LAW, CITIZENSHIP AND THE POLITICS OF IDENTITY
Sketching the limits of citizenship

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Introduction

Lawyers figure citizenship narrowly, interpreting signs of nationality,[1] of domicile, of suffrage,[2] of status, excluding migrant, permanent resident and alien. The lawyer's citizen is a shadowy creature, its attributes sensible only to those well versed in the decoding of legal language. Its identity is inseparable from the documents it carries: carefully stamped forms detailing movements, permissions, the intricacies of identity in the states of late modernity. Though the habits of this shadowy creature are varied, its habitats are almost invariably urban.

The lawyer's citizen is a creature of bureaucracy.[3] If bureau-tropic is not yet a word, the lawyer's citizen cannot exist without seeking out the paraphernalia of the liberal state just as phototropic plants seek out the sun. The disciplinary regimes of the state provide identity and sustenance. In this sense, citizenship is a product of late modernity, having developed coevally with the liberal order.[4]

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1 The *lex loci* rule, conferring citizenship on all of those born within a particular jurisdiction, was statutorily abrogated in 1986 by section 10 of the *Australian Citizenship Act* 1948 (Cth).

2 White women became members of the Australian polity in 1902. Aboriginal people could not vote until 1962, and, even then, voting for Aboriginal people was not compulsory as it is for non-Aboriginal citizens in Australia.

3 I use the phrase 'lawyer's citizen' to denote the legal understanding of citizenship and to distinguish that understanding from that of, *inter alia*, political theorists. It is useful as well to distinguish between the collective import of the legal rules concerning citizenship and the notions of belonging and identity that are often, but not always, associated with citizenship. In Australia, the beginnings of a national identity preceded Australian citizenship in the legal sense. Today, while we think of national identity and citizenship as largely co-extensive, this is an oversimplification. A final point is also worth making. The separation of citizenship and identity is a hallmark of the liberal order.

4 For the liberal order, identity and belonging are signified by possession of the appropriate documents. In many ways, the Australian understanding of citizenship epitomises this world view. As Gaudron J made clear in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 54, citizenship in Australia is an entirely statutory concept, one which is not constitutionally necessary. It is legalistic rather than normative.

Often, citizenship is coterminous with more profound kinds of attachment, so that one is both a citizen in the legal sense and understands oneself as such as a form of belonging and identity. Sometimes, indeed, the psychic dimension of citizenship overshadows the legal. As sites of identity proliferate, the possibility of multiple attachments and plural loyalties arises. This suggests the possibility of new ways of understanding questions of identity, ways that do not inevitably begin under the sign of exclusion.[5] I want to interrogate the relationship between citizenship and identity, and explore whether it is possible to understand both in a way that is not dependent upon a process of 'othering'.[6]

As the century draws to a close, new understandings of citizenship are emerging. Indigenous peoples are insisting upon their identity as distinct peoples, rejecting assimilation and erasure of cultural identity.[7] Linda Burnley tells us that she is a Wiradjuri woman, her words signifying attachment to place, as well as to community. As she argues: 'The kind of grass-roots civic-participation citizenship that I'm talking about has to be about these three things: *community* and *identity* and *belonging*'.[8] Perhaps we need to speak of citizenships, of plural attachments and allegiances, ask whether the nation states of late modernity contribute to forging these

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5 Jodi Dean's work on reflexive solidarity is one way of understanding identity: J Dean (1996) *Solidarity of Strangers: Feminism after Identity Politics*, University of California Press. According to Dean,

> [S]olidarity can be modeled as an interaction involving at least three persons. I ask you to stand by me over and against a third. But rather than presuming the exclusion and opposition of the third, the ideal of reflective solidarity thematizes the voice of the third to reconstruct solidarity as an inclusionary ideal for contemporary politics and societies. On the one hand, the third is always situated and particular, signifying the other who is excluded and marking the space of identity. On the other, including the third, seeing from her perspective, remains the precondition for any claim to universality and any appeal to solidarity. Coupled with a discursively achieved "we," the perspective of a situated hypothetical third articulates an ideal of solidarity attuned both to the vulnerability of contingent identities and to the universalistic claims of democratic societies. (p 42)

6 I use the term 'othering' to describe a familiar process, that of coming to understand who and what one is by a process of exclusion, by, in other words, what one is not.

7 In North America, both the 'First Nations' peoples and the 'Native Americans' are staking very particular sort of claims. The collective names they have taken for themselves insist upon an identity and an identification with the land which specifies their primary connection with it, symbolically relegating the culture which surrounds them to secondary status. The indigenous people of Australia at once insist upon pan-national status as symbolised by the Aboriginal flag and passport and upon the primacy of local clans and the associated dreamings.

8 This sense of 'placeness', of intensely local belongings, while strongest among traditional cultures, is not unique to them. The profound relief many of us experience upon returning home from sojourns away has everything to do with community, identity and belonging: L Burnley, 'An Aboriginal Way of Being Australian' (1994) 19 *Austl Fem Stud* 17, p 23.

attachments and allegiances or are best understood in terms of permissions, papers and rights.[9]

In Australia, the discourse of multiculturalism has redrawn the lines of identity politics. The 'dewogging ceremonies' of the past have been replaced by citizenship ceremonies that openly acknowledge the legitimacy of plural sites of identity. These changes have made it possible to speak of the Italian community, or the Vietnamese community, or indeed the American community, with an understanding that such communities belong equally to both cultures. The possibility of plural lines of belonging marks a profound change in the figuring of what it means to be Australian. It suggests that identity can be enriched, expanded to incorporate new belongings. Understanding oneself as an American Australian becomes, in this way, one way among many of being Australian.[10]

Inevitably, as sites of identity and belonging proliferate, the process of 'othering' recreates itself. As the anger of those who believe themselves marginalised in a world that is rightfully theirs fuels old hatreds, a monolithic 'Australian identity' insists upon its authenticity. The celebration of multiculturalism has allowed another kind of identity politics to flourish. It takes as its ensign the demand that the 'other' reject her 'otherness', become a 'real Australian'.[11] Dislocation and fear mark the transition between the old order and the new. Familiar identities seem less and less rewarding, the new environment threatening and disruptive. Solidarities predicated upon clear and fixed boundaries, upon reinforcing the lines between self and other, become untenable. Some, whose understanding of self demands such boundaries become hostile, rejecting a community which they no longer understand and against which they defend traditional ways.

New pathways for understanding identity and belonging present further challenges. Queer Nation reminds us that ways of belonging can

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9 Robert Cover draws a distinction between imperial and paideic community. He describes the courts of the imperial state as jurispathic, law killing, as extinguishing other, more local, laws: R Cover, 'Foreward: Nomos and Narrative' (1983) 97 *Harvard LR* 4. Cover insisted that imperial law required, not attachment, but obedience. If we look at the great contemporary theoretical controversies identified by Habermas — solidarity/justice, universalism/communitarianism, justice/care — it becomes clear that so long as we remain trapped within the within the given frames of reference, we cannot avoid oscillating between them: J Habermas (1990) 'Morality and Ethical Life' in *Moral Consciousness and Communicative Action*, trans C Lenhardt and SW Nicholsen, MIT Press, p 213. See also J Habermas, 'Justice and Solidarity: On the Discussion Concerning Stage 6' (1989–90) 21 *Philosophical Forum* 32, p 47.

10 Even this fractures into multiple ways of belonging, refusing to be reduced to a monolithic identity. Such an identity itself dissolves along lines of gender, of class, of origins. Much the same is true, whether to a greater or lesser extent, of other communities.

11 In so saying, the understood subtext is that there are those for whom this is impossible. Even if they attempt to renounce a former identity, adopt what Shelina Neallani describes as a 'raceless persona', they remain 'other': S Neallani, 'Women of Colour in the Legal Profession: Facing the Familiar Barriers of Race and Sex' (1992) 5 *Can J Women & Law* 148.

involve more than heritage, religion or citizenship. We forge our identities in many ways. If among those pathways to identity and belonging is sexuality, interrogating sexual politics may help us to understand other aspects of belonging and identity. To walk along this path, we must all learn to see ourselves as 'strange', rather than see the stranger as 'other' to the citizen.[12] Only if we understand all identities as contingent can we explore the creation of our Australian identity and identify the space available for a change. Against the background of the 'One Nation Party' and its call for another kind of identity politics, we dare not avoid interrogating the politics of identity more closely. If identity is contingent, a project that we have chosen to live, it is also a project that can be reconstituted on more inclusive lines.[13]

Plural identities, then, are plural ways of belonging, some encouraging diversity and permeable boundaries, others seeking to exclude plurality and insist upon a monolithic understanding of what it means to be Australian. Beneath all of these, the legal formalities of citizenship and the regulations associated with the movements of people remain an essential set of disciplinary mechanisms within the techno-bureaucratic regimes of late modernity. Thus, it is that we now turn to the lawyer's citizen, and to its configuration in Australia.

The Lawyer's Citizen

The lawyer's citizen is, as I have said, a shadowy creature, its lineaments traced by the indicia of nationality, of domicile, of suffrage. Questions of status loom large. Documentation is essential: proof of birth and parentage, tax file number, proof of marriage. Failing those, further indicia of status may be required, perhaps a passport establishing an entitlement to remain, whether as permanent resident or migrant, or tourist or migrant worker.[14] Here too we find the illegal entrant, the stateless person, the enemy alien,[15] and the news report detailing yet another influx of 'boat people'.[16] These are not individuals, but categories: legally inscribed, officially registered. As categories, they are critical to the integrity of the state, part of the disciplinary machinery by which it tracks the population within its borders.

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12 See J Kristeva (1993) *Nations without Nationalism*, trans LS Roudiez, Columbia University Press, p 29.

13 Perhaps, just as Neurath's sailor rebuilds his ship while at sea, plank by plank, we reconstruct our identities even as we live them, one plank at a time. See R Dworkin (1986) *Law's Empire*, Belknap Press, p 111.

14 The European Social Charter offers a wealth of categories: worker, employer, employed women, disabled persons, mothers and children, nationals, migrant workers — the categories of the bureaucratic state of late capitalism.

15 While the word 'citizen' is nowhere to be found in the Australian Constitution, the word 'alien' occurs in section 51(xix) and this placitum gives the Commonwealth the power to legislate with respect to aliens.

16 Refugees are a staple of news reports and television coverage. Of the most recent influx of boat people to Australia, arriving in July 1997, we also learn that they are well and even fashionably dressed, although the accompanying photographs rather belie that description.

Just how essential is that machinery is illustrated by the provisions of Division 4B of the *Migration Amendment Act* 1992 (Cth). Division 4B created the new category of 'designated person' and legitimated, retrospectively, the detention of a large number of 'boat people'. According to section 54J, it was enacted because:

> the Parliament considers that it is in the national interest that each non-citizen who is a designated person should be kept in custody until he or she: (a) leaves Australia; or (b) is given an entry permit.[17]
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> [s 54K provides that] designated person means a non-citizen who:
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> a) has been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992; and
> b) has not presented a visa; and
> c) is in Australia; and
> d) has not been granted an entry permit; and
> e) is a person to whom the Department has given a designation by:
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> i) determining and recording which boat he or she was on; and
> ii) giving him or her an identifier that is not the same as an identifier given to another non-citizen who was on that boat;
>
> and includes a non-citizen born in Australia whose mother is a designated person.

When this provision was enacted, litigation in *Chu Kheng Lim* was well advanced.[18] Legal advice had been received that the use of the executive power to detain the plaintiff boat people was unlawful because no existing statutory provision authorised their detention.[19] As Deane J said in *Re Bolton; Ex parte Beane*:

> Any officer of the Commonwealth Executive who, without judicial warrant, purports to authorize or enforce detention in custody of another person is acting lawfully only to the extent that his conduct is justified by clear statutory mandate.[20]

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17 It was enacted because it was feared that the executive lacked the legal authority to detain a massive influx of 'boat people' while their applications for refugee status were being considered.

18 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1.

19 Ibid at 63–64 per McHugh J. Initially, the plaintiffs had been held in purported pursuance of section 88 of the *Migration Acti* 1958 (Cth). That section provided that prohibited entrants could be detained in custody pending the departure of the vessel upon which they had arrived. The Minister had formed the view that, as the relevant vessels had been destroyed, they could be detained indefinitely. The majority (Brennan, Deane and Dawson JJ) in the High Court differed, holding that the period of lawful detention came to an end when the vessel was destroyed.

20 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 528–529.

By the time the amendments received the Royal Assent, the plaintiff boat people had already been detained for more than two years.[21] According to Brennan, Deane and Dawson JJ:

> Indeed, in the context of the pending proceedings in the Federal Court, it appears that one of the objects of the Act was to clothe with legislative authority the custody in which the "boat people" were being kept, a custody that might have been brought to an abrupt end once a court ascertained that custody was unlawful.
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> Accordingly, the questions reserved by the stated case must be approached on the basis that: (i) none of the plaintiffs is an "illegal entrant"; (ii) none of the plaintiffs has committed any offence against the Act or any other law; (iii) each of the plaintiffs was unlawfully held in custody at the commencement of Div 4B; and (iv) if the provisions of Div 4B are completely valid, they authorize the Department, by administrative "designation", effectively to direct and enforce the compulsory detention in custody ... of any person in the situation of the plaintiffs, under a regime where no court can, while such a person remains "a designated person", "order [his or her] release from custody".[22]

We understand who is a citizen not by positive indicia, but by the mechanisms of exclusion to which those who do not qualify are subjected.[23] They represent the public, official process of delineating 'otherness' by executive power. Thus, we learn that:

> *Ruddock to deport rapist, swindler*
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> A Chinese rapist and a Briton who swindled $32 million from Westpac in one of the nations' largest forgery scams will be deported, even though authorities found they were of good character and could stay. In an unusual intervention Immigration Minister Phillip Ruddock overturned yesterday the Administrative Affairs Tribunal rulings, declaring that their visas would be cancelled as they were classified as "excluded" persons and could not appeal against the ministerial order...[24]

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21 The plaintiffs were first detained on 27 November 1989; the Act received the Royal Assent on 6 May 1992.

22 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25.

23 While ordinarily retrospective legislation is repugnant and open to challenge, and one would think most particularly open to challenge where penal provisions are involved, the fact that the 'designated persons' to which it purported to apply were 'non-citizens' seems to have largely eliminated this concern. The majority, Brennan, Deane and Dawson JJ, noted that were the powers conferred by Div 4B applied to citizens they would 'be inconsistent with the Constitution's doctrine of the separation of judicial from executive and legislative power...': ibid at 29.

24 *Weekend Australian*, 14–15 June 1997, p 3.

> *Authorities ban doctor over disabled daughter*
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> A diagnostic radiologist and his family are being forced to leave Australia because their daughter has cerebral palsy.
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> Duncan Walker has been a Royal Brisbane Hospital staff doctor, teaching future specialists and treating patients for four years.
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> But because his daughter, Rosie, was born in Brisbane two years ago with cerebral palsy, the Walker family have been told they can't stay...
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> An Immigration Department spokesman said migrants "all need to meet certain requirements including medical requirements. They have to be healthy and not have any conditions that will end up costing the taxpayer any money at the end of the day."[25]

Native-born swindlers and rapists go to jail, are paroled or released, and either re-offend or not, depending. Whether or not they can be described as of 'good character' is something concerning which we will have to take our chances. For the handicapped daughter of a British doctor, on the other hand, even Australian birth may not be enough.[26] Too young herself to generalise, she has already become a category. To the Immigration Department, she is simply a handicapped child,[27] one who will, as an adult, require an invalid pension, thus costing 'the taxpayer' money.[28]

To Ruddock, the junior Minister who overturned the decision of the Department, she became something very different. Like a Chinese rapist and a British swindler, a handicapped child is an opportunity. Such a child offers a site of critical intervention, an intervention in which populist sentimentality vanquishes the mindless legality of the bureaucratic regimes of late modernity.[29] In these rituals, the public process of 'othering' is at work shoring up the boundaries between 'Australian' and 'other'.

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25 P Hammond (1997) 'Authorities ban doctor over disabled daughter', *Courier-Mail*, 21 June, p 7. Almost a fortnight later, on the 3 July, we learn that the Minister (Ruddock) has reversed the decision of the Department. This is not surprising; photos of a wide-eyed blond child ensure the furore, which allows the Minister to 'bow to the will of the people'.

26 *Australian Citizenship Act* 1948 (Cth) section 10 prescribes that birth on its own is insufficient. It will only suffice if, at the time of the birth, at least one parent was a permanent resident or citizen. The partial abandonment of *jus soli* in 1986 followed the decision in *Kioa v West* (1985) 159 CLR 550, where it was argued that the Australian-born child of persons subject to deportation was an Australian citizen and entitled to natural justice.

27 Had she been born of Australian parents, this status would have provided access to services and to medical care. Since she was born to parents who were not yet permanent residents, it became, potentially, a lever by which they could be excluded.

28 The proliferation of categories is characteristic of the techno-bureaucratic state of late modernity. To the bureaucratic state, one is never simply an individual.

29 In exploiting this site of intervention, it helps that the child is blonde and very pretty. Had she been less attractive, or of non-Anglo origin, one wonders whether the newspaper campaign would have been as successful. Neither the 'Chinese student' nor the 'British swindler' presented photo-opportunities.

Being a creature of documentation, rather than ethos or roots, the lawyer's citizen leads a shadowy half-life, emerging only when summonsed before the bureaucratic state of late modernity.[30] You are unlikely to encounter it outside of its natural habitat: in airport transit lounges, in endless snaking queues at border crossings, in Departments of Immigration. It is bureau-tropic, viable only if its existence is appropriately documented. The central issue is not loyalty or belonging, but the possession of the appropriate papers.[31] Identity papers document the right to pass from place to place, the right to seek (but never to secure) gainful employment, the right to remain within national borders for a particular period.

Constituting a People: The Making of Australians

The sign of the other

If documentation and surveillance are the panopticon of the nation states of late modernity, and the computer terminal the nerve centre of their disciplinary regimes, on their own they remain incapable of constituting a people, being necessary but never wholly sufficient. The conditions of identity, of belonging, have deeper roots. The relationship between the public constitution of an 'Australian identity' and the idea of citizenship is veiled in ambiguity. Ian Duncanson reminds us that:

> [t]he conditions in which citizenship and participation in government come into existence are shrouded in mystery.... The Australian 'people', according to Alastair Davidson, were invoked as electors and placed 'in half chloroformed indifference' by their leaders. In the United States, where constitutional foundations and popular sovereignty seem at first more tangible, Derrida points to another kind of mystery: the 'we the people of the United States of America' are constituted by the very document which they are simultaneously supposed to be so constituted as to authorise.[32]

Who are 'we the people'? From whence have we come? How came we to be constituted as a people? Who or what constituted us as such?[33] If repre-

30 A critical difference between more and less democratic states lies in the need to carry identity papersIn largely democratic nation states such as Australia and the United States, there is no official requirement to carry identity papers to move about freely. In other countries, that is not necessarily the case.

31 Until relatively recently, unless Aboriginal people possessed 'the appropriate papers', they were not free to move from place to place, to marry, to receive the wages they earned, even to return to the country which had been theirs. Only the possession of an exemption certificate, a 'dog tag', entitled them to recognition as Australian. The *Natives (Citizenship Rights) Act* 1944 in Western Australia was typical. It allowed 'natives' to apply for a 'Certificate of Citizenship'. To be eligible, a 'native' was required to establish that he/she had dissolved all tribal and native associations for two years before certification. Similar certificates were available in other states.

32 I Duncanson, '"Close Your Eyes and Think of England"': Stories about Law and Constitutional Change in Australia' (1996) 3 *Camb LR* 123, p 132.

33 One answer is, of course, the British Parliament, in enacting the *Constitution*

sentative government properly belongs to 'we the people', what understandings have formed this people? What images, what values have been held up as uniquely Australian, as constitutive of Australia's understanding of itself? At what point did 'we the people' become 'Australians', rather than 'British subjects', and what (if anything) do we understand that becoming to signify? In *Chu Kheng Lim v Minister for Immigration*, Justice Mary Gaudron spoke of the relationship between belonging and citizenship in these terms:

> It is no doubt correct to say that "alien" has become synonymous with "non-citizen" and that was accepted by this Court in *Nolan v Minister for Immigration and Ethnic Affairs*. But that conceals a number of questions: when did it become synonymous? with what effect in relation to persons, if any, who were not aliens but did not become citizens? and must it remain so?
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> It may be that the occasion to answer the questions that I have formulated will never arise. However, membership of the community constituting the Australian body politic, for which the criterion is now, but was not always, citizenship, is a matter of such fundamental importance that, in my view, it is necessary that the questions be acknowledged even if they are not answered.[34]

We need to look at a set of fragments, images which, for better or worse, are etched upon Australia's understanding of herself. Fear of the other was, from colonial days, a dominant theme. Before Federation, otherness was synonymous with the 'yellow peril'. CH Pearson offered an idealised picture of the Australians of the 1890s. In words evocative of a collective amnesia in which the land lay virgin, awaiting the coming of English civilisation, he wrote:

> Australia is an unexampled instance of a great continent that has been left for the first civilised people that found it to take and occupy. The natives have died out as we approached; there have been no complications with foreign powers; and the climate of the South is magnificent.... The Fear of Chinese immigration which the Australian democracy cherishes, and which Englishmen at home find it hard to understand, is, in fact, the instinct of self-preservation, quickened by experience. We know that coloured and white labour

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Act 1900 (UK). Perhaps we got the date wrong; perhaps the defining moment came with the enactment (by the British Parliament) of the *Statute of Westminister* 1931 (UK). Perhaps the defining moment came later still, in 1948, when the Commonwealth Parliament enacted the *Nationality and Citizenship Act* 1948 (Cth). In 1949, it became possible for the first time, to be an Australian citizen. Before, there were simply British subjects. See the discussion of similar issues in M Thornton, 'The Legocentric Citizen' (1996) 21 (2) *Alt LJ* 71, p 74.

34 *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 54. See also Thornton (1996) pp 72–3.

> cannot exist side by side; we are well aware that China can swamp us with a single year's surplus of population: and we know that if national existence is sacrificed to the working of a few mines and sugar plantations, it is not the Englishman in Australia alone, but the whole civilised world that will be the losers.... We are guarding the last part of the world, in which the higher races can live and increase freely, for the higher civilisation.[35]

We are asked to imagine the 'natives' lying down peacefully and folding their hands at the approach of the intruders, leaving an idyllic (and conveniently empty) landscape awaiting the touch of the English hand to become fruitful and burst into bloom. 'Disappeared' are the massacres which presaged the emergence of that 'empty landscape'. This process of collective amnesia was so successful that when seven white men were hanged in 1839 for the murder of more than 30 Aboriginal men, women and children at Myall Creek in 1837, there was widespread outrage, not at the murders but at the hangings. As for the prospect of Chinese immigration, as McKenna notes:

> if there was one issue which had the potential to force Australians to actively threaten independence it was the fear and hatred of the Chinese. It comes, then, as no surprise to say that the best chance for an Australian republic in the nineteenth century probably hinged on the British response to the colonies' stance on the Chinese question.... Australians would remain loyal so long as their nation was white.[36]

The Parliament of the new Commonwealth first met in Melbourne in 1901. Among the bills awaiting debate were two which were to have enormous symbolic potency in constituting 'we the people' in Australia. One restricted non-white entry to Australia, laying the foundation for a White Australia policy that endured until 1972.[37] The other prescribed a uniform franchise, affirming universal adult suffrage for all British subjects residing in Australia.[38] While the uniform franchise was subjected to delays and amendment, no such problems sullied the passage of the bill that made the 'White Australia' policy a reality. The first enactment of the new Parliament severely restricted non-white entry. As the first official act of the new Parliament, it began the legal process of constituting Australians. It inscribed

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35 CH Pearson (1893) *National Life and Character,* Macmillan, p 16. Pearson's words can be read back against traditional English fairy tales, for example Sleeping Beauty. The Australian continent lay fallow, sleeping until awakened by the kiss of prince charming. The evil stepmother (coloured labour in all of its manifestations) completes the allegory.

36 M McKenna (1996) *The Captive Republic: A History of Republicanism in Australia 1788–1996,* Cambridge University Press, p 164.

37 *Immigration Act* 1901 (Cth). It was followed by the *Pacific Islands Labourers Act* 1901 (Cth).

38 *Commonwealth Franchise Act* 1902 (Cth).

boundaries and began the process of defining the Australian nation in a very particular way, by those whom it excluded because of race.[39]

The Commonwealth Franchise Bill did not resurface until the following year. As presented to the Parliament, it granted the Commonwealth franchise to all adult British subjects irrespective of gender or racial origin.[40] Its opening gesture was one of inclusion. As a symbol of Australia's constitutive moment, it sent a very different message about what it might mean to be Australian. That was not to be. Beset by delays and bitter opposition on, *inter alia*, the question of woman suffrage, the Commonwealth Franchise Bill languished. In the end, a compromise emerged. Woman suffrage prevailed, but the Lower House rejected the terrifying prospect of Aboriginal suffrage.[41] Because South Australia and Western Australia had already granted the franchise to women and refused to give ground, without woman suffrage, a uniform franchise was out of reach.[42] The position of Aboriginal people was very different. Lacking numbers and an organised suffrage movement, they were an expedient sacrifice. Although at Federation, Aboriginal men were entitled to vote in all states except Western Australia and Queensland and Aboriginal women were entitled to vote in South Australia, this had come about because no one had thought to exclude them. When the question was put, the House of Representatives added an explicit rider:

> No Aboriginal native of Australia, Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.[43]

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39 It should be emphasised that the issue here was not citizenship. Australian citizenship in the strict sense did not exist until 1948 and many of those excluded by the *Immigration Act* 1901 (Cth) were British subjects. While today we understand the immigration laws in the context of citizenship, in 1901 the immigration act provided a mechanism for distinguishing between British subjects of different races.

40 A Oldfield (1992) *Woman Suffrage in Australia: A Gift or a Struggle?*, Cambridge University Press, p 63.

41 Both woman suffrage and Aboriginal suffrage were approved by the Senate.

42 Much of the opposition to woman suffrage was based upon two related ideas: first, that women would inevitably vote as their husbands or fathers directed, thus potentially giving one man many votes; and secondly, that politics was unsuitable for women. Proponents believed woman suffrage would, *inter alia*, help to curb the diminishing birth rate!

43 Oldfield (1992) p 65, citing section 4 of *An Act to provide for a Uniform Federal Franchise for the Commonwealth of Australia* 1902 (Cth). The short title is the *Commonwealth Franchise Act* 1902 (Cth). The deliberate exception of the Maori people is interesting and reflects the fact that, in New Zealand, the Maori people were already entitled to vote, as were all women. At that time, it was hoped that the New Zealand might eventually become part of Australia. A more detailed discussion may be found in P Stretton and C Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25 *Austl*

Aboriginal people were written out of the national polity.[44] The facts of birth, of origin, of connection to the land of Australia counted for little, so little that in Queensland and Western Australia, the franchise was not extended to Aboriginal people until 1962.[45] Invective focusing upon the double evil of female suffrage and Aboriginal suffrage overwhelmed parliamentary debate during the Federation period, with Sir Edward Braddon arguing that:

> if anything could tend to make the concession of female suffrage worse than it is in the minds of some people, it would be the giving of it to any of the numerous gins of the blackfellow. It cannot be claimed ... that the Aboriginal native is a person of very high intelligence, who would cast his vote with a proper sense of the responsibility that rests upon him. And it can even less be claimed that the gins would give a vote which would be intelligible.[46]

Constructing masculinity: From bushman to Anzac

In 1901, 'we the people' meant 'we the people of British racial origin'. Both the yellow peril from without and the black peril from within had been cabined off and isolated. Australia's constitutive moment was a moment of exclusion, of fear and hatred of the other.

> By the term Australian we mean not those who have been merely born in Australia. All white men who come to these shores — with a clean record — and who leave behind them the memory of the class distinctions and the religious differences of the old world: all men who place the happiness, the prosperity, the advancement of their adopted country before the interests of Imperialism are Australian.... Australian and Republican are synonymous. No nigger, no Chinaman, no lascar, no kanaka, no purveyor of cheap coloured labour, is an Australian.[47]

Hist Stud 521.

44 This was the first time that Australia was to disregard the principle of *jus soli*. It was not to be the last. In the end, only five members of the House of Representatives favoured granting the Commonwealth Franchise to the Aboriginal people.

45 Perhaps the answer is that birth has never been enough, and still is not today. Proof of birth is necessary, but may not be sufficient. The *Commonwealth Electoral Act* 1962 (Cth) eliminated the requirement for enrolment in state elections, thus guaranteeing the Commonwealth franchise to all Australians.

46 *Commonwealth of Australia Parliamentary Debates -Senate*, vol 9, 24 April 1902, p 11976.

47 *Bulletin*, Editorial, 2 July 1887, p 4. For the *Bulletin* and its readers, women were also excluded. This was a paean, not simply to a British racial heritage but also to the notion of egalitarian mateship that was to become the hallmark of the Australian identity.

Against the background of a vast and barely settled land, the *Bulletin* affirmed an understanding of colonial masculinity which was hostile towards women and which defined itself through prowess in drinking, gaming and brawling.[48] Even its valorisation of Australian manhood could not conceal the dangers of a largely unpeopled frontier. Imagined as a terra nullius[49] always already threatened both by 'Asian hordes' massing just outside its (permeable) borders and by irritants within, it evoked troubling images. Just outside of memory, an indigenous population remained unsubdued. Still more threatening, raising the spectre of violation from within, were the Chinese labourers who had come with the gold rushes and the kanakas brought to Australia by 'blackbirders' to work in the cane fields of the far North.[50] The question of borders, of sovereignty, loomed large at Federation.

The icons of race and gender dominated popular fiction, the ideal type of Australian manhood contrasted not only with the 'effeminate oriental' and the 'blackfellow' but also with the 'effete English gentleman'. The contrast between an English society in which wealth, leisure and property had castrated empire, leaving it open to invasion, was pitted against the archetypical Australian, the bushman. Less a real figure than a form of collective imaginary, the bushman was everything the effete Englishman, and even the city-dwelling Australian, was not.

> [T]he idealisation of the bushman dressed in a classless, unchanging mode of male 'backwoods' dress had become a powerful legend for those who lived in the cities. Associated with this fictional bushman were attributes of masculinity and mateship perceived to be important constituents of the Australian type.[51]

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48 See P Grimshaw et al (1994) *Creating a Nation*, McPhee Gribble, p 114.

49 At Federation, *terra nullius* and *terra incognita* fused, the land being figured simultaneously as unoccupied and unknown.

50 Just how porous those borders are is evidenced on the one hand by the repeated incursions of 'boat people' and the measures considered essential to deal with them, and, on the other, by the decision in *Wik Peoples v State of Queensland, Thayorre People v State of Queensland* (1996) 187 CLR 1. See in particular the judgment of Kirby J at 205.

> The picture painted of the two pastoral leasehold properties in question in the present case is ... somewhat bleak. Each of them in remote parts of Australia, offered to the lessee rudimentary and apparently unpromising conditions for depasturing cattle and conducting associated activities. So unpromising was the first Michelton Lease that it endured for only three years and was forfeit for non-payment of rent. The Second lease lasted for an even shorter period before it was surrendered. On 14th January, 1922, by order in Counsel of two day's earlier, the Mitchelton holding was reserved for the use of Aboriginal inhabitants of Queensland.
>
> According to the evidence neither of the Mitchelton lessees entered into possession. The Thayorre assert that they have never left their ancestral lands. Members of the Thayorre continued living on the land in their traditional way. They would have had no reason ... even to be aware of the grant of any Pastoral Lease over the land.

51 M Maynard (1994) *Fashioned from Penury: Dress as Cultural Practice in Colonial*

No female counterpart existed. In the collective (and recollective) imagination, it was of critical importance that the outback remained the site of egalitarian mateship. The archetypical Australian was associated not only with rural rather than urban images but also with a particular 'masculine ideology of mateship'[52] which was largely defined by that which it excluded.[53]

As the process of identity formation continued, the rural image of egalitarian mateship was increasingly read against those who were excluded: women, indigenous people, city dwellers. This collective nostalgia, a wish to valorise a particular masculine identity against anything that might weaken it, became Australia's understanding of herself. The potential contagions represented by the danger of invasion from without and by the image of the effete, over-civilised English gentleman, were read against the archetype of the Australian bushman. Australia's earliest understandings of herself became a kind of nostalgia for a non-existent past. Federation, said Alfred Deakin, must become a federation of the manhood of Australia, a bonding that transcended differences of class and locale.[54] The power of this combination of collective amnesia and mythologising, which all but obliterated a very different and wholly real figure (the Aboriginal stockman), remains with us.[55]

Australia, Cambridge University Press, pp 179–80.

52 Ibid, pp 178–9.

53 Given that a majority of Australians then as now lived in the coastal cities, the persistence of this image is remarkable.

54 Grimshaw et al (1994) p 192. That it did not transcend differences of race is as true now as it was then.

55 Ironically, this figure was very much in evidence in the debates over the *Commonwealth Franchise Bill* 1902 (Cth). Much of the opposition was based upon the belief that each squatter maintained a substantial gang or tribe of Aboriginal people. As Senator Matheson put it:

> The whole of that western portion of the State [Western Australia] is very sparsely populated with whites. It is in the hands of squatters, and even in the coastal towns the white population is exceedingly few. Every squatter maintains a gang or tribe of aboriginal natives. Sometimes there are forty or fifty people in a tribe. The squatter gives them ... "tucker," and a few wads of tobacco, in return for which they chop his wood, look after his cattle, and perform all the other menial occupations about his station. In many cases no white labour is employed upon the station, not even to the extent of a white cook. What will be the position if this Bill becomes law as it stands? Those squatters will be able — and undoubtedly they will do it — to put every one of these savages and their gins upon the federal rolls. We shall possibly have three or four thousand aboriginals put upon the rolls instantly, and the entire representation of that part of the country in the Federal Parliament will be swamped by aboriginal votes. Does any honorable senator suppose that these blacks will vote on anything but the instructions they receive from their masters? These squatters are real old crusted conservatives, who have no idea of anything but the immediate matters which concern their own interests.... What I have said in respect to Western Australia applies with equal force to the northern district of Queensland, and to the Northern Territory. The Territory in its northern

Small wonder, then, that the Anzac became the popular understanding of the archetypical Australian.[56] If that archetype had its origins in a rural fantasy of egalitarian mateship, the diggers of the First World War transformed it into a universal. The Anzac legend transcended the rural/urban divide and realised egalitarian mateship. The poet, John Masefield, mythologised the Anzacs as:

> the finest body of young men brought together in modern times. For physical beauty and nobility of bearing they surpassed any men I have ever seen; they walked and talked like kings in old poems and reminded me of a line of Shakespeare: 'Baited like eagles having lately bathed'.... [T]here was no thought of surrender in these marvellous young men; they were the flower of the world's manhood.[57]

The ensuing self-understanding depended upon on a kind of mythic remembrance in which the Australian digger became more central to empire than the England from which Empire had sprung. The Anzac became the defining image of Australian identity, elevating images of courage, of mateship and heroic service to a national icon.

> The new nation had been forged not just through its loyalty to Empire but through its loyalty to White Australia. Herein lay the essential paradox of Australian nationalism in the twentieth century. If being Australian meant being of white British stock, then the best way to nurture Australian sentiment was to maintain the connection with the protective fountain of that racial stock.[58]

> parts swarms with the most active aboriginals, who are employed upon the stations, and will undoubtedly be put upon the roll by the stations owners. Their votes will be used for the most improper purposes at an election.

Commonwealth of Australia Parliamentary Debates - Senate, vol 9, 10 April 1902, p 11582.

56 The American equivalent is almost certainly the cowboy.

57 Cited in C Schute (1995) 'Heroes and Heroines: Sexual Mythologies 1914-1918' in J Damousi and M Lake (eds) *Gender and War: Australians at War in the Twentieth Century*, Cambridge University Press, pp 23, 38. The homoerotic imagery in this passage is overwhelming.

58 McKenna (1996) p 217. This was, unsurprisingly, given legal support by, *inter alia*, the *Defence Act* 1903 (Cth). Section 59 makes it clear that all (male) residents of Australia between 18 and 60 are eligible for the draft in times of war. The legality of this provision was considered in *Polites v Commonwealth* (1945) 70 CLR 60. Despite provisions of international law to the contrary, the High Court held that Parliament had clearly intended that aliens be included and was entitled to do so. Latham CJ noted at 73 that:

> It is for the Government of the Commonwealth to consider the political significance, taking into account the obvious risk of the Commonwealth having no ground of objection if Australians who happened to be in foreign countries are conscripted for military service there.

Australian identity was inextricable from loyalty to Empire and the alluring beacon of a White Australia, its hallmark a male larrikin identity that remains an identifiable part of Australian culture today.[59] By 1949, the *Commonwealth Electoral Act* 1901 (Cth) restrictions, barely fleshed out at Federation, had been greatly elaborated through amendments. Section 5 proclaimed:

> No aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific (except New Zealand) shall be entitled to have his name placed on or retained on any roll or to vote at any Senate election or House of Representatives election unless—
>
> (a) he is so entitled under section forty-one of the Constitution;
>
> (aa) he is an aboriginal native of Australia and —
>
> (i) is entitled under the law of the State in which he resides to be enrolled as an elector of that State and, upon enrolment, to vote at elections for the more numerous House of the Parliament of that State (or, if there is only one House of the Parliament of that State, for that House); or
>
> (ii) is or has been a member of the Defence Force;
>
> (b) he is a native of British India; or
>
> (c) he is person to whom a certificate of naturalization has been issued under a law of the Commonwealth or of a State and that certificate is still in force, or is a person who obtained British nationality by virtue of the issue of any such certificate.[60]

Not until mid-century did the White Australia policy begin to tarnish. What had seemed sacred and inevitable in 1901 gradually fell into desuetude as first southern European and later Asian immigration represented an increasing proportion of the total intake.

The multiple levels of belonging and exclusion at work in these ideas are revealing. If, as in *Polites*, a Greek national present in Australia could be required to place himself, his services and his property at the disposal of the Commonwealth, at the time *Polites* was decided, the same was not necessarily true of an indigenous man or of a white woman, irrespective of birth and citizenship. The lawyer's citizen is a curious creature. Its rights expand and contract as seems appropriate at the time.

59 The White Australia policy was largely implemented through five Commonwealth Acts: *Immigration Act* 1901–1949, the *Pacific Islands Labourers Acts* 1901 & 1906, the *War-time Refugees Removal Act* 1949, the *Nationality and Citizenship Act* 1948, and the *Migration Act* 1958.

60 The term 'aboriginal' is defined in *Muramats v Commonwealth Electoral Officer* (1923) 32 CLR 500. This provision was finally replaced with one making no reference to race in 1961 by amendment No 26 to the *Commonwealth Electoral Act* 1901 (Cth) s 4.

Figuring otherness: Images of the woman citizen

If the enduring symbol of Australian identity remains the Anzac, the egalitarian bushman become soldier hero,[61] what, if anything, can be said about the woman citizen? What part did she play in the formation of the Australian identity? While there is no female counterpart to the Anzac myth, the persistent and pervasive reading of convict and indigenous women as sexually depraved constitutes a counter-myth, a deliberate 'othering'.[62] Cultural understandings of femininity rendered female activity 'invisible' to the economy. The dichotomy between reproductive and productive labour meant women's work, in the Australian colonies as elsewhere, occurred in the non-market sector and hence was devoid of economic valued and deemed not to exist. The gathering imperative of the 'white Australia' policy ensured that women were largely seen as living incubators for the pure white babies needed to populate the new nation.

> When politicians did promote women as important participants in the new Australia, women's main contribution was not forecast as active citizenship, but prolific childbearing. The first act of the new Commonwealth of Australia was one restricting non-white entry. Australia's spaces would be filled instead by pure white babies. But it was soon apparent that, in pressuring women to propagate, those vocal public men opposing fertility control were fighting a losing battle. The decline in the white colonial birthrate already noted in the 1890s, was acutely registered in the 1901 census...
>
> Federal and state governments set about devising ways to restrict the advertisement and sale of contraceptives, and the circulation of materials informing people of ways to control fertility. Ideas about 'social purity', about encouraging chastity and monogamy, underwrote other legislation raising the age of consent for girls, and opposed the double moral standard implicit in legislation to control venereal diseases and prostitution. Law enforcement agencies also began to intervene more actively in such concerns as abortion, the foster care of babies, and the conditions of lying-in hospitals and orphanages, to help prevent deaths.[63]

Both excluded from the nascent 'Australian identity' and essential to its construction, forming one element of the ground against which the 'Australian polity' stands out in stark relief, the 'woman citizen' became, in the Australian imagination, a living incubator.[64] Touted politically as

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61 For readings against the grain of the Anzac legend, see the essays in J Damousi and M Lake (eds) (1995) *Gender and War: Australians at War in the Twentieth Century*, Cambridge University Press.

62 See the discussion of the denigration of convict women in D Oxley (1996) *Convict Maids: The Forced Migration of Women to Australia*, Cambridge University Press, p 232.

63 Grimshaw et al (1994) pp 193–4.

64 *Commonwealth Parliamentary Debates - Senate*, vol 9, 10 April 1902, p 11556. Senator Dawson argued that one cure for the diminishing birth and marriage rate was granting the franchise to women:

essential to the mass production of white Australian (male) babies to swell the armies of empire and defeat the Asian hordes lying in wait just outside of memory, the citizen mother was urged on to ever greater reproductive efforts.

When Australian women sought to affirm active citizenship, they seized upon the 'citizen mother' as the counterpart to the 'citizen soldier'. According to Marilyn Lake, feminist activists:

> formulated the idea of maternal citizenship — conceptualised, like soldier citizenship, as a two-way contract through which mothers would be paid for their service to the state: this was their citizen's right and would secure their right to independence....
>
> The wife was a dependent of the husband and subject, amongst other things, to the exercise of his conjugal rights. The citizen mother, by contrast, asserted her independence from conjugal authority. Masculine opponents of the Maternity Allowance were quick to point out that the institution of marriage, the 'necessary foundation of national welfare' was under attack. In the extension of the Maternity Allowance to single women, to 'those who would be mothers before they have become wives', the government was seen to be substituting a contract between the state and the mother citizen in place of the older, traditional 'marriage contract' between man and wife.[65]

If the ideal of Australian manhood, the bushman become Anzac, had captured the popular imagination, seizing upon the opportunity presented by pro-natalist rhetoric, Australian feminists fought to rewrite the text of motherhood. As citizens, women had a duty to bear babies for the state and for the greater good of Australia. The 'pure white babies' of pro-natalist rhetoric, belonged, not to their husbands, but to the nation.[66]

> If we look closely into the statistics of the States, we shall find that the population is gradually falling off, that the marriage rate is decreasing, and that this is a subject of complaint, not only on the part of our statists, but also on the part of priests and parsons. The reason of it is, that the women of to-day who have an opportunity of education, possess intellects, and they refuse to hamper themselves or become hacks to anyone. They absolutely refuse to accept responsibilities which they see they are not likely to fulfil in a proper manner, in view of the conditions that operate around them. What is one of the suggested remedies for this? It is, that we should allow a woman — an educated woman, who can pass the necessary test of intelligence, just as a man can do — to have a voice in the legislation of the country; that, whatever her profession, occupation, or art, may be, she should have a voice in the affairs of the country, which will carry just as much weight as that of her brother or her son.

65 M Lake, 'Personality, Individuality, Nationality: Feminist Conceptions of Citizenship 1902–1940' (1994) 19 *Austl Femt Stud* 25, p 28.

66 Reading this back against history, we now know precisely how dangerous such ideas can be, Aryan babies for the Third Reich being a centrepiece of Hitler's

If the Anzac remains figure, the ground against which it is drawn is more complex than it might first appear. The dual images of a white society and of white motherhood united the diverse Australian colonies, inscribing the threat of domination by the 'other' as the alternative to unity. Whatever the rivalries between the States, they were insignificant compared to the horror of Asian domination and the death of white Australia. When, in 1912, Parliament debated a 'maternity allowance', it was justified because motherhood was dangerous and investment in motherhood was an investment in the future of the nation. According to Prime Minister Fisher: 'The more young Australians we have the wealthier the country must be'.[67] Yet if motherhood was the highest destiny for woman and critical to the wealth of the nation, it was not sufficient merely to be a mother.

> Not all mothers were deemed eligible for the maternity allowance, however, and the categories of women excluded tell us much about the racial constitution of the Australian nation. Women who were 'Asiatics' or 'Aboriginal natives of Australia, Papua, or the islands of the Pacific' would not be paid the allowance.[68]

As woman moved from ground to figure in the new nation, she did so as pregnant mother.[69] Pure white babies would ensure the defence and development of the new nation.

> [T]he implications of this policy for the lives of all Australian women were vast. Aboriginal mothers would be systematically deprived of

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policies. The underlying impetus behind the 'citizen mother' in early post-Federation Australia was identical to that in Hitler's Germany.

67 Quoted in Grimshaw et al (1994) p 207.

68 Ibid, p 207. The *Maternity Allowance Act* 1912 (Cth) provided for a payment £5 to the mother in respect of each occasion on which a child is either born alive or is viable per sections 4–5. Section 6(1) provides that 'The maternity allowance shall be payable only to women who are inhabitants of the Commonwealth or who intend to settle therein' while (2) provides that 'Women who are Asiatics, or are aboriginal natives of Australia, Papua, or the islands of the Pacific, shall not be paid a maternity allowance.' The legislation was amended in 1926 to delete the word 'Asiatics' and insert the word 'aliens'. The provision was further amended to specify that where a woman was an alien only by virtue of her marriage to an alien she was not excluded. By 1944, section 91 of the *Social Services Consolidation Act* 1947–1950 (Cth) provided that the Director-General might, at his discretion, direct that payment be made on behalf of an aboriginal native or other person living on a reserve to 'an authority of a State or Territory controlling the affairs of aboriginal natives, or to some other authority or person whom the Director-General considers to be suitable for the purpose...'.

69 The legislation offers a racial figuring of the madonna/whore understanding of Australian womanhood. Indigenous women, most particularly those who gave birth to mixed race babies, were 'unmothered', their children stolen, placed in orphanages or with white families. This practice of 'unmothering' took various forms. It was prevalent in the largely British colonies (and former colonies) of Canada, the United States and Australia.

> their children as state authorities took their offspring away and placed them in state or church institutions or private employment. For white women, meanwhile, motherhood was lauded as their grandest vocation.... As mothers, women lobbied for and were granted special services for themselves and their children.... But as unpaid civil servants and wealth producers, women were also subject to increasing surveillance, responsibility and blame. As mothers, said the *Australian Medical Gazette* in 1912, women should devote their lives to the breeding of a stronger and sturdier race.[70]

By 1914, the rhetoric hardened. Mere motherhood was not enough. Maternity was elevated to heroism and the number of sons she was willing to abandon to the imperialist cause gauged the worth of a woman.[71] Initially conceived as act of defiance, the image of the citizen mother was subverted to bolster the trappings of masculinity and whiteness.[72]

The rhetoric of the 'citizen mother' proved enduring, resurfacing in the policies of the Melbourne-based Australian Republican Party in 1964. Boasting a grab bag of policies, including an expanded social welfare system, which it proposed to finance by legalising off-track betting, the party proposed that:

> [half] of this new source of revenue would be spend on the now vital needs of a national maternity scheme, to allow every mother and mother to be, in all Australia, to carry out her highest sacrifice and noblest duty in presenting to her family and country our most precious asset, the newly born Australian completely free of cost to her of hospitalisation, doctor, medicine and transport charges.[73]

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70 Grimshaw et al (1994) pp 207–8. The increasing surveillance is hardly surprising. As statutorily validated motherhood took its place among the disciplinary regimes of the new Commonwealth, doctors and social workers took their places among those seeking to ensure the purity of the home and all within it. At much the same time, and for much the same reasons, the children of Aboriginal mothers were seized, transported to families or orphanages, the erstwhile mothers 'unmothered', located firmly on the wrong side of the madonna/whore divide.

71 Shute (1995) p 24. The following quotation from the *National Leader* is typical:

> The mother who gives her son in war is noble, sublime... the noblest thing on earth today... sometimes I go to the Coo-ee café and I chat to women who are suffering a noble martyrdom and my heart thrills with pride at a heroism that seems to me to be stupendously great.

National Leader, 1 June 1917, p 2.

72 Dean (1996) p 42. Jodi Dean suggests that if we are to find our way out of this morass, it will be necessary to jettison the abstract conception of the citizen with all its traditionalistic trappings of masculinity and whiteness. Freed from such a restrictive norm, we can acknowledge the diverse forms of action and participation already present in the institutions, associations and movements of civil society. We can recognise the multiplicity of our interpretations of the meaning of citizenship.

73 McKenna (1996) p 224, quoting from the Australian Republican Party Platform and Policy.

Mercifully, perhaps, this image of a republic centred on TAB and push-chair has left few traces. More disturbingly, to the extent that the search for an Australian identity has not been abandoned as an unfashionable form of essentialism, the image of the archetypical Australian has seemingly changed but little. In the words of Manning Clarke in 1991:

> I think it is possible to identify an Australian.... I think you identify him by the way he talks, even by the way he walks and his face. I would expect that despite the huge numbers of people coming here, there will always be a dominant culture, the Australian culture.[74]

Towards an as yet unimagined future

Today, both the Anzac and the citizen mother seem at variance with new understandings of identity and belonging. Along the Eastern urban fringe, the 'white Australia' policy is more recollection than reality. The equivocal and disturbing images of another war, that in Vietnam, have destabilised the heroic image of the Anzac. Yet, if the myths built up over the first three-quarters of a century of Australian nationhood have become uncomfortably dated, it is not clear what new images are available to replace them.

The watchwords of the last decade, multiculturalism and national reconciliation, have failed to capture the popular imagination. Those seeking to refurbish the images and the 'white Australia' rhetoric of the past have found a ready audience for their views. They promise a return to a white Australian imaginary, untouched by unfamiliar ways. It matters little that the Australia of their dreams vanished more than a decade ago, if, indeed, it ever existed. It matters even less that laws proscribing discrimination have long been part of the legal landscape.[75] The loss of which they complain is precisely the fraying of an earlier vision in which all men were Anzacs, and all women mothers. So long as multiculturalism meant nothing more than cafés and delicatessens, and national reconciliation souvenir boomerangs and dot paintings, they formed acceptable embroidery on the fringes of the national fabric. Once it became clear that a far deeper commitment would be required, they became threatening. As the pace of change mounts, those least able to adapt seek to turn back the clock.

If dreamtime images and dot paintings are acceptable cultural indicia of Aboriginality, *Mabo* and *Wik* evoke very different sentiments.[76] Given the role played by the bush and bushman in the Australian psyche, it is hardly surprising that *Wik* is profoundly threatening. No longer are Australia's outback spaces inviolate, even in the imagination. Pastoral and agricultural

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74 McKenna (1996) p 241. One does not have to look too hard to glimpse the shadow of the Anzac in Clarke's words. More disturbingly, there is little in Clarke's words to suggest the possibility of multiple understandings of what it might mean to be Australian.

75 *Racial Discrimination Act* 1975 (Cth).

76 *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v State of Queensland, Thayorre People v State of Queensland* (1996) 187 CLR 1.

leases held for generations, deemed equivalent to freehold by many, have, in the imagination, become ephemeral.[77] *Wik* has seen to that, epitomising the destruction of boundaries, threatening racial and cultural confusion. If boundaries are infinitely permeable, if even the law is unable to demarcate between that which is and which is not Australian, the 'hollow man'[78] of the Australian imaginary threatens to implode.

Against the background of an increasingly fragile multiculturalism and the receding hope of reconciliation, the ingredients of the Australian identity seem up for grabs. *Wik* is a sudden reminder that Australian possession of the bush is both recent and tenuous. Far from being *terra nullius*, the outback remains bound to older dreamings, obedient to other laws.

> To say that the pastoral leases in question did not confer rights to exclusive possession on the grantees is in no way destructive of the title of those grantees. It is to recognise that the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it.
>
> So far as the extinguishment of native title rights is concerned, the answer given is that there was no necessary extinguishment of those rights by reason of the grant of pastoral leases under the Acts in question. Whether there was extinguishment can only be determined by reference to such particular rights and interests as may be asserted and established. If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees. Once the conclusion is reached that there is no necessary extinguishment by reason of the grants, the possibility of the existence of concurrent rights precludes any further question arising in the appeals as to the suspension of any native title rights during the currency of the grants.[79]

What is forgotten is that, in reality, nothing has changed. Whether or not the Wik and Thayorre peoples can make out their native title claim remains to be determined. As Toohey J noted:

> The questions reduce to straightforward propositions what are in truth complex issues of law and fact. They look for a certainty in the

77 It is worth noting that the Michelton leases over Thayorre land were never worked and were surrendered after only four years. The Holyrod lease over Wik land had been worked in a desultory fashion. There had never been enough work done to satisfy the lease conditions.

78 TS Eliot ((1936) 'The Hollow Men' in *Collected Poems 1909-1938*, Faber & Faber, p 87) delineates an imploding identity, leaving nothing but the rustling of wind thorough scarecrows.

79 *Wik Peoples v State of Queensland, Thayorre People v State of Queensland* (1996) 187 CLR 1 at 132–133. Boundaries, which once seemed fixed and certain, determined by official survey and by grant become, in the imagination, porous. Irrespective of whether, in fact, anything changed, everything was different.

> answers which, in the circumstances of the present appeals, is a mirage. There have been no findings as to whether native title rights even exist in connection with the land, let alone the content of any such rights ... the questions framed by reference to 'exclusive possession' tend to obscure what is the critical question: that of extinguishment.[80]

What *has* happened is simple. The porous boundaries identified at Federation are once again a psychological and physical reality. If even a crown grant is potentially ephemeral, insufficient to guarantee exclusive possession, the centre seems unbounded, under threat. Without fixed and certain boundaries, without the ability to exclude the other, identity seems up for grabs. The vast reaches of outback Australia, mile upon mile of cattle pasturage, of potential mining claims, are no longer inviolate. In the imagination, even the bushman/Anzac has been displaced by the other, is no longer sacrosanct, a symbol of national identity.

Along the urban fringe, the fear of the other which became the ensign of Federation remains potent, if muted. Within a rural Australia abruptly confronted by the transitory nature of its tenure, it has become virulent. Much of this virulence has fastened upon the High Court. Over a little more than a decade, the High Court has embarked upon a profound reinterpretation of a hitherto unquestioned Australian identity. *Koowarta,* the *Dam* case, *Mabo, Wik*:[81] each of these is fundamentally about boundaries, about what is and is not Australian, about the creation and recreation of meanings.[82] Read in this way, against the grain, as about boundaries, about meanings, about ways of being Australian, these decisions collectively insist that so long as we fail to acknowledge the violence in our collective pasts, we will remain unable move beyond it.[83]

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80 Ibid at 131. Gummow J made similar remarks at 177.

81 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (the *Dam* case) (1983) 158 CLR 1; , *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v State of Queensland, Thayorre People v State of Queensland* (1996) 187 ALR 1. In *Koowarta,* the High Court upheld the right of the indigenous people to purchase a Crown lease and labelled the policy of the Queensland government, a policy which sought to prevent indigenous Australians from controlling large areas of land, as a violation of the *Racial Discrimination Act* 1975 (Cth). The *Dam* case was about the land itself, about the protecting wilderness against the will of a Tasmanian government eager to make it productive. *Mabo* and *Wik* are about boundaries in another way, in the way they recognise an older law, and in the way in which they attempt to conceptualise the co-existence of 'two laws' within one land. All of these cases have to do with boundaries, and with acts of transgression in respect of those boundaries.

82 These cases are not about citizenship (as a legal phenomenon) but about identity, about a different understanding of Australian history, and, indeed, of what it means to be Australian.

83 The violence of which I speak (against her indigenous people, against the land itself, against all those who are other) continues.

Psychic Citizenships: The Politics of Belonging

Sexual citizenship

Because of the profound importance of identity to our understanding of the meaning of citizenship, it is important to try to understand what is involved in identity politics more generally. Edmund White speaks of the genesis of a gay political identity in these terms:

> I can remember that after the cops cleared us out of the bar, we clustered in Christopher Street around the entrance to the Stonewall.... During that interval someone in the defiant crowd outside called out 'Gay Power', which caused us all to laugh. The notion that gays might become militant after the manner of blacks seemed amusing for two reasons — first because we gay men were used to thinking of ourselves as too effeminate to protest anything, and second because most of us did not consider ourselves to be a legitimate minority....
>
> [T]he very idea that sexual identity might demarcate a political identity was still fairly novel. Minority status seemed to be vouchsafed by birth, to be fairly involuntary. One was born into a race or religion or nationality or social class — that was the way to become a member of a real minority. One could also be born a woman...[84]

The moment of which he speaks, is the defining moment of psychic citizenship, the moment when an issue or a slight or a disadvantage or an individual or collective achievement becomes political. After Stonewall, 'coming out' became a political statement, a way of positioning oneself. For those steeped in the traditions of 'town hall' democracy, such moments signify coming of age as a community. Yet, there is a darker side to this coming of age. The battles over the 'politics of identity' provide a microcosm of the moment at which claiming identity begins to replicate the precise processes that necessitated affirmation. Jodi Dean suggests that identity politics involves three distinct phases. At first, the goal is assimilation, equal opportunity and liberal equality. In the second phase, the claim is not of sameness but of difference:

> I seek authenticity, trying to find the authentic histories and experiences that give content to who I am. I am less interested in your society than in my own culture. Your society is hierarchical and exclusionary.... Since you and your values determine what counts and who can be heard, your law can neither help nor hear me.[85]

In the second stage, the 'key narrative of gay and lesbian identity'[86] becomes the coming out story. If, as Judith Butler suggests, we speak, not in

84 E White (1995) 'The Political Vocabulary of Homosexuality' in *The Burning Library*, ed D Bergman, Picador, p 69.

85 Dean (1996) pp 50–1. I believe that Dean's analysis is largely applicable to Australia.

86 Ibid, p 55.

terms of 'coming out' but of 'coming in', in coming out one 'came into' a disciplinary moment of orthodox 'gayness'.[87] The bisexual, the transgender, the rituals of butch-femme culture, challenged the possibility of a 'gay and lesbian identity'. Those who affirmed them became other. A sanitised middle class 'gayness' allied itself with the rhetoric of liberal tolerance.

A final phase remains that of accommodation. Here, identity has become multiple, suggesting the possibility of plural allegiances, of strategic coalitions. Dean suggests:

> Claiming 'queer' as a label 'is an aggressive demand for recognition which simultaneously calls into question that which is to be recognized and denies the recognizer use of the term of what is to be recognized'. By destabilizing the position of the one who recognizes, 'queer' asserts from the outset its own public visibility; by disrupting the notion of what is recognized, it transforms the debate over recognition into a discussion of accountability....
>
> By replacing the modern subject of phase one and the identified subject of phase two with the subject of discourse in phase three, queer theorists restructure the problem of speaking as an issue of what is spoken and the conditions for and of speech itself.[88]

We find the same destabilising insistence upon public visibility, upon a blurring of boundaries, at work in Cathy Freeman's victory lap at the Commonwealth games, wrapped in both the Aboriginal and Australian flags.[89] I read that event as an attempt to reinterpret the relationship between her Aboriginal and her Australian identity. It was a profoundly political moment in which she insisted upon the importance of embracing two potentially complementary belongings capable of mutual enrichment. She was neither 'simply' Aboriginal nor 'simply' Australian. Both her Aboriginality and her identification with Australia were an integral part of her sense of self.

Two years later at Atlanta, the Aboriginal flag remained packed, Cathy having been threatened with expulsion from the track and field squad if she displayed the Aboriginal flag. Belonging, it would seem, must be exclusive, at least for Olympians. Another politics had come into play, a politics in which her position as a member of the team representing Australia depended upon her 'assimilating', forswearing the prohibited indigenous identity. To insist upon the possibility of a plural identity was to destabilise conventional understandings of Australian and other, and to destabilise as well Olympic categories predicated upon a unitary and exclusive understanding of belonging.

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87 J Butler (1991) 'Imitation and Gender Subordination' in D Fuss (ed) *Inside/Out: Lesbian Theories, Gay Theories*, Routledge, p 14.

88 Ibid, p 58.

89 On August 6 1997, the morning papers again featured Cathy Freeman wrapping herself in her two flags, a joyous victor in the 400 meters.

Tolerance and Avoidance: Recovering Voice

I want to interrogate these ways of figuring belonging and allegiance. It is possible to read the Pauline Hanson phenomenon as one episode in a series of skirmishes over the gradual reconfiguration of an Australian identity. The debates surrounding Hanson, like the debates over other aspects of the Australian national identity, are fuelled by a retrograde desire to understand ourselves in simple terms.[90] Identity must be straightforward. The Anzac myth endured because it was monolithic and concrete. It provided a recognisable ideal, an image of how many (male) Australians liked to see themselves. In this way, a particular myth, regularly refurbished with all of the trappings associated with vanquished heroes, routinely reinscribes itself upon the national character. If the Mardi Gras enables us to avoid complex and potentially confronting ways of understanding sexual identity, the Anzac myth functions in a similar way. Because it is larger than life, it allows us to escape the difficult and threatening process of drawing together the images that have contributed to the making of Australia and repress more disturbing images.

Once we acknowledge that events are open to multiple understandings, that Myall Creek and Gallipoli have more in common than many would like to think, we shatter our cultural comfort zone.[91] Plural understandings and open and dialogic processes refuse to map in any straightforward way onto images with which people can identify. The very plurality of such images often evokes alienation, rather than attachment. Our collective task is to find new ways of imagining identity, new ways of understanding ourselves as a people, ways that speak of inclusion, rather than exclusion. As we seek out new ways of belonging, the danger is plain. We pride ourselves on our increasing tolerance, but fail to recognise that it conceals an ongoing process of othering. We celebrate the 'correct' ethnic festivals, line the streets for the Mardi Gras, flock to a performance of Bran Nue Dae, book a tour of sacred sites, attend a corroboree. We are multicultural. If we applaud the growing popularity of indigenous arts, but lament *Wik*, if we insist that Aboriginal culture is only valid if it remains frozen in amber, we replicate the failures of the past. Moving beyond tolerance to solidarity demands something else. Once we understand that the perils of 'speaking as', understand that all such claimings are both falsely inclusive and profoundly implicated in the process of 'othering' we need to recover a different kind of speech.

> To speak of justice one must, I think, speak representatively. One must, in short, have a political voice. If one is to do that, one must see oneself as politically equal, as entitled to speak, not only for oneself but for others.... What I am seeking to discover here is those conditions under which it may become possible for those whose speech is heard as silence, whose voices are not simply muffled but

90 These politics are not unique to Australia.

91 The oscillation between fallen hero and hanged killer is profoundly destabilising.

> not understood as voices to find (or recover) their voices. It is not, I think, enough that they consent, for if silence is not consent, it nonetheless is routinely taken to allow all. It is that they must gain speech, come to be counted among those whose consent is actively sought, desired, so that it *matters* whether or not they '*recognize others to have consented with* [them], *and hence that* [they] *consent to political equality*'.[92]

I say to find or recover their voices but this is not truly what I mean. If these voices are to become political, part of the polity, it is hearing which must be recovered far more than speech. If hearing is to be recovered, its lack and loss must first be acknowledged, the deficit admitted. Hearing and speech will return when their consent is understood to be essential, worth having. Until then, they may be answerable, in the way a subject is answerable to a king, or a slave to a master or (not so very long ago) a wife to her husband, but remain outside the polity. So long as we stop our ears against them, deny that their consent matters, deny that they are entitled to speak representatively for our consent, nothing will change. For change to occur, we must learn to understand ourselves as other to a polity in which their voices count, in which they speak, not only for themselves, but representatively, for us and with our consent.

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