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STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 84

# STUDIES IN LAW, POLITICS, AND SOCIETY

## Special Issue: Law and the Citizen

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# CHAPTER 1

# CONSTITUTING CITIZENSHIP – THE EVOLUTION OF AUSTRALIAN CITIZENSHIP LAW

Elisa Arcioni

## ABSTRACT

*The legal status of citizenship is constitutive in that it determines the boundaries of formal membership of a nation-state and, by implication, the lines of exclusion. The ways in which Australian law has defined membership over time – from subject status to citizen – provide a case study of the factors at play in understanding citizenship within a constitutional setting. We see that the constitution of citizenship may be a complex and unsettled evolutionary process.*

**Keywords:** Citizenship; subject status; membership; formal status; substantive membership; Australia

## INTRODUCTION

Citizenship law is constitutive in the sense of marking the legal boundaries of membership of a nation-state and, by implication, lines of exclusion from that state. Thus, citizenship law has significance for states by constituting their people and for the individuals involved by establishing their legal status and membership or otherwise in relation to a state. At international law, citizenship (or nationality) is the marker of an individual's attachment to a nation-state. The right to enter and remain in the nation of one's citizenship is the minimum legal incident of citizenship

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(Irving, 2008). That right is the core practical benefit derived from citizenship, which stands in contrast to the state's power of exclusion of non-citizens.

But how is citizenship law itself constituted? The default is to look to national law in order to understand citizenship law. That is, each nation-state defines for itself who are its members. We see this approach adopted within domestic jurisdictions (*Re Canavan,* 2017). Standard statements of international law also adopt the position that it is for each nation to define its own members (*Nottebohm,* 1955, p. 26). Here, I tell the story of how the Australian legal system has identified membership of the Australian nation-state over time, as a case study of the legal constitution of citizenship.

The Australian example is to some extent common to a group of nations who each began as British colonies and then developed into fully independent nation-states. Australia, Canada, India, the Irish Free State, New Zealand, Newfoundland, South Africa and Canada were all self-governing components of the British Empire. They became known as "Dominions" and in 1926, at the Imperial Conference (1926, p. 2) of British Empire leaders, they unanimously accepted the Balfour Declaration which stated that they were each:

> […] 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.

The peoples of those places all shared the common legal status of British subject. The challenge for each nation, as they became independent of Britain, was for it to develop a distinct legal status of membership.

The Australian story is one where the historical status of British subject was the initial focus for understanding legal membership. However, that status was over-inclusive and did not allow for the lines of exclusion sought by the national institutions. British subject status contracted over time and a distinct Australian status emerged through several legal steps. Through that process, we can see the interplay of common law, constitutional law and statutory law. The Parliament is the dominant player, but the courts intervene to address lacunae in rules regarding membership and to guard the outer bounds of membership under the Constitution. We also see competing legal techniques deployed to articulate the rules of membership – with both substantive indicators of membership and formal ascription playing a role.

## AN HISTORICAL OVERVIEW

Australia is the country of the oldest living cultures – those of the Aboriginal and Torres Strait Islander peoples. That history has formed no part of the citizenship law of Australia until a recent case, the full implications of which are still uncertain. As I highlight toward the end of this chapter, Aboriginal law now plays a limited role, but within the framework of British law imposed on the Australian landmass from 1788.

Australia as a nation emerged through the coming together in 1901 of six British colonies which were established on the Australian continent and its islands. According to the British common law asserted over the Australian landmass, all persons born within the Australian colonies were born in the "ligeance" of the British monarch and were therefore automatically British subjects. The common law relied on the notion of allegiance to the monarch – for Australians, that was allegiance to the British monarch. The colonies came together in 1901 under a federal Constitution to create the Commonwealth of Australia, maintaining the status quo regarding the legal status of individuals. The Australian drafters of the Constitution debated proposals to include "citizenship" within the Constitution, but all such proposals were rejected at the Australian federal Convention.

The text of the Constitution reflected the consensus among the Australian drafters that the appropriate legal status of the people of the Australian Commonwealth was "subject of the Queen" (Rubenstein, 1997). The constitutional phrase "the people" or "the people of the Commonwealth," found in sections 7 and 24 of the Constitution, was also a potential means of identifying Australians in the sense of indicating legal membership. However, that phrase has not played that role until recent decades. The way in which that category features in the Australian story is addressed toward the end of this chapter.

It was not until 1948 that the federal Parliament legislated an Australian "citizenship" under the Nationality and Citizenship Act of 1948 (Cth), which came into effect in January 1949. Even then the status of citizenship coexisted with British subject status for several decades (Thwaites, 2017). This was a position common to the Dominions of the British Empire, in which the imperial status existed concurrently with the emerging national status operating in each country. To reach the current position of a distinct Australian legal status, divorced from the British one, the law evolved by taking various paths. The first part of the story is how the Australian courts sought to demarcate Australians from the broader category of British subjects.

## HOME, COMMUNITY AND EXCLUSION

At federation in 1901, the only legal status held by Australians was that of British subject status. Despite the enactment of a federal Constitution, there was no moment of independence or statement of national identity through the creation of the federation. The Constitution was a document principally to set out structures of government (Arcioni & Stone, 2016). Therefore, while it may appear strange today – both to Australians and others – the Constitution contained no distinct legal status applicable only to Australians. In the absence, for several decades, of a legislated citizenship, the High Court of Australia had to create a means of determining who was Australian. The High Court is Australia's highest court. Thus, the statements of that Court give the definitive account of law in Australia – as to the content of the common law and the interpretation and application of legislation, together with the validity of legislation as against constitutional limits and the meaning of the Constitution itself.

One complication in the Australian story, given the history noted above, is that the Constitution did not confer legislative power on the national Parliament with respect to "citizenship" per se. To understand how membership has been determined through law requires an exploration of both legal indicators of inclusion – "subject" status, and indicators of exclusion – "alien" and "immigrant" status. Subject status was included within the text of the Constitution as the only relevant legal indicator of membership at the time, given Australia's continued existence as part of the British Empire. It can be seen in section 34, which identifies the interim qualifications for members of federal Parliament, and in section 117, which protects "A subject of the Queen, resident in any State" from being

> 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.

The categories of alien and immigrant appear in the constitutional text as areas of legislative power given to the new Commonwealth Parliament under subsections 51(xix) and (xxvii), respectively. Those powers were conferred on that Parliament in order to ensure the ability of the Parliament to continue policies of exclusion which had previously operated within the colonies. The overriding expectation of the constitutional drafters was that the Australian people were "white" and therefore that non-white, particularly Chinese, people should be excluded. This developed into what became known as the White Australia Policy, which would operate as a racially discriminatory platform to restrict immigration until the 1960s and 1970s (Tavan, 2005). While we will see that the Court did not as a majority adopt such a racial view of membership and exclusion, the desire to allow exclusion on the basis of "undesirable" characteristics is nevertheless one feature affecting the development of membership within Australian law.

Membership at federation depended on British subject status and was to be contrasted with the exclusionary category of alien. However, British subject status was overly inclusive, in that it extended to all members of the British Empire and did not demarcate the Australian subjects or indicate which of the British subjects were outsiders by being "immigrants." In the absence of a clear legal status applicable only to Australians,[1] the judiciary adopted an approach which was to ask whether a person (albeit a British subject) was a substantive member of the Australian community. If so, that person was a member of the Australian polity, avoiding the exclusionary category of "immigrant." Thus, an assessment of substantive membership became the test for determining legal membership of the Australian polity. This was the absorption test.

Hints of the absorption approach can be seen in one of the very early cases of the High Court. In *Potter* v. *Minahan* (1908), the Court heard a challenge to the application of the Immigration Restriction Act of 1901 (Cth) to James Minahan. Minahan, whose mother was a white British woman and whose father was Chinese, had been born in Victoria, lived in China from the age of five and returned to Australia at the age of 31. Minahan was to be deported to China as an unlawful immigrant but argued that the Act did not apply to him, as he was a member of the Australian community and not an immigrant. A majority of the Court agreed. The majority applied the formal definition of subject

status, which held that a person born in the ligeance of the monarch is a subject and therefore has legal membership and cannot be deported. To the extent that the legal notion of domicile affected subject status, the Court also turned to ask where was Minahan's "home." Intention to return to Australia was relevant, if not central, to the majority's analysis. The majority concluded that Minahan was a subject and could not be excluded.

The minority judges – Isaacs and Higgins JJ – disagreed. The way they reached their conclusion indicates the beginning of a substantive approach to membership, which could override the pre-existing understanding of subject status and which would later come to the fore of the court's decisions. The minority judges – like the majority – focused on notions of "community" and "home" but did so in a way to overturn the usual rules applicable to subject status and to allow exclusion to operate within that category. Justice Isaacs stated that the:

> 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. (*Potter* v. *Minahan,* 1908, p. 308)

Membership of the community is connected to whether the person "has still his real home in Australia" (*Potter* v. *Minahan,* 1908, p. 308). The minority justices explicitly focused on the "substance" of the claim regarding Australia as a person's home (*Potter* v. *Minahan,* 1908, pp. 309, 322). Both justices emphasized language and cultural differences to identify the parameters of home and membership of the community in order to conclude that Minahan *was* an immigrant and therefore could be excluded. For example, Isaacs J noted that the "difference between the religion, laws, manners, and customs of the Chinese and of Englishmen" (*Potter* v. *Minahan,* 1908, p. 316) imposed a barrier to Minahan's being accepted as a member of the Australian community and therefore as being understood to be coming "home" upon his return from China. Higgins J emphasized that Minahan spoke no English, only Chinese, and that his parents were not of the same "race."

In later cases, these two justices continued their references to race and culture as affecting membership. The remainder of the Court did not take up the explicitly racial element of membership. However, they did take up a view of the distinctiveness of Australians within the Empire. This view was epitomized by a statement of Isaacs J in 1923:

> There is nothing in either the words of the specific power [regarding immigration] or any immediate context, or in any other part of the Constitution, to except British subjects who are not Australians from the operation of the [immigration] power … Australia is a distinct constituent unit of the Empire …. (*R* v. *MacFarlane,* 1923, p. 552)

While the Court agreed on the underlying principle that Australians could be a distinct group within the broader category of British subjects, the challenge was to determine how to identify them. In *Donohoe* v. *Wong Sau* (1925), the Court was asked to consider the case of Lucy Wong Sau. Wong Sau was born in Australia (and therefore born a British subject), moved to China as a child, and returned to Australia years later. On presenting herself to the Australian authorities, Wong Sau was treated as if she were an immigrant. Like Minahan, she spoke no English

and was imprisoned for refusing to leave Australia. Despite the similarities to the Minahan case, the Court (now differently composed) unanimously held she was an immigrant and could be deported. In *Ex parte Walsh and Johnson; In re Yates* (1925), Chief Justice Knox stated that the question for the Court was whether each of the individuals in question was "a member of the Australian community" (*Ex parte Walsh and Johnson; In re Yates,* 1925, p. 62). Chief Justice Knox's analysis was focused on whether the persons had made Australia their "home," an approach also adopted by the other members of the Court (*Ex parte Walsh and Johnson; In re Yates,* 1925, pp. 109–112, 136–138).

A more recent example of the use of the absorption doctrine is the case of *The Queen* v. *Director-General of Social Services (Vict); ex parte Henry* (1975). There the Court referred to the notion of absorption as applied in the earlier cases but on the facts, given the age of the child in question (she was four), and her limited time in Australia (six months), the Court concluded she had not yet been absorbed into the community (*The Queen* v. *Director-General of Social Services (Vict); ex parte Henry,* 1975, pp. 372–374).

Throughout the cases applying the absorption test, the justices focused on a notion of "home." The justices emphasized relationships with people within Australia, the presumed or stated intention of a person with respect to their return to Australia from time abroad, length of time spent within or outside of Australia, and, in some instances, issues of language and culture. As Sangeetha Pillai (2014) has argued, this means the Court relied on a substantive consideration of connection to the community as the relevant indicator of membership (pp. 580–587).

The Court has been clear that claims of self-identity are not given any weight. That is, assertions by a person that they believed and felt that they either were or were not a member, or that they believed they were *only* Australian and not a member of any other nation-state, have never been relevant to their legal status. Thus, we can see that the power to determine the rules of membership and apply them is unilaterally held by the nation-state, and it is the legal institutions of that state that determine the application of the rules, not any individual seeking membership. As I note later, there are hints of an exception with respect to the status of Australia's indigenous peoples.

What we have seen so far in the story of the development of Australian membership law is the Court using a judicially assessed notion of absorption. That substantive approach was a technique to address a legal lacuna regarding membership rules. Once membership rules were crystallized by the legislature, the Court retreated from any concerns with substance. The first step along that trajectory was the contraction of the overly broad subject category.

## MYSTICAL FORCES CHANGE THE HISTORICAL STATUS

The category of subject, as it applied in Australia, later contracted to include only Australian subjects. This transformation has been described as "mystical" and "evolutionary" (*Re Patterson*; *Ex parte Taylor,* 2001, p. 128; *Shaw* v. *Minister*

*for Immigration and Multicultural Affairs,* 2003, pp. 83, 101). This contraction occurred because of the legal independence of Australia from British institutions. Once all formal legal ties were broken between UK and Australian legal institutions such that all legal decisions in Australia would be made by Australian institutions, and without any UK institution having legal authority over them, independence was complete (Twomey, 2010). One significant component of that independence was the identity of the Crown to whom Australians owe allegiance.

As noted earlier, at federation in 1901, Australians were British subjects and owed allegiance to the British Queen. The High Court of Australia recognized that, by 1986, the Queen of Australia was distinct from the Queen of the United Kingdom (despite the same natural person wearing both Crowns) (Selway, 2003; Winterton, 1993). This change is understood by the Court to have occurred through a series of legal steps, including through statutory recognition of the changing style and title of the monarch (Royal Style and Titles Act of 1953 (Cth), 1973 (Cth)). The change in the Crown has led the Court to state on several occasions that a "subject of the Queen" in the Constitution should now be understood as "a subject of the Queen in right of Australia" (*Nolan* v. *Minister of State for Immigration and Ethnic Affairs,* 1988, pp. 185–186). That is, the historical "subject" category, which had previously been the common status across the British Empire, had contracted to include only Australian subjects with allegiance to a distinct Australian Queen.

Once the subject category had contracted to include only Australian subjects, the absorption test became redundant. There was no longer any need for the Court to ask who among the British subjects was a substantive member of the Australian community. Instead, all Australian subjects were – by definition – members of the Australian nation-state. However, that logic did not give an answer to how one knows who is an *Australian* subject. The next part of the story is to see how that status was coterminous with, and then displaced by, legislated citizenship.

## A PERIOD OF UNSETTLED LAW

The Parliament introduced the status of "citizenship" through legislation in 1948, operative from January 1949. This was decades earlier than the transformation and contraction of the "subject" category noted above, which was completed by 1986. During the intervening years, the legislative status of citizenship and the historical status of subject overlapped, leaving an unsettled state of the law. That is, there was uncertainty as to the interaction between the two statuses, including contradictions in case law regarding whether British subjects who lacked statutory citizenship status were considered members of the Australian nation-state – some cases deciding in favor of membership, others deciding against.

The confusion can be seen through the trifecta of cases of Nolan (1988), Taylor (2001) and Shaw (2003). In 1988, the Court decided the case of Therrance Nolan, who was resisting an attempt by the federal government to deport him. Nolan, born in the United Kingdom, was "a citizen of the United Kingdom and

a subject of the Queen" but not an Australian citizen. He came to Australia in 1967. Nolan was convicted and sentenced for a series of criminal offenses, and in 1985, the relevant Minister made an order for his deportation. The government argued that he was an alien and therefore subject to deportation. Nolan resisted that characterization. The Court agreed with the government. The majority commenced their consideration of the meaning of "alien" by noting that its meaning "as a matter of ordinary language … [is] a citizen or subject of a foreign state" (*Nolan* v. *Minister of State for Immigration and Ethnic Affairs,* 1988, p. 183). Nolan was born in England of non-Australian parents and had never become an Australian citizen. The Court concluded he was therefore an "alien."

Then came the case of Graham Taylor in 2001. Taylor was, like Nolan, born a British citizen and subject of the Queen of the United Kingdom. Taylor came to Australia as a child, did not become an Australian citizen but was enrolled to vote in federal elections from the age of 18 (Commonwealth Electoral Act of 1918 (Cth), section 39.1, as then in force). He held visas permitting him to stay in Australia. Taylor pleaded guilty to criminal charges and upon his release from prison, his visas were canceled and he was then liable to deportation. Taylor successfully challenged the attempt to deport him, but the Court split on whether or not he was an "alien."

Four of the seven justices concluded that Taylor was *not* an alien – either because he had been "integrated into the Australian community" (*Re Patterson*; *Ex parte Taylor,* 2001, pp. 411–412) or had been transformed into a subject of the Queen of Australia as a consequence of his residence in Australia at the time of the completion of the "evolutionary" process by which the identity of the relevant monarch of Australia had changed from that of the United Kingdom to that of Australia. Three of the justices rejected any challenge to the reasoning in Nolan (1988), and although they agreed with the ultimate orders of the Court, they concluded that Taylor *was* an alien.

The disparate reasoning of the justices in Taylor (2001) can be understood as the Court struggling with a junction point in the development of the law relating to membership of the Australian constitutional people. The historical focus of subject status was being replaced under legislation with a distinct Australian legal identity. That identity was formalized through ascription of allegiance under Australian law and to an Australian monarch, divorced from any connection to Britain. According to that formal approach, Taylor was an outsider. However, at the same time, the one exception to the legislated changes regarding membership was the closed class of non-citizen British subjects who retained a federal right to vote. Taylor was part of that limited class.

The Court returned to what has become the accepted position in the case of *Shaw* in 2003. In *Shaw*, the Court heard a challenge by Jason Shaw seeking to avoid deportation. Shaw came to Australia as an infant with his parents in 1974, all three holding permanent residency visas. Shaw, like Taylor and Nolan, was a British citizen and subject; he had never left Australia but did not take up Australian citizenship. The Court decided Shaw was an alien and could be deported.