CITIZENSHIP AND THE CONSTITUTIONAL CONVENTION DEBATES: A MERE LEGAL INFERENCE

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INTRODUCTION

> "Again, I ask are we to have a Commonwealth citizenship? If we are, why is it not to be implanted in the Constitution? Why is it to be merely a legal inference?"

These exasperated words were uttered by John Quick on Wednesday, 2nd March, 1898,[1] in the concluding stages of the Australasian Federal Convention Debates that led to the formation of the Australian Constitution.[2] Quick wanted a definition of citizenship in the Constitution. The Commonwealth, he argued, should have power to deal with Commonwealth citizenship,[3] and membership of the Commonwealth;[4] he advocated a "common citizenship for the whole of the Australian Commonwealth".[5] His proposals were rejected.

Despite the rejection, citizenship was nonetheless discussed by the Convention delegates. The topic of Australian citizenship was first raised in the 1891 Convention[6] when the delegate from New South Wales, Edmund Barton, with his "judicial dignity of speech"[7] discussed the nature of representation, and referred to the Australian

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1 *Official Record of the Debates of the Australasian Federal Convention* (1986) (Melbourne 1898) Vol V at 1767. Hereinafter referred to as *Record of the Debates of the Convention.*

2 The Melbourne session of the Convention ran from 20 January to 17 March 1898. J Quick and D G Garran, *The Annotated Constitution of the Australian Commonwealth 1901* (1995) at 194.

3 Quick moved that a new subsection be introduced to clause 52 (Powers of the Parliament): XXIA Commonwealth citizenship. *Record of the Debates of the Convention* (Melbourne 1898) Vol V at 1749.

4 Ibid at 1753.

5 Ibid at 1751.

6 The first National Australasian Convention "empowered to consider and report upon an adequate scheme for a Federal Constitution," was duly convened in Sydney on 2 March 1891.

7 Alfred Deakin, "The Federal Story" in S Macintyre (ed), *"And be one People": Alfred Deakin's Federal Story* (1995) at 34.

people being citizens of both a Federal entity and a State entity.[8] However, citizenship was mainly discussed later in the Melbourne Convention of 1898 in the context of clause 110, covering the treatment of people from one State who were present in another State (this later became section 117 of the Australian Constitution)[9] and within clause 52 which became section 51, outlining the areas upon which the Commonwealth could legislate. The antecedents of the 1898 discussions on clause 110 were in the 1891 Sydney Convention with the attempted insertion by the "republican" Andrew Inglis Clark of a section based on the United States Constitution 14th Amendment.[10] Clark's motivations were rights-based, and were quite different from Quick's desire for a common citizenship. This is highlighted by the fact that Quick voted against the inclusion of clause 110 in 1898 which sought to provide equal protection for the very citizens he was seeking to define.[11] These different understandings of the meaning and value of citizenship were essential ingredients in the failure to insert the term in the Constitution.

In fact, four main themes can be drawn from the Convention discussions on citizenship: the difficulty in defining the term, the consequences of double (Federal/State) citizenship, the rights of citizens and, finally and most importantly, the desire to determine who should be excluded and who should be included in the new Australian nation. Of course, in many instances the themes overlapped and intertwined. Those issues and themes will be examined in this article, first in the historical context of the discussions, and second, as issues currently in the public domain in Australia, to illustrate their continuing importance to any constitutional review.

The use of historical material in reviewing constitutional issues is controversial. The legal debate primarily revolves around constitutional interpretation: to what extent should the Court refer to the intentions of the framers of the Constitution in applying the Constitution today?[12] Yet that is not the primary reason for looking at the historical material in this article.[13] Rather, it is a basis for reconsidering the place of citizenship in the Australian Constitution for the 21st century. We are at a critical point in history

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8 *Record of the Debates of the Convention* (Sydney 1891) Vol 1 at 93-95.

9 "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 in such other State".

10 Inglis Clark was influential on the question of equal protection of citizens, although he does not figure prominently in this article because he was not present at the 1898 Convention upon which most of the discussion is based. For an analysis of Clark's involvement see J Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the 14th Amendment" (1996) 42 *Australian Journal of Politics and History* 10 and J Williams, "With our Eyes Open: Andrew Inglis Clark and Our Republican Tradition" (1995) 23 *F L Rev* 149.

11 *Record of the Debates of the Convention* (Melb, 1898) Vol IV at 685. I thank John Williams for highlighting this point for me.

12 See P Schoff, "The High Court and History: It Still Hasn't Found(ed) what It's Looking For" (1994) 5 *PLR* 253 which analyses the rule in *Cole v Whitfield* (1988) 165 CLR 360 and its application in subsequent cases.

13 Although, the absence of the term citizen in the Constitution has had significant legal consequences, with which the High Court has been involved. See further below n 17 and Part II of this paper.

where an opportunity exists to reassess how well our foundation document reflects the current needs of our society.

In the later years of the Keating Labor government, Australian citizenship was being discussed in many contexts. The year 1999 represents the half centenary of the operation of the Australian Citizenship Act 1948. A review of the Act has taken place and recommendations have been made.[14] Beyond the legal status of citizenship, the term has also gained currency in reflections on national identity and equality between citizens.[15] This is because debates about citizenship reflect profound questions about the status of individuals within the Australian community. Whom we regard as members of our community, and how we treat various people within the community, reflect greater social, democratic and political values. However, those public discussions about citizenship centred around a former government's initiated inquiries and popular responses to them. They do not appear to be a chief concern of the current government, as it looks forward to some form of constitutional review.[16] What is striking is that the current concerns about citizenship mirror the issues raised in the convention discussions of a century ago. Yet we are approaching the new century without resolving those very questions. The persistence of the debate sharpens our reflection upon whether we want citizenship to figure in any future constitutional review.

The fact that the framers chose not to define citizenship has had an impact on the legal status of citizenship in Australia.[17] This is because the Constitution can provide a framework and structure within which legal principles develop. Without that framework, citizenship has had a slow, staggered, and disconnected legal evolution. In looking at the 1890s Convention debates and analysing the reasons why Australian citizenship was not part of our Constitution, we can reassess whether citizenship should continue as a mere legal inference in our foundational legal document.

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14 The Act came into operation on 26 January 1949. In 1993, the Australian Parliament's Joint Standing Committee on Migration was given a reference on the Australian Citizenship Act, and in 1994 it produced a report *Australians All: Enhancing Australian Citizenship* (September 1994) (*Australians All*). See also the government response to the report tabled in the Senate on 4 September 1995, titled *The Ties that Bind*.

15 In December 1993, the Australian Parliament's Senate Standing Committee on Legal and Constitutional Affairs inquired into the possibility of a system of National Citizenship Indicators. This body became the Senate Legal and Constitutional References Committee. A discussion paper was published in May 1995. Its report, *National Well-being: A system of National Citizenship Indicators and Benchmarks* (April, 1996) was tabled in April 1996.

16 The Howard government restricted the issues to be raised in the proposed 1997 People's Convention to the Republic. The Minister for Immigration and Multicultural Affairs has announced that he will set up an Australian Council on Citizenship (ACC) which will undertake a review of Australian Citizenship, including how to celebrate the 50th Anniversary of the Citizenship Act on 26 January 1999: *Fact Sheet 12* (3 October 1996), Public Affairs Section, Department of Immigration and Multicultural Affairs. This will not necessarily look at the insertion of citizenship in the Constitution.

17 See K Rubenstein, "Citizenship in Australia: Unscrambling its Meaning" (1995) 20 *MULR* 508. This is also developed further in Part II of this article.

PART I: THE HISTORICAL CONTEXT

The federal movement in Australia and the drafting of the Constitution is well documented.[18] Importantly, most of the participants mentioned in this article were legally knowledgable and had been politically involved in the debates about Federation.[19] There were significant figures among them no doubt, but no matter how illuminating their individual biographies, the story they tell is constrained and narrow. None of the participants were women, and although the status of women came up once in the citizenship discussion,[20] the place of women in the context of citizenship was far from the delegates' minds. There were no indigenous Australians represented either and the place of the Aboriginal community and their citizenship was also out of sight of the delegates' deliberations. They did discuss voting rights when looking at citizenship but they did not directly refer to the rights of Aboriginal people to vote. Indirectly, Aborigines' voting rights were contemplated when calculating the numbers of people for the purpose of section 24. The South Australian delegate and young Premier John Cockburn thought that those "natives who are on the rolls" should not be debarred from the count.[21] Indeed, the traditional records of the Federal Movement pay almost no attention to the place of women and the Aboriginal movement. This has only recently been addressed.[22]

The jointly authored commentary on the Constitution by the Victorian delegate, John Quick, and the legal adviser, Robert Garran, published in 1901, provides some useful reflective material on the term citizen.[23] However, it does not illustrate how

18 Alfred Deakin, above n 7; J Quick and D G Garran, above n 2; J A La Nauze, *The Making of the Australian Constitution* (1972); A W Martin, *Essays in Australian Federation* (1969).

19 Most of the discussion emanates from the 1898 Convention in which the following delegates are important: Edmund Barton MLC QC (NSW), The Right Honourable Charles Kingston, Premier (SA), Dr John Quick (Vic), Josiah Henry Symon QC (SA), The Honourable James Henderson Howe (SA), The Honourable Sir John Downer QC, KCMG, MHA (SA), The Right Honourable Sir John Forrest, Premier (WA), The Honourable John Alexander Cockburn, Minister for Education, (SA), The Honourable Joseph Hector Carruthers, MLA, Secretary for Lands (NSW), The Honourable Isaac Alfred Isaacs, MLA, Attorney-General (Vic), The Honourable Richard Edward O'Connor MLC, QC, (NSW), Bernhard Ringrose Wise (NSW), The Honourable Adye Douglas, President, Legislative Council, (Tas), Patrick McMahon Glynn BA, LLB (SA), The Honourable John Hannah Gordon, MLC (SA) Henry Bourne Higgins, MLA (Vic), William Arthur Trenwith MLA (Vic) and The Honourable Frederick William Holder, MHA (Treasurer, SA). All the titles are cited in J Quick and D G Garran, above n 2 at 260-261. Andrew Inglis Clark was not present at the 1898 Convention. However his original draft of the Constitution in 1891 was the basis for much discussion as was his Tasmanian amendment to clause 110 which was central to the discussion.

20 See below n 44.

21 *Record of the Debates of the Federal Convention* (Adelaide 1897) Vol III at 1020. Note section 25 which allows the State to disqualify persons of any race from voting and, if so disqualified in the State, they are not to be counted.

22 H Irving (ed), *A Woman's Constitution* (1995) deals with women and their involvement with the Federation movement. The place of Aboriginal people in the Constitution has been one of the concerns of the Council for Reconciliation. See also H Reynolds, *Aboriginal Sovereignty* (1996).

23 J Quick and D G Garran, above n 2. Commentary on citizenship can be found at pages 449, 491, 776, and 955.

extensive the discussion was, nor how varied the motivations for exclusion of the term.[24] The analysis below is developed from the records of the Debates themselves.[25]

The difficulties in definition

The exasperation of Quick in his attempts to place citizenship in the Constitution was matched by the "powerful voice"[26] of South Australian delegate Josiah Symon who originally opposed defining the term:

> I do not think that it is necessary to frame a definition of "citizen". A citizen is one who is entitled to the immunities of citizenship. *In short a citizen is a citizen.* I do not think you require a definition of citizen any more than you require a definition of "man" or "subject".[27]

But what did citizenship mean in Australia in the 1890s? There was no existing definition of a citizen of a colony.[28] What was the difference between the suggested legal definition and the rights that flowed from the status? What was the distinction between citizens and members? Should a definition give rise merely to a description of an individual's legal status, or should the definition also prescribe the substantive nature of citizenship?

Throughout the various discussions the delegates were concerned to include in the Constitution only words which were absolutely necessary, in case the meaning intended should be misconstrued. Beneath this concern was a belief in representative democracy, which meant to the delegates that those who were elected to represent the people would act on that power responsibly. Rather than leaving any ambiguities for a court to determine, there was great faith in the parliamentary system Australia was inheriting. The Victorian representative, William Trenwith, in his "sledge-hammer style of oratory",[29] found it "utterly impossible to conceive that ... Parliament will proceed to infringe any of the liberties of the citizens"[30] and this was reflected in a reluctance to include rights in the constitutional text. In discussing clause 110, dealing with rights and citizenship, the New South Wales "little man with a great voice",[31] Joseph Carruthers, pointed out that "the Constitution should be so framed that he who runs may read, that there should be no pitfalls on account of ambiguous phraseology".[32] As it turned out, citizenship was the epitome of ambiguity. The Victorian representative, Isaac Isaacs, "intellectual to the finger tips",[33] encapsulated the position rejecting Quick's proposals: "I fear that all the attempts to define citizenship will land us in innumerable difficulties".[34]

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24 For another critique of Quick and Garran's account see J Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the '14th Amendment'" (1996) 42 *Austr J Pol Hist* 10 at 16-18.

25 *Record of the Debates of the Convention*, above n 1.

26 See Deakin's description of Symon in Alfred Deakin, above n 7 at 61.

27 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1782 (emphasis added).

28 Ibid at 1781.

29 Alfred Deakin, above n 7 at 71.

30 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1761.

31 Alfred Deakin, above n 7 at 66.

32 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 667.

33 Alfred Deakin, above n 7 at 70.

34 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1797.

Birthright/naturalisation?

Quick saw no such difficulty in defining citizenship and placing it in the Constitution. It would be a matter of "all persons resident in the Commonwealth, being natural born or naturalised subjects of the Queen, and not under any disability imposed by the Federal Parliament".[35]

However, in Symon's view, citizenship was a birthright which could not be, and should not be, handed over to any government, federal or otherwise. In placing the power over citizenship in Commonwealth hands, it could lead to the power to deprive a person of their citizenship, he reasoned.[36] Symon was like-minded about the two ways of recognising citizens: by birth in a State (which he believed would then entitle the person to Commonwealth citizenship); or by naturalisation. And his description of entitlement to naturalisation was loaded with meaning about the nature of citizenship:

> When you have immigration, and allow different people to come in who belong to nations not of the same blood as we are, they become naturalised, and are thereby entitled to the rights of citizenship.[37]

Birthrights linked with blood related to the notion of citizenship as an intrinsic reflection of membership of a particular racial group. The racial context of this discussion will be discussed later, but for present purposes, Symon was identifying citizenship as an intrinsic status, which then entitled a person to rights. Others saw it in the reverse: rights giving rise to citizenship.

Legal status through rights

Richard O'Connor, the New South Wales delegate, was content to define entitlement to the legal status in a circular fashion:

> Every person who has rights as a member of the Commonwealth must be a citizen either of some state or some territory. It is only by virtue of his citizenship of a state or of a territory that he has any political rights in the Commonwealth.[38]

In his view, there was no need to point out that every person in the States is a citizen of the Commonwealth because "citizenship flows from the rights you give every person in every portion of the Commonwealth under the Constitution".[39] In this context, the franchise and the concept of political liberty became an important reference point in defining citizenship.[40] This caused problems of its own, as there were many people who did not have the vote, women for example, whom delegates regarded as citizens. This led the delegates to consider the difference between citizenship and membership of the general community.

Citizenship/membership

The distinction between citizenship and membership was most vital for the discussions over the draft clause 110 which in 1898 was drafted as:

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35 Ibid at 1752.
36 This raised federal issues as well, discussed below pp 302-304.
37 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1763 (emphasis added).
38 Ibid. O'Connor at 1754.
39 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 672.
40 *Record of the Debates of the Convention* (Melb 1898) Vol V, Barton at 1765.

> 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.[41]

And this was integrally linked to the power of the Commonwealth over citizenship. O'Connor raised an important consequence of placing the power over citizenship in section 51:

> I would point out to Dr Quick that he is proposing to give a power to regulate or describe rights of citizenship, when we really do not know ... what is meant by a citizen ... Does he mean only the political rights which you give to every inhabitant of a state who is qualified to vote, or does he go beyond that ... and describe every person who is under the protection of your laws as a citizen? The citizens, the persons under the protection of your laws, are not the only persons who are entitled to take part in your elections in your government, but every person who resides in your community has a right to the protection of your laws and to the protection of the laws of all the states, and has the right of access to your courts.[42]

Symon also pointed out the differences between the legal status of citizen and the notion of citizenship as membership of the community. The latter was described as the broad sense of the term citizenship, or the general sense of the term. This was in contrast to the more particular sense, when it was *not* synonymous with "resident, inhabitant or person".[43] This was an important distinction for clause 110, which was seeking to protect people from one State being discriminated against in another State. Symon illustrated this difference in the following manner:

> ... the expression "citizen" does not mean only persons exercising the franchise; it includes infants and lunatics, if you like. Every one who is recognised as an inhabitant, and is under the laws, is a citizen. *Women in most of the colonies except South Australia do not exercise the franchise, but no-one can say they are not citizens.*[44]

Cockburn asked, "If the word citizen simply means resident or inhabitant, why should we go to all this trouble about it?".[45] Because of the difference between the broad and narrow view of citizenship, it was better not to use the term citizen, he argued, and O'Connor recommended the use of the formula "every subject of the Queen resident in a state".[46] In O'Connor's view, the accurate description of a member of the Australian community was "a subject of the Queen resident in the Commonwealth".[47]

In each of the different discussions involving the definition, the Convention delegates could not agree upon the way to describe Commonwealth citizenship. It was complicated by questions of birthright and naturalisation, by legal status compared to the substantive consequences of citizenship, and by the distinction between citizen and resident. Several phrases were used in the Constitution to describe members of the Australian community: "subjects of the Queen", "people of the Commonwealth" and

41 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 664.
42 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1761.
43 Ibid at 1796 (Isaacs and O'Connor).
44 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1794 (emphasis added). The treatment of women in the Constitutional debates is another interesting area in itself. See D Cass and K Rubenstein, "Representation/s of Women in the Australian Constitutional System" (1995) *Adelaide Law Review* 48 and H Irving, above n 22.
45 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1795.
46 Ibid.
47 Ibid at 1796.

"people of the States". The inconsistent use of these terms added to the ambiguity between citizenship and membership of the Australian nation. However, the existence of the ambiguity was part of the reason for it becoming a mere legal inference.

Concerns about double citizenship

I have used the term double citizenship to refer to citizenship of both the Commonwealth and a State, instead of dual citizenship because, when we talk about dual citizenship today, we think of citizenship of more than one country.[48] Citizenship of another nation was discussed by the convention delegates in the context of disqualification from representation in Parliament,[49] but it was not referred to as dual citizenship, nor was it the subject of much debate. After all, "you cannot have two allegiances".[50] This suggests that they excluded from Australian citizenship people who were citizens of other countries. The delegates were therefore content to disqualify people whose allegiance was to a foreign power because "[p]ersons who have taken the oath of allegiance to a foreign power are not to be classed in the same category as citizens of the country for the purpose of joining in legislation".[51] This led to an interjection "And not to be trusted!".[52]

Federal/State

In the resolutions recorded on 6 March 1891, Barton reminded the delegates that:

> It must not be forgotten that there is to be a *double citizenship* conferred by this constitution upon every citizen of these states and of the great nation which we hope to found. If there is that double citizenship and there is not in all essentials a due representation of it even in questions of money, then the friction....in the relations between the senate and the house of representatives...would be merely a surface indication of deep-seated irritation.[53]

The relationship between the Commonwealth and the States was, of course, the essence of the convention debates; how to arrange the new Commonwealth at the same time as preserving and maintaining an appropriate role for the States. The Victorian, Henry Bourne Higgins, with "his dogged courage and power of intellect"[54] used the terminology of citizenship at the 1897 Convention in discussing the appropriate balance of State representation, and cautioning against equal representation of the States:

> ... should not a citizen act directly on the Federation for the purposes of Federation, and why should not he act directly on the State for the purposes of the State.[55]

These discussions linked citizenship to its political core — the notion of democracy, and the nature of representation. In 1898 Barton continued with this line of argument,

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48 This will be examined in Part II of this paper.

49 Discussions about section 44 can be found in *Record of the Debates of the Convention*, "Guide to provisions" Vol VI at 405-411.

50 *Record of the Debates of the Convention* (Adelaide 1897) Vol III at 736.

51 *Record of the Debates of the Convention* (Sydney, 1897) Vol II, Barton at 1013.

52 Ibid. The significant debate, however, over the disqualification section was whether it should be constitutionally entrenched, or left to Federal parliament to alter. *Record of the Debates of the Convention* (Sydney, 1897) Vol II, Glynn at 1012.

53 *Record of the Debates of the Convention* (Sydney 1891) Vol 1 at 94-95 (emphasis added).

54 Alfred Deakin, above n 7 at 70.

55 *Record of the Debates of the Federal Convention* (Adelaide 1897) Vol III at 101.

emphasising that the Constitution provided for the rights of citizenship, "so far as the choice of representatives is concerned".[56]

In 1898, the New South Wales delegate, Bernard Wise, supporting Quick's proposals, suggested that the delegates acknowledge a singular Australian citizenship over any State citizenship.[57] Symon immediately refuted this because it expanded "the spirit of federation far beyond anything any of us had hitherto contemplated", reminding Wise that "the whole purpose of this Constitution is to secure a dual citizenship. That is the very essence of a federal system".[58] The distinction between a federation and a unified system was important for most of the delegates, resulting in a lasting impact on the term "citizen". Clauses 110 and 52 were essential to the federal system, and the nature of citizenship was implicated by those contexts.

Clause 52, (now section 51) is central to a federal system, in allocating the legislative power of the Commonwealth. The final version provided a list of thirty nine heads of power. These were not to be exclusive powers; the States would still be entitled to legislate in these areas, subject to conflict with the Commonwealth laws.[59]

Quick was seeking to insert sub-section "XXIA. Commonwealth citizenship." into Clause 52.[60] He recognised that this would be creating:

> two citizenships in this United Australia ... citizenship of the state in which a person resides, the rights and duties of which will be determined by the state, and there will be the wider federal citizenship, the rights and duties the incidence of which will be defined by the Federal Parliament.[61]

This recognised that there would be two levels of rights and duties, with the potential of rights and responsibilities flowing from the States being different throughout the Commonwealth. The ambiguities inherent in this layered citizenship were foreseen by South Australian delegate, John Gordon, in his discussions about clause 110:

> Suppose in one state a whole class had an absolute exemption from service upon juries, would a member of such a class, if he went into another state, carry that immunity from service with him?[62]

The inconsistencies were too great for the delegates to resolve.

However, the chief concern from the opponents to the clause 52 proposal was that the sub-section proposed by Quick would be giving the Commonwealth too much power. Given the range of problems in defining citizenship, they felt it would result in the "handing over to the Federal Parliament something which is vague in the extreme, and which might be misused".[63] Symon forcibly cautioned:

> I do not want to place in the hands of the Commonwealth Parliament ... the right of depriving me of citizenship.[64]

The delegates were, however, comfortable about depriving at least some people of their citizenship, namely, aliens. They were satisfied that this was provided for anyway

56 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1764.
57 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 675.
58 Ibid.
59 Section 109.
60 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1750.
61 Ibid at 1751.
62 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 681.
63 *Record of the Debates of the Convention* (Melb 1898) Vol V, O'Connor at 1761.
64 Ibid at 1764.

under the "naturalisation and aliens" power.[65] In fact, Cockburn used the reference to aliens to support Quick's proposal for a Commonwealth power over citizenship:

> If we place in the hands of the state the power of forcing on the Commonwealth an obnoxious citizenship, we shall be doing very great evil to the Commonwealth. This power should be in the hands of the Commonwealth, it should possess power to define the conditions on which the citizenship of the Commonwealth shall be given; and the citizenship of the Commonwealth should not necessarily follow upon the citizenship of any particular state.[66]

An "obnoxious citizenship", in the context of their discussions, was likely to have been an Asian person or an Aboriginal person, as will be explained further in the discussion below.[67]

British subjects

The other context for considering double citizenship was a citizen's identity as a British subject. Barton could not recollect the term citizen being used in any Imperial enactments, and he did not think it had been used in the colonies either.[68] Moreover, Isaacs contrasted Australia with other federal countries, such as Germany, whose Constitution was being used by delegates as an example of providing for a common citizenship.[69] Unlike Germany, he reminded the delegates of their "citizenship of the British empire on the one hand, and the citizenship of the state on the other".[70] This issue, however, was not dwelled upon by the delegates.

The amount of time spent discussing Australian citizenship emphasises that, even though the term "subject of the Queen" was used instead of "citizen", there was a specific debate about the nature of Australia as a separate nation with its own membership and identity. Quick did not see a problem with having Australian citizenship, for the "definition does not interfere with the term 'subject' in its wider relation as a member of the empire or subject of the Queen";[71] there was a clear sense of distinction between the two identities. The term "subject of the Queen" was used, however, because all attempts to define Australian citizenship landed them, in the words of Isaacs, in "innumerable difficulties".[72]

The tensions inherent in double citizenship, in both the Federal/State context, and in the British Commonwealth context, were additional factors for citizenship becoming a mere legal inference.

Rights and responsibilities

The third theme, alluded to earlier, was the discussion about the rights and responsibilities flowing from citizenship. The context for this discussion was primarily clause 110, (later section 117) which in 1898 was drafted as:

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65 Section 51 (XIX). See Symon, *Record of the Debates of the Convention* (Melb 1898) Vol V at 1764 and the further discussion about racism and exclusion.

66 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1764.

67 See below pp 306-308.

68 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1764.

69 Ibid at 1758-1759.

70 Ibid at 1759. He did support the inclusion of power over Commonwealth citizenship, for "[i]f that is to be found unnecessary, it will never be acted upon." at 1760.

71 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1786.

72 Ibid at 1797.

> 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.[73]

The origin of the clause, although somewhat modified, was the 14th amendment of the United States Constitution.[74] The Tasmanian delegates proposed a version closer to the United States amendment by including a reference to the citizens of the states, who

> shall be entitled to all the privileges and immunities of the Commonwealth in the several states... nor should a state deprive any person of life, liberty or property without due process of law...[75]

This led to a fuller discussion about the rights and responsibilities flowing from citizenship with Isaacs explaining them by reference to the United States Constitution.[76] In the United States, citizenship involved the right to:

> come to the seat of government to assert any claim he may have upon the government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions...[77]

O'Connor saw "political rights" as the only rights of citizenship. This was mirrored by Barton who saw "the sum and substance of political liberty" being linked with the franchise.[78] These rights and responsibilities in Barton's view flowed from the English laws, which were within the power of the States.

Trenwith was not concerned to define rights and responsibilities at all because the delegates had provided for the election to Parliament "on the broadest possible franchise" so that it was "utterly impossible to conceive that such Parliament will proceed to infringe any of the liberties of the citizens".[79] If women had been present at the Convention, it would be interesting to think how they would have responded to such a statement! Of course, the fact that they were not undermines the essence of what Trenwith purported to rely upon, and its legacy exists in our current system.[80]

The other important corollary to rights and responsibilities (even if they could not be defined) was the desire for equality of rights between the States. This was also central to the final theme raised in the debates: who would be excluded and who would be included in the "equality" equation?

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73 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 664.

74 Which reads: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law".

75 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 667. Andrew Inglis Clark was responsible for the drafting of this amendment. See J Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the 14th Amendment" (1996) 42 *Austr J Pol Hist* 10 at 14-16.

76 He referred to the *Slaughterhouse* cases 1872, 16 Wallace 36, cited in *Record of the Debates of the Convention* (Melb 1898) Vol IV at 668.

77 Ibid.

78 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1765.

79 Ibid at 1761.

80 See D Cass and K Rubenstein above n 44.

Exclusion/inclusion

The historical context for this theme adds another pervasive dimension to the debates. An underlying and explicit element of the debate was a fear of defining citizens as subjects of the Queen. That would mean Chinese people from Hong Kong would be treated differently from those from other parts of China, and those people from Hong Kong would also be able to claim citizenship of the Commonwealth.[81] Cockburn emphasised:

> We desire always to deal with Asiatics on broad lines, whether they are subjects of the Queen or not; and in South Australia, and, I believe, other colonies, those lines of distinction are obliterated.[82]

The colonies had separate laws about aliens, yet their treatment, or more precisely their exclusion, had been a common cause and a motivating force behind federation. As a prelude to the Constitutional Convention debates of 1881, discussions about controlling Chinese immigration were included in the Australasian Inter-colonial Conference of December 1880 to January 1881. A report to the British government at Westminster at the conclusion of the conference stated:

> In all the six Colonies a strong feeling prevails in opposition to the unrestricted introduction of Chinese, this opposition arising principally from a desire to preserve and perpetuate the *British type* in the various populations.[83]

Quick was "anxious to equip the Commonwealth with every power necessary for dealing with the invasion of outside coloured races"[84] as did Kingston in commending the white Australia policy. Kingston, however, saw a distinction in approach, once they were in Australia.

> [I]f you admit them and do not want them to be a standing source of embarrassment in connexion with your general government, treat them fairly, and let them have all the rights and privileges of Australian citizenship.[85]

Earlier, he stated that by imposing special rules intended for their special injury would emphasise "what some may consider the degradation of their position".[86]

Other delegates did not want to taint the subject of citizenship with the race issues that were, in their view, essential to the development of Australia. Higgins wanted to preserve "a discrimination based on colour" and thought it best to give "the Federal Parliament power to dictate its own terms as to citizenship" but this was "a distinct

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81 *Record of the Debates of the Convention* (Melbourne 1898) Vol V at 1788-1797.

82 Ibid at 1797.

83 (Emphasis added). These words allude to the intrinsic nature of citizenship as related to blood, as discussed in the section above on "birthright/naturalisation". Memorial to Secretary of State for Colonies, Westminster, from the Colonial Secretary's Office, Sydney 25/1/1881, quoted in A T Yarwood, *Attitudes to Non-European Immigration* (1968) 19 and reprinted in C A Price, *The Great White Walls are Built. Restrictive Immigration to North America and Australia 1836-1888* (1974) at 168.

84 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 246. This highlights the paradox of Quick's position regarding citizenship. He was the proposer of a common citizenship, yet it was the concern about exclusion, with which he agreed, which led to the downfall of his proposal.

85 Ibid at 247.

86 Ibid.

subject, and we should not mix up the subject of discrimination with citizenship of the Commonwealth".[87]

The power to discriminate was supported by many, despite some delegates protesting against it. Symon adamantly stated:

> It is monstrous to put a brand on these people when you admit them. It is degrading to us and our citizenship to do such a thing.[88]

Another South Australian delegate, former policeman James Howe,[89] responded indignantly, "our first duty is to consider the welfare of our own kindred",[90] and later reminded the delegates that

> the cry throughout Australia will be that our first duty is to ourselves, and that we should ... make Australia a home for Australians and the British race alone.[91]

In supporting the exclusion of Chinese immigrants, the Convention delegates were also outlining whom they wanted as members of Australia. The "British type" was most valuable, and anything that would prevent British people from being Australian citizens was anathema to them. However, Symon pointed out, that a British type was different from British:

> It would be simply monstrous that those who were born in England should in any way be subjected to the slightest disabilities. It is impossible to contemplate the exclusion of natural born subjects of this character; but on the other hand, we must not forget that there are other native-born British subjects whom we are far from desiring to see come here in any considerable numbers. For instance, I may refer to Hong Kong Chinamen.[92]

The decision not to define citizenship because of the problems that would arise from British aliens sat strongly with their decision that there should be Commonwealth power to legislate for those aliens already in the country. This was definitely an "Australian" issue, of concern to the whole Commonwealth, not just the individual colonies. In fact, one of the pieces of legislation introduced into the first Commonwealth Parliament was the Immigration Restriction Bill 1901. The debate about the Bill mirrored the debates over the question of citizenship and Asian immigrants in the Convention debates. Deakin was at pains to point out in the first Parliament that this Bill touched "the profoundest instinct of individual or nation — the instinct of self-preservation for it is nothing less than *manhood*,[93] the national character, and the national future that are at stake".[94] Moreover, he referred to the Constitution as "contain[ing] within itself the amplest powers to deal with this difficulty [immigration] in all its aspects".[95] This fear and antagonism towards Chinese aliens forged a particularly "Australian" sense of nationhood and was another significant reason for citizenship being a mere legal inference. In fact, the desire for exclusion, when added to

87 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1801.
88 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 250.
89 See the description of Howe in Alfred Deakin, above n 7 at 61.
90 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 250.
91 Ibid at 251.
92 *Record of the Debates of the Convention* (Melb 1898) Vol V at 1760.
93 Emphasis added. This statement is consistent with feminist critiques of citizenship as a male dominated, gendered concept.
94 Cth Parl Deb 1901, (1st Parliament) 12 September 1901, at 4804.
95 Ibid at 4805. He also championed the power to deal with people of any and every race (except the Aboriginal inhabitants) and his comments about the Aboriginal people also reflect notions of white superiority.

the former reasons of difficulty in defining and describing the term, was the conclusive blow to the term citizen being anything other than a mere legal inference.

Each of the themes developed in this first section — the difficulty of definition, the federal nature of the system, the concern about rights, and the desire to exclude — illuminates our present discussions about citizenship in our legal system. They illustrate that the current debates are a continuation of unresolved matters, moreover matters which are essential to the cohesion of any community.

PART II: CITIZENSHIP AND THE CURRENT FRAMEWORK

As a result of Australian citizenship being a legal inference, there was no such status at the time of Federation. Australians were subjects of the Queen according to the Constitution.[96] In fact, it was not until 1948 that the term Australian citizen became a legally recognised concept and it was not until 1984 that our status of British subject was abolished.[97] While the Nationality and Citizenship Act 1948 (Cth), which later became the Australian Citizenship Act 1948 (Cth),[98] set out who was entitled to Australian citizenship, and dealt with the legal definition of who was a citizen, it did not deal directly with the consequences of citizenship, nor the substantive nature of citizenship. In fact, those areas are still unclear. The reasons for not defining the term in the 1890s still resonate within the current legal framework for Australian citizenship.

This section mirrors the structure of the first section of this article, presenting each of the themes discussed at Federation in light of present concerns about the nature of Australian citizenship. The fact that they are still unresolved issues is partly due to the lack of any constitutional statement about citizenship. The current debates are not canvassed in full, but they are presented in order to highlight the similarities with the Convention debates, and to assess whether they should be further debated in any future constitutional review.

The difficulties of definition

There is still no constitutional definition or protection of the status of citizenship. In fact, as already mentioned, there was no legal status of citizen until 1948.[99] Although the definition of an Australian citizen has changed since its inception, the present formulation is reasonably clear. An Australian citizen is someone who falls within one of the following categories:

1 by birth if at the time of the person's birth in Australia, at least one parent is an Australian citizen or an Australian permanent resident,[100]

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96 The Naturalization Act 1903 (Cth), s 3 defined "British subject" as a natural-born British subject or a naturalized person. A naturalized person was someone naturalized under the Act. Section 8 provided that the status of naturalized persons was equal to that of British subjects.

97 Australian Citizenship Amendment Act 1984 (Cth).

98 Australian Citizenship Act 1973 (Cth).

99 For a review of the changes until 1981 see M Pryles, *Australian Citizenship Law* (1981) and for a summary of the changes see *Australians All*, above n 14 at 15-18. The Rt Hon Sir Ninian Stephen surveyed the developments in "Issues in Citizenship" on the occasion of The Deakin Lecture at the University of Melbourne, Thursday 26th August 1993.

100 Australian Citizenship Act 1948 (Cth), s10.

2 by adoption if adopted by an Australian citizen,[101]

3 by descent if a parent is an Australian citizen and registers the child's name at an Australian consulate within 18 years of the birth,[102] or

4 by grant of citizenship.[103]

What if a government decided to change the meaning of citizenship? Parliament obviously has the power to alter the Australian Citizenship Act. Moreover, if it decided to use discriminatory criteria in bestowing the legal status of citizenship, it would not be unconstitutional.[104] Are we as confident as the framers of the 1890s, who could not envisage the Parliament doing anything that would infringe existing rights?[105]

Two significant issues arise, from the definition as it presently stands, which are reminiscent of the "birthright" discussions of the 1890s. The previous nationality by birthplace rule was changed on 20 August 1986. The new rule limited citizenship to those born in Australia to a parent who was an Australian citizen or permanent resident. The change highlighted the notion of membership representing a connection to the country, rather than mere birth on Australian territory. The immediate catalyst was the case *Kioa v West*,[106] where it was argued that the child of parents subject to a deportation order was an Australian citizen and was therefore entitled to natural justice. This view was not accepted by the High Court. However, it was enough to encourage a change in the legislation.[107] Citizenship was not to be used to obtain an immigration advantage. This is reminiscent of the Convention delegates' overriding concern for absolute control over aliens, instead of resolving the definition of Australian citizenship.

The more significant area of ambiguity in the definition today is in distinguishing the difference between citizenship and membership of the Australian community. Just as the delegates to the 1890s Conventions were confused by the distinction between citizens and residents, so too does our public discussion about citizenship confuse these terms. How are permanent residents treated in contrast to legal citizens? Are these differences significant and should they be? These will be canvassed further below.

Double citizenship — the case of jury service

In the discussions about double (that is, Federal/State) citizenship, one of the delegates, Gordon, raised the concern about inconsistencies in the consequences of citizenship relating to jury service in the States.[108] This is still a current example. The Constitution provides:

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101 Australian Citizenship Act 1948 (Cth), s10A.

102 Australian Citizenship Act 1948 (Cth), s10B.

103 Australian Citizenship Act 1948 (Cth), s13.

104 However, one view is that Parliament could not retrospectively take away someone's status as a non-alien under Australian citizenship legislation. See *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 168 CLR 178 per Gaudron J at 193.

105 Of course, the framers were predominantly discussing the rights of white Anglo-Saxon/Celtic males.

106 (1985) 159 CLR 550.

107 The report on enhancing Australian citizenship proposed that section 10 remain unchanged. See *Australians All*, above n 14 at 100-101.

108 *Record of the Debates of the Convention* (Melb 1898) Vol IV at 681.

> The Trial on indictment of any offence against any law of the Commonwealth shall be by jury...[109]

The Federal system relies on State laws to determine the make up of juries,[110] although, the Jury Exemption Act 1965 (Cth), s 4 sets out who is *not* liable and shall *not* be summoned to serve as a juror in a Federal Court, a court of a State or a court of a Territory.[111] Each State does, however, require persons who are on the electoral roll to be available for jury service, and citizenship is necessary for being on the electoral roll.

Thus, the legal consequences flowing from citizenship, which logically should be consistent, are not. Each State has its own laws determining who should serve on a jury. While the States determine liability for jury service primarily by electoral rolls,[112] each have disqualification provisions,[113] and all provide for exemption from jury service.[114] These disqualifications and exemptions mean that many citizens are not responsible for jury service. There are many differences in the Acts. One example of an inconsistency is within the category of persons "entitled as of right to be excused from serving as a juror". In New South Wales, a person who resides more than 56 km from the place at which the person is required to serve is entitled to claim an exemption,[115] whereas in Victoria persons who reside more than 32 km from the court house at which they would be required to serve are entitled as of right to be excused.[116]

So the Commonwealth, (to whom citizens are bound) delegates to the States, in the case of jury service, the legal consequence of citizenship. The substantive effect of being a citizen therefore differs from State to State. There are other examples of inconsistencies, because State legislation regulates service in State public services, which is another context where citizenship is often a prerequisite to membership of the public service. Equality between citizens amongst the States is significantly altered by a

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109 There is no clear definition of the term "offence". It is just an offence which is so serious that it requires a jury. See discussion in P Hanks, *Constitutional Law in Australia* (1991) at 409-411.

110 The Judiciary Act 1903 (Cth), s 68 provides for State laws to apply in the procedure for trials and conviction on indictment to persons charged with Commonwealth offences. For High Court matters, section 77D requires that the laws that apply, for the purpose of the trial of civil proceedings in the Supreme Court of the State or Territory, apply in civil matters in which a trial is had with a jury in the High Court in that State or Territory. The right to seek an order that a trial of fact be heard by judge and jury exists in the Federal context in Order 31 of the Federal Court Rules.

111 This includes, amongst others, the Governor General, Members of the Federal Executive Council and Members of both Houses of Parliament.

112 Juries Act 1967 (ACT), s 9; Jury Act 1977 (NSW), s 5; Juries Act 1980 (NT), s 9; Jury Act 1929 (Qld), s 6; Juries Act 1927 (SA), s 11; Jury Act 1899 (Tas), s 4; Juries Act 1967 (Vic), s 4; Juries Act 1957 (WA), s 4.

113 Juries Act 1967 (ACT), s 10; Jury Act 1977 (NSW), s 6; and Juries Act 1980 (NT), s 10; Jury Act 1929 (Qld), s 7; Juries Act 1927 (SA), s 12; Jury Act 1899 (Tas) ss 6 and 7; Juries Act 1967 (Vic), s 4(2), 4(3), and s 5; Juries Act 1957 (WA), s 5.

114 Juries Act 1967 (ACT), s 11; Jury Act 1977 (NSW), s 7, Schedule 3; Juries Act 1980 (NT), s 11, Schedule 7; Jury Act 1929 (Qld), s 8; Juries Act 1927 (SA), s 13, Schedule 3 (ineligibility); Jury Act 1899 (Tas), s 7(A), Schedule 1; Juries Act 1967 (Vic), s 4(4), Schedule 4; Juries Act 1957 (WA), s 5(c), Schedule 2.

115 Jury Act 1977 (NSW), s 7, Schedule 3.

116 Juries Act 1967 (Vic), s 4(4), Schedule 4.

federal system. This is still a question which raises fundamental questions about the value and meaning of citizenship for the next century in a Federal system.

The move from "British" to multiculturalism

Beyond the Federal context, the delegates also discussed their British subject status. This of course has altered over the century, in that we are no longer British subjects.[117] Moreover, our identity as Australians has altered since the introduction of more inclusive immigration programs and with the advent of multiculturalism. This changed Australian identity and is one of the reasons for those supporting a proposal for Australia to become a republic. At the heart of any debate about a republic is an understanding of the relationship between the individuals and the state. Therefore, the broader questions about citizenship are a necessary part of the debate.

The problem of dual citizenship

In addition, the Constitution disqualifies persons who are "citizens of a foreign power"[118] from becoming members of Federal Parliament. This means that an Australian citizen with dual nationality cannot stand for Federal Parliament.[119] As discussed above in the historical context,[120] it appeared to be beyond doubt that a person could not have more than one country to which one devoted allegiance. If the delegates had taken heed of the South Australian delegate, Patrick Glynn, who was keen to leave the whole area of disqualification to Parliament, we would not need a constitutional amendment to change this disqualification. There is considerable debate over whether dual citizenship should be available to all Australians, whether born in Australia or not, and there is a more philosophical question about allegiance and dual citizenship.[121] These issues relate back to a fundamental question about the nature of citizenship and the centrality of "allegiance".[122] In other respects, dual citizens are treated equally with sole citizens.[123] Given that the make-up of Australia is fundamentally different from that of the 1890s, and we are part of a world where globalisation and internationalisation[124] has affected the meaning of loyalty to one

117 This terminology was changed with the introduction of the Australian Citizenship Amendment Act 1984 (Cth).

118 Section 44(i).

119 *Sykes v Cleary [No 2]* (1992) 176 CLR 77

120 See above p 302.

121 See K Rubenstein, "Dual reasons for dual citizenship" (1995) 3 *People and Place* 57 and K Betts, "Multiple Citizenships: Two Reports and some Implications" (1995) 3 *People and Place* 58.

122 For a fuller discussion about the centrality of allegiance to Australian Citizenship, see D Dutton, "The 'Call of the Blood' Allegiance, Nationality and Australian Citizenship 1901-1940", paper presented to the "Australian Identities: History, Culture and Environment" conference, Dublin 1996 (in possession of author) and forthcoming work of D Dutton as part of a Ph D on Australian Nationality.

123 Currently, individuals who were born and have citizenship in another country are entitled, according to Australian law, to maintain their former citizenship on taking up Australian citizenship. Their own country's law may, however, preclude them from maintaining that citizenship. Moreover, the Australian Citizenship Act 1948 (Cth), s 17 prevents an existing Australian citizen from taking up another citizenship.

124 There is extensive literature in political journals about the changed international environment for States. This includes the influence of the international economy,

country only, this is another area that must be reviewed in light of 21st century realities.[125]

Citizenship and membership — rights and responsibilities

In the Convention debates, the delegates' discussions about citizenship and membership of the community in drafting section 117 led them to consider the rights of citizenship. It was difficult because the rights and responsibilities had not been articulated before, even though political rights were identified. This difficulty in determining the rights and responsibilities of citizenship remains a pressing issue today and is in need of resolution.

Legislative distinctions

One way of determining the differences between citizens and non-citizens is by examining the legislative distinctions based on that status. The major pieces of Commonwealth legislation that distinguish citizens from non-citizens are the Commonwealth Electoral Act 1918 and the Migration Act 1958. In addition, each State's legislation on electoral rolls affirm the requirement of citizenship, and each State's legislation prescribing jury service relies on the electoral rolls, therefore linking it back to citizenship.[126] The Public Services Act (Cth) 1922 distinguishes citizens and non-citizens when it comes to permanent employment, and only Australian citizens can obtain an Australian passport under the Passports Act 1938. Each of these categories represent legal/political rights of citizenship. Interestingly, there is no distinction between citizen and non-citizen in the Defence Act 1903.

In fact, the area of defence is quite significant in highlighting one of the present ambiguities between the terms "citizen" and "resident". Perhaps an underlying reason for not allowing permanent or temporary residents the right to vote or serve on a jury, is that they may be loyal to another country, and that loyalty precludes them from being a full member of the country in which they are residing? If this were so, one would think it would translate into the defence of the nation. If you cannot rely on people who owe allegiance to another country to vote or to form a jury then logically they should not be entitled to serve in the defence of the nation. But the distinction of citizen is not present for the purpose of serving in the military defence of the country.

The Defence Act 1903 does not exclude non-citizens from voluntarily joining the forces,[127] nor is there a distinction for the purpose of compulsory conscription. Section

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international law, and technological advances which have transcended the borders of nation-states. See further, P Kennedy, *Preparing for the 21st Century* (1994); D Held, "Democracy, the nation-state and the global system" (1991) 20 *Economy and Society* 138; D Archibugi and D Held (eds), *Cosmopolitan Democracy: An Agenda For A New World Order* (1995); K Ohmae, *The Borderless World* (1991); R B J Walker and S Mendlovitz, *Contending Sovereignties: Redefining Political Community* (1990); D Elkins, *Beyond Sovereignty: Territory And Political Economy In The Twenty First Century* (1995).

125 The House of Representatives Committee on Legal and Constitutional Affairs is, at the time of writing, undertaking a review of the disqualification provisions in s 44(i) and (iv). Submissions were due before the Committee on 7 March 1997.

126 Juries Act 1967 (ACT), s 9; , Jury Act 1977 (NSW), s 5; Juries Act 1980 (NT), s 9; Jury Act 1929 (Qld), s 6; Juries Act 1927 (SA), s 11; Jury Act 1899 (Tas), s 4; Juries Act 1967 (Vic), s 4 Juries Act 1957 (WA), s 4.

127 Section 34.

59 outlines who is presently liable to serve in the Defence Force in time of war, namely, all persons (except those who are exempt from the section or to whom it does not apply) who have resided in Australia for not less than 6 months and who are 18 and under 60. Exemptions are on the basis of mental or physical disability. Eligibility does not apply to persons whose presence in Australia is solely related to employment in the service of a government outside Australia, or a prescribed official of an international organisation or a member of the Defence force.[128] Therefore, a traditionally significant role of membership of a community, that of defending the country, is bestowed upon non-citizens who have resided in Australia for more than 6 months. Thus, "membership" for defence purposes occurs after 6 months. We are still in the same position as the 1890s delegates in not being clear about the practical consequences of citizenship. This is partly because the Constitution does not guide us on the meaning of citizenship, so it is left to the government of the day to legislate the consequences of citizenship. And these legislative consequences have not been consistent in linking citizenship to membership of the community.[129]

Social membership

Other forms of membership exist beyond the traditional legal/political rights articulated above. These relate to social membership of the community. This concept was not entertained directly by the delegates to the 1890s Conventions, although it is central to the principle of equality of treatment in s 117.[130] The only rights of citizenship that the delegates could articulate were political rights. Since that time, the theorist T H Marshall has raised social and economic rights as fundamental elements of citizenship.[131] Factors which may be considered as representing social membership of a community are working rights, social security rights and the duty to pay tax.[132]

Social membership is a necessary ingredient in exercising the political rights of voting and jury service. The exercise of these rights influences one's identity as a citizen. This also works in the opposite way when people who are formally citizens are not treated as full members of the community. If we consider the position of Australia's indigenous population we can see that formal political membership[133] did not, and still does not, equate with full and equal membership of the community. The lack of attention to matters such as land rights and access to social rights such as health, education and employment, is still recognised as being deficient, demonstrating that a political right to vote does not mean that one becomes a full member of the community.

128 Section 61C.

129 See further K Rubenstein, above n 17.

130 See *Leeth v The Commonwealth* (1992) 174 CLR 455 per Deane and Toohey JJ at 480 and Gaudron J at 494.

131 T H Marshall, *Citizenship and Social Class* (1950).

132 The discussion paper of the National Citizenship Indicators Inquiry lists a range of possible matters which involve rights and duties of citizenship in this broader sense, above n 15 at 61-67.

133 In 1902, the Commonwealth Electoral Act denied Aboriginal people the right to vote. Extraordinarily, and anomalously, the Aborigines who had been voting in their own states, were stripped of that right. Aborigines waited 60 years for the passage of amending legislation, and in the Federal election of 1963 they were entitled to vote. For further discussion on the voting rights of Aborigines see P Stretton and C Finnimore, "Black Fellow Citizens: Aborigines and the Commonwealth Franchise" (1993) 25 *Australian Historical Studies* 521.

This also applies to other groups within the community who are socially and economically disadvantaged. Non-Aboriginal women have had the vote in Australia since 1902. However, this has not translated to equal representation in Parliament, which is a deficiency in our representative democracy.[134] Therefore, even the political consequence of citizenship does not necessarily lead to full and equal membership in the community.

The Australian Parliament's Senate Committee inquiring into the possibility of a system of National Citizenship Indicators, to enable measurement of the condition of legal, social and cultural rights of citizenship, dealt with some of these issues.[135] While these questions were not addressed as pressing issues in the 1890s, they were real issues for the disadvantaged communities and individuals at that time.[136] By not including a definition of citizenship in the Constitution, it meant that social issues were not constitutional issues, nor basic, foundational issues for our sense of identity. Therefore, there are no basic constitutional values that provide a foundation to any legislative programmes. For instance, the current government could override the Racial Discrimination Act without any constitutional consequences.

While citizenship underlies the Constitution in a political sense, as a mere inference, there is no similar inference for social and economic rights of citizenship. This then becomes part of a broader debate about our Constitution failing to deal adequately with the relationship between the individual and the State in not including a Bill of Rights. This debate links to citizenship when we try to determine the consequent rights. One approach is that a stronger understanding of citizenship would develop if a charter of citizenship were introduced. This could be done, either in the Citizenship Act, or as part of the Constitution.[137] At the very least, we need to be rethinking and discussing these issues in any constitutional review, in order to reassess our needs as a society in the 21st century.

Exclusion

A desire to exclude was a formidable reason for not referring to citizenship in the Constitution. This theme has been a constant one in Australian history and it has become another central issue in the late 1990s, predominantly in relation to immigration policy.

In defining whom we allow to become citizens, we are deciding whom we want to be regarded as members of our community. By not allowing a person into the country in the first place, we continue in the footsteps of the framers of the Constitution in regulating that membership through immigration. The regulation of mobility rights of non-citizens has been a continuing legal consequence of citizenship in Australia. The Migration Act 1958 (Cth) governs the "entry into and presence in Australia of aliens,

134 See D Cass and K Rubenstein, above n 44.

135 See above n 15.

136 The women who were politically active in the 1890s were concerned with these broader approaches to citizenship. See some of the newspaper articles of Louisa Lawson in "The Dawn 1888-1895" in O Lawson (ed), *The First Voice of Australian Feminism: Excerpts from Louisa Lawson's The Dawn 1888-1895* (1990).

137 Several submissions to this effect were made to the inquiry *Australians All*, above n 14 at 89-95. Similarly, the Australian Law Reform Commission raised this issue before the National Citizenship Indicators inquiry, above n 15, Submission No 43, at 4.

and the departure or deportation from Australia of aliens and certain other persons".[138] This Act is specifically directed to regulating non-citizens, as opposed to conferring rights or duties upon citizens. When the Act was reformed in 1994, an objects clause was included. It states in s 4(1) "the Act is to regulate, in the national interest, the coming into and presence in, Australia of non-citizens".[139]

All non-citizens have to obtain a visa in order to travel to Australia.[140] The entitlement to a visa is set out in the Act and Regulations. Therefore, whenever non-citizens, even permanent residents, leave the country, they do not have an absolute right of re-entry. Permanent residents need a Return (Residence) (Class BB) visa. Even with that Return (Residence) visa, there are grounds upon which the Minister can deny re-entry of those persons.[141]

Australia's record on discriminatory practices associated with exclusion has changed since the "White Australia" rhetoric of the framers of the Constitution and the first 50-70 years of nationhood. If the final blow to including citizenship in our foundational document was a racist one, should we be content to allow the concept of citizenship to remain unspoken? If we leave citizenship as a mere legal inference, are we allowing discriminatory tendencies to perpetuate in our society? This has become a more pressing consideration with a current member of Parliament proposing a return to a white Australia policy.[142] Moreover, there have been changes to welfare and migration entitlements for those who are not citizens. If citizenship were raised for discussion in the late 1990s for definition and inclusion in our Constitution, would we see a desire to exclude rear its head once more?

CONCLUSION

This article has drawn out themes on the concept of citizenship from the Convention debates in order to appreciate them in their own context, and to show the similarities with our discussions about citizenship today. The fact that these same issues have still not been addressed or resolved reflects upon the weakness of our constitutional foundations on this issue. The definition of citizenship, the double Federal/State citizenships that exist, the legal rights and responsibilities of citizenship, and, whom we want to be citizens of Australia are issues still gnawing at our national psyche.

The major difference, however, is that Australia in the 1990s is vastly different from the Australia of the 1890s. And this is important precisely because citizenship is about the individuals who make up Australia and their relationship with the State itself. Our Constitution needs to be reviewed in the light of the values and principles regarded as essential by the community. In rethinking our entire constitutional system, citizenship is important on two levels. First, because citizenship is the essence of a representative democracy that is accountable to, and is responsive to, its people; and second, because

138 See the opening words of the Act.

139 The authority to regulate non-citizens comes from the Commonwealth's power to legislate with respect to aliens and naturalisation in the Constitution, s 51(xix).

140 Section 42.

141 Subdivision D (Visas may be cancelled on certain grounds) of Division 3 (Visas for Non-citizens). Note, however, that there are certain procedures which must be followed, as set out in Subdivision E (Procedure for cancelling visas under Subdivision D in or outside of Australia).

142 Pauline Hanson, maiden speech. Cth H Reps Deb 1996, Vol 8 at 3860.

citizenship is a legal status which has had a slow, staggered and disconnected evolution which needs urgent review.

Our Constitution still describes us as "subjects of the Queen". This is not solely because the framers identified as British people. It was dictated more by the difficulties flowing from the federal compact — the lack of clarity in identifying the consequent rights and responsibilities of citizenship and, most importantly, the desire to exclude. In still grappling with many of these areas, we need to proceed into the 21st century resolved to clarify the nature of citizenship in our Constitution. Through the Australian Citizenship Act 1948 (Cth), we have pushed citizenship beyond mere legal inference, but we have stranded it shy of further articulation in its substantive rights and responsibilities. The approaching centenary of federation surely calls for clarification of citizenship in our founding document of nationhood, left suspended from the Constitution for a century.