

# "Indigenous People and Citizenship"

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In this paper we want to address two questions: when did Aborigines and Torres Strait Islanders become Australian citizens?; and how do Indigenous rights relate to citizenship? The first is an important historical question which is by no means easy to answer. We spent several years researching it. The second question is a more contemporary one that relates to the mobilisation of support amongst many Australian people for the recognition of Indigenous rights to land and self-determination.

When did Aborigines and Torres Strait Islanders become Australian citizens?

So onto the first question: when did Aborigines and Islanders become Australian citizens? This is difficult to answer. The following is a selection of dates that some people would give in answer to this question: 1948, 1962, 1967, and various combinations of these three dates.

Australian citizenship did not become a legal reality until 1948, when an Act of Parliament outlined the basis on which one could become an Australian citizen. Before 1948 people born in Australia were automatically, with rare exceptions, termed 'British subjects'. One of the main points we wish to make in this paper is that these two statuses, first 'British subject' and then 'Australian citizen', have been of very limited significance in terms of the rights that they have afforded the holder.

The Australian Constitution, adopted in 1901, is silent on the issue of citizenship, although citizenship was discussed in the Federation Convention of 1898. There the South Australian Premier argued that the Constitution should define Australian citizenship and that the States should be prevented from encroaching upon the rights of Australian citizenship. But this was the minority view. Other delegates thought that it would 'be very mischievous' to define Australian citizenship in the Constitution because that would unduly limit the right of the States to determine their own citizenship regimes.

The majority of delegates even objected to the use of the word 'citizen' in the Constitution. Indeed the word appears only in section 44, where citizens of foreign countries are prohibited from holding parliamentary office.

The concern about using 'citizen' was twofold. First, 'citizen', as it had been used in the American and French revolutions, had republican overtones. It had been used to describe the position of people who participated in the violent overthrow of monarchic regimes. The republican connotations attached to the word were considered inappropriate for Australia, a country that sought to affirm its constitutional links with the British monarch. Second, delegates were concerned that if 'citizen' appeared in the Constitution, there would be confusion as to whether it referred to citizens of the States or citizens of

the Commonwealth. Most delegates did not want references to citizens of the Commonwealth for fear that this might lead to a limitation of State power to deal with citizenship matters.

So, although the Constitution was responsible for establishing the Commonwealth government and for dividing power between it and the States, it did not contain any statement of the rights of Australian citizenship. Instead, these rights were left to be decided by legislative and administrative action. Since Australia was a federal nation, with powers divided between the States and the Commonwealth, the rights of citizenship were to be decided at not one but two levels of government. To understand citizenship in Australia, one must understand its dual nature.

Prior to 1948, then, Australian citizenship as a formal legal category did not exist. 'British subjecthood' was the comparable term that was used instead. But when we think about the word 'citizenship' and its everyday usage, the various rights that come under that term were governed not by the Constitution or any other document, but by individual laws that governed things like voting, access to social security, the ability to move freely, and so on.

When the 1948 citizenship legislation came into force, nothing changed. Under the new Nationality and Citizenship Act 1948 (Cth) the rights of the Australian citizen were not spelt out. One became an Australian citizen, for instance, by being born in Australia, but as we know not all people born in Australia shared the same citizenship rights. This is most clearly evident when one looks at the citizenship status of Indigenous Australians. Immediately after the legislation came into force Aborigines and Torres Strait Islanders, like other people born in Australia, became Australian citizens, according to the citizenship legislation. But, except in rare cases, Aborigines and Torres Strait Islanders had no right to vote in Queensland, the Northern Territory, Western Australia, or federally. The rights of Indigenous Australians to receive social security were extremely limited, and Indigenous Australians were subject to a range of highly intrusive powers not applicable to other Australians. They were citizens in name but not in practice: they enjoyed 'formal citizenship' but none of the basic rights that make citizenship substantial and prized.

Thus 1948 was the year in which Australian citizenship emerged as a legal category but, as the continuing denial of basic rights to Indigenous Australians clearly showed, this was a hollow citizenship only. Australian citizenship was a formal category like British subjecthood, which as Geoffrey Sawer has pointed out was 'by itself worth little; it is the foundation on which further conditions of disqualification or qualification are built'. The conditions of disqualification or qualification that were built onto formal Australian citizenship came by way of separate Commonwealth and State statutes and administrative practices.

In order then to understand the real citizenship status of Indigenous Australians, or indeed any other group, one needs to look beyond Australian citizenship legislation to Commonwealth and State laws that affect basic citizenship rights.

That leads us to the main problem in determining when Indigenous Australians might be said to have gained citizenship: what is meant by citizenship? As Mick Dodson, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, writes: 'citizenship' as a concept 'is ill-defined, poorly understood, confused and confusing'. We need to distinguish Australian citizenship in its narrow legal meaning - 'formal citizenship' as we term it - from the real citizenship of substantive rights. The word 'citizenship', in its public and academic use, usually refers to substantive rights. We will call this usage of the term 'substantive citizenship' to distinguish it from the 'formal' but hollow statutory usage of the term.

In order to assess when Indigenous Australians might be said to have enjoyed substantive Australian citizenship one has to do two things. The first is to construct a substantive concept of Australian citizenship. This needs to be done because substantive Australian citizenship is not defined in the Constitution or any core statute - something which was the product of a deliberate strategy rather than neglect, as we have suggested above. Our construction of substantive Australian citizenship derives from the core literature on citizenship and rights, from which we have sought to locate the basic rights and entitlements which a person needs in order to participate fully in the political community along with other citizens. The second thing to be done is to identify how these rights and entitlements have been denied to Indigenous Australians.

The obvious place to begin in constructing a concept of substantive Australian citizenship is with the most respected and quoted citizenship theorist, T.H. Marshall. Marshall's division of citizenship rights into three categories - civil, political and social - is still enormously influential almost 50 years after it first appeared. Other commentators, however, are much more expansive than Marshall in their usage of the term. Will Kymlicka has argued that 'most liberal theorists have recognized that citizenship is not just a legal status, defined by a set of rights and responsibilities, but also an identity, an expression of one's membership in a political community'. Alastair Davidson, in his book *From Subject to Citizen: Australian Citizenship in the Twentieth Century*, adopts a similar stance, arguing that the main theme of his book is the centrality of the idea of 'belonging' to the understanding of citizenship.

Our position is that the word 'citizenship' ought to be used more narrowly. These broad definitions of 'citizenship' risk losing the focus on rights and obligations that have long been central to the meaning of the word. Put another way, we think that T.H. Marshall remains the best authority on citizenship. Moreover, as we shall suggest later, there are sound political reasons for using a narrower definition of citizenship.

The term citizenship denotes the relationship between an individual and the state, a relationship that gives rise to certain rights, broadly defined. From rights literature and

Australian practice, we have distilled nine basic rights of Australian citizenship, which we have documented in our recent book *Defining Australian Citizenship*. These are the rights: to vote, to speak freely, to choose one's religion, to move freely, to be equally protected by the law, to enjoy free basic health care, and to receive a minimum wage, a minimum level of social security, and a basic level of education. This list includes rights from Marshall's three categories: the right to vote is obviously political, the equal protection of the law is civil, while the right to a basic level of education is social. Some rights come within more than one of Marshall's categories (the rights to speak and move freely, for instance, have civil and political dimensions). To be denied these rights is to be denied substantive citizenship. (Of course to enjoy all these rights one needs formally to be an Australian citizen, since the right to vote can only be exercised by Australian citizens.)

This list of nine rights is of course debatable, as indeed is Marshall's very notion of a social right. However, we have chosen to include key social rights because they underpin the other civil and political rights, and because these rights have been so significant in Australian political history.

So back to the question of when Indigenous people became citizens. One important point to recognise here is that in a federal country like Australia, the citizenship rights of individuals are sometimes affected as much by State laws as by Commonwealth laws. Thus while, for instance, Commonwealth franchise and social security laws have clearly impacted upon the citizenship rights of Australians, so too the States have retained power over a range of key citizenship areas, such as the conduct of criminal and civil trials, education, the use of land, and the State electoral franchise. To get a proper picture of Australian citizenship we need to look at both levels of government.

At Commonwealth level many Indigenous Australians were denied citizenship in the following ways. Very few Indigenous people were able to vote federally until 1949, and Indigenous people in Queensland, Western Australia and the Northern Territory were largely denied the federal vote until 1962. Access to social security was largely restricted for Indigenous Australians until 1959, and those Indigenous people who were deemed to be 'nomadic or primitive' continued to be barred from receiving most social security entitlements until 1966.

When one investigates the practices of each of the States during this century, the consistent theme for all of them (except Tasmania which has had no Aboriginal protection legislation as such) is the extraordinary denial of citizenship rights at the State level that has been enshrined in law. In varying degrees the States have limited the right of Indigenous people to work, to move freely, and to do other things without restriction, like receive an education, receive health care, marry, consume alcohol and so on. Specific restrictions barred most Indigenous people from voting in Western Australia and the Northern Territory until 1962, and in Queensland until 1965. But all States, to a greater or lesser degree, precluded Indigenous people from the rights of citizenship until relatively recently.

So during the first five or six decades of this century, while Indigenous people were being excluded from Commonwealth citizenship entitlements, they were also being barred, in various degrees, from State citizenship entitlements.

The confusion regarding Australian citizenship was thus caused both by the absence of any definitive constitutional or legislative statement about the rights of citizenship, and by the fact that one's citizenship status was decided at various levels of government.

In attempting to provide the moment at which Indigenous Australians gained citizenship, some people now point to the year 1962. This was the year when all adult Indigenous people were entitled to vote at the Commonwealth level. But even this was no great watershed moment, for from 1949 Indigenous people who had the State vote or who had served in the army, had been able to vote at federal level. In other words Indigenous people in all States but Western Australia and Queensland had the federal vote after 1949, so the 1962 changes did nothing to affect their rights.

Another date, and the one which most people give for the year in which Indigenous people became Australian citizens, is 1967. This of course was the year when a very powerful movement for social change convinced the Australian people to alter the Constitution to enable the Commonwealth government to legislate for Aborigines, and to require Aborigines to be counted in census statistics.

However, we would argue that these changes did not give citizenship, as such, to Aborigines. We argue that the Constitution was not responsible for Aborigines being denied the rights of citizenship, and similarly we argue that it follows that - although of immense symbolic importance - the changes to the Constitution in 1967 did not give Indigenous people citizenship. In 1901 the Constitution made only two references to Aborigines. One was in section 51 which lists the powers that reside in the Commonwealth parliament. Placitum 26 gave the Commonwealth the power to make laws for the people of any race, 'other than the aboriginal race in any State'. The other section was 127, which prevented Aborigines from being included in census statistics. Section 127 was repealed and section 51(26) was amended in the 1967 referendum.

We have looked at the Federation Convention debates and the practices of the Colonies prior to federation in 1901 in order to explain why the Constitution treated Indigenous people as it did. The reason why section 51(26) did not give the Commonwealth the power to make laws for Aborigines was because the founders did not want to tread too heavily on the toes of the States. Most of the Colonies/States had established or were soon to establish Aboriginal 'protection' regimes, and to this extent were seen already to be covering the field. It is easy to look back now and say, well if the Commonwealth had had power to make laws for Aborigines things wouldn't have been so bad. But if one looks at the position of Indigenous people in the Northern Territory (over whom the Commonwealth did have power) this view of things is seen to be inaccurate. The Commonwealth's governance of Indigenous people in the Northern Territory after

1911 was every bit as oppressive as was the governance of Indigenous Australians by any State. So the fact that section 51(26) did not give power over Aborigines to the Commonwealth is not the reason Indigenous people were non-citizens.

The second and last reference to Aborigines in the Constitution was in section 127, and the exclusion here of Aborigines is more difficult to explain. The reason for their exclusion from census statistics is difficult to ascertain from the convention debates. But it seems as though the section was there to assist in the calculating and implementing of the financial arrangements between the Commonwealth and the States, and Aborigines were considered of marginal significance in these terms. Clearly this was an offensive provision, but on its own it did not make Aborigines non-citizens.

So our argument is that, symbolic and important as it was, the passage of the 1967 referendum cannot be seen as the time when Indigenous people became Australian citizens. The passage of the referendum did not lead to Indigenous people gaining any of the rights of citizenship that we earlier set out.

This is not to say that the referendum was not immensely significant, because it was. It was an immensely powerful political symbol that was accompanied by great hopes about what the federal government could do when it was given the power to legislate specifically for Aborigines. The referendum's success still stands as an extraordinary achievement by those who turned the 'yes' campaign into a people's movement. Our point is simply that the referendum's success did not grant citizenship to Indigenous Australians.

The most that one can really say about when Indigenous people became Australian citizens is that largely during the 1960s Indigenous people slowly gained the substantive citizenship rights that until then had been denied to them at the State and Commonwealth levels. State and Commonwealth legislation that restricted their citizenship rights was repealed. The Commonwealth removed restrictions on access to social security. From 1962 the Northern Territory and Western Australia enfranchised all Indigenous people at the State and Territory level, just as had happened at the Commonwealth level. Queensland in 1965 was the last jurisdiction to enfranchise Indigenous people. So we can say that at some stage in the 1960s Indigenous people gained substantive Australian citizenship.

How do Indigenous Rights relate to Citizenship?

Turning to our second question, how do Indigenous rights relate to citizenship? At present there exists a real split in opinion as to whether Indigenous rights (primarily the recently recognised and legally evolving rights to native title and to self-determination) should be considered as an integral indicator of the citizenship status of Indigenous Australians, or whether they are rights that exist aside from the citizenship that all Australians share.

Only recently has Australian law begun to recognise Indigenous rights. In June 1992 the High Court in the Mabo decision for the first time recognised native title as a legal interest in land. At the end of 1993 the Native Title Act (Cth) put in place a process by which native title claims could be made and processed. Then in December 1996 the High Court in the Wik decision recognised that the grant of pastoral leases did not necessarily extinguish native title rights over the same land.

The moves toward the recognition of Indigenous rights to self-determination have been even slower. The partly-elected and partly-appointed Aboriginal and Torres Strait Islander Commission, which began to operate in 1990, has to some extent been an instrument of self-determination. But, overall, governments have largely been reluctant to allow Indigenous groups to be self-determining.

The question to be considered here is: can one consider these developments in the recognition of Indigenous rights to land and self-determination to be relevant to the citizenship status of Indigenous Australians? If so, how?

By and large, those who argue that Indigenous rights are crucial to the citizenship status of Indigenous people are using the word citizenship as a rhetorical tool for worthy purposes - to put across the idea that Indigenous rights are not some recently invented handout that some people get in addition to the citizenship rights that they and others share.

Mick Dodson, for instance, has argued that the term 'citizenship' can or ought to encompass Indigenous rights. He has argued that Indigenous rights need to be factored in to a modern conception of Australian citizenship, and that Australian citizenship 'must provide constitutional and on-going recognition' of the group-specific rights of Indigenous Australians.

International scholars, over the past ten years, have been attempting to broaden the meaning of citizenship to include group rights. Iris Young wrote in 1989 about 'differentiated citizenship', a term also adopted by Will Kymlicka in his important argument about how 'group-differentiated rights' might best be accommodated within liberal democracies.

This work has been drawn on by scholars looking at Australia. Nicolas Peterson and Will Sanders, for instance, agree with Kymlicka that 'accommodation of differences is the essence of true equality' and argue that the 'recognition of indigenous rights thus becomes the pursuit of equal rights at a more sophisticated level'. In similar vein, Paul Havemann, in his recent edited book on Indigenous Peoples' Rights in Australia, Canada, and New Zealand, has argued that:

A new notion of citizenship, which stresses self-determination by collectivities, cultural diversity, and pluralism, now has to be reconciled with the older notion of

citizenship, which depends on equal rights shared by bearers of a homogeneous cultural identity ...

Alastair Davidson, meanwhile, writes that the Mabo High Court decision amounted to a 'breakthrough to a contribution' by Indigenous Australians to citizenship theory, and he argues that the rejection by the High Court of terra nullius posed new possibilities 'about what citizenship could be for any inhabitant of this continent'.

In international law the two groups of rights – citizenship rights and Indigenous rights – are sometimes run together. The best example of this happening came in March 1999 when the United Nations Committee on the Elimination of Racial Discrimination criticised Australia's 1998 amendments to the Native Title Act. The Committee expressed concern about the 'compatibility' of the amendments with Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.

The right not to be discriminated against on the basis of race is one of the foundation human rights, and we would also class it as a crucial theme to one of our citizenship rights: the right of all to equality before the law. But things become complex when, as has happened here, a country's dealing with an Indigenous right (native title) is criticised in the language of citizenship rights, for being racially discriminatory.

This is analytically quite tricky, because here we have the Committee on the Elimination of Racial Discrimination, which oversees the main international document that seeks to prevent racial discrimination (the International Convention on the Elimination of All Forms of Racial Discrimination) criticising Australia for cutting back on the group-specific rights of Indigenous Australians. Native title itself is only open to Indigenous people, and native title law therefore, in a sense, embodies racial discrimination. That is no criticism of native title law at all, it is simply an acknowledgement that native title is a group-specific right. But our point here is simply that things can begin to get very muddled when you have an anti-racial discrimination committee criticising a country's legislation on group-specific rights.

It would make more sense to us for Australia to be criticised for working to deny the existence and operation of Indigenous rights, than for Australia to be criticised for being racially discriminatory, because in a sense any legislation on Indigenous rights is going to be racially discriminatory.

And, to put our argument in more general terms, we would say that 'citizenship' ought not to be used as broadly as some people have begun to use it, and ought not to be used to refer to Indigenous rights.

The most important reason for calling for Indigenous rights to be articulated separately from 'citizenship' is because it is likely that the attempt to look at all these rights under the heading of citizenship will ultimately backfire. The danger is that, as has happened in the past, those people who oppose the further enhancement of Indigenous rights will appeal to the public with the cry of why should certain people have special

rights. And if Indigenous rights have not been separately articulated, and instead are said to be crucial to the citizenship status of Indigenous Australians, then the question will appear to have been unanswered. Put another way, we do not think that non-academics will be convinced to adopt a broad understanding of citizenship. Some people may continue to talk of Indigenous rights under the rubric of citizenship, but they will ultimately be brushed aside by those opposing the further recognition of Indigenous rights, who will adopt a less theoretically loaded understanding of citizenship. The call for the citizenship status of Indigenous Australians to be enhanced by further recognition of Indigenous rights will be met with the persuasive response that citizenship is a shared status, and that we all should share the same citizenship rights.

Such a ploy was adopted by the current Prime Minister over ten years ago, when there was talk of a treaty being entered into between Indigenous and non-Indigenous Australians. John Howard opposed the signing of such a treaty, arguing the following: It is an absurd proposition that a nation should make a treaty with some of its own citizens. It also denies the fact that Aboriginal people have full citizenship rights now. The irony of their relatively recent acquisition of citizenship being used here against Indigenous Australians would be lost on no-one. Here 'citizenship' was used by Mr Howard to counter the suggestion that some Indigenous rights of Indigenous people might be encoded in a treaty. Mr Howard said this even though those pressing for a treaty were not generally referring to citizenship. In the recent debate over the legislative response to the Wik High Court decision the same ploy was used by those who opposed the further enhancement of Indigenous rights, with the argument being put forward that we all enjoy, and should enjoy, the same rights.

While we would agree that we all should enjoy the same citizenship rights, the important point to be made to those who oppose the further recognition of Indigenous rights is that citizenship rights are not the only rights that exist. Indigenous rights are different, pre-existing rights that must be recognised by Australian law. We think that the belated recognition of Indigenous native title rights is a significant step towards justice, and that further steps need to be taken. Our point is simply that we do not think that the two terms - citizenship and Indigenous rights - should be run together. To put this another way, we do not think that the term citizenship should be used as a synonym for justice.

Moreover, this approach should not be taken to suggest that all the citizenship battles have been fought and that citizenship as a category can be confined to history. Denial of access to the provision of basic services such as education, health care and social services, is a clear denial of citizenship rights. The deprivation of many remote and not-so-remote Aboriginal communities clearly affects the citizenship rights of the members of those communities.

To close, our suggestion is that Australians of good conscience need continually to be told why the recognition and enhancement of Indigenous rights is an important step in the country's belated attempt to treat Aborigines and Torres Strait Islanders with justice. The simple proposition needs to be placed again and again before those Australians who

have not the time or inclination to learn all about the legalities of native title: that Indigenous Australians had rights before Europeans came and that these have not all been wiped out. Those rights that remain should now attract the recognition and protection of the law and the support of those people who have benefited most by the quashing of so many Aboriginal rights.

This, in our view, can best be done without talk of citizenship, which is a different problem, though as we say still a pressing one.

## Endnotes

John Chesterman and Brian Galligan, *Citizens Without Rights: Aborigines and Australian Citizenship* (Melbourne: Cambridge University Press, 1997).

Official Record of the Debates of the Australasian Federal Convention, Melbourne 1898, pp. 677, 682-3.

Opinion of Geoffrey Sawer, Appendix III to the 'Report from the Select Committee on Voting Rights of Aborigines', part 1, Commonwealth Parliamentary Papers, 1961, vol. 2, p. 37.

Michael Dodson, 'First Fleets and Citizenships: The Citizenship Status of Indigenous Peoples in Post-Colonial Australia', in S. Rufus Davis (ed.), *Citizenship in Australia: Democracy, Law and Society* (Melbourne: Constitutional Centenary Foundation, 1996), p. 193.

T.H. Marshall, 'Citizenship and Social Class' [1950], in T.H. Marshall and Tom Bottomore, *Citizenship and Social Class* (London: Pluto Press, 1992), p. 8.

Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995), p. 192.

Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge: Cambridge University Press, 1997), p. 5.

John Chesterman and Brian Galligan (eds), *Defining Australian Citizenship: Selected Documents* (Melbourne: Melbourne University Press, 1999).

Dodson, 'First Fleets and Citizenships', p. 218.

Kymlicka, *Multicultural Citizenship*, pp. 26, 174-6.

Nicolas Peterson and Will Sanders, 'Introduction', in Nicolas Peterson and Will Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (Melbourne: Cambridge University Press, 1998), p. 27; see also Susan Dodds, 'Citizenship, Justice and Indigenous Group-Specific Rights – Citizenship and Indigenous Australia', *Citizenship Studies*, vol. 2, 1998, pp. 105-119, at pp. 115-18.

Paul Havemann, 'Indigenous Peoples, the State and the Challenge of Differentiated Citizenship: A Formative Conclusion', in Paul Havemann (ed.), *Indigenous Peoples' Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999), p. 472.

Davidson, *From Subject to Citizen*, pp. 202-3.

Committee on the Elimination of Racial Discrimination, Press Release RD/893, 19 March 1999.

John Howard, 'Treaty is a Recipe for Separatism', in Ken Baker (ed.), *A Treaty with the Aborigines?* (Melbourne: Institute of Public Affairs, 1988), p. 6.