

# I. Migration Control and the Law

## Control, culture and context

- Government has power to make laws for the peace, order and good government of the Commonwealth with respect to 'naturalisation and aliens': s51(xix) Constitution
  - This power gives the government power to enact laws for the deportation of aliens ; *Robtelmes v Brennan*

## White Australia

<i>Robtelmes v Brennan (1906) 4 CLR 395</i>
<b>Facts:</b> <ul style="list-style-type: none"> <li>• First deportation case to come before the HCA</li> </ul>
<b>Issue:</b> Was the Pacific Island Labourers Act, empowering the deportation of non-citizens, within the constitutional powers of the government?
<b>Held:</b> O'Connor J: <ul style="list-style-type: none"> <li>• The power to deport includes 'the power of choosing the place of deportation and the means of deportation in order that the exercise of the power shall be effectual'</li> <li>• The aliens power must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it.</li> </ul> Barton J: <ul style="list-style-type: none"> <li>• The legislation sought to be impugned was within Commonwealth legislative competence under any three of four heads of power – one of which was the race power – but did not state which of the four heads of power would not justify the legislation.</li> </ul>

## Early 'Citizenship' cases

<i>Potter v Minahan (1908) 7 CLR 277</i>
<b>Facts:</b> <ul style="list-style-type: none"> <li>• Person born to an Irish mother and Chinese father attempting to return home from China after a long absence</li> <li>• Speaking no English he was identified as an 'immigrant' for the purposes of the Immigration Act 1901 and was subjected to a dictation test</li> </ul>
<b>Issue:</b> Was the person an immigrant within the meaning of the Constitution
<b>Held:</b> The majority found he is not an immigrant or the dictation test had not been properly administered to him  Griffith CJ: <ul style="list-style-type: none"> <li>• "Immigration" as used in the constitution does not mean mere physical entry into the Commonwealth although the fact of entry is sufficient prima facie evidence that the person entering is an immigrant.</li> <li>• The respondent's residence in China is relevant as a circumstance to be taken into consideration for the purpose of ascertaining whether he intended to remain there.</li> <li>• Every person becomes at birth a member of the community into which he is born and is entitled to remain in it until excluded by some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort</li> </ul>

<p>when he thinks fit.</p> <ul style="list-style-type: none"> <li>• An alien has no legal right to enter a country of which he is not a national.</li> <li>• The return of a person to their native land after temporary absence has never been described as immigration.</li> </ul> <p>Isaacs J (dissent):</p> <ul style="list-style-type: none"> <li>• Takes the view that James is an immigrant and that James could not be seen to be coming home in this instance.</li> <li>• Isaacs J often took the view that “once an immigrant, always an immigrant”.</li> </ul> <p>Conflict of laws</p> <ul style="list-style-type: none"> <li>• Court looked to where he was domiciled. English law found that an illegitimate child was domiciled where the mother was. <ul style="list-style-type: none"> <li>◦ However there was an argument that this was not the correct test, and instead it was whether he was a constituent member of the Australian nation (which had more to do with racial background).</li> </ul> </li> </ul>
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*Donohue v Wong Sau (1925) 36 CLR 404*

**Facts:**

- Respondent born in Australia of naturalized Chinese parents and was raised in China
- When Miss Wong Sau sought to return to Australia as the wife of a Chinese market gardener from New South Wales, she was excluded on the basis that Australia was not her ‘home’, and charged with being a prohibited immigrant on her failure to pass the dictation test
- She was a British subject but was also legally domiciled in Australia as the spouse of a NSW resident

**Issue:** Was she an immigrant?

**Held:**

Unanimous decision that she is an immigrant

Isaacs J:

- The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.
- Test whether the whole of the facts show that at the moment of entry the person desiring to be admitted is fairly to be considered as one of the people of the Commonwealth, and whether, notwithstanding any personal absence from Australia, he can justly and in substance claim to regard this country as a place of habitation or general residence which he had never abandoned
- The respondent was not Australian in point of language, bringing-up, education, sentiment, marriage, or of any of those indicia which go to establish Australian nationality

## Indicators of Substantive Citizenship

Chesterman and Gallidan suggest 9 rights to substantive citizenship:

- Voting
- Speak freely
- Choose one’s religion
- Move freely
- Be equally protected before the law
- Enjoy free basic health care
- Receive a minimum wage
- Receive a minimum level of social security
- Receive a basic education

## Exclusion of Australia's Indigenous peoples

- Indigenous people were excluded in the Constitution until amendment in 1967 of s51(26) which had excluded from the legislative power 'the aboriginal peoples of any State'
- Indigenous people were not counted in federal censuses until after 1967
- Against Chesterman and Galligan's 9 indicators, there is little doubt that they were treated as aliens in substance
- Exclusion of indigenous Australians persisted *after* the laws and policies relating to other persons of colour were relaxed
- Think about the ways in which Australia's indigenous people are not afforded the rights of citizenship today?

## Current Issues in Citizenship Law

### Process to gain citizenship in Australia

Citizenship may be acquired in two ways:

1. **Automatically:** The two traditional ways of acquiring nationality automatically involve place of birth (*jus soli*) and ancestry or descent (*jus sanguinis*)
2. **Acquisition:** Australian citizenship can be acquired in one of two ways: by operation of law (automatically) or by application/grant.

Two traditional ways of acquiring nationality involve either the territory (*jus soli*) where you are born, or your ancestry (*jus sanguinis*). In Australia it is governed by the *Citizenship Act* and involves both aspects automatic citizenship and citizenship by application:

- **Automatic:** The law has been changed so as to alter the consequences of birth in Australia. Originally it followed the American model to provide that automatic citizenship for anyone who was born in the territory
  - *Jus soli:* In 1986 the law was changed to provide that citizenship will only accrue to a child born physically in Australia if at the time of the child's birth one of the child's parents are Australian citizens or permanent residents (**s12-16 CA**).
  - *Abandonment:* The government can deem citizen a child found abandoned in the country ("abandonment provisions" **s14 CA**)
  - Consider the issue of statelessness in Australia
  - *Incorporated territory:* A child born on territory incorporated into Australia (**s15 CA**)
  - *Just sanguinis (citizenship by descent):* Either parent is citizen, or became a citizen after 1949 (**Part 2, 2A**)
  - *Adoption:* There are four circumstances in which children who are adopted can become Australian citizens: (**Part 2, Subdivision AA**)
    - Hague Convention countries have specific provision (Australia is one)
      - The arrangements involve a rigorous scrutiny of the adopting parents and the child to prevent the sale of children internationally
      - If you go through the Hague Process and receive an adoption compliance certificate, the adoption will be recognised under Australian law and the child will be recognised as a citizen
      - You can also adopt a child through the Intercountry Adoption Scheme. The process is that you apply for a visa and on arrival the process is finalized and they become citizens
      - Other procedures for children who are adopted overseas and return to Australia with the parents
      - Generally you have to show that an adoption process overseas is legal under the local adoption laws, if the parties

are nationals of the country in which the child is adopted. If one of the parties is an Australian citizen, you need to show you did not travel overseas for the purpose of adopting a child and you need to have been overseas for at least 12 months before the child was adopted

- **Application:**
  - By conferral (**Subdivision B**): various requirements
    - Take an oath/pledge to become an Australian citizen
    - Over the age of 16
    - Permanent resident
    - Citizenship Test unless they have an enduring physical or mental incapacity
    - Have to have been lawfully present in Australia for 4 years, including the last 12 months as a permanent resident
      - Exceptions for people who work in an occupation that requires them to work overseas
        - Case law to decide what constitutes a requirement to work overseas
        - Current government wants to increase the time to stay here as a permanent resident to 4 years

## Process to cease citizenship in Australia

- Dual citizenship (historical)
  - This changed in 2007, Australians can have dual citizenship
- By renunciation (**s33**)
- By revocation of the Minister as a result of fraud or misrepresentation (**s34**)
  - Citizenship has become binomial over time. As this has occurred, Parliament has tried expand their power to take citizenship away again
  - This section is not being used at the moment
- Conduct inconsistent with Australian citizenship (**s33AA, 35, 35A**)
  - If you travel abroad to fight with a country at war with Australia
  - If you travel abroad to fight with organisations or countries who have not yet declared war on Australia
    - These provisions provide that if you engage in that conduct, your citizenship is deemed to have been renounced (rather than providing for a process of cancellation)
    - Does this fail to capture those who fight in service of terrorist organisations online from within the territorial limits of Australia?