land in a way that was seen as establishing Indigenous sovereignty. Students will be aware of the modern term 'terra nullius' that is usually claimed to be the legal doctrine that was applied to justify the British claim to sovereignty. They will realise that this is a modern term for the actual legal principle that was applied, that of claim by possession.

Investigation 2

What is a gaol? A decision-maker exercise

Students now start thinking about the characteristics that make for a gaol, and those that apply in a free society. Students will know that Australia was established as a British gaol, but will soon see that right from the start there were other elements that created some of the characteristics of a free society as well.

Investigation 3

What does the First Fleet tell us about Australia as a gaol or a free society?

Students now use the information on the First Fleet as evidence of whether Australia was a gaol or a free society. As they gather information they apply it back to the criteria they have previously worked on. They will see that Australia was never just a gaol, but that elements of a free society were carried with the cultural baggage brought with the First Fleet.

Teachers could break up this section to distribute parts of the information to different individuals or small groups, to read and report on to the whole class. This will reduce the amount of reading required for the whole class to be able to progress relatively quickly and efficiently.

Investigation 4

What does a court case tell us about Australia as a gaol or a free society?

The fact that the British Rule of Law, and the jury system, were introduced on the landing of the First Fleet is established by this short film. The film looks at the case of Henry and Susannah Kable, convicts who were still able to sue the powerful, their ship's captain, for recovery of damages for their stolen possessions.

IN THE CLASSROOM



Investigation 5

Were the Indigenous people and their law recognised as part of the new society?

The First Fleet established a new society in the place where an old one existed. Students investigate whether the new Rule of law applied to the Indigenous people. They discover that the situation was complex and not clear-cut, and that while attempts were made to include Indigenous people within the Rule of Law, these attempts often failed for a variety of reasons.

Students will realise that the result was one in which there was both co-operation and harmony, as well as conflict and disorder.



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INTRODUCTION

In January 1788 a fleet of 11 ships landed at Botany Bay, and on the 26th moved to the site that is now Sydney. The crews unloaded the ships, and the people began to create a new settlement.

But what sort of settlement? We know that most of the people who landed were convicts. So, it was set up as a prison. Right?

Well, maybe. Or maybe you will discover something different about New South Wales in 1788, something that will surprise you.

! Look at the following investigations to explore this question.



THE LANDING of the CONVICTS at BOTANY BAY

INVESTIGATION 1

How did the British legally claim Australia?

After James Cook's mapping in 1770 of the east coast of Australia (which he called New South Wales), the British Government claimed ownership of all the land from the east coast, across almost half the continent westwards to meridian 135° east. Then, in 1831 the claim was extended further west to include the whole continent.



1. Mark this on the map of Australia.

The land claimed by the British Government was known as 'Crown Land' and meant that the British Government could sell it, or give it away, or rent it out to people. It also meant that the Government did not recognise that it was owned by Aboriginal people.



INVESTIGATION 1

How did the British legally claim Australia?

How was sovereignty claimed?

What was the legal basis of the claim to ownership or sovereignty over Australia by the British?

In the eighteenth century there were three ways that Europeans could acquire sovereignty (legally accepted rule) of another country:

1. By **conquest** of the existing people.
2. By **cession** — where the existing people give control to the newcomer.
3. By **occupation** — where the territory was not under the control of a sovereign power, a recognisable government.

This can be clearly seen in the instructions given in 1641 to the Dutch explorer Abel Tasman on what to do with the discovery of new lands — as he did with Tasmania.

2. Look at these instructions and decide if each is an example of conquest, cession or occupation.

Abel Tasman	This is an example of claim by
With a friendly sovereign power, make a treaty	
With an unfriendly sovereign power, declare them an enemy	
In lands manifesting no sovereign power or visible government, whether uninhabited or not uninhabited, claim the land for the Dutch State.	

Australia was claimed by the British in 1770 and again in 1788 according to the last of the three: by occupation, or possession. We know now that Aboriginal people occupied, owned, used and manipulated the land, and that they had government and laws. So how could the British have decided that the land was free to be claimed like this, without a treaty, or without invasion and war?

To understand this we need to look at the attitudes and values of the day, and how these attitudes and values were included in the law as legal and proper behaviour in international relations.

3. Here is some evidence of attitudes, and the law at the time. Use it to answer the question: *Why was Australia claimed as a land without any treaty being made?*

SOURCE A - John Locke, an influential philosopher in the 18th century:

'As much land as a man tills [ploughs], plants, improves, cultivates, and can use the product of, so much is his property. He by his labour does, as it were, inclose it from the Common [that which is owned by nobody].' He added that if a man improves common land 'for the benefit of life', it becomes his legal property.

4. What did people have to do to become owners of common or unclaimed land?

INVESTIGATION 1

How did the British legally claim Australia?

5. If Australia was unclaimed or apparently unowned land, how would this idea justify the British claiming it as theirs?

SOURCE B - 18th Century Swiss lawyer Emerich de Vattel on international law:

'Nations, incapable by the smallness of their numbers to people the whole [of an area], cannot exclusively appropriate to themselves more land than they have occasion for, and which they are unable to settle and cultivate. Their removing their habitations [being nomadic and shifting where they live] through these immense regions, cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they make no actual and constant use, may lawfully possess it, and establish colonies there.'

6. What does he say is a legal reason for claiming unused or unoccupied land?
7. Would this apply to land that was already clearly and permanently settled and occupied?

SOURCE C - Observation of Captain James Cook on the state of Australia, 1770:

'We see this country in the pure state of nature, the industry of man has had nothing to do with any part of it.'

8. What is Cook saying is the state of the settlement of Australia?
9. How does this fit the legal ideas about claiming land set out in sources A and B above?

These ideas were what influenced the creation of the accepted laws at the time, and as can be seen in the instructions given to Governor Phillip by the British Government for the settlement at New South Wales.

The Government clearly knew there were people in Australia, and made it clear that they were to be protected by British law — so why did the Government not realise that they were the original owners, and try to make a treaty with them?

Here are key facts and beliefs that help explain this:

1. There was no obvious indigenous government to make any treaty with.
2. There was no obvious indigenous farming or organised use of the land.
3. The land seemed to be 'common' land occupied by wandering tribes.

10. How would these beliefs influence the way the British claimed sovereignty over Australia?
11. How would the Indigenous people at the time have felt about this?

'Terra nullius'

We now know that none of these was true and accurate, but it was what appeared to be the case at the time. In 1889, the Privy Council in Britain, then the highest court of appeal about Australian law, made the ruling that from the outset the law of Britain was New South Wales law, because the colony 'consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions'. In modern times this has become known as the law of '*terra nullius*'. This Latin phrase translates as 'nobody's land'. The phrase was never used in connection to the colonisation of Australia until the later twentieth century, though it does describe the idea that was in existence at the time of colonisation. In legal terms, *terra nullius* means 'land over which no previous sovereignty has been exercised' or 'land of no sovereign power'.

INVESTIGATION 1

How did the British legally claim Australia?

12. How could Australia have been claimed as terra nullius?
13. Why might it have been considered accurate then, but not now?
14. Is it right that Australia was claimed under a European law that the Indigenous people of Australia knew nothing about?

Treaty?

There is currently much discussion about the possibility of the Australian Government making a treaty or treaties with Indigenous Australians.

A 'treaty' is an agreement between two sovereign powers (or governing bodies). These would be the Australian Government today, and either a body representing all Indigenous Australians, or possibly a series of bodies representing separate Indigenous 'nations' within Australia.

We can understand how the British claimed sovereignty of Australia, but why was there no treaty signed, if not immediately, then later during the occupation?

In New Zealand and North America indigenous groups were large enough to cause the British and later the American governments to be involved in major wars, leading to peace treaties. This did not happen in Australia. Many Indigenous groups in Australia resisted invasion and fought against the invaders, and often slowed the colonisation of more remote areas for many years. There were some occasions when martial law was declared, meaning that ordinary law was suspended and the military could shoot Indigenous people to stop harassment of the settlers, but these were always limited in scale and time. This resistance could be considered a type of war, but it but never on a scale to cause the British to bring in an army to fight them, and never for long enough, or with sufficient casualties, for the British to have to make a treaty to stop the fighting.

In effect, Britain did not make a treaty with the Indigenous people because it did not believe it had to, and was not forced to.

15. Follow any news items about moves for a treaty with Indigenous Australians. Prepare a table that sets out both the arguments in support of, and the arguments against, making a treaty or treaties. Then work out your own opinion based on this informed process.

So, Britain had claimed sovereignty of Australia under accepted international law.

What would happen when they sent people there — would they create a gaol, or a free society?

! Look at Investigation 2 to start exploring this question.

INVESTIGATION 2

What is a gaol? A decision-maker exercise

This unit is investigating whether New South Wales, while settled as a gaol, was in any way also a free society.

To decide if the settlement was a gaol or a free society we need to know what the criteria or characteristics are for each.

Here is a table with a set of aspects of a society. Beside each, mark whether you think this characteristic is likely to be seen in a **gaol**, or in a **free** society. Tick the appropriate box, B or C. At this stage leave columns D and E empty — we will look at New South Wales in 1788 and see what was actually happening there later.

A	B	C	D	E
Characteristics of a society	Gaol	Free	1788	Comments
Movement of people is controlled and restricted				
People are locked up at night				
People can sue others to enforce their rights				
There are trials for people accused of a crime				
People can work in paid jobs				
People must work for the government				
People can grow food				
People can own land				
People are controlled by guards				
People can leave the place and go away				
People wear compulsory uniforms				
People can change jobs freely				
There is trade with other places				
People can make and sell things				
There is trial by jury to protect the rights of people				
Are there any other criteria? Add them if you think of them				

! Now look at the next investigations to see what the settlement of New South Wales was like in 1788.



INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

So, you now know what you expect a gaol to look like, and how it will be run.

You are about to read about the First Fleet. This information will help you answer the main question — was the settlement a gaol, or a free society, or maybe a bit of both?

To do this you need to:

- Read each section of text (A-H). You might read it all, or divide each page up between groups who will report back on what they have read.
- Decide how each section tells you about the way the new settlement was being set up, and whether it seems to be set up as a gaol or a free society.
- As you discover information that helps you understand what the new settlement was like, look back at your table, and complete columns D and E — what you have discovered about that criterion for 1788, and your notes on this finding.



You might decide to read all the information yourself, or you might have a number of people or small groups reading particular sections, and reporting back to the whole class. If you do this, answer the questions for each section based on what the 'expert' has told you about it.



Conclusion:

When you have answered the questions about each section you will be able to answer the original question with good evidence to support your answer.

From the evidence you have looked at so far, what do you now think — was the settlement at New South Wales in 1788 a gaol? Or was it a free settlement? Or was it partly both?

When you have finished, go to the next Investigation to help you resolve this issue.

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

PART A



Was New South Wales a gaol or a free society? Reasons for settlement of New South Wales

Britain needed a gaol

On 19 August 1786, the British government decided to send a fleet of convicts with military guards and officials to New South Wales.

This was to ease overcrowding in gaols and hulks (old ships that were moored in rivers and used as prisons) in Britain.

Britain had previously sent convicts to its colonies in America, but after the American Revolution of 1776 it could no longer send them there.

So Britain wanted a new place to send the convicts. The government chose Botany Bay in New South Wales. It had a good harbour and a healthy climate; the reports of the explorers James Cook and Joseph Banks from their time when they mapped the east coast of Australia in 1770 suggested that there were not many existing inhabitants; and the location had already been claimed for Britain by Cook in 1770.

1. Why was New South Wales suitable as a gaol?

Other possible reasons for settling New South Wales

But there might have been other reasons at work also.

Britain was engaged in a naval war with the French, Dutch and Spanish. The Dutch and Spanish, as well as the Portuguese, had established many ports in Asia to load their cargoes of spices for Europe, and these were places where Britain's enemies could also re-supply and repair their warships. Britain did not have such an advantage: it only controlled Hong Kong as a port.

2. For what other reason might New South Wales have been seen as a place to settle?
3. Would this need to be a free settlement or a gaol?



INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

Other possible reasons for settling New South Wales

Britain also feared that its colony of India might be attacked from the sea, and it could not provide and keep a fleet in good repair to protect it. Britain therefore needed its own naval base in that part of the world.

New South Wales was reasonably close to India, the East Indies (now Indonesia), and the South American coast, as well as to the Pacific Islands. Some of these islands seemed to promise a good supply of timber for masts, and flax for sails – materials essential for running a fleet. Timber in particular was important – one British warship alone required 3000 mature trees to build it. Ship builders needed tall, straight tree trunks for masts, and the tall, straight Norfolk Island pines that grew in New Zealand and on Norfolk Island might be perfect for masts.

4. For what other reason might New South Wales have been seen as a place to settle?

5. Would this need to be a free settlement or a gaol?

6. Which criteria for a gaol or free colony does this provide information about?

Tick the box in Column D, and briefly summarise the main information in Column E.

7. Do the reasons for the settlement of New South Wales suggest that it was to be a gaol — a dumping place for unwanted prisoners — or a useful and free society?

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

PART B



Was New South Wales a gaol or a free society? Who were the convicts?

Conditions in Britain

Britain by 1788 was at the start of the Industrial Revolution. Many rural labourers were being replaced by machines and people were crowding into cities for work. There were no social services for the orphaned, the poor, the unemployed or the disabled, so people had to find other ways to survive. Many turned to crime as a way of surviving, or improving their income.

Crimes of the First Fleet convicts

The first group of convicts to be sent to New South Wales were selected from prisoners who had been sentenced to transportation — for 7 or 14 years, or life. Most had been convicted for theft of goods, and a minority for violent crimes such as highway robbery. Most seem to be frequent thieves who found crime made their lives easier.

Who were they?

Official records differ but there were approximately 568 males and 191 females. Their ages ranged from 13 up to 62 years for the oldest man, and possibly 82 years for the oldest woman. Most were aged between 20 and 39 and were English, but there were also some Irish, Welsh, and Scottish people.

Some of the convicts bound for Botany Bay were at least halfway through their sentence.

1. Does this seem to show that New South Wales was settled as a gaol or as a free society?

What were their skills?

It seemed also that the reason for their selection was not based on any criteria, such as their age, strength or health; rather they were randomly gathered for the voyage. At least 163 male and 67 female convicts had useful skills — as carpenters, brick-makers, weavers, farmers or gardeners — but most seem to have been unskilled labourers.

2. Does this seem to show that New South Wales was settled as a gaol or as a free society?

Not all were criminals

There were also 25 convicts' wives and a few children who were permitted to go, plus a few children who were born on the way.

3. Which criteria for a gaol or free colony does this provide information about? Tick the box in Column D, and briefly summarise the main information in Column E.
4. Do the characteristics of the convicts sent to New South Wales suggest that it was to be a gaol — a dumping place for unwanted prisoners — or a useful and free society?

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

PART C



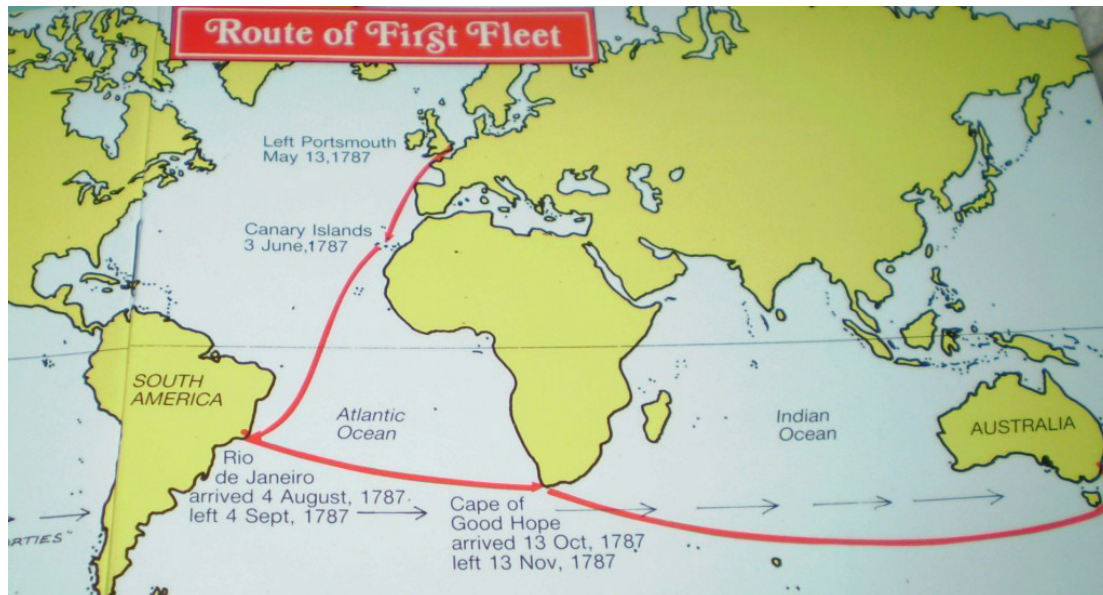
Was New South Wales a gaol or a free society? The voyage

A challenge

The task now was to work out how to send more than 1000 people in eleven ships 19,000 kilometres across the world on an eight- to nine-month voyage through almost uncharted waters to a place where nobody had settled before. The First Fleet was an extraordinary undertaking for a fleet of transport ships. None of the sailors, crew, officials or marines had ever been to Botany Bay. Although the crew and officials expected to be able to return, the convicts knew that they probably never would. They were sailing into exile. It was a challenging mission!

The route

The fleet left England on 13 May 1787 and stopped at Teneriffe (in the Canary Islands off the west coast of Africa), Rio de Janeiro in Brazil, and Cape Town in South Africa for supplies. The journey from Cape Town to Botany Bay was one into the unknown — the route had only been sailed three times before, by Abel Tasman in 1642, then Tobias Furneaux as part of Cook's second expedition in 1773, and James Cook himself during his third voyage in 1777.



Supplies and conditions

The boats left Cape Town packed with pigs, goats, poultry, horses, oxen, bulls, sheep, plants, fresh water and food for the animals. Phillip's own small cabin was full of plants. The fleet ran into fogs, fierce gales and deep swells as they sailed close to the Antarctic Circle. Disease and the freezing cold temperatures killed many of the animals and plants. Several people fell overboard in the high seas and fierce winds. In these conditions there was little hope of saving anyone, though incredibly some were rescued.

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

Dangers

Apart from the threat of extreme weather, on-board conditions also held elements of danger. The convict ships had to be specially fitted out to provide the crew with security against any potential attempts at mutiny. Special barriers were built to keep the convicts separate from the crew on the decks.

Conditions

The most unhygienic part of the ship was below deck, where the convicts slept in hammocks crammed together. There was no porthole, and no candles at night (for fear of fire), so the convicts would spend half their day in darkness, in heat or cold depending on the weather, in filthy conditions and with no privacy. Rats, cockroaches and lice thrived in this unsanitary environment.

Casualties

The First Fleet sailed south of Van Diemen's Land and then north for the final approach to Botany Bay. The journey had lasted eight months and one week. Forty-eight people had died – about 3 per cent of the total who had embarked, compared with an average of 10–15 per cent for the much shorter and easier Atlantic crossings of convict ships between Britain and the American colonies.

1. Which criteria for a gaol or free colony does this provide information about? Tick the box in Column D, and briefly summarise the main information in Column E.
2. Does the planning and preparations for the voyage to New South Wales suggest that it was to be a gaol — a dumping place for unwanted prisoners — or a useful and free society?

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

PART D



Was New South Wales a gaol or a free society? Arrival

Arriving at Botany Bay

The ships of the fleet arrived at Botany Bay separately over two days, and were disappointed that the Botany Bay of a hot and dry summer January of 1788 was not the pleasant and fertile land that Cook and Banks had described in May 1770.

Choosing Sydney Cove

Phillip investigated the area and found an entry to a harbour that Cook had named Port Jackson but not entered. Phillip sailed in and chose a place that was better-suited for a new settlement. Philip named it Sydney Cove, after British government minister, Thomas Townshend, Lord Sydney, who was in charge of organising the whole venture.

Governor Phillip chose Sydney Cove because it offered a sloping ground that would not be flooded, a source of fresh water in the form of the Tank Stream, and a deep water anchorage, so that ships could come in close to shore to be easily unloaded.

Landing and creating the settlement

On 26 January 1788, Captain Arthur Phillip and an official party from the First Fleet sailed into Port Jackson on HMS *Supply* and stepped ashore at Sydney Cove. A few convicts and marines had already prepared a flagpole with the British flag flying from it. A marine guard fired a volley from their weapons and Phillip and the other officials toasted the British king, George III, and his royal family. Some of the Eora, the Indigenous people of New South Wales, looked on, hidden, and not realising that this moment started the dispossession of this part of their domain and the devastation of their culture.

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?



1. Which criteria for a gaol or free colony does this provide information about? Tick the box in Column D, and briefly summarise the main information in Column E.
2. Does the arrival at the settlement of New South Wales suggest that it was to be a gaol — a dumping place for unwanted prisoners — or a useful and free society?

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

PART E



Was New South Wales a gaol or a free society? Creating the new settlement

The new settlers

There were about 1000 people in the new society, including the governor, a chaplain, a surveyor, a judge, several naval surgeons, 16 officers, 192 soldiers, 548 male convicts, 188 female convicts, 42 wives and 37 children of soldiers or convicts.

Creating the settlement

In the two weeks after the first landing, the convict transports and the supply ships were unloaded, transforming the area into a noisy, busy worksite. The convicts chopped down trees, cleared ground, split logs, dragged stores and supplies ashore, built rough fences, and set up canvas tents or made rough bark shelters. Convict parties were set to work constructing the first permanent buildings — two solid wooden rooms to protect the stores, then a barracks for the marines, followed by a brick house for the Governor, which was completed in June 1789. Officials, officers and convicts had to find ways to build their own houses from the bricks made in kilns from local clay. While Phillip had set aside land around Sydney Cove for different groups and purposes, most of those areas grew as a rough and largely unplanned jumble during the first few years. The shape of parts of Sydney today, especially the Rocks area where the convicts were established, still shows evidence of that unplanned development.

Food

The First Fleet brought two years' supply of dried food such as grain, flour and salt meat. This was rationed out to the new colonists, both convicts and officials, who had to find their own way of cooking their meals. Phillip realised, when allocating sections of land, that one of the most important tasks was to clear an area to grow food to keep the settlement going. The governor's instructions from Britain were clear: convicts were to be put to work on large public farms to cultivate food for the common good, which would replace the rations that would run out after two years.

Freed convicts

The orders also authorised him to grant farming land to convicts when their term of transportation had ended, including additional land for their wife and children, together with tools, seeds, grain and rations for two years. Phillip wanted to create a self-sufficient agricultural society like the one he had lived in back in England.

1. Which criteria for a gaol or free colony does this provide information about? Tick the box in Column D, and briefly summarise the main information in Column E.
2. Does the creation of the settlement of New South Wales suggest that it was to be a gaol — a dumping place for unwanted prisoners — or a useful and free society?

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

PART F



Was New South Wales a gaol or a free society? Adapting and surviving

The environment

But there were major problems with this plan: most of the convicts did not want to work clearing the land; the local soil was not suitable for growing vegetables on a large scale; summer, the season in which they had arrived, was not the best time for planting; and, though they did not know it, the First Fleet had landed during an El Niño drought. As time went on, it was apparent that the settlers had not anticipated the harsh conditions the new environment presented. The ship bringing supplies was wrecked, but more shiploads of prisoners kept arriving.

Exploring

Governor Phillip encouraged explorers to investigate the surrounding land. By June 1789 large public farms had been established in rich soil alongside rivers, and private land grants were given to some convicts to start small farms.

Growing food

The new farmers began to adapt to the new conditions. They learned how to prepare the soil for crops, and discovered which local plants would help cure the scurvy – a disease caused by vitamin-C deficiency – that afflicted the settlers when they landed.

No gaolers

Although the new settlement was being farmed by convicts, there were no gaolers watching over them. The marines refused to keep watch over the convicts, as they claimed that their job was to protect the settlement from attack or rebellion, not to force people to work. So Phillip used convict overseers to supervise the government work parties clearing the land. Convicts who were not working on government jobs or on the communal farm could do what they wanted. Many hired themselves out to build houses for the officers and officials.

Female convicts

The female convicts were also not obligated to work. On the voyage to Australia, some women formed relationships with crew members or guards, and as a result gained protection and favourable treatment. After the fleet landed at Sydney Cove, some of these relationships were made official through marriage, and many women were employed by the officials and officers as cooks and domestic helpers.

INVESTIGATION 3

What does the First Fleet tell us about Australia as a gaol or a free society?

NSW society

Governor Phillip returned to Britain in 1792. The new settlement he had helped create in New South Wales was a society with distinct social groups: the government officials, the marine officers, the marines and their families, the convicts, the free wives and children of the convicts, and the local Eora people. It had survived the early threat of starvation, and had grown in size and number as more convict fleets arrived, and people spread to the rich soils of the Hawkesbury and the Nepean Rivers. But it was not a thriving society. The international situation that had helped create the settlement had changed.

International changes

From 1789 Britain was at war with France, and this pushed the New South Wales settlement well down the list of British government priorities. In India, the British East India Company – the body that controlled trade between India and Britain – had its trade monopoly renewed, so there was no longer any chance for trade between India and New South Wales to grow. The vital naval supplies that were supposedly on Norfolk Island had been found not to exist.

The future

New South Wales would have to look after itself and not draw money from the British government, and earn its keep as an effective gaol. The next three governors would try to achieve this.

1. Which criteria for a gaol or free colony does this provide information about? Tick the box in Column D, and briefly summarise the main information in Column E.
2. Does the development of the settlement of New South Wales suggest that it was to be a gaol — a dumping place for unwanted prisoners — or a useful and free society?

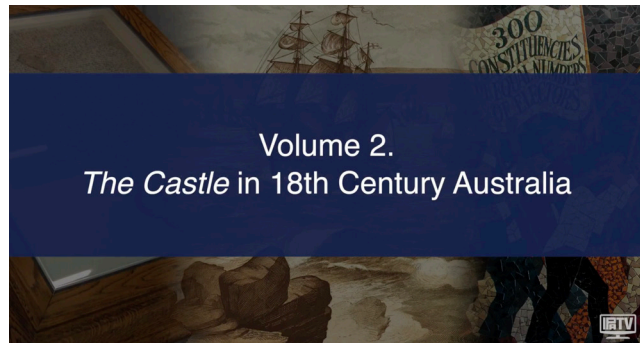
INVESTIGATION 4

What does a court case tell us about Australia as a gaol or a free society?

You are about to learn about an important court case in early Australian history.

It is an important piece of evidence that will help you decide if the settlement of new South Wales in 1788 was a gaol or a free society.

! Watch the film 'The Castle' in 18th Century Australia at www.ipa.org.au/heritage-of-our-freedoms and answer the questions below.



1. The film is about the 'Rule of Law'. What does the presenter, Dr Bella d'Abrera, explain is meant by the Rule of Law?
2. Why is it an important idea for a nation?
3. When was the idea of a Rule of Law established in England.
(Note that you can learn more about Magna Carta in another of the episodes in this series at www.ipa.org.au/heritage-of-our-freedoms).
4. Why is the Rule of Law important for protecting an individual's rights?
5. The Rule of Law is a right — does it also impose any obligations on a person? Explain your answer.
6. The presenter refers to the Letters Patent of the British King George III. These are also called the First Charter of Justice. What was this document? How and when did it come to Australia?
7. Why was it an important document?
8. The presenter explains that local civil and criminal courts were important. Why?
9. How did the Rule of Law apply to convicts in Australia?
10. The presenter stresses that Governor Arthur Phillip would not allow slavery in Australia. What is slavery? Why was it important that slavery was not to be allowed in Australia? Who would benefit from this?
11. The case that established that the Rule of Law had been successfully brought from England was the case of Henry and Susannah Kable (or Cable). Who were they?
12. Why were they convicts?
13. How were they able to come to New South Wales together in the First Fleet?
14. What happened to their parcel?
15. Captain Duncan Sinclair was held responsible for the theft. Why?
16. Why was it so significant that they were able to sue the Captain?
17. What was the result?
18. How did this decision establish the Rule of Law in Australia?

INVESTIGATION 4

What does a court case tell us about Australia as a gaol or a free society?

19. Why is this Rule of Law still so important in our society today?

20. Why is the film called 'The Castle'? What modern film is it referring to?

21. Which criteria for a gaol or free colony does this provide information about? Tick the box in Column D, and briefly summarise the main information in Column E.



Conclusion:

What do you now think, based on the evidence — was the settlement at New South Wales in 1788 a gaol? Or was it a free settlement? Or was it partly both? Be able to justify your answer.

Look again at this image of the people who made up New South Wales society in the early 1800s.



22. Identify as many of the different people as possible — for example, the character on the far left seems to be a wealthy person, or possibly a government official. See how many others you can identify or categorise.

23. Who is missing from this image?

Here is an image by an artist showing an early jury trial in New South Wales.



INVESTIGATION 4

What does a court case tell us about Australia as a gaol or a free society?

24. Why was trial by jury such an important part of the Rule of Law that was inherited by Australia from Britain?

A historical note:

In 1788, on the 200th anniversary of their wedding, 500 of Henry and Susannah Kable's descendants met in Sydney to celebrate the event. For more information about the Kables go to <http://adb.anu.edu.au/biography/kable-henry-2285> and https://en.wikipedia.org/wiki/Henry_Kable

So far we have looked at the settlement of New South Wales and the creation of the Rule of Law from a British point of view.

What about the impact of settlement on the original inhabitants: did the establishment of the Rule of Law in the new society also apply to them?

! Look at the next Investigation to decide.

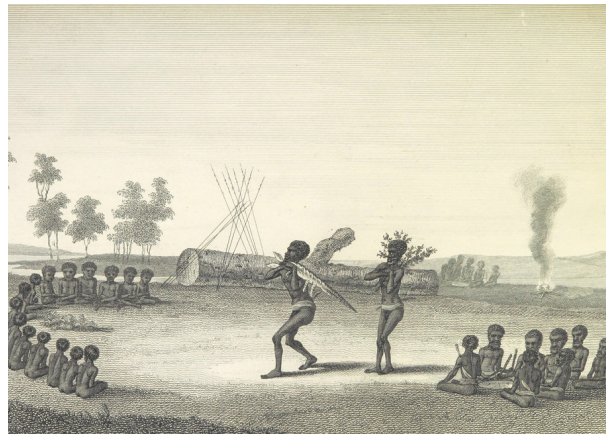
INVESTIGATION 5

Were the Indigenous people and their law recognised as part of the new society?

When the First Fleet arrived the Indigenous people had an established system of law, based on thousands of years of development.

Would this law continue to apply? Would it apply to the new settlers? Would the new law and the Rule of Law brought by the settlers also apply to the Indigenous people?

1. Look at the following information about the law governing Aboriginal people before the arrival of the First Fleet in 1788. As you discover the meaning of each of the words in the table below, add your definition or explanation of them.



Ancestral beings	
The Dreaming	
Songlines	
The Law	
Reciprocity	
Social organisation	

Aboriginal Law

The lives of Aboriginal people depended on their understanding and interaction with all aspects of the natural world, such as animal behaviour, plant growth, soil and water conditions, weather patterns, and the movement of the stars in the sky. They understood the connectedness of these things.

Behind all nature were **Ancestral Beings**, creators who were tied to special places. Oral stories, art and ceremonies were used to pass on knowledge of what today is called '**the Dreaming**'. These are sacred stories explaining aspects of the creation, and were often part of 'songlines'.

Songlines are a long sequence of short verses that form a song map of an Ancestral Being's journey in creating natural features of the environment. Elders would take children to points in the songline and tell stories and sing the verses, thus helping children create a mental map of their Country. Stories could also be secular, providing explanations for natural phenomena such as how a bird got its colours or how the echidna got its quills. These stories usually had a moral lesson to teach children how to behave.

The Law was laid down in the Dreaming and all behaviour was governed by the Law. The Law existed to define the right behaviour in every aspect of life and to make clear each person's responsibilities and duties. Breaches of law could be

INVESTIGATION 5

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treated harshly. For any breaking of the law, someone had to be guilty — even if the law breaker had escaped, someone from his family had to be punished.

Their **society** was built around family, clans and language groups. The kinship system structured people's relationships, obligations and behaviour towards each other, and this in turn defined such matters as who would look after children if a parent died, who could marry whom and who would care for the sick. Both sexes had their secret and sacred ceremonies, and both had some rights, duties and obligations that only they were allowed to exercise.

The **principle of reciprocity** or mutual exchange was central to most aspects of community life. Gifts were given at events such as initiation or marriage, and people shared food or other valued goods with those from whom they had received benefits in the past.

Reciprocity and obligation extended to caring for the land. The land gave life and in return people were obliged to care for it. This included burning an area at the right time and in the appropriate way to reduce fuel that could otherwise lead to an uncontrollable and destructive fire. In managing and manipulating the land, Aboriginal people were helping make sure it would continue to meet their needs.

As in all societies, there were undoubtedly outstandingly talented individuals - great explorers, artists, storytellers, engineers, healers, actors, dancers, hunters, diplomats, comedians and spiritualists - among Indigenous peoples. There was also a belief in magic and spirits. There were spells for love, for harming enemies or rivals, as well as for good and bad luck. As there was no system of writing to record individual deeds, such people remain largely unknown to us today. But it was a society in which every person knew their role and their responsibilities, and in which individualism always gave way to the interests of the group.

2. Do you think the new settlers would understand this system of law and society? Explain your reasons.
3. Do you think the settlers would prefer their own system, and ignore or overrule that of the Aboriginal inhabitants? Explain your reasons.
4. Try to imagine the meeting of the new settlers with the Aboriginal inhabitants. What problems would you expect might occur?
5. How do you think the new government would try to avoid or solve these problems?

There are no Aboriginal records of how the local Aboriginal people reacted to the invasion of 1788. Prior to British settlement, the local Aboriginal people only had experience of themselves and their neighbouring groups to create their understanding of the world. The sudden intrusion of a totally different people must have been puzzling and almost certainly threatening. They now had to fit these new elements into their world view.

! Look at the following evidence and information to decide what happened when the two systems of law and society met. Was the Rule of Law applied to the Aboriginal people of the early settlement?

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PART A



British Government instructions to Governor Phillip 1788:

'You are to endeavour [try] by every possible means to open an Intercourse [connection] with the Natives and to conciliate their affections [behave peacefully with them], enjoining [ordering] all Our Subjects to live in amity [friendship] and kindness with them. And if any of Our Subjects shall wantonly destroy them, or give them any unnecessary Interruption in the exercise of their several occupations. It is our Will and Pleasure that you do cause such offenders to be brought to punishment according to the degree of the Offence.'

6. What was Phillip to do?
 7. What would happen if a convict or official did harm to an Aboriginal person?
 8. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.
-

PART B



The early interaction

The interaction between the invaders and local people was complex and varied. From the evidence of the British invaders, it appears that the local people initially ignored and avoided the new settlement as much as possible.

9. How would this have helped maintain peace between the groups?
 10. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.
-

PART C



Applying the law

Governments periodically made efforts to educate Aboriginal people, to assimilate them into the new society, and finally to segregate and protect them where possible. But as the new settlers spread out beyond the government settlements, there were few officials to impose the law fairly.

11. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.

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Were the Indigenous people and their law recognised as part of the new society?

PART D



A poster



12. Look at this image showing a poster or panel that was created in about 1820 to explain the legal situation to the Aboriginal people. Describe what is being shown in each line of the panel.
13. What is the overall message of the panel?
14. Is this consistent with or opposite to what Governor Phillip was ordered to behave towards Aboriginal people? Explain your reasons.
15. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.

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PART E **Bennelong**

In November 1789 Governor Phillip ordered a party to capture an Eora man, so that Phillip could learn about Aboriginal language and customs. The party captured a man named Bennelong. Bennelong was kept as a prisoner but treated well, and he quickly learned English and seemed to enjoy the food, the alcohol, and the customs of the new society. In May 1790 he escaped and was seen at Manly. Shortly after this, Governor Phillip went to Manly and tried to persuade him to return. In an event that has puzzled historians as to its meaning, Bennelong drew Phillip in towards him. Then another man, named by a witness to the event as Wil-le-me-ring, picked up a spear and threw it into Phillip's shoulder, severely injuring the Governor. This may have been a matter of Law, and payback, for the capture of Bennelong or for intruding on the Aboriginals' domain, although the reasons for this are not certain.

Philip recovered and Bennelong remained friendly towards him. When Phillip left New South Wales for England in 1792, Bennelong and another Aboriginal man called Yemmerrawanie voluntarily went with him and the two men were presented to King George III. Yemmerrawanie passed away in Britain, becoming the first Aboriginal person to die on English soil. Bennelong, ill, homesick and depressed, returned to Australia in 1795 and lived in his own brick hut at what is now called Bennelong Point, the site today of the Sydney Opera House.

In 1798 Bennelong was twice dangerously wounded in tribal battles before finally dying in 1813.

16. Why did Phillip ordered the kidnapping of Bennelong?

17. Do you think this was justified? Explain your reasons.

18. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.

PART F **Contact, conflict and co-operation**

Bennelong's experiences show the complexities of contact between the Aboriginal people and the colonists. There was a 'coming in', a voluntary engagement with the new society, but there was also resistance to contact. There were many examples of friendship between the Aboriginal people and the Europeans, but there was also violence. Aboriginal people who had interacted with the Europeans enjoyed some of that contact, and many became very fond of the tea, sugar, flour and alcohol the British had introduced. Aboriginal people were also quick to adapt some of the new technology that became available to them. But there were other aspects of the European culture that they rejected. The local Aboriginal people could see no sense in the hot, uncomfortable clothes of the British or the hard work that many convicts were made to do. When Phillip had another kidnapped Eora man, Arabanoo, watch the flogging of a convict to show how justice worked according to the British system of that time, Arabanoo showed only 'disgust and terror'. Europeans in turn were shocked by the violence of Aboriginal men towards Aboriginal women, who were frequently beaten over the head with clubs.

There was also occasional physical conflict between the settlers and the Aboriginal culture in the early years of the settlement. Soldiers sometimes fired on the Eora people if they felt threatened, and the Eora soon learned to leave armed soldiers alone. However, the bush became a dangerous place for unarmed convicts to wander alone or in pairs. They were likely to be targeted by the Eora, perhaps because they were invaders, perhaps because they had disturbed a sacred place, or perhaps in payback for some injury inflicted on the local people.

19. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.

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PART G **Disease**

The greatest killer of the Eora people was disease. Aboriginal people were devastated in 1789 by smallpox, a disease to which they had no immunity. There is still much debate among historians about whether the smallpox was released in Sydney by accident, through transmission by clothing or blankets, or whether it was released deliberately by the British settlers. There is even a theory that the disease was transmitted by contact with Indonesian fishermen in northern Australia, and gradually moved down the waterways that were used for travel by Aboriginal people. Whatever the cause, the result was horrific. An estimated half of the local population was killed. Men, women and children were struck down. The victims suffered a high fever, severe headaches, backaches, vomiting, and rashes throughout the body, including in the mouth and throat. People could not speak or breathe properly, or swallow water, even though they had an agonising thirst.

Arabadoo, the Eora man who had witnessed the flogging, also witnessed the death of his people from this disease – ‘All dead! All dead!’ he cried. He had returned from the British settlement to nurse some of his family and caught the smallpox from them, dying shortly after. Arabadoo was buried in Governor Phillip’s garden.

20. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.

PART H **Aboriginal people as citizens**

The Aboriginal people were classed by the British as British subjects, entitled to all the protection of British laws. However, because they were not Christians they were unable to swear on oath, and therefore could not give evidence in court. This meant that they could not bring cases against any British settlers who committed crimes against them. A case could only be won if there were non-Aboriginal witnesses who supported them in court.

The British Government also imposed the laws of Britain in 1788. All people, including the Aboriginal people, were now British subjects, and were to have British laws applied to them equally. Aboriginal law was not recognised.

The process of colonisation brought new people, new animals, new diseases, new technology, new attitudes and values, new beliefs and culture. The main impact was that there was now competition for use of the land. Aboriginal people faced three choices: to resist; or to try to share and co-operate with the newcomers; or to submit completely and become part of the new society.

These edges of expansion were called the frontier — the place where the two cultures met. The location of the frontier varied over time, and Europeans spread more quickly and easily in some places than in others. But by the end of the nineteenth century in all but the most remote areas, Aboriginal people across much of Australia had been displaced or dispossessed, and their traditional culture had been severely disrupted, and even destroyed.

21. There were massacres and killings of Aboriginal people, sometimes in retaliation for attacks by Aboriginal people on what was seen as the invasion of their territory, and the disruption and even destruction of their Law and culture. Would you say that the Rule of Law is being applied to the Aboriginal people? Explain your reason.

22. Conclusion: Did the Aboriginal people benefit partly, fully, or not at all to the introduction of the Rule of Law into Australia? Explain your views.

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