



# **AUSTRALIAN CITIZENSHIP**

by

**Genevieve Louise Ebbeck**

**Faculty of Law  
University of Adelaide**

**Submitted      July 1996**

**This thesis is submitted in partial satisfaction  
of the requirements for the degree of Doctor of Philosophy**

**TABLE OF CONTENTS**

Abstract		iii
Declaration		iv
Acknowledgments		v
Introduction		1
Chapter 1	Citizens, Community and the Common Law	6
Chapter 2	British Common Law Rules of Citizenship	35
Chapter 3	The Emergence of the Australian Constitution	62
Chapter 4	Recognition of a Distinct Australian People	84
Chapter 5	The Emerging Citizen	110
Chapter 6	A Constitutional Guarantee of a National Citizenship	132
Chapter 7	Functional Citizenship Rights	148
Chapter 8	<i>McGinty</i> and Representation of Citizens	167
Chapter 9	Australian Citizens, Sovereignty and Equality	181
Chapter 10	Australian Citizens in a State Context	202
Chapter 11	The People in Relation	212
Conclusion		240
Bibliography		242

## **ABSTRACT**

Australian citizenship is fundamentally a common law matter. The common law rules which define an Australian citizen and his/her citizenship rights and duties are derived from the notion of community and are hierarchically superior to the Commonwealth Constitution and any legislative enactments.

The detail of citizenship is a legislative matter; but the statutory concept of Australian citizenship, in existence since 26 January 1949, tends to be confused with the common law (constitutional) concept of Australian citizenship. The distinction is crucial.

My thesis examines the development of Australian citizenship as a matter of law, and it focuses upon major judicial decisions and legislative enactments which consider and clarify the nature of the concept.

The Constitution must be interpreted in accordance with the common law principles of Australian citizenship. The recent "freedom of political speech" High Court cases should be understood as decisions upholding principles of citizenship, not espousing a particular notion of representative government (*McGinty v Western Australia*). The common law rules of Australian citizenship are rules particular to the Australian community. Although broad principles of membership and participation are common to all communities, and cannot validly be breached in any community, the common law citizenship rules of Australia differ from those of the United States and Britain because they are a product of distinctive Australian history. A shift in the High Court's techniques of constitutional analysis in the 1990's, towards a process-based method, has facilitated recognition of both fundamental and particular citizenship rights.

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

1996

I give consent to this copy of my thesis, when deposited in the University Library, being available for loan and photocopying.

First and foremost, I gratefully acknowledge the assistance of my supervisor, Professor Michael Detmold.

Thanks also to my parents, Fred and Marjory Ebbeck, my brother Nick Ebbeck and Fred Briggs.

I also acknowledge with thanks the assistance provided by Brad Selway QC, Chief Justice John Doyle, Esther David, John Gill, Nick Shaw and Greg Cox. Special thanks to Christine Kelly.

## INTRODUCTION

As Australia approaches its centenary as a nation and as Australians contemplate the possibility of adopting a republican form of government, the consideration of the nature of Australian citizenship comes sharply into focus. Citizenship is that which binds Australians together as a community. As the High Court has recently acknowledged in *McGinty v Western Australia*,<sup>1</sup> Australian citizenship is a product of Australian history.

There is significant evidence to suggest that Australian citizens do not understand their status and role as citizens. In 1988, for example, the Fitzgerald Report into Immigration<sup>2</sup> concluded that the status of Australian citizenship is seriously undervalued, with one million immigrants to Australia having declined to become citizens at that time.<sup>3</sup> That Report argued that citizenship should reflect a commitment to Australia and its institutions and principles. Since that Report the Commonwealth Parliament has, with its 1993 amendments to the Australian Citizenship Act, provided a statutory statement about the nature of Australian citizenship. Then, in June 1994, the Prime Minister established a Civics Expert Group to report on the understanding of Australian citizenship possessed by members of the Australian community. Their Report of November 1994 concluded that,<sup>4</sup>

there is disturbing evidence that many Australians lack the knowledge and confidence to exercise their civic role.

The Civics Expert Group urged that Australian citizens be educated about their citizenship rights and responsibilities.

---

<sup>1</sup> (1996) 134 ALR 289.

<sup>2</sup> *Immigration. A Commitment to Australia - The Report of the Committee to Advise on Australia's Immigration Policies* (AGPS, Canberra 1988). The Chair of the Committee was Dr Stephen Fitzgerald A.O.

<sup>3</sup> Fitzgerald Report at p xi.

<sup>4</sup> *Whereas the People ... Civics and Citizenship Education - Report of the Civics Expert Group* (AGPS, Canberra 1994) p3.

Australian citizenship is in need of restatement, and ... more could be done to promote informed and active citizenship. Deficiencies of knowledge, capacity and civic confidence are apparent. The level of knowledge of how the Australian system of government works is low ... . Most Australians have little knowledge of the constitutions of the Commonwealth, states and territories. They are not familiar with the principles of responsible government, of the division of powers, and the relationship between legislative, executive and judiciary. The federal system is poorly understood.<sup>5</sup>

In recent years the Commonwealth and State Governments have sought, and are continuing to seek, the views of Australian citizens on whether Australia should become a republic. The debate has largely focussed on the nature of the 'preferred' Head of State. This narrow concern overlooks the more fundamental questions which should be asked about the role of the Australian citizen, his/her citizenship rights and duties and the collective place of Australian citizens within the framework of government. As we shall see, citizenship is the primary (republican) counter to monarchy.

Citizenship defines those who are, and those who are not, members of a common community. A citizen is an individual considered in relation to other citizens and to the community as a whole. My thesis examines the nature of the relationship between Australian citizens and the Australian community.

The thesis is a legal examination of the development and fundamental nature of Australian citizenship. It is not a political treatise and it does not examine political writings, speeches and other activities related to the meaning of Australian citizenship. Rather, it is an examination of Australian law as contained in common law principles, the Constitution and certain statutes.

The basic claims of the thesis are as follows:

First, Australian citizenship is fundamentally a common law matter. The statutory conception of Australian citizenship, in existence since 26

---

<sup>5</sup> at 13.

January 1949, should not be confused with the common law conception of Australian citizenship.

- Second, deriving from the notion of community are fundamental common law principles of membership, participation and non-exclusion. These fundamental principles cannot be denied or abrogated. They are hierarchically superior to any community's constitution and to any legislative enactments. Thus, an Australian citizen cannot lawfully be denied his/her right to participate in the governance of Australia.
- Third, these fundamental principles have found expression, in Australia, in the form of common law rules concerning the Australian citizen's right to vote, to communicate with representatives about political / governmental matters and to retain Australian citizenship and not be deported.
- Fourth, these common law rules of Australian citizenship are rules particular to the Australian community. Although they have roots in the broad principles of membership and participation common to all communities, the common law citizenship rules of Australia differ from those of the United States and Britain because they are a product of Australian history. The High Court has recently affirmed this proposition in *McGinty v Western Australia*.
- Fifth, a new common law rule of Australian citizenship, concerning equality of citizens, may be emerging. However, its content is as yet unclear.
- Sixth, the Constitution must be interpreted in accordance with the fundamental principles deriving from community and the particular common law rules of Australian citizenship. It should not be interpreted with the aim of preserving a particular model of government. Rather, interpretation must be consistent with the Australian citizen's right to participate in the governance of the Australian community and his/her State or Territory community. This right of participation extends to permit choice in the method



of governance.<sup>6</sup> Furthermore, such interpretation must acknowledge the fundamental difference between human rights and citizenship rights.

Seventh, understanding of the role of the Australian citizen and his/her citizenship rights has been assisted by a process-based interpretation of the Constitution. Recognition of the structures and processes established by the Constitution has enabled the High Court to consider the Australian citizen as he/she exists and functions in relation to the state (in its legislative and executive manifestations) and in relation to other Australian citizens.

Eighth, recent judicial statements about the role of Australian citizens considered collectively have confused two concepts of sovereignty. A consideration of sovereignty must distinguish between (i) a sovereign body and (ii) sovereign legislative power (and sovereign executive power). The Australian community, as defined by the common law rules of Australian citizenship, is hierarchically prior to the Constitution and any Australian Parliament, and is the sovereign body within Australia. Over the course of this century there has been an elevation of the Australian community over British monarchical rule. As the Australian community is now recognised as the sovereign body within Australia, Australia is already a true republic. Sovereign legislative power rests with the Section 128 "legislature", and the current "republican debate" is merely a debate about who should be the repository of sovereign executive power.

Ninth, there is increasing recognition of the duties associated with Australian citizenship, particularly those owed by the Australian community to its more vulnerable citizens. This trend mirrors a broader development in Australian law, namely the growth of equitable doctrines of conscience.

---

<sup>6</sup> As is discussed in Chapter 8, representative government can take many forms, as is evidenced by the adoption of the rule "one vote one value" in the United States but the rejection of this same rule in relation to Australia.

**Chapter 1** examines the proposition that citizenship is a common law notion, and considers the fundamental principles deriving from the notion of community and the particular common law rules of Australian citizenship. **Chapter 2** contains an examination of the common law rules of British citizenship which were inherited from Britain upon colonisation. It also looks at the particular status of United States Indians<sup>7</sup> as compared with Australian Aborigines, for the purpose of considering their citizenship status. **Chapter 3** then looks at the background to the drafting of the Constitution, and the unlawful denial to women, Aborigines and other racial minorities of certain Australian citizenship rights. **Chapter 4** examines the process by which a distinct Australian identity emerged, culminating in the adoption of a statutory conception of Australian citizenship. **Chapter 5** looks at the distinction between the statutory concept of Australian citizenship and the common law concept, particularly in light of the issue of deportation. **Chapter 6** considers the Constitution's recognition of a national citizenship and examines Section 117 of the Constitution; a distinction between citizenship rights and human rights is also drawn. **Chapter 7** analyses the process-based approach to constitutional interpretation which the High Court is increasingly adopting, and examines the recent cases concerning the freedom of speech in relation to political / governmental matters in light of the 1996 decision of *McGinty*. **Chapter 8** then examines the meaning of representation within the Australian context. **Chapter 9** looks at the issue of sovereignty and the High Court's use of the concept of "the people" when undertaking constitutional analysis - a technique which, when used correctly, facilitates understanding of the fundamental relationship between community and Constitution. **Chapter 10** considers the position of the Australian citizen when functioning in a State sphere. **Chapter 11** is a consideration of the duties imposed upon the Australian citizen by virtue of his/her citizenship, and the increasing awareness of the obligations on the Australian community in relation to vulnerable citizens. Finally, certain **conclusions** are reached.

---

<sup>7</sup> The term "Native American" may be preferred; however, "Indian" is used in my thesis because it is the term adopted in numerous judgments to which I refer.

## CHAPTER 1

### Citizens, Community and the Common Law

A constitution exists to serve a community;<sup>8</sup> a community does not exist to serve a constitution. In this sense a community is hierarchically superior to a constitution. This is the fundamental proposition of my thesis, from which I derive my conclusions about citizenship.

Community has not always been superior to constitution. In late medieval England,<sup>9</sup> the relationship between subjects and Monarch was such that we might say the community existed to serve its Monarch. The Monarch, who can be seen as "the Constitution", was in a position of power over his/her subjects. The Monarch's orders and institutions became the rules and institutions that governed. Those rules were made by the Monarch to serve his/her ends, not the ends of the community. In late medieval England a person's life, death and livelihood was ultimately owed to, and subject to the will of the Monarch. The Monarch was not accountable to the people. It can be said of late medieval England that the monarchical constitution was hierarchically superior to the community.

The revolutionary period of seventeenth century England was a struggle to elevate a community over its constitution.<sup>10</sup> Charles I was tried for treason on the basis that he had levied war against the Parliament and the Kingdom. In January 1649 Charles was brought before a court consisting of the Lord President of the High Court of Justice and a number of other members sitting at the Great Hall in Westminster. He refused to recognise the jurisdiction of the court. The

---

<sup>8</sup> "Constitution" refers to both written and unwritten constitutions. The nature of a constitution is considered in this Chapter.

<sup>9</sup> The English and then British community is obviously the community of most historic relevance to an examination of the development of Australian citizenship.

<sup>10</sup> The process did not begin in the seventeenth century; the Magna Carta, for example, was the result of a much earlier struggle between the community (of nobles) and the King.

opinion Charles gave to the court was consistent with the hierarchical superiority of the constitution as personified in him, a "divine right Monarch". Charles claimed that he was the holder of a trust committed to him by God,<sup>11</sup> and he stated that "no earthly power can justly call me (who is your king) in question".<sup>12</sup> He rejected any suggestion of his being accountable to the people of England:

For the People, truly I desire their Liberty and Freedom as much as any body whatsoever; but I must tell you, that their Liberty and Freedom consist in having government, those laws by which their lives and their goods may be most their own. It is not their having a share in government - that is nothing appertaining to them. A subject and a sovereign are clean different things.<sup>13</sup>

The competing principle, that of the hierarchical superiority of the community, was put to Charles by the Lord President of the Court:

Sir, as the Law is your Superior, so truly, Sir, there is something that is superior to the Law, and that is indeed the Parent or Author of the Law, and that is the people of England.<sup>14</sup>

The growth of, or movement towards, citizenship can be seen as the movement towards the hierarchical superiority of a community over its constitution. My thesis is an examination of the movement towards Australian citizenship - in other words, of the nature of Australian citizenship and the process by which it has been recognised and understood by Australian courts as the most fundamental principle of Australian law.

### **The Australian community and the Australian Constitution**

A constitution (whether written or unwritten) exists for a community; it provides a structure for the governance of that community (for example, it may provide

---

<sup>11</sup> Cobbett, *Complete Collection of State Trials* (Bagshaw, Covent Garden, London 1809), 24 Charles I, 1649 989 at 1074.

<sup>12</sup> at 1086.

<sup>13</sup> at 1139.

<sup>14</sup> at 1009.

for the establishment of a Parliament, Executive and Courts). The Australian Constitution thus exists to serve the Australian community. In fact, there is increasing recognition by the High Court of the relevance of the Australian community to the process of constitutional analysis; this is seen by the High Court's introduction of the concept of "the people" in its reasoning.<sup>15</sup> Numerous recent judgments link references to "the people" with concepts of sovereignty and democracy; these are discussed in detail in Chapter 9.

The term "the people" must refer to all Australian citizens, although it has not been defined with such precision. Indeed it has been used quite loosely by some members of the High Court. Fundamentally, there has been a confusion between on the one hand viewing the Australian community as that which is hierarchically superior to all other bodies or persons, and on the other hand viewing it as somehow possessing sovereign legislative power.

The Australian community is hierarchically prior to the Constitution and any legislative body created by that Constitution. In this sense it is the sovereign body within the Australian legal system (the term "sovereignty" being derived from the medieval Latin term "superanus", which means "being above"<sup>16</sup>). Recognition of this has occurred with diminishing monarchical rule. As monarchy diminished, the community has been elevated. Because the Australian community can thus be seen as a sovereign body, those fundamental principles which define the Australian community (which I discuss in this Chapter) cannot lawfully be breached. These common law rules act as limits on the legislative power of any legislative body created to facilitate governance of the Australian community.<sup>17</sup> However the Australian community itself does not possess sovereign legislative power. Legislative, executive and judicial power within Australia are conferred

---

<sup>15</sup> Chapter 9 contains an examination of the references to "the people" in recent High Court cases.

<sup>16</sup> Wolfrum (editor-in-chief), *United Nations: Law, Policies and Practice Volume 2* (Matrinus Nijhoff Publishers, Dordrecht, new revised English edition 1995) p1193.

<sup>17</sup> This proposition is discussed further in this Chapter.

upon certain bodies by the Constitution. The ultimate legislative power is possessed by the body with the power to change the Constitution; and that body is the Section 128 legislature.<sup>18</sup> The Section 128 legislature is not the same thing as Australian citizens considered collectively. The two concepts of sovereignty must not be confused; it makes no sense to talk of "the people" possessing sovereign legislative power.

Furthermore, just as there is a distinction between sovereign body and a sovereign legislative power, so too there is a distinction between sovereign body and a sovereign executive power. The term "sovereign executive power" refers to what are commonly termed "reserved powers" (those powers which are reserved to the Queen or to her representative, the Governor-General / Governor), namely the power to appoint and dismiss a Prime Minister / Premier, and to dissolve a Parliament.<sup>19</sup> The current republican debate has failed to recognise this distinction; the question whether the country should be 'headed' by the Queen in right of Australia, the Governor-General or an Australian President is a question about the identity of the body possessing sovereign executive power. It does not go to the more fundamental question of what is the sovereign body within Australia; and that is the Australian community. I discuss this issue further in Chapter 9. As the Australian community is the sovereign body within Australia, it can be said that the real republic already exists.

The High Court's reliance upon the concept of "the people" is properly understood as a recognition of the hierarchically superior position of the Australian community vis-a-vis the Australian Constitution. This interpretation of the references to "the people" necessitates recognition of the primacy of particular common law rules. It leads to the conclusion that these fundamental

---

<sup>18.</sup> The Section 128 legislature is examined in Chapter 9.

<sup>19.</sup> For a further discussion of 'reserved powers', see for example Harris & Crawford, "The Powers and Authorities Vested in Him" (1967-70) 3 *Adel LR* 303; Campbell, "The Prerogative Power of Dissolution" (1961) *Public Law* 165.

(but narrow) rules cannot lawfully be breached, but it does not permit "judicial creation" of a constitutional "Bill of Rights".<sup>20</sup>

### **The common law**

The community for which a constitution exists is defined by the common law.<sup>21</sup> There are two senses in which one refers to the common law, when considering the notion of community. There are fundamental principles applicable to all communities, and then there are specific common law rules defining a particular community.

I argue for the existence of certain fundamental principles which are superior to all other laws, including any document termed "the Constitution" and any legislative enactment. These fundamental principles exist because of the nature of community;<sup>22</sup> I argue that they must exist if there is to be a community. This argument falls within Davies' conception of "classical common law theory", described in *Asking the Law Question*:

[t]hose who wrote about the common law prior to the 19th century ... took seriously the idea that law was essentially common to the people, and represented a customary reason; a law was not just something external to people, it was part of their existence in a community.<sup>23</sup>

---

<sup>20.</sup> This issue is further explored in Chapter 9. As is noted there, Toohey J has (extra-judicially) acknowledged that recourse to "the people" has the potential, by adoption of a particular line of reasoning, to enable a "Bill of Rights" to be implied into the Constitution.

<sup>21.</sup> The term "common law" should be seen to refer to the dynamic principles of the common law, and to encompass a conception of judicial power exercised by judges who decide matters. Sometimes it is thought that the term simply refers to a series of judicial decisions which establish a set of legal principles. However the term should be interpreted as extending to the processes of the common law, and not merely particular doctrines or lines of authority.

<sup>22.</sup> I discuss the meaning of "community" later in this Chapter.

<sup>23.</sup> Davies, *Asking the Law Question* (The Law Book Co Limited, North Ryde 1994) p54.

In one sense they may be termed "natural law" principles;<sup>24</sup> however, I argue that they are legal principles and not merely philosophical or moral principles. If a community is to have a legal existence, then the principles which define it must be rules of law. If for example the status of community member (or citizen) is to be a legal concept, then the principle distinguishing a citizen from a non-citizen must be legal.

These fundamental principles exist regardless of whether or not there is a court to declare them to be law. As Detmold notes in *The Australian Commonwealth*,

if a sovereign will were to dismiss all judges judicial power would remain; the people would become their own judges, irrevocably charged, each one of them by the nature of the reason within him, to accept an imposed will only on conditions.... It is this logical status of reason which establishes that the judicial power (or the process of the common law) is the ultimate foundation of a commonwealth [community].<sup>25</sup>

There is ample evidence of this in "frontier" communities, and in the United States for example the custom of elections for sheriffs and judicial officers, and the functions of the Grand Jury, are a development from this notion.

The fundamental principles applicable to all communities are formulated into specific common law rules for a particular community, by that community's courts. The most fundamental legal rules underpinning a particular legal system are common law rules.

The function and primacy of the common law was acknowledged by Sir Owen Dixon in his extra-judicial speeches and papers. In 1943, Dixon gave an address in Detroit to the Section of the American Bar Association for International and Comparative Law. He stated:

---

<sup>24</sup> In terms of the distinction which tends to be drawn between "natural law" and "positive law", my argument may well be classified as a natural law argument, and the fundamental principles for which I argue seen ultimately to be natural law principles.

<sup>25</sup> Detmold, *The Australian Commonwealth* (The Law Book Co Limited, North Ryde 1985) pp 256-257.



[i]n Australia we ... conceive a State as deriving from the law; not the law as deriving from a State. A State is an authority established by and under the law, an authority possessing legislative and other power restricted territorially and qualified in point of subject matter.

We do not of course treat the common law as a transcendental body of legal doctrine, but we do treat it as antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth.<sup>26</sup>

In 1957, Dixon reiterated his view of the primacy of the common law. He wrote,

[i]n Australia we begin with the common law. ... Dr W.E. Hearn opened his [1867] treatise on the Government of England with the words 'The English constitution forms part of the Common Law.' At bottom it is because of this fact that in the working of our Australian system of Government we are able to avail ourselves of the common law as a jurisprudence antecedently existing into which our system came and in which it operates.<sup>27</sup>

Dixon's reference to "antecedent" should be understood as a reference to hierarchically antecedent, not chronologically antecedent. He notes that organs of government are defined by the common law. By this, he must mean that the common law is hierarchically superior to those organs of government. Dixon rejects the notion that the common law is "transcendent"; and this must be correct. The common law is not "above all else" because it exists in another realm (as some might argue God's law, however defined, is thus transcendent). It is hierarchically superior because of the nature of judicial power itself, and what it means for something to be "law". "Law" is the qualification that is given to something after investigation and adjudication. That investigation and adjudication is the exercise of judicial power.

---

<sup>26</sup> Address contained in Dixon, *Jesting Pilate and other Papers and Addresses* (The Law Book Company Limited, Melbourne 1965) 198; quotation at 199.

<sup>27</sup> Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240 at 240.

Even the traditional notion of Parliamentary supremacy is a legal rule because it is accepted as such by courts. It is a common law rule which has evolved over time. As Allan notes in *Law, Liberty and Justice*,<sup>28</sup>

legislation obtains its force from the doctrine of parliamentary sovereignty, which is itself a creature of the common law and whose detailed contents and limits are therefore matters of judicial law-making. (It could hardly, without circularity, be a doctrine based on statutory authority.) Parliament is sovereign because the judges acknowledge its legal and political supremacy...

Similarly, the traditional notion of the supremacy of a written document entitled "the Constitution" is a common law rule. Why is the Constitution binding? Because a court holds it so. I argue that the status of the Australian Constitution, and the validity of its provisions vis-a-vis the common law rules of Australian citizenship (which I detail later in this Chapter), are justiciable matters. Authority for this proposition can be found in the Privy Council case of *Madzimbamuto v Lardner-Burke*.<sup>29</sup>

In *Madzimbamuto* the Privy Council considered the status of the *Southern Rhodesia (Constitution) Act* 1961 (UK) and the status of the new revolutionary Rhodesian Constitution of 1965. A majority of the Privy Council in *Madzimbamuto* held that the revolutionary constitution was invalid. The judgment of the majority is not significant for this point; its significance lies in the fact that the Court acknowledged its jurisdiction to rule on the validity of a constitution. The Privy Council acknowledged that,

It is an historical fact that in many countries - and indeed in many countries which are or have been under British Sovereignty - there are now regimes which are universally recognised as lawful but which derive their origins from revolutions or coups d'etat. The law must take account of that fact. So there may be a question how or at what stage the new regime became lawful.<sup>30</sup>

---

<sup>28</sup> Allan, *Law, Liberty and Justice* (Clarendon Press, Oxford 1993) p10.

<sup>29</sup> [1969] 1 AC 645.

<sup>30</sup> at 724.

The Privy Council referred to the 1966 Constitution of Uganda as an example of a revolutionary constitution which it would have upheld as valid.<sup>31</sup> However, by contrast with the revolutionary events in Uganda - where the revolutionary Government was well-established with no rival - the British Government was (according to the Privy Council) taking steps to regain control in Rhodesia and it was impossible to predict with certainty whether or not it would succeed. Accordingly, the Privy Council held that the usurping Government could not be regarded as a lawful government.<sup>32</sup> It is implicit in these sentiments that the Privy Council would have regarded the revolutionary government as lawful, and thus the revolutionary Constitution of 1965 as valid, if the revolutionaries had demonstrated clear control of Rhodesia. Regardless of which way the decision went, the Privy Council accepted that it was for a court to determine the question. Detmold notes,

A decision on this question could not be determined either way by the (old) ultimate power, for it is that power which is in issue. It could only be determined by the courts; that is to say, it is a common law matter.<sup>33</sup>

Indeed if the Privy Council had said that it could not decide the question, but had stated that it was required to uphold the authority of the British Act and not the revolutionary Rhodesian Act because it was a British court, in stating this the court would have still made a decision. That decision would also have been a common law matter.

Lindell, in his article entitled "Why is Australia's Constitution binding? - The reasons in 1900 and now, and the effect of independence", asks the question why Australia's Constitution should be regarded as an instrument of higher law and thus legally binding.<sup>34</sup> He looks at the status of the Constitution in 1900, enacted as part of a British statute, and acknowledges that the status of the

---

<sup>31.</sup> at 724-725.

<sup>32.</sup> at 725.

<sup>33.</sup> Detmold, *The Australian Commonwealth* p94.

<sup>34.</sup> Lindell, "Why is Australia's Constitution binding? The reasons in 1900 and now, and the effect of independence" (1986) 16 *Fed LR* 29.

Constitution as a fundamental law "is now derived from the authority of the Australian people".<sup>35</sup> It is Lindell's posing of the question that is significant. By the very act of asking this question, Lindell is also implicitly acknowledging that in some circumstances a Constitution can be regarded as not binding. The question is therefore conceded to be justiciable.

Just as the Privy Council had jurisdiction in *Madzimbamuto* to consider the status of the 1961 Rhodesian Constitution (UK) and the 1965 revolutionary Rhodesian Constitution, so too the High Court has jurisdiction to consider the status of the Australian Constitution (as it has done in considering Australia's independence from Britain) and the validity of particular provisions of the Constitution for their consistency with the common law rules of Australian citizenship.

Of course the High Court is created by the Constitution. But it does not follow that it has no power to declare invalid a provision of the Constitution. It is created by the Constitution but it is as a court of law that it is created. And therefore its function is to ascertain and declare the law. If a provision of the Constitution is unlawful, it is the duty of the High Court to determine that it is invalid. Invalidity goes with validity. If the High Court cannot rule on the invalidity of a provision of the Constitution, then it cannot rule on its validity either. If the Court is required to accept the Constitution without question, without adjudication, then it is not a law. It is merely a piece of paper. "Law" is the qualification that is given to something after investigation and adjudication; for the Constitution to be law, the High Court must have power to rule upon it.

The justiciability of the Constitution can be contrasted with the non-justiciability of the acquisition of sovereignty over Australia. In *Mabo v Queensland [No 2]*,<sup>36</sup> the High Court clearly re-affirmed the principle that the acquisition of territory by a sovereign state for the first time is an act of state which cannot be

---

<sup>35</sup> at 49.

<sup>36</sup> (1992) 175 CLR 1.

challenged, controlled or interfered with by the courts of that state.<sup>37</sup> However, as Brennan J then noted,<sup>38</sup>

[a]lthough the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.

The court's jurisdiction extends to questions concerning the membership of the community of that newly-acquired territory. As *Mabo [No 2]* itself shows, the citizenship status of Aborigines upon acquisition of the territory of Australia is a justiciable matter (and is a common law matter). By rejecting the doctrine of terra nullius, the High Court in *Mabo [No 2]* acknowledged that Aborigines became members of the colonial community established upon colonization - in other words, the Court acknowledged their status as people at that time (rejecting the view that Australia was the land of "no-one"). In Chapter 2, I look further at the citizenship status of Aborigines.

### **The common law of communities**

As mentioned, there are two senses in which one must refer to the common law when considering community and citizenship, namely:

- (a) fundamental principles flowing from the concept of community;
- and
- (b) specific common law rules applicable to a particular community.

The specific common law rules cannot be inconsistent with the fundamental principles, as these principles are applicable to all communities.

#### **(a) The fundamental principles flowing from the concept of community**

Certain fundamental principles are derived, as a matter of logic, from the notion of community. These can be summarised as:

---

<sup>37.</sup> See for example Brennan J at 31-32, citing with approval an earlier statement of Gibbs J in *New South Wales v Commonwealth (The Seas and Submerged Lands Act Case)* (1975) 135 CLR 337 at 388.

<sup>38.</sup> *Mabo [No 2]* at 32.

- (i) membership
- (ii) participation in governance
- (iii) non-exclusion.

A community consists of members; for a community to have an identity there must be a distinction between a member and a non-member of a community.

Furthermore, there must be substance to the concept of citizenship for it to have any meaning beyond being a mere word. That substance is participation. It is fundamental to the notion of community that a citizen possess the right (and is subject to a duty) to participate in the governance of that community.<sup>39</sup> [I draw a distinction between participation in the governance of a community, and the broader concept of participation in community life. Constitutional law is concerned with governance, and my thesis is a constitutional law thesis.]

For there to be community, membership cannot be revoked without consent (non-exclusion). Consider a community of ten people; the ten members are citizens and exist in relation to each other because they are a community. The community defines their relationship. The first nine members cannot act together to expel the tenth member from the community; to expel the tenth is to redefine the community from which they derive their relationship. The powers which individuals in community have in relation to each other exist because there is community (a relating of the people); the first nine members, by assuming the power to act together vis-a-vis the tenth member, cannot act inconsistently with the notion of that community of ten people. "The stream cannot rise above its source".<sup>40</sup> The expulsion of the tenth member is unlawful.<sup>41</sup>

---

<sup>39</sup> The meaning of "governance of a community" is considered later in this Chapter.

<sup>40</sup> The maxim is discussed in Zines, *The High Court and the Constitution* (Butterworths, Sydney, 3rd ed 1992) p185. It was used by Griffith CJ in *Heiner v Scott* (1914) 19 CLR 381 at 393.

<sup>41</sup> The action of the nine members can be seen as revolutionary, and results in the creation of a new community of nine members. However, it remains an unlawful action when considered by reference to the law of the old community.

This is a strong conclusion relating to the whole of the community, not just to that part of it that is expelled. If the first nine members had the power to act together and expel the tenth member, then any eight members would have the power to expel the ninth member, and so on. If there exists this power to expel, then all members must be liable to such expulsion - and hence there can be no community between them. When all members are liable to expulsion, there is between them what Hobbes would term a "state of war".<sup>42</sup> He termed the opposite to a state of war being "peace", but it can equally be termed "community".

By contrast, a voluntary decision of the tenth member to leave the community is lawful. The source of the power to make such a decision is the individual, not the community. The exercise of the power to leave is not dependant upon a relation with others (although it results in the severing of relationships); it is an individual act.<sup>43</sup>

The individual citizen must have the ability to leave the community, although it can be subject to certain restrictions (such as requiring performance of obligations arising out of citizenship). In a community of citizens, a citizen's loyalty is to a free body politic, which contrasts with the lack of choice accompanying absolute monarchical rule.

Detmold would argue that there is a further fundamental principle of equality deriving from the notion of community itself. He has argued that Australian citizens hold their Constitution equally [and therefore have the power that it generates equally].<sup>44</sup> The equality is implicit in the having of a constitution;

---

<sup>42</sup> Hobbes, *Leviathan* (Penguin Books, London, 1651 reprinted 1979) at 185.

<sup>43</sup> Note that the ability to voluntarily leave can be made subject to certain requirements to perform what might be termed contractual obligations; for example, considerations of national security and military service obligations may prevent an individual citizen from renouncing his/her citizenship and expecting that renunciation to have immediate effect.

<sup>44</sup> Detmold, "The New Constitutional Law" (1994) 16 *Syd LR* 228 at 229. See also Detmold, "Australian Constitutional Equality: The Common Law Foundation" (1996) 7 *PLR* 33.

Detmold argues that, for there to be a contract [the "social contract"], the parties to it must be equal. My analysis of Australian citizenship differs from his in this respect. I do not accept that there is a fundamental principle of equality deriving from the notion of community; there is equality only insofar as all persons who are citizens must possess the right to participate in the governance of their community and the right to retain community membership. Rather than accepting there is a fundamental principle of equality, I argue that there can be a particular common law rule concerning the "equality" (however defined) of citizens within a specific community, as an aspect of the fundamental principle of participation. As I discuss in Chapter 7, citizenship is a functional concept. Thus, as I discuss further in Chapter 9, the equality (however defined) of Australian citizens - which may be emerging as a new Australian common law rule of citizenship - should be defined in terms of the narrow concept of participation in governance (rather than the broad concept of participation in community life).<sup>45</sup> If such a common law rule does emerge, it will be particular to the Australian community, rather than being fundamental to all communities.

The three principles of membership, participation in governance and non-exclusion are fundamental to the notion of community. They are the essence of citizenship. The specific rules which are adopted by a particular community to define the citizen and his/her rights and duties cannot be inconsistent with these three fundamental principles. The rules specific to the Australian community are introduced in this Chapter; those rules specific to the British community as at the time of Australian Federation are considered in Chapter 2.

This argument is radical; it is contrary to traditional notions of sovereignty and legislative power. Regardless of arguments about who possesses sovereign legislative power, it is traditionally accepted that the sovereign's legislative power is unlimited.<sup>46</sup> Thus it is a fundamental and accepted proposition that legislation

---

<sup>45</sup> The difficulties associated with the meaning of "equality" are also discussed in Chapter 9.

<sup>46</sup> The traditional view of the British Parliament is that its legislative power is unlimited; this view must now be modified in light of links with Europe and the EEC.



can and does alter the common law. However this proposition has one limitation: the sovereign has no power to alter the fundamental principles deriving from community. The sovereign is the ultimate authority within a community. He/she/it is defined by reference to a community. Something other than the sovereign must define that community itself. The common law pertaining to that community performs this task (and it must be consistent with the above-mentioned three fundamental principles of community). The common law must also define the sovereign. This second aspect was recognised by Richard Latham (the son of Chief Justice Latham, killed in the Second World War), who stated in *The Law and the Commonwealth*:

the designation of [the sovereign] ... must include a statement of rules for the ascertainment of his will, and these rules, since their observance is a condition of the validity of his legislation, are Rules of Law logically prior to him.<sup>47</sup>

A constitution of a community (whether written or unwritten) cannot be inconsistent with the fundamental principles of community, for example by exclusion of some class of citizens. If the constitution were inconsistent with those principles, by definition it would be the constitution for another community (namely that of the citizens who remained).<sup>48</sup>

Thus, if it is to remain the Constitution for all Australian citizens, the Australian Constitution cannot validly be inconsistent with the fundamental principles of Australian citizenship and community.

---

<sup>47</sup> Latham, "The Law and the Commonwealth" (O.U.P., 1949) p523, quoted in Heuston, *Essays in Constitutional Law* (Stevens & Sons, London, 2nd ed 1964) p7.

<sup>48</sup> As is discussed later in this Chapter, the right to participate is a fundamental right which cannot be denied to a citizen. It is expressed in many communities in terms of the right to vote. If a provision of a community's constitution were to deny to a particular group of citizens - for example, all citizens over the age of forty years - their citizenship right to vote, whilst still defining the fundamental right to participate in terms of the right to vote, then the provision of the constitution is only valid if the community now becomes a community of under-40's. Otherwise, the provision is invalid on the basis that it is inconsistent with the citizenship of the over-40's. A court should not recognise and apply that provision of the constitution.

**(b) common law rules specific to a particular community**

A specific community is defined by common law rules which are particular to that community. As stated, all communities must have members (as opposed to non-members) who can be termed citizens. However, the common law definition of who is / is not a citizen and the processes for bringing this about can vary from community to community. Similarly the common law rules for participation by a citizen in a community vary from community to community. They are common law rules which have emerged (and continue to emerge) as a result of the history of that particular community. Furthermore, just as the meaning of "participation" can vary from community to community, it also varies over time within communities.

The distinction between the fundamental proposition that a citizen has the right to participate in the governance of his/her community and the expression of that right within a particular community such as the Australian community, is made clear by the High Court in *McGinty*, one of the most important High Court decisions to date.<sup>49</sup> The High Court in *McGinty* acknowledged that citizenship necessitates participation within government. However, the Court clearly drew a distinction between what that participation has come to mean in the United States as compared with Australia because of each country's particular history. The War of Independence fought against Britain, the struggle against slavery and the divisions of the Civil War all contributed to the development of a particular meaning of participation by citizens within the United States, encapsulating (inter alia) the notion of "one vote one value". However the particular mode of participation by Australian citizens in Australian government has been influenced by other factors, most particularly the way in which Australians embraced English traditions of democratic government and changed it to suit their own perceptions and needs.<sup>50</sup>

---

<sup>49</sup> The case is discussed in detail later in my thesis.

<sup>50</sup> *McGinty* at 309-310, per Dawson J; at 321-322, per Toohey J; at 356-357, per McHugh J; at 369-374 per Gummow J.

### The common law rules of Australian citizenship

The common law rules of Australian citizenship define the Australian citizen (as opposed to the non-citizen) and his/her citizenship rights and duties. The common law processes are dynamic; as I discuss in Chapter 9, there may be developing a common law rule of Australian citizenship concerning equality. These common law rules, particular to Australia cannot validly be inconsistent with the fundamental principles deriving from community.

A citizen is a person who:

- (a) considers him/herself to be a member, and
- (b) is accepted by that community as a member.

British common law, which was adopted by the Australian colonies as applicable law upon colonisation, provided that community acceptance was given to persons who were born within and subject to the jurisdiction of the community.<sup>51</sup> Acceptance was also given to persons who wished to become members of the community and who had gone through a community-sanctioned process (immigration & citizenship procedures). This common law definition became, and remains, the definition of an Australian citizen.<sup>52</sup>

---

<sup>51</sup> This British common law rule is discussed in Chapter 2.

<sup>52</sup> At the time of British colonisation of Australia, international law recognised three effective ways of acquiring sovereignty over land: by conquest, by cession and by occupation of "terra nullius" land (ie, territory belonging to no one): *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 32, per Brennan J; at 77, per Deane and Gaudron JJ; at 180, per Toohey J. Australia was considered to be a "desert uninhabited country"; the indigenous peoples were seen as barbarous or unsettled, without an established legal system or sovereign. Hence, the land could be settled; and by virtue of the principles of international law, the British colonists at settlement brought with them so much of English law as was applicable to their own situation and the condition of an infant colony.

*Blackstone's Commentaries*, published from 1767, noted the distinction between "settled" and "conquered" colonies:

if an uninhabited country be discovered and planted by English subjects, all the English laws are immediately there in force. For as the law is the birthright of every subject, so wherever they go they carry their laws with them. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the

Thus, Australian citizens are all persons born within Australia<sup>53</sup> and all persons who have gone through a formal process sanctioned by the Australian community (via its national Parliament and Government) and acquired citizenship.<sup>54</sup>

The rights<sup>55</sup> and duties associated with Australian citizenship can be identified by examination of the role of the Australian citizen (as compared to the role of all persons merely living in or visiting Australia).

There is a fundamental distinction between citizenship rights and human rights. Citizenship rights are those rights which are possessed by the citizen in order to enable him/her to participate in the governance of his/her community. Participating in the governance of a community is a concept narrower than that of participating in community life. The former refers to participation in the body politic; the latter encompasses (for example) having a job, owning property and entering into contracts. All persons within the geographical limits of Australia,

---

case of an infidel country.

*Blackstone's Commentaries on the Laws of England* [A reprint of the First Edition], (Dawsons of Pall Mall, London 1966). For a further discussion, see the judgment of Brennan J in *Mabo v Queensland [No 2]*.

- <sup>53</sup>. Special provision is also made in relation to children born overseas, to parents who are Australian citizens.
- <sup>54</sup>. Insofar as section 10(2) of the *Australian Citizenship Act 1948* (Cth) requires a parent of a person born in Australia after the commencement of the *Australian Citizenship Amendment Act 1986* to be an Australian citizen or a permanent resident, it is inconsistent with the common law rules of Australian citizenship and is invalid. Only children born of aliens who are "not subject to the jurisdiction", for example foreign diplomats, do not acquire Australian citizenship (as a constitutional concept) upon birth within Australia. It is here that the distinction between the statutory concept of Australian citizenship, and the constitutional concept, becomes important. The distinction is discussed in Chapter 5.
- <sup>55</sup>. The meaning of a "right", and the rationale behind it (for example, moral-based), is a topic of significant debate. Dworkin, for example, defines a right as a "trump" over some background justification for political decisions that states a goal for the community as a whole: Dworkin, "Rights as Trumps" in Waldron (ed), *Theories of Rights* (Oxford University Press, Oxford 1984) p153. My thesis does not attempt to analyse the nature of rights. For the purpose of my thesis, a "right" can be simply defined as a freedom or power that is morally or legally due to a person. I examine what Australian law recognises as a legally enforceable right.

regardless of their citizenship status, participate in community life. The right to own property (even if it be just the clothes one is wearing) is a right possessed by all persons within Australia. In this sense it is a human right and not a citizenship right. The distinction between the two concepts is explored in more detail later; the nature and extent of human rights is not otherwise a topic for examination in my thesis.

Citizenship is a functional concept and citizens have functional rights and duties. The nature of Australian citizenship duties is considered in detail in Chapter 11. The three rights which derive from possession of Australian citizenship are briefly summarised in this chapter, and discussed in detail in subsequent chapters.

They are:

- (i) the right to vote;
- (ii) the right to communicate with representatives about political / governmental matters;
- (iii) the right to remain an Australian citizen and remain within the geographical boundaries of Australia.

As noted earlier in this Chapter, there may be emerging another common law rule of Australian citizenship concerning equality, the scope of which is as yet unclear.<sup>56</sup> This is discussed further in Chapter 9.

Citizenship rights are not absolute rights. They are subject to qualifications or limitations which arise because of the nature of community. The interests of the individual citizen must be considered vis-a-vis the interests of citizens collectively. The rights possessed by the individual citizen cannot be such as to threaten the existence or well-being of the community as a whole. This is discussed further in Chapter 11.

---

<sup>56</sup> The issue of equality is discussed in Chapter 9.

**(a) The right to vote**

The Australian citizen can be distinguished from the non-citizen by virtue of the fact that only the Australian citizen is entitled to participate formally in the community's political and electoral processes.<sup>57</sup> To participate in the Australian community's political and electoral processes the Australian citizen has the right to vote. I include within the notion of the right to vote the right to stand for election as a representative.<sup>58</sup>

Countries such as Australia, Britain and the United States (to name just a few) define the citizen's right to participate in the government of the community in terms of possession of the right to vote. Participation need not be defined in this way; in another community, the right, for example, to own property might be the basis upon which a citizen participates in the governance of his/her community. In yet another community the right to participate might be tied to membership of a political party. Furthermore, although Australia, Britain and the United States all define participation by citizens in terms of voting for representatives, all three systems can and do vary as a result of the historical development of the different communities.<sup>59</sup>

Despite the existence of differences (such as the applicability of the principle of "one vote one value", discussed later) the fundamental importance of participation by voting is upheld within all three communities. The United States Supreme Court has recognised that the right to vote is a "fundamental political right,

---

<sup>57.</sup> The fact that non-citizens may also be given the ability to participate to a degree in certain political processes is of no consequence; a non-citizen has no fundamental right to participate, but may be given the privilege of participating. Thus, non-citizens are entitled to participate at a local government level in certain Australian States. For example, adult property owners of any rateable land in a ward in Victoria are entitled to be on the local government voter's roll, even if they are not on the electoral roll for the Victorian Legislative Assembly: see Rubenstein, "Citizenship in Australia: Unscrambling its Meaning" (1995) 20 *MULR* 503 at 510.

<sup>58.</sup> I make no further specific mention of the right to vote including the right to stand for election of a representative; the point is assumed in the rest of the thesis.

<sup>59.</sup> The High Court recognised this in *McGinty*.

because [it is] preservative of all rights".<sup>60</sup> In a similar vein, in 1703 Lord Chief Justice Holt of the English Court of King's Bench emphasised the importance of the right to vote:

A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as much in divers statutes ... The right of voting at the election of burgesses is a thing of the highest importance.<sup>61</sup>

The Australian citizen's fundamental right to participate in the governance of the Australian community cannot lawfully be denied. This right to participate finds its form in Australia in terms of the right to vote. The right to vote is an Australian citizenship right, and a citizen cannot lawfully be deprived of it.<sup>62</sup> This does not, however, preclude evolutionary changes in the nature of participation within Australian government. Participation by means of voting could be replaced with another method of participation.<sup>63</sup> However, whilst the method of participation remains that of voting, an Australian citizen cannot lawfully be deprived of the right to vote.

The only restrictions which can be imposed upon the right to vote relate to capacity to understand the nature of the right and its exercise. An Australian citizen must be of sufficient capacity to exercise the right to vote, in order to be entitled to cast a vote at an election. Thus, children and the mentally ill can validly be prevented from exercising their right to vote because they lack the capacity to exercise that right. Citizens have the right to vote because it enables them to exercise their citizenship function of participating in the political and

---

<sup>60.</sup> *Yick Wo v Hopkins* 118 US 356 at 370 (1886).

<sup>61.</sup> *Ashby v White* (1703) 2 Ld Raym 938 at 953; 92 ER 126 at 136.

<sup>62.</sup> Its importance is discussed in Chapter 7.

<sup>63.</sup> This would need to be in accordance with Section 128 of the Constitution, given that the Constitution requires a method of participation by way of voting.

electoral process; to perform this function, a capacity to understand the function and right is required.

Restrictions which are not tied to capacity to understand the concept of voting are invalid. To be valid, a restriction on the ability to exercise the right to vote must be rational and reasonably proportionate to the legitimate end of ensuring that the citizen has the capacity to function as a citizen. Once children possess sufficient capacity to vote, they cannot be denied this right.<sup>64</sup>

A very strict test must be applied when considering whether a law which denies the ability to exercise the right to vote is valid. Failure to adopt a very strict test can lead to (invalid) denial of this citizenship right on, for example, the basis of colour - as occurred in Australia in relation to the Commonwealth franchise until 1962.<sup>65</sup> In the past an assumption of incapacity was made in relation to women (and others), which resulted in their being discriminated against and denied their citizenship right to vote. Such distinctions are "not germane to one's ability to participate intelligently in the electoral process".<sup>66</sup> Such denials of or restrictions upon the right to vote are invalid.

Restrictions on the right to vote have been, and continue to be, imposed on convicted criminals by the Commonwealth and various States. Section 93(8)(b) of the Commonwealth Electoral Act 1918, for example, provides:

A person who:

...

- (b) is serving a sentence of 5 years or longer for an offence against the law of the Commonwealth or of a State or Territory;

...

---

<sup>64.</sup> The Australian community defines capacity by reference to the age of 18 years. If the voting age were raised to 40 years, that requirement would be invalid. Drawing a line between capacity and incapacity is difficult at the margin; however, an extreme age restriction such as age 40 would clearly be invalid.

<sup>65.</sup> In 1962 the *Commonwealth Electoral Act* 1918 was amended to extend the franchise to all Australian Aborigines. The franchise is discussed further in Chapter 3.

<sup>66.</sup> *Harper v Virginia Board of Elections* 383 US 663 at 668 (1965).



is not entitled to have his or her name placed on or retained on any Roll or to vote at any Senate election or House of Representatives election.

The "maintenance of the purity of the ballot box" is advanced as a reason for denying convicted persons voting rights.<sup>67</sup> In *Green v Board of Elections*, the United States Court of Appeals (Second Circuit) stated,

A man who breaks the laws he has authorised his agent to make for his own governance could fairly have been thought to have abandoned the right to participate in further administering the compact.<sup>68</sup>

Despite this rationale (which may be convincing to some), denial of the right to vote to convicted criminals may be unlawful. It can be argued that Australian citizens who are convicted of offences remain citizens. They retain their citizenship right to vote. They cannot lawfully be deprived of this right. If a Parliament had the ability to declare a particular behaviour to be unlawful and an offender liable to imprisonment - as the Tasmanian Parliament has done in relation to homosexual behaviour - significant groups of citizens could be discriminated against and deprived of their citizenship right to vote.

A contrary argument can be mounted in relation to some serious crimes such as treason and murder; they can be seen as renunciation of citizenship. According to this classical theory of punishment, an offender having (by renunciation) thereby placed him/herself outside the community, he/she must pay a price (punishment) for reintegration.<sup>69</sup> Having been punished, the offender is then reintegrated into the community. If this approach to criminal activity is taken then a strict test for those who can be seen to have (theoretically) renounced their community membership must be adopted; otherwise, as just noted, significant groups of citizens can be disenfranchised by virtue of criminalising behaviour.

---

<sup>67.</sup> Fitzgerald and Zdenkowski, "Voting Rights of Convicted Persons" (1987) 11 *Crim L.J.* 11 at 11.

<sup>68.</sup> *Green v Board of Elections* 380 F 2d 445 (1967) at 451; certiorari refused by the Supreme Court at 389 US 1048 (1968).

<sup>69.</sup> For a further discussion, see Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge 1989).

There are other difficulties with deprivation of the franchise on the basis of criminal activity. Section 93(8)(b) of the Commonwealth Electoral Act disenfranchises persons who are convicted of a State offence and imprisoned for 5 years. It thus permits disenfranchisement of Australian citizens whose behaviour may be lawful in every Australian State and Territory other than one - again, as for example in Tasmania with homosexual behaviour.

**(b) The right to communicate with representatives about political / governmental matters**

The citizen's fundamental right to participate in governance also finds form within Australia in terms of a common law rule concerning communication necessary to ensure participation. The Australian citizen is represented by his/her representatives once they are elected to Parliament. In order to ensure participation in the on-going processes of representation, the Australian citizen has the right to communicate with his/her representatives about political / governmental matters. This extends to communicating both privately and publicly, whether directed to a particular representative or being critical (or praising) the actions and policies of representatives generally.

Insofar as the citizen's fundamental right to participate cannot lawfully be denied or abrogated, an Australian citizen cannot be deprived of his/her Australian citizenship right to communicate with representatives about political / governmental matters.

As is discussed further in Chapter 11, any restrictions imposed on the exercise of this right (such as those preventing advocating the violent and unlawful overthrow of a Government) must be rational and reasonably proportionate to the legitimate end of preserving the existence of the community and the safety and well-being of all citizens.

**(c) The right to remain a citizen**

Finally, subject only to one qualification, an Australian citizen's membership of the Australian community cannot validly be terminated against his/her will.

Termination contrary to the citizen's will is unlawful because it breaches the fundamental principle of non-exclusion, which derives from the notion of community. An Australian citizen cannot be deported to another country, in contrast to the non-citizen who is always subject to the risk of deportation.<sup>70</sup> (The Commonwealth Parliament has power under Section 51(xix) to make laws with respect to "naturalization and aliens"; this power extends to deportation of aliens.<sup>71</sup>)

As I have argued, a community consists of its members and, as discussed earlier, it is hierarchically superior to any Parliament or Executive Government which is created to serve the community. A Parliament or Executive Government can have no power to redefine the community and exclude groups or individual members who belong to the community from the community.

The only qualification to the proposition that an Australian citizen cannot be deprived of his/her citizenship relates to naturalised citizens who have acquired Australian citizenship unlawfully, for example by provision of false information. Their citizenship can validly be revoked. If an applicant for citizenship lies about his/her criminal history, it can be argued that the relationship between individual and community is not and was never one of membership as it was based upon false information and deception. This qualification is not contentious; it is consistent with ordinary principles of contract law, whereby fraudulent behaviour enables an innocent party to repudiate a contract.

---

<sup>70</sup> Having concluded that a Government has no power to deport an Australian citizen, it must follow that it has no power to execute that Australian citizen (execution being final and irrevocable termination of community membership).

<sup>71</sup> The fact that Section 51(xix) does not also give power to legislate with respect to "citizenship" supports my argument that the common law rules of citizenship are beyond the legislative reach of an Australian Parliament or Executive Government whose authority to act presupposes the existence of the Australian community.

Citizenship rights are individual rights insofar as it can be said they attach to the office of citizen, which is held by the individual.<sup>72</sup> Citizenship is possessed by the individual and acceptance or renunciation of it is a matter for the individual. Tribe has noted that United States citizenship is an individual right,<sup>73</sup> stating:

The 'rights' conception of citizenship embraced by the fourteenth amendment holds only that acceptance or renunciation of citizenship is a decision for the individual, not for government. Acceptance or renunciation may be signified by action as well as by express declaration.<sup>74</sup>

There is clear United States authority for the proposition that a citizen has the right to remain a citizen. In *Afroyim v Rusk, Secretary of State*,<sup>75</sup> the United States Supreme Court considered the power of Congress to strip a person of his/her United States citizenship. The State Department had refused to renew the passport of a naturalised American citizen who had voted in an Israeli legislative election. The *Nationality Act 1940* (US) provided that a United States citizen lost his/her citizenship if he/she voted in a foreign political election. A challenge was mounted to this provision, and a majority of the Supreme Court held it to be invalid.

We reject the idea ... that ... Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot ... be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are

---

<sup>72.</sup> In Chapter 7 there is further discussion of whether these rights can be seen as "personal" rights.

<sup>73.</sup> Tribe, *American Constitutional Law* (The Foundation Press Inc, Mineola, New York, 2nd ed 1988) p356.

<sup>74.</sup> at 357. The Fourteenth Amendment to the United States Constitution provides that:  
All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

<sup>75.</sup> 387 US 253 (1966).

sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.<sup>76</sup>

The majority of the Court examined the Fourteenth Amendment and concluded that its wording indicated that, once acquired, Fourteenth Amendment citizenship was not to be shifted, cancelled or diluted at the will of the Federal Government, the States or any other governmental unit.<sup>77</sup> The Supreme Court went on to state:

Citizenship is no light trifle to be jeopardised any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world - as a man without a country. Citizenship in this Nation is a part of a co-operative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, colour, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.<sup>78</sup>

The British common law cases which are discussed in Chapter 2, concerning outlawry and termination of citizenship, are inconsistent with the fundamental principle of non-exclusion which derives from the notion of community. They should not be followed.<sup>79</sup>

---

<sup>76.</sup> at 257. The question of sovereignty in Australia is considered in Chapter 9.

<sup>77.</sup> at 262.

<sup>78.</sup> at 267-268.

<sup>79.</sup> The United States common law rule concerning non-exclusion is an example of a common law citizenship rule which is consistent within both the United States and Australia. It is a common law rule which flows from the concept of community, and applies to all communities. Other common law rules which are particular to a community can vary, as the High Court acknowledges in *McGinty*.

Whilst it can be said that the individual citizen has the right to renounce his/her citizenship, limits can be imposed on how and when the individual does so. A citizen can be required to fulfil any existing obligations which arise out of his/her citizenship. For example (as is discussed further in Chapter 11), in times of war the community may require its individual citizens to defend its people and its territory. If an individual citizen is required to perform military service at the 'front-line', reasonable restrictions can be imposed to prevent him/her from renouncing citizenship prior to or whilst performing that military service. Furthermore, the Parliament has power to prescribe the manner in which renunciation of citizenship is to be evidenced.

### **Citizenship rights and the Constitution**

Citizenship rights derive from the common law. They are not rights which derive from a constitutional document such as the Commonwealth of Australia Constitution of 1901 ("the Constitution"), although they can be acknowledged and declared to be citizenship rights in a constitution. They are possessed by the Australian citizen regardless of the existence of a written constitutional document termed "the Constitution". If Australia had an unwritten Constitution, it would still be a community membership of which was defined by possession of the rights of citizenship.

Although the Constitution does not mention Australian citizens, it is (and must be) a document for Australian citizens since they comprise the community for which the Constitution exists. My thesis examines, inter alia, the extent to which the Australian citizen is able to enforce these citizenship rights. To a degree the express terms of the Constitution acknowledge and protect citizenship rights. Examination of the structure of the Constitution and the principles which are implicit in it is necessary to understand the nature of Australian citizenship and the Constitution's protection of citizenship rights. However, as is discussed further in Chapters 3 and 4, the Constitution itself denied to Aboriginal Australian citizens the right to vote in Commonwealth elections until 1962 and

their status as Australian citizens until 1967.<sup>80</sup> Insofar as the Constitution did this it was inconsistent with the fundamental principle of participation, that participation being defined in terms of voting, and was therefore invalid. Of course, this was not understood at the time.<sup>81</sup> Current constitutional jurisprudence is much more attuned to fundamentals.

---

<sup>80.</sup> The franchise restrictions occurred by virtue of the operation of Sections 30 and 41 of the Constitution, whilst the status of Aborigines as "people of the Commonwealth" and "people of a State" was denied by Section 127.

<sup>81.</sup> The question never arose in 1900; my conclusion about invalidity is made with the hindsight of the latter part of the twentieth century, after the nature of Australian citizenship has become far more apparent.

## CHAPTER 2

### British Common Law Rules of Citizenship

In the lead-up to Australian Federation, consideration had to be given to membership of the proposed national community. However, there was a common law definition of "citizen" (termed "subject") and a tradition of participation by voting inherited from Britain which was to provide the basis for the concept of citizenship adopted for the new Australian nation. This Chapter examines the common law rules surrounding membership of the British community. It is an historical examination of British common law rules to assist in understanding the development of Australian citizenship; it is not an examination of modern British citizenship law.<sup>82</sup> This Chapter also examines the United States common law rules of citizenship which define "citizen", recognise the conception of participation by voting and uphold the principle of non-exclusion. The citizenship status of American Indians is contrasted with that of Australian Aborigines.

The method of analysis that is applied in relation to Australian citizenship is equally applicable to a consideration of British citizenship. To be lawful,<sup>83</sup> British common law rules of citizenship must be consistent with the fundamental principles which derive from the notion of community, namely membership, participation and non-exclusion.

Thus, whilst the British common law definition of citizen / subject and the notion of the citizen's fundamental right to vote became part of Australia's common law rules of Australian citizenship - both principles being consistent with community - one point of distinction must be made. British common law failed to recognise

---

<sup>82</sup> An exception to this is an analysis of a 1945 British case, *Joyce v Director of Public Prosecutions* [1946] AC 347.

<sup>83</sup> If one is referring to a decision of a British court, it will only be "correct" if consistent with these fundamental principles; if one is referring to a British statute it will only be "valid" if consistent with these fundamental principles.



the principle of non-exclusion which is fundamental to the notion of community membership; the common law principles of outlawry and the inability to renounce citizenship voluntarily are inconsistent with the concept of community and should not be accepted as correct precedents for the purposes of an analysis of Australian citizenship. The United States authorities on non-exclusion / non-deprivation of citizenship are consistent with the fundamental principles deriving from the notion of community and should be preferred.

That there should be a preference of certain United States authorities over British authorities is not surprising; both Australia and the United States have undergone a process of breaking away from British rule. Australia's independence has been evolutionary, whilst the United States was achieved by revolution. However, as *McGinty* highlights, the common law rules of citizenship for Australia, the United States and Britain are rules applicable to each country, the result of each country's peculiar historical development.

### **Birth within Realm**

British common law developed a definition of membership of the British community primarily based upon birth within territory under the rule of the British monarch. A person was either a subject of the King/Queen or an alien. In their history of English law, Pollock and Maitland wrote:

As regards the definition of the two great classes of men which have to be distinguished from each other, the main rule is very simple. The place of birth is all-important. A child born within any territory that is subject to the king of England is a natural-born subject of the king of England, and is no alien in England. On the other hand, with some exceptions, every child born elsewhere is an alien, no matter the nationality of its parents.<sup>84</sup>

---

<sup>84</sup> Pollock & Maitland, *The History of English Law Volume 1* (University Printing House, Cambridge, 2nd ed 1898; reprinted 1968) p458.

They traced this rule back to the end of the thirteenth century. Prior to this century, "very ancient law" placed emphasis not on place of birth but on "purity of blood", with tribal associations being of far greater importance.<sup>85</sup>

By 1608, the year that *Calvin's Case* was heard,<sup>86</sup> it was clear that as a general rule all persons born within the King's domains were members of the British community. A member of the community was called a "subject"; the term "citizen" was rarely found in English statute or case law. If used at all it was in reference to the inhabitants of an English city or nationals of another country.<sup>87</sup> The common bond shared by all subjects was allegiance owed to the King/Queen.

Membership of the British community, and the nature of the bond between Monarch and subject, was extensively discussed in *Calvin's Case*. The case arose because of the accession of James VI of Scotland to the English throne, whereby he became James I of England. A joint session of commissioners from both kingdoms was held to consider issues arising from the union in one person of the two Crowns.<sup>88</sup> An objection to his accession was the fact that he was an alien.<sup>89</sup> The commissioners considered that all persons born in either kingdom after the accession of James I (termed "postnati") had the status of subjects in the other kingdom, and proposed that those born prior to the accession (termed "antenati") be naturalised by statute. However, the Commons could not agree to

---

<sup>85.</sup> at p460.

<sup>86.</sup> *Calvin's Case* (1608) 77 ER 377.

<sup>87.</sup> For example, an Act of 1486 made reference to "the Citizens and Freeman of the City of London": 3 Hen 7 c8 (1487). In 1606, an Act dealing with trade and merchants made reference to the "Citizens of the City of Exeter": 4 Ja 1 c9 (1606). Then, in 1703 an Act was passed to repeal a proviso in an earlier Act from the time of William and Mary, which prevented the "citizens of the City of York" from disposing of their personal estates by their wills: 2 & 3 Ann c5 (1703).

<sup>88.</sup> Jones, *British Nationality Law* (Oxford University Press, Oxford, revised ed 1956) p52.

<sup>89.</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland* (Stevens & Sons Limited, London 1957) p40.

this latter suggestion.<sup>90</sup> Hence a fictitious case was commenced by a Robert Calvin, against Smith and others, alleging that the defendants had disseised him of certain lands. Calvin was a child born in Scotland after the accession of James I, and the action was brought in his name by his guardians. The defendants pleaded that Calvin was an alien and therefore the action was not maintainable. The court held that Calvin (a postnati) was not an alien, whilst antenati were aliens in England, remaining subjects of the King of Scotland only, after the accession of James I.

It was stated by Coke LCJ in *Calvin's Case* that:

By all which is evidently appeareth, that they are born under the obedience, power, faith, ligealty or ligeance of the King, are natural subjects, and no aliens.<sup>91</sup>

Coke described a subject by reference to the following characteristics:

There be regularly (unless it be in special cases) three incidents to a subject born.

1. That the parents be under the actual obedience of the King.
2. That the place of his birth be within the King's dominion, and
3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one Kingdom that was born under the ligeance of a King of another Kingdom, albeit afterwards once Kingdom descend to the King of the other.<sup>92</sup>

Some exceptions to the common law requirement of birth within the realm in order to gain the status of subject were thought necessary, and the common law was duly amended by statute. From a relatively early time it had been thought necessary to regulate the status and inheritance laws concerning children born outside the realm. In 1350 it was enacted that:

---

<sup>90.</sup> at p40-41.

<sup>91.</sup> *Calvin's Case* at 383.

<sup>92.</sup> at 399.

all Children Inheritors, which from henceforth shall be born without the ligeance of the King, whose Fathers and Mothers at the Time of their Birth be and shall be at the Faith and Ligeance of the King of England shall have and enjoy the same Benefits and Advantages to have bear the inheritance within the same Ligeance, as the other Inheritors aforesaid in time to come; so always that the Mothers of such Children do pass the Sea by the Ligeance and Wills of their Husbands.<sup>93</sup>

The terms of this statute illustrate the linkage between allegiance and territory; a person was either born "within" or "without" the realm.

The common law rule of membership by birth within the realm was also adopted in the United States upon its colonisation, subject to one exception, namely American Indians. The status of negro slaves and former slaves was also unclear, for a period of time.<sup>94</sup> In *Dred Scott v Sandford*,<sup>95</sup> a majority of the United States Supreme Court held that negroes were not United States citizens. In the case it was an accepted fact that Scott was a negro whose ancestors had been

---

<sup>93</sup> 25 Ed 3 St 1 (1350). For a further discussion of this statute, see Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p31-33. Parry describes it as having a "curiously chequered history" [at 32].

A number of Acts concerning the status of children born outside the realm were passed in the eighteenth century. In 1708 an Act "for naturalising Foreign Protestants" was passed: 7 Ann c5 (1708). It stated, inter alia, "That the Children of all natural born Subjects born out of the Ligeance of Her Majesty, her Heirs and Successors, shall be deemed, adjudged, and taken to natural born Subjects of this Kingdom to all Intents, Constructions, and Purposes whatsoever".

This seemed to require clarification, and 1731 an explanatory Act was passed: 4 Geo 2 c21 (1731). That Act stated, "that all Children born out of a Ligeance of the Crown of England, or of Great Britain, or which shall hereafter be born out of such Ligeance whose Fathers were or shall be natural born Subjects of the Crown of England, or of Great Britain, at the Time of Birth of such Children respectively, shall and may, by virtue of the said recited Clause in the said Act of the seventh Year of her Reign of her said late Majesty and of his present Act, be adjudged and taken to be, and all such Children are hereby declared to be natural born Subjects of the Crown of Great Britain, to all Intents, Constructions and Purposes whatsoever."

In 1773 yet another Act was passed to explain earlier Acts dealing with naturalising foreign protestants, relating to the children of natural born subjects of the Crown of England or of Great Britain: 13 Geo 3 c 21 (1773).

<sup>94</sup> The term "black Americans of African descent" may be preferred today; however, I use the term "negro" as it is used in the authorities to which I refer.

<sup>95</sup> 60 US 393 (1856).

brought to America and sold as slaves. He brought an action against Sandford alleging that Sandford had assaulted him, his wife and daughters. Sandford argued that Scott, his wife and daughters were his slaves and lawful property, and that the action could not be brought as Scott was not a "citizen" within the meaning of the Constitution.

The question before the Court was summarised by Taney CJ as follows:<sup>96</sup>

The question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to the citizen? One of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution.

A majority of the Court held that negroes, whether slaves or free, were not intended to be and were not included within the term "citizens" in the United States Constitution. It held that, on the contrary, they were at the time of the adoption of the Constitution considered as a subordinate and inferior class of beings who, whether emancipated or not, remained subject to the authority of white Americans and who had no rights or privileges other than those who held power and the Government might choose to grant them.<sup>97</sup> The majority viewed the Constitution as a contract formed by those persons who, at the time of its adoption, were recognised as citizens in the several States; it was formed "for them and their posterity, but for no one else".<sup>98</sup>

*Dred Scott* helped to provoke the American Civil War.<sup>99</sup> Following the war, the Fourteenth Amendment was enacted (ratified in 1868) in order to clarify the citizenship status of negroes. The Amendment declares that all persons born or

---

<sup>96</sup> at 403.

<sup>97</sup> at 404-405.

<sup>98</sup> at 406.

<sup>99</sup> Tribe, *American Constitutional Law* p356.

naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

Whilst *Dred Scott* was not overruled by the Supreme Court in the later case of *United States v Wong Kim Ark*,<sup>100</sup> the Court in *Wong Kim Ark* noted that the adoption of the Fourteenth Amendment "put to rest" questions about the citizenship of negroes.<sup>101</sup>

*Wong Kim Ark* concerned a decision in 1898 by the collector of customs at the port of San Francisco to refuse entry to a Chinese man born in San Francisco of parents who were Chinese citizens domiciled in San Francisco, and to then detain him. A writ of habeas corpus was issued. It was argued by the United States Government in that *Wong Kim Ark* was not a United States citizen. The United States Supreme Court rejected this argument, finding that the common law rule that birth within the jurisdiction gave rise to citizenship, which had been inherited from Britain, was still applicable law in the United States and indeed was affirmed by the wording of the Fourteenth Amendment to the United States Constitution. The Court held,

The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes.<sup>102</sup>

The only clear exception to the rule of citizenship by virtue of birth within realm is that of American Indians.

---

<sup>100</sup> 169 US 649 (1898).

<sup>101</sup> at 674-676.

<sup>102</sup> at 693.

### The special status of American Indians vis-a-vis Australian Aborigines

Indians were considered to be citizens of their tribes and not citizens of the United States. As the United States Supreme Court noted in *United States v Wong Kim Ark*,<sup>103</sup>

children of members of the Indian tribes ... [stand] in a peculiar relation to the national Government, unknown to the common law...

The "peculiar" status of United States Indians arose because the Indian tribes were considered to be sovereign peoples with their own citizenship. Their citizens were not "subject to the jurisdiction of" the British Crown (as is discussed below).

During the colonization of America, the British Crown dealt with the Indian tribes formally as sovereign nations.<sup>104</sup> This contrasts starkly with British dealings with Australian Aborigines. The British Crown did not recognise Australian Aboriginal peoples as constituting sovereign tribes. An argument that Australian Aborigines were "free and independent" tribes, sovereign as such, was rejected by the Full Court of the New South Wales Supreme Court in *R v Murrell*.<sup>105</sup> Australian Aborigines were always seen to be "subject to the jurisdiction of" the British Crown.

There is an interesting reason in the United States Department of the Interior's *Handbook of Federal Indian Law* (1942) offered for the position adopted in relation to Indians. It is noted in the Handbook that the first mention of the "necessity of a civilized nation treating with the Indian tribes to secure Indian consent to cessions of land or changes of political status" was made in 1532 by

---

<sup>103</sup> at 682.

<sup>104</sup> Canby, *American Indian Law in a Nutshell* (West Publishing Co, St. Paul, Minn., 2 ed 1988) p10.

<sup>105</sup> (1836) 1 Legge 72 at 73, per Burton J.

Franciscus de Victoria,<sup>106</sup> who had been invited by the Emperor of Spain to advise on Spanish rights in the New World.<sup>107</sup> Victoria concluded that the Indians were the true owners of the land, and in the absence of a just war only the voluntary consent of the Indians could justify the annexation of their territory.

The Handbook notes that,

the theory of Indian title put forward by Victoria came to be generally accepted by writers on international law of the sixteenth, seventeenth, and eighteenth century who were cited as authorities in early federal litigation on Indian property rights.<sup>108</sup>

Thus, for a period of almost 100 years,<sup>109</sup> the United States Federal Government entered into numerous treaties with Indian tribes. Until the last decade of treaty-making, terms familiar to modern international diplomacy were used in the Indian treaties. Many provisions showed the international status of Indian tribes, dealing with issues of war, boundaries, passports, extradition and foreign relations.<sup>110</sup>

Indian tribes, being within the territorial limits of the United States, were not foreign States. Their status was that of dependent nations.<sup>111</sup> The first judicial statement of the principle that an Indian tribe was a political body with powers of self-government was made by Marshall CJ of the United States Supreme Court in *Worcester v Georgia*, in 1832.<sup>112</sup> In *Elk v Wilkins* the Supreme Court described Indian tribes as,

alien nations, distinct political communities, with whom the United States might and habitually did deal, as they thought fit, either

---

<sup>106.</sup> His surname can also be spelt "Vittoria".

<sup>107.</sup> Cohen, *Handbook of Federal Indian Law* (United States Government Printing Office, Washington, 1942 [reprinted 1988]) p46.

<sup>108.</sup> At p47.

<sup>109.</sup> The first treaty was entered into in 1778 and the last treaties were entered into in 1868: Cohen, *Handbook of Federal Indian Law* at p47 and p66.

<sup>110.</sup> At p39.

<sup>111.</sup> At p40.

<sup>112.</sup> 6 Pet. 515 at 559 (1832), referred to in Cohen, *Handbook of Federal Indian Law* px.



through treaties made by the President and Senate, or through acts of Congress in the ordinary forms of legislation.<sup>113</sup>

The dependency of the Indian nations was highlighted by treaty references to "protection" by the United States and the granting of broad administrative powers to the President.<sup>114</sup>

In *Elk v Wilkins* it was held that Indians born within the territorial limits of the United States, members of and owing immediate allegiance to one of the Indian States (being alien, though dependent, powers) were not United States citizens. Although born within the territorial limits, they were not "subject to the jurisdiction thereof".<sup>115</sup> The members of the tribes owed allegiance to their tribes and "were not part of the people of the United States".<sup>116</sup>

Indians could acquire United States citizenship by way of treaty, special statute, general statutes naturalising allottees of land or by general statute naturalising other classes of Indians (by reason of marriage, for example).<sup>117</sup>

Until the Citizenship Act of 1924 those Indians who had not acquired citizenship by marriage to white men, by military service, by receipt of allotments, or through special treaties or special statutes, occupied a peculiar status under Federal law. Not only were they noncitizens but they were barred from the ordinary processes of naturalization open to foreigners.<sup>118</sup>

In 1924 Congress conferred national citizenship on all Indians born in the United States. Once United States citizenship was obtained, an Indian became a citizen of the State in which he/she resided by virtue of the Fourteenth Amendment.<sup>119</sup>

---

<sup>113.</sup> *Elk v Wilkins* 112 US 94 (1884).

<sup>114.</sup> Cohen, *Handbook of Federal Indian Law* p40-43.

<sup>115.</sup> *Elk* at 102.

<sup>116.</sup> at 99.

<sup>117.</sup> Cohen, *Handbook of Federal Indian Law* p153-154.

<sup>118.</sup> at 154.

<sup>119.</sup> Canby, *American Indian Law in a Nutshell* p237-238.

Thus, whilst the British common law rule of citizenship by virtue of birth within the realm was transported to both the United States and Australia, it took on a different form in the United States in relation to American Indians. In Australia, however, the rule of birth within the realm was wholly adopted. If it were not otherwise adopted, then the conclusion to be reached is that Aboriginal Australians were a distinct and sovereign community (or communities) at colonisation. This has recently been rejected by Mason CJ in *Coe v Commonwealth* (1993)<sup>120</sup>.

Although the High Court in *Mabo [No 2]* rejected the doctrine of terra nullius, it has subsequently reiterated the position of the New South Wales Supreme Court last century in *R v Murrell* concerning Aboriginal sovereignty. In *Coe v Commonwealth* (1993), a case after *Mabo [No 2]*, Mason CJ rejected the claim made by the Wiradjuri people that it was a sovereign nation of [Aboriginal] people. Chief Justice Mason referred with approval to the following quote from Gibbs CJ in an earlier case also named *Coe v Commonwealth* (1979):

the history of the relationships between the white settlers and the aboriginal peoples has not been the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ of the Cherokee Nation, that the aboriginal people of Australia are organised as a 'distinct political society separated from others', or that they have been uniformly treated as a state. ... The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which such sovereignty might be exercised. If such organs existed, they would have no powers, except such as the law of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.<sup>121</sup>

---

<sup>120</sup>. (1993) 68 ALJR 110.

<sup>121</sup>. Mason CJ at 114-115, referring to the earlier decision of *Coe v Commonwealth* (1979) 53 ALJR 403 at 408.

Chief Justice Gibbs' recognition of the different approach to the citizenship status of indigenous peoples taken in the United States, as compared to Australia, is consistent with the Court's attitude towards United States authorities on "one vote one value" in *McGinty* [which is discussed in Chapter 8]. The common law rules of United States citizenship are similar in some respects to the Australian rules; however in other respects they are significantly different. Both sets of common law rules are a product of their community's history.

In rejecting the claim made by the Wiradjuri people in *Coe v Commonwealth* (1993), Mason CJ stated that *Mabo [No 2]* is itself entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. *Mabo [No 2]* recognised that land in the Murray Islands was held by means of native title under the paramount sovereignty of the Crown.<sup>122</sup> As was noted in Chapter 1, the High Court in *Mabo [No 2]* clearly stated that the Crown's acquisition of sovereignty over Australia could not be challenged in Australian municipal courts, and Mason CJ in *Coe v Commonwealth* reiterated this position.<sup>123</sup> However, as also noted in Chapter 1, the consequences flowing from the acquisition of sovereignty over Australia are justiciable matters. The citizenship status of Aborigines is a common law matter, as is evidenced by the rejection of the doctrine of terra nullius.

### **Bond of allegiance (ligeance)**

British common law defined the relationship between subject and Monarch in terms of the bond of allegiance (or ligeance).

Ligeance is a true and faithful obedience of the subject due to his Sovereign. This ligeance and obedience is an incident inseparable to every subject: for as soon as he is born he oweth by his birthright ligeance and obedience to his capital sovereign. . . for as the subject owes to the King his true and faithful ligeance and

---

<sup>122</sup> *Coe* at 115.

<sup>123</sup> As above.

obedience, so the sovereign is to govern and protect his subjects...<sup>124</sup>

An alien was a person born out of the ligeance of the King and under the ligeance of another.<sup>125</sup>

The bond between subject and Monarch was a reciprocal bond. However it was rare for the obligations imposed on the Monarch to be highlighted.<sup>126</sup> The reciprocal nature of the relationship was relied upon during the trial of Charles I in 1649.<sup>127</sup> At his trial the Lord President of the High Court of Justice referred to the obligations upon Charles I as King:

And, Sir, your Oath, the manner of your Coronation, doth shew plainly that the kings of England, although it is true, by the law the next person in blood is designed: yet if there were just cause to refuse him, the People of England might do it. For there is a Contract and a Bargain made between the King and his People, and your Oath is taken: and certainly, Sir, the bond is reciprocal; for as you are the Liege Lord, so they Liege Subjects. And we know very well, that hath been so much spoken of, Ligeantia est duplex. This we know now, the one tie, the one bond, is the Bond of Protection that is due from the Sovereign; the other is the Bond of Subjugation that is due from the Subject. Sir, if this bond be once broken, farewell sovereignty!<sup>128</sup>

The accountability of the Monarch to the people was not highlighted during the Restoration eleven years later. Instead the subject's duty of obedience and loyalty was reiterated at the trial of the Regicides (a handful of scapegoats tried for having executed Charles I). Prior to the trial, on 6 June 1660 the new King (Charles II) made a proclamation concerning the "traitors", which stated (inter alia):

---

<sup>124.</sup> *Calvin's Case* at 382.

<sup>125.</sup> at 396.

<sup>126.</sup> Chapter 11 contains an examination of a new development in Australian law, whereby certain obligations owed by the community to its vulnerable citizens are becoming recognised as legally enforceable.

<sup>127.</sup> See report of the trial of Charles the First in Cobbett, *Complete Collection of State Trials*, 24 *Charles I* (1649) 989.

<sup>128.</sup> at 1013.

We are now in right lawfully seized of the said Crown, and ought, by the laws of God, and that nation, to enjoy a royal power there as well in Church as Commonwealth; to govern the people of that kingdom according to the ancient and known law; to maintain them in peace and justice; and to protect and defend them from the oppression of any usurped power whatsoever. And the people of that nation, by the like laws, owe unto us, and ought reciprocally to pay, duty and obedience, as unto their liege, lord and sovereign. This royal right of ours is grounded upon so clear a title, is settled by such fundamental laws, confirmed by so many Oaths of Allegiance in all ages, is supported by such a long continued succession in our royal progenitors, and by such a constant submission of all the people, that the same can admit of no dispute: no act of our predecessors can debar us of it; no power on Earth can justly take it from us; and, but the undoubted laws of that nation, to oppose us, either in the claim or exercise thereof, is a treason of the highest degree.<sup>129</sup>

At the opening of the trial of the Regicides on 9 October 1660 the Lord Chief Baron adopted a similar position, stating:

I must deliver to you the plain and true law, That no authority, no single person, no community of persons, not the people collectively, or representatively, have any coercive power over the King of England.<sup>130</sup>

Of fundamental importance to the revolutionary struggle of the mid-seventeenth century was the ability to impose limits on the executive power of the Crown. The arguments raised and reasoning adopted in the two trials of 1649 and 1660 bear a striking resemblance to the arguments before and reasoning of the Australian High Court in recent cases. Then, and now, reference is made to notions of the social contract and fundamental rights / freedoms; in mid-seventeenth century Britain they were raised in the context of elevating parliamentary sovereignty and curbing the executive power of the Crown, whilst in the 1990's in Australia they are raised in the context of curbing parliamentary sovereignty. A continuous process is apparent here. It is the process of the emergence of citizenship against sovereign power; first through Parliament

---

<sup>129</sup> See report of the Trial of the Regicides in Cobbett, *Complete Collection of State Trials*, 12 Charles 11 (1660) 947 at 960-961.

<sup>130</sup> at 989.

against the sovereign power of the king, then (particularly in Australia) against an omnipotent sovereign power reasserted in the name of Parliament.

### Acquisition of membership of British community

British common law recognised that persons not born within the King's ligeance could become members of the British community. Aliens could become subjects by undergoing a process of naturalisation (by way of Act of Parliament) or endenization (by way of letters patent). It has been noted that the earliest case of naturalisation is generally taken to be that of Elyas Daubeny, recorded on the Roll of the Parliament in 1295.<sup>131</sup> The two processes were said to lead to different effects: naturalisation could have retrospective effect, whilst the Crown acting by way of letters patent could only make the grantee a subject prospectively.<sup>132</sup>

Particular individuals were naturalised,<sup>133</sup> as were groups defined by reference to a particular characteristic such as their religion.<sup>134</sup> Persecution of Protestants in Europe, for example, led to an influx of immigration. The seventeenth century

---

<sup>131.</sup> See Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* pp 34-35. Parry then goes on to explain that Daubeny's Case is really only remarkable for its notation on the Roll of the Parliament, and that instances of endenization can be traced back as far as at least 1240 by a search of the printed Calendars of the Patent Rolls.

<sup>132.</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p38.

<sup>133.</sup> For example, it was necessary in 1704 for an Act to be passed enabling a bill for the naturalisation of the Princess Sophia of Hanover and her issue to be brought into Parliament: 4 Ann c1 (1704). Then, in 1705, an Act was passed to naturalise the Princess Sophia and her issue: 4 Ann c4 (1705).

<sup>134.</sup> For example: in 1708 there was passed "an Act for naturalizing Foreign Protestants": 7 Ann c5 (1708). In 1753 an Act was passed to permit persons professing the Jewish religion to be naturalised by Parliament. It enabled Jews, upon application to Parliament, to be naturalised without taking the sacrament: 26 Geo 2 c26 (1753). However, there was apparently much disquiet about this Act, and it was repealed soon after: 27 Geo 2 c10 (1753).

saw for the first time naturalisation legislation of a general nature, directly providing for grants with respect to a prescribed class of persons.<sup>135</sup>

The first general naturalizing provision can be found in the *Act of Anne* 1708.<sup>136</sup> In contrast to earlier statutes, it provided for naturalisation under statute instead of by statute. The Act provided that a person who took the oaths of allegiance and supremacy, and the declaration concerning the succession, should be deemed to be natural born subjects upon taking the sacraments. The Act arose as a response to the influx of Huguenot refugees from Europe. It was repealed in 1711.<sup>137</sup>

This naturalization legislation enabled persons who had immigrated to Britain to become members of the British community. However, British law had also to deal with the status of increasing numbers of persons living outside Britain in British colonies.

The colonisation of America led to English legislation ensuring that certain colonists retained their status as subjects of the King. In 1740 an Act was passed to naturalise such foreign protestants and others as were settled or should settle in any of His Majesty's colonies in America. The Act of 1740 recognised that British colonies in America attracted newcomers from a number of countries:

Whereas the Increase of People is a Means of advancing the Wealth and Strength of any Nation or Country: And whereas many Foreigners and Strangers from the Lenity of our Government, the Purity of our Religion, the Benefit of our Laws, the Advantages of our Trade, and the Security of our Property might be induced to come and settle in some of His Majesty's Colonies in America, if they were made Partakers of the Advantages and Privileges which the natural born Subjects of this Realm do enjoy...

---

<sup>135.</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p47.

<sup>136.</sup> 7 Ann c5 (1708).

<sup>137.</sup> Parry states that the Act did not prove beneficial, and led to a violent outbreak of pamphleteering: Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p66.

It was therefore provided that:

all Persons born out of the ligeance of His Majesty, his Heirs or Successors, who had inhabited and resided, or shall inhabit or reside, for the space of seven years or more, in any of His Majesty's Colonies in America, and shall not have been absent out of some of the said Colonies for a longer Space than two Months at any one Time during the said seven Years, and shall take and subscribe the Oaths and make, repeat, and subscribe the Declaration appointed by an Act made in the first Year of the Reign of his Late Majesty King George the First, ... or, being of the People called Quakers, shall make and subscribe the Declaration of Fidelity, and take and affirm the Effect of the Abjuration Oath. . . shall be deemed, adjudged, and taken to be, His Majesty's natural born Subjects of this Kingdom, to all Intents, Constructions, and Purposes, as if they, and every of them, had been or were born within this Kingdom;...<sup>138</sup>

The period between the passing of the *Act of Anne* 1708 and the enactment of the *Aliens Act* 1844 (UK) saw an increase in the number of naturalisations by way of statute, as compared with that of endenization.<sup>139</sup> However, there was no general naturalisation Act until 1844. The *Aliens Act* 1844 was the first Act to enable an alien to apply to the Secretary of State, seeking to be naturalised. The Secretary if he saw fit could issue a certificate of naturalisation. This administrative process removed the cost and difficulties associated with endenization by Letters Patent, and individual naturalisation by way of Act of Parliament.

### **Termination of membership of the community**

At common law, a subject's membership of the British community could be terminated unilaterally by the Crown by one of a number of mechanisms - by use

---

<sup>138</sup> 13 Geo 2 c7 (1740). Then, in 1747 an Act was passed to extend the provisions of the Act made in the thirteenth year of His Majesty's reign, dealing with naturalising foreign protestants and others in His Majesty's colonies in America: 20 Geo 2 C 44 (1747). It was provided that "the said Foreign Protestants shall enjoy the Privileges of Natural Born Subjects, and all the Benefits of this Act, and the said Act of the Thirteenth Year of His Majesty's Reign".

<sup>139</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p65.



of the decree of outlawry, by abjuration or by transportation of an individual. However, it could not be terminated by a subject. This position can be contrasted with the modern position of an Australian citizen, whose membership of the Australian community can be terminated voluntarily by him/her (by words or actions, usually accompanied by acquisition of another country's citizenship) but cannot validly be unilaterally terminated by the Australian Government or a State/Territory Government.

Membership of the British community could be terminated by use of the decree of outlawry. Originally the King or Queen could declare a person to be an outlaw if he/she had committed an offence, and it was the right and duty of every law-abiding man "to pursue the outlaw and knock him on the head as though he were a wild beast".<sup>140</sup> It was certainly a punishment meted out in the thirteenth century, at the time that the concept of membership by association with British territory began to develop. However, over the course of the next few centuries outlawry became increasingly a procedural tool, a means of ensuring that an accused person stood trial, rather than a substantive punishment. Holdsworth wrote in his *History of English Law* that,

The decree of outlawry remained for many centuries the ultimate remedy of the state. But we shall see that with the growth of a more ordered society decrees of outlawry ceased to be so freely issued. Many steps must intervene before this final step is taken. To withdraw the state's protection from the individual and to declare war against him is the only course open to a rude society, and in the infancy of the state it is not necessarily efficacious. The increasing organisation of the state gives it other means of constraint, and renders this course so efficacious that, in fairness to the individual, it is only used when all other means have failed.<sup>141</sup>

The termination of community membership was a unilateral action, a step taken by the King/Queen. The community's rejection of the outlaw was absolute:

---

<sup>140.</sup> Pollock & Maitland, *The History of English Law* Volume 1 p476.

<sup>141.</sup> Holdsworth, *A History of English Law* Volume II (Methuen & Co Ltd, London, 3rd ed 1923) p46.

If knowing his condition we harbour him, this is a capital crime. He is a 'lawless man' and a 'friendless man'. Of every proprietary, possessory, contractual right he is deprived; the king is entitled to lay waste his land and it then escheats to his lord; he forfeits his chattels to the king; every contract, every bond of homage or fealty in which he is engaged is dissolved.<sup>142</sup>

Although the institution of outlawry declined after the thirteenth century, membership of the British community could still be effectively terminated by transportation. As a punishment for crime, transportation became very common in the latter part of the seventeenth and in the course of the eighteenth century. It continued to be used until its abolition by Acts passed in 1853 and 1857.<sup>143</sup> Transportation was introduced as a punishment that could be awarded by a court for certain crimes by an Act of 1717.<sup>144</sup> It was also always possible for the Crown to pardon a criminal and attach conditions to the pardon. The Crown might pardon a criminal on condition that he/she transported him/herself over the seas, or on condition that he/she submitted to be transported and imprisoned overseas.<sup>145</sup>

A subject could also be forced to leave the realm by taking an oath of abjuration. Holdsworth details that, from the thirteenth to the first half of the sixteenth century, a person who had committed a crime could flee for refuge to consecrated soil. The coroner was then summoned, and the criminal confessed his/her guilt. Upon then taking an oath to abjure the kingdom, he/she was allowed to proceed in safety to an assigned port within a certain number of days.<sup>146</sup> The effects of abjuration were exactly the same as those of a condemnation to death except that

---

<sup>142</sup> Pollock & Maitland, *The History of English Law* Volume I p477.

<sup>143</sup> Holdsworth, *A History of English Law* Volume XI (Methuen & Co Ltd, London, 3rd ed 1938) pp 568-569.

<sup>144</sup> 4 Geo I c11 (1717).

<sup>145</sup> Holdsworth, *A History of English Law* Volume XI p569.

<sup>146</sup> Holdsworth, *A History of English Law* Volume III (Methuen & Co Ltd, London, 3rd ed 1923) p303.

the criminal's life was spared. The criminal's "goods were forfeited, his lands escheated, and his wife was treated as a widow".<sup>147</sup>

British common law's recognition of outlawry, transportation and abjuration was inconsistent with the fundamental principle of non-exclusion which derives from the notion of community. As such, the particular common law rules surrounding these institutions should not be accepted as correct.

Furthermore, although these procedures enabled the Crown to rid itself of unwanted subjects, British common law did not recognise the right of a British subject who wished to become a subject or citizen of a foreign power to divest him/herself of British allegiance. The report of *Re Aeneas Macdonald* (1747) states that the court declared,

It was never doubted, that a subject-born, taking a commission from a foreign prince and committing high treason, may be punished as a subject for that treason, notwithstanding his foreign commission ... It is not in the power of any private subject to shake off his allegiance, and to transfer it to a foreign prince. Nor is it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the crown.<sup>148</sup>

Thus, when the United States was colonized its colonists from Britain remained British subjects. Aliens who settled in United States colonies could become British subjects pursuant to legislation passed in 1740. No distinct United States citizenship was recognised.

Insofar as British common law failed to recognise the right of a British subject to divest him/herself of British allegiance, it was inconsistent with fundamental notions of community and citizenship.

On 4 July 1776 a number of United States colonies declared themselves to be free and independent states, "the United States of America". After the War of

---

<sup>147</sup> Holdsworth, *A History of English Law* Volume III p305.

<sup>148</sup> *Re Aeneas Macdonald* (1747) Fost 59 at 59, 168 ER 30 at 30.

Independence the British King acknowledged the United States to be free, sovereign and independent States. He signed a treaty of peace on 3 September 1783.<sup>149</sup> In 1822 an action for recovery of lands was brought in England, by a woman claiming to be entitled to be the heiress at law. Her father was born a British subject, in that he was born in a part of America which at the time of his birth was a British colony. However, the court found that at the time of the birth of his daughter he was no longer a British subject. She was born after American independence and her father had become a citizen of the United States. The court stated that,

a relinquishment of the government of a territory, is a relinquishment of authority over the inhabitants of that territory; a declaration that a State shall be free, sovereign, and independent, is a declaration, that the people composing the State shall no longer be considered as subjects of the Sovereign by whom such a declaration is made.<sup>150</sup>

With the enactment of the Naturalization Act 1870 (UK), a British subject gained the right to make a declaration of alienage or to voluntarily naturalize in a foreign country, and thereby lose his/her status as a British subject.<sup>151</sup>

In *Joyce v Director of Public Prosecutions* the House of Lords gave consideration to the ability to divest oneself of allegiance. The appellant, Joyce, had been born in the United States of America in 1906. He was the son of a naturalized American citizen who had previously been a British subject by birth. Joyce thus became a natural born American citizen. At age three he was brought to Ireland, where he lived until 1921; he then went to England and lived there until 1939. In 1933 Joyce had applied for a British passport, describing himself as a British subject by birth, born in Galway. He sought the passport for the purpose of holiday touring. Joyce was granted a passport with a five year term.

---

<sup>149.</sup> These events are detailed in *Doe d. Thomas v Acklam* (1822) 2 B & C 779 at 781, 107 ER 572 at 573.

<sup>150.</sup> *Doe d. Thomas* 2 B & C at 796, 107 ER at 579.

<sup>151.</sup> *Naturalization Act 1870* (UK), ss 3, 4, 6.

On 26 September 1938 he applied for a renewal of the passport for a period of one year, again describing himself as a British subject who had not lost that national status. His application was granted. On 24 August 1939 he again applied for a renewal of his passport for a period of one year. His passport was renewed until 1 July 1940. Joyce broadcast propaganda in Germany on behalf of the German State between 3 September 1939 and 10 December 1939, and had been employed by the German radio company of Berlin as an announcer of English news from 18 September 1938. At the end of World War II he was tried by the British Government for treason. A majority of the House of Lords upheld his conviction for treason. The Lord Chancellor, Lord Jowitt, delivered the majority judgment.

Lord Jowitt noted that, at common law, neither a natural born subject nor a naturalized subject could divest him/herself of allegiance.<sup>152</sup> However, Joyce was an alien - an American citizen - although he had falsely declared himself to be a British subject to obtain the passport. Lord Jowitt then went on to note that an alien resident within the realm owes allegiance to the British Monarch whilst he/she is resident. That local allegiance is founded on the protection that a foreigner enjoys for his/her person, family or effects whilst residing within the realm. Joyce had left the realm and there was no evidence that he had left a family behind relying on the on-going protection of the Monarch.<sup>153</sup> However, the critical factor was the British passport Joyce possessed.

Lord Jowitt referred with approval to the description of a passport given by Lord Alverstone CJ in *R v Brailsford*:

It is a document issued in the name of the sovereign on the responsibility of a minister of the Crown to a named individual, intended to be presented to the governments of foreign nations and to be used for that individual's protection as a British subject in foreign countries.<sup>154</sup>

---

<sup>152.</sup> *Joyce* at 366.

<sup>153.</sup> at 368.

<sup>154.</sup> *Joyce* at 369, referring to *R v Brailsford* [1905] KB 730 at 745.

It was noted that possession of a passport gave Joyce rights, and imposed on the British sovereign, obligations which would not otherwise be given or imposed.

It is immaterial that he has obtained it by misrepresentation and that he is not in law a British subject. By the possession of that document he is enabled to obtain in a foreign country the protection extended to British subjects. By his own act he has maintained the bond which while he was within the realm bound him to his sovereign. The question is not whether he obtained British citizenship by obtaining the passport but whether by its receipt he extended his duty of allegiance beyond the moment when he left the shores of this country. As one owing allegiance to the King he sought and obtained the protection of the King for himself while abroad.<sup>155</sup>

The majority of the House of Lords held that Joyce was still under the protection of the King until 1 July 1940 when his British passport would lapse. Accordingly, he was guilty of treason by broadcasting for the German enemy prior to that date. Lord Porter dissented on the basis that the duty of allegiance might have ceased on 18 September 1938. He considered that the renewal of the passport was at best but some evidence from which a jury might infer that the duty of allegiance was still in existence. Lord Porter considered that the jury should have been directed to consider whether the allegiance had been terminated at the time of the broadcasts.

Insofar as Lord Jowitt reiterated the British common law position that a subject could not divest him/herself of allegiance, his reasoning was wrong. He failed to recognise that one of the fundamental rights possessed by a citizen is the right to remain a citizen unless and until he/she chooses otherwise. The citizen has the right to renounce his/her citizenship (subject to restrictions arising out of the need to perform citizenship obligations, and to comply with procedures prescribed by Parliament for renunciation, as was noted in Chapter 1). However, the decision of the House of Lords may itself be correct because Joyce had not taken all steps available to him to sever his ties with the British community. Whilst a citizen has the right to renounce his/her citizenship, he/she can be required to fulfil any existing obligations such as, in Joyce's case, returning a passport. Such a

---

<sup>155.</sup> *Joyce* at 369-370.

requirement is consistent with ordinary principles of contract law. If Joyce had returned his British passport and clearly indicated his intention to terminate his membership of the British community then he should not have been convicted of treason.

### **Citizenship duties of British subjects**

Historically the bond of allegiance between British subject and Monarch required British subjects to be "obedient". [Although it is not a topic for consideration in my thesis, it is likely that the bond of allegiance owed by British subject now can increasingly be conceptualised as a bond between subject and the British community.] The duties imposed on British subjects were and are similar to those which have been and are imposed on Australian citizens (discussed in Chapter 11). British subjects can for example be conscripted if their military service is required. In 1494 an Act to this effect was passed:

The King our Sovereign Lord, calling to his Remembrance the Duty of Allegiance of his Subjects of this his Realm, and that they by reason of the same are bound to serve their Prince and Sovereign Lord in his Wars, for the Defence of him, and the Land, against every Rebellion, Power, and Might reared against him, and with him to enter and abide in Service in Battle, if case so require;  
...<sup>156</sup>

Historically the obligations and duties imposed on British subjects have been evidenced in particular circumstances such as wartime, as has also occurred in Australia.

### **Citizenship rights of British subjects**

British common law subjected aliens to a number of disqualifications in addition to being unable to vote in parliamentary elections. These disqualifications often depended upon whether the alien was classified as an "alien enemy" or an "alien

---

<sup>156</sup> 11 Hen 7 c1 (1495).

friend".<sup>157</sup> A common law definition of British citizenship rights may have been historically broader than the definition of citizenship rights proposed in my thesis. For example, prior to the Naturalization Act 1870 (UK) an alien could not hold real estate - and this rule extended to leaseholds.<sup>158</sup> Thus the right to hold property may have been a citizenship right at British common law.<sup>159</sup>

In Britain the subject's right to participate in the governance of the British community was defined in terms of possession of the right to vote. However, although all persons born within the King / Queen's domains were members of the British community, the right to vote was denied to large sectors of the population. At common law only certain classes of subjects were entitled to vote in Parliamentary elections. Women were incapable of voting, as were peers of Parliament, lunatics and idiots, persons convicted of treason or a felon sentenced to imprisonment with hard labour or imprisonment for a term exceeding twelve months, paupers and persons in receipt of medical or surgical assistance.<sup>160</sup> There was also a property qualification which had to be met, and which varied in the counties and boroughs.<sup>161</sup>

These restrictions resulted in the denial of citizenship rights to certain groups of British citizens. The restrictions denied to these citizens their fundamental right of participation in the governance of the British community. As such, any statutory restrictions were invalid and any common law principles should be seen as wrong.

---

<sup>157.</sup> For a further discussion, see *Halsbury's Laws of England* Volume 1 (Butterworth & Co, London, 1st ed 1907) pp 310-312.

<sup>158.</sup> *Halsbury's Laws of England* Volume 1 p306.

<sup>159.</sup> I do not discuss this point further.

<sup>160.</sup> For a detailed description of these restrictions on the franchise at common law, see *Halsbury's Laws of England* Volume 7 (Butterworths, London, 1st ed 1910) pp139-145.

<sup>161.</sup> For a further discussion, see *Halsbury's Laws of England* Volume 7 pp145-181.



Although there were (unlawful) restrictions upon the franchise, the fundamental importance of the right to vote was acknowledged. In 1703, Matthew Ashby brought an action against the returning officer of a borough for refusing his vote at an election of members to serve in Parliament. The Court of King's Bench held, with Holt LCJ dissenting, that no action lay and ordered that judgment for the defendants be entered. In his dissent, Holt LCJ stated:

It is not to be doubted, but that the commons of England have a great and considerable right in the government, and a share in the legislature, without whom no law passes; but because of their vast numbers this right is not exercisable by them in their proper persons, and therefore by the constitution of England, it has been directed, that it should be exercised by representatives, chosen by and out of themselves, who have the whole right of the commons of England vested in them; and this representation is exercised in three different qualities, either as knights of shires, citizens of cities, or burgesses of boroughs; and these are the persons qualified to represent all of the commons of England.<sup>162</sup>

Emphasising the importance of the right to vote,<sup>163</sup> Holt LCJ held that, given that the plaintiff had this right, he must of necessity have a means to vindicate and enjoy it and a remedy if he was injured in the exercise or enjoyment of it.<sup>164</sup> However, the majority of the King's Bench held that no action lay against the defendant. The matter then went on appeal to the House of Lords, and by a majority the decision was reversed and judgment was entered for the plaintiff. He was held to be entitled to receive damages and his costs.<sup>165</sup> The report of the House of Lords' decision indicates that the decision caused a great disturbance in both Houses of Parliament. On 25 January 1704 the House of Commons resolved itself into a committee and made five resolutions, which provided (inter alia) that it was the sole right of the Commons to examine and determine all matters relating to the election of its own members, and that Ashby had, in

---

<sup>162.</sup> *Ashby v White* (1703) 2 Ld Raym. 938 at 950; 92 ER 126 at 134.

<sup>163.</sup> See quote from Holt LCJ in Chapter 1 at page 20.

<sup>164.</sup> *Ashby* at 953.

<sup>165.</sup> *Ashby v White*, House of Lords, (1703) 1 Brown 62; 1 ER 417.

contempt of the House, commenced and prosecuted an action at common law and was thereby guilty of a breach of a privilege of the House.<sup>166</sup>

### **Background to Australian Federation**

The British common law rules defining the citizen and his/her participation in government by way of voting formed the foundation of Australia's common law rules of citizenship. When Australian Federation was being considered, particularly during the 1890's, a linkage between territory and community membership was assumed and there was little suggestion of abandoning the notion of allegiance to the British Monarch. When representatives of the Australian colonies came together to consider formation of a unified Australian country, their discussions of membership of the Australian community were largely framed in terms of exclusion (as is discussed in Chapter 3). The importance of the right to vote was assumed and discussion could merely focus on particular groups within the community and the issue of whether or not to extend the franchise to those groups. Overall, very little thought was given to the nature of citizenship; it was not until many years after Federation that this became a topic for consideration.

---

<sup>166</sup> See footnote at the end of the report at *Ashby* 1 Brown 62; 1 ER 417.

## **CHAPTER 3**

### **The Emergence of the Australian Constitution**

An examination of the Constitution reveals that its provisions are primarily concerned with the establishment of the legislative, executive and judicial arms of the Commonwealth, and allocation of their powers and functions. There is a dearth of reference to the Australian community on whose behalf the legislative, executive and judicial arms of government were created. The Constitution does not expressly deal with membership of the Australian community other than by recognition of the concept of alien. Recognition of aliens is, of course, significant; aliens are the converse of citizens and in this respect a power to legislate with respect to aliens (non-citizens) is a power to legislate with respect to citizenship.

This Chapter examines the background to the drafting of the Constitution and considers to what extent the Constitution encapsulates a vision of a national community and its membership. It also examines the extent to which there was a desire to draft a Constitution which would recognise and protect those rights which derive from Australian citizenship itself, namely the right to vote, the right to communicate with one's representatives about political / governmental matters and the right to remain a citizen and reside within Australia.

The Constitution as finally adopted went some way towards recognising and protecting these citizenship rights. However in certain respects it not only failed to recognise, expressly or by implication, these citizenship rights but actually denied them to certain citizens. Insofar as it did so, it denied to certain Australian citizens their fundamental right to participate in the governance of Australia (that right to participate being defined in terms of voting), and was thus inconsistent with the fundamental principle of participation deriving from community. Those provisions of the Constitution which did this were invalid and remained invalid.

### The movement towards Federation

A thorough examination of the political movement towards Federation is not within the scope of my thesis.<sup>167</sup> The decade of the 1890's is highlighted as the period over which intensive legal thought was devoted to the drafting of a federal Constitution. However it should be noted that there was a measure of support for federation from the middle of the nineteenth century, driven largely by difficulties with inter-colonial trade and tariff barriers, the need for inter-colonial arrangements to regulate posts and telegraphs, common concern over immigration, rising population and an on-going awareness of the isolation of the colonies.<sup>168</sup> Mention should also be made of the Federal Council of Australasia which was established by Imperial Statute in 1885.<sup>169</sup> Certain legislative powers were conferred upon the Federal Council; however, the Federal Council had no executive body, no permanent existence and no guaranteed funding. New South Wales and New Zealand did not participate and South Australia only participated between 1889 and 1891, which significantly reduced its effectiveness<sup>170</sup>.

In February, 1890 a Federation Conference was held in Melbourne and attended by official representatives from New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria and Western Australia. It was resolved at this Conference to call a Convention "to consider and report upon an adequate scheme for a Federal Constitution".<sup>171</sup>

---

<sup>167.</sup> The topic has been dealt with far more thoroughly elsewhere, in for example La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Victoria 1972); Coper, *Encounters with the Australian Constitution* (CCH Australia Limited, North Ryde 1987) ch 2; McMinn, *A Constitutional History of Australia* (Oxford University Press, Melbourne 1979) ch 5.

<sup>168.</sup> For more detailed discussion, see McMinn, *A Constitutional History of Australia* ch 5.

<sup>169.</sup> 48 & 49 Vic c60 (1885).

<sup>170.</sup> Sharwood, "The Australasian Federation Conference of 1890" in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books Pty Ltd, Sydney 1986) p42.

<sup>171.</sup> at 41.

During the 1890's the movement towards Federation accelerated. A series of Constitutional Conventions were held over the course of the decade, with representatives from the colonies participating.<sup>172</sup> These Conventions were held in Sydney in 1891 and 1897, in Adelaide in 1897 and in Melbourne in 1898. It is the Official Records of the Debates of these Constitutional Conventions ("Convention Debates") which provide much background to the intentions of those drafting the Constitution. Relevant extracts from these Debates are examined in this Chapter.<sup>173</sup> Analysis of the Convention Debates assists in

---

<sup>172.</sup> All colonies were represented at the First Convention, held in Sydney in 1891 - delegates attended from New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria and Western Australia. However, at the other Conventions Queensland and New Zealand were not represented.

<sup>173.</sup> It is acknowledged that there is debate about the extent (if at all) to which one should refer to the material contained in the Convention Debates, in constitutional analysis. The High Court refused to refer to the material contained in the Convention Debates until *Cole v Whitfield* (1988) 165 CLR 360. That decision marked the High Court's acceptance of use of the Debates to determine "the mischief" to which a provision of the Constitution was directed.

It is clear that one can now refer to the Convention Debates to assist in constitutional analysis. However, the extent to which one should refer to them is a contentious question, and the Court has been "accused" by some commentators of having resorted to the principle of "original intent". This doctrine is based upon the proposition that, when interpreting a written constitution, the "sacred and supreme duty of the judiciary is to ascertain the intentions of those who wrote that document, and to give effect faithfully to those intentions": Craven, "Original Intent and the American Constitution - Coming Soon to a Court Near You?" (1990) 1 *PLR* 166 at 167. As but one example, Deane J has decried the recent tendency to invoke the intention of the framers of the Constitution (encapsulated in the Convention Debates) and thereby "adopt a theory of construction of the Constitution which unjustifiably devitalises its provisions by effectively treating its long dead framers rather than the living people as the source of its legitimacy": *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104 at 167.

However, Doyle CJ (writing extra-judicially) sees value in the Court's willingness to make use of the Convention Debates because it assists "an approach which relies less on deductive reasoning and scrutiny of language, and more on an understanding of the purpose or object of constitutional provisions": Doyle, "Constitutional Law: At the Eye of the Storm" (1993) *UWAL Rev* 15 at 18.

An analysis of the High Court's use of the Convention Debates is not within the scope of my thesis; it has been dealt with in Craven's article (above) and also in, for example, Kennett, "Constitution Interpretation in the Corporations Case" (1990) 19 *Fed LR* 223 at 237-242; Stokes, "Constitutional Commitments not Original Intentions: Interpretation of the Freedom of Speech Cases" (1994) 16 *Syd LR* 250; Schoff, "The High Court and History: It Still Hasn't Found(ed) What It's Looking For" (1994) 5 *PLR* 253.

understanding why there was a failure to expressly recognise Australian citizenship in the Constitution.

The delegates at the Conventions of the 1890's had some awareness of the need to create a common national citizenship. However they did not devote much thought to considering the rights and obligations attaching to membership of this new national community. There was some interest displayed in the United States Constitution which places emphasis on the role and rights of the citizen. However, as one commentator, Rich, notes, it is not surprising that the delegates doubted whether the inclusion of similar provisions would add to protections already embedded within the constitutional structure. Rich concludes that a survey of United States law as at the time of the drafting of the Australian Constitution would have revealed that:

Nineteenth century decisions of the United States Supreme Court offered little support for advocates of individual rights provisions. The Bill of Rights had rarely been used, and it had been construed in a narrow fashion. Decisions of the United States Supreme Court would not have inspired confidence among those concerned about protecting individual civil and political rights; several decisions would have been cause for alarm. Thus, the Supreme Court turned its back on victims of racial discrimination and formally sanctioned the doctrine of racial segregation. In contrast, the Court gave more active support to economic 'rights' than to principles of political freedom or equality.<sup>174</sup>

Instead, membership of the proposed national community was defined by way of exclusion of certain groups, and in particular maintenance of the right to impose restrictions on particular racial groups.<sup>175</sup> In this respect the Constitution was drafted in a climate of racial suspicion of Asians, Kanakas and other non-white

---

<sup>174.</sup> Rich, "Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia" (1993) 21 *Fed LR* 202 at 203-204. [Rich is Professor of Law at Washburn University.]

<sup>175.</sup> Howe argues that the Australian citizen's identity has been constituted through a process of exclusion, which has continued over the course of the twentieth century: Howe, "The Constitutional Centenary, Citizenship, the Republic and all that - absent Feminist Conversationalists" (1995) 20 *The Constitutional Centenary* 218, especially at 220-224, 230-231.

racess, and with minimal attention paid to Aborigines. Women and the franchise was also a contentious issue.

### **Denial of citizenship rights**

A Constitution provides a framework for the governance of a community. It exists to serve the citizens of the community. As such, all members of the colonial communities had the right to participate in the process by which the Australian Constitution was drafted and adopted (by exercising their right to elect representatives to the Conventions and then voting whether or not to adopt the Constitution).

The preamble to the Constitution states that "the people" of the various colonies agreed to unite in one indissoluble Federal Commonwealth. It has been said by Deane and Toohey JJ of the High Court that the "conceptual basis of the Constitution ... was the free agreement of 'the people' - all the people - of the federating Colonies to unite in the Commonwealth under the Constitution".<sup>176</sup> Justices Deane and Toohey state the theoretical principle, which is in accordance with fundamental notions of community and citizenship. However, in reality significant groups were denied this right to participate and vote in relation to the drafting and adoption of the Constitution. Furthermore, the number of persons who actually voted was only 60% of the eligible voters (which is significant if one views the "right" to vote as also being a duty, as is discussed in Chapter 11.)

In 1901, South Australia and Western Australia alone had enfranchised women. Aborigines and other racial minorities were specifically disenfranchised in Western Australia and Queensland. Persons in receipt of particular kinds of charitable or government aid or relief could not vote in New South Wales, Victoria, Queensland and Western Australia while Tasmania imposed a property or income qualification. Multiple voting, based on ownership of property in different electorates, was permitted in Queensland, Tasmania and Western Australia.<sup>177</sup>

---

<sup>176</sup> *Leeth v Commonwealth* (1992) 174 CLR 455 at 486, per Deane and Toohey JJ.

<sup>177</sup> *Theophanous* at 174 (fn 20), per Deane J.

The denial by colonial communities of the right to vote to women, Aborigines and other persons of other racial minorities who fell within the definition of "citizens" - being born within the limits of the relevant colonial community or who had undergone immigration and citizenship procedures - was unlawful.<sup>178</sup> It prevented their participation in the process of determining whether the colonies should federate and, if so, what form the government of the new country should take.

Whether or not women should be given the right to vote was a contentious issue during the 1890's as the movement towards Federation accelerated. Women had been given the right to vote in South Australia in 1894 (the legislation being proclaimed in 1895), but not the other colonies.<sup>179</sup> Indeed, one woman, Catherine Helen Spence, unsuccessfully stood for election as a South Australian delegate to the Convention in Adelaide in 1897.<sup>180</sup> At that Convention it was proposed by South Australian delegates to define electors for Federal Parliament to include all men and women over the age of twenty one.<sup>181</sup> However this proposal failed. The delegates at all the Conventions were presented with numerous petitions both for and against women's suffrage. In favour of women's suffrage was for example the Women's Christian Temperance Union of Australasia. This group noted in a petition presented on March 24, 1897 that the women of South Australia already possessed the right to vote for candidates for elections as members of the South Australian Parliament, whilst the women of the other colonies did not.<sup>182</sup> The petition stated that,

---

<sup>178.</sup> Crisp, *Australian National Government* (3rd ed 1975) at 12, cited in Lindell, "Why is Australia's Constitution binding? The reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed LR* 29 at 30.

<sup>179.</sup> At 1901, only South Australia and Western Australia had given women the right to vote.

<sup>180.</sup> *Official Record of the Debates of the Australasian Federal Conventions* (Adelaide 1897) (Legal Books Pty Ltd, Sydney 1986) at 725. Reference is made to the role of women during the 1890's in Irving "A Gendered Constitution? Women, Federation and Heads of Power" (1994) 24 *UWAL Rev* 186.

<sup>181.</sup> at 714-725.

<sup>182.</sup> at 32.



women are patriotic, and law abiding citizens, taking an equal part in the religious and moral development of the people, and doing more than half of the educational, charitable, and philanthropic work of society as at present constituted - that, therefore, whatever federal franchise shall conferred upon or possessed by male citizens should also be conferred upon or possessed by women.<sup>183</sup>

As this quote indicates, the term "citizen" was popularly used in the context of participation within community life (being a broad concept that can be contrasted with the legal definition adopted in my thesis whereby citizenship enables participation in the governance of the community). If women were in all other respects participants within the activities of a community, it was argued that they should possess the franchise.

Certainly before Federation there were many opposed to giving women the right to vote. An examination of some of the interactions between Convention participants illustrates the diametrically opposing views held in relation to the participation of women in political matters. By contrast there was far greater consensus in relation to the exclusion of Aborigines and coloured persons from the [then] current, and future, political processes. A delegate from Tasmania, Grant, advised the Convention on April 15, 1897 that as far as he was aware public opinion in Tasmania was distinctly against franchise for women.

They do not want to have the discussion of political matters in their private family circles.<sup>184</sup>

Further, he stated that one objection to giving women as a class a vote was,

the danger of popular excitement. They are subject to emotional or hysterical influences to a much greater extent than men. In the matter of strikes, the women, generally speaking, are the chief disturbing cause, and they hold on, to their own damage and detriment, far longer than men do. They are moved by impulse, and do not maintain that self control that men, from being continually associated with one another, are compelled to exercise.

---

<sup>183.</sup> at 32.

<sup>184.</sup> *Official Record of the Debates of the Australasian Federal Conventions* (Adelaide 1897) at 721, per Grant.

We should, therefore, hesitate before attempting to force upon the new Commonwealth women's suffrage.<sup>185</sup>

Views on the issue were obviously polarised. Just prior to Federation, in 1899, women were given the right to vote in Western Australia.<sup>186</sup>

Aborigines were even further disenfranchised, as is evidenced in the terms of the Constitution as finally adopted. The Constitution states that it is "the people of the State[s]" who choose Senators to represent them in the Upper House of Federal Parliament,<sup>187</sup> and "the people of the Commonwealth" who choose members of the Lower House.<sup>188</sup> However, the concept of "the people" of Australia was clearly racially defined and remained so until 1967. Until its removal in 1967, Section 127 of the Constitution provided:

In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Furthermore, Section 51(xxvi) was drafted so as to give the Commonwealth power to make laws with respect to the "people of any race for whom it is deemed necessary to make special laws, other than the aboriginal race in any State".<sup>189</sup>

During the Conventions there was virtually no opposition to the exclusion of Aborigines from a count of "the people of the Commonwealth". At the Adelaide Convention in 1897, a South Australian delegate, Cockburn, drew attention to the fact that South Australian electoral rolls contained a number of natives who "ought not to be debarred from voting".<sup>190</sup> However, he then did not object to

---

<sup>185.</sup> at 722.

<sup>186.</sup> *Electoral Act 1899* (WA).

<sup>187.</sup> Section 7 of the Constitution.

<sup>188.</sup> Section 24.

<sup>189.</sup> The phrase "other than the aboriginal race in any State" was deleted in 1967, with the referendum held pursuant to the *Constitution Alteration (Aboriginals) Act 1967* (Cth).

<sup>190.</sup> *Official Record of the Debates of the Australasian Federal Conventions* (Adelaide 1897) p1020.

their exclusion from the definition when it was pointed out to him that, when it came to dividing the expenses of the Federal Government per capita, omitting South Australian Aborigines would reduce the proportion of money South Australia had to pay.<sup>191</sup>

The Constitution was drafted so as to provide that the qualification of electors of members of the House of Representatives was to be as prescribed by State legislation until the Commonwealth Parliament provided otherwise.<sup>192</sup> Insofar as the Constitution thus denied women within certain States and members of certain minority groups their citizenship right to vote, it was invalid. Furthermore, Aborigines were natural-born citizens of the colonial communities, and then natural-born citizens of Australia (as they met the criteria of the definition of "citizen" discussed in Chapter 1). The Constitution purported to deny them their citizenship right to vote and indeed their very status of members of the Australian community (as "people of the Commonwealth"). Insofar as it did this, those provisions of the Constitution were inconsistent with the fundamental principles of membership and participation deriving from the notion of community (discussed in Chapter 1) and were invalid.

### **"Citizen" in the Constitution**

A thorough examination of the Constitution reveals no reference to the term "Australian citizen"; indeed the word "citizen" is only used in the Constitution in relation to citizens of foreign powers.<sup>193</sup> Instead one finds the phrase "subject of the Queen". However, during the Conventions of the 1890's the term "citizen" was widely used, albeit somewhat loosely.<sup>194</sup> Previous drafts of the Constitution

---

<sup>191</sup> As above.

<sup>192</sup> Section 30 of the Constitution.

<sup>193</sup> Section 44.

<sup>194</sup> See for example, *Official Record of the Australasian Federal Conventions* (Sydney 1891) at 94-95, per Barton; at 546, per Clark; at 317, per Sir Henry Parkes; (Adelaide 1897) Womens' Suffrage Petition presented at 32; at 101, per Higgins; (Melbourne 1898) at 246, per Kingston; at 249, per Symon; at 246-255, general debate.

also made reference to citizens of the Commonwealth. For example, the clause that eventually became Section 117 of the Constitution was originally drafted in terms similar to Article IV Section 2 of the United States Constitution<sup>195</sup>, and the Fourteenth Amendment to the United States Constitution<sup>196</sup>.

During the Conventions the term "citizen" was considered applicable in a State as well as Federal context, and it was thought by most delegates that there would be a dual citizenship whereby a person would be a citizen of a State as well as a citizen of the Commonwealth.

We are not here for unification, but for federation, and a dual citizenship must be recognised as lying at the very basis of this Constitution.<sup>197</sup>

Few delegates understood that citizenship was a national concept; Wise was an exception:

If we are to have federation, the idea that when a man moves from one part of the Commonwealth into another he becomes an absentee, or ceases to be an Australian, is one that must vanish, and we ought, as far as our Constitution will permit us, to do everything to make it vanish quickly. It is the survival of the old idea that there is a distinctive citizenship in a Victorian, and a distinctive citizenship in New South Wales man. That is the idea which I am endeavouring to destroy by supporting the amendment of Tasmania, that Australian citizenship, and that alone, shall be recognised in every part of the Federation. The way to secure that is to provide in the clearest terms, as Tasmania suggests, that no local Parliament can have any authority to, in any way, abridge the citizenship of an Australian.

It was noted at the 1898 Melbourne Convention that there was no definition of "citizen of the Commonwealth" in the Constitution, and accordingly one was proposed by O'Connor:

---

<sup>195.</sup> Article IV Section 2 states that "The citizens of each State shall be entitled to all privileges and immunities of citizens of the several States".

<sup>196.</sup> The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law".

<sup>197.</sup> *Official Record of the Debates of the Australasian Federal Conventions* (Melbourne 1898) at 675, per Symon.

the citizens of each state, and all other persons owing allegiance to the Queen, and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth.<sup>198</sup>

Another definition was later proposed by Dr Quick, who was keen either to insert into the Constitution a definition or to confer on the Federal Parliament the power to define what constituted citizenship. A citizen was defined as:

All persons resident in the Commonwealth, being natural born or naturalised subjects of the Queen, and not under any disability imposed by the Federal Parliament.<sup>199</sup>

However, concerns about the rights of States to regulate their own citizenship brought about the rejection of Dr Quick's proposal.

Neither of the proposed definitions indicated what it meant to be an Australian citizen; they merely identified who was to be an Australian citizen. Ultimately the term "citizen" was abandoned. It was seen to have republican connotations and adoption of the term might alienate Britain. Barton, for example stated:

I must admit, after looking at a standard authority - Stroud's Judicial Dictionary - that I cannot find any definition of citizenship as applied to a British subject. No such term as citizen or citizenship is to be found in the long roll of enactments, so far as I can recollect, that deal with the position of subjects of the United Kingdom, and I do not think we have been in the habit of using that term under our own enactments in any of our colonies... I am inclined to think that the Convention is right in not applying the term 'citizens' to subjects residing in the Commonwealth or in the states, but in leaving them to their ordinary definition as subjects of the Crown.<sup>200</sup>

The word "subject" was seen to express more correctly the constitutional relationship to the Empire. The process by which the phrase "subject of the Queen, resident in Australia" came to be equated to "Australian citizen" by the High Court is considered in Chapter 5.

---

<sup>198</sup> at 673, per O'Connor.

<sup>199</sup> at 1752, per Dr Quick.

<sup>200</sup> at 1764, per Barton.

Even though there was use of the term "citizen" by delegates during the Conventions, attention was not devoted to the substantive meaning of citizenship and to the proposed Australian citizenship. The founders,

regarded themselves as practical men gathered together to draft a constitution which would be acceptable to all colonies and would secure the economic benefits of federation, and they did not see it as part of their task to set out fundamental relations between individuals and governments.<sup>201</sup>

### **Provision in the Constitution for regulation of "Aliens"**

Whilst the term "citizen" was rejected and an imprecise notion of "the people" recognised, the delegates appeared to have little difficulty with the meaning of "alien". No definition of alien was thought necessary. The concept of an alien was inherited by the colonies from British law. As discussed in Chapter 2, it referred to a person born out of the allegiance of the British King/Queen.

Much can be learnt of "citizen" from reference to its opposite, "alien". A power to legislate about aliens is a power to legislate about "non (or not)-citizens".

The Australian colonies had had significant experience with immigration of certain ethnic groups, particularly individuals from Asian countries. The representatives at the Conventions of the 1890's were keen to ensure that restrictive legislation against such persons could continue. In this sense, membership of the Australian community was defined by a process of exclusion. In the various drafts of the Constitution, the power to prohibit or control the influx of aliens (and indeed other immigrants), was expressly given to the Commonwealth Parliament because the introduction of an alien race in considerable numbers into any part of the Commonwealth was seen to be a

---

<sup>201</sup>. Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581 at 582.

danger to the whole of the Commonwealth.<sup>202</sup> As was noted at the Melbourne Convention in 1898,

there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so.<sup>203</sup>

Australians were envisaged as being a white people priding themselves on cultural uniformity rather than diversity.

By way of example, a brief survey of South Australian colonial legislation prior to federation illustrates the background to the Conventions of the 1890's and the drafting of the Constitution. It explains the focus on regulating the entry and activities of aliens rather than on the rights and obligations of members of this new national community. Legislation targeting particular racial groups continued to be enacted during the 1890's. The background is also of importance when one considers the extent to which notions of equality are implicit within the Constitution (discussed in Chapter 9).

### **Colonial (South Australian) regulation of "aliens"**

Immigration from non-European countries was not governed by early general immigration legislation.<sup>204</sup> Specific Acts were passed to deter non-European

---

<sup>202</sup> *Official Record of the Debates of the Australasian Federal Conventions* (Sydney 1891) at 525, per Sir Samuel Griffith.

<sup>203</sup> *Official Record of the Debates of the Australasian Federal Conventions* (Melbourne 1898) at 666, per Sir John Forest.

<sup>204</sup> The earliest South Australian Acts dealing with "aliens" were those which naturalised a number of persons previously "Natives of Germany": see for example 3 Vic No 4 (1839); 5 Vic No 6 (1841); 9 Vic No 12 (1845). An Act of 1860 gave aliens who had been naturalised in Great Britain or in any of the Australasian Colonies certain privileges within South Australia: 23 & 24 Vic No 20 (1860).

The *Aliens Act* 1864 (27 & 28 Vic No 5) (1864) was significant in clarifying the legal status of aliens and naturalised persons. It removed restrictions on the holding of real and personal property (sections 4 and 5); that the Governor might, by way of letters of naturalisation, grant any alien friend residing in South Australia naturalisation if he was of good repute and would take the prescribed oath (subject to conditions, if any, as considered necessary or advisable by the Governor) (section 7); and that any alien woman who married a natural-born or naturalised subject of Her Majesty thereby became

immigration. The South Australian legislation referred to is illustrative of similar legislation enacted in other colonies.

**(a) Chinese Immigration**

In 1854 Chinese immigration to the Australian colonies began, with the gold-rushes in Victoria.<sup>205</sup> In the following years the various colonies, including South Australia, began to legislate to restrict Chinese immigration. In 1857 an Act was passed to impose a charge on Chinese arriving in South Australia in an attempt to check the tide of Chinese immigrants arriving into South Australia and then moving into Victoria.<sup>206</sup> It had been estimated that about 30,000 Chinese intended to travel from South Australia into Victoria that year.<sup>207</sup> This Act was subsequently repealed in 1861.<sup>208</sup>

The *Chinese Immigrants Regulation Act 1881* (SA) again imposed strict regulation upon the numbers of Chinese entitled to immigrate to South Australia.<sup>209</sup> They were seen to be "birds of passage", not colonists, intent only

---

naturalised within the limits of South Australia (section 8). The Act also established the method for obtaining naturalisation and taking the oath of allegiance (sections 9 and 10), and, upon obtaining naturalisation, an alien resident enjoyed "all the rights and capacities which a natural-born subject of Her Majesty can enjoy or transmit within the said Province, save as herein otherwise provided": section 11. Any alien who had obtained letters of naturalisation in any British Colony or Possession and had taken an oath of allegiance to the British Monarch, was entitled to obtain the privileges of naturalisation within South Australia (section 12). Section 19 expressly provided that nothing in the Act in any way altered or effected any laws relating to the Constitution of South Australia or the election of Members of Parliament.

<sup>205</sup>. Quick and Garran *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901) p624.

<sup>206</sup>. 21 Vic No 3 (1857).

<sup>207</sup>. SA, Parl, *Debates*, (11 June 1857) at 270 per the Chief Secretary, moving the second reading of this Bill in the House of Assembly.

<sup>208</sup>. 24 & 25 Vic No 14 (1861).

<sup>209</sup>. No 213 of 1881. The number of "Chinese" [defined as any person of the Chinese race not being a British subject] that a vessel could carry into a South Australian port was restricted, and a poll-tax of 10 pounds had to be paid by the master of a vessel for each Chinese person on board before they were permitted to land. Chinese entering South



upon making money (particularly through finding gold) and then returning to China.<sup>210</sup> Those Chinese who did work, as for example labourers and market gardeners, were seen as a threat to the working classes, especially as they were apparently prepared to work for much lower wages. The Chinese were also alien - their customs often neither understood nor accepted. Their counterparts in America were described by a Member of the South Australian Parliament as living in "horrible dens and infamous homes".<sup>211</sup> Certainly not all persons condemned the Chinese, and they were defended by a minority of people as industrious and useful.<sup>212</sup> Others were simply afraid of them, and sought to insulate themselves.<sup>213</sup> There was also a need to prevent the spread of disease,

---

Australia by means other than sea also had to pay this 10 pounds tax. All Chinese had to be vaccinated or show proof of prior vaccination, before being allowed to land from any vessel.

<sup>210.</sup> See for example discussion recorded in the SA, Parl, *Debates* (11 June 1857) at 271 per the Chief Secretary moving the second reading of the 1857 Bill in the House of Assembly; SA, Parl, *Debates* (14 June 1881) at 86 per the Commissioner of Crown Lands moving the second reading in the House of Assembly of the 1881 Bill and at 114 per Haines.

<sup>211.</sup> SA, Parl, *Debates* (14 June 1881) at 86 per the Commissioner of Crown Lands, Playford.

<sup>212.</sup> SA, Parl, *Debates* (16 June 1881) at 109-110 per Tomkinson of the House of Assembly who opposed the 1881 Bill to restrict Chinese immigration; at 290-293 per Scott of the Legislative Council who opposed the Bill; at 525 per Crozier of the Legislative Council who saw the Chinese as "in many respects a deserving people, being industrious in their habits and very highly civilised".

<sup>213.</sup> Parsons, a Member of the House of Assembly supporting the 1881 Bill, stated on 16 June, 1881:

In supporting the principles of the Bill he would like to say at the outset that so far from underestimating or despising this wonderful nation he had quite the opposite feelings. He admired the wonderful ability of the Chinese ... His first reason for legislating on this subject was that he regarded that there existed what might be called a race antagonism which could not possibly be overcome - a thing not peculiar to the Chinaman and our Western nations ... It might sound strange, perhaps, but the chief reason why he feared Chinese immigration was, that he was afraid of the Chinese as a race, and he was afraid of them chiefly because of their enormous numbers ... : SA, Parl, *Debates* (16 June 1881) at 112.

as apparently some Chinese ships had brought smallpox with them.<sup>214</sup> The Act of 1881 did not, however, apply to Chinese arriving and disembarking in the Northern Territory (then part of the colony of South Australia) as Chinese labour was seen by a majority in Parliament to be necessary for the development of the Northern Territory, given their "suitability" to the tropical climate.<sup>215</sup>

Legislation targeting Chinese immigration was not popular with the British Government as Britain had peaceful relations with the Chinese. In 1877 the colonial secretary declared,

that exceptional legislation, intended to exclude from any part of Her Majesty's dominions the subjects of a State at peace with Her Majesty, is highly objectionable in principle.<sup>216</sup>

There was British concern that restraining Chinese immigration might be contrary to the Treaty of Tien-Tsin and the Convention of Peking of 24 October 1869.<sup>217</sup> However the colonial governments were insistent on their right to pass all such laws as were considered necessary for the good government of the colony. In this sense, there was an early assertion of the right to define the community (then, a colonial community), in defiance of the British Government's wishes. It also

---

<sup>214.</sup> SA, Parl, *Debates* (16 June 1881) at 113 per Parsons of the House of Assembly; at 290 per the Commissioner of Public Works, Ramsay of the Legislative Council. However, others did not see the Chinese in particular as "disease carriers" - see for example Sandover of the Legislative Council:

to set down certain diseases as peculiar to the Chinese and as caused specially by their overcrowding was absurd. No doubt overcrowding was a fruitful source of disease, but it was not peculiar to the Chinese - the lower classes of English, Irish and Scotch did the same: 19 July, 1991 at 294.

<sup>215.</sup> See for example SA, Parl, *Debates* (16 June 1881) at 110 per Tomkinson of the House of Assembly:

It was admitted and proved that the white race could not labour and live in cultivating the productions of tropical climates - that we must look to Eastern labour for developing the resources of our Northern Territory. By such means alone could we hope to derive any return for the heavy outlay incurred on our Northern Territory.

See also Baker of the Legislative Council on 23 August 1881 at 633; Murray of the Legislative Council at 634.

<sup>216.</sup> Lord Carnarvon's Dispatch to Governor Cairns dated 27 March 1877, discussed in Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* p624.

<sup>217.</sup> at 625.

appears that there was a general practice of refusing to naturalise Chinese (although of course some Chinese were naturalised).<sup>218</sup>

At a meeting of representatives of the Australasian Governments held in Sydney in June 1888 it was resolved that uniform Australasian legislation should be adopted for the restriction of Chinese immigration.<sup>219</sup> The following resolutions were adopted:

1. That in the opinion of this Conference the further restriction of Chinese immigration is essential to the welfare of the people of Australasia.
2. That this Conference is of opinion that the desired restriction can best be secured through diplomatic action of the Imperial Government and by uniform Australasian legislation.
3. That this Conference resolves to consider a joint representation to the Imperial Government for the purpose of obtaining the desired diplomatic action.
4. That this Conference is of opinion that the desired Australasian legislation should contain the following provisions:
  - (a) That it shall apply to all Chinese, with specified exceptions.
  - (b) That the restriction should be by limitation of the number of Chinese which any vessel may bring into any Australasian port, to one passenger to every 500 tons of the ship's burthen.
  - (c) That the passage of the Chinese from one colony to another, without the consent of the colony which they enter, be made a misdemeanour.<sup>220</sup>

---

<sup>218</sup> SA, Parl, *Debates* (12 July 1888) - The Treasurer is noted as stating that "we have refused to do so [naturalise Chinese] for years" at page 337. See also for example Angas of the Legislative Council on 10 October 1888 at 1307 where he stated that he certainly did not advocate the naturalising of coloured races.

<sup>219</sup> See preamble to the *Chinese Immigration Restriction Act* (SA), No 439 of 1888.

<sup>220</sup> These resolutions are found in Quick and Garran, *Annotated Constitution of the Commonwealth of Australia* p626.

The *Chinese Immigration Restriction Act 1888* (SA) was duly enacted, with harsh penalties for failure to comply with its requirements imposed.<sup>221</sup>

Anti-Chinese legislation remained in existence during the 1890's, whilst the Constitution was being drafted. Given the widespread support for such legislation it is not surprising that the delegates to the Conventions did not embrace the notions of equality found in the United States Constitution.

### **(b) Indian Immigration**

Immigration from India was also strictly regulated prior to Federation, although in a somewhat more positive framework, because there were seen to be certain economic advantages to the introduction of Indian immigrants. "Coolie labour" was seen by some sections of the South Australian population to be more desirable than Chinese labour:

it was an advantage to introduce the coolies instead of the Chinese, as the coolies could do the work of the Chinese and were not an alien race, of whom they knew but little, but were under British rule.<sup>222</sup>

It was also thought more likely that the Indian labourers would bring their wives with them and settle on the land, becoming permanent settlers.<sup>223</sup>

The *Northern Territory Indian Immigration Act 1879* (SA) was intended to provide for the introduction of "Indian native labour" into the sugar and coffee plantations of the Northern Territory of South Australia and to protect Indian

---

<sup>221.</sup> Whilst the Act did abolish the poll-tax, the penalty for failing to specify the number of Chinese on board a vessel was 100 pounds, whilst the penalty for bringing more than one Chinese passenger for every 500 tons of the registered tonnage of a vessel was set at 500 pounds per Chinese person in excess.

<sup>222.</sup> As above. See also the Minister of Education, King, of the House of Assembly on 3 October 1879 at 1250.

<sup>223.</sup> See for example SA, Parl, *Debates* (16 October 1879) at 1467 per Hay and per the Chief Secretary, both of the Legislative Council.

immigrant labourers.<sup>224</sup> It was modelled on Acts of the Indian Parliament already in existence which governed Indian labour in Mauritius and the West India Islands.<sup>225</sup> The Indian Government would not permit Indians to emigrate unless certain conditions were guaranteed, and this Act therefore had to be approved by the Governor-General of India. It was intended that those employers seeking labour paid for the importation costs of the Indian labour. However, it appears that this Act never received Royal Assent;<sup>226</sup> the Indian Government was not wholly satisfied with the Bill and therefore would not allow Indians to emigrate to Australian colonies without certain amendments occurring.<sup>227</sup> The *Northern Territory Indian Immigration Act 1882* (SA) replaced the 1879 Act, and provided for a much more comprehensive regulation of Indian immigration - it contained 163 sections. An Indian Native Immigration Department was created, and its officers given wide powers of inspection and investigation. Employers were entitled to apply for "allotments of immigrants" of each nationality required, those immigrants being indentured for the term of five years. Indentured workers were subject to strict controls. For example, section 77 of that Act provided:

If any immigrant under indenture shall, without leave, absent himself for seven days from the plantation, he shall be taken to be a deserter from such plantation; and the manager shall thereupon proceed to lay an information or make a complaint against him in

---

<sup>224.</sup> Provision was made for the appointment of Emigration Agents at Calcutta, Madras and Bombay, and a "Protector of Immigrants" at every port at which the disembarkation in South Australia of Indian immigrants was authorised. Before being allowed to enter South Australia, male Indians had to be contracted to work for a specified employer. The Act also dealt with the entering into and termination of contracts of employment, wages and certain conditions, and the health of Indian immigrants.

<sup>225.</sup> SA, Parl, *Debates* (16 October 1879) at 1464 per the Chief Secretary, Morgan, moving the second reading of this Bill in the Legislative Council.

<sup>226.</sup> The preamble to Act No 240 of 1882 stated that Her Majesty "has not signified her pleasure with respect to" the *Northern Territory Indian Immigration Act 1879* (SA); hence, the *Northern Territory Indian Immigration Act 1882* (SA) was enacted "in lieu of the provisions contained in" the 1879 Act.

<sup>227.</sup> See discussion concerning the 1879 Bill in SA, Parl, *Debates* (19 July 1882) at 402 per the Commissioner of Public Works, Ramsay, moving the second reading of the 1882 Bill in the Legislative Council; at 69 per the Minister of Education, Parsons, moving the second reading of the 1882 Bill in the House of Assembly.

that behalf before any Justice of the Peace, and to apply for a warrant for his apprehension; and such warrants shall be granted free of cost .....

Desertion from a plantation was an offence, and workers were liable to be sentenced to imprisonment. If leaving the confines of a plantation, an immigrant had to carry a certificate of exemption from labour or a pass from his/her employer; failure to produce such a document resulted in an immigrant being taken into custody. The Act also regulated, inter alia, the hours of work and payment of wages, housing and hospitals on plantations, and in this manner provided some protection for workers.

Again, during the period of the drafting of the Constitution, anti-Indian legislation remained in existence with wide-spread support. The drafters of the Constitution had little desire to enact comprehensive provisions about the rights of individuals generally, or of citizens; they were concerned to ensure the preservation of these restrictions after Federation.

### **(c) Coloured Immigration generally**

Indeed, there were moves towards the end of the century to extend discriminatory legislation to all persons of colour who sought to emigrate to the colonies. Although the 1890's saw an intensification of the movement towards national unity, it was a racially exclusive unity that was sought.

A Conference of Premiers held in March 1896 resolved to extend without delay the provisions of the Chinese Restriction Acts to all coloured races, including Indians and Japanese.<sup>228</sup> Resulting from this Conference was an Act of 1896 to restrict the immigration of all persons of coloured race; however, it did not receive Royal Assent.<sup>229</sup> Those supporting the Bill argued that "admitting inferior races ... might bring down the standard of living and comfort", and that "the right to exclude races which might deteriorate the population had long been

---

<sup>228.</sup> SA, Parl, *Debates* (1 December 1896) at 422 per the Chief Secretary moving the second reading speech in the Legislative Council.

<sup>229.</sup> No 672 of 1896.

exercised in Australia and elsewhere".<sup>230</sup> The South Australian Parliamentary Debates over this Bill indicate that questions arose concerning the right of the colonies to restrict / exclude all coloured persons:

If we came to the conclusion that it was better to shut those alien races out ... Could we legally and properly and constitutionally do so, seeing that we must necessarily shut out a large number of Her Majesty's subjects, who were as much the subjects of the realm of England as we ourselves? The reply to that was that we had already started on a course of legislation which committed us to it ... If they could exclude a man because he was infirm, deaf, or dumb, and likely to be a charge on the State, they could exclude a man because he was black, and likely to be an undesirable subject.<sup>231</sup>

There was also recognition of a desire for Australian social unity:

The Bill was a national question ... it would enable the people of Australia to say whether the united Australia was to consist of one people, with the same religion, traditions, and social position, or of many nations having nothing in common, and who would be a danger to the future of the colonies.<sup>232</sup>

Not all persons supported this Bill; some were vehemently opposed to it and its underlying philosophy:

Such distinctions as this Bill drew were foreign to the fundamental principles of English law. All men, whatever their creed, colour, or nationality, had equal rights as men.<sup>233</sup>

The Imperial Government sympathised with the desire to "prevent the influx of people who were alien in civilisation, in religion, and in customs, and who

---

<sup>230.</sup> SA, Parl, *Debates* (8 December 1896) at 423 per the Chief Secretary in moving the second reading in the Legislative Council.

<sup>231.</sup> SA, Parl, *Debates* (8 December 1896) at 448 per Gordon of the Legislative Council, supporting the Bill.

<sup>232.</sup> at 448 per Adams of the Legislative Council.

<sup>233.</sup> SA, Parl, *Debates* (3 November 1896) at 660 per Hague of the House of Assembly, opposing the Bill. Hague implored his colleagues to vote impartially, looking at the issue as "citizens of the world, and not merely as Australians". See also for example Caldwell of the House of Assembly on 5 November 1896 at 691.

interfered with the legitimate rights of the existing labouring population";<sup>234</sup> However, it was the "tradition of the Empire" not to make distinctions of race or colour; and the Imperial Government therefore urged the colonies to base their legislation on the objectionable characteristics of the immigrants.

### **A Constitution for all Australians?**

On its face, the Constitution of 1901 was a document for all members of the new national Australian community. In reality it represented the interests of a narrow group within an increasingly diverse community. Furthermore, those groups in the Australian community whose interests had been represented in the process leading up to the enactment of the Constitution in the main considered themselves to be "British subjects of Her Majesty Queen Victoria of the United Kingdom", resident in Australia, in 1901. There was little sense as yet of a legally recognised and distinct Australian citizenship.

---

<sup>234</sup> This was the view expressed in 1897 to the Australian Premiers who were present at the Jubilee celebrations in London: Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* p626.



## **CHAPTER 4**

### **Recognition of a Distinct Australian People**

The colonies united into the Commonwealth of Australia in 1901, thereby creating a national Australian identity and an Australian community. There existed, from 1901, common law rules of Australian citizenship. Indeed, common law rules of colonial citizenship were in existence prior to Federation. However, widespread failure to understand that citizenship is a common law concept prevented the courts from acknowledging the existence of Australian citizenship and from exploring the rights which Australians possess by virtue of their citizenship. Instead, of significance was the concept of "British subject" and the absence of a statutory notion of Australian citizenship.

#### **Federation**

Federation generated renewed loyalty to Britain as well as the beginnings of a jubilant nationalist pride. That both sentiments could co-exist may seem an antinomy; certainly in the long run they were to prove to be incompatible sentiments. On 12 March 1901, the news of the proclamation of His Majesty King Edward VII as Australia's Monarch by the first Federal Government was reported in the London *Morning Post*. The author, Alfred Deakin, was at the time Australia's first Attorney-General.<sup>235</sup> He wrote:

It is almost needless to say that not a single antagonistic voice was raised anywhere or on any grounds to mar the unanimity of Australia's greeting to her King... it is already manifest that his Majesty King Edward will have nowhere among his dominions a more loyal people than those of the Southern Seas.

It was not always so. Some fourteen years ago there was a distinctly Separatist movement in both Sydney and Brisbane, which for a time caused considerable alarm. In Sydney an ultra-democratic weekly paper, the *Bulletin*, then at the height of its

---

<sup>235</sup> See Introduction by La Nauze to Deakin, *Federated Australia* (Melbourne University Press, Victoria 1968) at viii. LaNauze details how the articles appeared regularly from 1901 until 1914, from a "special correspondent" who at the time was anonymous.

influence, had boldly declared for the future Australian Republic, while the popular *Sydney Daily Telegraph*, though with more circumspection, made the preaching of "Nationalism" its chief end...<sup>236</sup>

However Deakin went on to note that the fledgling Separatist movement was short-lived.

The *Sydney Daily Telegraph* changed its editorial staff and at the same time its attitude. The South African War rallied the whole continent to the Mother Country, and at the same time to the Crown. The journal and the Labour parties in the States, which adopted the pro-Boer view lost the greater part of their influence in consequence, and they have been swept into the background... We are now able to see that the supposed agitation for independence, though noisy, was of the most superficial character and of the narrowest dimensions.<sup>237</sup>

The form of national flag adopted for Australia reinforced ties to Britain. A national flag competition was held and 30,000 entries were displayed in the Exhibition Building in Melbourne in September 1901.<sup>238</sup> The version adopted did draw some criticism, for being a "bastard British flag". Sydney's "Bulletin" newspaper commented as follows on 28 September, 1901:

That bastard flag is a true symbol of the bastard state of Australian opinion, still in large part biased by British tradition, British customs, still lacking many years to the sufficiency of manhood which will determine a path of its own. The natural feeling of resentment at the indignity is not shared by the multitude. Probably seven in ten Australians or British-Australians are conscious of no offence in the monstrosity that has been foisted upon them for a symbol.<sup>239</sup>

Similar criticisms of the form of the Australian flag remain voiced in the 1990's, although there also remain its staunch defenders.

---

<sup>236.</sup> Deakin, *Federated Australia* p33.

<sup>237.</sup> at 34.

<sup>238.</sup> Crowley, *Modern Australia in Documents Volume 1, 1901-1939* (Wren Publishing Pty Ltd, Melbourne 1973) p18.

<sup>239.</sup> Excerpt from the "Bulletin", Sydney, 28 September 1901, quoted in Crowley, *Modern Australia in Documents Volume 1, 1901-1939* p19.

### Exclusion and denial of citizenship rights

This new country (or colony) <sup>240</sup> entered the twentieth century with the first Commonwealth Parliament reinforcing a commitment to the "White Australia" policy. Just before the first Commonwealth Parliament assembled in Melbourne, the Melbourne "Argus" commented:

It is good for the world that a White Empire should grow up in these Southern-Asian seas, as a counter-balance to the great Asiatic empires of China and Japan, with all their mysterious possibilities. The coloured races were fast creeping down the Malayan peninsula and isles, and it is well that Australia is occupied beforehand by a united people, who will maintain for Europe its civilisation here.<sup>241</sup>

Indeed, Deakin noted in 1901 that,

The one matter on which the Commonwealth is united is in the determination to maintain a "White Australia". There at least is one article of the national faith already accepted as the first principle in every political programme.<sup>242</sup>

Among the first heated topics for Parliamentary debate were two Acts intended to implement the "White Australia" policy, namely the *Pacific Island Labourers Act* 1901 (Cth) and the *Immigration Restriction Act* 1901 (Cth).

The *Pacific Island Labourers Act* 1901 provided that no Pacific Islander should enter Australia on or after 31 March 1904, and that prior to that date Pacific Islanders required a licence to enter Australia.<sup>243</sup> It was intended to phase out Kanaka labour in the Queensland sugar industry. Its provisions were so harsh

---

<sup>240.</sup> Note that Australia entered the twentieth century as a colony, not an independent nation; see *China Ocean Shipping Co v South Australia* (1979) 145 CLR 172 at 182-183, per Barwick CJ; at 211, per Stephen J; however, see also at 236, per Murphy J (contra). Justice Murphy considered that, at 1901, Australia became an independent nation. However, his views were not accepted by a majority of the High Court.

<sup>241.</sup> Excerpt from "Argus", Melbourne, 9 May 1901, quoted in Crowley, *Modern Australia in Documents Volume 1, 1901-1930* p6.

<sup>242.</sup> Deakin, *Federated Australia* p77.

<sup>243.</sup> *Pacific Island Labourers Act* 1901 (Cth) ss 3, 4.

that, in 1906, it was amended to allow certificates of exemption to be granted by the relevant Minister to those who had married in Australia, were elderly or infirm, who held freehold land or who had resided here for twenty years or more.<sup>244</sup>

The *Immigration Restriction Act* 1901 was passed to regulate the immigration of non-whites generally. The debate generated in Parliament was not over whether there should be restriction; it was simply over the manner of restriction - specific exclusion of non-whites, on the one hand, or implementation of the less overtly racist "dictation test". Those advocating adoption of the dictation test prevailed. The Act prohibited the immigration into the Commonwealth of any person who, when asked to do so by an immigration officer, failed to write out at dictation and sign in the presence of the immigration officer a passage of fifty words in length in a European language directed by the officer.<sup>245</sup> Whilst on its face this test did not discriminate on the basis of race, as a matter of practice it was used to exclude Asians and other coloured persons ("form v substance"). This Act also prohibited the immigration of indentured manual labourers. These provisions were so harsh that they had to be modified in 1905, when the system was relaxed to allow the Minister to approve coloured immigration in certain circumstances.<sup>246</sup>

Women fared better than non-whites under the new Commonwealth Government. Western Australia had joined ranks with South Australia and had given women the vote in 1899.<sup>247</sup> In 1902 an Act of the Commonwealth was passed to provide for a uniform federal franchise. Both men and women of the age of twenty-one or above were given the right to vote as long as they had lived in Australia for

---

<sup>244.</sup> *Pacific Island Labourers Act* 1906 (Cth).

<sup>245.</sup> *Immigration Restriction Act* 1901 (Cth) s 3(a).

<sup>246.</sup> *Immigration Restriction Amendment Act* 1905 (Cth).

<sup>247.</sup> *Electoral Act* 1899 (WA).

six months continuously, were natural born or naturalised subjects of the King and became listed on an Electoral Roll.<sup>248</sup>

Following the example of the Commonwealth, women received the right to vote in New South Wales in 1902, in Tasmania in 1903, in Queensland in 1905, and in Victoria in 1908.<sup>249</sup> However, women did not receive the right to sit in Parliament until much later in many States. It was not until 1923 that Victoria permitted women to run as candidates for the Victorian Legislative Assembly.<sup>250</sup> [Indeed, as recently as 1959, an action was brought seeking declarations that, under the South Australian Constitution Act 1934 and by law, women could not be elected as members of the South Australian Legislative Council: *R v Hutchins ex parte Chapman and Cockington*.<sup>251</sup> The Full Court of the South Australian Supreme Court held that it had no jurisdiction to make such an order against a Returning Officer.]

Despite the electoral advances made by women in the new country (which can with hindsight be seen as only the removal of unlawful restrictions, rather than the extension of the franchise), the Commonwealth Act of 1902 also provided that "no Aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under Section 41 of the Constitution".<sup>252</sup> They were thus unable to enrol under the Commonwealth Act unless they were entitled to vote for the more numerous House of the Parliament of a State. Severe electoral

---

<sup>248.</sup> *Commonwealth Franchise Act* 1902 (Cth) s 3.

<sup>249.</sup> See the *Women's Franchise Act* 1902 (NSW), the *Constitution Amendment Act* 1903 (Tas), the *Elections Act Amendment Act* 1905 (Qld) and the *Adult Suffrage Act* 1908 (Vic) [which was not proclaimed until 1 March 1909].

<sup>250.</sup> Women became entitled to become candidates for the Legislative Assembly pursuant to the provisions of the *Parliamentary Elections (Women Candidates) Act* 1923 (Vic).

<sup>251.</sup> [1959] SASR 189. Two women had been nominated as candidates for election to the Legislative Council, and an application was made for mandamus directing the Returning Officer to reject their nomination papers.

<sup>252.</sup> *Commonwealth Franchise Act* 1902 (Cth) s 4.

restrictions were imposed on Aborigines by various State Acts. Indeed, Aborigines only acquired the right to enrol to vote in Queensland in 1965.<sup>253</sup> The denial of Aborigines' right to vote by both the Commonwealth and the States was unlawful, as it denied to them their fundamental right to participate in the governance of Australia (that right extending to both the federal and State spheres, as is discussed further in Chapter 10).

In the early years after Federation, as had occurred during the 1890's, analysis of the meaning of "an Australian" often arose in a context of exclusion. In 1907 a case was brought before the High Court to determine whether a Chinese man, Ah Sheung, who had failed the dictation test, was a prohibited immigrant within the meaning of the Immigration Restrictions Acts 1901-1905.<sup>254</sup> Evidence established that he had been naturalised in Victoria in May 1883, and had returned to China on previous occasions and had been let into Victoria again. The proceedings were then abandoned.<sup>255</sup> However, Griffith CJ wrote a short judgment for the Court, holding that "the term "immigration" does not extend to the case of Australians - to use for the moment a neutral word - who are merely absent from Australia on a visit *anino revertendi*".<sup>256</sup> Although he referred to "Australians", he also stated:

We are not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality...<sup>257</sup>

---

<sup>253.</sup> For a further discussion of State restrictions on the franchise in relation to Aborigines, see Brooks, "A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise" (1993) 12(2) *Uni Tas LJ* 208 at 222-223; *Laws of Australia Volume 1 - Aborigines* (Law Book Co Ltd, North Ryde, Looseleaf Service) at Chapter 1.1 (6) paragraph [24].

<sup>254.</sup> *Commonwealth v Ah Sheung* (1907) 4 CLR 949.

<sup>255.</sup> At first instance, Cusson J had found that the *Immigration Restriction Acts* did not apply to Ah Sheung, and had therefore ordered his release. Subsequently a prosecution brought against Ah Sheung was dismissed. The two matters went on appeal to the High Court; it was this appeal which was abandoned by the Commonwealth.

<sup>256.</sup> *Ah Sheung* at 951.

<sup>257.</sup> As above.

### Separate State communities integrate

As the evidence in *Ah Sheung* illustrates, prior to Federation the colonies had granted naturalisation papers to regulate membership of colonial communities. The power to legislate in respect of the naturalisation of aliens was conferred upon colonies in 1870 by the British Parliament.<sup>258</sup> Letters of naturalisation granted by the Governor of a colony were only operative within that colony. Immediately after Federation questions arose as to whether naturalisation for the purposes of one State became operative in other States. The State Governments were reluctant to abandon their powers of regulating entry into their territories. Opinions of the early Commonwealth Attorneys-General discussed the issue in terms of whether the Commonwealth had legislated to extend the benefits of naturalisation throughout the Commonwealth, rather than in terms of a new and unified national community comprised of peoples from the former colonies.<sup>259</sup>

The difficulty was resolved with the enactment by the Commonwealth of the Naturalisation Act 1903, pursuant to Section 51(xix) of the Constitution.<sup>260</sup> It provided that prior naturalisation in a State or colony was recognised as naturalisation under the Act,<sup>261</sup> and also established a process whereby a person who had resided in the Commonwealth for two years immediately prior to his/her application, or who had obtained in the United Kingdom a certificate or letters of naturalisation, could apply to the Governor-General for a certificate of naturalisation.<sup>262</sup> Naturalisation provided that the person was then entitled "to all political and other rights powers and privileges and ... subject to all

---

<sup>258.</sup> *Naturalisation Act 1870 (UK) s 16.*

<sup>259.</sup> See for example the Opinion of 13 March 1903, contained in *Opinions of the Attorneys-General of the Commonwealth of Australia, Volume 1 (1901-1914)* (Australian Government Publishing Service, Canberra 1981) p169.

<sup>260.</sup> Section 51(xix) gives the Commonwealth power to legislate with respect to "naturalisation and aliens".

<sup>261.</sup> *Naturalisation Act 1903 (Cth) s4.*

<sup>262.</sup> Section 5.

obligations to which a natural-born British subject is entitled or subject in the Commonwealth."<sup>263</sup> However, whilst the Act created a uniform status within all colonies, such status was not available to all. "Native" persons from Asia, Africa and the Islands of the Pacific (excluding New Zealand) were barred from applying for a certificate of naturalisation.<sup>264</sup> This Act also provided that the right to issue certificates of naturalisation vested exclusively in the Government of the Commonwealth; States could therefore no longer issue certificates or letters of naturalisation.<sup>265</sup>

Although denied the right to naturalise persons after the Naturalisation Act 1903 (Cth) came into operation, the States persisted for some years after Federation with attempts to regulate membership of State communities. The High Court considered the ability of a State to prevent a person convicted of an offence from entering from another State in *R v Smithers ex parte Benson*.<sup>266</sup> Benson, a British subject who was born in Victoria and resided there most of his life, was sentenced to imprisonment for twelve months in 1910. Upon release, he went to New South Wales seeking employment. He was there convicted of having breached section 3 of the Influx of Criminals Prevention Act 1903 (NSW).<sup>267</sup> The High Court held this conviction to be bad in law. New South Wales had urged the High Court to find that, after Federation, the States retained a general

---

<sup>263</sup> Section 8. This section also contained a proviso:

Provided that where by any provision of the Constitution or of any Act or State Constitution or Act a distinction is made between the rights powers or privileges of natural-born British subjects and those of persons naturalised in the Commonwealth or in a State, the rights powers and privileges conferred by this section shall for the purposes of that provision be only those (if any) to which persons so naturalised are therein expressed to be entitled.

<sup>264</sup> Section 5.

<sup>265</sup> Section 10.

<sup>266</sup> *R v Smithers; ex parte Benson* (1912) 16 CLR 99.

<sup>267</sup> That Act made it an offence for a person who had been convicted of an offence for which he/she was liable to suffer death or be imprisoned for one year or longer, to enter New South Wales within three years of having finished such imprisonment.



power for the regulation of internal affairs (in the United States referred to as the "police power"). However, Griffith CJ stated:

The so-called 'police power' of the Colonies before the establishment of the Commonwealth extended to the exclusion of any person whom the Colonial Parliament might think an undesirable immigrant. It is clear that the continuance of such a power in its full extent after the federation is inconsistent with the elementary notion of a Commonwealth ... the former power of the States to exclude any person whom they might think undesirable inhabitants is cut down to some extent by the mere fact of federation, entirely irrespective of the provisions of secs. 92 and 117.

The extent to which it is cut down, and the line of demarcation which should be held to separate a justifiable from an unjustifiable exclusion, may be hard to determine, and yet it may be possible to say on which side of it a particular case lies. The basis of the discrimination, so far as it does not depend upon positive enactment, must be the necessity of the continuance of the power ... to make laws 'designed for the promotion of public order, safety, or morals'.<sup>268</sup>

Griffith CJ held that the law in question could not be justified on the ground of necessity. Barton J was of the opinion that,

the creation of a federal union with one government and one legislature in respect of national affairs assures to every free citizen the right of access to the institutions, and of due participation in the activities of the nation.<sup>269</sup>

Justice Barton agreed with Griffith CJ that the residue of the police power left to the States was "clearly limited by the existence of some necessity for the defensive precaution".<sup>270</sup> The legislation in question did not meet this requirement.

Justices Isaacs and Higgins, in separate judgments, decided the question on the basis of the freedom of intercourse guaranteed by Section 92 of the Constitution. Justice Isaacs was firmly of the view that State borders could not in themselves

---

<sup>268.</sup> *ex parte Benson* at 108-109.

<sup>269.</sup> at 109-110.

<sup>270.</sup> at 110.

be regarded as possible barriers to intercourse between Australians;<sup>271</sup> Higgins J quoted with approval a passage from an American case affirming that all citizens of the United States, as members of the same community, must have the right to pass and repass through every part of it without interruption.<sup>272</sup> He saw this principle as being applicable to movement between the States of Australia.

In addition to curtailing the powers sought by the States, the decision in *ex parte Benson* seemed to affirm that membership of the national community was accompanied by certain rights. Soon after the decision was handed down, the Commonwealth Attorney-General noted in an Opinion of 13 February 1913 that,

The establishment of a Federal Commonwealth and the consequential creation of a Federal citizenship is to my mind inconsistent with the idea of the existence of any power of exclusion (unless of a very limited nature) on the part of the States. Section 92 of the Constitution appears to have been framed to effectuate and protect Federal citizenship. Federal citizenship appears to me to imply a right of access to Federal Courts, offices, and other institutions, and also a right of access to any part of the Federal Commonwealth for Federal purposes. The existence of State powers of exclusion on the ground of communicable disease does not strike me as being inconsistent with the exercise of Federal rights, and there may possibly be other cases where a temporary interference with Federal rights by a State might be justified on the grounds of public protection.<sup>273</sup>

This was an early recognition of the Australian citizen's right to participate in the governance of the Australian community, framed in terms of access to the institutions of government.

Whilst the term "Australian citizen" appears in this Opinion of 1913, Australian courts did not recognise a legally distinct Australian citizenship until 1948. "Citizen" as a term was coming into usage as a matter of everyday language.

---

<sup>271.</sup> at 117.

<sup>272.</sup> at 119. Higgins J quoted the words of Tanney CJ (7 How 283 at 492) approved by the Supreme Court in *Crandwell v State of Nevada* 6 Wall 35 at 49.

<sup>273.</sup> *Opinions of the Attorneys-General of the Commonwealth of Australia, Volume 1: 1901-14* p631.

However the courts and Parliaments lagged far behind in recognising the creation of a new, national and distinct community. There was a continuing failure to recognise that Australian citizenship is a common law concept and it therefore did not matter that there was no statutory concept of citizenship in existence at the time.

The trend towards the elevation of the Commonwealth as the body within the Federation which regulated membership of the Australian community continued. In January 1915 the Governor of New South Wales attempted to insist on the right of his State to resume the issue of passports after the First World War was over. The Commonwealth took the view that a passport, as a document "issued by a government for identifying a citizen and authenticating his right to protection when in a foreign country", was appropriately issued by the national government alone. Section 51(xxix), the external affairs power, gave the Commonwealth the ability to regulate the issue of passports accordingly.<sup>274</sup> Any attempt by a State to legislate inconsistently on the topic would have been rendered invalid by operation of Section 109 of the Constitution.

Conflicts such as these, between the States on the one hand attempting to protect their rights or areas of concern and the Commonwealth, on the other hand, extending the reach of its regulation when it considered matters to be of national concern, continued over the course of this century and remain all too familiar in the 1990's. However, as is discussed later, these constitutional struggles have begun to be replaced by a focus on the individual within the Australian community, with the citizen and Australian citizenship becoming concepts fundamental to the High Court's method of constitutional analysis.

---

<sup>274</sup>. *Opinions of the Attorneys-General of the Commonwealth, Volume 2: 1914-23* (Australian Government Publishing Service, Canberra 1988) p59-60.

### Membership of the community of "British subjects"

In the first two decades after Federation, the breaking down of a sense of disparate State communities and the development of an integrated national Australian community was accompanied by the development of a common community with a common status within the British Empire. In one sense the movements were complementary - a trend towards unification was occurring at both the international and national levels. However, the trend towards unification at the national level in countries, including Australia, generated nationalist sentiments which were to lead ultimately to the disintegration of the British Empire.

Financial / economic pressures lead to certain measures which marked a growing Australian independence from Britain. In 1910, for example, Commonwealth paper currency came into existence in the form of notes issued by the Federal Treasury. Prior to this, British currency and banknotes issued by private banks had been used.<sup>275</sup> A detailed analysis of these developments is not within the scope of my thesis. However, at a personal level the ties with Britain remained very strong. Membership of the British Empire was still deemed to be of fundamental importance by Dominion Governments. It was decided at the Premiers' Conference of February 1905 that 24 May, the birthday of the late Queen Victoria, should become a public holiday known as "Empire Day". The first "Empire Day" was considered a "festival unique in the history of the world", dedicated to "the great Empire which binds together in an Imperial brotherhood about one-fourth of the human race".<sup>276</sup>

Whilst the *Naturalisation Act* 1903 (Cth) created a uniform Australian naturalisation procedure and removed doubts about the status of persons

---

<sup>275.</sup> The first Commonwealth note issue coincided with a heavy tax being imposed on all bank notes issued or re-issued by any bank, in order to phase them out: *Bank Notes Tax Act* 1910 (Cth).

<sup>276.</sup> The Sydney "Daily Telegraph" of 24 May 1905, quoted in Crowley, *Modern Australia in Documents Volume 1, 1901-1939* p74.

naturalised by colonial Governments, the status of British subject remained paramount. A person born anywhere in the British dominions was considered to be a natural-born subject of the British Monarch, as was any person born abroad whose father or paternal grandfather was born in the British Dominions.<sup>277</sup>

Difficulties arising out of local naturalisations were acknowledged at Imperial Conferences.<sup>278</sup> There was also, throughout the British Empire, an increasing desire on the part of self-governing Dominions to grant certificates of Imperial naturalisation.<sup>279</sup> In 1914 the British Nationality and Status of Aliens Act 1914 (UK) was enacted. The Government of any British Possession was given the same power to grant a certificate of naturalisation as was given to the British Secretary of State.<sup>280</sup> In relation to those British Possessions other than British India and the Dominions, this power was exercised by the Governor and subject to the approval of the Secretary of State. The self-governing Dominions (Canada, Australia including Papua and Norfolk Island, New Zealand, the Union of South Africa and Newfoundland) were given power to confer naturalisation which conferred British nationality throughout the Empire if the Dominion legislatures chose to adopt the provisions of Part II of the Act.<sup>281</sup> The *British Nationality*

---

<sup>277.</sup> See footnote 92.

<sup>278.</sup> In this sense "local" means naturalisation by a colonial national government, as opposed to naturalisation by the British government.

<sup>279.</sup> The term "self-governing Dominions" was adopted at the Colonial Conference of 1907; the phrase obtained legal recognition in certain United Kingdom Acts in 1911. The term came to be shortened, to "Dominions": see Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, Oxford, 4th ed 1949) p22. The term "Dominion" was never precisely defined; on 14 December 1914, Lloyd George addressed the British House of Commons and stated, in the context of granting Dominion Status to the Irish Free State,

what does Dominion status mean? It is difficult and dangerous to give a definition ... That is not the way of the British constitution. We realise the danger of rigidity and the danger of limiting our constitution by too many finalities...

reported in Keith, *Speeches and Documents on the British Dominions 1918-1931* (Oxford University Press, Oxford 1932) p84.

<sup>280.</sup> Section 8.

<sup>281.</sup> Section 9.

*and Status of Aliens Act* also contained general provisions which were to be of universal application throughout the Empire concerning the status of married women and children, the loss of British nationality by foreign naturalisation, declaration of alienage, and the status of aliens.

Enabling the Australian Parliament to make provision for naturalization was a significant step insofar as it placed responsibility for defining membership of the Australian community now with the Australian Government and Parliament. An independent community must be able to define itself and its membership. However, although these advances were made, the relationship of members within that community to the State and to each other was not examined or altered. The practice of defining a subject by reference to his/her allegiance to the British Monarch was maintained.<sup>282</sup>

Parts I, II and III of the *British Nationality and Status of Aliens Act* were reproduced in the *Nationality Act 1920* (Cth). Other Dominions also enacted similar legislation. It was intended that there be a common code throughout the British Commonwealth. Maintenance of it was dependent upon all parties reproducing amendments (assuming them indeed to be applicable), and this was to cause difficulties. In retrospect, it can be seen that the commonality of the code began to break down almost as soon as it was achieved, with for example the passing of the *Canadian Nationals Act* in 1921 and the Irish Free State's adoption in 1922 of a Constitution which included criteria for Irish citizenship.<sup>283</sup>

There were other problems with this Code. It ignored persons who were in substance members of a national community but who were not British subjects. Further, in practice the common status "did not connote outside the United

---

<sup>282</sup> See for example section 1(1) which deems certain persons to be natural-born British subjects. There is reference to persons "born within His Majesty's dominions and allegiance".

<sup>283</sup> Brazil, "Australian Nationality and Immigration" in Ryan (ed), *International Law in Australia* (Law Book Co Limited, Sydney, 2nd ed 1984) 210 at 214-215.

Kingdom any substantial equality in relation to, in particular, the right to enter or settle in any particular part of British territory".<sup>284</sup> For example, Australian immigration officials were reluctant to admit Indians because they were coloured, despite their status as British subjects. Yet another problem was the fact that insistence on the common status made it difficult to define who was (say) "an Australian" or "a Canadian" for the purposes of bilateral treaties.<sup>285</sup> Most importantly, it has been said that the most serious defect of the scheme was that it "neither created a real unity of nationality throughout the Commonwealth nor met the needs of national self-awareness in its several parts".<sup>286</sup>

Pursuant to section 6(1)(a) of the *Nationality Act 1920* (Cth), all Aborigines and Torres Strait Islanders born after 1 January 1921 became natural-born British subjects. This legislation went part-way towards rectification of the unlawful denial of Aborigines' citizenship rights and citizenship status.

### **Developments prior to 1948**

Australia's gradual breaking of ties with Britain in the years between the two World Wars occurred in both the political and legal spheres. An examination of the constitutional relations between Britain, the Dominions and other colonies of the British Empire had been postponed during the war years of the First World War.<sup>287</sup> However, the role played by the Dominions during the war "completely revolutionised" their position in the Empire.<sup>288</sup> Recognition of membership of

---

<sup>284.</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p85.

<sup>285.</sup> p86.

<sup>286.</sup> p85.

<sup>287.</sup> The Imperial War Conference of 1917 recommended that a special Imperial Conference be summoned as soon as possible after the war, to consider the constituent relations of the component parts of the Empire: Keith, *Speeches and Documents on the British Dominions 1918-1931* p65.

<sup>288.</sup> Lloyd George, in a speech to the House of Commons on 14 December 1914. Keith, *Speeches and Documents on the British Dominions 1918-1931* p85.

a particular national community was emerging as a major issue. Without examining the phenomenon in any detail, it is noted that the growth of an Australian identity was accelerated by the experiences of Australians at war. For example, Anzac Day was quickly seized upon as a symbol of the birth of a nation. Australia's oldest Roman Catholic newspaper wrote, in April 1916:

[t]he price of nationhood must be paid in blood and tears ... Before the Anzacs astonished the watching nations, our national sentiment was of a flabby and sprawling character. We were Australian in name, and we had a flag, but we had been taught by our politicians not to trust ourselves - we were constantly admonished by our daily journals to remember that we were nothing better than a joint in the tail of a great Empire ... Anzac Day has changed all that. The Australian flag has been brought from the garret and has been hoisted on a lofty tower in the full sight of its own people. No matter how the war may end - and it can only end one way - we are at last a nation, with one heart, one soul, and one thrilling aspiration.<sup>289</sup>

The fragmentation of the British Empire (which was increasingly being termed British Commonwealth), and the emergence of Australia (amongst other countries) as an individual nation, is evidenced by an examination of the resolutions of the international conferences of the members countries in the decades between the two World Wars.

In 1918 an Imperial War Conference was held in London; all parts of the Empire / Commonwealth were represented. It was resolved that,

[i]t is an inherent function of the Governments of the several communities of the British Commonwealth, including India, that each should enjoy complete control of the composition of its own population by means of restriction on immigration from any of the other communities.<sup>290</sup>

As with the ability to naturalize, possession of the ability to restrict immigration was fundamental to the process whereby the Australian community, through the

---

<sup>289</sup> The "Freeman's Journal", Sydney, 27 April 1916, quoted in Crowley, *Modern Australia in Documents Volume 1, 1901-1939* p255.

<sup>290</sup> Keith, *Speeches and Documents on the British Dominions 1918-1931* p9.



organs of the Australian Government and Parliament, gained the right to self-definition.

At the Imperial Conferences of 1926 and 1930, the British and Dominion Governments began to examine seriously the constitutional relations of the components of the Empire / Commonwealth.<sup>291</sup> A Committee chaired by Lord Balfour was appointed to report to the 1926 Conference; its report defined the position and mutual relations of Great Britain and the Dominions as,

autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.<sup>292</sup>

However, the sentiment expressed was perhaps more of an ideal than a realistic definition; indeed, the Balfour Committee recognised that in practice substantial inequalities existed.<sup>293</sup> For example, the King had power to disallow certain Acts passed by the Dominion legislatures<sup>294</sup>; there was a power to reserve Bills for signification of His Majesty's pleasure<sup>295</sup>; doubts existed about the ability of Dominion legislatures to enact legislation with extra-territorial effect; colonial laws repugnant to the terms of an Act of the United Kingdom Parliament extending to colonies were void and inoperative to the extent of the inconsistency; appeals could be taken from colonial courts to the Privy Council<sup>296</sup>; and in practice, the United Kingdom Government could commit the whole Empire to international obligations.<sup>297</sup> Nevertheless the Balfour Report

---

<sup>291.</sup> Wheare, *The Statute of Westminster and Dominion Status* p26-27.

<sup>292.</sup> Keith, *Speeches and Documents on the British Dominions 1918-1931* p161.

<sup>293.</sup> Keith, *Speeches and Documents on the British Dominions 1918-1931* p163-170.

<sup>294.</sup> Section 59 of the Constitution.

<sup>295.</sup> Section 60.

<sup>296.</sup> Section 74.

<sup>297.</sup> Wheare, *The Statute of Westminster and Dominion Status* p35-37.

both illustrated and contributed to the fragmentation of the British Empire / Commonwealth.

The issue of nationality within the Empire / Commonwealth was considered at the Imperial Conference of 1929. It was noted that,

[n]ationality is a term with varying connotations. In one sense it is used to indicate a common consciousness based upon race, language, traditions, or other analogous ties and interests and is not necessarily limited to the geographic bounds of any particular State. Nationality in this sense has long existed in the older parent communities of the Commonwealth. In another and more technical sense it implies a definite connexion with a definite State and Government. The use of the term in the latter sense has in the case of the British Commonwealth been attended by some ambiguity, due in part to its use for the purpose of denoting also the concept of allegiance to the Sovereign. With the constitutional development of the communities now forming the British Commonwealth of Nations, the terms "national", "nationhood", and "nationality", in connexion with each member, have come into common use.<sup>298</sup>

The members of the Empire / Commonwealth were united by a common allegiance to the Crown. That allegiance was considered to be the basis of the common status possessed by all subjects of His Majesty.<sup>299</sup> However it was acknowledged (perhaps merely a vain hope) that this common status was "in no way inconsistent with the recognition within and without the Commonwealth, of the distinct nationality possessed by the nationals of the individual states of the British Commonwealth".<sup>300</sup> Participants at the Conference acknowledged that the practical working out and application of these principles was not an easy task; common agreement between the members of the Commonwealth and reciprocal action was recommended and steps were to be taken as soon as possible to arrive at a settlement.<sup>301</sup>

---

<sup>298</sup> Paragraph 73 of the Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929, reported in Keith, *Speeches and Documents on the British Dominions 1918-1931* p194.

<sup>299</sup> Paragraph 75 at p195.

<sup>300</sup> Paragraph 78 at p195-196.

<sup>301</sup> As above.

The following year it was the task of the participants at the Imperial Conference of 1930 to reconcile, or harmonise, "the real self-determination of the Dominions with the real unity of the British Commonwealth of Nations".<sup>302</sup> It was resolved,

[t]hat it is for each member of the Commonwealth to define for itself its own nationals, but that, so far as possible, those nationals should be persons possessing the common status, though it is recognised that local conditions, or other special circumstances, may from time to time, necessitate divergences from this general principle.<sup>303</sup>

That same year the *Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws* was adopted.<sup>304</sup> Article 1 stated,

It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2 provided that any question as to whether a person possessed the nationality of a particular State was to be determined in accordance with the law of that State.

Whilst Australia participated in international efforts to ensure State determination of its own nationals, there remained domestically a reluctance to sever ties with Britain. In the same year of the adoption of the Hague Convention, 1930, the Australian Labor Government appointed for the first time an Australian born man to the position of Governor-General - Sir Isaac Isaacs, then Chief Justice of the High Court. The Opposition was outraged:

---

<sup>302.</sup> Introductory Speeches at the Imperial Conference of 1930, per Mr Scullin on 1 October 1930, reported in Keith, *Speeches and Documents on the British Dominions 1918-1931* p208.

<sup>303.</sup> Brazil at 215.

<sup>304.</sup> (1937-1938) 179 LNTS 89. The Convention is contained in Annex I to *United Nations Legislative Series - Laws Concerning Nationality* (United Nations, New York 1954) p567. Australia ratified this Convention on 10 November 1937: Holder and Brennan, *The International Legal System Cases and Materials* (Butterworths, Sydney 1972) p480.

[This appointment] will sever an important link with what the great majority of Australians are still proud to call 'the Mother Country'. It will be a gratuitously unfriendly gesture at a particularly critical time. No other Dominion has taken a similar step. While the courtesy of Great Britain will doubtless disguise the natural reaction to the new (practically republican) policy, it is certain that the result will be a real prejudice to the prestige of Australia.<sup>305</sup>

The King was also reluctant to make the appointment, but the Australian Government remained firm.<sup>306</sup>

In 1931 the *Statute of Westminster* was enacted by the United Kingdom Parliament.<sup>307</sup> This was one of the few formal documents, having legal consequences, that marks the process by which Australia became independent from Britain. One commentator, Lindell, has noted that the changes in the constitutional and international status of the Australian nation since 1901 have been largely evolutionary, the result of the operation of constitutional practices and conventions.<sup>308</sup> The same comment can be made about the process by which recognition of Australian citizenship has occurred.

The *Statute of Westminster* reaffirmed that the Crown was the symbol of the free association of the members of the British Commonwealth of Nations, and that these members were united by a common allegiance to the Crown.<sup>309</sup> The *Statute of Westminster* gave effect to certain resolutions passed by Imperial Conferences in 1926 and 1930. It provided that no law made by a Dominion Parliament might be void or inoperative on the basis of repugnancy with a United

---

<sup>305.</sup> Leader of the Federal Opposition, Mr John Latham, as quoted in the "Argus" newspaper, Melbourne, 25 April 1930, excerpt reproduced in Crowley, *Modern Australia in Documents Volume 1, 1901-1939* p466-467.

<sup>306.</sup> Cowen, "The Legal Implications of Australia becoming a Republic" (1994) 68 *ALJR* 587 at 590.

<sup>307.</sup> 22 Geo 5 c4 (1931).

<sup>308.</sup> Lindell, "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed LR* 29 at 33.

<sup>309.</sup> Preamble to the *Statute of Westminster* 1931 (UK).

Kingdom Act or law,<sup>310</sup> that Dominion Parliaments had full power to pass laws having extra-territorial operation,<sup>311</sup> and that the United Kingdom Parliament could no longer legislate for a Dominion without the request and consent of that Dominion.<sup>312</sup>

Australia did not adopt the *Statute of Westminster* until 1942, largely due to the opposition of at least some of the Australian States. There were fears that its adoption would disturb the federal balance, to the detriment of the States. In addition, there was a desire not to be seen to weaken Australia's links with the United Kingdom during the war years.

The outbreak of the Second World War curtailed discussions on the determination of each State's nationals. During wartime, unification and not diversification within the British Commonwealth was essential. It is interesting to note the speech of the then Prime Minister, R.G. Menzies, announcing that Australia was at war with Germany:

Fellow Australians. It is my melancholy duty to inform you officially that, in consequence of the persistence by Germany in her invasion of Poland, Great Britain has declared war upon her, and that, as a result, Australia is also at war.<sup>313</sup>

The Prime Minister considered Australia to be automatically at war with Germany, upon Great Britain's declaration of hostilities. This is of significance; it could be construed as indicating the Australian Government's perception of a subordinate role. [Alternatively, it could simply be seen as members of the British Commonwealth unifying against a perceived common enemy.] In any event, despite the perceptions which resulted in Australia's automatic declaration

---

<sup>310.</sup> Section 2.

<sup>311.</sup> Section 3.

<sup>312.</sup> Section 4.

<sup>313.</sup> National Radio Broadcast of the Prime Minister made on Sunday 3 September 1939, reproduced in Crowley, *Modern Australia in Documents Volume 2, 1939-1970* (Wren Publishing Pty Ltd, Melbourne 1973) p1-2.

of war, the experiences of Australians during the Second World War contributed significantly to the on-going development of a distinct national identity.

**The Natives (Citizenship Rights) Act 1944 (WA)**

In 1944 an unusual Act was passed by the Western Australian Parliament. Entitled the *Natives (Citizenship Rights) Act 1944 (WA)*, it enabled adult Aborigines to apply for a "Certificate of Citizenship". An Aborigine granted such a certificate became a "citizen of the State".<sup>314</sup> In order to obtain such a Certificate, an Aborigine had to indicate that he/she had dissolved tribal and native association, except with respect to lineal descendants or "native relatives of the first degree", and had either served in the armed forces of the Commonwealth or was otherwise a fit and proper person to obtain such a Certificate.<sup>315</sup> The holder of a certificate was,

deemed to be no longer a native or aborigine and shall have all the rights, privileges and immunities and shall be subject to the duties and liabilities of a natural born or naturalised subject of His Majesty.<sup>316</sup>

The reference to a "citizen of the State" harked back to the concepts of the 1890's. The notion of State citizenship was inconsistent with the creation of a unified national citizenship that occurred upon Federation. The Act was inconsistent with the fundamental principle of membership flowing from the creation of the Australian community, and could not have been a valid Act.

With the benefit of hindsight it is clear that the sentiments behind the Act were at best paternalistic and at worst blatantly racist and discriminatory. Perhaps the only positive thing that might be said about such an Act is that its existence indicates that, by the close of World War 2, attention within Australia was being turned towards citizenship.

---

<sup>314</sup> *Natives (Citizenship Rights) Act 1944 (WA)* s4(2).

<sup>315</sup> As above.

<sup>316</sup> Section 6.

### The break-up of the "Code"

Immediately after the Second World War, Canada enacted the *Canadian Citizenship Act* 1946. With the pace having been set by Canada, a Conference of Commonwealth representatives met in London in 1947 to draft a new scheme of nationality legislation.<sup>317</sup> A "two-tiered system" was adopted;<sup>318</sup> it was contemplated that each country would adopt its own statutory definition of citizenship (a local citizenship), and would at the same time recognise all citizens of Commonwealth countries as possessing a common status of "British subject" or "Commonwealth citizen" (interchangeable terms).<sup>319</sup>

It has been said that the concept of allegiance, which had been fundamental to the notion of a subject, was "not imported into the rules governing local citizenship but was altogether swept away".<sup>320</sup> However, the correctness of this statement can be challenged. The concept of allegiance remained, insofar as a person becoming a naturalised Australian citizen swore an oath of allegiance to a monarch. Furthermore, even if a community is not based upon allegiance to a monarch, citizenship requires some bond of membership and loyalty to the community.

---

<sup>317.</sup> Jones, *British Nationality Law* p92.

<sup>318.</sup> Brazil, "Australian Nationality and Immigration", in Ryan (ed), *International Law in Australia* p217.

<sup>319.</sup> Section 1 of the *British Nationality Act* 1948 (UK) [11 & 12 Geo 6] provided:

- (1) Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject.
- (2) Any person having the status aforesaid may be known either as a British subject or as a Commonwealth citizen; and accordingly in this Act or in any other enactment or instrument whatever, whether passed or made before or after the commencement of this Act, the expression "British subject" and the expression "Commonwealth citizen" shall have the same meaning.
- (3) The following are the countries hereinbefore referred to, that is to say, Canada, Australia, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon."

<sup>320.</sup> Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* p92.

### **A statutory Australian citizenship**

A statutory concept of Australian citizenship came into existence with the enactment of the *Nationality and Citizenship Act 1948* (Cth), in operation from 26 January 1949. Part II of the Act dealt with British nationality; a person who was an Australian citizen under this Act, or was a citizen of another Commonwealth country, was also recognised as a British subject.<sup>321</sup> Part III then dealt with Australian citizenship. A person born in Australia after 26 January 1949 was an Australian citizen by birth.<sup>322</sup> Provision was also made for citizenship by descent.<sup>323</sup> A person born outside Australia was an Australian citizen if, at the time of his/her birth, his father was an Australian citizen or, if born out of wedlock, his/her mother was an Australian citizen or a British subject ordinarily resident in Australia or New Guinea, and if the child's birth was registered at an Australian consulate within one year of the birth.

Australian citizenship could also be acquired in accordance with the "citizenship by registration" provisions. The relevant Minister could, upon application, grant a certificate of registration as an Australian citizen to a person who was a British subject of either the United Kingdom, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia, or Ceylon, or who was an Irish citizen.<sup>324</sup> The importance of these provisions is seen in *Kenny v Minister for Immigration*,<sup>325</sup> discussed in Chapter 5.

The Act also made provision for acquisition of Australian citizenship by naturalisation. An "alien" or "protected person" could, at least one year after entering Australia or New Guinea, apply to become naturalised as an Australian

---

<sup>321.</sup> *Nationality and Citizenship Act 1948* (Cth) s7(1).

<sup>322.</sup> Section 10(1).

<sup>323.</sup> Section 11.

<sup>324.</sup> Section 12.

<sup>325.</sup> (1993) 42 FCR 330.



citizen.<sup>326</sup> "Alien" referred to a person who was not a British subject, an Irish citizen or a protected person; a protected person referred to a person from a prescribed class of persons under the protection of the Government of any part of His Majesty's Dominions.<sup>327</sup>

An examination of the preconditions which had to be met by an applicant included the requirement that the applicant have "an adequate knowledge of the responsibilities and privileges of Australian citizenship".<sup>328</sup> This was the first statutory acknowledgment of the two substantive aspects to membership of the Australian community:

1. Responsibilities, or duties; and
2. Privileges, or rights.

The *Nationality and Citizenship Act* required persons seeking to become members of the Australian community to have "knowledge" of the rights and privileges attaching to Australian citizenship. However in 1949 recognition of Australian citizenship rights and privileges was very rudimentary. The vast majority of persons born within Australia devoted little thought to the consequences of being an "Australian citizen"; and the status of British subject was still prized. The Commonwealth Parliament did not seek to acknowledge in statutory form the rights deriving from possession of Australian citizenship; Australian courts did not see it to be their role to uphold citizenship rights when it appeared they were being abrogated.

As the Australian nation reached its fiftieth anniversary its people were able to celebrate as Australian citizens. However to a large degree the concept of citizen remained couched in the language of a subject, indicating that the ties to Britain remained. Whilst an Australian citizen was not defined in terms of his/her relationship to a monarch, to become naturalised as an Australian citizen one had to take an oath swearing to "be faithful and bear true allegiance" to His Majesty

---

<sup>326.</sup> Section 14.

<sup>327.</sup> Section 5(1).

<sup>328.</sup> Sections 12(1)(e) and 15(1)(a).

King George VI.<sup>329</sup> The nature and content of Australian citizenship had not been analysed in any depth by either the Commonwealth Parliament or the High Court. Equality was still far from the forefront of both legal and political thinking. The "White Australia" policy continued to exist, and Aborigines were still not counted as part of "the people of the Commonwealth". It was not until 1962 that unlawful qualifications on their Commonwealth voting rights were removed,<sup>330</sup> and not until 1967 that the unlawful denial of their citizenship status ("people of the Commonwealth") was removed. Furthermore it was not until 1984 that Aborigines became subject to the same obligation to enrol to vote as non-Aboriginal Australians, in this sense becoming fully subject to the citizenship duty of participating in the governance of their community.<sup>331</sup>

The Commonwealth Parliament having created a statutory concept of Australian citizenship, it then took a "back-seat" and largely left the process of recognising the rights, duties and functions of the Australian citizen to the High Court until 1993. In much of this judicial process, an understanding of the nature of Australian citizenship was gained by consideration of the position of those who were not citizens. Chapter 5 examines a series of cases significant for their role in clarifying the distinction between an Australian citizen and an alien (or non-citizen).

---

<sup>329</sup> Section 16.

<sup>330</sup> With an amendment in 1962 to the *Commonwealth Electoral Act*. The position of tribal Aborigines was recognised by exempting Aborigines from the requirement of compulsory voting. However, those who chose to enrol thereby became subject, with all other enrolled voters, to notify changes of residence: Brooks at 227.

<sup>331</sup> With the *Commonwealth Electoral Legislation Amendment Act 1984* (Cth).

## CHAPTER 5

### The Emerging Citizen

Whilst the creation of a statutory concept of Australian citizenship shifted focus towards Australians and away from the status of British subjects, it also tended to confuse an understanding of the nature of Australian citizenship. The statutory concept has been confused with the common law concept of Australian citizenship.

In 1949 the statutory concept of Australian citizenship was still understood in terms of allegiance owed to a Monarch - who at that time was not considered to be the King merely "in right of Australia". From 1949, the process of elevating the Australian community over the British monarchical constitution has continued.<sup>332</sup> The process has been a common law one, and a series of High Court decisions which form part of that process are discussed in this Chapter.

The fundamental changes brought about by that process are evidenced by an examination of the *Nationality and Citizenship Act 1948* (Cth), now the *Australian Citizenship Act 1948* (Cth), as it is in 1996.<sup>333</sup> The Commonwealth Parliament has an important role to play in establishing the procedures whereby non-citizens become citizens of Australia. Since a 1993 amendment to the Act, those procedures formally acknowledge that allegiance is now owed to the Australian community and not to a hierarchically superior monarch. No longer

---

<sup>332</sup> The term "British monarchical constitution" refers back to the discussion in Chapter 1, concerning the elevation of community over constitution. As discussed in Chapter 1, in late medieval England the divine right Monarch (who can be seen as "the monarchical Constitution") was hierarchically superior to the community. The process of elevating the community over the constitution began with the revolutionary struggles of seventeenth century Britain. In Australia, that process has continued this century.

<sup>333</sup> In 1969, the title of the Act was amended to the *Australian Citizenship and the Status of British Subjects Act 1948* (Cth), by section 5 of the *Citizenship Act 1969* (Cth). In 1984, its title was again amended to simply read *Australian Citizenship Act 1948* (Cth): see section 3 of the *Australian Citizenship Amendment Act 1984* (Cth).

does a person becoming an Australian citizen pledge allegiance to a Monarch. He/she swears or affirms the following:

From this time forward, [under God,]  
I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.<sup>334</sup>

Allegiance is now owed to a country and its community; a new citizen acknowledges a sharing of beliefs with other community members and that there are certain rights and liberties possessed by those other community members. The preamble to the Act, which was also only inserted in 1993, attempts for the first time a statutory definition of Australian citizenship:

Recognising that:-

Australian citizenship represents formal membership of the community of the Commonwealth of Australia; and

Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity; and

Persons granted Australian citizenship enjoy these rights and undertake to accept these obligations

by pledging loyalty to Australia and its people, and

by sharing their democratic beliefs, and

by respecting their rights and liberties, and

by upholding and obeying the laws of Australia.

The 1993 statutory amendment is indicative of the process occurring this century in Australia, which has seen the emergence of a distinct Australian community and the elevation of that community over the British monarchical constitution.

Whilst the Commonwealth Parliament took this step in 1993 in relation to the procedures for acquisition of Australian citizenship, it has fallen to the High Court to highlight, in relation to those who are already Australian citizens, the process by which community is being elevated over constitution. The task is appropriately that of the High Court, as the nature of Australian citizenship is a common law matter.

---

<sup>334</sup> Form of Pledge contained in Schedule 2 to the *Australian Citizenship Act 1948* (Cth).

The High Court has been slow to recognise the emergence of Australia as an independent community of Australian citizens. Until the 1980's, judicial analysis tended to focus upon the international identity of Australia as a nation rather than on Australian citizenship. It was not until *Pochi v MacPhee*<sup>335</sup> and then *Nolan v Minister for Immigration and Ethnic Affairs*<sup>336</sup> that the High Court gave consideration to the following questions:

- (i) in the monarchical context of Australian citizenship, to whom is allegiance owed?
- (ii) by whom is allegiance owed?

### **Severance of legal ties to Britain**

Judicial analysis of Australian independence has until recently tended to focus on nationhood, and only by implication on citizenship. The most radical legal position adopted in relation to Australia's independence has been that of Murphy J, who held the view that Australia became an independent nation at Federation in 1901. Justice Murphy not only denied the competency of the United Kingdom Parliament to legislate for Australia after federation, but also denied the continued operation after federation of Imperial legislation previously in force in Australia. Justice Murphy's sentiments were expressed in lone dissents in *Bistrivic v Rokov* and *China Ocean Shipping Co v South Australia*, and also in *Robinson v The Western Australian Museum*.<sup>337</sup>

In *Bistrivic*, Murphy J held that, notwithstanding many judicial statements to the contrary,

Australia's independence and freedom from United Kingdom legislative authority should be taken as dating from 1901. The United Kingdom Parliament ceased to be an Imperial Parliament

---

<sup>335.</sup> (1982) 151 CLR 101.

<sup>336.</sup> (1988) 165 CLR 178.

<sup>337.</sup> *Bistrivic v Rokov* (1976) 135 CLR 552; *Robinson v Western Australian Museum* (1977) 138 CLR 283.

in relation to Australia at the inauguration of the Commonwealth.<sup>338</sup>

Then, in *Robinson*, Murphy J noted that Australia was no longer part of a unified imperial-colonial system regulating merchant shipping and which was controlled from London. He expressed the view from 1901 the Commonwealth has had "nation-state rights (including inchoate rights) in the territorial sea, seabed and subsoil".<sup>339</sup> The State of South Australia attempted to rely upon his statements in *China Ocean Shipping* in 1979, but was admonished for so doing by the majority of the Court. Chief Justice Barwick stated,

I must say that when I heard this proposition put by the Solicitor-General [for South Australia], it seemed to me to represent a very quaint aberration, not only unsupported by any authority but contradicted by decisions of this Court. Moreover, it seemed to me to betray a lack of appreciation of the constitutional history of this country.<sup>340</sup>

As was expected, in *China Ocean Shipping* Murphy J repeated his interpretation of events in 1901, and accused the majority of the Court of having failed to appreciate that Australia's constitutional position cannot be detached from political realities.<sup>341</sup> He likened the readiness of the High Court to treat Australia as inferior in status to the United Kingdom and subordinate to it, to the readiness centuries ago of some English courts in accepting the pretensions of the Stuart Kings: "in this century, some Australian courts have just as readily accepted the United Kingdom Parliament's "divine right" to legislate for the Australian nation".<sup>342</sup>

Rejecting the interpretation of events preferred by Murphy J, the majority of the Court in *China Ocean Shipping* stressed that, in 1901, the colony (and not nation) of Australia came into existence; its path towards independence was "gradual

---

<sup>338.</sup> *Bisticic* at 567.

<sup>339.</sup> *Robinson* at 343.

<sup>340.</sup> *China Ocean Shipping Co* at 181.

<sup>341.</sup> at 237.

<sup>342.</sup> at 239.

and, to a degree, imperceptible".<sup>343</sup> Significant weight was attached to the passing of the *Statute of Westminster*, and its adoption by the Commonwealth Parliament.<sup>344</sup>

Because there have been few formal legal documents to symbolise, or effect, the development of Australia's independence, it has been remarked that its timing "has not been the subject of precise determination".<sup>345</sup> Extra-judicially, Sir Anthony Mason has described Australia's legal separation from the United Kingdom as being "so harmonious and so recent" that he considers "we have no reason to distance ourselves from the continuing evolution of the law [in the United Kingdom]".<sup>346</sup>

Certainly, judicial recognition of Australia as a distinct and unified community of Australian citizens has been slow. The ties with Britain acted as a brake upon judicial analysis of Australian citizenship until a series of High Court cases in the 1980's.

### **Allegiance to the Monarch**

It was not until 1982, in *Pochi v MacPhee*, that the High Court clearly acknowledged that Australians owed allegiance to the Queen as Queen in right of Australia. *Pochi* also contains an analysis of the meaning of "alien" as found in Section 51(xix) of the Constitution.

Pochi was born in Italy in 1939 and came to Australia in 1959 with the intention of making it his home. He married in Australia and claimed to have been

---

<sup>343.</sup> at 183, per Barwick CJ. Justice Gibbs also referred to the change in the relationship between Australia and the United Kingdom as "gradual", at 195.

<sup>344.</sup> at 183, per Barwick CJ.

<sup>345.</sup> Lindell, "Why is Australia's Constitution binding? The Reasons in 1900 and Now, and the effect of Independence" (1986) 16 *Fed LR* 29 at 33.

<sup>346.</sup> Mason, "Future Directions in Australian Law" (1987) 13 *Monash Uni LR* 149 at 154.

absorbed into the Australian community. In September of 1974 he applied for a grant of citizenship, and received approval. However, he did not become an Australian citizen because the relevant Department did not inform him that his application had been successful. He did not take an oath of allegiance, nor was a citizenship certificate issued. In 1977 Pochi was convicted of supplying Indian hemp and was sentenced to imprisonment for 2 years. In 1979 the Minister for Immigration ordered his deportation. Pochi then sought a declaration from the High Court that the Minister and the Commonwealth did not have power to order his deportation.

Section 12 of the *Migration Act* 1958 gave the Minister power to deport aliens convicted of certain crimes. Pochi challenged the validity of section 12. "Alien" was defined in section 5(1) of the *Migration Act* to mean "a person who is not - (a) a British subject; (b) an Irish citizen; or (c) a protected person". "British subject" was defined in the *Australian Citizenship Act* (and included Australian citizens). Pochi was clearly not a British subject (having been born in Italy), but he sought to argue that there were certain classes of persons who in truth were British subjects yet did not have the status of British subjects under the Australian Citizenship Act; on his argument, section 12 of the *Migration Act* therefore extended to some persons who were not aliens within the meaning of Section 51(xix) and was thus invalid. In other words, Pochi tried to argue that the constitutional definition of alien could not include any person who was a British subject under the law of the United Kingdom. Although he was not a British subject, he mounted the argument on the basis that, if the section did have this invalid operation, the provision fell (in other words could not be read down at all). The High Court rejected his argument about the validity of section 12.

Chief Justice Gibbs wrote the leading judgment; Mason and Wilson JJ agreed with his judgment. The following comment of Gibbs CJ was made in the context of examining Section 51(xix); however, an analysis of an alien assists in defining who is an Australian citizen. There is a reference to the *British Nationality Act* 1981 (UK), which had been enacted but had not yet come into operation at the



time of *Pochi*; with this Act, Britain abandoned the concept of "British subject".<sup>347</sup> Gibbs CJ stated:

The scope of the legislative power conferred on the Parliament by s.51(xix) is not determined by the British Nationality Acts of the United Kingdom. In recent times the status of a British subject has lost much of its former significance to Australian citizens. It has ceased to carry with it practical advantages, such as the unrestricted right to enter the United Kingdom or other Commonwealth countries, or the right to a British passport. The allegiance which Australians owe to Her Majesty is owed not as British subjects but as subjects of the Queen of Australia. Now, once the British Nationality Act 1981 (UK) has come into force, the principle that every Commonwealth citizen is a British subject will have finally been abandoned, and the status of British subject will be restricted to a narrow group. If English law governed the question who are aliens within s.51(xix), almost all Australian citizens, born in Australia, would in future be aliens within that provision. The absurdity of such a result would be manifest. The meaning of "aliens" in the Constitution cannot depend on the law of England. It must depend on the law of Australia.

For the first time, a member of the High Court clearly stated that Australians owe allegiance to the Queen as Queen of Australia. Further, by holding that the meaning of alien was a matter for Australian, and not British, law, the Australian community's right of self-definition was acknowledged.

Parliament can ... treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian.<sup>348</sup>

The Court's emphasis on a person's relationship *with Australia* was important. This was the first clear recognition by the High Court that no longer was England the "mother country" with whom was the primary legal relationship (putting to one side Murphy J's earlier dissenting views on Australian independence).

Pochi also argued that he was no longer an alien because he had been absorbed into the Australian community. There was earlier High Court authority for the proposition that an immigrant (not being an alien or prohibited immigrant), who

---

<sup>347.</sup> *British Nationality Act 1981 (UK) c61.*

<sup>348.</sup> *Pochi* at 109-110, per Gibbs CJ.

had resided in Australia for a certain period of time without conviction, was immune from deportation.<sup>349</sup> However the Court in *Pochi* rejected this argument at least insofar as it applied to aliens. The fundamental role of the Parliament in providing the mechanism by which a person could become a member of the Australian community was affirmed.

There are strong reasons why the acquisition by an alien of Australian citizenship should be marked by a formal act, and by an acknowledgment of allegiance to the sovereign of Australia. The Australian Citizenship Act validly so provides.<sup>350</sup>

Pochi's action was dismissed. In a separate judgment, Murphy J agreed with the other members of the Court in upholding the validity of section 12 of the *Migration Act*, but spoke out strongly against the deportation of a man who had made Australia his home and who, but for the Department's misplacing of papers recommending his naturalization, would be an Australian citizen. Justice Murphy noted, "Apart from his lack of citizenship he is in every way an Australian".<sup>351</sup> His deportation would be "inhumane and uncivilized".<sup>352</sup>

In his judgment, Murphy J stated that the concept of alien had not been fully explored in the presentation of the case, at least to his satisfaction. Without delving into the matter, Murphy J noted:

The concept of alien is applicable to republics; and under our Constitution the status of and the relinquishing of alienage have no necessary relationship to allegiance to a personal sovereign.<sup>353</sup>

There was no other discussion in *Pochi* of the nature of Australia's political / legal framework (whether monarchical or republican), nor a discussion of Australian citizenship rights and obligations.

---

<sup>349.</sup> *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at 430, per Stephen J.

<sup>350.</sup> *Pochi* at 111, per Gibbs CJ.

<sup>351.</sup> at 113, per Murphy J.

<sup>352.</sup> at 115, per Murphy J.

<sup>353.</sup> at 113, per Murphy J.

Chief Justice Gibbs briefly noted that the Commonwealth Parliament cannot, by postulating its own definition of alien, thereby expand the power in Section 51(xix) to include persons who could not possibly answer the description of aliens in the ordinary understanding of the word.<sup>354</sup> He did not discuss this point further; however, it is a matter which has been taken up and developed by Gaudron J in subsequent cases.

Chief Justice Gibbs's point is crucial. From 1901 there has been an Australian community which has been defined in terms of "alien" and "non-alien"; there has thus been a constitutional notion of non-membership and membership of this community since 1901. Indeed, there were colonial communities in existence prior to Federation, whose members decided to unite in a federation. As Australian citizenship has developed, membership of the Australian community has come to be defined in terms of possession of a statutory concept of Australian citizenship. However the Australian community is hierarchically superior to the Constitution and to any statutory enactment; it is defined by the common law. To be valid, the statutory definitions of citizen and alien / non-citizen must not be inconsistent with the common law rule of Australian citizenship which defines who is a citizen.

### **The scope of the power to deport**

In 1988 the High Court again considered the deportation of aliens and section 12 of the Migration Act, in *Nolan v Minister for Immigration and Ethnic Affairs*. The facts in *Pochi* and *Nolan* were similar; however, the distinction between the two cases was that section 12 for the purposes of *Pochi* was expressed in terms of "aliens" and the *Migration Act* contained a definition of "alien" which excluded persons who had the status of "a British subject", whilst in *Nolan*, section 12 applied to "non-citizens". Nolan was a citizen of the United Kingdom, born in the United Kingdom, who had come to Australia in October 1967. He lived in Australia continuously thereafter but was not naturalized. On 22

---

<sup>354</sup>. at 109.

September 1985 the Minister for Immigration and Ethnic Affairs ordered his deportation under section 12 of the *Migration Act*. By then, Nolan had resided in Australia for almost eighteen years, more than nine years of which he had spent in prison serving sentences for criminal offences. Nolan brought proceedings in the High Court, challenging the validity of the deportation order. The defendants demurred to that part of the statement of claim.

The High Court gave further consideration to the meaning of alien. In a joint judgment, Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ (forming the majority of the Court) noted that it means "belonging to another person or place", and is used as a descriptive word to describe a person's lack of relationship with a country. As a matter of ordinary language, the term "alien" was defined by them to mean "nothing more than a citizen or subject of a foreign state".<sup>355</sup>

In defining an alien for the purposes of Australian law, these majority judges identified three critical developments:

- (i) the emergence of Australia as an independent nation;
- (ii) the acceptance of the divisibility of the [British] Crown, which was implicit in the development of the British Commonwealth as an association of independent nations; and
- (iii) the creation of a distinct Australian citizenship.<sup>356</sup>

The majority thus emphasised the statutory concept of Australian citizenship. They did not consider the converse of their definition of alien, namely "a person belonging to or having a relationship with a country", and did not attempt to analyse the nature and consequences of that relationship in a positive sense. The view earlier put forward by Gibbs CJ in *Pochi*, that the phrase "subject of the

---

<sup>355</sup> *Nolan* at 183.

<sup>356</sup> at 185-186.

Queen" in the Constitution refers in a modern context to "the Queen in right of Australia", was affirmed.<sup>357</sup>

Nolan was found by the majority of the Court to be an alien as he was a person born outside Australia, whose parents were not Australians, and who had not been naturalized as an Australian. Justice Gaudron dissented. Her approach highlights the fact that the statutory definition of Australian citizenship has not always equated with the constitutional [in other words, common law] notion of membership of the Australian community.

Justice Gaudron focussed on the statutory history of the *Australian Citizenship Act*, and the position accorded to British subjects who were not Australian citizens. She began her analysis by defining "alien" in the following terms:

[a]n alien (from the Latin *alienus* - belonging to another) is, in essence, a person who is not a member of the community which constitutes the body politic of the nation state from whose perspective the question of alien status is to be determined. For most purposes, it is convenient to identify an alien by reference to the want or absence of the criterion which determines membership of that community. Thus, where membership of a community depends on citizenship, alien status corresponds with non-citizenship; in the case of a community whose membership is conditional upon allegiance to a monarch, the status of alien corresponds with the absence of that allegiance. At least this is so where the criterion for membership of the community remains constant.<sup>358</sup>

Justice Gaudron then noted that, as the Empire was transformed into the British Commonwealth of Nations consisting of sovereign and independent nation states, the *statutory* definition of members of the Australian community changed from "British subjects" to "Australian citizens". However, she noted that the Act continued to accord a special position to British subjects who were not Australian citizens until 1 May 1987. British subjects who had permanently resided in Australia for six months were eligible to vote under the *Commonwealth Electoral*

---

<sup>357.</sup> at 186.

<sup>358.</sup> at 189.

*Act* until that date. It was not until 1 May 1987, when a 1984 amendment came into operation and removed all reference to "status of British subject", that this right was removed. Only at that point according to Gaudron J did Australian citizenship become the sole statutory description of membership of the Australian nation.<sup>359</sup>

In relation to Nolan, who had arrived in Australia as a British subject in 1967 and who had resided continuously here since that date, Gaudron J found that he could not be an "alien" within the statutory meaning of the term.

It is hard to conceive that persons who were excluded from the statutory definition of alien by virtue of their being British subjects, and who were entitled (subject to a six month residence qualification) to participate in the election of the government of the day, were aliens in the sense of not being members of the community constituting the body politic of Australia.<sup>360</sup>

In 1967, when Nolan arrived in Australia, he became a member of the community constituting the body politic of Australia by virtue of his allegiance to the Crown, in other words by virtue of him being a British subject. It is crucial to note that, at the time he immigrated, no legislative distinction was made between the several and distinct capacities of the Queen as Head of State of several and distinct sovereign nations. Allegiance to the Crown was simply allegiance to the [British] Crown and not to the distinct concept of the Crown in right of Australia. Justice Gaudron considered that perhaps that distinction could be drawn from 1973; however, it could not be drawn as at 1967 when Nolan arrived in Australia.

The year 1973 was significant because it marked the repeal of the *Royal Style and Titles Act 1953 (Cth)*, by the *Royal Style and Titles Act 1973 (Cth)*. The 1953 Act provided that Her Majesty was referred to as,

---

<sup>359.</sup> at 190-191.

<sup>360.</sup> at 191.

Elizabeth the Second, by the Grace of God of the United Kingdom, Australia and Her other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith.<sup>361</sup>

The 1953 Act was drafted in accordance with the agreement of the Prime Ministers and Representatives of Her Majesty's Government in the United Kingdom, Canada, Australia, New Zealand, the Union of South Africa, Pakistan and Ceylon. It was worded so as to "reflect the special position of the Sovereign as Head of the Commonwealth".<sup>362</sup> The equivalent Act for all these countries was thus to include the phrase "Queen of her other Realms and Territories and Head of the Commonwealth".

Amendment occurred in 1973 because "the Government of Australia consider[ed] it desirable to propose to Her Majesty a change in the form of the Royal Style and Titles to be used in relation to Australia and its Territories"<sup>363</sup>. Clearly, in the twenty years that had passed since the passing of the earlier Act, the relations between the United Kingdom and Australia had fundamentally altered; by 1973 it was considered to be for the *Australian* Government to determine how Her Majesty should be referred to, in an Australian context. The 1973 Act provided that Her Majesty was to be referred to as,

Elizabeth the Second, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth.<sup>364</sup>

To return to *Nolan*, Gaudron J considered that, even if the constitutional notion of the Queen changed in 1973, and a change in allegiance accordingly occurred, that distinction did not effect any immediate change to the special position statutorily accorded to British subjects.<sup>365</sup>

---

<sup>361.</sup> *Royal Style and Titles Act 1953 (Cth)*, Schedule.

<sup>362.</sup> Preamble.

<sup>363.</sup> As above.

<sup>364.</sup> Schedule.

<sup>365.</sup> *Nolan* at 191.

On Gaudron J's analysis, the next question that arose was whether the Commonwealth Parliament could transform Nolan, a non-alien person, into an alien by reason of him not having acquired Australian citizenship. She held that Parliament could not transform a non-alien into an alien if there had not been some relevant change in the relationship between that person and the community constituting the body politic of Australia. That relevant change might be the abandonment of membership of the community, or the acquisition of membership of some other national community. Justice Gaudron considered that mere failure on the part of a non-alien to acquire citizenship did not involve any fundamental alteration of his or her relationship with that community (although she noted it might be otherwise if citizenship were offered and refused in circumstances such that refusal could properly be seen as a revival of an earlier allegiance to some other nation or as an abandonment of allegiance to Australia).<sup>366</sup>

If Nolan was not an alien, then he must by definition have been a citizen. Citizenship and alienage are linked; just as an alien is not a citizen, so too a non-alien must be a citizen. Perception of Australian citizenship as merely a statutory conception leads to a failure to recognise that Nolan must have been a citizen in the constitutional (common law) sense.

It is quite apparent that Gaudron J's reasoning about non-citizenship is at the same time reasoning about citizenship. Whilst Gaudron J's judgment is based upon rigorous statutory analysis and a consideration of the legal status of British subjects within Australia at various times, it is also a judgment that considers the consequences of membership of the Australian community for an individual. A note of caution should be sounded. Possession of the right to vote in Commonwealth and State elections is an Australian citizenship right; and Nolan possessed that right to vote until 1 May 1987. However, conferral of the right to vote is not in itself definitive of the question of citizenship status. An alien can be granted the privilege of voting; the citizen's fundamental right to participate in the governance of Australia need not be an exclusive right. The distinction

---

<sup>366</sup> at 193.



between the alien's privilege, and the citizen's right, is that the former can be withdrawn whilst the latter cannot be. The question in *Nolan* is instead decided on the basis that, when Nolan immigrated he was considered to be a member of the Australian community because of his status as British subject. Justice Gaudron thus considered Nolan to be in substance an Australian citizen albeit one without having undergone a formal ceremony.

*Pochi* and *Nolan* raise fundamental questions about the role of the Parliament, and the role of the community, in determining who is an alien or an Australian citizen. Chief Justice Gibbs in *Pochi* placed emphasis on the need for an Act of Parliament, and compliance with its requirements (formal ceremony, taking of oath), for the acquisition of Australian citizenship by an alien. However, what must also be recognised are the restrictions on the power of the Parliament to define who is, and who is not, an "alien".

Justice Gaudron's view that the Australian Parliament cannot unilaterally convert a "non-alien" into an "alien" is argued from the starting point of the aliens power, Section 51(xix). Section 51(xix) is concerned with the acquisition of citizenship and with aliens, and it is thus a power to legislate about citizenship. It is framed in terms of the converse to citizenship. The conferral of a power to deal with those who are not citizens is consistent with the focus last century of exclusion. My argument goes a step further than Gaudron J's; she stops at the terms of the Constitution while I argue that, prior to the terms of the Constitution, are hierarchically superior fundamental principles deriving from the notion of community. In one sense both arguments are common law arguments; the process of interpreting the aliens power is a common law process. What is yet to be recognised is that the limits to the Parliament's powers pursuant to the aliens power are determined by reference to fundamental principles, by virtue of which the Parliament has no power to convert an Australian citizen into a non-citizen / alien.

Justice Gaudron reiterated her understanding of Australian citizenship in *Chu Kheng Lim v Minister for Immigration*.<sup>367</sup> She noted that citizenship as defined by the Australian Citizenship Act is a statutory concept; it should not be elevated to the level of the constitutional concept.

Citizenship, so far as this country is concerned, is a concept which is entirely statutory, originating as recently as 1948 with the enactment of what was then styled the Nationality and Citizenship Act 1948 (Cth)... It is a concept which is and can be pressed into service for a number of constitutional purposes, including with respect to Commonwealth elections... and, as this case shows, for the purpose of legislating with respect to aliens pursuant to s51(xix) of the Constitution. But it [the statutory conception] is not a concept which is constitutionally necessary, which is immutable or which has some immutable core element ensuring its lasting relevance for constitutional purposes.

Because citizenship is a concept of the kind indicated, it cannot control the meaning of "alien" in s51(xix) of the Constitution... More particularly, although the power conferred by s51(xix) to make laws with respect to "[n]aturalization and aliens" authorises denaturalization laws, it does not, in my view, authorize laws providing for denaturalization in the absence of some failure to observe the requirements associated with naturalization or in the absence of some relevant change in the relationship of the person or persons concerned with the community constituting the body politic... And it certainly does not authorize the transformation of a non-alien into an alien by statutory redefinition of citizenship or by repeal or amendment of legislative provisions dealing with citizenship.<sup>368</sup>

Whilst Gaudron J correctly distinguishes between the statutory concept of Australian citizenship, and the constitutional (common law) concept, she does not go on to further analyse the constitutional concept. There are fundamental principles deriving from the notion of community itself, which are immutable. Whilst the common law rules of Australian citizenship, which are a product of Australian history, may develop over time, they must remain consistent with these fundamental principles.

---

<sup>367.</sup> *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

<sup>368.</sup> at 54.

Justice Gaudron's analysis leads to the conclusion that there are limits to the ability of the Parliament to define and re-define membership (and loss thereof) of the Australian community. Nolan - who came to Australia as a British subject owing allegiance to "the same Queen" in constitutional theory (and of course the same individual) as did Australian citizens, who acquired the right to vote, and who was not considered an alien within the meaning of the term in Section 51(xix) - could not be converted by legislative or executive act into an alien and thereby be liable for deportation without some fundamental alteration in the relationship between him and the Australian community. The two parties to the relationship were (a) Nolan and (b) the Australian community, not (a) Nolan and (b) the Australian Parliament.

Justice Gaudron's analysis logically extends to the conclusion that the Australian Parliament or Government cannot, by unilateral action, convert a person who has since birth been an Australian citizen into an alien and then deport him/her. This conclusion is correct; it is consistent with the fundamental principle of non-exclusion which derives from the notion of community (as discussed in Chapter 1). A law which purported to alter the status of a person who has never not been an Australian citizen (in other words who has been an Australian citizen since birth) to that of a non-citizen (alien) would be invalid. Thus an Australian citizen has, by virtue of his/her Australian citizenship, the right to remain a member of his/her community. Membership cannot validly be terminated against his/her will. An Australian citizen cannot be deported for having committed a crime. Citizenship is a status which, once acquired (whether by birth or by acquisition through a community-sanctioned process of immigration), is beyond the reach of the Parliament or Executive Government. By contrast, vulnerability to deportation is one of the most important disabilities to which aliens are subject.<sup>369</sup>

---

<sup>369</sup> In *Chu Kheng Lim* at 29-31, Brennan, Deane and Dawson JJ considered the vulnerability of aliens to deportation:

While an alien who is actually within this country enjoys the protection of our law, his or her status, rights and immunities under that law differ from the status, rights and immunities of an Australian citizen in a variety of important respects. For present purposes, the most important difference has already been identified. It lies in the vulnerability of the alien to exclusion or deportation... That

The arbitrariness of the distinction between "non-alien immigrants" and "aliens", in a historical context, can be seen in the case of Kenny, whose matter was heard by Gummow J (then of the Federal Court) in 1993.<sup>370</sup> The facts of *Kenny* are somewhat complicated; Kenny had the misfortune to fall in a "gap" between legislative regimes.<sup>371</sup>

---

vulnerability flows from both the common law and the provisions of the Constitution. For reasons which are explained hereunder, its effect is significantly to diminish the protection which Ch III of the Constitution provides, in the case of a citizen, against imprisonment otherwise than pursuant to judicial process.

The power to exclude or expel even a friendly alien is recognised by international law as an incident of sovereignty over territory...

[30] In this Court, it has been consistently recognised that the power of the Parliament to make laws with respect to aliens includes not only the power to make laws providing for the expulsion or deportation of aliens by the Executive but extends to authorising the [31] Executive to restrain an alien in custody to the extent necessary to make the deportation effective...

<sup>370.</sup> *Kenny v Minister for Immigration* (1993) 42 FCR 330.

<sup>371.</sup> The following facts are detailed in the judgment of Gummow J in *Kenny*:

- \* Kenny had been born in what was then the Irish Free State in 1923.
- \* He first entered Australia in September 1946 whilst serving in the Royal Australian Navy ("RAN") (having commenced his service in Ceylon). Whilst with the RAN, Kenny swore an oath of allegiance to the Commonwealth of Australia and the King.
- \* Upon discharge from the RAN in November 1946, he remained in Sydney and made his home there. Kenny's wife joined him in Sydney in early 1947. Three children of the marriage were born in Australia. Kenny and his wife separated in 1966. From his discharge from the RAN until 1983, Kenny lived and worked in Australia, voting in all State and Federal elections between 1946 and 1983.
- \* During Kenny's war service he had not been issued with a passport. In 1980, wishing to return to Ireland to visit an ill brother, Kenny obtained an Irish passport after being advised that it would take six weeks to obtain an Australian passport (as compared to one week for an Irish passport). The brother recovered and it was not necessary for Kenny to leave the country and use the passport.
- \* Kenny left Australia in May 1983 and travelled extensively in South East Asia, having left his personal belongings with a daughter in Queensland. He returned to Darwin in May 1984.
- \* Kenny remarried twice more. He and his third wife had two children.
- \* In December 1984 Kenny again left Australia to visit his family in Ireland. Whilst in Ireland, he attempted to clarify his citizenship and resident status in Australia with the Australian Embassy in Ireland. Kenny returned to Australia in 1991, and his wife and two younger children arrived several weeks later.
- \* On 23 January 1992 Kenny applied for Australian citizenship, but it was refused.

Kenny's status was exhaustively considered by Gummow J, who began his analysis by noting that the Irish Free State came into existence on 6 December 1922. Kenny was born in the Irish Free State in 1923. Under Irish law he was regarded as an Irish citizen. However, he was also regarded as a natural born British subject, having been born "within the King's Dominions". In 1935 the *[Irish] Nationality and Status of Aliens Act* was passed, which abolished as far as possible the status of British subject or national and asserted the fundamental independence of the Irish Free State. Despite this Act, British law continued to recognise Irish citizens as British subjects until the enactment of the *Ireland Act* 1949 (UK). That Act recognised and declared that, from 18 April 1949, Eire (as it was then known) ceased to be part of His Majesty's Dominions. A saving provision was inserted in respect of a class of persons who were deemed not to have ceased to be British subjects - but that class was limited to persons born before 6 December 1922. Kenny did not fall within that class of persons. Accordingly, he ceased to be a British subject from 1 January 1949 (that date being selected as the relevant date because it was the date on which the *British Nationality Act* came into operation).

With the coming into operation of the *[Australian] Nationality and Citizenship Act* 1948 on 26 January 1949, all persons who were immediately prior to that date British subjects became Australian citizens if they met a certain residency criteria. However, Kenny was not a British subject immediately prior to this date. The position of Irish citizens was specifically dealt with in the 1948 Act. A citizen of the Republic of Ireland was provided with the opportunity to make a claim to remain a British subject and thereby remain a British subject. However Kenny did not avail himself of this opportunity prior to leaving Australia in 1983, as he "simply regarded himself as an Australian resident and as one who had made his home here".<sup>372</sup> Kenny also failed to avail himself of the "citizenship by registration" provisions of the 1948 Act.

---

<sup>372</sup>. at 343.

On 1 May 1987, amendments to the *Australian Citizenship Act* (Cth) came into force, which removed all provisions which attributed to Irish citizens in Kenny's position any of the characteristics of the status of British subject.<sup>373</sup>

Justice Gummow held in *Kenny v Minister for Immigration* that, since 1949, Kenny had been an alien, subject only to the existence of the elective provisions in the Australian 1948 Act.

By reason of the constitutional changes in 1949 which severed, in the eyes of the legal systems of the United Kingdom and the Dominions, the link between Ireland and the Crown, a person in the position of Mr Kenny became an alien in accordance with then received notions. Ireland was "an independent country with its own distinct citizenship" and its citizens were therefore "aliens" in the Australian constitutional sense ... This step occurred quite independently and in advance, of subsequent developments which saw the divisibility of the Crown as between the self-governing Dominions...<sup>374</sup>

Justice Gummow noted the views of Gaudron J in *Nolan* and *Lim*, concerning the requirement of a relevant change in the relationship between the non-alien and the community constituting the body politic of Australia, including such matters as the abandonment of membership of the community or the acquisition of membership of some other nation community. He then held that the (discussed) changes in the constitutional status of Ireland met this "relevant change" requirement.<sup>375</sup> The result was that Kenny had been an alien since 1 January 1949.

*Kenny* illustrates the difficulties associated with a transitional period, during which there occurred a movement away from the notion of allegiance to Britain and a movement towards a notion of allegiance to Australia. The pre-26 January 1949 definition of membership of the Australian community was linked to the

---

<sup>373.</sup> at 344.

<sup>374.</sup> *Nolan* at 346.

<sup>375.</sup> *Kenny* at 347.

status of British subject, and by an unfortunate chain of events Kenny did not possess this status at the relevant time.

It can be noted that Kenny was also a person who had voted in all relevant State and Federal elections until 1983 (when he first left Australia). It appears that for 37 years, from 1946 until 1983, Kenny exercised substantive rights possessed by Australian citizens other than the right to be issued with an Australian passport and travel overseas on it. He presumably did not seek to obtain an Australian passport prior to 1983 as there was no need to obtain one. Furthermore, he served in the Royal Australian Navy - thus performing a duty ordinarily associated with Australian citizenship. However, as was noted previously in the context of *Nolan*, nothing turns on the fact that Kenny could for example vote in Australian elections during this period of time. An extension of the franchise to Kenny merely conferred upon him a privilege; it did not mean that he possessed the right, as an Australian citizen, to vote. Kenny still failed to meet the strict requirements for Australian citizenship prescribed by the Australian Citizenship Act (then known as the *Nationality and Citizenship Act*).

As defined in Chapter 1, a citizen is a person who (a) considers him/herself to be a member of a community, and (b) is accepted by that community as a member. Kenny may or may not have considered that he immigrated to Australia in 1946; at the time when he arrived in Australia the *Immigration Act* 1901 (Cth) excepted from the restrictions upon immigration into Australia members of the King's regular land or sea forces.<sup>376</sup> The decision in *Kenny* can be explained on the basis that, in a time of transition, Kenny failed to show that he considered himself to be a member of the Australian community by taking advantage of the statutory procedures available to him. Furthermore, the procedures set down by the Parliament to indicate community acceptance of his membership were not complied with.

---

<sup>376</sup>

at 334.

### **Consideration of the content of Australian citizenship**

By the mid-1980's it was clear that an *Australian* community had evolved. Allegiance remained allegiance to a monarch, but it had become allegiance to a monarch in her capacity as head of Australia. The preconditions for membership of the Australian community were now clearly regulated by an Australian Parliament and Government, and the status of British subject was irrelevant from 1 May 1987 if not before. However, what remained to be considered were the consequences flowing from Australian citizenship. Very little consideration had to this point been given to what rights and obligations attach to Australian citizenship. Insufficient attention had also been paid to the underlying purpose behind possession of citizenship rights and obligations; the constitutional function of participation in government by the citizen remained underscored.

In *Pochi* and *Nolan* the High Court continued a tradition of analysing Australian citizenship by reference to exclusion. Its analysis in these cases paid insufficient attention to the position of persons who were already Australian citizens. It did not define their rights, duties and role. Yet it is their role within the Australian community that is fundamental; the process of acquisition of citizenship is but one aspect of a legal analysis of Australian citizenship. Chapter 6 considers to what extent the role of Australian citizens is expressly recognised in the Commonwealth Constitution.



## **CHAPTER 6**

### **A Constitutional Guarantee of a National Citizenship**

The Commonwealth Constitution does not expressly guarantee to all Australian citizens their citizenship rights to vote, communicate with representatives about political / governmental matters, and to remain Australian citizens. [As is discussed in Chapter 7, these citizenship rights are (to a degree) impliedly guaranteed.] Other than those provisions dealing with elections of representatives, the only express mention of the right to vote is contained in Section 41 of the Constitution; and it only provides that a person who has a right to vote in an election for the more numerous House of a State Parliament cannot be prevented from voting in Commonwealth Parliamentary elections.

There is no express reference to Australian citizenship in the Constitution. As already mentioned, Section 51(xix) is concerned with the acquisition of citizenship and with aliens, and to this extent it is a power to legislate about citizenship. The only other constitutional provision directed to Australian citizenship is Section 117. Furthermore, Section 117 is phrased in terms of "subject of the Queen, resident in any State" rather than "Australian citizen".<sup>377</sup>

Section 117 provides all Australian citizens with another citizenship right, namely the right to be treated as members of a national community which does not permit certain State-based distinctions. It supplements those citizenship rights which derive from possession of citizenship itself, as discussed in Chapter 1. Discrimination on the basis of State residency is unlawful. This Chapter examines the significance of this Australian citizenship right, the source of which is the Constitution. As is discussed later in this Chapter, the other rights guaranteed by the Constitution such as the right to trial on indictment of a Commonwealth

---

<sup>377.</sup> As is discussed in this Chapter, the term "subject of the Queen, resident of any State" has been interpreted by the High Court to mean "Australian citizen".

offence being by way of jury, are not rights tied to possession of Australian citizenship.

### Securing equal rights of citizenship

Many participants at the Convention Debates of the 1890's were keen to "secure equal rights of citizenship".<sup>378</sup> Section 117 of the Constitution was the product of this desire. It is a provision fundamental to an analysis of Australian citizenship because it operates to prevent a State from attaching rights to persons on the basis of a "State citizenship". Section 117 operates to ensure that Australian citizenship is national.

Section 117 states:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Its significance was not acknowledged by the High Court until 1989, with the decision of *Street v Queensland Bar Association*.<sup>379</sup> Prior to 1989, the High Court had in a series of decisions rendered Section 117 virtually ineffective by adopting a technical distinction between residency and domicile.<sup>380</sup> *Street* marked the rejection of the highly technical approach evident in the earlier High Court decisions, and gave due recognition to Section 117 as being a provision of the Constitution that:

- (i) guarantees to individual Australian citizens a fundamental right; and
- (ii) is an integral part of the structure of the federation intended to foster unity within the Commonwealth.

---

<sup>378.</sup> Terminology used by Symon, a South Australian delegate, *Official Record of the Debates of the Australasian Federal Convention* (Melbourne 1898) at 676.

<sup>379.</sup> (1989) 168 CLR 461.

<sup>380.</sup> For a further discussion, see Ebbeck, "Section 117: the Obscure Provision" (1991) 13 *Adel LR* 23.

*Street* concerned Queensland Rules relating to the admission of barristers, which required a person who applied for admission to be a resident of Queensland and to cease to practice in any other State. The High Court in *Street* held that these Rules breached Section 117.

The importance of Section 117 to the creation of "one people" was emphasised by Mason CJ:

The very object of federation was to bring into existence one nation and one people. This section is one of the comparatively few provisions in the Constitution which was designed to enhance national unity and a real sense of national identity by eliminating disability or discrimination on account of residence in another State.<sup>381</sup>

Section 117 was described by Deane J as,

a structural provision directed to the promotion of national economic and social cohesion and the establishment of a national citizenship.<sup>382</sup>

Justice Dawson noted that a fundamental principle to which Section 117 is directed is that "there is but one nation", and "the citizens of that nation carry their citizenship with them from State to State".<sup>383</sup>

Australian citizenship can in this respect be contrasted with United States citizenship. There is but one national Australian citizenship; however, in the United States a double citizenship exists. In the United States, a person is ordinarily a citizen both of the United States and of a particular State, and is subject to, owes allegiance to, and can demand protection from two governments, each within its own jurisdiction.<sup>384</sup> Within the United States there is a conception of dual sovereignty.<sup>385</sup> In *Feldman v United States*, the United

---

<sup>381.</sup> *Street* at 485.

<sup>382.</sup> at 522, per Deane J.

<sup>383.</sup> at 548, per Dawson J.

<sup>384.</sup> *Dred Scott* at 405-406.

<sup>385.</sup> The distinction between a sovereign body and sovereign legislative power is discussed in Chapter 9.

States Supreme Court referred with approval to the following extract from the "great judgment" of Chief Justice Taney in *Ableman v Booth*:

the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.<sup>386</sup>

By contrast, there has always been but one single and indivisible Australian sovereign body. This view was expressed in monarchical terms earlier this century in the *Engineers Case* (the notion of the indivisible Crown).<sup>387</sup> In *Bradken Consolidated Ltd v BHP*, Mason and Jacobs JJ expressed this principle as follows:

The concept of the unity and indivisibility of the Crown is not denied by the recognition that there are different sources of legislative, executive and judicial power. Indeed, it is only when there are such different sources that the concept becomes important at all. What it means in its application to Australia is that there is one country under the rule of a body of law even though the sources from which the law emanates are different in different cases: that the law binds everyone whom it is intended to bind no matter from which legislative source it springs by virtue of the Constitution, provided that it is a law which was within the legislative competence of that source to enact and which remains a valid law under the Constitution.<sup>388</sup>

Over the course of this century there has been an elevation of the Australian community over British monarchical rule. This movement is the transition towards a republic. The one and indivisible Crown has been replaced, as the sovereign body, by the one and indivisible Australian community as allegiance

---

<sup>386.</sup> *Feldman v United States* 322 US 487 (1943), the Court at 491, referring to *Ableman v Booth* 21 How. 506 at 516 [62 US 506].

<sup>387.</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129 at 152, per Knox CJ, Isaacs, Rich and Starke JJ. See also *Federated Municipal and Shire Council Employees Union v City of Melbourne* (1919) 26 CLR 508 at 533; *Commonwealth v New South Wales* (1923) 32 CLR 200 at 211; *New South Wales v Commonwealth* (1975) 135 CLR 337 at 447; *Bradken Consolidated Ltd v BHP* (1979) 145 CLR 107 at 135; *Polyukovich v Commonwealth* (1991) 172 CLR 501 at 638.

<sup>388.</sup> *Bradken* at 135-136, per Mason and Jacobs JJ.

has come to be owed to the Australian community. Membership of that Australian community unifies Australians. Whilst Australians may be residents of a State or Territory, they are not citizens of that State or Territory. As there is but one Australian sovereign body there is but one Australian citizenship.<sup>389</sup>

With the elevation of the one and indivisible Australian community, as now the sovereign body, Australia has truly become a republic. The identity of who is to exercise sovereign legislative power and sovereign executive power within the Australian legal system [which is discussed further in Chapter 9] does not affect the position of the Australian community as the sovereign body, "above all else".

### **Relationship with Section 92**

In the context of Section 117 operating as a unifying provision, a link with Section 92 of the Constitution can be highlighted. Section 92 provides:

On the imposition of uniform duties by customs, trade, commerce, and intercourse among the States, whether by means of international carriage or ocean navigation, shall be absolutely free.

It operates to prohibit laws which impose fiscal impediments in the nature of border duties or which impose a discriminatory burden upon interstate trade or commerce of a protectionist kind (in other words which operate to effect a protectionist barrier providing local trade with a market advantage within the State).<sup>390</sup> In this sense, Section 92 can be seen to promote national economic unity. There is a parallel with Section 117 insofar as Section 117 promotes national unity through ensuring one national identity.

There is another aspect to Section 92 which is of particular importance: it guarantees freedom of intercourse, or movement between the States. "The people of Australia are ... free to pass to and fro among the States without burden,

---

<sup>389</sup>. The question of sovereignty is further considered in Chapter 9.

<sup>390</sup>. *Cole* at 392-394.

hindrance or restriction": *Gratwick v Johnson*.<sup>391</sup> The guarantee of freedom of intercourse is essential to the preservation of a national citizenship. The link between Sections 92 and 117 becomes clearer: Section 92 guarantees to an individual the right to cross State borders and Section 117 then guarantees to that interstate traveller that he/she will be treated on an equal footing with residents of that State, while he/she is within that State.

### **A guarantee limited to Australian citizens**

In *Street*, Deane, Toohey and Gaudron JJ all noted that the phrase "subject of the Queen" in Section 117 refers to Australian citizens.<sup>392</sup> Prima facie, Section 117 gives no protection to Australian citizens who are not residents in a State; nor does it give protection to persons who are resident in a State but who are not Australian citizens.<sup>393</sup> Thus, persons with permanent residency status who have not formally become Australian citizens, and all persons resident within Australia's territories (internal and external), appear to be denied the protection of Section 117.<sup>394</sup> Furthermore, Brennan J noted in *Street* that Section 117 "does not appear" to extend to Australian citizens resident in the Territories;<sup>395</sup> this is clearly of concern. The Final Report of the Constitutional Commission in 1988 recommended the substitution of a new Section 117 which refers to "in any State or Territory".<sup>396</sup> It is arguable that Section 117's guarantee must by implication extend to residents of the Territories, given that its purpose is to

---

<sup>391.</sup> *Gratwick v Johnson* (1945) 70 CLR 1 at 17, per Starke J.

<sup>392.</sup> at 525, per Deane J; at 544, per Toohey J; at 572, per Gaudron J.

<sup>393.</sup> at 504, per Brennan J.

<sup>394.</sup> Furthermore, whilst Section 117 does prohibit discrimination on the basis of State residency, even it is of limited protection for the individual citizen who, within a State, can be subject to discrimination on the basis of factors other than State residency.

<sup>395.</sup> *Street* at 504.

<sup>396.</sup> *Final Report of the Constitutional Commission - Summary* (AGPS, Canberra, August 1988) p38.

ensure the maintenance of a national citizenship, and residents of the Territories are Australian citizens no less than are residents of the States. However, amendment of the provision to expressly include all Australian citizens would remove any doubts.

The restriction of Section 117's protection from discrimination to Australian citizens is significant; as is discussed later in this Chapter, Section 117 can be contrasted with a number of other constitutional provisions which provide particular guarantees to all persons regardless of their citizenship status. Before contrasting Section 117 with other guarantees, the exceptions to Section 117 should be explored.

### **The federal aspect to national citizenship**

It is clear that Section 117 does not prohibit all differential treatment; there are some exceptions, some differential or discriminatory treatment which is valid. Australian citizenship has a federal aspect to it. For the purposes of the Constitution there are two fundamental groupings of "the people": "the people of the Commonwealth" and "the people of the State". The Constitution requires there to be communities of people clearly identified with the various States:

- \* Senators are chosen "by the people of the State" (Sections 7, 15);
- \* The number of members chosen for the House of Representatives in the several States is in proportion to the number of people in those States (Section 24). Sections 24 and 25 are the only sections of the Constitution which expressly refer to "the people of the Commonwealth", and as a matter of interpretation Section 24 refers to the people of the States.<sup>397</sup>
- \* The Constitution contemplates that the people of a particular race may be disqualified from voting at State elections; and, if that is the case, the persons of that race resident in that State shall not be

---

<sup>397</sup> *Ex rel McKinlay* (1975) 135 CLR 1 at 19; *Ex rel McKellar* (1978) 139 CLR 527 at 533, 542, 554, 562, 566.

counted as "people" (Section 25). Section 25 expressly refers to "the people of the State or of the Commonwealth".

- \* Whilst the word "electors" is used in Sections 8, 30, 123 and 128 of the Constitution, only Section 128 refers to a majority of all electors in Australia, and that section also requires a majority of electors in a majority of the States.

However, although there is a federal nature to the Australian community, the fundamental function of Section 117 is to ensure the unification of the national community.

The exceptions to Section 117 have to date been phrased in terms of preservation of the States as bodies politic (with legislative, executive and judicial arms of government),<sup>398</sup> rather than by reference to the Australian (Commonwealth) community. Such an approach often fails to sufficiently acknowledge that State communities form part of the Australian community. Membership of the Australian community is defined in terms of citizenship; however, membership of a State community is not so defined. The fundamental difference between the Australian community and a State community is that the Australian community includes all State (and Territory) communities. Detmold argues that the Australian Commonwealth is an organic commonwealth, wherein the states are incorporated into the federal commonwealth. The continued existence of the States provides much of the strength of the larger national community.

---

<sup>398</sup> A majority of judges in *Street* adopted a "*Melbourne Corporation / implied immunities*" test for the limits of Section 117's protection. The *Melbourne Corporation* principle was recently formulated by the High Court in *Re Australian Education Union & Others; ex parte Victoria & others* in terms of protecting the State functioning as a government: *Re Australian Education Union & Others; ex parte Victoria and Others* (1995) 128 ALR 609. It should be noted that the High Court has acknowledged that it has experienced difficulty in formulating the principle with a sufficient degree of precision; the decided cases offer little by way of guidance: at 627. The doctrine is directed to protecting those aspects of a State's functions which are critical to its capacity to function as a government; it is not aimed at preventing any interference with or impairment of any function which a State government might undertake: at 625-631 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ and especially 630. Thus (for example) in the industrial context, the High Court has stated that critical to the State's capacity to function as a government is its right to determine the number and identity of the persons whom it wishes to employ, the term of appointment of such persons, and the number and identity of those persons whom it wishes to make redundant.



[T]he Roman Catholic community, or an immigrant community, or the industrial working community, or the North Shore community contribute to the constitution of the community of New South Wales... Now, as the local communities are to the New South Wales community so New South Wales is to the Commonwealth community. Thus we can say that ordinarily the people of New South Wales, tied together as New South Welshmen, are part of the social tie which we call federal community or Commonwealth. This is the sense in which Australia is an organic federation; constructed, like Bryce's great church, over and above and incorporating the smaller communities. Of course, nothing of this sort can be said vice versa; there is no sense in which Australia is part of the New South Wales community.<sup>399</sup>

To adopt the phrase traditionally associated with the Crown, the Australian community is "one and indivisible". Discrimination on the basis of State residency tends towards fragmentation of that national unity.

The only discrimination on the basis of State residency which should be upheld as constitutionally permissible is that which permits Australian citizens to exercise the federal aspect of their citizenship rights. An Australian citizen has the right to participate in the governance of the Australian community (the fundamental principle of participation right being expressed in terms of voting, in Australia). That right of participation has a federal aspect. Thus, an Australian citizen has the right to participate in the governance of both the national, and a State / Territory community (with which he/she is identified). Section 117 should be interpreted in accordance with this federal aspect of Australian citizenship; accordingly, residency restrictions attaching to State electoral laws are clearly valid.<sup>400</sup> Such restrictions are necessary to permit an Australian citizen who is a member of a particular State / Territory to participate in its governance. Section 29(1) of the *Electoral Act* 1985 (SA), for example, requires a person seeking to enrol for a subdivision to have resided in that subdivision for one continuous

---

<sup>399.</sup> Detmold, *The Australian Commonwealth* at 17.

<sup>400.</sup> *Street* at 512-513, per Brennan J; at 528, per Deane J; at 548, per Dawson J; at 572, per Gaudron J; at 584, per McHugh J.

month prior to application for enrolment. A defined group of people must be able to select their representatives.

However, discriminatory measures which are not aimed at facilitating this federal aspect of a citizen's right to participate in governance should be held to be invalid. Discrimination solely out of a concern for protecting a State's revenue base, such as access to hospital services, for example, breaches Section 117.

Unlike the other members of the Court in *Street*, Gaudron J appeared to reject the need to interpret Section 117 in light of its fundamental function of unifying the national community. She stated:

The limits to the protection afforded by s117 are, in my view, to be ascertained by reference to the expression 'disability or discrimination' rather than by identification of interests pertaining to national unity or by reference to the federal object attending s117.<sup>401</sup>

Justice Gaudron instead turned to consider examples of anti-discrimination legislation, adopting the terminology used by courts in anti-discrimination cases. Such tests incorporate notions of "relevant difference" and look to whether the differential treatment can be seen to be "reasonably appropriate and adapted" to that relevant difference.<sup>402</sup>

Justice Gaudron's approach, and her rejection of the relevance of the concept of "national unity", tends to suggest that she viewed Section 117 as a guarantee of a human right, rather than a provision directed towards citizens. Her approach fails to recognise the distinction which exists between citizenship rights and human rights.

---

<sup>401.</sup> at 570. For a further discussion of her method of reasoning, see Ebbeck, "The Future for Section 117 as a Constitutional Guarantee" (1993) 4 *PLR* 89 at 92-94.

<sup>402.</sup> at 570-573.

### Distinction between citizenship rights and human rights

Unlike all other express guarantees found in the Constitution, Section 117 is linked to possession of Australian citizenship. There are other provisions of the Constitution which expressly guarantee certain freedoms, rights or immunities; they are as follows:

- \* Section 80 provides that the trial on indictment of a Commonwealth offence shall be by jury, and to obtain a conviction that jury verdict must be unanimous;<sup>403</sup>
- \* Subsections 51(ii), 51(iii), Sections 86, 88 and 90 (collectively) prohibit discrimination between persons in different States and parts of States in relation to Commonwealth taxes and bounties, and in relation to customs and excise duties;
- \* Section 92 guarantees freedom of interstate trade, commerce and intercourse; this has been interpreted to mean that laws which impose fiscal impediments in the nature of border duties, or which impose a discriminatory burden upon interstate trade or commerce of a protectionist nature, invalid;<sup>404</sup> and, furthermore, movement between the States is guaranteed;<sup>405</sup>
- \* Sections 7 and 24 guarantee direct suffrage (as opposed to electoral colleges);<sup>406</sup>
- \* Section 116 prohibits the Commonwealth from establishing a religion or prohibiting the free exercise of religion.

Justice Deane has stated that the rights or guarantees which were expressly adopted can today be seen to serve at least one of two purposes:

---

<sup>403</sup> In *Cheatle v The Queen* (1993) 177 CLR 541, the High Court unanimously held that, for a jury to convict, its verdict must be unanimous. Section 80 itself makes no mention of this requirement; however, the High Court interpreted the phrase "trial by jury" to connote this requirement, and also that a jury be randomly or impartially selected.

<sup>404</sup> *Cole* at 392-394.

<sup>405</sup> *Gratwick* at 17, per Starke J.

<sup>406</sup> Equality of voting is discussed in Chapter 8.

1. They advance or protect the liberty, the dignity or the equality of the citizen;
2. They enhance national unity and national identity.<sup>407</sup>

He referred to the liberty, dignity or equality of "the citizen"; however, his comment overlooks the fact that the above-mentioned rights / guarantees are applicable to all persons rather than Australian citizens specifically, and they advance or protect the liberty, dignity or equality of the individual (who may or may not be an Australian citizen). Section 80 requires a trial for an indictable Commonwealth offence to be a jury trial; and (for example) a permanent resident who commits any such offence will be equally entitled to a jury trial. The above-mentioned financial clauses, and Sections 92 and 116, operate as limits on legislative power; they do not confer rights upon Australian citizens. Acting as limits to legislative power, these sections can be invoked by non-citizens and corporate entities.

These rights which are expressly guaranteed by the Constitution are important to any analysis of the nature of Australian society and the Australian community; religious tolerance, for example, can be said to be a basic principle of Australian society. However these rights / guarantees do not assist in understanding the nature of Australian citizenship. Australian citizenship confers the right to participate in the governance of the Australian community (as opposed to a broad notion of participation in community life). The distinction between citizenship rights and other rights (whether they be termed "human rights" or "fundamental rights") is crucial.

The distinction is illustrated by considering Nicholas Toonen's communication to the Human Rights Committee of the United Nations ("the Committee").<sup>408</sup> The Committee is a body of 18 persons elected by periodic meetings of State parties to the *International Covenant on Civil and Political Rights* ("the

---

<sup>407.</sup> *Street* at 522, per Deane J.

<sup>408.</sup> The Views of the Committee are reported in Shearer, *United Nations: Human Rights Committee: The Toonen Case* (1995) 69 *ALJ* 600 at 602-609.

Covenant"). Each member of the Committee must be a national of a State party, but serves in a personal capacity.<sup>409</sup> Optional Protocol 1 to the Covenant recognises the competence of the Committee to receive communications directly from citizens of a State party that has subscribed to the Protocol claiming to be victims of a violation by that State party of any of the rights set forth in the Covenant.<sup>410</sup> Australia signed the Covenant on 18 December 1972 and deposited its instrument of ratification on 13 August 1980.<sup>411</sup> The Optional Protocol was acceded to by Australia on 25 September 1991. On 25 December 1991, Toonen communicated a complaint to the Committee under this Protocol. Toonen complained that he was the victim of violations by Australia of Articles 2(1), 17 and 26 of the Covenant.<sup>412</sup>

Toonen, who was a member of the Tasmanian Gay Law Reform Group, challenged subsections 122(a) and (c) and section 123 of the Tasmanian Criminal Code, which criminalise various forms of sexual contact between men including all forms of sexual contact between consenting adult homosexual men in private.

---

<sup>409.</sup> at 601.

<sup>410.</sup> As above.

<sup>411.</sup> As above.

<sup>412.</sup> **Article 2** states (inter alia):

(1) "Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

**Article 17** states (inter alia):

(1) "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."  
(2) Everyone has the right to the protection of the law against such interferences or attacks."

**Article 26** states (inter alia):

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Toonen drew attention to the fact that the legislation did not distinguish between sexual activity in private and sexual activity in public.

The Committee held that it was undisputed that adult consensual sexual activity in private is covered by the concept of "privacy". It also held that Toonen's privacy was interfered with by the Tasmanian legislation, even if the provisions had not been enforced for some years, because this was no guarantee that actions would not be brought against homosexual men in the future. The interference was held to be arbitrary, and thus a breach of Article 17. The Committee did not find it necessary to consider whether there had also been a violation of Article 26.

In response to the Committee's findings, the Commonwealth enacted the *Human Rights (Sexual Conduct) Act* 1994. The Preamble to this Act states that it is "An Act to implement Australia's international obligations under Article 17 of the International Covenant on Civil and Political Rights". The substantive provision of the Act is section 4(1):

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.

It is likely that, by virtue of inconsistency with section 4(1) of the Commonwealth Act and the operation of Section 109 of the Constitution, the offending Tasmanian provisions are rendered inoperative.<sup>413</sup>

Toonen's right to privacy is best understood as a human right; he was entitled to seek a ruling on its infringement by a human rights body, namely the Human Rights Committee of the United Nations. The existence of that right can be seen to have been acknowledged by the "world community" (or a large part thereof) by its inclusion in a list of rights contained in the *International Covenant on Civil and Political Rights*.

---

<sup>413</sup> Rodney Croome, another Tasmanian gay man, has brought High Court proceedings to clarify this point.

Toonen's right to privacy should not be seen to be an Australian citizenship right<sup>414</sup> (even though his ability to make the communication to the Committee was dependant upon him being a citizen of a country such as Australia, that had subscribed to the Protocol). I argue that the common law rules of Australian citizenship do not include a right to privacy.<sup>415</sup> Furthermore, Toonen was not singled out by the law in his capacity as an Australian citizen who happened to be homosexual; he was singled out as a male homosexual. The Tasmanian legislation affected all Tasmanian homosexual males equally, be they Australian citizens, permanent residents or visiting aliens. The discrimination did not prevent Toonen from voting or communicating with members of Parliament or making statements about political matters (which are rights attaching to Australian citizenship).

Thus, to return to Section 117, Gaudron J's rejection of the relevance of "national unity" to its interpretation is short-sighted. Section 117 operates to prevent the creation of a State citizenship; it ensures the unity of the Australian community. Far from being irrelevant, recognition of national unity is essential to understanding Section 117, in clear contrast to those other provisions of the Constitution which expressly guarantee certain freedoms, rights or immunities.

### **Express constitutional recognition of Australian citizenship**

If an Australian citizen turned to the Constitution for guidance on his/her citizenship rights and duties, disappointment would follow. The Constitution contains no mention of the role of Australian citizens, either considered

---

<sup>414</sup> Subject to the possible arguments about a citizen's rights to representation and equality, which are discussed in the following chapters.

<sup>415</sup> I reject the argument that there is a citizenship right to privacy for the same reasons that I reject the argument that there is (at least currently) a citizenship right to equality: there is insufficient common law evidence to support the existence of the rule, and any existing case law is not tied to citizenship and participation in the governance of the Australian community. Detmold, who would adopt the contrary view in relation to equality, may argue that Toonen's right as an Australian citizen to "equal respect" is infringed and therefore the Tasmanian law is invalid: see Detmold, "Australian Constitutional Equality: The Common Law Foundation" (1996) 7 *PLR* 33 at 44-45.

individually or collectively. It contains only indirect reference to the Australian citizen's right to vote, and no mention of his/her rights to communicate with representatives about political / governmental matters and to remain an Australian citizen. As is discussed in the next chapter, one must undertake a structural analysis of the Constitution in order to clarify the constitutional functions of the Australian citizen. The High Court has recently adopted such an approach; and in so doing, has laid itself open to criticism for judicial law-making. The criticism is unjust; what the Court is doing is giving long overdue recognition to the most fundamental principle of Australian law, Australian citizenship.



## CHAPTER 7

### Functional Citizenship Rights

The right to vote is an Australian citizenship right. Justice Isaacs of the High Court acknowledged its importance in *Judd v McKeon* in 1926:

That the franchise may be properly regarded as a right, I do not for one moment question. It is a political right of the highest nature.<sup>416</sup>

Its importance to United States citizens, also, has been emphasised by the United States Supreme Court:

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.<sup>417</sup>

Consideration of the franchise is fundamental to an analysis of Australian citizenship.<sup>418</sup> The Australian citizen possesses the right to vote in order to be able to participate in his/her community's political and electoral processes. As discussed in Chapter 1, a citizen cannot validly be deprived of his/her right to participate.

Certain aspects of the right to vote are expressly recognised and guaranteed by the Constitution. It contains certain provisions dealing with the qualification of electors and the election of members of the Commonwealth House of Representatives and the Senate;<sup>419</sup> and these express terms make it clear that voting is to be by way of direct vote ("directly chosen by the people") rather than

---

<sup>416.</sup> *Judd v McKeon* (1926) 38 CLR 380 at 385.

<sup>417.</sup> *Wesberry v Sanders* 376 US 1 (1963) at 17.

<sup>418.</sup> Only Australian citizens are eligible to vote in Federal and State elections (subject to certain historical anomalies, with British subjects entitled to be on electoral rolls in the past).

<sup>419.</sup> The relevant provisions are set out later in this Chapter, in the footnotes.

by way of (say) electoral college voting methods.<sup>420</sup> Furthermore, the invalidity of the Constitution insofar as it denied to Aboriginal citizens their status of citizens and their right to vote has been rectified by Constitutional amendment.

However the express terms of the Constitution are of limited assistance to understanding the nature of the Australian citizen's right to vote. The Constitution does not expressly acknowledge the role and responsibilities of individual citizens when exercising their right to vote. Furthermore the express terms of the Constitution do not guarantee the Australian citizen's right to communicate with his/her representatives about political / governmental matters in order to ensure the process of representation is on-going.

Because the express terms of the Constitution fail to sufficiently identify the rights, duties and functions of Australian citizens, the High Court has had to adopt an approach to constitutional interpretation which extends beyond consideration of the words of the Constitution, to a consideration of its structure.

### **Structure of the Constitution**

The High Court has, in recent decisions, turned to consider broad underlying themes contained in the Constitution, and implicit principles. The Court has freely referred to broad notions such as "federal purpose", "unity" and "equality".<sup>421</sup> There has also been acknowledgment of the nature of the system of government established by the Constitution, with references to "representative government" and "representative democracy".<sup>422</sup> Doyle notes that such language

---

<sup>420.</sup> Section 7 of the Constitution provides that the Senate shall be composed of Senators for each State, directly chosen by the people of the State. Section 24 provides that the House of Representatives shall be composed of members directly chosen by the people of the Commonwealth.

<sup>421.</sup> The reference to broad themes is seen in the judgments in *Street*, for example.

<sup>422.</sup> These concepts were discussed by the Court in the "free speech" cases, which are analysed in this Chapter.

"indicates more than the conventional purposive approach to interpretation, which involves purpose in a relatively narrow, functional sense".<sup>423</sup>

Seen by many as an undesirable shift away from the written words of the Constitution, the changing approach to constitutional interpretation has laid the High Court open to increasing criticism. It has been said by Goldsworthy, for example, that the members of the court, whilst honourably and conscientiously attempting to carry out their judicial duty as they conceive it, have had their conceptions of that duty "warped by powerful moral and political convictions concerning human rights and democracy",<sup>424</sup> the result of which will not "free the present generation from the dead hand of the past" but will instead free itself "from the living hand of the elected representatives of today's Australians".<sup>425</sup> Another critic, Lindell, argues that there is a very significant difference between the Court's democratic mandate to give a real and substantial operation to the express restrictions on legislative power, and the Court by implication finding the existence of such restrictions. Whilst Lindell does not deny the legitimacy of implications altogether, he argues that, at best, they may rest on a "fragile basis".<sup>426</sup>

However the change in the High Court's approach to constitutional interpretation can be defended on the basis that the Constitution is a "living document" which was intended to create a blueprint for an evolving Australian community. Detmold describes constitutions as being "in movement". By this he means that they "change communities", and thereby "change their own relation to

---

<sup>423</sup>. Doyle, "Constitutional Law: 'At the Eye of the Storm'" (1993) 23 *UWAL Rev* 15 at 21.

<sup>424</sup>. Goldsworthy, "The High Court, Implied Rights and Constitutional Change" (1995) *Quadrant* 46 at 47.

<sup>425</sup>. at 51.

<sup>426</sup>. Lindell, "Form and Substance: Discrimination in Modern Constitutional Law" (1992) 21 *Fed LR* 136 at 148 - being Part II of an article by Zines and Lindell.

communities".<sup>427</sup> As O'Connor J stated in *Jumbunna Coalmine N/L v Victorian Coal Miners Association* (1908),

it must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.<sup>428</sup>

As discussed in Chapter 1, the Constitution exists to serve the Australian community; the community does not exist to serve the Constitution.

The "structure" of the Constitution has become increasingly relevant to the High Court's process of discerning what principles are implicit in the Constitution. The Court has acknowledged that an implication in the Constitution must be securely based.<sup>429</sup> It has adopted a distinction between a textual implication and a structural implication. In *Australian Capital Television Pty Ltd v Commonwealth*, Mason CJ stated:<sup>430</sup>

[i]n cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

The implication that Section 80 of the Constitution requires a unanimous verdict of guilty for the trial on indictment of Commonwealth offences is an example of a textual implication - the principle has been held to be implicit within the term "trial by jury". However the meaning of "structure" requires further consideration.

Chief Justice Mason did not elaborate on what he meant by the structure of the Constitution in *Australian Capital Television*. Indeed the distinction between a

---

<sup>427</sup> Detmold, "Australian Law: Federal Movement" (1991) 13(1) *Syd LR* 31 at 31.

<sup>428</sup> *Jumbunna Coalmine N/L v Victorian Coal Miners Association* (1908) 6 CLR 309 at 367-368.

<sup>429</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 134, per Mason CJ.

<sup>430</sup> at 135.

textual implication and a structural implication sometimes appears to become blurred. Justice Dawson is a critic of the distinction; in *McGinty* he queried whether a structural implication was in fact different from a textual implication, because (he considered) ultimately it must be drawn from the text.<sup>431</sup>

Although the distinction has not always been defined by members of the High Court, the reference to "structure" must mean a reference to something beyond constitutional text. If this were not the case then Dawson J would be correct and the distinction would be meaningless. The clue to the meaning of "structure" is found in references to the Constitution being an "instrument of government". Previous members of the High Court have given due weight to the status of the Constitution as an Act which establishes a system of government, when undertaking constitutional interpretation. Their statements to this effect have been relied upon by the current High Court in its structural analysis of the Constitution.

In *Australian Capital Television*, Mason CJ referred with approval to the following statement made by Dixon J in *Australian National Airways Pty Ltd v Commonwealth*:

[w]e should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications.<sup>432</sup>

Another statement made by Dixon J in that case was quoted with approval by Toohey J in *McGinty*:

it is a Constitution we are interpreting, an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances.<sup>433</sup>

Justice McHugh in *McGinty* quoted a similar sentiment expressed by Higgins J, in *Attorney-General (NSW) v Brewery Employees Union of NSW*:

---

<sup>431.</sup> *McGinty* at 307-308.

<sup>432.</sup> *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29 at 85.

<sup>433.</sup> *McGinty* at 44-45.

although we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act we are interpreting - to remember it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.<sup>434</sup>

In his analysis of the Constitution in *McGinty*, Gummow J referred to "the system devised by the framers of the Australian instrument of government".<sup>435</sup>

A structural analysis of the Constitution gives consideration to the question "why and for whom does the Constitution exist?" The answer is two-fold. It exists for the purpose of providing a national system of government. Furthermore it exists to provide a system of government for Australian citizens. The Constitution should be interpreted in this light, with appropriate regard had to its fundamental purpose.

The High Court's recent emphasis on structure is not novel; it is consistent with the approach adopted in *Melbourne Corporation v Commonwealth* in 1947<sup>436</sup> and *R v Kirby ex parte Boilermakers' Society of Australia* in 1956<sup>437</sup>. In *Melbourne Corporation* the High Court held that an implication drawn from the federal structure of the Constitution is a principle of "implied immunities", which recognises that the Constitution is based upon and provides for the continued co-existence of Commonwealth and States as separate Governments, each independent of the other within its own sphere. Thus it is beyond the power of either to abolish or destroy the other. Then, in *Boilermakers* it was held that an implication of the separation of judicial power can be drawn from the structure

---

<sup>434.</sup> *McGinty* at 81, quoting from *Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469 at 611-612.

<sup>435.</sup> *McGinty* at 127.

<sup>436.</sup> (1947) 74 CLR 31

<sup>437.</sup> (1956) 94 CLR 254.

of the Constitution, most particularly the existence of Chapter III dealing with 'the Judicature'.

The High Court's analysis in the "free speech" cases,<sup>438</sup> as understood in light of *McGinty* (discussed later in this Chapter) is merely an extension of the method of analysis adopted in *Melbourne Corporation* and *Boilermakers*; it involves consideration of the nature of government established by the Constitution and for whom that government exists. The Constitution is an instrument of government which exists for Australian citizens. As Dixon J noted in *Melbourne Corporation*, "the Constitution is a political instrument".<sup>439</sup> Australian citizenship and the constitutional functions of Australian citizens are matters which must be taken into account by the High Court in its interpretation of the Constitution.

### **Representative government**

In *Australian Capital Television Pty Ltd*, Mason CJ, Brennan, Deane, Toohey and Gaudron JJ all made broad statements that the Constitution enshrines a principle of [Commonwealth<sup>440</sup>] representative government or prescribes a system of representative government.<sup>441</sup> Taking a more precise view, McHugh J held that the Constitution embodies a system of responsible government which involves conceptions of freedom of participation, association and communication in respect of the election of the representatives of the people.<sup>442</sup> In the light of *McGinty*, McHugh J's formulation now seems to be the authoritative one. Before turning to *McGinty*, however, the "free speech" cases should be examined.

---

<sup>438.</sup> *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1; *Australian Capital Television; Theophanous; Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; and *Cunliffe v Commonwealth* (1994) 182 CLR 272.

<sup>439.</sup> *Melbourne Corporation* at 82.

<sup>440.</sup> The applicability of the principle to the States is considered in Chapter 10.

<sup>441.</sup> *Australian Capital Television* at 137, per Mason CJ; at 149, per Brennan J; at 168, per Deane and Toohey JJ; at 210, per Gaudron J.

<sup>442.</sup> at 233.

The terms "representative government" and "representative democracy" have been used interchangeably, or without seeming distinction by some members of the Court and by commentators. However McHugh J in particular has stated that the two terms are not synonymous. In *Theophanous*, McHugh J stated that he considered representative democracy to be the wider concept of the two, commonly used to describe a society which provides for equality of rights and privileges. Justice McHugh saw "representative democracy" as being a term descriptive of a wide spectrum of political institutions and processes, and the conceptions of representative democracy have been evolving for a very long period of time. By contrast, he considered that the essence of representative government - which is a narrower concept than representative democracy - is a political system where the people in free elections elect their representatives to the political chamber which occupies the most powerful position in the political system.<sup>443</sup> The term "representative government" is used in my thesis; the concept of "representative democracy" is discussed in more detail in Chapter 9.

Whilst there is some variance in the identification of the provisions of the Constitution which can be said to give rise to the implication of representative government, the provisions generally referred to include Sections 1,<sup>444</sup> 7,<sup>445</sup>

---

<sup>443.</sup> at 199-200.

<sup>444.</sup> Section 1 states:

The legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is herein-after called 'The Parliament' or 'The Parliament of the Commonwealth'.

<sup>445.</sup> Section 7 states:

The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate.

But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal



24,<sup>446</sup> 25,<sup>447</sup> 61,<sup>448</sup> 62<sup>449</sup> and 128.<sup>450</sup> The interrelationship of these

---

representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.

<sup>446.</sup> Section 24 states:

The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth, and the number of such members shall be, as nearly as practicable, twice the numbers of the senators.

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:-

(i) A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators;

(ii) The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.

<sup>447.</sup> Section 25 states:

For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

<sup>448.</sup> Section 61 states:

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

<sup>449.</sup> Section 62 states:

There shall be a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors, and shall hold office during his

provisions can be seen in the following quote from Mason CJ in *Australian Capital Television*:

The Constitution provided for representative government by creating the Parliament, consisting of the Queen, a House of Representatives and a Senate, in which legislative power is vested

---

pleasure.

450.

Section 128 states:

This Constitution shall not be altered except in the following manner:- The proposed law for the alteration thereof must be passed by an absolute majority of each House of the Parliament, and not less than two nor more than six months after its passage through both Houses the proposed law shall be submitted in each State and Territory to the electors qualified to vote for the election of members of the House of Representatives.

But if either House passes any such proposed law by an absolute majority, and the other House rejects or fails to pass it, or passes it with any amendment to which the first-mentioned House will not agree, and if after an interval of three months the first-mentioned House in the same or the next session again passes the proposed law by an absolute majority with or without any amendment which has been made or agreed to by the other House, and such other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, the Governor-General may submit the proposed law as last proposed by the first-mentioned House, and either with or without any amendments subsequently agreed to by both Houses, to the electors in each State and Territory qualified to vote for the election of the House of Representatives.

When a proposed law is submitted to the electors the vote shall be taken in such manner as the Parliament prescribes. But until the qualification of electors of members of the House of Representatives becomes uniform throughout the Commonwealth, only one-half of the electors voting for and against the proposed law shall be counted in any State in which adult suffrage prevails.

And if in a majority of the States a majority of the electors voting approve the proposed law, and if a majority of all the electors voting also approve the proposed law, it shall be presented to the Governor-General for the Queen's assent.

No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing or otherwise altering the limits of the State, or in any manner affecting the provisions of the Constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.

In this section, "Territory" means any territory referred to in section one hundred and twenty-two of this Constitution in respect of which there is in force a law allowing its representation in the House of Representatives.

(s.1), the members of each House being elected by popular vote, and by vesting the executive power in the Queen and making it exercisable by the Governor-General on the advice of the Federal Executive Council (ss. 61, 62) consisting of the Queen's Ministers of State drawn, subject to a minor qualification, from the House of Representatives and the Senate... In the case of the Senate, s.7 provides that it 'shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate'. In the case of the House of Representatives, s.24 provides that it 'shall be composed of members directly chosen by the people of the Commonwealth'. Although s.24 contains no reference to voting, s.25 makes it clear that 'chosen' means 'chosen by vote at an election'.<sup>451</sup>

It has also been said that representative government can be seen to be a broader principle, "a doctrine of government which underlie[s] the Constitution and form[s] part of its structure".<sup>452</sup> Seen as a fundamental doctrine underpinning the Constitution, representative government has been compared to two other fundamental constitutional doctrines acknowledged by the Court to be implicit in the Constitution, namely federalism and the separation of judicial power from legislative and executive power.<sup>453</sup>

The High Court's discussions of representative government do not always make it clear whether the implication is seen to be textual or structural. There are clearly numerous provisions of the Constitution upon which the implication can be based; however, consideration of representative government requires analysis extending beyond the words of the Constitution to a broad examination both of the system of government established by the Constitution and the Australian citizens for whom it is established.

After discussing representative government as enshrined in the Constitution, a majority of the High Court in *Australian Capital Television* held that there is a

---

<sup>451.</sup> *Australian Capital Television* at 137, per Mason CJ.

<sup>452.</sup> *Nationwide News* at 70, per Deane and Toohey JJ.

<sup>453.</sup> See *Nationwide News* at 70, per Deane and Toohey JJ; and *Australian Capital Television* at 210, per Gaudron J.

freedom of communication with respect to political / governmental matters implicitly enshrined in the Constitution. The nature of this implication is considered later in this Chapter. The reasoning adopted by the majority judges in *Australian Capital Television* was based on the following steps:

- (i) the Constitution enshrines a principle of representative government;
- (ii) freedom of communication in relation to political / governmental matters is essential for the preservation of that representative government;
- (iii) accordingly, there is this freedom of communication in relation to political / governmental matters implicit in the Constitution.

However, in the more recent case of *McGinty* there has been recognition by both Brennan CJ and McHugh J that this line of reasoning is flawed. Their analysis of the correct method of constitutional interpretation, and the ascertainment of implications within the Constitution, is far more rigorous in *McGinty* than it was in the "free speech" cases. Chief Justice Brennan stated in *McGinty* that it is logically impermissible to treat "representative democracy" as though it were contained in the Constitution, to attribute to it a meaning or content derived from sources extrinsic to the Constitution, and to then invalidate a law for inconsistency with that meaning or content. Instead, the meaning or content of any principle of representative democracy must be implicit in the text and structure of the Constitution.<sup>454</sup> Justice McHugh's reasoning was similar; he was of the opinion that it is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure.<sup>455</sup> He rejected any suggestion that the Constitution contains a free-standing principle of representative government or representative democracy.<sup>456</sup> Justice Dawson (who had not formed part of the majority in *Australian Capital Television*) also stated

---

<sup>454.</sup> *McGinty* at 295-296.

<sup>455.</sup> at 345.

<sup>456.</sup> at 347.

in *McGinty* that it is fallacious reasoning to posit a system of representative government for which the Constitution does not provide, and to read the requirements of that system into the Constitution by implication.<sup>457</sup>

Nevertheless, the "free speech" cases were rightly decided. The Constitution presupposes, and requires, Australian citizenship; and that is the justification for these cases. The existence of Australian citizenship is the most fundamental principle implicit in the Constitution, and it leads to the "free speech" decisions in the following way:

- (i) the Constitution contains an implication of Australian citizenship;
- (ii) Australian citizenship necessitates participation insofar as the citizen has the right to vote and the right to communicate with his/her representatives in relation to political / governmental matters;
- (iii) accordingly there is (inter alia) a freedom of communication in relation to political / governmental matters constitutionally guaranteed to Australian citizens (which enables them to carry out their constitutional functions of voting and communicating with representatives about political / governmental matters).

This method of reasoning is consistent with Brennan CJ and McHugh J's more rigorous approach in *McGinty*.

The High Court's method of interpreting the Constitution in the "free speech" cases as viewed in light of *McGinty* is process-based. The Court has legitimately turned its attention on the processes of government which are established by the Constitution; it has seen its role to be one of enhancing participation within those processes. In *Australian Capital Television*, Mason CJ referred to the need to enhance the political process (which embraces the electoral process and the workings of Parliament) and to ensure its integrity.<sup>458</sup>

---

<sup>457.</sup> at 307-308.

<sup>458.</sup> *Australian Capital Television* at 145, per Mason CJ.

A process-oriented approach to judicial review of legislation is advocated by John Hart Ely in *Democracy and Distrust*.<sup>459</sup> Ely argues that the role for a court (specifically the United States Supreme Court, in his writings) is to ensure that access to the political process is open to those of all view-points on something approaching an equal basis.<sup>460</sup> [Ely argues also for confinement of the task of properly identifying, weighing and accommodating substantive values to the political process, an argument which is considered later in my thesis.]

Adoption by the High Court of process-based interpretation of the Constitution is significant and long-overdue; it directs attention towards the role of the respective parties within the Australian polity and their interrelationship. Australian citizens, both collectively and as individuals, have constitutional functions. These constitutional functions are citizenship functions. The Court is concerned to interpret the Constitution in such a way as to enable the Australian people to carry out their constitutional functions.<sup>461</sup>

To date, three major issues which have been formulated in terms of Australian representative government have arisen for the consideration of the High Court:

1. [As already mentioned], whether representative government to the extent that it is enshrined in the Constitution necessitates that there be freedom of communication on political matters;
2. Whether representative government as it is enshrined in the Constitution necessitates that each elector's vote be of (as nearly as practicable) equal value; and
3. Whether the implication of representative government found in the Commonwealth Constitution binds the States, and / or whether State Constitutions establish representative government and, if so, what flows from it.

---

<sup>459</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge 1980).

<sup>460</sup> at 74.

<sup>461</sup> *Nationwide News* at 50, per Brennan J.

These are issues of citizenship.<sup>462</sup> This Chapter examines in more detail question 1. Questions 2 and 3 are examined in Chapters 8 and 10 respectively.

### **The citizen and his/her right to free speech in relation to political matters**

Australian citizens possess the right to choose their representatives. To be able to exercise this right effectively, the ability to discuss political matters or matters of government must be guaranteed.

It would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of political discussion from which the people derive their political judgments.<sup>463</sup>

The High Court has also held that there is an inextricable link between matters relating to each tier of government in Australia; "public affairs and political discussion are indivisible and cannot be subdivided into compartments that correspond with, or relate to, the various tiers of government in Australia".<sup>464</sup> Thus the right is not limited to matters relating to the government of the Commonwealth.

The breadth of the involvement that an individual citizen may choose to adopt in participating in government in a broad sense of the term was highlighted by Mason CJ, Toohey and Gaudron JJ in *Theophanous*.

‘political discussion’ includes discussion of the conduct, policies or fitness for office of government, political parties, public bodies,

---

<sup>462.</sup> Rephrased, the questions can be seen as:

1. Does the Constitution guarantee the right of an Australian citizen to privately communicate with his/her Commonwealth Parliamentary representatives and members of the Executive Government and to publicly discuss matters of political and governmental concern?
2. An Australian citizen possesses the right to vote for his/her representatives in the Commonwealth Parliament; is his/her right to vote "equal" to the right to vote possessed by other citizens? (and how is that equality to be defined?)
3. Do these rights extend to communication with State / Territory Members of Parliament and State / Territory political or governmental matters, and to the "value" of an Australian citizen's right to vote in State / Territory elections?

<sup>463.</sup> *Nationwide News* at 47, per Brennan J.

<sup>464.</sup> *Australian Capital Television* at 142, per Mason CJ.

public officers and those seeking public office. The concept also includes discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate, eg, trade union leaders, Aboriginal political leaders, political and economic commentators. Indeed, in our view, the concept is not exhausted by political publications and addresses which are calculated to influence choice. Barendt states that:

‘political speech’ refers to all speech relevant to the development of public opinion on the whole range of issues which an intelligent citizen should think about.<sup>465</sup>

The High Court’s recognition of the right to free speech in relation to political/governmental matters has focussed attention on the role of the Australian citizen. A citizen has the right to have and express views on an extremely wide range of matters in the public domain. The acknowledgment and protection of this right emphasises the role of the Australian citizen in choosing his/her representatives and in having an on-going ability to ask questions, raise issues and express opinions. This constitutes a shift in focus onto the represented and away from the representors (who up until these High Court decisions have been in a privileged position vis-a-vis the general population by virtue of the benefit of Parliamentary privilege, which enables Members of Parliament to discuss matters freely without fear of defamation laws within the House).

### **Individual or Personal rights**

The implied freedom of speech in relation to political matters is referred to as a "right" in my thesis because it is a right possessed by all Australian citizens. Insofar as it attaches to the office of citizenship - held by the individual citizen - it can be termed an individual right. It derives from citizenship itself, and has recently been recognised as being implicitly guaranteed by the Constitution. However, members of the High Court appear to have differing views on the question whether the constitutional implication gives rise to a positive right that

---

<sup>465.</sup> *Theophanous* at 124. The reference to Barendt is to his book *Freedom of Speech* (1985) p152.



can be raised between individuals or whether it simply operates as a restriction on power. Chief Justice Mason, Toohey and Gaudron JJ in *Theophanous* noted:

The decisions in *Nationwide News* and *Australian Capital Television* establish that the implied freedom is a restriction on legislative and executive power. Whether the implied freedom could also conceivably constitute a source of positive rights was not a question which arose for decision in those cases and it is unnecessary to decide it in this case.<sup>466</sup>

Justice Brennan reached a firm conclusion on the question in *Theophanous*. He contrasted a personal right or immunity with a freedom that is the consequence of a limitation on power and held that the freedom of speech in relation to political matters is not a personal freedom.<sup>467</sup>

In one sense Brennan J is correct; given that the right exists to enable the citizen to perform his/her constitutional function of participating in the Australian political process, it is not a personal right in the sense of being a human right. However, it is too narrow a view to state that it merely operates as a restriction on legislative power; the right is held by the individual citizen to permit him/her to exercise the fundamental right of participation. Citizens do not exist merely in relation to the Parliament and the Executive; a citizen exists in relationship to other citizens, who do not have the right to prevent that first-mentioned citizen from exercising his/her constitutional functions.

#### **Class of persons possessing this right**

Although the rationale for the existence of this right is the relationship between represented and representor, it appears that the benefit of the right may extend to both Australian citizens and non-citizens. The members of the High Court appear to have split on this matter. It is arguable that non-citizens should be able to communicate freely about political / governmental matters, one obvious rationale being that Australian citizens benefit from having the political views of

---

<sup>466.</sup> at 125.

<sup>467.</sup> at 149.

non-citizens aired. Further, of course, Australian citizens and non-citizens communicate about political matters and the communication is thus inextricably linked.

In *Theophanous*, Mason CJ, Toohey and Gaudron JJ stated:

The implied freedom of communication is not limited to communication between the electors and the elected. Because the system of representative government depends for its efficacy on the free flow of information and ideas and of debate, the freedom extends to all those who participate in political discussions. By protecting the free flow of information, ideas and debate, the Constitution better equips the elected to make decisions and the electors to make choices and thereby enhances the efficacy of representative government ... the implied freedom extends to members of society generally.<sup>468</sup>

The division in the Court about the classes of persons able to claim the benefit of the freedom became more apparent in *Cunliffe*, a matter concerning restrictions upon the giving of "immigration assistance" (as defined in the *Migration Act* 1985 (Cth)). The plaintiffs in the matter were Australian citizens. However, Mason CJ reiterated that non-citizens within Australia are entitled to invoke the implied freedom of communication in relation to political matters, being "entitled to the protection afforded by the Constitution and the laws of Australia".<sup>469</sup> This was not a view adopted by Brennan, Deane and Dawson JJ. Justice Brennan defined the freedom to be a freedom "enjoyed by Australian citizens"<sup>470</sup>. He noted that aliens have no constitutional right to participate in or to be consulted on matters of government in this country. Justice Deane stated that an alien "stands outside the people of the Commonwealth whose freedom of political communication and discussion is a necessary incident of the Constitution's doctrine of representative government".<sup>471</sup> Justice Dawson appears to also have

---

<sup>468.</sup> at 122.

<sup>469.</sup> *Cunliffe* at 299.

<sup>470.</sup> at 327, per Brennan J.

<sup>471.</sup> at 336, per Deane J.

been of a similar view, emphasising that aliens are "not participants in the democratic process of the country".<sup>472</sup>

Insofar as legislation infringing the implied freedom will be struck down, the issue will in many instances be merely academic as non-citizens will benefit along with Australian citizens from the invalidity of any law in breach of the implied freedom. It was the particular nature of the law in question in *Cunliffe*, namely a law with respect to aliens, that gave rise to the issue of non-citizens being entitled to the benefit of the implied freedom.

### **Significance of a process-based interpretation of the Constitution**

Understood in light of *McGinty*, the "free speech" decisions, which have been harshly criticised in some quarters, are an acknowledgment by the High Court of Australian citizenship rights. The "free speech" decisions have been criticised for importing into the Constitution a guarantee of freedom of speech, albeit limited, that is not contained in its express provisions. However, criticism of the decisions on this basis is short-sighted. Such criticism fails to recognise that the Constitution must be interpreted to facilitate the performance by Australian citizens of their citizenship functions.

---

<sup>472.</sup> at 365, per Dawson J.

## **CHAPTER 8**

### **McGinty and Representation of Citizens**

The rights which derive from Australian citizenship, whilst of fundamental importance, are narrow.<sup>473</sup> They are rights which facilitate participation by the citizen in the governance of the Australian community. They are process-based; they permit the Australian citizen to perform constitutional functions. A distinction must be drawn between participation and representation. The "free speech" decisions referred to in the previous Chapter have been misunderstood, in part because of a lack of precise reasoning by the High Court. Emphasis simply on representative government, when interpreting the Constitution, diverts attention away from the functional role of the Australian citizen necessarily implicit in the Constitution, towards a particular system of government which is not implicit. *McGinty* corrects this focus; the "free speech" cases should now be understood as cases upholding the Australian citizen's right of participation in the governance of Australia. But, as *McGinty* shows, what that participation entails varies from community to community, and develops over time.

#### **McGinty and the choice of representatives**

As shown in Chapter 1, the Australian citizen's right to participate in the governance of the Australian community cannot lawfully be denied or abrogated. The fundamental right to participate has been formulated, in Australia, in terms of the right to vote. But does the right to vote import other considerations, such as equality of voting power?

---

<sup>473.</sup> As discussed previously, they are the right to vote, the right to communicate with one's representatives about political / governmental matters, and the right to retain Australian citizenship and not be deported.

*McGinty* concerned a challenge to certain provisions of Western Australian electoral legislation.<sup>474</sup> The plaintiffs in *McGinty* submitted that, for every elector's vote to be effective and meaningful, each elector's vote must, as far as is practically possible, be equal to that of every other. Twenty years earlier, in *ex rel McKinlay*, a majority of the High Court (Murphy J dissenting) had rejected this argument.

It was argued by the plaintiffs in *McGinty* that there is necessarily implicit in the Constitution a general principle of electoral equality, which extends to the States as well as the Commonwealth. In the alternative it was submitted that the provisions of relevant Western Australian legislation established a system of representative government. Electoral apportionment in Western Australia was said to be in breach of these requirements. Because of a division of the State into the Metropolitan Area and the remainder of the State, the agreed facts showed that 74% of voters (being those living in the Metropolitan Area) would elect 60% of the members of the Legislative Assembly as at the time the legislation came into operation, and 26% of voters (being those living in the remainder of the State) would elect 40% of the members. In respect of the Legislative Council, that same 74% of voters would elect 50% of the members, whilst the other 26% of voters would elect the other 50% of the members.<sup>475</sup>

A majority of the High Court in *McGinty* (Toohey and Gaudron JJ dissenting) rejected the plaintiffs' submissions and held that neither the Constitution nor the Constitution Act of Western Australia requires there to be an electoral apportionment based on the principle of "one vote one value".

The High Court considered a number of decisions of the United States Supreme Court, which stood for the principle relied upon by the plaintiffs. The United

---

<sup>474.</sup> Certain provisions of the *Constitution Acts Amendment Act 1899* (WA), the *Electoral Distribution [formerly Districts] Act 1947* (WA) and the *Acts Amendment (Electoral Reform) Act 1987* (WA) were challenged.

<sup>475.</sup> *McGinty* at 330-331, per Toohey J.

States Supreme Court explained the linkage between representative government and "one vote one value" in *Reynolds v Sims* (1963):

representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature.<sup>476</sup>

The conclusion that has been reached by the United States Supreme Court is that, to the extent that a citizen's right to vote is debased, he/she is that much less a citizen.<sup>477</sup> The United States Supreme Court has adopted a very strict approach to Federal electoral apportionment schemes. Perhaps the most rigorous application to date of the principle was in 1983, where the Court invalidated a New Jersey redistricting plan, where the population deviance between largest and smallest districts was a mere 0.7%.<sup>478</sup> A somewhat less strict test is applied to State electoral apportionment schemes, but the same principles apply.<sup>479</sup>

However, as was recognised by the majority of the High Court in both *ex rel McKinlay* and *McGinty*, historical context was a major factor in the development of the strict American doctrine. The clear rejection of "vote dilution" can be particularly seen in the context of the racial gerrymandering cases. The Fifteenth Amendment to the United States Constitution, ratified in 1870 after the Civil War, clearly provides that the right of citizens of the United States to vote cannot be denied or abridged on the basis of race, colour or previous condition of servitude. However, after 1870 it was found that a number of States continued

---

<sup>476.</sup> *Reynolds v Sims* 377 US 533 (1963) at 565.

<sup>477.</sup> at 567.

<sup>478.</sup> *Karcher v Daggett* 462 US 725 (1983).

<sup>479.</sup> See for example *Davis v Brandemer* 478 US 109 (1984); *Thornburg v Gingles* 478 US 30 (1986).

to circumvent the Fifteenth Amendment's prohibition, with the use of prima facie race-neutral devices such as literacy tests and "good character" provisos, designed in reality to deprive black voters of the franchise. Ultimately, Congress passed the *Voting Rights Act* 1965, which (inter alia) suspended the use of literacy tests in certain States, and granted to the United States Federal Attorney-General extensive powers of intervention if he/she believed that any State or political subdivision thereof maintained any test or device the purpose or effect of which was to abridge the right to vote by reason of race or colour.<sup>480</sup>

Another device adopted by certain States of America was "racial gerrymandering", namely the deliberate distortion of district boundaries for racial purposes.<sup>481</sup> Recognising that guaranteeing equal access to the polls would not suffice to prevent other racially discriminating votes, the United States Supreme Court drew on the "one vote one value" principle and recognised that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot".<sup>482</sup>

In the United States even the drawing of boundaries to ensure black representation, aimed at benefiting blacks (on the basis of historical disadvantage), has been held to be unconstitutional.<sup>483</sup> It has been stated that,

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class' ... When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls' ... Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their

---

<sup>480.</sup> Loveland, "Positive discrimination and fair electoral representation in the United States" [1994] *Public Law* 332 at 336.

<sup>481.</sup> Discussion by the Court in *Shaw v Reno* 125 L Ed 2d 511 at 523 (1993).

<sup>482.</sup> *Allen v State Board of Elections* 393 US 544 at 569 (1968).

<sup>483.</sup> See for example *Miller v Johnson* 63 LW 4726 (1995)

thoughts and efforts - their very worth as citizens -according to a criterion barred to the Government by history and the Constitution'.<sup>484</sup>

In relation to considerations of locality, the United States Supreme Court has stated:

A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people'. The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.<sup>485</sup>

Underlying the approach of the United States Supreme Court is the assumption that representative government requires election of the candidates chosen by a majority of individuals who have cast identically-weighted votes. It is a conception of representative government that is, fundamentally, majoritarian.

The applicability of these United States decisions to the Australian context was clearly rejected in *McGinty*. Justices Dawson, Toohey, McHugh and Gummow all stated that the United States cases provided little guidance,<sup>486</sup> and the Canadian decisions were to be preferred on the basis that Canada and Australia had both "adopted and built on the English tradition".<sup>487</sup>

Adoption of the approach of the United States Supreme Court would have prevented the Commonwealth Parliament (and State Parliaments, if the analysis extends to the States) from passing legislation so as to enable representation of certain groups or community interests by special seats in Parliament.

---

<sup>484.</sup> at 4729.

<sup>485.</sup> *Reynolds* at 568.

<sup>486.</sup> *McGinty* at 310, per Dawson J; at 321-322, per Toohey J; at 343, per McHugh J; and at 372-374, per Gummow J.

<sup>487.</sup> at 322, per Toohey J, quoting *Dixon v British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247 at 260, per McLachlin CJSC.



Furthermore, it would have prevented the drawing of electoral boundaries to favour certain disadvantaged groups (such as those in remote areas). It can be argued that there are strong policy reasons for seeking to ensure that, for example, rural Australians are represented in Parliament, and "given a voice". Similarly it might be thought desirable to enable Aboriginal representation in the Commonwealth and/or State Parliaments, thereby necessitating an Aboriginal electorate. In New Zealand, as a comparison, there are a certain number of Maori seats in Parliament.<sup>488</sup>

Strong arguments for permitting distinctions can be mounted on the basis that to do so will in fact promote "equality", if equality is seen in terms of effective representation. The *Constitution Act* 1934 (SA), for example, contains the following instruction to the Electoral Commissioner:

- 83(2) In making an electoral redistribution, the Commission must have regard, as far as practicable, to -
- (a) the desirability of making the electoral redistribution so as to reflect communities of interest of an economic, social, regional or other kind;
  - (b) the population of each proposed electoral district;
  - (c) the topography of areas within which new electoral boundaries will be drawn;
  - (d) the feasibility of communication between electors affected by the redistribution and their parliamentary representative in the House of Assembly;
  - (e) the nature of substantial demographic changes that the Commission considers likely to take place in proposed electoral districts between the conclusion of its present proceedings and the date of the expiry of the present term of the House of Assembly,
- and may have regard to any other matters it thinks relevant.<sup>489</sup>

---

<sup>488</sup> For a discussion of the New Zealand electoral system, see Mai Chen, "The Introduction of Mixed-member Proportional Representation in New Zealand - Implications for New Zealand" (1994) 5 *PLR* 104. Reference to Maori seats is made at 115-116.

<sup>489</sup> *Constitution Act* 1934 (SA) s83(2).

This provision indicates a concern to ensure that, as a matter of practicality, electors in remote regions have access to their Member of Parliament.<sup>490</sup> It was presumably thought desirable to consider "communities of interest", whether they be economic, social, regional or other kind, in electoral redistribution. Population is but one of a number of considerations.

Although the High Court in *McGinty* did not express the matter in these terms, a fundamental issue is to what extent is the individual citizen the basic unit in the Australian community, and to what extent is an identifiable "interest group"? This is an extremely difficult issue and it goes to the heart of the issue of citizenship. One, or "a" citizen is an individual person; however, he/she is an individual in relation to others. Citizenship is only meaningful if considered in the context of individuals within a community. A citizen is by definition a member of a community; in isolation he/she is an individual and is not a member of a community. In considering electoral matters, can (or should) an Australian citizen only be considered as a member of a State or Federal community? Or can one have regard to other characteristics such as race?

Does "representation" in Australia mean representation of the majority (however defined) and compliance with its wishes, usually seen to be expressed through the legislative actions of a Parliament and the executive actions of a Government, or is there guaranteed to minorities (however defined<sup>491</sup>) an ability to contribute effectively to the process by which a government is elected? The extent to which the interests of minority groups are protected must be considered when analysing the meaning of participation in the governance of Australia.

---

<sup>490.</sup> Chapter 10 further examines State Constitutions and arguments in relation to representative democracy and electoral equality.

<sup>491.</sup> The terms "majority" and "minority" are loose terms, which can be used to refer to the majority of the population which voted in a particular Government, or can refer to the majority of the population which is assumed to support a particular piece of Government legislation which targets or disadvantages a minority of the population. Membership of "the majority" and "a minority" fluctuates.

The Constitution provides some guidance in relation to election of representatives; there must be a "choice" made by electors. Section 24, for example, requires that members of the House of Representatives be "directly chosen by the people of the Commonwealth". When can a law be struck down for denying that choice? There is obviously significant scope for interpretation of the term, taking into account considerations of equality and majoritarianism.

In considering whether a law denies either the "choice" or the choice by the relevant "people", in exercise of the franchise, value judgments must be made. A test for validity that relies upon relevant differences justifying differential treatment, where that differential treatment is appropriate to that difference, cannot avoid value judgments. A judge must determine whether there is a "difference", whether that difference justifies differential treatment, and if so what that "treatment" should be.<sup>492</sup> For example: if the discriminatory treatment accorded Aborigines during the past 200 years justifies the (positive) singling out of Aborigines, by enabling Aboriginal Members of Parliament to be elected by Aborigines, does the discriminatory treatment of homosexuals not equally justify their representation in Parliament by homosexual Members? How will the values of a judge interact with the values of the elected members of Parliament? To what extent can one take into account the perspective of a minority (however defined)?

In *Dietrich v The Queen*, Brennan J stated:

[t]he contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate

---

<sup>492</sup> See for example analysis in *Street* at 568-574, per Gaudron J.

courts provides some assurance that those values are correctly perceived.<sup>493</sup>

Justice Brennan did not, however, indicate how one is to identify the "relatively permanent values of the Australian community". What, indeed, is the Australian community? Is it all Australian citizens? or it is a majority (however defined) of those citizens? To what extent does one have recourse to traditional notions, in determining "relatively permanent" values?

The legitimacy of members of the judiciary having express or implicit recourse to value judgments is fundamental to a consideration of the nature of judicial review of legislation. It is an issue which gives rise to sharply divided views. In *Democracy and Distrust*, Ely analysed the arguments which are made in favour of the [US Supreme] Court giving content to the [United States] Constitution's open-ended provisions by identifying, and enforcing, those values that are "truly important or fundamental". Ely examines the bases upon which those values can be identified and enforced, and rejects each basis. He notes that a court's search for "the community's values" purports to avoid subjectivity:

the search purports to be objective and value-neutral; the reference is to something 'out there' waiting to be discovered, whether it be natural law or some supposed value consensus of historical America, today's America, or the America that is yet to be.<sup>494</sup>

Ely notes that on occasions courts refer to "natural law" to identify fundamental rights or values which a Parliament cannot (or should not) infringe. However he rejects natural law as a source of fundamental values on the basis that all theories of natural law have a singular vagueness, and one can invoke natural law to support basically anything one wants to support.<sup>495</sup> He mounts the same criticism of reliance upon tradition to determine fundamental values.<sup>496</sup> The other primary way by which courts seek to identify fundamental values is by reference to consensus, and values as (apparently) accepted by the (relevant)

---

<sup>493.</sup> *Dietrich v The Queen* (1992) 177 CLR 292 at 319.

<sup>494.</sup> Ely, *Democracy and Distrust: A Theory of Judicial Review* p48.

<sup>495.</sup> at 50.

<sup>496.</sup> at 60.

community. However, in criticism of this approach, Ely argues that the theory that the legislature does not truly speak for the people's values, but that the court does, is ludicrous.<sup>497</sup> He points out that,

[t]he notion that the genuine values of the people can most reliably be discerned by a nondemocratic elite is sometimes referred to in the literature as 'the Fuhrer principle'.<sup>498</sup>

Ely purports to reject reliance upon fundamental values in constitutional interpretation. He sees a process-based approach to be one where the Court's intervention can be seen to be,

fuelled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process - which is where such values are properly identified, weighted, and accommodated - was open to those of all view-points on something approaching an equal basis.<sup>499</sup>

However, aspects of his argument appear to contradict this stance. Ely also argues that his process-based approach is consistent with a commitment to representative democracy. He argues that representative democracy, which involves the concept of representation of the interests of "the people", requires effective protection of minorities. "Every citizen ... [is] entitled to equivalent respect".<sup>500</sup> Groups that constitute minorities of the population can be treated less favourably than the majority of the population, but what is precluded is "a refusal to represent them".<sup>501</sup> These arguments do not appear to be value-free; they encapsulate particular values about the worth of the individual.

Whilst I advocate the adoption of a process-based interpretation of the Constitution, I disagree with Ely's conclusion that a process-based interpretation

---

<sup>497.</sup> at 68.

<sup>498.</sup> As above.

<sup>499.</sup> at 74.

<sup>500.</sup> at 79.

<sup>501.</sup> at 82.

is value-free. As Fish argues in *There's No Such Thing as Free Speech*,<sup>502</sup> no theory or agenda can be detached from its value-laden origins;

none of us is ever in that 'originary' position, unattached to any normative assumptions and waiting for external guidance; rather, we are always and already embedded in one or more practices whose norms, rules, and aspirations we have internalized, and therefore we are not only capable of making distinctions and passing judgments but cannot refrain from doing so.<sup>503</sup>

In considering questions of participation and representation it becomes impossible to avoid making value judgments about minority groups and impugned legislation. This is not fatal; indeed the High Court now acknowledges that it does not make decisions in a vacuum. As the Constitution is a political instrument, it is not surprising that value judgments must be made. However the political nature of the decisions must be acknowledged. The potential for vastly differing value judgments to be made can create difficulties with enunciating a test for the validity of legislation. The adoption of a distinction between laws which go to the process by which citizens are represented (which I term laws concerning participation), and laws the content / nature of which can be said to be unrepresentative of "minorities", assists in formulating a workable test for the courts.

Focus on participation as a process-based concept permits the High Court to perform its role of ensuring that Australian citizens can fulfil their constitutional functions and exercise their citizenship rights, whilst it also leaves to the Parliaments the appropriate content of legislation not concerned with the process of participation.

Insofar as an impugned law is a law concerned with the process by which representatives are chosen, a test for validity based upon appropriate and relevant differences justifying differential treatment can be sustained. This test requires

---

<sup>502.</sup> Fish, *There's No Such Thing as Free Speech* (Oxford University Press, New York/Oxford 1994).

<sup>503.</sup> at 10.

there to be an identified "legitimate end". In the context of exercise of the franchise, for example, there is a legitimate end, namely election of representatives by all Australian citizens (other than those who, by virtue of age or mental incapacity, are unable to perform their constitutional function). In the words of the Constitution, the task is to elect representatives who are "directly chosen by the people of the Commonwealth [or a State]".

### **Laws the content of which denies representation of a minority**

Insofar as a law is challenged on the basis that its content is such as to deny the on-going representation of a particular group in the Australian community, a test for validity based upon appropriate and relevant differences justifying differential treatment cannot be sustained. There is no "legitimate end" that is sufficiently clearly identified in this context.

The issues are difficult; it is acknowledged that a member of Parliament must be seen to represent all persons in his/her constituency, not merely those who voted for him/her. Indeed, some of the most vulnerable groups within society such as the young and the intellectually impaired are not able to vote for their representatives. They too must be represented. What if a particular minority group within the electorate considers its voices unheard and its interests not represented? Can that minority challenge a particular law on the basis that its nature / content is such as to deny representation of that minority by the Members of Parliament?

By way of example: can it be said that the Tasmanian Parliament is refusing to represent Tasmanian homosexuals by virtue of its failure to repeal Tasmania's sodomy laws (which make anal intercourse between consenting adult homosexual men a criminal offence)? For example, can Nicholas Toonen (whose complaint to the Human Rights Committee of the United Nations was discussed in Chapter 6) establish the invalidity of the Tasmanian law on the basis that his right, as a citizen, to on-going representation by the members of the Tasmanian Parliament is breached?

Toonen's argument would be that the existence of the impugned Tasmanian law had such a discriminatory and detrimental effect on his well-being that the Tasmanian Parliament, by acquiescing in the maintenance of the law, is refusing to represent him. He would argue that the law denies him his Australian citizenship rights.<sup>504</sup>

However, in all other respects can it be said that the Tasmanian Parliament does not represent Toonen and other Tasmanian homosexual men? Those who are Australian citizens above the age of 18 and who are resident in Tasmania still possess the right to vote in Tasmanian elections. Doubtless, many such men can be considered part of "the majority" in other contexts - for example, many would be white Australians who are therefore not part of an Aboriginal minority. The issue becomes to what extent is their sexuality so intrinsic to their very identity that a statute of this sort constitutes a refusal to represent them, and this issue is not one capable of being formulated into a workable test for validity of legislation.

For Toonen to succeed, the Court would have to go beyond considering the validity of a law which interferes with the process of representation - in other words, which prevents the Australian citizen from participating in the governance of the Australian community - to consideration of a law which does not interfere with the process of representation but harms the relationship itself between represented (Toonen) and representor (members of the Tasmanian Parliament).

Not every law which discriminates against a particular group can be seen to go to the issue of participation in the governance of the Australian community, although of course some do. The logical extension of Toonen's hypothetical argument is that any discrimination can be turned into a citizenship argument by linking it to participation / representation. This cannot be a correct result to reach. If this were so, then any law which singled out a group within the Australian

---

<sup>504</sup>. Chapter 10 contains a detailed discussion of Australian citizenship rights in the State context.



community regardless of their citizenship status, and completely independent from the functional role of Australian citizens could be argued to be detrimental to the relationship between represented and representors. Indeed, the distinction between citizenship rights and human rights would disappear. This distinction must be maintained, in order that the status of Australian citizenship remain of any significance.

The fundamental distinction between a law which purports to discriminate against certain groups or individuals in their possession or exercise of the franchise, and a law which discriminates against certain groups or individuals in a substantive (and non-process) fashion (as is the case in Tasmania with homosexuals), is that only the former law can be examined for its validity against a defined "legitimate end". There is no clearly definable "legitimate end" in the second instance. The "legitimate end" is so broad that it can be stated as the "legitimate end of fully and equally participating in the Australian (or specifically Tasmanian) community". Such a broad proposition, capable of reformulation in numerous ways, cannot be used as a test for validity of legislation. A law cannot be seen to deny an Australian citizen his/her fundamental right to participate in the governance of the Australian community, on this basis.

## CHAPTER 9

### Australian Citizens, Sovereignty and Equality

In recent years, and particularly in the "free speech" cases and *McGinty*, the High Court has introduced into the process of constitutional analysis the concept of "the people". The concept is linked with sovereignty and democracy. However, as was noted in Chapter 1, an examination of recent High Court discussions of sovereignty reveals a confusion of two concepts of sovereignty. A distinction must be drawn between a sovereign person or body, which is hierarchically superior to all others, and a sovereign legislative power.

The sovereign body within Australia is the Australian community, in other words Australian citizens considered collectively. Over the course of this century there has occurred a process whereby the Australian community has been elevated over British monarchical government. As discussed in Chapter 1, the Australian community is hierarchically prior to the Constitution and any legislative body created by that Constitution. However, sovereign legislative power lies with the Section 128 Legislature.<sup>505</sup> The two concepts must not be confused. This latter conception of sovereignty requires exercise of power within a defined structure.

#### "The people" and democracy

The High Court's analysis of sovereignty has to a degree been couched in terms of democracy and democratic government. The literal meaning of democracy is "government by the people".<sup>506</sup> In *Nationwide News* both Brennan and Gaudron

---

<sup>505.</sup> Section 128 of the Constitution and the role of the Commonwealth Parliament and Australian citizens is discussed in this Chapter.

<sup>506.</sup> Lijphart, *Democracies - Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven and London 1984) p1.

JJ referred to representative democracy being embodied in the Constitution.<sup>507</sup> In *Australian Capital Television* Mason CJ referred to both representative government and representative democracy being implicit in the Constitution<sup>508</sup>, whilst Gaudron J again referred to representative parliamentary democracy being a fundamental part of the Constitution<sup>509</sup>. Then, the term representative democracy gained wider usage in *McGinty*, at least in part because it was the term preferred by the plaintiffs in their submissions (as was noted by Toohey J in his judgment)<sup>510</sup>.

It is particularly difficult to define the term representative democracy. As Stephen J noted in *ex rel McKinlay*,

‘representative democracy’ is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description.<sup>511</sup>

Two very different models of democratic government, the majoritarian (or Westminster) model of democracy and the consensus model of democracy, have been analysed by Lijphart in *Democracies - Patterns of Majoritarian and Consensus Government in Twenty-One Countries*. The majoritarian model is most closely approximated by the British system of government, with two of its nine identified elements being an unwritten constitution with the accompanying principle of parliamentary sovereignty, and an exclusively representative democracy (with no room for any element of direct democracy such as referenda). By contrast, Lijphart’s consensus model is characterised by, inter alia,

---

<sup>507.</sup> *Nationwide News* at 46-47, per Brennan J; at 94, per Gaudron J. Justice Gaudron used the phrase "representative parliamentary democracy", whilst Brennan J merely used the phrase "representative democracy".

<sup>508.</sup> *Australian Capital Television* at 137-138.

<sup>509.</sup> at 210.

<sup>510.</sup> *McGinty* at 318.

<sup>511.</sup> *ex rel McKinlay* at 57.

territorial and nonterritorial federalisms and decentralization, a written constitution and minority veto.<sup>512</sup>

Those members of the Court who have found that the Constitution contains an implication of representative democracy have failed, to date, to acknowledge the fundamental differences which can exist in differing models of democratic government.

### **Sovereignty**

As noted in Chapter 1, the term "sovereign" is derived from the medieval Latin term "superanus", which means "being above". The following quote shows the use of the term "sovereign" in relation to a person or body:

---

<sup>512.</sup> Lijphart has attributed nine elements to the majoritarian model, which is most closely approximated by the British system of government (at pages 4-9): concentration of executive power: one-party and bare-majority cabinets; fusion of power and cabinet dominance; asymmetrical bicameralism; two-party system; one-dimensional party system; plurality system of elections; unitary and centralized government; an unwritten constitution and parliamentary sovereignty; and exclusively representative democracy. It is these last two elements that are of significance to the analysis of Australian citizenship in my thesis. Lijphart notes, in relation to this majoritarian model of democracy, that Parliament normally obeys constitutional "rules", that is, rules which specify the composition and powers of governmental institutions and the rights of citizens, but is not formally bound by them. Even these basic laws have no special status, and are liable to be amended by Parliament. Courts do not possess the power of judicial review. Parliament is the ultimate, or sovereign, authority [this proposition is discussed later in this chapter]. There is no scope for any element of direct democracy such as referenda; Parliamentary sovereignty and popular sovereignty are incompatible. (See Lijphart at page 9). On Lijphart's analysis, the majoritarian interpretation of democracy is "government by the majority of the people" (at page 21). The minority are (or may be) excluded from participation in decision-making.

By contrast, the consensus model of democracy as defined by Lijphart is aimed at restraining majority rule, by requiring or encouraging the sharing of power between the majority and the minority, separating power between the organs of government, and by procedures for minority veto. It is characterised by eight elements (discussed at pages 23-30): executive power-sharing: grant coalitions; separation of powers, formal and informal; balanced bicameral and minority representation; multiparty system; multidimensional party system; proportional representation; territorial and nonterritorial federalism and decentralization; a written constitution and minority veto. The last element is perhaps the most important to the analysis at hand; the existence of a written Constitution permits the High Court to judicially review statutes, and there is a clear role for "the people" in Section 128's referendum process.

The quality of being above was ascribed to the state by Jean Bodin (1530-96) in his book *Les Livres de la Republique* of 1576 and, three quarters of a century later, by Thomas Hobbes (1588-1679) in his book *Leviathan, or The Matter, Forme, and Power of a Common-wealth Ecclesiasticall and Civil* of 1651. Both studies were written under the immediate impact of an ongoing civil war, in France and in the United Kingdom respectively, confronting the king, various factions of the nobility and religious groups. The state, which is considered a source of stability, was partly described, partly postulated, to constitute the most powerful social system.<sup>513</sup>

The other conception of sovereignty, tied to legislative power, is highlighted by Dicey's definition of Parliamentary (or legal) sovereignty (which has been referred to as the "classic exposition"<sup>514</sup>). Dicey defined "Parliamentary sovereignty" to mean,

neither more nor less than this, namely, that Parliament [the King, the House of Lords and the House of Commons] thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.<sup>515</sup>

Dicey analysed and rejected a number of "alleged legal limitations" on the legislative sovereignty of Parliament. The three suggested limitations considered were "moral law", the prerogative and what are now termed "manner and form" provisions. Dicey considered that, in relation to the first suggested limitation, "there is no legal basis for the theory that judges, as exponents of morality, may overrule Acts of Parliament".<sup>516</sup> Regarding the second proposed limitation, Dicey noted that "no modern lawyer would maintain that these powers or any other branch of royal authority could not be regulated or abolished by Act of

---

<sup>513</sup>. Wolfrum (editor-in-chief), *United Nations: Law, Policies and Practice Volume 2* at p1193.

<sup>514</sup>. Wade, "The Basis of Legal Sovereignty" (1955) *CLJ* 172 at 172.

<sup>515</sup>. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, London, 6th ed 1902) p37-38.

<sup>516</sup>. at 60.

Parliament".<sup>517</sup> Finally, he concluded that a Parliament could not tie the hands of its successors by passing a law which could not be touched by any subsequent Parliament.<sup>518</sup> Parliament cannot detract from its own continuing sovereignty.<sup>519</sup>

To Dicey, Parliamentary sovereignty was "an undisputed legal fact".<sup>520</sup> He noted the distinction between sovereignty as a legal conception, and as a political conception. In discussing political sovereignty, Dicey stated:

that body is 'politically' sovereign or supreme in a state the will of which is ultimately obeyed by the citizens of the state. In this sense of the word the electors of Great Britain may be said to be, together with the Crown and the Lords, or perhaps, in strict accuracy, independently of the King and the Peers, the body in which sovereign power is vested.<sup>521</sup>

According to this traditional theory the electors can in the long run always enforce their will; however, the courts will take no notice of the will of the electors as such:

The judges know nothing about any will of the people except in so far as that will is expressed by an Act of Parliament, and would never suffer the validity of a statute to be questioned on the ground of its having been passed or being kept alive in opposition to the wishes of electors.<sup>522</sup>

---

<sup>517.</sup> at 61-62.

<sup>518.</sup> at 62-64.

<sup>519.</sup> Wade, "The Basis of Legal Sovereignty" (1955) *CLJ* 172 at 174.

<sup>520.</sup> Dicey, *Introduction to the Study of the Law of the Constitution* p66. Although it is not within the scope of my thesis to explore the topic, the notion of Parliamentary sovereignty in Britain is undergoing some change, with the interaction between British law and Community law, and the superimposition of Conventions such as the European Convention on Human Rights on British law. See for example Jones, "Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia?" (1994) 22 *Fed LR* 57 at 65.

<sup>521.</sup> Dicey, *Introduction to the Study of the Law of the Constitution* p70.

<sup>522.</sup> at 71.

Dicey's distinction between legal sovereignty and political sovereignty is useful in that it distinguishes between political accountability and legislative power. However it fails to recognise that the body which can be seen as politically sovereign, namely the community comprised of citizens, is defined by fundamental principles which cannot be breached. Rather than use the terms "legal sovereignty" and "political sovereignty", I use the terms "sovereign body" and "sovereign legislative power" to distinguish between the two concepts of sovereignty.

### Sovereignty in Australia

The Commonwealth Parliament is a sovereign legislature insofar as its legislative powers are not capable of being invalidated by virtue of repugnancy with British legislation, or on the basis of extra-territorial legislative incompetence (unlike the position of colonial legislatures<sup>523</sup>). The power of the United Kingdom Parliament to pass paramount legislation extending to Australia has been terminated.<sup>524</sup> In *R v Foster; ex parte Eastern and Australian Steamship Co Ltd*, Windeyer J stated that, in respect of the matters set out in Section 51 of the Constitution, the Commonwealth Parliament is "now in reality fully sovereign".<sup>525</sup> More recently, in *Union Steamship Co of Australia P/L v King*, the High Court reiterated that the power to make laws for the peace, welfare (or order) and good government of the Commonwealth or a State is a plenary power.

[W]ithin the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament.<sup>526</sup>

---

<sup>523</sup> For example, Boothby J of the colonial South Australian Supreme Court acted on the view that local laws could not be "repugnant to the law of England": Castles, "The Reception and Status of English Law in Australia" (1963) 2 *Adel LR* 1 at 24.

<sup>524</sup> *Australia Act* 1986 (Cth) s1; *Australia Act* 1986 (UK) s1.

<sup>525</sup> *R v Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256 at 306-307. Justice Windeyer qualified this proposition only by noting the theoretical view of those who see the Statute of Westminster as a repealable enactment of the Imperial Parliament).

<sup>526</sup> *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 10.

Justice Dawson recently articulated the traditional view of Parliamentary legislative sovereignty in *Australian Capital Television*.<sup>527</sup> He noted:

- a) The Constitution is contained in an Act of the Imperial Parliament;
- b) The Constitution is binding on all courts, judges and people of every State and every part of the Commonwealth because the *Imperial Act* declares it to be so binding;
- c) No comparable preamble to that of the United States Constitution can be found in the Constitution [ie there is no equivalent phrase to "We the People of the United States ... do ordain and establish this Constitution for the United States of America"].

It is Dawson J's view that the legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament. He dismissed any notion of "acceptance by the people" being a proper basis upon which to find that "the people" are thus sovereign:

No doubt it may be said as an abstract proposition of political theory that the Constitution ultimately depends for its continuing validity upon the acceptance of the people, but the same may be said of any form of government which is not arbitrary.<sup>528</sup>

This view was clearly the position of the High Court in years past. Sir Owen Dixon wrote in 1935, extra-judicially, that Australia's Constitution,

is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government. It is a statute of the British Parliament enacted in exercise of its legal sovereignty over the law everywhere in the King's Dominions.<sup>529</sup>

However, in recent High Court decisions there has been a shift towards identifying "the people" as sovereign. The term "legal sovereignty" has been used in this context. The judgments are not altogether clear whether this term is used in the context of "sovereign body" or "sovereign legislative power". The term has

---

<sup>527.</sup> *Australian Capital Television* at 180-181.

<sup>528.</sup> at 181.

<sup>529.</sup> Dixon, "The Law and the Constitution" (1935) 51 *LQR* 590 at 597.



been interpreted to mean "sovereign legislative power", and the judgments have accordingly been strongly criticised.

The High Court's use of the concept of "the people", and the claim that "the people are legally sovereign", has led one commentator to accuse the Court of having,

invented a fictitious popular sovereign to endow the heavily eroded constitutional authority still legally vested in the British Crown with an aura of political legitimacy.<sup>530</sup>

The criticism arises because of the Court's failure to distinguish between a sovereign body - being "above all" - and sovereign legislative power. The Australian community (Australian citizens considered collectively) is the sovereign body in Australia, whilst the sovereign legislative power vests in the Section 128 legislature.

Justice Murphy was the first High Court judge to make statements consistent with the view that the Australian people are the sovereign body within Australia. In 1976 in *Bisticic v Rokov* he stated:

The original authority for our Constitution was the United Kingdom Parliament, but the existing authority is its continuing acceptance by the Australian people.<sup>531</sup>

His identification of the role of the Australian people vis-a-vis the Australian Constitution is correct; the Australian Constitution exists for the Australian community. However, the distinction between sovereign body and sovereign legislative power must be maintained. In *Kirmani v Captain Cook Cruises Pty Ltd*, Murphy J stated:

On the inauguration of the Commonwealth on 1 January 1901, British hegemony over the last Australian Colonies ended and the Commonwealth of Australia emerged as an independent sovereign nation in the community of nations. From then, the British Parliament had no legislative authority over Australia. The authority for the Australian Constitution then and now is its

---

<sup>530.</sup> Fraser, "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Syd LR* 213 at 224.

<sup>531.</sup> *Bisticic* at 556.

acceptance by the Australian people. Any continuing authority over the Australian people by the British Parliament would be inconsistent with Australia's sovereignty; Australia would not be a legitimate member of the community of nations.<sup>532</sup>

Justice Murphy's statement insofar as it concerns sovereign legislative power as at 1901 is clearly not historically supportable.

In 1984, Deane J made reference to "the people" in *University of Woollongong v Metwally*:

the provisions of the Constitution should properly be viewed as ultimately concerned with the governance and protection of the people from whom the artificial entities called Commonwealth and States derive their authority.<sup>533</sup>

He and Toohey J have made similar statements in more recent cases. In *Nationwide News* they stated that "all powers of government ultimately belong to, and are derived from, the governed".<sup>534</sup> Similarly, in *Leeth v Commonwealth* in the context of legal equality, they noted:

The States themselves are, of course, artificial entities. The parties to the compact which is the Constitution were the people of the federating Colonies. It is the people who, in a basic sense, now constitute the individual States just as, in the aggregate and with the people of the Territories, they constitute the Commonwealth.<sup>535</sup>

These statements are recognition of the hierarchical superiority of the Australian community vis-a-vis the Constitution and the Commonwealth and State structures created by that Constitution.

Recognition of the position of the community (Australian citizens considered collectively) as the sovereign body has been confused with the concept of sovereign legislative power. In *Australian Capital Television*, Mason CJ stated:

---

<sup>532.</sup> *Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351 at 383.

<sup>533.</sup> *University of Wollongong v Metwally* (1984) 158 CLR 447 at 477.

<sup>534.</sup> *Nationwide News* at 70.

<sup>535.</sup> *Leeth* at 484.

The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the case of the Australian Constitution, one obstacle to the acceptance of that view is that the Constitution owes its legal force to its character as a statute of the Imperial Parliament enacted in the exercise of its legal sovereignty; the Constitution was not a supreme law proceeding from the people's inherent authority to constitute a government, notwithstanding that it was adopted, subject to minor amendments, by the representatives of the Australian Colonies at a convention and approved by a majority of the electors at each in each of the Colonies after several referenda. Despite its initial character as a statute of the Imperial Parliament, the Constitution brought into existence a system of representative government for Australia in which the elected representatives exercised sovereign power on behalf of the Australian people. Hence, the prescribed procedure for amendment of the Constitution hinges upon a referendum at which the proposed amendment is approved by a majority of electors and a majority of electors in a majority of the States (s128) and, most recently, the *Australia Act 1986* (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognised that ultimate sovereignty resided in the Australian people.<sup>536</sup>

The idea that legal sovereignty (or sovereign legislative power) was formerly vested in the Imperial Parliament but now resides in the Australian people tends to run together the two concepts of sovereignty. The Australian community is the sovereign body within Australia [and therefore the fundamental principles which define it cannot lawfully be breached]. But the Australian community does not possess sovereign legislative power. Legislative, executive and judicial power within Australia are conferred upon certain bodies by the Constitution. The ultimate legislature is the Section 128 Legislature. It, as the body with the power to alter the Constitution, possesses sovereign legislative power. "The people" possess sovereign legislative power only in the way in which they participate in this process of constitutional amendment.

---

<sup>536</sup>

*Australian Capital Television* at 137 138.

The participatory role of Australian citizens was acknowledged by McHugh and Gummow JJ in *McGinty*. Justice McHugh noted:

Only the people can now change the Constitution. They are the sovereign.<sup>537</sup>

In the context of discussing representative government, Gummow J stated in *McGinty*:

Given the special adaption of principles of representative government to federalism, where in such a case does ultimate sovereignty reside? Writing in 1901, Bryce put the view that, in such a case, ultimate sovereignty resides with the authority or body which, according to the constitution, may amend the constitution.<sup>538</sup>

These statements made by McHugh and Gummow JJ, on the one hand, and Mason CJ on the other hand (quoted earlier), give only a partial account of sovereignty. Justices McHugh and Gummow look only to sovereign legislative power; they overlook "the people" as being the sovereign body within the Australian legal system. Chief Justice Mason, on the other hand, overstates the significance of Section 128 in the constitution of the people as the sovereign body of Australia.

As was noted in Chapter 1, a distinction can also be drawn between the sovereign body and sovereign executive power. The real republican question looks to what is the sovereign body within Australia; and I have argued that the Australian community has, over the course of this century, become the sovereign body within Australia, replacing British monarchical rule. In this fundamental sense, Australia is now a republic. However, this real republican question tends to be confused with the question of what person should be the repository of sovereign executive power. This latter question is not unimportant, and constitutional amendment may be thought necessary. However, the real republican question has been answered by a process of evolution over this century.

---

<sup>537</sup>. *McGinty* at 89.

<sup>538</sup>. As above.

Sovereign executive power refers to the 'ultimate' (or reserved) executive powers of dismissing a Prime Minister or Premier, and dissolving a Parliament. Within Australia, the concept of sovereign executive power is a federal concept; sovereign executive power is shared between the constituent bodies created / preserved by the Constitution. Just as the High Court is grappling with the question of where sovereign legislative power lies, the identity of the body holding sovereign executive power is also currently of concern to Australians. Do Australian citizens wish to have sovereign Commonwealth executive power vested in the Queen in right of Australia, or in the Governor-General, or in an Australian President? Prior to the *Royal Style and Titles Act 1973 (Cth)*, when the Queen clearly became the Queen in right of Australia, sovereign executive power was vested in a complex arrangement of the [British] Queen, the Governor-General and State Governors, and Federal and State Cabinets. After 1973, sovereign Commonwealth executive power can be seen to be vested in (still) complex arrangements involving the Queen in right of Australia, the Governor-General and Federal Cabinet.<sup>539</sup> Prior to the *Australia Act 1986 (Cth)* there was some confusion about the relationship of the States to Her Majesty; this confusion was resolved by the *Australia Act*, and sovereign State executive power is now clearly held by the Queen in right of Australia, State Governors and State Cabinets.<sup>540</sup> There is some public support for alteration of the identity of the

---

<sup>539</sup> The details of these arrangements are not within the scope of my thesis.

<sup>540</sup> As Gibbs J (with whom Barwick CJ, Stephen, Mason, Aickin and Wilson JJ agreed) noted in *Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246 at 261,

this alteration in Her Majesty's style and titles was a formal recognition of the changes that had occurred in the constitutional relations between the United Kingdom and Australia.

However, he also held that these changes had no effect whatever on that part of the law of South Australia which conferred a right of appeal to the Privy Council.

The *Royal Style and Titles Act 1973* did not affect the relationship of the States to Her Majesty; this relationship was clarified by the *Australia Act 1986 (Cth)*. The *Australia Act* provided:

- (a) except in respect of the appointment or termination of the Governor, or when Her Majesty is present within the State, all powers of Her Majesty in respect of the State are exercisable only by the Governor: section 7(2);

person(s) and bodies holding sovereign executive power. But, regardless of whether one now wishes to replace some of the 'players' in these arrangements, the identity of the sovereign body within Australia will remain unaltered. It is the Australian community.

### **Equality of citizens**

A further example of confusion between a sovereign body and sovereign legislative power is evidenced in the dissenting judgments of Deane and Toohey JJ in *Leeth*, wherein they held that there is a broad principle of equality enshrined in the Constitution. *Leeth* involved a challenge to a particular section of the *Commonwealth Prisoners Act 1967* (Cth) which provided that, in sentencing a State offender, the court could fix non-parole periods by reference to State sentencing legislation (which varied considerably). A majority of the Court held the particular provision to be valid; Deane, Toohey and Gaudron JJ dissented.

Justices Deane and Toohey noted that the Constitution does not "spell out that general doctrine of legal equality in express words".<sup>541</sup> However they held that a number of considerations combined to dictate the conclusion that there is a broad principle of equality implicit in the Constitution. The factors which they laid weight upon, to reach this conclusion, were:

- (i) the Constitution protects the States from certain discrimination, and the States are merely artificial entities composed of people;
- (ii) the Constitution was drafted upon a common law background, and at common law (a) all persons are subject to the ordinary law and jurisdiction of the courts, and (b) all persons are equal under the law;

- 
- (b) when Her Majesty does exercise her powers personally, the advice to Her Majesty shall be tendered by the Premier of the State: section 7(5); and
  - (c) Her Majesty's Government in the United Kingdom shall have no responsibility for the Government of any State: section 10.

<sup>541</sup> *Leeth* at 486.

- (iii) the conceptual basis of the Constitution was the free agreement of all the people to unite, as parties to a compact - and implicit in that free agreement was the notion of the inherent equality of the people as the parties to the contract;
- (iv) there is a separation of judicial power from legislative and executive power;
- (v) there are a number of specific provisions in the Constitution which guarantee equality.<sup>542</sup>

The principle of legal equality adopted by Deane and Toohey JJ requires substantive equality in that the content of a law must be non-discriminatory.

Deane and Toohey JJ stated:

The doctrine of legal equality is not infringed by a law which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment ... Provided that the differentiation of and between those to whom ... [laws] are addressed does not involve discrimination of a kind that infringes their inherent equality as people of the Commonwealth, such laws will not infringe the doctrine of equality under the law and before the courts.<sup>543</sup>

The implications of Deane and Toohey JJ's conclusion are significant. This approach to determining the validity of a law requires a court to decide whether or not there is inequality, whether or not there is a justification for that inequality, and whether or not the unequal treatment is proportionate. But there are flaws in their reasoning. They have confused reference to the Constitution with reference to notions of community, and have not paid sufficient attention to the distinction between sovereign body and sovereign legislative power.

Reasons (i), (iv) and (v) proposed by Deane and Toohey JJ rely upon the terms of the Constitution itself. They are readily countered: the protection of the States against certain discrimination, and the prohibition of discrimination on the basis

---

<sup>542.</sup> at 484-488.

<sup>543.</sup> at 488-489.

of State residency, was inserted into the Constitution to remove State boundaries and to create a national community. No broad prohibition on discrimination was adopted. Furthermore, the separation of judicial power from legislative and executive power has historically only led to the result that parties are treated equally in a court's application of a particular law. It is true to say that a number of constitutional provisions provide for, or indicate, notions of equality and non-discrimination. Saunders argues that there are a number of constitutional provisions, such as Sections 7, 51(ii), 51(iii), 92, 99 and 117 which all expressly guarantee or provide for a form of equality.<sup>544</sup> However it must also be acknowledged that there are a number of other constitutional provisions the existence of which support an argument that the Constitution enshrines discrimination and inequality. Section 25 contemplates the disqualification of persons of a particular race from voting, whilst Section 117 does not apply to residents of Australia's internal and external territories.<sup>545</sup> The prohibition contained in Section 116 against making a law for the establishment of a religion, or for prohibiting the free exercise of any religion, only binds the Commonwealth. As was detailed in Chapter 3, the drafters of the Constitution were in no way desirous of abolishing racist colonial laws.

An examination of Section 128, without placing it in the context of the distinction between sovereign body and sovereign legislative power, leads to a conclusion that individual Australian citizens do not have an equal share in the exercise of sovereign legislative power. This much was concluded by McHugh J in *McGinty*:

individual Australians do not have an equal share in the sovereignty of Australia.<sup>546</sup>

---

<sup>544</sup> Saunders, "Concepts of Equality in the Australian Constitution" in Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, Canberra, 1994) p209.

<sup>545</sup> Unless it be argued to apply, by implication, to Territory residents.

<sup>546</sup> *McGinty* at 88.



He noted that, in accordance with the process prescribed by Section 128, a majority of electors in a majority of States must approve the proposed law to amend the Constitution.

Accordingly, the votes of the persons living in one of the less populous States are equivalent to the votes of the persons living in one of the more populous States. If the majority of New South Wales voters approve a constitutional amendment but a majority of Tasmanians reject it, their votes cancel each other out, notwithstanding the enormous population difference between the two States. Thus, the share in the right to amend the Constitution of each Tasmanian voter can be more than 12 times as great as the share of each New South Wales voter.

Further, where an alteration of the Constitution would in any manner affect the provisions of the Constitution in relation to a State, s 128 of the Constitution provides that the alteration shall not be valid unless the majority of electors in the State concerned approve the proposed alteration. In that class of constitutional amendment, the votes of a majority of people in the State concerned are equivalent to the votes of the rest of the nation.<sup>547</sup>

In addition, Australian citizens resident in the Territories do not have the same representation in the Commonwealth Parliament, which also has a role to play in the processes of Section 128.

When one looks only to the definition of the body which exercises sovereign legislative power, it seems reasonable to conclude that there can be no limitations arising from a broad principle of equality implicit in the Constitution on the exercise of legislative power. However, it is necessary to look beyond Section 128, to the nature of membership of the Australian community itself. All Australians are, equally, citizens. As has been discussed, all Australian citizens possess the citizenship rights to vote, to communicate with their representatives about political / governmental matters, and to remain citizens. To this extent there must be a measure of equality attached to citizenship. What remains to be seen is whether there is in fact emerging a distinct common law rule of Australian citizenship, concerning equality.

---

<sup>547</sup> at 88, per McHugh J.

It is with this analysis that the distinction I have drawn between, on the one hand, fundamental principles which are applicable to all communities and which cannot lawfully be breached, and on the other hand specific common law rules applicable to a particular community, becomes relevant. In Chapter 1, I argued that any principle of equality which may be emerging is only at the level of a particular Australian common law rule of citizenship. If it emerges, it will be in the form of a particular rule which facilitates participation, it being participation that is the fundamental principle (and hierarchically superior). Unlike Detmold, I do not argue for the existence of a fundamental principle of equality which cannot be breached. Detmold takes a broad view of citizenship; he defines it to encompass all aspects of the relations between individuals, and he would therefore reject the distinction I draw between citizenship rights and human rights.<sup>548</sup> By contrast, I argue that citizenship permits the citizen to participate in the governance of his/her community, that being a narrower concept than participating in community life (which I argue all persons within Australia, regardless of their citizenship status, do).

Both my approach, and the one I consider Detmold would adopt, require consideration of what is beyond the terms of the Constitution. However, a principle of equality encapsulated in a common law rule of Australian citizenship can be developed and modified over time; it is the overriding and fundamental principle of participation in governance which cannot be denied or abrogated. Detmold's approach, which argues for a fundamental principle of equality (which he defines as a principle of "equal respect") deriving from the notion of community itself, becomes that which cannot be denied or abrogated.

The need to look beyond the Constitution is touched upon in the reasoning of Deane and Toohey JJ in *Leeth*. Reasons (ii) and (iii) relied upon by Deane and Toohey JJ are of a different nature to reasons (i), (ii) and (v). These reasons go to the common law and the notion of the Australian community. The equality for

---

<sup>548</sup> Detmold, "Australian Constitutional Equality: The Common Law Foundation" (1996) *PLR* 33 at 46.

which they argue is derived from the participation by the colonialists in the process of federating. Overall, the reasons adopted by Deane and Toohey JJ are particular to Australia (as opposed to being universal and deriving from the nature of a community); thus, their judgments may form part of a process whereby there emerges a common law rule of Australian citizenship concerning equality.

The movement towards common law recognition of an "equality" of Australian citizens may, or may not, be taken up by a majority of the High Court. Justice Brennan in *Leeth* appeared to adopt a notion of equality, when he stated,

It would be offensive to the constitutional unity of the Australian people 'in one indissoluble Federal Commonwealth', recited in the first preamble to the *Commonwealth of Australia Constitution Act* 1900, to expose offenders against the same law of the Commonwealth to different maximum penalties dependant on the locality of the court by which the offender is convicted and sentenced.<sup>549</sup>

However he held that the principle was not infringed on the facts in *Leeth*. Justice Brennan did not further explain how the concept of unity, and one people, necessitates equality. It may be that his concerns arose because the distinction in question was State-based, and thus contrary to the notion of one national citizenship. If this is the case then any principle of equality adopted by Brennan J will also be at the level of a common law rule particular to Australia, linked to the events of federation and the creation of a national Australian citizenship.

Movement towards a principle of equality has generated significant criticism. However, if the reasoning and conclusions of Deane and Toohey JJ are understood in the light I propose, much of the criticism should evaporate. The common law rule (assuming it does emerge) will be a narrow one, tied to participation in governance.

A major criticism of "*Leeth* equality" is that the task of defining "equality" and "inequality" is difficult, and the results of the test proposed by Deane and Toohey

---

<sup>549</sup>. *Leeth* at 475.

JJ appear to be difficult to predict in any particular instance. In analysing *Leeth*, Rose has stated,

Since all laws make distinctions between people, the validity of all Commonwealth legislation (unless it falls within one of the exceptions) would depend on whether a majority of the High Court thought that the distinctions created by the law were capable of being seen to be 'rational and relevant'.<sup>550</sup>

As Zines points out, an implication based on a general notion of equality could raise questions about the validity of most legislation, yet supply few criteria for its assessment.<sup>551</sup> Indeed, he considers it could lead to "judicial censorship" of all legislation.<sup>552</sup> However, this is much overstated. This can be seen when one bears in mind the distinction between human rights and citizenship rights. Citizenship rights are functional rights which exist to permit the citizen to participate in the governance of his/her community. The distinction between participating in the governance of a community, and participating in community life, should be maintained. Any common law rule to this effect which emerges should be a broad rule of equality of access enabling the Australian citizen to participate in a process; it should not be an inflexible rule (such as "one vote one value", as was proposed by the plaintiffs in *McGinty*) which does not permit of changes to the form of government within Australia.

### **Limitations on legislative power**

Recourse to "the people" has also been made as part of a reasoning process which concludes that there are fundamental rights which cannot be abridged - the rationale being that "the people" would not have intended to give Parliament the power to so abridge them. Justice Toohey has stated (extra-judicially):

It might be contended that the courts should ... conclude ... that where the people of Australia, in adopting a constitution, conferred power to legislate with respect to various subject matters upon a

---

<sup>550.</sup> Rose, "Judicial Reasoning and Responsibilities in Constitutional Cases" (1994) 20(2) *Monash Uni LR* 195 at 207.

<sup>551.</sup> Zines, *The High Court and the Constitution* p338.

<sup>552.</sup> As above.

Commonwealth Parliament, it is to be presumed that they did not intend that those grants of power extend to invasion of fundamental common law liberties - a presumption only rebuttable by express authorisation in the constitutional document.<sup>553</sup>

On this reasoning, reference may be had to "the people" as part of a process of finding that a statute of the Parliament is invalid. Stokes describes this "social contract" vision of the Constitution as being based upon the proposition that,

all political legitimacy, and indeed the legitimacy of all social arrangements is based on the consent of those to whom the arrangements apply. On this view, no government is legitimate unless it has been consented to by the governed. Indeed, the theory goes further and requires that to be legitimate, each power which the government possesses must be consented to by the governed.<sup>554</sup>

Justice Toohey acknowledged (extra-judicially) that he considered this reasoning would enable a "Bill of Rights" to be implied into the Constitution.<sup>555</sup> What is being evidenced is a desire to limit the reach of Parliament in order to protect what are perceived to be fundamental rights. Again, it is here that the distinction between "human rights" and "citizenship rights" becomes crucial. There is a tendency to subsume notions of citizenship rights into the much broader category of fundamental or human rights. Correctly used, reference to "the people" in the process of constitutional analysis leads only to the upholding of Australian citizenship rights.

The High Court has a mandate to interpret the Constitution in accordance with Australian citizenship. However, citizenship rights should not be confused with other rights. If it is thought desirable to constitutionally enshrine certain fundamental rights which are not linked to possession of citizenship but which are widely perceived to be human rights (determined to be such by reference, for example, to United Nations Conventions and Declarations on human rights) or

---

<sup>553.</sup> Toohey, "A Government of Laws, and Not of Men?" (1993) 4 *PLR* 158 at 170.

<sup>554.</sup> Stokes, "Is the Constitution a Social Contract?" (1990) 12 *Adel LR* 249 at 266.

<sup>555.</sup> Toohey, "A Government of Laws, and Not of Men?" (1993) 4 *PLR* 158 at 170.

rights which should be guaranteed to all persons regardless of citizenship status, then the appropriate mechanism for so doing is constitutional amendment. This process permits Australian citizens to participate in the identification and appropriate protection of such rights (via Section 128).

## **CHAPTER 10**

### **Australian Citizens in a State Context**

The national citizenship possessed by Australian citizens takes a federal form. The Constitution creates a federal system of government but it provides for a unified national Commonwealth community. It also converts the former colonies into States and preserves State Parliaments, Executives and Courts. The Constitution clearly contemplates that Australian citizens are members of two communities. However, as discussed in Chapter 6, Australians possess only one national citizenship. State (and Territory) communities form part of the unified national Commonwealth community. There is no separate State citizenship. The indivisibility of the Crown can now be expressed as the indivisibility of the Australian community.

In Australia's federal system, the functions of an Australian citizen extend to participating in two political processes, one Commonwealth and one State / Territory process. The rights that Australian citizens possess by virtue of their citizenship, which enable them to participate in government are rights that Australian citizens possess in order to exercise their constitutional functions. An Australian citizen has citizenship functions in relation to a State community to which he/she belongs, as well as to the national community. Because State communities form part of the Commonwealth community, State citizenship rights are Commonwealth citizenship rights.

An Australian citizen cannot lawfully be denied his/her citizenship rights. A State Parliament or Government cannot validly deny to a citizen who is a member of that State community his/her citizenship rights of voting and communicating with his/her representatives about political or governmental matters, nor can a State deport an Australian citizen or deprive him/her of citizenship.

### **The States and citizens' electoral rights**

In *Stephens v Western Australia* and *McGinty* the High Court considered whether there exists a freedom of speech in relation to State political matters, and whether there certain fundamental principles attached to State voting rights such as "one vote one value". The analysis was confined to a discussion of two possible sources of these rights or limitations on State legislative power, namely the relevant State Constitution and the Commonwealth Constitution. The reasoning in relation to these two possibilities can be briefly examined; in both instances it fails to acknowledge that the rights to vote and to communicate with representatives about political / governmental matters are rights which derive from possession of a national citizenship which takes a federal form.

#### **(a) State Constitutions**

The first possible source of these rights (at a State level) is seen to be State Constitutions. A State Parliament has power to make laws for the "peace, order and good government" of the State.<sup>556</sup> State Constitution Acts are ordinary statutes. As was noted by the Privy Council in *McCawley v The King*, State Constitution Acts are "uncontrolled" and they occupy "precisely the same position as a Dog Act or any other Act, however humble its subject matter".<sup>557</sup> State Constitutions can be varied by ordinary Act of Parliament, subject only to "manner and form" requirements. "Manner and form" legislation refers to legislation respecting the "Constitution, Powers and Procedures" of the legislature (for example, a requirement for a two-thirds majority, or a requirement for a

---

<sup>556.</sup> *Australia Act 1986* (Cth) ss2(2). The term "peace, welfare and good government" is used in *Constitution Act 1902* (NSW) s5; *Constitution Act 1867* (Qld) s2. The South Australian and Tasmanian Constitutions do not contain express grants of power, and one must refer back to the *Australian Constitutions Act 1850* (UK) s14. In Victoria, the power is expressed to be power to legislate "in and for Victoria in all cases whatsoever": *Constitution Act 1975* (Vic) s16.

<sup>557.</sup> *McCawley v The King* (1920) 28 CLR 106 at 116.



referendum). States have full power to enact "manner and form" requirements.<sup>558</sup>

One argument which is made in relation to the States is that the only restrictions on State Parliaments to abolish Houses of Parliament, alter the number of seats, or restrict or expand the franchise, are "manner and form" requirements found in State Constitutions. Such "manner and form" requirements vary from State to State, and indeed will only be found in State Constitutions if a State Parliament has chosen to place them there. With the South Australian Constitution, for example, only parts of it are entrenched. This line of reasoning appears to have been accepted by McHugh J in *McGinty* and by Dawson and Toohey JJ in their separate judgments in *Muldowney v South Australia*.<sup>559</sup>

Whilst the terms of State Constitutions vary quite significantly, the type of provision which is likely to form part of a structural analysis of the system of government created by the State Constitutions is reasonably evident. In relation to South Australia, for example, the relevant sections equating to those in the Commonwealth Constitution discussed in the "free speech" cases would be sections 4, 11, 27, 32 and Part V of the *Constitution Act 1934 (SA)*.<sup>560</sup> These

---

<sup>558.</sup> *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict c63 s5; *Australia Act 1986* (Cth) s6. The other source of the power to make "manner and form" provisions is a broad principle as stated by Lord Pearce in *Bribery Commissioner v Ranasinghe* [1965] AC 172 at 197: "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law". This principle was referred to with approval by Gibbs J in *Victoria v Commonwealth* (1975) 134 CLR 81 at 163.

<sup>559.</sup> *McGinty* at 363 per McHugh J; *Muldowney v South Australia* (unreported judgment of the High Court dated 24 April 1996, FC 96/013) at 10, per Dawson J; at 13-14, per Toohey J. *Muldowney* is discussed further in Chapter 11.

<sup>560.</sup> Section 4 states:

There shall be a Legislative Council and a House of Assembly which shall be called the Parliament of South Australia, and shall be constituted in the manner provided by this Act;

Section 11 states:

The Legislative Council shall consist of twenty-two members elected by the inhabitants of the State legally qualified to vote;

Section 27 states:

sections are entrenched under Sections 8, 10A and 88 of the *Constitution Act* 1934 (SA). These sections provide some detail of the nature of government within South Australia. The "manner and form" argument thus runs as follows: any South Australian law seeking to interfere with these provisions and State electoral rights must comply with the "manner and form" requirements of Sections 8, 10A and 88 of the South Australian Constitution Act.

On this argument, it is only to this extent that the State electoral rights possessed by Australian citizens are protected from State legislative encroachment (subject to any limitation arising out of the Commonwealth Constitution). Furthermore, State governmental / electoral systems are far more flexible than is the Commonwealth. Queensland, for example, has only one House of Parliament. Unless "manner and form" provisions entrench the fundamental elements of State Parliaments and/or electoral systems, this argument suggests that a State Parliament could by a simple majority enact a law disenfranchising certain groups within the community or diluting their votes.

**(b) The Commonwealth Constitution**

The other possible source for the right to vote and the right to communicate with representatives about political / government matters, identified in *Stephens* and *McGinty*, is the [Commonwealth] Constitution. The High Court has held that the Constitution impliedly guarantees freedom of speech in relation to political matters. The implication exists to facilitate maintenance of a system of Commonwealth representative government. The States cannot legislate

---

The House of Assembly shall consist of forty-seven members elected by the inhabitants of the State legally qualified to vote;  
Section 32 states, inter alia:

- (1) The State shall be divided into House of Assembly electoral districts in accordance with the last effective electoral redistribution.

Part V deals with Electoral Redistribution. Note in particular that section 77 provides that the numbers of electors comprised in each electoral district must not vary from the electoral quota by more than the permissible tolerance of 10%.

inconsistently with a constitutional implication;<sup>561</sup> thus, a State law which purported to restrict discussion about the performance of Commonwealth politicians would clearly be invalid. Furthermore, as the Court has held that communication about political matters at the three tiers of government is inextricably linked, the Commonwealth Constitution guarantees freedom of speech in relation to State political matters.<sup>562</sup>

However, there were suggestions made by some members of the High Court in the "free speech" cases that the freedom of State political speech guaranteed by the Commonwealth Constitution is a freedom existing only insofar as is necessary to protect Commonwealth representative government. In *Theophanous*, McHugh J noted:

the Constitution has nothing whatever to say about the form of government in the States and Territories of Australia. Even if the terms of ss 1,7,24,30 and 41 implied that the institution of representative government ... was part of the Constitution in relation to the Commonwealth, those sections have nothing to say about the form of government for the States and Territories. If a State wishes to have a system of one party government, to abolish one or both of its legislative chambers or to deny significant sections of its population the right to vote, nothing in the Constitution implies that it cannot do it. There is not a word in the Constitution that remotely suggests that a State must have a representative or democratic form of government or that any part of the population of a State has the right to vote in State elections. The Constitution contains no guarantee of a right to vote in State elections. Nor, despite references in the Constitution to the Houses of Parliament of the States, does the Constitution guarantee the continued existence of the State Houses of Parliament.<sup>563</sup>

---

<sup>561.</sup> *Victoria v ABCE & BLF* (1982) 152 CLR 25 at 162-165; *Hammond v Commonwealth* (1982) 152 CLR 188 at 206; *Sorby v Commonwealth* (1983) 152 CLR 281 at 306-308; *Polyukovich* at 607, 689, 703-704; *Leeth* at 470, 487, 502. Thus, for example, a State could not legislate to authorise a federal court to act contrary to the Federal principle of the separation of powers.

<sup>562.</sup> *Nationwide News* at 75-76; *Australian Capital Television* at 142, 168-169, 215-217; *Theophanous* at 122; *Stephens* at 232, 257.

<sup>563.</sup> *Theophanous* at 201.

Justice Brennan in *Stephens v West Australian Newspapers Ltd* took a similar view. He noted, in relation to the implication found in the Commonwealth Constitution concerning freedom of political speech,

Although the constitutional implication is capable of limiting the exercise of the legislative power of the Parliaments of the States, that implication is to be found in provisions that prescribe the structure of the government of the Commonwealth, not the structure of the government of the States. That implication effects a qualified (not absolute) freedom to discuss government, governmental institutions and political matters in order to protect the structure of the government of the Commonwealth.<sup>564</sup>

It is clear that a State cannot legislate to interfere with the freedom of communication about political matters, be they Commonwealth, State or even local government matters, because to do so would interfere with the principle of Commonwealth representative government. However, on this argument, it is not because the Constitution contains any implication of the nature of State governments or participation therein.

The contrary argument has been put by Deane J (a minority view on this point), who relies upon Sections 106 and 107 of the Constitution for his conclusion.

Section 106 of the Constitution provides:

The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State.

Section 107 then provides:

Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

Section 108 follows, and states:

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the

---

<sup>564</sup>.

*Stephens* at 235.

Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

In *Theophanous* Deane J stated that, at Federation, the colonies were transformed into States which thenceforth derive existence and authority from the Constitution itself. Their continuation was made subject to the Constitution - as is stated in Sections 106 and 107 - and that includes being subjected to constitutional implications.<sup>565</sup> Then, in *Stephens v West Australian Newspapers*, he reiterated this view. Justice Deane stated in broad terms that State legislative powers are curtailed by the implication found in the Commonwealth Constitution. This view can be contrasted with those of Brennan and McHugh JJ (cited above). Referring to his reasoning process in *Theophanous*, Deane J stated in *Stephens*,

Those reasons would also lead me to conclude that the constitutional implication, which extends to political communication and discussion in relation to all levels of government including State government **and which applies to confine the laws and legislative powers of the States as well as the Commonwealth**, precludes the application of State defamation laws to impose liability in damages for statements or comments about the suitability for office or official conduct of a member of a State Parliament or other holder of high State public office. [emphasis added]<sup>566</sup>

However, Deane J's view did not find favour with a majority of the High Court in *McGinty*. The majority emphasised that the Constitution says very little about the government of the States. The High Court in *McGinty* clearly rejected the argument that any notion of representative government contained in the Commonwealth Constitution extends to the States. In this respect the structure of the Constitution was significant to Brennan J (with whom Dawson J agreed on the issue); he noted that Chapter V is the Chapter dealing with the States and

---

<sup>565.</sup> *Theophanous* at 165-165.

<sup>566.</sup> *Stephens* at 257.

their Constitutions and the structure of the Constitution is opposed to the notion that the provisions of Chapter I might affect the Constitutions of the States to which Chapter V is directed.<sup>567</sup> Even Toohey J, who dissented in relation to other issues and the result in *McGinty*, was of the opinion that the primary aim of Section 106 was merely to guarantee the continuation of State Constitutions after Federation, and it does not effect a blanket importation of the Australian Constitution into State Constitutions.<sup>568</sup> The broadest view of Section 106 was taken by Gaudron J, who also dissented in *McGinty*; she stated that it requires the States as constituent bodies of the federation to be and remain essentially democratic.<sup>569</sup> However she acknowledged that this fell short of the proposition put by the plaintiffs in *McGinty* that the Constitution required the Parliaments of the States to be elected pursuant to voting systems that conformed with the principle of "one vote one value".

**Australian citizenship is the source of these rights**

Both approaches to the question of the source of the right to vote in State elections, and the right to communicate with State representatives about political / governmental matters, are shortsighted. By focussing on the terms of the [Commonwealth] Constitution or a State Constitution, they fail to give due weight to the role of an Australian citizen. As a member of both the national and a State / Territory community, an Australian citizen must possess those rights which permit him/her to perform his/her constitutional functions. The right to participate in the governance of the Australian community (that right being formulated, in Australia, in terms of the right to vote) cannot validly be denied to any Australian citizen. That right has a federal aspect to it. Thus, for example, the right to vote in a State election cannot be denied to an Australian citizen who is a member of that State community. [Membership of State communities is

---

<sup>567.</sup> *McGinty* at 300.

<sup>568.</sup> at 327-328.

<sup>569.</sup> at 333.

defined by residence within a specific geographical area, and identification with that State community.<sup>570]</sup>

In *McGinty*, Brennan CJ expressed the tentative view that,

it is at least arguable that the qualifications of age, sex, race and property which limited the franchise in earlier times could not now be reimposed so as to deprive a citizen of the right to vote.<sup>571</sup>

Justice Dawson expressed the contrary view in *McGinty* in relation to the Commonwealth:

the qualifications of electors are to be provided by parliament under ss 8 and 30 and may amount to less than universal suffrage, however politically unacceptable that may be today.<sup>572</sup>

Chief Justice Brennan's view is correct. It is consistent with the hierarchically superior fundamental principle of participation deriving from the notion of community.

As was discussed in Chapter 3, State electoral laws varied significantly at Federation.<sup>573</sup> Furthermore the Constitution expressly contemplates that discriminatory State electoral laws were preserved. Those colonial restrictions on the franchise were invalid. They denied to citizens of the colonial communities

---

<sup>570.</sup> The notion of membership of a State community may, in some instances, give rise to difficult questions. Some Australian citizens reside for significant periods of a year in more than one State, and might argue that they are members of more than one State community.

<sup>571.</sup> *McGinty* at 293.

<sup>572.</sup> at 306.

<sup>573.</sup> As was noted previously, in South Australia legislation was passed in 1894 and proclaimed in 1895 which gave women the right to vote and to sit in Parliament. In Western Australia, women received the right to vote in 1899. Women did not have the right to vote in the other colonies, at Federation. Furthermore, at 1900, Aborigines were disqualified from voting in Queensland, South Australia and Western Australia; disqualifications existed in relation to persons in receipt of charity in New South Wales, Tasmania, Queensland and Western Australia; and Ministers of religion were prohibited from being candidates for election in Victoria, Tasmania, Queensland, South Australia and Western Australia.

their citizenship right to participate in the governance of those communities.<sup>574</sup> Similarly, any such State restrictions were invalid in that they denied to Australian citizens the State-based aspect of their citizenship rights.

The constitutional functions of Australian citizens are not merely limited to the Commonwealth sphere; they extend to the State sphere also. Australian citizens do not vote in State elections and communicate with State Members of Parliament as State citizens; there is only one national citizenship which has a federal aspect to it.

---

<sup>574</sup> As was defined in Chapter 1, a citizen is a person who (a) considers him/herself to be a member of a community, and (b) is accepted by that community as a member. That acceptance is given to persons who are born within the jurisdiction of the community and to persons who wish to become members of the community, by virtue of them going through a community-sanctioned immigration and citizenship process.



## CHAPTER 11

### The People in Relation

Hobbes wrote in *Leviathan* of the desire of individuals to unite into a "Commonwealth" or "Civitas" in order to ensure their peace and defence.<sup>575</sup>

The only way to erect such a Common Power, as may be able to defend them from the invasion of Forraigners, and the injuries of one another, and thereby to secure them in such sort, as that by their own industrie, and by the fruites of the Earth, they may nourish themselves and live contentedly; is, to confer all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will: which is as much as to say, to appoint one man, or Assembly of men, to beare their Person; and every one to own, and acknowledge himself to be Author of whatsoever he that so beareth their Person, shall Act, or cause to be Acted, in those things which concern the Common Peace and Safetie; and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment.<sup>576</sup>

The will of the individual becomes subordinated, in certain respects, to the needs of the community. Community membership necessitates the imposition of certain obligations or duties.<sup>577</sup> However, citizenship is often analysed in terms of rights only, with little discussion of those duties which are imposed upon, and legally enforceable against, the citizen. Citizenship comes from community. Community is people in relation; arising from the relationship are duties as well as rights.

The notion of citizen "rights and duties" is routinely referred to in texts of political ideas; "rights and duties" are paired almost by reflex. It is equally routine to find that, lip-service to duty once paid, generally at the outset of discussion, it is rights which are the dominating subject of discourse. Duties, never or rarely particularised, are soon forgotten, or alluded to in token or passing

---

<sup>575.</sup> Hobbes at 227.

<sup>576.</sup> As above.

<sup>577.</sup> The terms "duties" and "obligations" are used interchangeably.

fashion as if their content and implications were taken for granted.<sup>578</sup>

Citizens are members of a community and they perform functions within that community. The functions are performed in part in order to preserve the community;<sup>579</sup> a citizen has an interest in ensuring the welfare of the community as well as his/her own individual welfare. Certain duties are thus imposed on individual citizens, which require the citizen to act in accordance with this broad objective. Citizenship duties differ from duties or obligations which apply to all persons within the relevant jurisdiction, such as the obligation to pay taxes or the obligation to obey the law. These latter examples are not citizenship obligations / duties.

Citizens of all communities are subject to duties of loyalty to, and participation in the governance of, their community. As was discussed in a historic context in Chapter 2, citizenship is a reciprocal bond; there is thus also a duty of protection of the citizen imposed on the community. What particular form the individual citizen's loyalty and participation might take, and what particular requirements are imposed on the community for protecting its citizens from harm, will vary from community to community, and over time. The common law rules concerning citizenship duties which are applicable to a particular community are a product of its history, just as are the common law rules concerning citizenship rights.

Australian citizenship duties imposed on the individual citizen are duties of allegiance, participation in the defence of the community in times of war, and voting in elections for representatives. This Chapter examines the nature of these duties. The nature of the reciprocal duty on the Australian community to protect its citizens from harm is only now emerging. This development has been fuelled

---

<sup>578</sup> Selbourne, *The Principle of Duty* (Sinclair-Stevenson, Great Britain 1994) p2.

<sup>579</sup> There may also be a benefit to the individual citizen - for example, voting benefits the individual in that it may result in the selection of his/her preferred candidate, in addition to benefiting the community by ensuring a candidate will be voted into office.

by recent developments in other broad areas of law, highlighting increased awareness of the notion of duty (in the context of non-citizenship duties). A broad survey of these recent developments, contained in this Chapter, puts into perspective the new directions which are emerging in relation to the obligation of protection from harm owed by the Australian community to its citizen members (and particularly vulnerable citizens)

### **The Constitution and Allegiance**

The express terms of the Constitution make no mention of Australian citizenship duties, in marked contrast to the constitutions of other countries such as (for example) Italy. Article 48 of the Italian Constitution states "To vote is a civic duty", and Article 52 states (inter alia), "The defence of the country is a moral duty of every citizen. Military service is compulsory, within the limits and in the manner laid down by law." Article 54 of the Italian Constitution contains the broad provision, "All citizens have the duty of fealty to the Republic and shall respect the Constitution and the laws."<sup>580</sup>

Within the Australian and British context, duties of citizenship have traditionally been defined in the context of loyalty owed to a Monarch. Until the 1993 amendments to the *Australian Citizenship Act*, to become an Australian citizen one had to take an oath (or affirm), swearing (or promising) to "be faithful and bear true allegiance" to Her Majesty Queen Elizabeth II. With these 1993 amendments, allegiance is now clearly owed to a country and its community.<sup>581</sup> However, notions of duty and obligation remain. The preamble to the *Australian Citizenship Act*, which was only inserted in 1993, is statutory recognition that "Australian citizenship is a common bond, involving reciprocal rights and obligations".

---

<sup>580.</sup> The Constitution of the Republic of Italy, approved by the Constituent Assembly on December 22, 1947; contained in Blaustein and Flanz, *Constitutions of the Countries of the World* (Oceana Publications Inc, Dobbs Ferry, New York 1987).

<sup>581.</sup> Discussed in Chapter 5.

### Crimes of treason and sedition

Although an Australian citizen has the right to communicate with his/her representatives about political / governmental matters (being a right which extends to public criticism), this right is not an absolute right. It is counter-balanced with the need to ensure the Australian community's lawful continuance and the preservation of "peace, order and good government". The right to criticise does not extend to bringing about the fragmentation of the Australian community.

Traditionally a subject / citizen is expected to be a loyal subject / citizen. The common law, and later statute law, made certain expressions of disloyalty to be criminal offences. Treason was considered to be the most serious offence against the Sovereign.

The essence of the offence of treason lies in the violation of the allegiance which is owed to the King.<sup>582</sup>

At common law the punishment for treason was death. Indeed the common law regarded both subjects and aliens living within the Monarch's domains and receiving the protection of its laws, to be capable of committing treason.<sup>583</sup> Aliens owed a "local allegiance" to the Monarch whilst within his/her Realm, and hence could commit treason.

Part II of the *Crimes Act* 1914 (Cth) now codifies these common law offences, terming them "Offences Against the [Commonwealth] Government". Section 24 of that Act provides, inter alia, that treason is an offence.<sup>584</sup> By its terms it is

---

<sup>582.</sup> *Halsbury's Laws of England* Volume 9 (Butterworth & Co, London, 1st ed 1909) p450.

<sup>583.</sup> As above. Halsbury cites the following as authorities for this proposition: *Fost* 185; *1 East*, P.C 52; *Kel* 38; *R v De la Motte* (1781) 21 State Tr 687 at 814.

<sup>584.</sup> Section 24(1) states:  
24(1) A person who:  
(a) kills the Sovereign, does the Sovereign any bodily harm tending to the death or destruction of the Sovereign or maims, wounds, imprisons or restrains the Sovereign;  
(b) kills the eldest son and heir apparent, or the Queen Consort, of the Sovereign;

not restricted to expressions of disloyalty by Australian citizens. Supplementing the offence of treason is the offence of seditious intention, a crime both at common law and in the *Crimes Act* (section 24A).<sup>585</sup>

- 
- (c) levies war, or does any act preparatory to levying war, against the Commonwealth;
  - (d) assists by any means whatever, with intent to assist, an enemy:
    - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
    - (ii) specified by proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth;
  - (e) instigates a foreigner to make an armed invasion of the Commonwealth or any Territory not forming part of the Commonwealth; or
  - (f) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act;
- shall be guilty of an indictable offence, called treason, and liable to the punishment of death.

The death penalty was abolished by the *Death Penalty Abolition Act 1973* (Cth), and has been replaced by life imprisonment.

<sup>585.</sup>

Seditious intention is defined in section 24A of the *Crimes Act* as:

An intention to effect any of the following purposes, that is to say:

- (a) to bring the Sovereign into hatred or contempt;
- ...
- (d) to excite disaffection against the Commonwealth or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
- ...
- (f) to excite Her Majesty's subject to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
- (g) to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth;

is a seditious intention.

It is also an offence to engage in or attempt to procure the carrying out of a "seditious enterprise", which is defined to be an enterprise undertaken in order to carry out a seditious intention: sections 24B and 24C. In addition it is an offence to write, print, utter or publish any seditious words: section 24D. Excluded from the scope of this latter offence are efforts made by a person in good faith to, inter alia, "show" that the Government (or a particular individual such as the Governor-General) is or has been mistaken in any of its counsels, policies or actions: section 24F.

It makes little sense to consider convicting an alien of treason or seditious intent; as an alien is not a community member, he/she should not be expected to possess the same community loyalty as can be expected of Australian citizens. The breadth of these statutory offences is a reflection of the historic notion of all persons within the jurisdiction owing allegiance to the Monarch; however, it is inconsistent with the notion of citizenship. Instead, non-citizenship crimes may be the appropriate offence (such as murder, not treason).

Indicative also of the continuing historic ties with Britain is the fact that, until 1986, section 24A also made it an offence to excite disaffection against either the Commonwealth Government or Houses of Parliament, or the United Kingdom Government or Houses of Parliament.<sup>586</sup>

The maintenance of the offence of sedition has been strongly criticised by Maher on the basis that it is anachronistic and an unjustified interference with freedom of expression. He notes the justification for the law of sedition, namely the State's right of "self-defence", and argues,

This self-protection argument has a disarmingly attractive appeal about it. Why should the state not be entitled to put a stop to incipient insurrection? Why should the state have to wait until violence and insurrection breaks out before responding to seditious speech? These are questions which need to be asked. However, in seeking answers to them it is important to acknowledge just how rubbery is a test based on *tendency*. The cases applying the tendency approach have not been based on any close analysis of the nature and magnitude of the actual threat supposedly presented by the voicing of dissident opinion.<sup>587</sup>

---

Other offences against the [Commonwealth] Government found in Part II of the *Crimes Act* include the offences of treachery, sabotage and mutiny. Their rationale is clear - the prohibition of certain acts which threaten the safety and stability of the country, its government and people. As with the offences of treason and seditious intention, they bind all persons, not simply Australian citizens.

<sup>586</sup>. These provisions of section 24A of the *Crimes Act* 1914 (Cth) were repealed by the *Intelligence and Security (Consequential Amendment) Act* 1986 (Cth) s11.

<sup>587</sup>. Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd LR* 287 at 292.

Maher argues that sedition laws have been used in the past in unjust and oppressive ways, from the "grim Star Chamber origins of sedition"<sup>588</sup> to the anti-communist hysteria of the Cold War period.

The High Court's recent decisions on freedom of speech in relation to political matters may well operate as a restriction on future uses of sedition laws in such a fashion. Australian citizens owe loyalty to the Australian community; and, as was noted in Chapter 1 in the context of the individual possessing the ability to renounce his/her citizenship, a community of citizens must be a free community. Loyalty is owed to a free community; and this necessitates the ability to criticise. It is only where that criticism can be seen to threaten the existence or stability of the community, that restrictions should be applied. The boundary between "mere criticism" and "advocating unlawful revolution" may at times be difficult to discern; and a strict test should be applied.

The High Court considered an earlier version of section 24A of the *Crimes Act* in *Burns v Ransley*.<sup>589</sup> Burns, a member of the Australian Communist Party, was convicted of having uttered seditious words during a public debate in Brisbane upon the subject "that communism is not compatible with personal liberty".<sup>590</sup> Given the timing of the case, not long after the end of World War II and at a time of increasing suspicion between "East" and "West", it is not surprising that the High Court emphasised the need for loyalty to the Government in upholding his conviction. Chief Justice Latham stated:

Protection against fifth column activities and subversive propaganda may reasonably be regarded as desirable or even

---

<sup>588.</sup> at 295.

<sup>589.</sup> *Burns v Ransley* (1949) 79 CLR 101.

<sup>590.</sup> When asked what would be the attitude and actions of the Communist Party in Australia in the event of a third world war between Soviet Russia and the Western Powers, Burns replied initially, "If Australia was involved in such a war it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. We would oppose that war." Pressed for "a direct answer", Burns then added, "We would oppose that war. We would fight on the side of Soviet Russia." (at 103, as per the facts in the case stated).

necessary for the purpose of preserving the constitutional powers and operations of governmental agencies and the existence of government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organised societies. I agree that the Commonwealth Parliament has no power to pass a law to suppress or punish political criticism, but excitement to disaffection against a Government goes beyond political criticism.<sup>591</sup>

That same day the High Court handed down judgment in *R v Sharkey*, upholding Sharkey's conviction for the same offence.<sup>592</sup> Justice Dixon stated in *Sharkey* that the Commonwealth's power to punish any utterances or publications which arouse resistance to the law or excite insurrection against the Commonwealth Government, or are reasonably likely to cause discontent with and opposition to the enforcement of Federal law or to the operations of Federal government, arises out of the very nature and existence of the Commonwealth as a political institution.<sup>593</sup>

---

<sup>591.</sup> at 110, per Latham CJ.

<sup>592.</sup> *R v Sharkey* (1949) 79 CLR 121. Sharkey had stated the following:  
If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. I support the statements made by the French Communist leader Maurice Thorez. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist party also wants to bring the working class to power but if Fascists in Australia use force to prevent workers gaining that power Communists will advise the workers to meet force with force. (at 123, per the facts in the case stated).

<sup>593.</sup> at 148.



In 1949, when *Burns* and *Sharkey* were heard, the High Court clearly viewed that a law designed to safeguard the Constitution and Parliament of the United Kingdom was also valid.<sup>594</sup> Justice Dixon saw a law upon such a matter to be incidental to the protection and maintenance of the Federal polity itself.<sup>595</sup> Indeed, Latham CJ went further, considering that the preservation of their integrity and authority to be part of the protection and maintenance of the Commonwealth itself.<sup>596</sup> With the changes to the constitutional relations between Australia and the United Kingdom that have occurred since 1949, it is arguable that the Commonwealth could not now make it an offence to incite disaffection against the United Kingdom.<sup>597</sup>

There are limits to the power of the Commonwealth Government to "protect" the Australian community from perceived enemies or undesirable influences within Australia. The obligation of loyalty required of Australian citizens to the community is not one that goes so far as to deny the freedom of the citizen to criticise. It is also an obligation which varies according to circumstances such as, for example, whether or not a state of war exists, as was noted by the High Court in the *Australian Communist Party*.<sup>598</sup>

In 1950 the Commonwealth Government attempted to go beyond merely prosecuting individual Communists for uttering seditious words, and purported to dissolve the Australian Communist Party. The *Communist Party Dissolution Act* 1950 (Cth) declared the Australian Communist Party to be an "unlawful

---

<sup>594.</sup> In 1949, the relevant Crimes Act provisions were expressed in terms of, inter alia, exciting disaffection against the Government or Constitution of the United Kingdom, any of the King's Domains or of the Commonwealth.

<sup>595.</sup> *R v Sharkey* at 149.

<sup>596.</sup> at 136.

<sup>597.</sup> Although, conversely, it could be argued that the Commonwealth can so legislate pursuant to the External Affairs power.

<sup>598.</sup> *Australian Communist Party v Commonwealth* (1951) 53 CLR 1.

association", and was thereby dissolved by force of that Act.<sup>599</sup> Certain disabilities were also attached to communists if they became the subject of a declaration by the Governor, such as inability to hold an office under or be employed by the Commonwealth or any Commonwealth authority.<sup>600</sup> A majority of the High Court held this Act to be invalid.<sup>601</sup>

The Commonwealth had argued that the legislation was enacted pursuant, inter alia, to the Defence Power, Section 51(vi).<sup>602</sup> However at the time of enactment the Commonwealth was not engaged in any hostilities except in Korea; the state of affairs was peace, not war.<sup>603</sup> The condition of the application of the Act to the Australian Communist Party (or any association or person) was merely that it was communist; it was not based upon the Party's actions in any way. Justice McTiernan stated:

---

<sup>599.</sup> *Communist Party Dissolution Act 1950* (Cth) s4(1).

<sup>600.</sup> Sections 9, 10, 11.

<sup>601.</sup> Rich sees the *Australian Communist Party* to be a decision paralleling the United States landmark decision of *Brown v Board of Education* 347 US 483 (1954), in which the United States Supreme Court held that official racial segregation was unconstitutional. Rich argues that,

the 1950's marked the point at which the highest courts of both Australia and the United States reasserted their power to protect fundamental values and to limit government action which threatened those values;

Rich, "Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia" (1993) 21 *Fed LR* 202 at 206. However, he also qualifies this comparison by noting that, although the United States Supreme Court became a "visible fortress" for protecting civil rights and limiting interferences with certain freedoms during the 1960's, the Australian High Court did not assume this same high profile: at 212.

<sup>602.</sup> The Commonwealth argued for the validity of the Act on the basis of the Defence Power, and on the basis of the power to make laws in respect of the maintenance of the Constitution or the execution of laws (whether that be a power derived from a combination of Section 51(xxxix), the Incidental Power, and Section 61, the Executive Power, or whether it be a power which arose from the very existence of the Commonwealth as a body politic: *Australian Communist Party* at 20 (submissions for the Commonwealth).

<sup>603.</sup> at 207, per McTiernan J.

The Court may take judicial notice of the fact that persons of this class [communists of the Lenin-Marx school] manifest strong sympathy with the Soviet and sharp antagonism to the existing social and political orders and are desirous of overthrowing them. But their mere aims as communists, apart from their actions, are not sufficiently substantial to give the Commonwealth Parliament a foot-hold on which to enact laws to deprive all members of the class of civil liberties which in peace time are immune from Commonwealth control. The Commonwealth might, in an emergency of a certain kind ... have the constitutional power to assume this control.<sup>604</sup>

Justice Dixon reiterated his view that the Commonwealth has the ability to legislate so as to protect the very nature of the polity established by the Constitution.<sup>605</sup> The notion of preservation of the "body politic" (or the Australian community) is important in two respects; first, it implies restrictions upon the ability of individual citizens to act to the detriment of the body politic as a whole; and secondly, it implies the ability of the Australian Government / Parliament to exercise legislative / executive powers in order to ensure that preservation.

The High Court has more recently considered this issue in *Davis v Commonwealth*.<sup>606</sup> In *Davis* the Court upheld the validity of the Australian *Bicentennial Authority Act 1980* (Cth) insofar as it established the Australian Bicentennial Authority and provided for its funding; however, it held invalid a provision of that Act which made it an offence to use the expression "200 years" without the permission of the Authority.

In *Davis*, Mason CJ, Deane and Gaudron JJ approved the earlier view of Dixon J that the legislative powers of the Commonwealth include such powers as may be deduced from the establishment and nature of the Commonwealth as a

---

<sup>604.</sup> at 210, per McTiernan J.

<sup>605.</sup> *Australian Communist Party* at 187-188.

<sup>606.</sup> *Davis v Commonwealth* (1988) 166 CLR 79.

polity.<sup>607</sup> The Commonwealth's Executive power also extends to the execution and maintenance of the Constitution.<sup>608</sup>

Although the distinction is probably not significant in practice, Wilson, Dawson and Toohey JJ appeared to take a somewhat narrower view of the source of the Commonwealth's "nationhood power"; they saw it as arising from Section 61 and Section (xxxix), and not from the establishment and nature of the Commonwealth as a polity.<sup>609</sup>

In his judgment in *Davis*, Brennan J in particular placed emphasis upon Australia's nationhood. He saw Section 61 as extending to the execution and maintenance of the Constitution, a phrase which necessarily imports the idea of Australia as a nation.<sup>610</sup> Justice Brennan noted that the end and purpose of the Constitution is to sustain the nation. The Commonwealth has power both to protect the nation against forces which would weaken it, and to advance the nation by fostering its strength.<sup>611</sup>

An approach to constitutional interpretation which highlights the body politic and the nation, rather than merely a list of enumerated Commonwealth powers, emphasises the importance of the purpose for which the Constitution exists. The Constitution "summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth'".<sup>612</sup> The obligations which are imposed upon Australian citizens are imposed for a purpose, namely to ensure that relations between citizens do not disintegrate, and that the Australian community remains cohesive,

---

<sup>607.</sup> at 93.

<sup>608.</sup> at 92-93.

<sup>609.</sup> at 102, per Wilson and Dawson JJ; at 117, per Toohey J.

<sup>610.</sup> at 109-110.

<sup>611.</sup> at 110.

<sup>612.</sup> at 110, per Brennan J.

with functioning and effective organs of government to lead it on behalf of its constituent members.

### **Military obligations**

An Australian citizen's obligations can become more onerous during times of war because of the need to protect the very existence of the community. The Constitution exists for the Australian community, and it contains provisions within it to ensure the survival of that community - most obviously, the defence power (Section 51(vi)).

The Constitution ... is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled ...<sup>613</sup>

During wartime in particular the interests of the individual are often rendered subordinate to the interests of the nation. The Commonwealth can enact legislation establishing a system of national service, or conscription. It has validly done so in the past. Conscription is a highly controversial issue. It has a history dating back to just after Federation, to 1903 when the *Commonwealth Defence Act* came into force. That Act required all males between the ages of 18 and 60 to serve in defence of their country, in times of war. It has been said that conscription runs counter to the ideal of liberty and the primacy of the rights of the individual.<sup>614</sup> However it is justified on the basis that, at times, the rights of the individual must give way to duty to the State or community. Citizenship imposes obligations in addition to conferring rights.

Military service is seen to be a duty and citizens can be required to serve unless they meet statutory formulations for "conscientious objectors". Traditionally it has been adult males within a certain age range that have been compelled to serve.

A man who under the Act is obliged to serve cannot, with impunity, refuse to do so, leaving the duty to others who are law-

---

<sup>613</sup>. *Farey v Burvett* (1916) 21 CLR 433 at 451, per Isaacs J.

<sup>614</sup>. Main, *Conscription - The Australian Debate, 1901-1970* (Cassell Australia Limited, Melbourne 1970) p1.

abiding and dutiful. Nor can a man on his enlistment pursuant to the Act make a bargain with the Commonwealth as to the orders he will, as a soldier, obey or the places in which he will serve.<sup>615</sup>

Ordinarily, only citizens are compelled to register for national service, as international law principles state that it is not permissible to enrol aliens except with their own consent in a force to be used for ordinary national or political objects.<sup>616</sup> [However, it must be noted that, in *Polites v Commonwealth*; *Kandiliotes v Commonwealth*,<sup>617</sup> the High Court upheld the validity of Commonwealth Regulations imposing requirements on "residents", a term which clearly included non-citizens.]

Just as it seems to make little sense to convict an alien of the crime of treason or sedition, doubts may arise about a requirement for aliens to perform national service. The obligation to defend the community is a corollary to membership of the community; and aliens are not community members. However, in response to this it could be argued that aliens who reside in Australia still enjoy the benefits of community life and can thus be required to defend the Australian community.

At common law,

the Sovereign may compel her subjects to serve in such offices as the public good and the nature of the constitution require, and ... refusal to perform a public duty, when legally called upon to do so, is a punishable offence.<sup>618</sup>

There is High Court authority for the proposition that a duty such as military service can today be compelled only pursuant to statutory authority. In *Marks v Commonwealth*, Windeyer J expressed the following view:

---

<sup>615.</sup> *Zarb v Kennedy* (1968) 121 CLR 283 at 305, per Windeyer J.

<sup>616.</sup> *Polites v Commonwealth*; *Kandiliotes v Commonwealth* (1945) 70 CLR 60 at 63 (submissions of the plaintiffs), 70, 76, 77, 79, 80.

<sup>617.</sup> As above.

<sup>618.</sup> *Marks v Commonwealth* (1964) 111 CLR 549 at 557, per Kitto J.

I think that the Government cannot now without the authority of Parliament, lawfully call up subjects, either individually or by conscription, and compel their service in any capacity it chooses. Today when military service is compelled, whether in peace or war, this is done pursuant to statute, not by the exercise of ... 'the rusty weapons of the war prerogative'.<sup>619</sup>

Justice Windeyer's reasoning is based upon the assumption that the power to compel military service could only, otherwise, reside in the Monarch (as a prerogative power). In fact, I argue that citizenship duties arise by virtue of community membership itself. However, there is a role for the Parliament in determining how and when those duties are to be performed. In this way duties are of a different nature to rights. When considering the imposition of duties, "the community" must act to impose the duty through the Parliament. Duties require mechanisms for enforcement; it is a matter for the Parliament to determine the particularities.

### **Compulsory voting**

The third broad category of Australian citizenship duties concerns voting. An Australian citizen can be required to vote. Compulsory voting is one of the obligations imposed on Australian citizens in order to ensure that there are members elected to the Parliament, from which is drawn the Government.

The Commonwealth and all State and Territory Governments require eligible voters whose names are recorded on the electoral rolls to attend a polling booth on election day, have their names marked off the electoral roll, receive their ballot papers and then place those ballot papers in a ballot box.<sup>620</sup> The voting itself is by way of secret ballot. Only one State, South Australia, has voluntary enrolment, and it is voluntary for initial enrolment only.

---

<sup>619</sup> at 574, per Windeyer J.

<sup>620</sup> Major, *To Vote or Not to Vote?: Compulsory Voting in Australia* (Western Australian Electoral Commission, Discussion Paper 16/95, December 1995) at 13.

Compulsory enrolment was first introduced by the Commonwealth in 1911.<sup>621</sup> Although it was introduced for the purpose of improving the accuracy of the electoral rolls, it is seen to have "opened the door for compulsory voting".<sup>622</sup> Compulsory voting was first seen in Queensland, with its introduction for both Houses of Parliament in 1915 (the Upper House not being abolished until 1922). The Commonwealth followed suit in 1924, and then Victoria, New South Wales and Tasmania in the late 1920's. Western Australia introduced compulsory voting in 1936, with South Australia being the last State to introduce it in 1942 for the House of Assembly.<sup>623</sup>

Major, in a Report commissioned by the Western Australian Electoral Commission entitled "To Vote or Not to Vote?: Compulsory Voting in Australia" argues:

[c]ompulsory voting, one of the most extraordinary experiments in Australian democratic history, slipped by like a thief in the night virtually unchallenged. Most electors did not know what was happening until the parliamentary debates were over, and by then it was far too late for them to complain. Compulsory voting became a cornerstone of Australian politics, both at the Commonwealth and the State level, and it has become so deeply entrenched that most commentators find it difficult to discuss Australian government without at least touching upon the subject. It has become such a distinguishing feature of Australian politics, and it has had a profound impact upon the way in which elections are conducted.<sup>624</sup>

Compulsory voting is an issue which divides political opinion. Fundamentally, advocates of compulsory voting define it as a duty. It is seen to be a civic duty which does not impose an onerous burden, as the citizen must only vote every few years. Those in favour of compulsory voting also argue that it encourages citizens to take an interest and responsibility in government, and that as a result of compulsory voting government represents the real majority of "the people". It

---

<sup>621.</sup> *Commonwealth Electoral Act 1911 (Cth)*.

<sup>622.</sup> Major, *To Vote or Not to Vote?: Compulsory Voting in Australia* at 17-18.

<sup>623.</sup> at 22.

<sup>624.</sup> at 23.



is also seen to educate voters about current political issues and increase their political knowledge. On a practical level, compulsory voting is also seen to reduce campaign costs as parties no longer have to persuade voters to vote, and enables more accurate electoral rolls to be maintained.<sup>625</sup>

Those who oppose compulsory voting differ from its proponents on a fundamental point: they consider voting to be a right. Compulsion is seen to be an infringement upon an elector's civil liberties. It is argued that, by forcing a citizen to exercise a right, the very nature of that right is destroyed. Opponents also argue that compulsory voting leads political parties to "embrace the lowest common denominator when determining their policies",<sup>626</sup> and to focus attention only on "swinging voters". Political parties tend to gravitate towards the "centre" of the political spectrum, in order to capture the majority of votes. Further criticism is made of the costs of enforcing compulsory voting.<sup>627</sup>

After the introduction of compulsory voting for Commonwealth elections, a challenge was unsuccessfully mounted to validity of the relevant provisions of the *Commonwealth Electoral Act*. In *Judd*, the appellant - who had been prosecuted for failing to vote without a valid and sufficient reason at an election of members of the Senate for the State of New South Wales - argued that the right to vote implies the right not to vote, and excludes the notion of compulsion.<sup>628</sup> The High Court rejected his argument, holding that the phrase "to choose" meant no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available.<sup>629</sup>

---

<sup>625.</sup> For a detailed analysis of the arguments in favour of compulsory voting, see Chapter 4 of Major's Report.

<sup>626.</sup> at 35.

<sup>627.</sup> For a detailed analysis of the arguments against compulsory voting, see Chapter 5 of Major's Report.

<sup>628.</sup> *Judd* at 382 (submissions for the appellant).

<sup>629.</sup> at 383, per Knox CJ, Gavan Duffy and Starke JJ.

Justice Isaacs agreed that the franchise may properly be regarded as a right, in fact a political right of the highest nature (as has been discussed in Chapter 7). However he then went on to state,

[b]ut I am equally free from doubt that Parliament, in prescribing a "method of choosing" representatives, may prescribe a compulsory method. **It may demand of a citizen his services as soldier or juror or voter.** The community organised, being seised of the subject matter of parliamentary elections and finding no express restrictions in the Constitution, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be... A method of choosing which involves compulsory voting, so long as it preserves freedom of choice of possible candidates, does not offend against the freedom of elections, as established and recognised by the Statute of Westminster I (3 Edw I, c 5).

**The compulsory performance of a public duty is entirely consistent with freedom of action in the course of performing it.** [emphasis added]<sup>630</sup>

Justice Rich put the issue as he saw it quite simply:

[t]he vote is not merely a right but a duty. Every elector must discharge that duty, and if he "fails to vote at an election without a valid and sufficient reason for such failure he shall be guilty of an offence".<sup>631</sup>

The Australian citizenship right to communicate with representatives about political / governmental matters, which extends to public criticism of members' performance and policies, is not an absolute right. It is subject to restrictions which ensure that voters are not encouraged to vote informally: *Muldowney v South Australia* and *Langer v Commonwealth*.<sup>632</sup> These recent High Court

---

<sup>630.</sup> at 385, per Isaacs J.

<sup>631.</sup> at 390.

<sup>632.</sup> *Muldowney v South Australia* (Judgment of the High Court handed down on 24 April 1996; judgment number FC 96/013). The Court unanimously upheld the validity of provisions of the *South Australian Electoral Act* which make it an offence to advocate voting informally. It is not an offence to leave one's ballot paper blank in South Australian elections; however, one cannot advocate that electors do so, or vote otherwise than in accordance with the method prescribed by the *Electoral Act* 1985 (SA).

Also heard with *Muldowney* was the matter of *Langer v Commonwealth*, which involved a challenge to similar provisions of the *Commonwealth Electoral Act*. Reasons in that

decisions involved challenges to this type of statutory restriction; the High Court held that a ban on the advocating of voting informally is not detrimental or contrary to the system of government enshrined in the Constitution. A full preferential system of voting is constitutionally valid; hence a law which is appropriate and adapted to prevent the subversion of that method is also within power.<sup>633</sup>

### **The States and the imposition of citizenship duties**

When one contemplates the duties imposed upon Australian citizens it is usually in the context of duties imposed by the Commonwealth Parliament or Government. However the States (and Territories) have the capacity to impose certain obligations on the basis of Australian citizenship. As a matter of practice those obligations may only attach to persons resident or at least within the jurisdiction of that State. However the obligations can be imposed because of national considerations. A number of Australian States have enacted legislation making it an offence to commit treason or sedition.<sup>634</sup> These State Acts still contain references to disloyalty to both the Government of the relevant State and the Government of the United Kingdom. A prosecution of a person under State law for inciting disaffection against the United Kingdom Government would raise interesting issues about the ability of a State to impose this statutory obligation on Australian citizens when its Commonwealth equivalent has been repealed.

### **Duties imposed on the community concerning the safety of citizens**

Citizenship obligations are usually considered from the perspective of the individual citizen, who is subjected to certain duties or obligations by a

---

matter were handed down on 20 February 1996, and a majority of the High Court held that the Commonwealth provisions are valid: (1996) 134 ALR 400.

<sup>633.</sup> *Langer* at 405-406, per Brennan CJ; at 418-419, per Toohey and Gaudron JJ; at 422-423 and at 425-426, per McHugh J.

<sup>634.</sup> *Crimes Act* 1985 (Vict) s9A; *Criminal Code* 1924 (Tas) s56-62; *Criminal Code* 1899 (Qld) s37-46.

Government or Parliament. However, allegiance is a reciprocal bond. An issue that has been largely overlooked until very recently is that of the duties owed by the Australian community to its citizen members.

Historically the bond of allegiance required the Monarch to protect his/her subjects. However the ability of a subject to enforce that obligation was debatable. The duty imposed on the Monarch has been described as "a duty of imperfect obligation", a right which exists although the subject has no means to enforce it.<sup>635</sup>

It was thus held in 1932 that there was no duty on the [British] Crown to afford, by its military forces, protection to British subjects in foreign parts. In *China Navigation Co Ltd v Attorney-General*,<sup>636</sup> a British shipping company requested the British Crown to provide armed guards to be placed upon its ships, to protect against piracy. The guards were provided, but on the condition that they were to be paid by the shipping company. The company argued that, as the members of the company were British subjects, they were entitled to protection without payment. Scrutton LJ, in rejecting this argument, stated,

[i]n my opinion there is no legally enforceable duty to protect British property from danger in foreign parts. The remedy, if any, is pressure brought by Parliament on Ministers to take steps either by diplomatic action or otherwise to protect British subjects. Britons fortunately are enterprising people accustomed to look after themselves; to suggest a duty on the British Government to follow adventurous Britons all over the world into places where their personal wishes or adventures have taken them to protect them from the difficulties they have got themselves into, does not represent a legal duty of any kind.<sup>637</sup>

This traditional view, namely that obligations imposed upon the Monarch by the "mutual bond of allegiance" are unenforceable as against the Monarch, may need

---

<sup>635.</sup> *Attorney-General v Tomline* (1880) 14 Ch D 58 at 66, per Brett LJ.

<sup>636.</sup> *China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197.

<sup>637.</sup> at 213.

to be reconsidered (at least for the purposes of the common law rules of Australian citizenship) in the light of recent developments in Australian law. These recent developments are twofold: (i) increasing awareness of a duty imposed on "individuals in relation" to act conscientiously, and (ii) increasing awareness of the need for the Australian community to protect its vulnerable citizens.

**Duty is integral to being "in relation" ("in community")**

The concept of duty permeates all spheres of Australian law and extends to all aspects of relations between citizens. In the last decade there has been a series of High Court decisions which have highlighted the obligations imposed on an individual when dealing with (relating to) other individuals.<sup>638</sup> Whilst they are not confined in their application to Australian citizens, the decisions are extremely significant to understanding the modern concept of duty, considered broadly and considered specifically in the context of citizenship duties. The cases illustrate the shift in Australian law's focus, away from the notion of a bond between subject and Monarch, towards a bond between members of the Australian community. The elevation of the Australian community over a monarchical constitution involves not merely the crystallisation of Australian citizenship rights; it requires recognition of the obligations deriving from the relationship between Australian community members.

The cases also illustrate how broad legal concepts applicable to all communities - such as the concept of a contract, or a tort - are formulated into rules particular

---

<sup>638.</sup> Matters of contract, commercial, tort, family and criminal law are all matters pertaining to the relations between individuals. The relationship which arises between two individuals who enter into a contact gives rise to obligations, just as does (for example) the entering into of a business arrangement, the creation of a relationship of "neighbour", and the embarking upon a personal relationship.

to a community. There is, for example, growing recognition of a distinctly Australian common law of contract and a distinctly Australian law of tort.<sup>639</sup>

Recognition of the duties owed by one individual to another has recently been highlighted by a flourishing of equitable doctrines, most notably the concept of unconscionability. Fundamentally, individuals are under a duty to act conscionably towards one another. Chief Justice Mason wrote extra-judicially in 1993:

[e]quitable doctrines and relief have extended beyond old boundaries into new territory where no Lord Chancellor's foot has previously left its imprint. In the field of public law, equitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers. Equitable doctrine and relief have penetrated the citadels of business and commerce, long thought, at least by common lawyers, to be immune from the intrusion of such alien principles. Equity, by its intervention in commerce, has subjected the participants in commercial transactions, where appropriate, to the higher standards of conduct for which it is noted and has exposed the participants to the advantages and detriments of relief in rem.

A similar effect has been achieved by resurrecting and expanding the traditional concept of unconscionable conduct as a basis for relief and recognising that the constructive trust is both an institution and a remedy. The concept of unconscionable conduct, along with the recognition of unjust enrichment which is partly a derivative of unconscionable conduct, has been the source of the recent rejuvenation of equity.<sup>640</sup>

Traditionally, equitable relief was granted when the party seeking relief was suffering from a special disadvantage or disability and the conduct challenged

---

<sup>639</sup>. For a further discussion of these issues, see for example Carter and Stewart, "Commerce and Conscience: the High Court's Developing View of Contract" (1993) 23 *UWALR* 49; Trindade, "Towards an Australian Law of Torts" (1993) 23 *UWALR* 74.

<sup>640</sup>. Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *LQR* 238 at 238.

was conduct which "shocked the conscience" or was "unscrupulous" or "harsh".<sup>641</sup> The standard has now been lowered, and there has been a "softening of the language used to describe unconscionable conduct".<sup>642</sup>

One example of this development in Australian law is *Commercial Bank of Australia Ltd v Amadio*.<sup>643</sup> In *Amadio*, a majority of the High Court held that a mortgage document containing a guarantee, executed by two elderly migrants who were unfamiliar with written English after being misinformed as to its contents by their son, should be set aside on the basis that they were under a special disability when they executed the deed containing the guarantee. The manager of the branch was aware of the limitations of the parents.

Developments in the availability of equitable relief have also extended to the sphere of personal relationships and family law. In *Baumgartner v Baumgartner*,<sup>644</sup> for example, the High Court recognised that a constructive trust may arise even though the parties may not have intended to create a trust, without resort to the fiction of presumed intent. A de facto couple had lived together for some years, pooling income to make contributions for the purchase of a home. They later separated and the man asserted that the property was solely his, as it was only in his name. Mason CJ, Wilson and Deane JJ stated:

the appellant's assertion, after the relationship has failed, that the Leumeah property, which was financed in part through pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.<sup>645</sup>

---

<sup>641.</sup> McLachlin, "Fairness and the Common Law: Using Equity to Achieve Justice" (Paper presented at "The Mason Court and Beyond" Conference, 8-10 September 1995, Melbourne) at 24.

<sup>642.</sup> As above.

<sup>643.</sup> (1983) 151 CLR 447.

<sup>644.</sup> (1987) 164 CLR 137.

<sup>645.</sup> at 149.

The decision of *The Queen v L* highlights the High Court's attitude towards modern relations between individuals.<sup>646</sup> In this case the Court categorically rejected any notion that a wife gave irrevocable consent to sexual intercourse with her husband. Mason CJ, Deane and Toohey JJ stated,

even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage.<sup>647</sup>

The High Court is increasingly focussing on relations between individuals, rather than relations between an individual and the state. These developments are in keeping with the elevation of the Australian community over a monarchical constitution.

There are still some areas of Australian law where at least the trappings of monarchical rule remain, most obviously the field of criminal law.<sup>648</sup> A crime usually results in injury to a victim and also harms the Australian community generally. Reflecting this, in the United States an alleged offender is prosecuted by "the People". This contrasts with British and Australian law, where a matter is still prosecuted by "the Queen". This is a historical relic, deriving from the fact that a crime was originally considered to be committed "against the peace of our Lord the King".<sup>649</sup> In 1880, Stephen wrote in his *Commentaries on the Laws of England* of,

the doctrine of the 'pleas of the crown', so called because the sovereign, - in whom centres the majesty of the whole community, - is supposed by the law to be the person injured by every wrong

---

<sup>646.</sup> (1992) 174 CLR 379.

<sup>647.</sup> at 390.

<sup>648.</sup> However, although remaining couched in monarchical terms, in substance criminal law proceeds upon the basis that harm occurs to individual victims (hence for example the recent development of Victim Impact Statements being tendered to a sentencing court) and to the community generally (hence public policy considerations in sentencing).

<sup>649.</sup> *Halsbury's Laws of England* Volume 9 p232 fn(b).



done to that community; and is therefore, in all cases, the proper prosecutor for every such offence.<sup>650</sup>

Despite these remaining historic ties to British monarchical government, there is overall a clear movement whereby Australia's common law is developing in a unique fashion consistent with notions of the Australian community. As Brennan J noted in *Mabo v Queensland [No 2]*, "[t]he law which governs Australia is Australian law".<sup>651</sup>

The rise of a broad notion of individuals being required to act conscientiously towards one another has facilitated recognition of the citizenship duty imposed on the Australian community to protect its member citizens, most particularly vulnerable ones. This process involves development of the common law of Australian citizenship.

### **The Australian community's obligation to protect its citizens**

There is a growing awareness of the obligation on the Australian community to offer special protection to its vulnerable citizens. There is some hint of this found in the judgments in *Mabo [No 2]*. In that case the plaintiffs had sought a declaration that the State of Queensland was under a fiduciary duty, or alternatively bound as a trustee, to the Meriam People to recognise and protect their rights and interests in the Murray Islands. The argument in the context of native title turned on the existence and exercise of traditional rights and interests in land, the statutory basis on which the Islands were held, the history of the administration of the Islands and the reliance by the Aborigines on the exercise of discretionary powers by the Queensland Government.<sup>652</sup> It is not difficult to see how arguments particular to native title interests in land can be applied to

---

<sup>650.</sup> Stephen, *Commentaries on the Laws of England* Volume IV (Butterworths, London, 1880) p2.

<sup>651.</sup> *Mabo [No 2]* at 29.

<sup>652.</sup> *Mabo [No.2]* at 11 (submissions for the second and third plaintiffs).

create a broad fiduciary duty, based upon the vulnerability of Aborigines and the role of 'protector' adopted by colonial Governments and Parliaments.

Justice Toohey was the strongest supporter of this argument. He agreed with the submission that a policy of 'protection' by government emerged from a consideration of relevant legislation concerning Aborigines, as well as by executive actions such (for example) as the creation of reserves and the removal of non-Islanders from the Islands in the 1880's.<sup>653</sup> Justice Toohey held that a fiduciary relationship did arise, out of the power of the Crown to extinguish traditional title by alienating the land or otherwise.<sup>654</sup> The fiduciary obligation imposed on the Crown was that of a constructive trustee.<sup>655</sup>

Justice Brennan, with whom Mason CJ and McHugh J agreed, reserved his position in relation to the existence of a fiduciary duty;<sup>656</sup> Deane and Gaudron JJ appeared to support the notion of a constructive trust arising in appropriate circumstances.<sup>657</sup>

If this principle is accepted by a majority of the High Court in future cases, it will constitute a significant expansion of equitable principles. Those seeking to argue for the existence of a fiduciary duty between the executive manifestation of the Australian community and Aborigines will rely on (inter alia) United States precedents, where it has been held that a fiduciary relationship exists between the United States Government and American Indians, resembling "that of a ward to his guardian".<sup>658</sup> These authorities may be applicable; however, it

---

<sup>653.</sup> at 201.

<sup>654.</sup> at 203.

<sup>655.</sup> at 203-204.

<sup>656.</sup> at 60.

<sup>657.</sup> at 113, 119.

<sup>658.</sup> *Cherokee Nation v State of Georgia* 5 Peters 1 at 17 (1831). See also *Tee-Hit-Ton Indians v United States* 348 US 272 (1954); *United States v Mitchell* 463 US 206 (1982).

must be borne in mind that the United States common law rules of citizenship are the product of United States history.

A perhaps stronger example of a growing concern for vulnerable citizens is Gaudron J's judgment in *Minister for Immigration and Ethnic Affairs v Teoh*.<sup>659</sup> The case concerned a Malaysian citizen (Teoh) who had applied for permanent residency. Teoh had married an Australian citizen who had four children from former marriages; they then had three children of their own. Teoh's application was refused, and a deportation order made, on the basis that he had been convicted of various drug offences. Teoh then appealed this decision. A majority of the High Court held that the ratification by Australia of the Convention on the Rights of the Child gave rise to a legitimate expectation that a Commonwealth Government decision-maker would act in accordance with that Convention, in the absence of a statutory or executive indication to the contrary.<sup>660</sup>

Justice Gaudron formed part of the majority of the Court, but stated that she considered the Convention to be of only subsidiary importance. She placed significance on the fact that Teoh's children were Australian citizens.

What is significant is the status of the children as Australian children. Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability. And there are particular obligations to the child citizen in need of protection. So much was recognised as the duty of kings, which gave rise to the *parens patriae* jurisdiction of the courts. No less is required of the government and the courts of a civilized democratic society.<sup>661</sup>

Justice Gaudron considered that it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best

---

<sup>659</sup>. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

<sup>660</sup>. The issue before the Court was whether the decision-maker had considered the effect deportation would have on the children; it was held that insufficient consideration had been given to this matter.

<sup>661</sup>. at 304.

interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare.<sup>662</sup>

Justice Gaudron's approach in *Teoh* can be contrasted with that of McHugh J, who dissented in the case. Justice McHugh was strongly critical of the suggestion that administrative decision makers had to consider children, when making decisions or taking actions which were not directed at children but merely had consequences in relation to them.<sup>663</sup> On Gaudron J's approach, the answer is clearly yes, this consideration must be given. Children are the citizens of the future. When an administrative decision or action has an impact upon them, their interests should be given special weight. To do otherwise is to fail to recognise the importance of Australian citizenship, and to fail to recognise the purpose for which legislative and executive power is exercised: to serve the Australian community, now and in the future.

---

<sup>662.</sup> As above.

<sup>663.</sup> at 319.

## CONCLUSION

Australian citizenship binds individual Australians together as a community. As such, it is the most fundamental principle of the Australian legal system. *McGinty* is a landmark decision whose implications will take many years to unfold. Immediately prior to *McGinty* it had been thought that a certain form of representation (representative government / democracy) was implicit in the Constitution. *McGinty* shows that it is not. Rather, it is representation, or citizenship, that is implicit. I have argued in this thesis that the Constitution must be interpreted in accordance with (the hierarchically superior) principles of Australian citizenship law; the starting point for the High Court's method of constitutional analysis must be Australian citizenship.

I have argued that Australian citizenship law is, essentially, a common law matter. It defines the nature of the relationship between individuals "in society, not in solitude".<sup>664</sup> This has two levels. At the first level, fundamental principles deriving from the notion of community cannot lawfully be denied or abrogated. They are hierarchically superior to the Constitution and to any statutory enactment. But particular citizenship rights are also functions of particular histories. The specific (second level) common law rules of Australian citizenship are a product of distinctive Australian history. They certainly draw upon inherited principles of the British common law concerning citizenship, and in certain respects resemble United States principles of citizenship law but ultimately they are Australian common law rules.

*McGinty* will prove to be a seminal decision for the reason also that it asserts the particularities of Australian history over universal prescription. The High Court has shown that it is not becoming a court of human rights. I have drawn a sharp distinction between particular citizenship rights and human rights.

---

<sup>664</sup>. Hobbes at 188.

The historical recognition and understanding of the nature of Australian citizenship has been slow in coming, in part because of continuing ties with Britain. But the main constitutional feature of this century of Australian history is that Australian citizenship has come to be understood in terms of allegiance to the Australian community rather than to the British Monarch. This is the true republic.

## **BIBLIOGRAPHY**

### **Primary Sources**

*Official Record of the Debates of the Australasian Federal Conventions* (Volume I - Sydney 1891, Volume III - Adelaide 1897, Volume IV - Melbourne 1898 (I) and Volume V - Melbourne 1898 (II)), (Legal Books Pty Ltd, Sydney 1986)

*Opinions of the Attorneys-General of the Commonwealth of Australia, Volume 1, 1901-1914*, (Australian Government Publishing Service, Canberra 1981)

*Opinions of the Attorneys-General of the Commonwealth of Australia, Volume 2, 1914-1923*, (Australian Government Publishing Service, Canberra 1988)

#### **S.A. Parl. Debates**

11 June 1857

3 October 1879

16 October 1879

14 June 1881

16 June 1881

19 July 1881

23 August 1881

19 July 1882

12 July 1888

10 October 1888

3 November 1896

5 November, 1896

1 December 1896

8 December 1896

**Acts**

25 Ed 3 St1 (1350)

3 Hen 7 c8 (1487)

11 Hen 7 c1 (1495)

4 Ja 1 c9 (1606)

2 & 3 Ann c5 (1703)

4 Ann c1 (1704)

4 Ann c4 (1705)

7 Ann c5 (1708)

4 Geo 1 c11 (1717)

4 Geo 2 c21 (1731)

13 Geo 2 c7 (1740)

20 Geo 2 c44 (1747)

26 Geo 2 c26 (1753)

27 Geo 2 c10 (1753)

13 Geo 3 c21 (1773)

3 Vic No 4 (1839) (SA)

5 Vic No 6 (1841) (SA)

9 Vic No 12 (1845) (SA)

21 Vic 3 (1857) (SA)

23 & 24 Vic No 20 (1860) (SA)

24 & 25 Vic No 14 (1861) (SA)

48 & 49 Vic c60 (1885)



No 672 of 1896 (SA)

*Act of Anne* (1708) 7 *Anne* c 5

*Acts Amendment (Electoral Reform) Act* 1987 (WA)

*Adult Suffrage Act* 1908 (Vic)

*Aliens Act* 1864 (SA)

*Australia Act* 1986 (Cth)

*Australia Act* 1986 (UK)

*Australian Citizenship Act* 1948 (Cth) [formerly the *Nationality and Citizenship Act* 1948 (Cth) and the *Australian Citizenship and the Status of British Subjects Act* 1948 (Cth)]

*Australian Citizenship Amendment Act* 1984 (Cth)

*Australian Citizenship Amendment Act* 1986 (Cth)

*Australian Constitutions Act* 1850 (UK)

*Bank Notes Tax Act* 1910 (Cth)

*British Nationality and Status of Aliens Act* 1914 (UK)

*British Nationality Act* 1948 (UK)

*British Nationality Act* 1981 (UK)

*Chinese Immigrants Regulation Act* 1881 (SA)

*Chinese Immigration Restriction Act* 1888 (SA)

*Citizenship Act* 1969 (Cth)

*Colonial Laws Validity Act* 1865 (Imp)

*Commonwealth Electoral Act* 1911 (Cth)

*Commonwealth Electoral Act* 1918 (Cth)

*Commonwealth Electoral Legislation Amendment Act* 1984 (Cth)

*Commonwealth Franchise Act* 1902 (Cth)

*Communist Party Dissolution Act 1950 (Cth)*

*The Constitution of the Commonwealth of Australia*

*The Constitution of the United States of America*

*Constitution Act 1867 (Qld)*

*Constitution Act 1902 (NSW)*

*Constitution Act 1934 (SA)*

*Constitution Act 1975 (Vic)*

*Constitution Acts Amendment Act 1899 (WA)*

*Constitution Alteration (Aboriginals) Act 1967 (Cth)*

*Constitution Amendment Act 1903 (Tas)*

*Crimes Act 1914 (Cth)*

*Crimes Act 1985 (Vic)*

*Criminal Code 1899 (Qld)*

*Criminal Code 1924 (Tas)*

*Death Penalty Abolition Act 1973 (Cth)*

*Elections Act Amendment Act 1905 (Qld)*

*Electoral Act 1899 (WA)*

*Electoral Act 1985 (SA)*

*Electoral Act 1988 (WA)*

*Electoral Distribution [formerly Districts] Act 1947 (WA)*

*Human Rights (Sexual Conduct) Act 1994 (Cth)*

*Immigration Act 1901 (Cth)*

*Immigration Restriction Act 1901 (Cth)*

*Immigration Restriction Amendment Act 1905 (Cth)*

*Intelligence and Security (Consequential Amendment) Act 1986 (Cth)*

*Natives (Citizenship Rights) Act 1944 (WA)*

*Naturalisation Act 1870 (UK)*

*Naturalisation Act 1903 (Cth)*

*The Northern Territory Indian Immigration Act 1879 (SA)*

*The Northern Territory Indian Immigration Act 1882 (SA)*

*Pacific Island Labourers Act 1901 (Cth)*

*Pacific Island Labourers Act 1906 (Cth)*

*Parliamentary Elections (Women Candidates) Act 1923 (Vic)*

*Royal Style and Title Act 1953 (Cth)*

*Royal Style and Title Act 1973 (Cth)*

*Statute of Westminster 1931 (UK)*

*Women's Franchise Act 1902 (NSW)*

### **Treaties/Conventions**

*Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws*

*International Covenant on Civil and Political Rights*

Cases

*Ableman v Booth* 62 US 506 [21 How. 508] (1858)

*Re Aeneas Macdonald* (1747) Fost 59; 168 ER 30

*Afroyim v Rusk, Secretary of State* 387 US 253 (1966)

*Allen v State Board of Elections* 393 US 544 (1968)

*Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129

*Ashby v White*, Kings Bench, (1703) 2 Ld Raym 938; 92 ER 126

*Ashby v White*, House of Lords, (1703) 1 Brown 62; 1 ER 417

*Attorney-General (NSW) v Brewery Employees Union of NSW* (1908) 6 CLR 469

*Attorney-General v Tomline* (1880) 14 Ch D 58

*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106

*Australian Communist Party v Commonwealth* (1951) 53 CLR 1

*Re Australian Education Union & Others; ex parte Victoria & Others* (1995) 128 ALR 609

*Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29

*Baumgartner v Baumgartner* (1987) 164 CLR 137

*Bisticic v Rokov* (1976) 135 CLR 552

*Bradken Consolidated Ltd v BHP* (1979) 145 CLR 107

*Bribery Commissioner v Ranasinghe* [1965] AC 172

*Brown v Board of Education* 347 US 483 (1954)

*Burns v Ransley* (1949) 79 CLR 101

*Calvin's Case* (1608) 77 ER 377

*Cheatle v The Queen* (1993) 177 CLR 541

*Cherokee Nation v State of Georgia* 5 Peters 1 (1831)

*China Navigation Co Ltd v Attorney-General* [1932] 2 KB 197

*China Ocean Shipping Co v South Australia* (1979) 145 CLR 172

*Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1

*Coe v Commonwealth* (1979) 53 ALJR 403

*Coe v Commonwealth* (1993) 68 ALJR 110

*Cole v Whitfield* (1988) 165 CLR 360

*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447

*Commonwealth v Ah Sheung* (1907) 4 CLR 949

*Commonwealth v New South Wales* (1923) 32 CLR 200

*Crandwell v State of Nevada* 73 US 35 [6 Wall 35] (1867)

*Cunliffe v Commonwealth* (1994) 182 CLR 272

*Davis v Brandemer* 478 US 109 (1984)

*Davis v Commonwealth* (1988) 166 CLR 79

*Dietrich v The Queen* (1992) 177 CLR 292

*Dixon v British Columbia (Attorney-General)* (1989) 59 DLR (4th) 247

*Doe d Thomas v Acklam* (1822) 2 B&C 779; 107 ER 572

*Dred Scott v Sandford* 60 US 393 (1856)

*Elk v Wilkins* 112 US 94 (1884)

*Farey v Burvett* (1916) 21 CLR 433

*Federated Municipal and Shire Council Employees Union v City of Melbourne* (1919) 26 CLR 508

*Feldman v United States* 322 US 487 (1943)

*Gratwick v Johnson* (1945) 70 CLR 1

*Green v Board of Elections* 380 F 2d 445 (1967) and then 389 US 1048 (1968)

*Hammond v Commonwealth* (1982) 152 CLR 188

*Harper v Virginia Board of Elections* 383 US 663 (1965)

*Harris v Minister for the Interior* [1952] 2 SA 428

*Joyce v Director of Public Prosecutions* [1946] AC 347

*Judd v McKeon* (1926) 38 CLR 380

*Jumbunna Coalmine N/L v Victorian Coal Miners Association* (1908) 6 CLR 309

*Karcher v Daggett* 462 US 725 (1983)

*Kenny v Minister for Immigration* (1993) 42 FCR 330

*Kirmani v Captain Cook Cruises Pty Ltd* (1985) 159 CLR 351

*Langer v Commonwealth* (1996) 134 ALR 400

*Leeth v Commonwealth* (1992) 174 CLR 455

*Mabo v Queensland [No. 2]* (1992) 175 CLR 1

*McCawley v The King* (1920) 28 CLR 106

*McGinty v Western Australia* (1996) 134 ALR 289

*Ex rel McKellar* (1978) 139 CLR 527

*Ex rel McKinlay* (1975) 135 CLR 1

*Madzimbamuto v Lardner-Burke* [1969] 1 AC 645

*Marks v Commonwealth* (1964) 111 CLR 549

*Melbourne Corporation v Commonwealth* (1947) 74 CLR 31

*Miller v Johnson* 63 LW 4726 (1995)

*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 272

*Muldoney v South Australia* (Unreported Judgment of High Court, 24 April 1996, FC96/013)

*Nationwide News Pty Limited v Wills* (1992) 177 CLR 1

*New South Wales v Commonwealth (Seas and Submerged Lands Act Case)* (1975) 135 CLR 337

*Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178

*Pochi v MacPhee* (1982) 151 CLR 101

*Polites v Commonwealth; Kandiliotes v Commonwealth* (1945) 70 CLR 60

*Polyukovich v Commonwealth* (1991) 172 CLR 501

*R v Brailsford* [1905] KB 730

*R v De la Motte* (1781) 21 State Tr 687

*R v Foster; ex parte Eastern and Australian Steamship Co Ltd* (1959) 103 CLR 256

*R v Hutchins; ex parte Chapman and Cockington* [1959] SASR 189

*R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254

*R v L* (1992) 174 CLR 379

*R v Murrell* (1836) 1 Legge 72

*R v Sharkey* (1949) 79 CLR 121

*R v Smithers; ex parte Benson* (1912) 16 CLR 99

*Reynolds v Sims* 377 US 533 (1963)

*Robinson v Western Australian Museum* (1977) 138 CLR 283

*Salemi v MacKellar (No. 2)* (1977) 137 CLR 396

*Shaw v Reno* 125 L Ed 2d 511 (1993)

*Sorby v Commonwealth* (1983) 152 CLR 281

*Southern Centre of Theosophy Inc v South Australia* (1979) 145 CLR 246

State Trials:

*24 Charles 1* (1649) 989

*12 Charles 11* (1660) 947 (Trial of the Regicides)

*Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211

*Street v Queensland Bar Association* (1989) 168 CLR 461

*Sykes v Cleary* (1992) 176 CLR 77

*Tee-Hit-Ton Indians v United States* 348 US 272 (1954)

*Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104

*Thornburg v Gingles* 478 US 30 (1986)

*United States v Mitchell* 463 US 206 (1982)

*United States v Wong Kim Ark* 169 US 649 (1898)

*Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1

*University of Wollongong v Metwally* (1984) 158 CLR 447

*Victoria v ABCE & BLF* (1982) 152 CLR 25

*Victoria v Commonwealth* (1975) 134 CLR 81

*Wesberry v Sanders* 376 US 1 (1963)

*Worcester v Georgia* 6 Pet. 515 (1832)

*Yick Wo v Hopkins* 118 US 356 (1886)

*Zarb v Kennedy* (1968) 121 CLR 283



**Articles**

Berger, "Ely's Theory of Judicial Review" (1981) 42 *Ohio State LJ* 87

Brazil, "Australian Nationality and Immigration" in Ryan (ed), *International Law in Australia* (Law Book Co Ltd, Sydney, 2nd ed 1984)

Brest, "The Substance of Process" (1981) 42 *Ohio State LJ* 131

Brooks, "A Paragon of Democratic Virtues? The Development of the Commonwealth Franchise" (1993) 12(2) *Uni Tas LJ* 208

Campbell, "The Prerogative Power of Dissolution" (1961) *Public Law* 165

Carter and Stewart, "Commerce and Conscience: the High Court's Developing View of Contract" (1993) 23 *UWALR* 49

Castles, "The Reception and Status of English Law in Australia" (1963) 2 *Adel LR* 1

Cowen, "The Legal Implications of Australia becoming a Republic" (1994) 68 *ALJR* 587

Craven, "Original Intent and the American Constitution - Coming Soon to a Court Near You?" (1990) 1 *PLR* 166

Detmold, "Australian Law: Federal Movement" (1991) 13(1) *Syd LR* 31

Detmold, "The New Constitutional Law" (1994) 16 *Syd LR* 228

Detmold, "Australian Constitutional Equality: The Common Law Foundation" (1996) 7 *PLR* 33

Dixon, "The Common Law and the Constitution" (1935) 51 *LQR* 590

Dixon, "The Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240

Doyle, "Constitutional Law: At the Eye of the Storm" (1993) *UWAL Rev* 15

Doyle, "Courts in a Representative Democracy - Courts unmaking the law" (Paper presented at Law Council of Australia Conference - "Courts in a Representative Democracy", Hyatt Hotel, Canberra, 11-13 November 1994)

Dworkin, "Rights as Trumps" in Waldron (ed), *Theories of Rights* (Oxford University Press, Oxford 1984)

Ebbeck, "Section 171: the Obscure Provision" (1991) 13 *Adel LR* 23

- Ebbeck, "The Future for Section 117 as a Constitutional Guarantee" (1993) 4 *PLR* 89
- Fitzgerald and Zdenkowski, "Voting Rights of Convicted Persons" (1987) 11 *Crim LJ* 11
- Fraser, "False Hopes: Implied Rights and Popular Sovereignty in the Australian Constitution" (1994) 16 *Syd LR* 213
- Goldsworthy, "The High Court, Implied Rights and Constitutional Change" (1995) *Quadrant* 46
- Grano, "Ely's Theory of Judicial Review: Preserving the Significance of the Political Process" (1981) 42 *Ohio State LJ* 167
- Harris and Crawford, "The Powers and Authorities Vested in Him" (1967-70) 3 *Adel LR* 303
- Howe, "The Constitutional Centenary, Citizenship, the Republic and all that - absent Feminist Conversationalists" (1995) 20 *The Constitutional Centenary* 218
- Irving, "A Gendered Constitution? Women, Federation and Heads of Power" (1994) 24 *UWAL Rev* 186
- Kennett, "Constitutional Interpretation in the Corporations Case" (1990) 19 *Fed LR* 223
- Kennett, "Individual Rights, the High Court and the Constitution" (1994) 19 *MULR* 581
- Latham, "The Law and the Commonwealth" (O.U.P 1949), quoted in Heuston, *Essays in Constitutional Law* (Stevens & Sons, London, 2nd ed 1964)
- Lindell, "Form and Substance: Discrimination in Modern Constitutional Law" (1992) 21 *Fed LR* 136
- Lindell, "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed LR* 29
- Loveland, "Positive discrimination and fair electoral representation in the United States" [1994] *Public Law* 332
- Maher, "The Use and Abuse of Sedition" (1992) 14 *Syd LR* 287
- Mai Chen, "The Introduction of Mixed-member Proportional Representation in New Zealand - Implications for New Zealand" (1994) 5 *PLR* 104
- Mason, "Future Directions in Australian Law" (1987) 13 *Monash Uni LR* 149
- Mason, "The Role of a Constitutional Court in a Federation: a Comparison of the Australian and the United States Experience" (1986) 16 *Fed LR* 1

Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World" (1994) 110 *LQR* 238

Mason, "Trends in Constitutional Interpretation" (1995) 18(2) *UNSWLJ* 237

McLachlin, "Fairness and the Common Law: Using Equity to Achieve Justice" (Paper presented at "The Mason Court and Beyond" conference, Melbourne, 8-10 September 1995)

Rich, "Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia" (1993) 21 *Fed LR* 202

Rose, "Judicial Reasoning and Responsibilities in Constitutional Cases" (1994) 20(2) *Monash University LR* 195

Rubenstein, "Citizenship in Australia: Unscrambling its Meaning" (1995) 20 *MULR* 503

Saunders, "Concepts of Equality in the Australian Constitution" in Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, Canberra 1994)

Schoff, "The High Court and History: It Still Hasn't Found(ed) What It's Looking For" (1994) 5 *PLR* 253

Sharwood, "The Australasian Federation Conference of 1890" in Craven (ed), *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books Pty Ltd, Sydney 1986)

Shearer, "United Nations: Human Rights Committee: The Toonen Case" (1995) 69 *ALJ* 600

Stokes, "Constitutional Commitments not Original Intentions: Interpretation of the Freedom of Speech Cases" (1994) 16 *Syd LR* 250

Stokes, "Is the Constitution a Social Contract?" (1990) 12 *Adel LR* 249

Toohey, "A Government of Laws, and Not of Men?" (1993) 4 *PLR* 158

Trindade, "Towards an Australian Law of Torts" (1993) 23 *UWAL Rev* 74

Wade, "The Basis of Legal Sovereignty" (1955) *CLJ* 172

**Books**

Allan, *Law, Liberty and Justice* (Clarendon Press, Oxford 1993)

*Blackstone's Commentaries on the Laws of England* [A Reprint of the First Edition] (Dawsons of Pall Mall, London 1966)

Blaustein and Flanz, *Constitutions of the Countries of the World* (Oceana Publications Inc., Dobbs Ferry, New York 1987)

Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge 1989)

Canby, *American Indian Law in a Nutshell* (West Publishing Co, St Paul, Minn. 2 ed 1988)

Cobbett, *Complete Collection of State Trials* (Bagshaw, Covent Garden, London 1809)

Cohen, *Handbook of Federal Indian Law* (United States Government Printing Office, Washington 1942 (reprinted 1988))

Coper, *Encounters with the Australian Constitution* (CCH Australia Ltd, North Ryde 1987)

Craven, *The Convention Debates 1891-1898: Commentaries, Indices and Guide* (Legal Books Pty Ltd, Sydney 1986)

Crisp, *Australian National Government* (3rd ed, reprint 1975), cited in Lindell, "Why is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect of Independence" (1986) 16 *Fed LR* 29

Crowley, *Modern Australia in Documents, Volume 1, 1901-1939* (Wren Publishing Pty Ltd, Melbourne 1973)

Crowley, *Modern Australia in Documents, Volume 2, 1939-1970* (Wren Publishing Pty Ltd, Melbourne 1973)

Davies, *Asking the Law Question* (The Law Book Company Ltd, North Ryde 1994)

Deakin, *Federated Australia* (Melbourne University Press, Victoria 1968)

Detmold, *The Australian Commonwealth* (The Law Book Company Ltd, Sydney 1985)

Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan & Co, London, 6th ed 1902)

Dixon, *Jesting Pilate and other Papers and Addresses* (The Law Book Company Limited, Melbourne 1965)

Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, Cambridge 1980)

*Final Report of the Constitutional Commission - Summary* (Australian Government Publishing Service, Canberra, August 1988)

Fish, *There's No Such Thing as Free Speech* (Oxford University Press, New York/Oxford 1994)

*Halsbury's Laws of England* Volume 1 (Butterworth & Co, London, 1st ed 1907)

*Halsbury's Laws of England* Volume 7 (Butterworth & Co, London, 1st ed 1910)

*Halsbury's Laws of England* Volume 9 (Butterworth & Co, London, 1st ed 1909)

Heuston, *Essays in Constitutional Law* (Stevens & Sons, London, 2nd ed 1964)

Hobbes, *Leviathan* (Penquin Books, London 1651, reprinted 1979)

Holder and Brennan, *The International Legal System Cases and Materials* (Butterworths, Sydney 1972)

Holdsworth, *A History of English Law* Volume II (Methuen & Co Ltd, London, 3rd ed 1923)

Holdsworth, *A History of English Law* Volume III (Methuen & Co Ltd, London, 3rd ed 1923)

Holdsworth, *A History of English Law* Volume XI (Methuen & Co Ltd, London, 3rd ed 1938)

*Immigration: A Commitment to Australia - The Report of the Committee to Advise on Australia's Immigration Policies* (Australian Government Publishing Service, Canberra 1988)

Jones, *British Nationality Law* (Oxford University Press, Oxford revised ed 1956)

Keith, *Speeches and Documents on the British Dominions 1918-1931* (Oxford University Press, Oxford 1932)

La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, Victoria 1972)

*Laws of Australia Volume 1 - Aborigines* (Law Book Co Ltd, North Ryde, Loose Leaf Service)

Lijphart, *Democracies - Patterns of Majoritarian and Consensus Government in Twenty-One Countries* (Yale University Press, New Haven and London 1984)

Lindell, *Future Directions in Australian Constitutional Law* (Federation Press, Canberra 1994)

McMinn, *A Constitutional History of Australia* (Oxford University Press, Melbourne 1979)

Main, *Conscription - The Australian Debate, 1901-1970* (Cassell Australia Limited, Melbourne 1970)

Major, *To Vote or Not to Vote? : Compulsory Voting in Australia* (WA Electoral Commission, Discussion Paper 16/95, December 1995)

McMinn, *A Constitutional History of Australia* (Oxford University Press, Melbourne 1979)

Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens & Sons Ltd, London 1957)

Pollock and Maitland, *The History of English Law Volume 1* (University Printing House, Cambridge, 2nd ed 1898; reprinted 1968)

Pryles, *Australian Citizenship Law* (Law Book Co Ltd, Sydney 1981)

Quick and Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, Sydney 1901)

Ryan (ed), *International Law in Australia* (Law Book Co Ltd, Sydney, 2nd ed 1984)

Selbourne, *The Principle of Duty* (Sinclair-Stevenson, Great Britain 1994)

Stephen, *Commentaries on the Laws of England Volume IV* (Butterworths, London 1880)

Tribe, *American Constitutional Law* (The Foundation Press Inc, Mineola, New York 2nd ed 1988)

*United Nations Legislative Series - Laws Concerning Nationality* (United Nations, New York 1954)

Waldron (ed), *Theories of Rights* (Oxford University Press, Oxford 1984)

Wheare, *The Statute of Westminster and Dominion Status* (Oxford University Press, London, 4th ed 1949)

*Whereas the People...Civics and Citizenship Education - Report of the Civics Expert Group* (Australian Government Publishing Service, Canberra 1994)

Wolfrum (editor-in-chief), *United Nations: Law, Policies and Practice Volume 2* (Matrinus Nijhoff Publishers, Dordrecht, new revised English Edition 1995)

Zines, *The High Court and the Constitution* (Butterworths, Sydney, 3rd ed 1992)