

# "Citizenship before 1949"

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Today, and over the next two days, we are commemorating the Golden Jubilee of the Nationality and Citizenship Act of 1949. The passage of this Act was a remarkable event in the evolution of Australian law. But citizenship was not invented in 1949. It was given legal status, and the word citizen was cloaked in law. But before the Act was the word. Citizenship meant something prior to becoming a legal category; similarly 'subject' status which existed in law, meant something broader than its meaning in law.

In Athens and Rome there were, of course, concepts of citizenship and political practices were built around membership of the citizenry. We know also about the declarations of citizens' rights in the French and American revolutions. These historical developments are of great interest in their own right, but they are not what I intend by saying that citizenship had a meaning in Australia prior to 1949. Australians have rarely thought about citizenship in theoretical terms; unlike the Americans who read works of political theory as they wrote their Constitution and constructed a political definition of citizenship, Australians have tended to draw, if anything, on social definitions of citizenship, thinking less about political or civic practices, and more about 'character' or community. For Australians, citizenship has been more of a social construction than a political or legal category, and this approach has changed little over the last one hundred years.

Take the recent debate about the Preamble. The Prime Minister's proposed Preamble addresses social characteristics rather than political or constitutional practices. It attempts to set down the unique, essential nature of Australian society, like a German romantic of the nineteenth century, seeking the soul of the people in their social life, in their attachment to the land, in their myths and folklore. It may come as a surprise to Australians in general and Mr Howard in particular, to hear themselves described as romantics, but Australians' concern with citizenship as a particular type of community, imbued with a particular character, has been consistent in Australian history, and the advent of citizenship law has had little impact upon it. The attempt to excite Australians in the 1990s with a new enthusiasm for citizenship by invoking the practices of ancient Greece and Rome is, I suggest, doomed to failure.

In looking at citizenship in Australia prior to 1949, I am concerned with three different, although interwoven strands: one is the way in which the term and the concept were popularly used; the second is the way in which citizenship was conceptualised in the Federal Convention debates in which the Constitution was shaped; and the third is the

status of the British subject, and the particular way in which this was translated into a specific notion of an Australian 'citizen'.

By the 1890s, there was manhood suffrage in effectively all of the colonies. Plural voting persisted in several colonies, along with property qualifications in a couple of them. But these qualifications were weak; in Tasmania and Queensland, the qualifying property levels were such that the working man on an average basic income could easily meet them. By the end of the 1890s, such fetters on the right to vote - at least for the lower houses of parliament - had been reformed or were in the process of being reformed in all colonies, and the franchise was being extended to women. Other fetters were, of course, being added in their place, with the simultaneous denial of the vote to some, although not all, categories of 'coloured' men and women, just as immigration policy was increasingly constructed around colour and race. The citizenry was both expanding and contracting at the same time (just as it is now, I might add, although on different grounds).

In the 1890s, the word 'citizen' appears again and again, in speeches, in the press, in the rules and charters of organisations, and in debates about political entitlement. We find the rhetoric of citizenship in particular attached to the Federation movement. It is well known now that the fortunes of Federation did not flourish until 1893, when the direct involvement of 'the people' was sought in the formal processes of achieving Federation. The Federal Convention of 1891 had already given rise to a full draft Constitution, and a commitment to taking this through the colonial parliaments to its completion. But the 1891 Constitution languished, with many intervening events preventing its passage through the parliaments and with the political will to see it through seeping away. With the failure of the parliaments, the participation of the 'people', or the citizens was invoked.

Who were the citizens? This question has raised some debate among historians in recent years. The argument has revolved around the question of whether Federation was really a 'popular' movement, led by the citizens and involving the active participation of the 'people' or whether it was in reality a politicians' movement, one which calculatedly invoked and even manipulated popular participation, for one or another purpose. It is very easy for us now, from the perspective of 1999, to say that the involvement of citizens in Federation was in fact limited, because there was a restricted franchise, optional voting, and slim majorities recorded in both the rate of turn-out and in the level of support for the election of Convention delegates and the Constitutional referendums held between 1898 and 1900. Setting aside the argument about how participation should be measured in statistical terms, that is, just how big a majority you need to be persuaded that participation has taken place, this argument in any case focuses too exclusively on the vote as the mark of citizenship. Not only did the citizens include also those who could not vote (this is, of course, still the case); in the 1890s they were more than simply voters, the citizen was a type of person.

In a minimal sense the citizens were simply everyone except the politicians. Politicians were not spoken of as citizens in Australia then or now (contrast this, again,

with the Athenian notion of the politically-active citizen, or the American idea of displaying civic virtue by becoming involved in politics). We find the term citizen used frequently in relation to 'citizens' meeting', or citizens' organisations- referring, that is, to groups or events that were organised independently of the politicians. The Australasian Federation League, for example, described itself in its Rules as an 'organisation of citizens', the membership of which was open to 'all adult citizens' of the relevant colony. 'All adult citizens'. What did this mean? Here we find a more subtle sense of citizenship creeping in. The Federation League was open to women, as well as men. But in NSW where the Federation Leagues were first established, as in most other colonies, women did not yet have the vote. They were still counted among the 'citizens'.

This notion of citizenship entailed commitment, belonging, and contribution. It did not begin with a count of rights. Rather, from the idea of citizens as particular type of person, an argument for rights emerged. The claim was the reverse of what we commonly make today - that is, we see the acquisition of rights as a means of becoming a citizen. Last century, people identified as citizens and thus claimed rights. The citizens were, minimally, British subjects, either by birth or naturalisation. But being a British subject was not enough - 'coloured' subjects from Hong Kong, or India, for example, had difficulty being considered 'citizens' in Australia. An exceptional coloured person might be transformed into an Australian citizen: the most striking example is Sydney's famous tea-importer, Quong Tart, the David Wang of the 1890s, a successful Chinese-born business man, philanthropist, socialite, honoured by both the Chinese and the NSW governments, as well as within both the Chinese and the 'white' colonial communities. Quong Tart was lauded as an exemplary citizen, partly because this was indeed what he was, and partly because it was considered an exceptional achievement for an Asian in 19th century Australia. To be a white subject was almost always necessary to be a citizen, but it was not sufficient; being law-abiding and respectable was important.

Being someone who contributed to the community by good work in the fields of welfare and community support was the final passport to citizenship. Thus we find the Womanhood Suffrage League of NSW (where women did not yet have the vote) petitioning the members of the 1897 Federal Convention for adult suffrage to be included in the Constitution. The women described themselves 'patriotic and law-abiding citizens', and they reminded the Convention delegates that women were taxpayers, and that they took 'an equal part in the religious and moral development of the people, and [did] more than half of the educational, charitable, and philanthropic work of society as at present constituted.' They described their lack of voting rights as a 'disability' rather than a disqualification from citizenship.

Neither the Womanhood Suffrage League nor the others who petitioned on similar lines were directly successful in their petition, but they were successful to a degree. After a good deal of debate - much of it focused on the rights of the states to determine their own state franchise, rather than on women's right to vote as such - section 41 was included in Constitution, providing a guarantee that no one who had the right to vote before Federation could be deprived of it by an act of the Commonwealth after Federation.

This meant that South Australian, and soon after, Western Australian women would have the Commonwealth vote, and combined with a general commitment across the colonies that there must be a uniform Commonwealth franchise, it meant that women in all the states would have the vote with the first Commonwealth Franchise Act. This section does not use the word 'citizen', but it records one of the important struggles around citizenship at that time.

It has often been noted that the Australian Constitution does not include a statement of or a definition of Australian citizenship. This is literally true, although the Constitution, as we know only too well, includes many things by implication. The closest we have to an express statement of citizenship in the Constitution is section 117: 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. When the delegates - most of them popularly elected by what we would now call the citizens - assembled for the second, and definitive Federal Convention in 1897, they had before them the work of the 1891 Convention, which included an alternative formula, much closer to the fourteenth amendment of the United States Constitution: A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth, nor shall a State deny to any person, within its jurisdiction, the equal protection of the laws.

There is no record of debate concerning the insertion of this section, but it is clear that it is the work of Andrew Inglis Clark, in 1891 Tasmanian Attorney-General and ardent admirer of the United States Constitution. Clark was not at that Convention, and he attempted from afar to have a similar provision inserted in the new draft Constitution, but he missed the debate which saw his 1891 provision evolve into section 117 as we have it today. It was Dr John Quick, co-author of the famous Quick and Garran, who led the attempt to include a statement of Australian citizenship in the new draft. The debate went on over days, stretching into weeks, in an attempt to reach a formula. None of the delegates was hostile to the concept at the start; none objected that a definition of citizenship was inappropriate in an Australian Constitution. No one disagreed that the equal protection of the law and 'the ordinary political privileges of the Commonwealth or of a state' should extend to the citizen.

They took Quick's proposition seriously: that a new type of person was being constructed with Federation. People who had been 'citizens' of an individual colony only would now become 'citizens' of the new Commonwealth. There were, however, several problems. In law - common law that is, for there was no British nationality Act yet - Australians were British subjects: what then was the relationship between being a citizen of the Commonwealth and being a subject of the Empire? The two were not coterminous, or it would make no sense to attempt to define one rather than the other. The problem that arose from being subjects of the Empire was that Australians shared this status with a class of people whom they did not wish to regard as citizens of the Commonwealth. Andrew Inglis Clark's formula - A State shall not make or enforce any law abridging any privilege or immunity of citizens of other States of the Commonwealth - was too broad.

The states wanted to abridge the privileges of some of the 'citizens' of the other states, if by citizens it was meant British subjects. The Empire counted many 'coloured' persons among its subjects, and while the Commonwealth's power over immigration was the principle means of dealing with this matter, the states wished to remain free in particular to impose discriminatory laws in the area of employment. The target was, in particular, the Chinese residents of the colonies, who numbered around 36,000 at the time of Federation.

If Clark's formula were adopted, the states would not be free to discriminate against Chinese subjects, unless a special category of Australian citizenship were adopted which not only described the Australian citizen as a member of the Commonwealth, entitled to the privileges of such membership, but also expressly limited the membership of the citizenry on grounds of race. When we look at these debates, and note, as we do, that the Commonwealth was founded on an ideal of 'whiteness', captured in both the Franchise Act of 1902 and in the Immigration Restriction Act of 1901, we should remember that the Australians did not go this far. There was an attempt in that direction: Dr Quick sought to define citizens as 'all persons resident in the Commonwealth, being natural-born or naturalized subjects of the Queen, and not under any disability imposed by the Federal Parliament': in other words, all British subjects in Australia who had not been singled out for discriminatory treatment. The Convention did not even adopt this subtle formula which, Quick had explained, permitted them to exclude people from citizenship on the grounds of race. There were several reasons for their reserve: one is that the British would certainly have objected, and may well have refused to pass the Constitution Bill when it came before the Imperial Parliament in 1900 had it contained a definition of the Australian citizen as a white person. For more than a decade, the Colonial Office had been voicing objections to the colonies' Immigration Restriction Acts because they discriminated against coloured subjects. There were additional reasons: the ideal was a white Australia, but colour as such was in fact secondary to culture. For one thing, an exception would have had to be made for the New Zealand Maori, as it was in the Franchise Act of 1902, or any hope of persuading New Zealand to enter the Commonwealth - a hope that was entertained right into the early years of the 20th century - would have been lost. Whatever the case in practice, the New Zealanders prided themselves on equality in rights between the white and the native populations.

Further, at the time of its genesis, the 'white Australia' policy was explained more as a cultural strategy than as a matter of eugenics. The Australians were fearful that the Commonwealth they were constructing would be threatened by people who were unfamiliar with Australian-British practices of parliamentary government, and Australian standards in wage earning and conditions. They were afraid of race-based conflict, for the example of the American Civil War was still a living memory for them all. Their goal was not so much to 'purify' the Australian population as to neutralise and homogenise it and to create a citizenship that conformed to an ideal.

A further reason for not including a race-based definition of citizenship (or indeed any definition of citizenship) was the Constitution's framers general reluctance to include express statements of policy in the Constitution. The Constitution is, with some few

exceptions, constructed around the distribution of powers between levels of government - powers with which the Parliaments can do more or less what they like as far as policy is concerned. This reluctance has served us well. It has shielded us from the inappropriate values of the past; it has allowed the evolution of different approaches to Australian politics; it has served to reinforce restraint and to permit tolerance of ways of doing things that are not otherwise prohibited. It will, I might add, continue to serve us well if we do not succumb to the temptation to write our current values into the Constitution, to entrench them as if they were eternal rather than contextual, and as if we, in the 1990s, enjoyed a level of wisdom that was not given to either our predecessors nor is to be given to those who come after us.

But, back to 1898. The formula finally adopted in section 117 was limited in two ways: it prohibited discrimination only on the grounds of residence, and it extended its protection only to 'subjects'. But this latter was not as narrow as it may appear. British subject status was a broad embrace; anyone born in a British territory or on board a British ship, regardless of their colour, regardless of the nationality of their parents, was a British subject and entitled to the privileges of a subject. Colonial naturalisation Acts had been recognised by Britain after 1847, although subject status by naturalisation was not portable from one colony to another until 1914. After the long search for a definition of citizenship, the Constitution's framers settled for the term 'subject' - the familiar and 'accurate', term used for members 'of the community or of the nation'. Edmund Barton pointed out at the same time that they had provided for 'the exercise of the rights of citizenship so far as the choice of representatives is concerned, and [had] given various safeguards to individual liberty in the Constitution.' In their own eyes, they were not neglectful of citizenship, but they were cautious, and they were also mindful that in a federal system, there is, in any case, dual citizenship.

Like most sections of the Constitution, Section 117 has undergone its own little odyssey over the years since 1901, wandering into only two High Court cases indeed in the early decades, but appearing more significant in the last few years. In 1904, its first appearance, *Davies and Jones v the State of Western Australia*, produced very narrow reading of the section, but the Justices of the Court none the less expressed their confidence in its robustness, and Justice O'Connor described it as 'the only section of the Constitution which recognizes in express terms a common citizenship amongst the States.' Many years later, in *Street v Queensland Bar Association*, Chief Justice Mason was to speak of section 117 as 'one of the comparatively few provisions in the Constitution which was designed to enhance national unity and a real sense of national identity'.

But the section's odyssey does not end here. One of the proposed alterations to the Constitution which will face the verdict of the republican referendum in November this year, is the removal of the words 'subject of the Queen' from section 117, and their replacement with the words 'an Australian citizen.' In the list of definitions attached to the Constitution Alteration (Establishment of Republic) Bill, 'an Australian citizen' is defined as 'a person who is an Australian citizen according to the laws made by the Parliament'.

This is not the same thing as a 'subject of the Queen'. The likely effect of this change will be to narrow the reading of section 117, just when it appeared to be loosening up.

Judgments of the High Court since 1992 in regard to section 44(i) of the Constitution illustrate how such a narrowing can occur when the focus becomes purely the legal category of citizenship, rather than the intention of the section. Section 44 (i), we have been reminded very recently in the disqualification of One Nation Party Senator-elect (or rather Senator-non-elect) Heather Hill, provides that a person is ineligible to stand for Parliament if he or she is 'under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power'. This section, we might note, is the only one in the whole Constitution where the word 'citizen' appears. In 1992, the Court read this to mean: any person who is entitled to hold a passport of another country, whether or not they have ever held one or ever intend to, or whether they even knew that they were entitled to hold one at the time they stood for election - any such person is disqualified from being a Member of Parliament.

Yet dual citizenship was not, and could not have been, what the Constitution's framers had in mind: Australians all had 'dual citizenship' in 1901, in the sense that they were British subjects, as well as Australians. No one had passports in those days. The section was - as the Convention Debates make clear - concerned with allegiance, with that quality of commitment and belonging of which I spoke earlier, that made one a 'citizen' in the 1890s. It was concerned with the 'real and effective' attachment, the closeness of connection and the strength of the bond between the individual and the country in question, which has been invoked in international law in post-War years in deciding a person's nationality, independently of his or her legal citizenship.

The world and the law, of course, move on, and we should not be forever bound to the intentions of those who framed our Constitution. But at the same time we should not be blind to the narrowing of citizenship that is happening in many spheres around us. Since 1949, Australians who take out the nationality of another country lose their Australian citizenship, and this still applies (when even the United States has dropped this requirement for its nationals); since 1984, only legal citizens have had the right to vote; since 1992, those with dual nationality cannot stand for Parliament; welfare rights are being restricted for non-citizens; residents who have not been naturalised must now pay full fees when they attend university; there is a move to disqualify from voting those British nationals who had the right to vote before 1984 and thus still retain it. The proposed republican alterations to the Constitution, if successful, will take this process further. Do we want to conflate the national community with the country's passport holders? And if so, why?

I have noted that the category of citizenship was both broad and restrictive in 1901. Those who met the definition of a 'citizen' shared in the enjoyment of an unusually democratic polity which still comes out relatively well, nearly one hundred years later, weighed on the modern scales of democracy. The adult franchise, the participatory

mechanism of the referendum, limited government, a federal system in which the interests of minorities are balanced against the interests of population majorities, have all been there since the beginning. The Australian citizen of the Constitution of 1901 was, in the words of Alfred Deakin, an 'independent Australian Briton'. The Constitution was constructed in an era of optimism and romanticism, even utopianism. Its creation was attended by flights of the highest sentiment. The citizen was thought of more in social terms than legal or political terms. As typical Australians, however, people were cautious and perverse, and pragmatic enough at the same time to be careful not to entrench their sentiments into words.

Perhaps they had a foreboding of the great, revolutionary changes that the world would soon undergo, a sense that we seem to be either mercifully or foolishly free of in 1999. Certainly, Australians one hundred years ago looked forward to a dramatically enlarged Australian population, to a wondrous expansion in science and technology, to Australian states multiplying in number, to Australia becoming independent of Britain, and to Australia becoming a world leader in many spheres. Much of this optimism was punctured by the terrible events of the First World War, and a new type of Australian 'citizen' was forged, built around the heroes of Gallipoli.

Sacrifice, resourcefulness, heroism became the criteria, just as philanthropy and community service had been the measure in the years preceding Federation. The wide and generous embrace of British subject status began to loosen; Britain introduced its first Nationality Act, and Australia followed. Although 'imperial naturalisation' was now permitted, subject status was no longer inalienable; nor did it automatically guarantee certain protections. British subjects of German origin were interned during the War, as if they were enemy aliens. Ultimately, Australia and the other dominions began to carve out a citizenship that was separate from subject status and exclusive to their nationals. Canada in particular took early steps in this direction, and was first to depart from the common code of 'Imperial citizenship' with the Canadian Nationals Act 1921 and the Canadian Citizenship Act of 1946. Canada's particular concerns revolved domestically around its multi-ethnic population as well as its standing in international law and on international tribunals. Australia did not appear to share such concerns, at least until the advent of the Curtin government and the Attorney-Generalship of Dr Evatt. In 1946, Australia took part in the conference of Commonwealth Prime Ministers that had been prompted by Canada's actions, and at which it was agreed that there should be a new scheme for individual citizenship in Commonwealth countries, one which provided at the same time for the retention of common British subject status across the old Empire.

We are celebrating the introduction of the Australian Act that first provided for such exclusive citizenship. It may come as a surprise to learn that the Nationality and Citizenship Bill was roundly attacked when it came before the Parliament in 1948. Why was it attacked? Not because of any deficiency in the law itself, but on the basis of its anticipated effect on Australian society. Members of the Liberal and Country Party Opposition (although not Robert Menzies himself) were beside themselves with outrage: they called the Bill a 'socialist plot', designed to break Australia's ties with Britain and to

'liquidate the Empire'. Terrible consequence to Australia's international standing, and to its cultural integrity were forecast. These fears were, of course, misplaced. The liquidation of the Empire was well underway, under its own steam - or lack of steam - by 1948. The critics were right that the Act did represent an assertion that Australians were different from and separate from Britons. But that assertion had been made long before, right from the time Australians were refusing to yield to the Colonial Office on immigration policy, from when Australian women were gaining the vote decades before British women, when separate naturalisation laws were passed in the colonies, when a concept of the Australian citizen as a particular type of person was being shaped in the parallel cultural and constitutional processes of the 1890s.

We are still attempting to juggle our romantic idea of the citizen as the bearer of the nation's spirit against a very limited idea of citizenship as purely a limited legal category. We have not yet abandoned our eternal search for a national identity, nor recognised that there is an alternative in the civic identity of which Donald Horne writes in *The Avenue of the Fair Go*, where what unifies Australians is not values or character, but commitment to a liberal-democratic polity. We should, I suggest, retain the idea of citizenship as a type of commitment, but recognise as they did last century, that exclusive legal citizenship is only one way, and often not the best way, in which that commitment may be expressed and measured.