

ALIENS IN THEIR OWN LAND

**‘ALIEN’ AND THE RULE OF LAW IN COLONIAL AND
POST-FEDERATION AUSTRALIA**

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I declare that this thesis is my own original work.

Peter Prince

November 2015

Dedication

I dedicate this thesis to my lovely wife Shona and our two beautiful daughters Rohana and Erin.

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Abstract

This thesis argues that the ‘rule of law’ was not followed in colonial and post-federation Australia in relation to a fundamental principle of the common law. According to the rule in *Calvin’s Case* (1608), no person born as a ‘subject’ in any part of the King’s dominions could be an ‘alien’. This was the legal position in Australia from the reception of English law until well after federation.

In colonial and post-federation Australia the racial meaning of ‘alien’ was consistently used in political and legal contexts instead of its proper legal meaning. In legislation and parliamentary debates, cases and prosecutions, inter-colonial conferences and conventions it was employed to refer not merely to those who were ‘aliens’ under the common law but also to people regarded as ‘aliens’ in the broader or racial sense of the word, especially those of non-European background. Chinese and Indian settlers, Pacific islanders and even indigenous Australians were treated as ‘aliens’ in Australia even if under British law they were actually ‘subjects’ of the Crown and not ‘aliens’ at all in the accepted legal sense.

In the 1820s and 1830s the New South Wales Supreme Court thought it inconceivable that ‘barbarous’ indigenous inhabitants could ‘owe fealty’ or allegiance to the British Crown, considering their legal position analogous to that of ‘foreigners’ or ‘strangers’. In debates on exclusionary legislation in the 1870s and 1880s, parliamentarians in the Australian colonies portrayed all Chinese settlers as ‘aliens’, despite acknowledging that many came from Hong Kong, the Straits Settlements or other British possessions. Immigrants from British India were generally treated the same way. Delegates to Australia’s constitutional conventions in the 1890s, including prominent legal figures, repeated this mistake. And in the 1900s Pacific islanders born in Australia as British subjects were deported as ‘aliens’ with the approval of the Australian High Court. The misuse of ‘alien’ in this case contributed to a defective judgment still cited today in support of the Commonwealth’s claims to extensive exclusionary power.

Between federation and the Second World War, Queensland’s dictation test legislation and industrial awards regulating various occupations provide many examples of the misuse and manipulation of the term ‘alien’ in a legal context. In prosecutions under these laws the word was used as a weapon against non-Europeans whether they were ‘aliens’ under the law or not.

Commentators both in the early years of federation and in more recent times have failed to identify the misuse of ‘alien’– and have made the same error themselves. This mistake is critical because of the continued force of the term in Australian law. The Commonwealth’s sweeping power to define who shall be citizens of Australia and to exclude, detain indefinitely without trial and deport ‘aliens’ is still justified by reference to colonial and post-federation cases and constitutional convention debates where ‘alien’ was incorrectly used in its racial sense contrary to the rule of law.

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INTRODUCTION

Interviewer: 'You want to feel like an Australian, but you feel that other people constantly see you as a Cambodian...'

Brother: 'Yes, It's very hard because physically you're Asian and you're automatically not Australian – you're an alien'.¹

Sir Edward Coke and the common law of aliens

Justice Windeyer of the High Court of Australia said the rule of law and other 'greatnesses' of the Australian legal system owe much to the legacy of Sir Edward Coke (1552–1634),² arguably 'the most famous and influential figure in English legal history'.³ According to Sir William Holdsworth:

What Shakespeare has been to literature, what Bacon has been to philosophy, what the translators of the Authorized Version of the Bible have been to religion, Coke has been to the public and private laws of England.⁴

Holdsworth credited Coke with 'remoulding the medieval common law in such a way that it was made fit to bear rule in the modern English state.'⁵ As Shaunnagh Dorsett says, 'Coke attempted to impose a unity and structure on English common law and to translate medieval law to modern...Under Coke, the once fragmented common law became the 'law of the land'.⁶

This thesis argues that the 'rule of law' was not followed in colonial and post-federation Australia in relation to a fundamental principle of the common law prescribed by Coke himself. In *Calvin's Case* (1608), Coke - as Chief Justice of the Court of Common Pleas -

¹ Trevor Batrouney and John Goldlust, *Unravelling Identity. Immigrants, Identity and Citizenship in Australia* (Common Ground 2005) 74-75.

² Sir Victor Windeyer, 'A Birthright and Inheritance, The Establishment of the Rule of Law in Australia' (1962) 1 *University of Tasmania Law Review* 635, 654.

³ Damian Powell, 'Coke in Context: Early Modern Legal Observation and Sir Edward Coke's Reports' (2000) 21(3) *Journal of Legal History* 33, 33, citing S.E. Prall (ed) *The Puritan Revolution: A Documentary History* (1968) 306.

⁴ Ibid, citing Sir William Holdsworth, *Some Makers of English Law* (Cambridge, 1938) 132. For a contrasting depiction of Coke's contribution to English law, see Enid Campbell, 'Thomas Hobbes and the Common Law' (1958) 1 *Tasmanian University Law Review* 20.

⁵ Shaunnagh Dorsett, '“Since Time Immemorial”: A Story Of Common Law Jurisdiction, Native Title And The Case Of Tanistry' (2002) 26(1) *Melbourne University Law Review* 15, 37, citing Holdsworth, above n 4, 132.

⁶ Ibid 37-38. Coke is also remembered for entrenching the rule that sovereign power is exercisable subject to the law. Robertson states that Coke's writings 'convinced generations of lawyers that Magna Carta was part of the common law, and guaranteed the independence of the judiciary as guardians of the limits of the king's power'. Geoffrey Robertson, 'Magna Carta remains pillar', *Canberra Times* (Canberra), 12 June 2015, 4.

laid down the guiding principle for legal membership of the British Empire for the next three and a half centuries, namely: ‘they that are born under the obedience, power, faith, ligealty, or ligeance of the King, are natural subjects, *and no aliens*’.⁷

As its entry in the Oxford English Dictionary shows, the word ‘alien’ has widely varied meanings, including:

- a legal meaning, i.e. ‘*One who is a subject of another country than that in which he resides. A resident foreign in origin and not naturalized, whose allegiance is thus due to a foreign state*’
- a normal or common meaning, i.e. ‘*A person belonging to another family, race, or nation; a stranger, a foreigner*’
- a science fiction meaning, i.e. ‘*An (intelligent) being from another planet, especially one far distant from the Earth; a strange (usually threatening) alien visitor*’.

The various dictionary meanings of ‘alien’ are clearly related. All refer in some way to people or things who are ‘not one of us’. ‘Alien’ in a legal sense, however, has some clear markers: a subject or citizen of another country, a resident who has not been ‘naturalised’ and - somewhat more vague but still central to the concept in modern Australian jurisprudence - a person who owes ‘allegiance’ to a foreign state. By contrast, in its more common, broader sense, ‘alien’ does not depend on formal legal markers but on subjective cultural or personal perceptions of who ‘belongs’. In this sense someone who merely ‘belongs to another family’ can be seen as an ‘alien’.⁸ More commonly - and most significantly for the purpose of this work - a person regarded as belonging to some other ‘race’ or ‘nation’, whatever their formal legal status, can be seen as an alien in this broader sense.

According to the rule in *Calvin’s Case*, no person born as a ‘subject’ in any part of the King’s dominions could be an ‘alien’. This was the legal position in Australia from the reception of

⁷ *Calvin v. Smith or the Case of the Postnati* (‘*Calvin’s Case*’) (1608) 7 Coke Report 1a, 5b; 77 Eng. Rep. 377, 383. For the facts and analysis of *Calvin’s Case*, see Keechang Kim, ‘Calvin’s case (1608) and the law of Alien status’ (1996) 17:2 *Journal of Legal History* 155 and Polly J Price, ‘Natural Law and Birthright Citizenship in *Calvin’s Case* (1608)’ (1997) Vol 9, Iss. 1, Art. 2. *Yale Journal of Law & the Humanities*, 73. As Kim says, the case ‘provided the opportunity to discuss and settle the question of the legal status of Scotsmen in England after the accession of James 1’ (at 155). As he notes, ‘the political importance of the case made it one of the most elaborately argued cases in the common law history. All justices of the King’s Bench and Common Pleas, the Barons of the Exchequer and Sir Francis Bacon, the King’s Counsel, participated in the argument’ (169 n 4).

⁸ Or even, in Australia, a sporting team from another State. In September 2008 *The Age* described non-Victorian Australian Football League clubs as ‘aliens’ when highlighting the lack of success of those teams in the season which had just finished, stating ‘here’s another good stat for all of us who have been sick and tired of the sight of those “aliens” from the north and west. Officially, 2008 was the worst year for interstate clubs since...1997’. ‘Sport’, *The Age*, 23 September 2008, 12.

English law until well after federation. As six judges of the High Court observed in *Nolan* (1988), the term ‘alien’ could not have been used in the colonial era:

...to identify the status of a British subject vis-a-vis one of the Australian or other colonies of the British Empire...At that time, no subject of the British Crown was an alien within any part of the British Empire...The British Empire continued to consist of one sovereign State and its colonial and other dependencies with the result there was no need to modify either the perception of an indivisible Imperial Crown or the doctrine that, under the common law, *no subject of the Queen was an alien* in any part of Her Majesty’s dominions.⁹

Under the common law people were either ‘subjects’ or ‘aliens’. As Coke said, ‘every man is either *alienigena*, an alien born, or *subditus*, a subject born’.¹⁰ The creation of the Commonwealth of Australia in 1901 did not alter this position. As Guy Aitken and Robert Orr note:

The *Constitution* does not contain any reference to Australian citizenship. Indeed, at the advent of federation in 1901, and for a long time after that, there was no such concept. All persons in Australia were either *British subjects or aliens*.¹¹

As this thesis argues, however, in colonial and post-federation Australia the racial meaning of ‘alien’ was consistently used in political and legal contexts instead of its proper legal meaning. In legislation and parliamentary debates, cases and prosecutions, inter-colonial conferences and conventions it was employed to refer not merely to those who were ‘aliens’ under the common law but also to people regarded as ‘aliens’ in the broader or racial sense of the word, especially those of non-European background. Chinese and Indian settlers, Pacific islanders and even indigenous Australians were treated as ‘aliens’ in Australia even if under British law they were actually ‘subjects’ of the Crown and not ‘aliens’ at all in the accepted legal sense.

In the 1820s and 1830s the New South Wales Supreme Court thought it inconceivable that ‘barbarous’ indigenous inhabitants could ‘owe fealty’ or allegiance to the British Crown,¹²

⁹ *Nolan v Minister For Immigration And Ethnic Affairs* (1988) 165 CLR 178, 183 (Mason C.J. Wilson, Brennan, Deane, Dawson, Toohey JJ). Emphasis added.

¹⁰ *Calvin’s Case* 77 ER 383, 397. See Kim, above n 7, 165ff in relation to the uncertainty about when the distinction between ‘aliens’ and ‘subjects’ under English law began. However this dates at least to an Act of Parliament in 1335, see House of Lords Record Office, ‘Citizenship: a history of people, rights and power in Britain’, www.nationalarchives.gov.uk/pathways/citizenship. See also *Singh v Commonwealth* (2004) 222 CLR 322, [59] to [116] (McHugh J) for an extensive account of the origins and development of the law regarding ‘aliens’ in Britain and Australia.

¹¹ Guy Aitken and Robert Orr, *Sawer’s The Australian Constitution* (Australian Government Solicitor, 3rd ed, 2002) 48. Emphasis added. At least until 1949, there was no deviation from this principle in Australia’s statutory law. See eg *Nationality Act 1920* (Cth) s 5(1).

¹² *R v Ballard*, [1829] NSWSupC 26, 13 June 1829, Macquarie University Division of Law, *Decisions of the Superior Courts of New South Wales, 1788-1899*, www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1829/r_v_ballard_or_barrett/

considering their legal position analogous to that of ‘foreigners’ or ‘strangers’.¹³ In debates on exclusionary legislation in the 1870s and 1880s, parliamentarians in the Australian colonies portrayed all Chinese settlers as ‘aliens’, despite acknowledging that many came from Hong Kong, the Straits Settlements or other British possessions.¹⁴ Immigrants from British India were generally treated the same way.¹⁵ Delegates to Australia’s constitutional conventions in the 1890s, including prominent legal figures, repeated this mistake.¹⁶ And in the 1900s Pacific islanders born in Australia as British subjects were deported as ‘aliens’ with the approval of the Australian High Court.¹⁷ The misuse of ‘alien’ in this case contributed to a defective judgment still cited today in support of the Commonwealth’s claims to extensive exclusionary power.¹⁸

Amongst the Australian States, it was in Queensland where governments, legislators, courts and officials found the word ‘alien’ most useful after 1901, not least as a way of excluding Chinese and other non-Europeans from major agricultural industries such as sugar and bananas. Between federation and the Second World War, Queensland’s dictation test legislation and industrial awards regulating various occupations provide many examples of the misuse and manipulation of the term ‘alien’ in a legal context.¹⁹ In prosecutions under these laws the word was used as a weapon against non-Europeans whether they were ‘aliens’ under the law or not.²⁰

Commentators both in the early years of federation and in more recent times have failed to identify the misuse of ‘alien’— and have made the same error themselves. This mistake is critical because of the continued force of the term in Australian law. The Commonwealth’s sweeping power to define who shall be citizens of Australia and to exclude, detain indefinitely without trial and deport ‘aliens’ is still justified by reference to colonial and post-

¹³ *R v Murrell and Bummaree* [1836] NSWSupC 35, 5 February 1836, Macquarie University Division of Law, *Decisions of the Superior Courts of New South Wales 1788-1899*, www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1836/r_v_murrell_and_bummaree/. Also cited as *R. v Jack Congo Murrell* [1836] 1 Legge 72.

¹⁴ See Chapter Two.

¹⁵ See Chapters Three and Four.

¹⁶ See Chapter Three.

¹⁷ *Robtelmes v Brennan* (1906) 4 CLR 395.

¹⁸ See Chapter Five.

¹⁹ See Chapter Six.

²⁰ See Chapter Seven.

federation cases and constitutional convention debates where ‘alien’ was incorrectly used in its racial sense contrary to the rule of law.²¹

Australia and the rule of law

*‘There are moments in history which are turning points. Now is such a time. Australia can stand up and protect the rule of law or become an international pariah, living isolated at the end of the world, forever in fear of others’.*²²

The common perception remains that the Australian society created by British colonisation was built on the rule of law.

Dr Nandini Chatterjee has observed that ‘In what historians call the “second British empire” – centred on Africa and Australasia – law was supposed to be Britain’s particular boon to previously benighted societies’.²³ This was a core belief at the time of the European settlement of Australia. In 1795 Governor Hunter of New South Wales declared:

...no man within this Colony can be put out of the power or lose the protection of the laws under which we live, from the meanest of His Majesty’s subjects up to the Commander-in-Chief or first Magistrate, we are all equally amenable to and protected by the laws.²⁴

In 2001 the Chief Justice of the Australian High Court, Murray Gleeson, acclaimed the role of Sir Francis Forbes (first Chief Justice of the Supreme Court of New South Wales) in establishing the rule of law in the colony.²⁵ Justice Windeyer also praised Forbes as ‘the main architect of the reconstruction of the legal institutions of the Australian colonies’.²⁶ Others say Forbes’ role in embedding the rule of law as the ‘foundation stone of today’s Australian

²¹ See Chapter Two referring to *Toy v Musgrove* (1888) 14 VLR 349 cited in *Ruddock v Vardalis* (the *Tampa* case) (2001) 110 FCR 491, 541 (French J); *Ex parte Lo Pak* (1888) 9 NSWLR(L) 221 and *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250 also cited by French J at 541; Chapter Three referring to *Singh v Commonwealth* (2004) 222 CLR 322, 345-346, where Justice McHugh cited the debate over John Quick’s proposal to include a power over citizenship at the 1898 constitutional convention in Melbourne; and Chapter Five, referring to *Robtelmes v Brennan* (1906) 4 CLR 395 cited in *Ruddock v Vardalis* (2001) 110 FCR 491, 495, 498 (Black CJ), 543 (French J) and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (the indefinite detention case) (2013) 251 CLR 322, 329 n 19 (JT Gleeson SC, Solicitor-General for the Commonwealth). See also *Schlieske v Minister for Immigration and Ethnic Affairs* (1988) 84 ALR 719, 725 (Wilcox and French JJ).

²² Malcolm Fraser and Barry Jones, ‘Perverse migration bill shreds the rule of law’, *The Age*, 7 November 2014, 22.

²³ Nandini Chatterjee, ‘Law and the British Empire’, *Privy Council Papers Online*, www.privycouncilpapers.org/contexts/law-and-british-empire/.

²⁴ Windeyer, above n 2, 665, citing *Historical Records of Australia*, Series 1, Vol 1, 604-643.

²⁵ Murray Gleeson, ‘Courts And The Rule Of Law’ (Paper presented at Rule of Law Series, University of Melbourne, 7 November 2001) www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_ruleoflaw.htm.

²⁶ Windeyer, above n 2, 654.

constitutionalism’ entitles him to ‘the same place in Australian history as...the great Chief Justice John Marshall in American history’.²⁷ In 1827 Forbes declared that:

Every man, who has read *Blackstone’s Commentaries*, knows that it is laid down as a given proposition, that the English laws in force, at the time of a British Colony ‘being planted’, are in force in the Colony as the birthright of the subject.²⁸

The same year Forbes wrote to the Under-Secretary of State for the Colonies stating that supervision of the Court by the military governor was ‘inconsistent with the nature of a Supreme Court ... the judicial office...stands uncontrolled and independent, and bowing to no power but the supremacy of law’.²⁹ Chief Justice Gleeson remarked approvingly that this ‘assertion of the rule of law was made by a colonial Chief Justice, in a remote part of the British Empire, writing some 50 years before A.V. Dicey’.³⁰

According to Cameron Stewart, Dicey’s 1885 exposition of the rule of law ‘was accepted in English (and Australian) legal discourse as authoritative and it remains so today’.³¹ As this thesis explains, however, central tenets of Dicey’s formulation – including that regular law is supreme over arbitrary power and the idea of legal equality³² - were not followed by colonial and post-federation political and legal institutions in Australia in relation to the law on ‘alienage’.

The ‘rule of law’ remains a contested concept.³³ In 2007, Lord Bingham, Senior Law Lord of the United Kingdom, noted that ‘well-respected authors have thrown doubt on its meaning and value’.³⁴ Professor Meyerson explains the contest between a ‘formal’ or ‘thin’ conception of the rule of law ‘which places no constraints on the content of law and is therefore

²⁷ Ian Holloway, Simon Bronitt and John Williams, ‘Rhetoric, Reason and the Rule of Law in Early Colonial New South Wales’, in Hamar Foster, Benjamin L Berger and A R Buck (eds), *The Grand Experiment* (UBC Press 2014) 78, 85, 88.

²⁸ Windeyer, above n 2, 667, citing *Historical Records of Australia*, Series IV, vol 1, 746 (Forbes CJ, 12 Nov 1827).

²⁹ Gleeson, above n 25, citing J M Bennett (ed), *Some Papers of Sir Francis Forbes* at 143.

³⁰ Ibid.

³¹ Cameron Stewart, ‘The Rule of Law and the Tinkerbell Effect: Theoretical Considerations, Criticisms and Justifications for the Rule of Law’, (2004) 4 *Macquarie Law Journal* 135, 140.

³² A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed Macmillan, 1959) 188, 193. See also Stewart, 140-141.

³³ As Holloway, Bronitt and Williams explain:

‘On the one hand, the rule of law is presented by some scholars as a pivotal concept, providing authority and legitimacy for the exercise of state power and paving the way for representative and democratic systems of government. On the other hand, the rule of law is presented as an ideological tool, serving only to legitimate or mask oppressive systems of governance and class oppression’.

Holloway et al, above n 27, 80.

³⁴ Lord Thomas Bingham, ‘The Rule of Law’ (2007) 66(1) *Cambridge Law Journal* 67, 68.

compatible with great iniquity in the law’ and a ‘substantive conception’ that also involves ‘moral constraints on the exercise of state power’.³⁵ As Keith Mason explains, Dicey’s ‘rule of law’ assumes law consists of rules which are ‘prior to particular cases, more general than particular cases, and applied to particular cases’.³⁶ This concept of the ‘rule of law’ is ‘compatible with the existence of morally bad general rules’.³⁷ As this thesis argues, key institutions in colonial and post-federation Australia mostly failed to comply with the rule of law even in this formal or ‘thin’ sense with respect to established rules on alien status.

According to David Neal, contemporary discussions about the ‘rule of law’ have ‘importantly different connotations from those which it had for seventeenth and eighteenth century English people’:

For English settlers in New South Wales, conflicts over the extent of the governor’s powers – a governor who stood in the place of the king in the colony but wielded more power than any king since James 1 – conjured up seventeenth-century demons about royal tyranny.³⁸

John McLaren observes that at the time of the European settlement of Australia, ‘the rule of law...was a highly tensile notion. Its meaning varied depending on who was employing it and for what purpose’.³⁹ Nevertheless, as Neal explains, the rule of law ‘occupied a central place in the political ideology of late eighteenth-century England. It was from this political culture...that the white settlement of Australia was launched’.⁴⁰ As he states:

...courts were provided and politics in the colony soon took on an English form which stressed the rule of law as the measure of legitimacy. Ideas which were already prominent in English politics took on heightened importance in a penal colony where there were so few other means of political expression.⁴¹

Indeed the rule of law in early New South Wales was said to have at least three elements:

[1] general rules laid down in advance, [2] rational arguments from those principles to particular cases, and, at least in a developed form, [3] a legal system independent of the executive for adjudication of disputes involving the general rules.⁴²

³⁵ Denise Meyerson, ‘The Rule of Law and the Separation of Powers’ (2004) 4 *Macquarie Law Journal* 1, 2.

³⁶ Keith Mason, ‘The Rule of Law’, in P D Finn (ed), *Essays on Law and Government Vol 1 Principles and Values* (Law Book Co 1995) Chapter 5, 115, 115-116.

³⁷ David Neal, *The Rule of Law in a Penal Colony* (Cambridge University Press 1991) 67.

³⁸ *Ibid* 64.

³⁹ John McLaren, ‘The Uses of the Rule of Law in British Colonial Societies in the Nineteenth Century’ in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought. Transpositions of Empire* (Palgrave Macmillan 2010) 71, 71.

⁴⁰ Neal, above n 37, 75.

⁴¹ *Ibid* 83.

⁴² *Ibid* 67.

There is, interestingly, disagreement about when the rule of law in a formal or ‘thin’ sense became embedded in the political and legal culture of colonial New South Wales. On the one hand, according to Neal:

The core components of the rule of law model – general laws, legal forms of argument and courts – gained a foothold in the colony along with the colonists; they were soon put to use...The courts, in particular, established a crucial bridgehead for the development of a fully-fledged version of the rule of law and for the transformation of the penal colony.⁴³

On the other hand, Holloway, Bronitt and Williams argue that:

...the modernist project associated with the rule of law mindset cannot be said to be fully formed in colonial Australia until after the arrival of lawyers such as Francis Forbes in the early 1820s...It was not until 1824, when the present Supreme Court of New South Wales was established, that the real debate over the nature of the rule of law began to take place in Australia.⁴⁴

Holloway and his fellow authors credit Forbes with instilling the spirit of English law in colonial Australia:

...what did happen — though in 1824, not 1788 — was that a court was created with all of the authority of the English common law courts. This meant not that the substantive law in New South Wales would be the same as in England, for it never had been, but that the legal dynamic would be the same. To put it another way, Australia did not receive English law, but it received - and this serves as the foundation stone of today’s Australian constitutionalism - English legal culture.⁴⁵

Importantly, they note Forbes’ view that only in exceptional circumstances could English law be tailored to the colonial setting and that any qualification had to be proportionate.⁴⁶ They cite an 1831 case where Forbes argued that the common law rule of ‘felony attain’ (which prevented convicts from testifying) should be maintained in colonial New South Wales despite the shortage of witnesses this might cause:

To determine this most delicate and important question, we must look to the spirit of the law of England, and satisfy ourselves whether the rule of law...be a rule founded in reason, and only admitting of a deviation, upon grounds of extreme necessity, and not sanctioning a departure any further than such necessity will justify.⁴⁷

⁴³ Ibid 86.

⁴⁴ Holloway et al, above n 27, 80, 87.

⁴⁵ Ibid 85.

⁴⁶ Ibid, 88, 97.

⁴⁷ Ibid, 96-7, citing *R v Farrell, Dingle and Woodward* (1831) 1 Legge 5. The other judges in this case, Justices Stephen and Dowling, held that a convict ‘could be a competent witness in the colony although this was not strictly in accord with the English common law on the subject’. Alex C Castles, ‘The Reception and Status of English Law in Australia’ (1963) 2(1) *Adelaide Law Review* 1, 9. As Castles says, this was a ‘limited exception’ where the unenacted English common law yielded to special conditions in New South Wales.

Despite differences over exactly when a ‘government of laws, not of men’⁴⁸ was transported to colonial Australia, it appears to be accepted therefore that by the late 1820s and the first of the examples in this thesis, there was at least a ‘thin’ or ‘formal’ rule of law in place requiring courts independent of executive government to apply established rules to particular cases, with only necessity of colonial circumstance justifying proportionate deviation from fundamental tenets of English law.

As the thesis illustrates, however, there was little attempt to follow established rules of English law in colonial and post-federation Australia when it came to determining the legal status of non-European inhabitants. Notwithstanding historical acclaim for his role in implanting the rule of law in colonial Australia, this included the New South Wales Supreme Court under Chief Justice Forbes in relation to the status of indigenous Australians (see Chapter One).

The Common Law as Birthright

Belief in the rule of law as a foundation for modern Australia is accompanied by reverence for the unenacted or ‘common’ law (that part of English law comprising case precedent and custom rather than legislation). Indeed the common law has been described as the ‘source of all legal authority’ in Australia.⁴⁹ Justice Windeyer referred to ‘the old and well-known principle of the common law that Englishmen going out to found a colony carried the law with them to their new home’, observing that:

...today lawyers look to the Statute of 1828 as the good root of title of our inheritance of the law of England. But we must not think of it as the source of that inheritance. The source is the common law itself. The law of England had come to Australia with the First Fleet, forty years before 1828.⁵⁰

As the High Court of Australia affirmed in *Mabo* (1992):

...once the establishment of the Colony was complete on 7 February 1788, the English common law, adapted to meet the circumstances of the new Colony, automatically applied throughout the whole of the Colony as the domestic law... within the Colony, both the Crown and its subjects, old and new, were bound by that common law.⁵¹

⁴⁸ The famous description of the rule of law from leading American revolutionary John Adams. John Adams, *Novanglus* Essays, No. 7. See www.john-adams-heritage.com/quotes/.

⁴⁹ H Patapan, ‘Australian Federalism: An Innovation in Constitutionalism’, in A Ward & L Ward (eds), *The Ashgate Research Companion to Federalism* (Ashgate Publishing, 2009) 485, 488.

⁵⁰ Windeyer, above n 2, 636. The ‘Statute of 1828’ is the *Australian Courts Act 1828* (Imp). According to Justice Windeyer, the 1828 Act ‘did not introduce the law of England in Australia, for it was already here. The only question was how much of it was here’ (at 667). Uncertainty about how much of the English common law was ‘applicable’ to the Australian colonies was resolved by the 1828 Act which incorporated into Australian law all relevant laws and statutes in force in England on 25 July 1828.

⁵¹ *Mabo v Queensland* (No 2) (1992) 175 CLR 1, 80 (Deane, Gaudron JJ).

The initial reception of English law in colonial Australia, according to former Justice Michael Kirby, ‘flowed without much distinction into the assumptions of precedent’.⁵² While the doctrine of precedent was only consolidated later in the nineteenth century,⁵³ there was a ‘general disinclination on the part of Australian courts to take into account special local conditions in deciding whether the general principles of unenacted law should apply’.⁵⁴ As Castles notes:

..a strong sense of unity was maintained between the unenacted law of England and Australia...[E]ven aside from the precedent making authority of the Privy Council, the Australian judiciary, to this day, places great weight on the authority of decisions handed down by the higher English courts.⁵⁵

By the latter part of the nineteenth century, it was unquestionable that courts in colonial and post-federation Australia, as part of the British legal hierarchy, had to adhere to the principles of English common law. As Justice Kirby said:

Until the 1970s and 1980s the Judicial Committee of the Privy Council in London was the final court of appeal for Australians and at the apex of our legal system. As such, in respect of any legal principle essential to the case, decisions of the Privy Council were binding upon all courts, both federal and state, throughout Australia.⁵⁶

Except where there were differences caused by the uniqueness of Australia’s situation,⁵⁷ courts in Australia could not deviate from legal interpretations determined by the Privy Council. In practice this extended also to rulings by the House of Lords (in its capacity as the final appeal court for the domestic English legal system). As Professor Leslie Zines commented:

...from the beginning it was probably inconceivable that an Australian court would, on an issue of a general principle of the common law, refuse to follow the House of Lords, even though it was recognised from an early date, that ‘technically’ the only decisions of a court in England that were binding were those of the Privy Council.⁵⁸

As Professor Zines noted, the Privy Council itself declared that the House of Lords ‘is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is

⁵² Justice Michael Kirby, ‘Australia and New Zealand’ in Louis Blom Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press, 2009) 339 (Chapter 19(a)), citing P E von Nessen, ‘The Use of American Precedents by the High Court of Australia, 1901–1987’ (1992) 4 *Adelaide L Rev* 181, 182.

⁵³ Alex C Castles, *An Australian Legal History* (Law Book Co, 1982), 448.

⁵⁴ Castles, ‘The Reception and Status of English Law in Australia’, above n 47, 9, 10.

⁵⁵ *Ibid* 9.

⁵⁶ Justice Michael Kirby, ‘Precedent - Report On Australia’ (Speech to International Academy of Comparative Law Conference, Utrecht, The Netherlands, 17 July 2006) 2-3.

⁵⁷ See p 11.

⁵⁸ Leslie Zines, ‘The Common Law In Australia: Its Nature And Constitutional Significance’ (2004) 32 *Federal Law Review* 337, 340.

bound by English law, is bound to follow it'.⁵⁹ Professor Paul Finn observed that the 'Anglo-centric orientation' of Australian law was further bolstered by the Privy Council which insisted it was 'of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same'.⁶⁰ As Justice Kirby says:

In the 19th century and throughout much of the 20th century great weight was also placed on maintaining uniformity within the English common law or '*the Common Law*' as it was usually described.⁶¹

Legal historian Alex Castles explains that not all English common law was transferable to colonial Australia:

...special district customs recognised by unenacted law in England were not part of the body of law which could be transported to colonies...local colonial courts would need to make judgments on whether unenacted law was sufficiently general in its import to be receivable...⁶²

For instance, Castles identifies 'a special system of landholding in Kent called gavelkind' and 'rules applied in England's ecclesiastical courts' as esoteric aspects of English law held not to be receivable in Australia.⁶³

Importantly, the common law was regarded not merely as guiding precedent for judicial decisions but also as the 'birthright' of subjects of the British Crown. Justice Windeyer noted that until 'Charters of Justice' were granted for New South Wales and Van Dieman's Land in 1823, there were complaints of bias in favour of the military in the judgments of officers who sat in the Civil and Criminal Courts:

...there were complaints that in the judicial arrangements of the Colony Englishmen abroad were being deprived of rights that Englishmen enjoyed at Home...It was a claim to enjoy ancient rights and lawful liberties. It embodied a concept – implicit and not analysed, but basic – of the common law as the ultimate foundation of British colonial institutions, a belief that not even Parliament could properly deprive British subjects anywhere of their birthright.⁶⁴

As Justice Kirby affirmed, 'English law did not simply provide a foundation for Australian and New Zealand law...In large part, English law was viewed as part of the *precious birthright* of the settlers'.⁶⁵ Justice Windeyer explained further that:

⁵⁹ Ibid, citing *Robins v National Trust Co* [1927] AC 515, 519.

⁶⁰ Paul Finn, 'Statutes and the Common Law', (1992) 22 *Western Australian Law Review* 7, 9, citing *Trimble v Hill* (1879) 5 App Cas 342, 345.

⁶¹ Kirby, 'Australia and New Zealand', above n 52, 339. Emphasis in original.

⁶² Castles, *An Australian Legal History*, above n 53, 501.

⁶³ Ibid.

⁶⁴ Windeyer, above n 2, 653.

⁶⁵ Kirby, 'Australia and New Zealand', above n 52, 339. Emphasis added.

The origin of that principle lies far back in the Middle Ages, in the doctrine, widespread in feudal Europe, of allegiance of subjects to their sovereign. A subject could not divest himself of his allegiance, except by becoming the subject of another sovereign. So that, wherever they went, men were bound by their allegiance and carried the law of their allegiance with them as a personal law. It was their birthright. It was also the measure of their duty.⁶⁶

Subject status as ‘birthright’

Calvin’s Case established that all people born in the territory of the King of England ‘were to enjoy the benefits of English law as subjects of the King’.⁶⁷ The case ‘began a three-century period in which the rule determining citizenship in the English-speaking world, a rule based on place of birth, was self-consciously the product of judicial decisions’.⁶⁸ As Professor Price of Emory University explains:

Remarkably, the rule of birthright citizenship derived from *Calvin’s Case* remained a status conferred by the common law, as opposed to statutory or constitutional law, for centuries. Until 1898 in the United States, and as late as 1949 in Britain, there were still some cases in which the determination of nationality depended upon the common-law rule of birth within a territory.⁶⁹

The principle of ‘birthright’ nationality or subject status set down in *Calvin’s Case* was not altered under English law at least until after World War Two⁷⁰ and under Australian law not until 1986.⁷¹ As Parry said with respect to the imperial *British Nationality and Status of Aliens Act 1914*:

The Act of 1914, in providing that any person born within the dominions and allegiance of the Crown should be deemed to be a British subject, merely put into statutory form a rule that had for centuries been a rule of the common law...The rule embodied the principle of the *jus soli* – of the attribution of nationality on the basis of place of birth irrespective of parentage or

⁶⁶ Windeyer, above n 2, 636.

⁶⁷ Polly Price, above n 7, 74.

⁶⁸ Ibid 75.

⁶⁹ Ibid 74.

⁷⁰ This rule was not altered by any British legislation until the *British Nationality Act 1948* (UK) after being affirmed by the *British Nationality and Status of Aliens Act 1914* (UK). See Geoffrey Sawer, ‘National Status of Aborigines in Western Australia’, *Report of Select Committee on Voting Rights of Aborigines* (Parliament House, Canberra 1961) Appendix III. For the 1948 changes, see Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and Republic of Ireland* (Stevens & Sons, 1957) 92ff; cf Kim Rubenstein, ‘From this time forward...I pledge my loyalty to Australia: Loyalty, Citizenship and Constitutional Law in Australia’ in Victoria Mason and Richard Nile (eds), *Loyalties* (Network Books 2007) 23.

⁷¹ The principle of ‘birthright’ nationality remained the law in Australia until section 10 of the *Australian Citizenship Act 1948* (now section 12 *Australian Citizenship Act 2007*) was amended by section 4 of *Australian Citizenship Amendment Act 1986*, with effect from 20 August 1986. Under the current law, birth in Australia only entitles a person to citizenship if a parent is themselves a citizen or permanent resident at the time of the birth or the person remains ‘ordinarily resident’ in Australia for ten years after their birth. See also Peter Prince, ‘We are Australian – The Constitution and Deportation of Australian-born Children’, *Research Paper* no 3, 2003-04 (Parliamentary Library, Canberra 2003) 10-14.

race. It involved that the *son of a Chinese national, born in the colony of Hong Kong*, was as much a British subject as the son of English parents, born in the United Kingdom.⁷²

Australia's *Nationality Act 1920* also adopted this common law principle in statutory form when it re-enacted the imperial 1914 Act as Commonwealth law. Section 6 deemed 'any person born within His Majesty's dominions and allegiance' to be a natural-born British subject. Consistent with the common law, an 'alien' was defined under section 5 as 'a person who is not a British subject'.

This meant that any person born in the various colonies and dominions of the British Empire acquired the imperial nationality of 'British subject', sharing common 'allegiance' to the English sovereign with every other such person. As the High Court affirmed in *Singh* (2004):

There is no doubt that after *Calvin's Case*, at common law, subject to exceptions for children of foreign diplomats and children of occupying armies, any person born within the British Dominions (*whatever the nationality of that person's parents*) was a natural-born British subject.⁷³

Despite the clear position under the law, this thesis argues that starting with the New South Wales Supreme Court under Chief Justice Forbes in the 1820s and continuing into Queensland until the Second World War or later, the 'precious birthright' of the common law - and hence the rule of law itself - was routinely ignored in determining whether inhabitants of Australia were 'aliens' or were entitled to 'birthright nationality' as natural-born subjects of the British Crown.

'Alien' as a concept

The principal concept in the *legal* notion of 'alien', as inherited and applied in Australia from British common law, is straightforward. Since *Calvin's Case* the fundamental meaning of 'alien' under the common law, a citizen of another state, has remained unchanged. As the High Court said in *Nolan* (1988):

As a matter of etymology, 'alien' from the Latin *alienus* through old French, means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the word means, as a matter of ordinary language, 'nothing more than a citizen or subject of a foreign state'.⁷⁴

In relation to the broader, *non-legal* concept of alien, as Linda Bosniak has observed:

⁷² Parry, *Nationality and Citizenship Laws*, above n 70, 151. Emphasis added.

⁷³ *Singh v Commonwealth* (2004) 222 CLR 322, 389 (Gummow, Hayne, Heydon JJ). Emphasis added.

⁷⁴ *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183 (Mason C.J. Wilson, Brennan, Deane, Dawson, Toohey JJ), citing *Milne v Huber* 17 Fed. Cas. 403, 406.

...there is, in fact, no essential alien. Alienage is inevitably tied up with race and gender, as well as with sexual orientation and national origin and religion and disability, in ways that can heighten disadvantage or can minimize or ameliorate it.⁷⁵

This was true in nineteenth and early twentieth century Australia, when non-Europeans were categorised as ‘aliens’ whether or not they came within that term in a legal sense. Race, national origin, religion and perceived differences in standard of living were factors, as were gender and even supposed sexual practices.⁷⁶ As Bosniak also observes:

The classic example of the ameliorative case in the U.S. context is that of the lawfully present northern European alien, whose privileged race and national origin often figure more significantly than non-citizenship in his or her social experience.⁷⁷

This was also true of colonial and post-federation Australia, where Germans, Scandinavians and other settlers from northern Europe – all ‘aliens’ in a legal sense under Australian law – were nevertheless exempt from restrictive legislation prohibiting ‘aliens’ from a range of occupations and activities.⁷⁸

Despite the clarity of the common law for centuries, the broader, non-legal meaning of the word ‘alien’ persistently influenced the exercise of power in Australia. The concepts of ‘otherness’, of being a ‘stranger’ and ‘foreigner’, were merged into understandings of ‘belonging to’ another nation. The fact that the same word has different but overlapping general and legal meanings allowed key political and legal figures in colonial and post-federation Australia to be less than precise in their use of the term. Indeed the ambiguous nature of the word made it a valuable political and legal tool in the White Australia era and in the pre-federation lead up to that era.⁷⁹ The term was routinely used to target people seen as ‘aliens’ in a racial not legal sense. It was particularly useful for legislators of the day because the ideas of ‘foreignness’ or ‘otherness’ at its heart matched the attitude of ‘White Australia’ towards non-European residents.⁸⁰

⁷⁵ Linda Bosniak, *The Citizen and the Alien, Dilemmas of Contemporary Membership* (Princeton University Press 2006) 134.

⁷⁶ See, for example, Chapter Two in relation to allegations of the routine practice of sodomy amongst Chinese settlers.

⁷⁷ Bosniak, above n 75, 210 n 48.

⁷⁸ See, for example, the sections on ‘White Aliens’ in Chapter Four, ‘Desirable versus undesirable aliens’ in Chapter Six and exemptions under Queensland’s alien and dictation test laws in Chapter Seven.

⁷⁹ Although its origins date to the resentment of white miners about ethnic Chinese on colonial goldfields in the 1850s, official accounts describe the White Australia policy as formally being in place from federation until its last vestiges were removed in 1973. <https://www.immi.gov.au/media/fact-sheets/08abolition.htm>.

⁸⁰ See Chapters Four and Six in particular.

Aliens and allegiance

Allegiance to the Crown acquired by birth on British territory, and not racial, religious or other characteristics, distinguishes a 'subject' from an 'alien'.⁸¹ As three judges said in *Singh*:

...the alien 'belonged to another'. Often that was expressed by reference to the concept of allegiance and often it was expressed in terms that, by their definitions, assumed that the world could be divided into two groups. Either one was a British subject or one was an 'alien'. And those groups were defined by reference to the nature of the allegiance they owed.⁸²

Throughout the period considered by this thesis - and continuing until this day - an 'alien' in a legal sense is defined as a person who owes 'allegiance'⁸³ to some power other than the sovereign of Australia. As Chief Baron Macdonald of the Court of Exchequer said in *Daubigny v Davallon* (1794):

...now the word *alien* is a legal term, and amounts to as much as many words; an alien must be *alien né*... It implies being born out of the liegeance of the King, and within the liegeance of some other state.⁸⁴

In *Ame's Case* (2005), the High Court of Australia confirmed the common law on this issue has not changed in the four hundred years since *Calvin's Case* and that the defining characteristic of an 'alien' remains the 'owing of allegiance to a foreign sovereign power'.⁸⁵

There are different types of allegiance under the common law with varying rights and obligations. As Sir John Salmond, inaugural Professor of Law at the University of Adelaide, explained in 1902, 'natural' or 'natural-born' subjects owe *permanent and personal allegiance* to the sovereign. They are permanently bound by the bond of fealty and in return

⁸¹ JW Salmond, 'Citizenship and Allegiance' (1902) 18 LQR 49, 51, citing *Forsyth's Cases and Opinions in Constitutional Law*, 262. See also *Singh v Commonwealth* (2004) 222 CLR 322, 395 (Gummow, Hayne and Heydon JJ).

⁸² (2004) 222 CLR 322, 395 (Gummow, Hayne and Heydon JJ).

⁸³ The concept of allegiance has its origins in feudal times. As Salmond noted, 'allegiance' is a corruption of liegeance (*ligentia*) derived from liege (*ligius*) meaning 'absolute or unqualified'. A fundamental maxim of feudalism was that a person could owe 'fealty' or loyalty to two or more lords, but 'liege fealty' (*ligentia*) to only one. A person could have two lords, but not two liege lords. As feudalism grew and prospered, 'binding all men within the kingdom into a hierarchy of lords and vassals, and as the King made good his position as the sovereign lord of all men within his kingdom', it became clear that the King could be the only 'liege lord' because all faith or fealty which a person might owe to other lords was subject to that owed to the King. Salmond, above n 81, 51. With the evolution of a constitutional monarchy in Britain, allegiance ceased to be regarded as personal and instead was owed to the King 'in his politic, and not his personal, capacity'. *Re Stepney Election Petition; Isaacson v Durant* (1886) LR 17 QBD 54, 66. See Clive Parry, *British Nationality* (Stevens & Sons, 1951) 7. So 'allegiance' took on its modern meaning - fidelity or loyalty owed from a subject to the Crown. Salmond, above n 81, 51.

⁸⁴ *Daubigny v Davallon* (1794) 2 Anstr. 462, 468. Emphasis in original.

⁸⁵ *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Ame*; (2005) 222 CLR 439, 458. See Peter Prince, 'Mate!: citizens, aliens and 'real Australians': the High Court and the case of Amos Ame', *Research Brief* no 4, 2005-06 (Parliamentary Library, Canberra 2005).

are permanently entitled to the King's protection. This was an enduring status and applied even beyond the realm of England. 'Alien subjects', on the other hand, owed merely *temporary and local allegiance* while residing in the King's dominions. As long as this residence continued, such people stood within the King's protection and owed him 'correlative allegiance'. They had to obey the King's law and submit to royal government and jurisdiction, but unlike natural subjects could withdraw from these obligations at any time. Beyond the realm of England they were not answerable to the King.⁸⁶

A critical point for this thesis is that under the common law a foreigner or 'outsider' living in the King's territory is not a 'natural subject' and owes merely temporary or local allegiance, whereas a child of such a person born in the King's dominions is a 'natural-born subject'⁸⁷ and cannot be classified as an 'alien' legally. In *Calvin's Case* Sir Edward Coke set out the classic common law rule regarding 'natural-born subjects':

There be regularly...three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom.⁸⁸

As Coke's statement indicates, temporary or local allegiance ('actual obedience') on the part of the parent(s) was sufficient to confer the status of 'natural-born subject' on locally-born children. As the United States Supreme Court said in 1830:

Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.⁸⁹

In 1898 the US Supreme Court again applied the principle from *Calvin's Case* when it declared that ethnic Chinese born to alien parents in the United States were citizens at birth:

Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke,

⁸⁶ Salmond, above n 81, 50.

⁸⁷ As Salmond noted, 'To this day English law has derogated in no way from the feudal principle that a man of alien parentage born in England is a British subject'. Ibid, 53 n 1. However, locally born children of those not subject to the sovereign's jurisdiction, such as diplomats or a member of an invading army, would not qualify as natural born subjects under this principle.

⁸⁸ 7 Co. Rep 1a, 18a, 18b; 77 ER 377, 399. Cited by the High Court in *Nolan* (1988) 165 CLR 178, 189 (Gaudron J); *Taylor* (2001) 207 CLR 391, 429 (McHugh J) and 482 n 320 (Kirby J); and *Te and Dang* (2002) 193 ALR 37, 49 (Gaudron J), 62-63 (Gummow J).

⁸⁹ *Inglis v Sailor's Snug Harbour* (1830) 28 US 99, 164.

in *Calvin's Case* 'strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject'.⁹⁰

Birth within the dominions of the Crown was by far the most important way in which a person became a British subject. As Salmond noted in 1902, factors such as race or 'blood' were irrelevant and place of birth was all that mattered:

He may be by blood a Frenchman or a Chinaman, but if he first saw the light on British soil he is a British subject. Conversely if he is born beyond the boundaries of the empire, he is judged an alien, though he may be an Englishman by blood and parentage.⁹¹

While there were some exceptions to this absolute rule,⁹² as Parry observed in *British Nationality* (1951):

...before 1949⁹³ a person born in British territory was prima facie, and in all but a very limited number of cases, a British subject at and from his birth, and a person born out of British territory was prima facie, and save in a limited number of cases, not a British subject at and from his birth.⁹⁴

A person's place of birth created *permanent and indelible* loyalty or allegiance to the sovereign of the land. Under the common law, individuals could not revoke their allegiance and take up another nationality of their own accord.⁹⁵ This created an underlying tension with the other main method of becoming a 'subject', namely 'naturalisation'.⁹⁶

⁹⁰ *United States v Wong Kim Ark* 169 US 649, 693 (1898). The common law rule from *Calvin's Case* was incorporated in the Fourteenth Amendment to the United States Constitution in 1868. As the Supreme Court said, 'the Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes'. 169 US 649, 693.

⁹¹ Salmond, above n 81, 53.

⁹² In particular, children born overseas to British subject parents were – to varying degrees depending on the policy of the time – regarded as subjects themselves. As Parry notes, children born outside the 'ligeance of King' to 'fathers and mothers' within the 'faith and ligeance' of the King were treated as subjects. Parry, *Nationality and Citizenship Laws*, above n 69, 31. In the 1351 law *De natis ultra mare* 25 Edward III provided a partial remedy to the rule that the son of an Englishman, if born abroad (and therefore an alien), could not inherit his father's real estate. Salmond, above n 81, 53, n 1. Under the *British Nationality Act 1730* (UK) (4 Geo II, c. 21) and *British Nationality Act 1772* (UK) (13 Geo III, c. 21) a person born abroad to a natural born British subject father, or the son of such a person, was deemed to be a natural born subject. This was extended under the *British Nationality and Status of Aliens Act 1914* (UK) which treated as a natural born subject a person born abroad to a father who was a British subject by birth or naturalisation. W E Wilkinson, (1914-1915) 40 (5th ser) *Law Magazine and Review: A Quarterly Review of Jurisprudence* 187; Salmond, above n 81, 53, n 1.

⁹³ With the commencement of extensive changes under the *British Nationality Act 1948* (UK).

⁹⁴ Parry, *British Nationality*, above n 83, 21.

⁹⁵ Salmond, above n 81, 52.

⁹⁶ The inherent conflict between naturalisation and 'perpetual allegiance' caused a long standing rift between the United Kingdom and the United States in the nineteenth century. Despite its long

Aliens and naturalisation

The strict notion of allegiance as ‘absolute or unqualified’ affected the perception and legal treatment in Australia of ‘naturalised’ subjects (those who had formerly owed allegiance to another country). According to Salmond, naturalisation was ‘an agreement by which an alien is received into the permanent allegiance of the Crown’.⁹⁷ While colonial parliaments could naturalise foreigners, the effect was limited to that territory.⁹⁸ Consequently, as Salmond noted in 1902:

A man may be a British subject in one part of the empire, and an alien in another part. In New Zealand he may be an Englishman, and in England a Frenchman. In Victoria he may

history of naturalising foreigners, Britain had refused to accept that its own subjects could become citizens or subjects of another power and free themselves from the ‘indelible allegiance’ they owed to the British Crown. A 1783 treaty declared that British subjects already settled in the United States at independence were citizens of the new nation. But British immigrants to the new state were not allowed to naturalise and throw off allegiance to the King. In 1807 an official British Proclamation declared that ‘no such letters of naturalisation, or certificates of citizenship’ can divest natural-born subjects of their allegiance and duty to the ‘lawful sovereign’. See F B Edwards, ‘Common Law Naturalisation and Expatriation’ (1915) 15 *Journal of the Society of Comparative Legislation* 108, 113-114; P J Spiro, ‘Dual Nationality and the Meaning of Citizenship’ (1997) 46(4) *Emory Law Journal* 1411-1421 n 36, 1422. In the early 1800s, British naval ships forcefully asserted this doctrine against former British subjects found on US flagged vessels, ‘impressing’ many into military service. This was an ‘important contributing factor’ in the 1812-14 Anglo-American war. The problem festered until 1868 when Britain charged naturalised US citizens with treason, causing outrage in the United States and prompting a Royal Commission in Britain, which in turn led to the abandonment of permanent allegiance as a guiding principle of British nationality in the *Naturalisation Act 1870*. See Parry, *Nationality and Citizenship Laws*, above n 70, 77-79; E B Sargant, ‘Naturalisation in the British Dominions, with Special Reference to the British Nationality and Status of Aliens Bill’, (1914) 14 *Journal of the Society of Comparative Legislation* 327. The *Naturalization Act 1870* was careful to provide ‘to some extent’ against the existence of ‘double allegiance’. As Salmond notes, the legislation provided that the reception of a British subject into the allegiance of foreign state ‘extinguishes his British nationality ipso jure’. Salmond above n 81, 56.

⁹⁷ Salmond above n 81, 56. The first recorded examples of ‘naturalisation’ date from the 13th century and were more correctly ‘endenization’ - an exercise of royal prerogative through letters patent. In 1295 King Edward I declared that because of the meritorious services of one Elyas Daubeny and his ancestors to the King and his progenitors, Daubeny ‘*shall be reputed and taken to be Anglicum purum*’. Until the mid-nineteenth century, ‘private’ Acts of Parliament naturalising individuals and ‘letters of denization’ from the sovereign were normally the only means of acquiring the status of British subject. Both were expensive. In the early 1800s an individual naturalisation bill cost £100. The charge for endenization was £120, although not less than seven individuals were included in each instrument. Parry, *Nationality and Citizenship Laws*, above n 70, 69. The first modern naturalisation Acts were passed in Britain in the nineteenth century. See *Imperial Aliens Act 1844* (also known as *Naturalisation Act 1844*) 7 & 8 Vict. C. 66 (Imperial). The 1844 Act took the important step of authorising naturalisation by government officials, removing the need for personal legislation. However, doubts immediately arose as to whether naturalisation certificates issued in accordance with the 1844 Act ‘had any force in the overseas dominions of the Crown’. Parry, *Nationality and Citizenship Laws*, above n 70, 69, 76.

⁹⁸ *Naturalisation Act 1847* 10 & 11 Vict. C. 83. 1847. This legislation confirmed that colonial legislatures had power to impart all or any of the privileges of naturalisation of their own motion, to be ‘*exercised and enjoyed within the respective limits of such colonies or possessions respectively*’. Parry, *Nationality and Citizenship Laws*, above n 70, 76. Emphasis added.

owe permanent allegiance to the British Crown, and on crossing the border into New South Wales he may find himself an alien.⁹⁹

In other words, any person naturalised under the laws of an Australian colony became a 'British subject' but only within that particular colony. This position changed with federation. In the *Naturalization Act 1903* (Cth), the new Commonwealth Parliament granted subject status across the federation as a whole to any person naturalised under the law of a former Australian colony.¹⁰⁰

An enduring theme in law and popular perception is that 'naturalised' subjects are not the equal of their 'natural-born' counterparts. Historically, 'naturalised' subjects lacked the full rights and privileges of 'natural subjects'. In the United Kingdom they could not be granted Crown land or become a Privy Councillor or Member of Parliament, and their children born overseas were not considered British nationals. While the *Naturalisation Act 1870* removed most of these restrictions for the United Kingdom,¹⁰¹ the various British Dominions, including the Australian colonies, continued to discriminate between different classes of British subjects.¹⁰² Underlying this difference in perception and legal treatment was the view that naturalised subjects lacked the degree of loyalty or allegiance inherently acquired by those born within the territory of the sovereign. This had a particular effect on the legal position of non-European settlers in Australia in the nineteenth and twentieth centuries. Not only were they seen as 'aliens' in the common or racial meaning of the word, but the process of naturalisation was considered insufficient to give them allegiance to Australia and the

⁹⁹ Salmond above n 81, 58.

¹⁰⁰ As well as to any person naturalised under a law of an Australian State between 1901 and the commencement of the 1903 Act on 1 January 1904. Section 4 of the 1903 Act stated that 'A person who has before the passing of this Act obtained in a State or in a colony which has become a State a certificate of naturalization or letters of naturalization shall be deemed to be naturalized'. Once this federal act came into force, naturalisation of 'aliens' could occur only under Commonwealth and not State law. A limited form of common naturalisation had been introduced shortly before federation. At the insistence of Victoria and Queensland, the Federal Council of Australasia enacted the *Australasian Naturalisation Act 1897* which provided for granting of certificates to naturalised persons of European descent, which meant that if they moved to another Australasian colony which was a member of the Council and complied with any residency conditions applying there, they were deemed to be naturalised in that other colony. Parry, *Nationality and Citizenship Laws*, above n 70, 528. The effect of this legislation was reduced, however, since the largest Australasian colony, New South Wales, as well as New Zealand, were never members of the Federal Council.

¹⁰¹ *Naturalization Act 1870* s 7.

¹⁰² For example, section 12 of Queensland's *Aliens Act 1867* stipulated that naturalised 'Asiatics and Africans' 'shall not be capable of becoming a member of the Executive or Legislative Council or Legislative Assembly'. This provision was not repealed until the enactment of the *Aliens Act 1965* (Qld).

British Empire, justifying their continued treatment as ‘aliens’ even if they had formally become ‘subjects’ of the Crown.¹⁰³

In turn this led to a curious paradox in relation to naturalisation in colonial and post-federation Australia. On the one hand many Anglo-Celtic lawmakers believed that non-European settlers (especially Chinese migrants) - regarded as ‘alien’ because of their different culture and ethnic background - could only become British subjects and legal members of the community through the formal process of naturalisation. There was a refusal to accept that people who were so ‘alien’ in the perception of white Australian society might already be ‘non-aliens’ under British law by virtue of their birth in a British colony or dominion.

On the other hand, white colonists feared naturalisation as a mechanism by which non-Europeans could infiltrate British society and undermine the racial purity and way of life of the white community. Around the time of federation, for example, the government of South Australia decided it would not ‘grant any more letters of naturalization to Asiatic aliens’ unless formally requested to do so by the House of Assembly.¹⁰⁴ During a parliamentary debate in 1903, one member opposed the naturalisation of a Palestinian man who had run a successful hawker’s business in South Australia for the last fourteen years because:

Asiatic peddlers in the country districts were not only a pest, but in some cases were almost a source of danger to lives...Where were they to draw the line if they naturalized men like that? Asiatics swarmed around the country like ants, to the great disadvantage of white storekeepers, who could not possibly compete with them...it would encourage other Asiatics to swarm over the country. He was not one of those who said “Australia for the Australians”, but he believed in Australia for white men. It was on those lines he opposed the naturalization.¹⁰⁵

Anxiety that naturalisation enabled those seen as less than human (‘pests’, ‘ants’) to infiltrate or ‘swarm’ across Australia, together with a refusal to accept a legal process converting ‘alien’ non-Europeans into loyal British subjects, is an example of how race was more important than the rule of law in colonial and post-federation Australia.

¹⁰³ See, for example, Chapter Two page 94 (Premier Gillies of Victoria 1888); Chapter Six page 226 (Mr McGhie, Queensland Legislative Council, 1911).

¹⁰⁴ South Australia, *Debates in the House of Assembly during the second session of the seventeenth Parliament of South Australia*, 14 October 1903, 588. The former Australian colonies continued to be responsible for naturalization until the Commonwealth assumed this function on 1 January 1904 under the *Naturalization Act 1903* (Cth). See above n 100.

¹⁰⁵ Ibid 588 (Mr Conybeer). On this occasion, however, the House of Assembly supported the motion to request the Chief Secretary to approve the naturalization of Mr Salim Eblem (at 590). For an account of the ‘second class’ standing in the modern era of naturalised Australian citizens who retain their original foreign citizenship, see Kim Rubenstein, ‘From Supranational to Dual to Alien Citizen: Australia’s Ambivalent Journey’ in S. Bronitt and K. Rubenstein (eds) *Citizenship in a Post-National World, Australia and Europe Compared*, Law and Policy Paper 29, Centre for International and Public Law (Federation Press 2008) 38.

Australians as British subjects

As late as 1947 Wade and Phillips contended that the whole of the British Commonwealth and Empire was ‘united by the one tie of allegiance to the Crown, and all its nationals enjoy the status of British subjects, wherever they may be, by reason of their common nationality’.¹⁰⁶ As Justice Higgins said in *Potter v Minahan* (1908):

All the King’s subjects are members of one great society, bound by the one tie of allegiance to the one Sovereign, even as children hanging on to the ropes of a New Zealand swing. The top of the pole is the point of the union: *Calvin’s Case*.¹⁰⁷

At least until the creation of Australian citizenship by legislation in 1949, the nationality of Australians in a constitutional or formal legal sense was solely that of ‘British subject’. As the High Court said in *Attorney-General for the Commonwealth v Ah Sheung* (1907), ‘we are not disposed to give any countenance to the novel idea that there is an Australian nationality as distinguished from a British nationality...’.¹⁰⁸ Similarly, Justice Higgins in *Potter v Minahan* rejected the idea that there was ‘an Australian species of British nationality’, stating emphatically that:

I cannot find any foundation for these contentions. Throughout the British Empire there is one King, one allegiance, one citizenship. I use this last word, not in the Roman or in the American sense, but only because there is no suitable abstract noun corresponding to the word ‘subject’ (natural-born or naturalized).¹⁰⁹

Helen Irving notes that as the Australian colonies moved towards federation, there was much discussion of ‘citizenship’:

In the 1890s, the word ‘citizen’ appears again and again, in speeches, in the press, in the rules and charters of organisations, and in debates about political entitlement. We find the rhetoric of citizenship attached in particular to the federation movement.¹¹⁰

Although Australians used the term ‘citizen’, the only legal category of membership under imperial law at this time was ‘British subject’. As Irving says, ‘the citizens were, minimally,

¹⁰⁶ E C S Wade, and G Godfrey Phillips, *Constitutional Law: An Outline of the Law and the Practice of the Constitution, Including Central and Local Government and the Constitutional Relations of the British Commonwealth* (Longmans, 3rd ed, 1947) 361.

¹⁰⁷ (1908) 7 CLR 277, 320-321.

¹⁰⁸ (1907) 4 CLR 949, 951 (Griffith CJ, Barton and O’Connor JJ).

¹⁰⁹ (1908) 7 CLR 277, 320-321. See also Chief Justice Latham in *R v Burgess, ex parte Henry* (1936) 55 CLR 608, 647, 649-50 where he stated: ‘There is not yet any established legal category of “Australian nationals”...The general rule as to nationality in Australia is the same as that in Great Britain. Any person who is a British subject in Great Britain would be regarded as a British subject in Australia. *Within the class of British subjects recognized as such in Australia there are in Australia no distinctions.* The Canadian-born British subject in Australia, so far as nationality is concerned, is upon precisely the same footing as the Australian-born or English-born British subject’. Emphasis added.

¹¹⁰ Helen Irving, ‘Citizenship before 1949’, in Kim Rubenstein (ed), *Individual, Community, Nation: Fifty Years of Australian Citizenship* (Australian Scholarly Publishing, 2000) 9, 10.

British subjects, either by birth or naturalisation'.¹¹¹ In terms of practical (as against legal) membership, Irving notes 'being a British subject was not enough: "coloured" subjects from Hong Kong or India, for example, had difficulty being considered "citizens" in Australia'.¹¹²

Importantly, as Justice Higgins indicated in *Potter v Minahan*, the legal identity of Australians as British subjects was shared with inhabitants of other British possessions. Any natural-born or naturalised inhabitant of the various British colonies and dominions across the world - whatever their racial background and whether they were in Africa, Asia, the Pacific Islands or Australasia - shared the imperial nationality of 'British subject', with a common allegiance to the King of England. In other words, all those living in Australia born as subjects in the United Kingdom or a British imperial possession or naturalised in an Australian colony were 'British subjects' and could not - by definition and at least until 26 January 1949¹¹³ - be legally treated as 'aliens' in the various Australian jurisdictions.¹¹⁴ As Justice McHugh explained in *Re Patterson* (2001), 'prior to the completion of the evolutionary process that made the United Kingdom a foreign power, the Parliament could not have asserted that British subjects, living in Australia, were aliens'.¹¹⁵

It followed that while there were many other factors which in practice determined if a person became a member of the Australian community, the only formal legal test until after World War Two was whether a person was a 'subject' or an 'alien'. If a person was a British subject, he or she could not, under the law applying in Australia, be an 'alien'.

This distinction was, however, routinely ignored by key figures in colonial and post-federation Australia who described and treated non-European settlers as 'aliens' even if they were legally British subjects, undermining the very rule of law upon which the society was founded.

¹¹¹ Ibid 12.

¹¹² Ibid.

¹¹³ The date on which the *Nationality and Citizenship Act 1948* (Cth) came into effect. In *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, Chief Justice Gleeson and Justices Gummow and Hayne, supported by Justice Heydon, said that at least from this point there was a distinct Australian nationality that Britons arriving in this country did not share.

¹¹⁴ Except, of course, before 1 January 1904 in the case of people naturalised in an Australian colony or State whose naturalisation had no effect in the other Australian jurisdictions.

¹¹⁵ (2001) 207 CLR 391, 436.

Aliens and racial discrimination

*'...as long as human societies have assumed and perpetuated the idea that there are distinct races across the world, much misery has resulted. Today we understand there are no distinctions to be made among peoples on the basis of race. We are a human race. While we do not share a uniform culture, language, religion and ethnicity, we do share one characteristic: we are members of a single race.'*¹¹⁶

Australia played a prominent role in global racial discrimination in the nineteenth and twentieth centuries. After Japan's proposal for 'racial equality' to be included in the Covenant of the League of Nations was defeated at the 1919 Paris Peace Conference,¹¹⁷ the British Foreign Office warned of the danger for world order, observing that the issue:

...primarily concerns the following countries: Japan, China, British India, United States of America...Canada, Australia, New Zealand, South Africa. The first three countries demand the right of free immigration and freedom from discrimination disabilities for their nationals in the territories of the last five countries. The question can be regarded from an economic or from a political point of view, but in essence it is a racial one.¹¹⁸

Coinciding with the unprecedented immigration of the second half of the nineteenth century, the emergence of 'Social Darwinism' allowed lawmakers in 'white men's countries' such as Australia to rationalise racial discrimination against non-whites.¹¹⁹ As Lauren argues, 'Europeans eagerly seized upon this biological conception of survival of the fittest and used it to advance further the idea of a struggle for existence among the races of mankind'.¹²⁰ Arguments of racial struggle based on Darwinian concepts justified (and were reinforced by) European imperial conquests in Africa, Asia and the Pacific.¹²¹ Key political figures in Australia were strongly influenced by social Darwinists including E.A. Freeman, the 'pre-eminent English historian of race'.¹²² As Lake and Reynolds observe, Freeman preached that 'history was the story of Anglo-Saxon triumph'. They note that his 'extravagant Saxonism':

...presented in numerous public lectures and books, had a major impact on historical thinkers and political leaders of the late nineteenth century, especially in the young countries of the

¹¹⁶ Noel Pearson, 'A Rightful Place. Race, Recognition and a more complete Commonwealth' (2014) 55 *Quarterly Essay* 1, 52.

¹¹⁷ See Marilyn Lake and Henry Reynolds, *Drawing the Global Colour Line: White Men's Countries and the Question of Racial Equality* (Melbourne University Press 2008) 284ff.

¹¹⁸ Public Record Office, Foreign Office, United Kingdom, 371/6684, 10 October 1921, as cited in Paul Gordon Lauren, *Power and prejudice: the politics and diplomacy of racial discrimination* (Westview 1988) 103.

¹¹⁹ Lauren, above n 118, 37.

¹²⁰ Ibid 45.

¹²¹ Ibid 58-59.

¹²² Lake and Reynolds, above n 117, 51.

United States and Australia, where English-speaking peoples were keen to identify with their long ‘race history’.¹²³

The word ‘alien’ was a significant part of the discriminatory terminology used to describe non-white inhabitants in nineteenth and twentieth century Australia. As John Docker has observed, wherever European colonists went in the world and despite the little time they may have been in a new place, they were not:

...*aliens* or outsiders from distant continents but the immediate rightful settlers at home in this their new home with the confidence to do immediate injury to those already there or not from Europe or not from the right part of Europe: people who [could] be immediately designated by the new settlers as *aliens* or outsiders or not belonging.¹²⁴

Promulgated by colonial leaders in Australia as an appropriate description of Chinese, Indian, Pacific islander and other non-white settlers, the term ‘alien’ became justification in itself for discrimination. Non-Europeans were ‘alien’ or different in the eyes of the Anglo-Celtic community, so they could also be treated differently. In this way ‘alien’ was an important language or discourse tool used to reinforce the dominance of the white community. As Bloor and Bloor state:

We do not claim...that discourse is the only factor – or even the main factor – in the establishment or maintenance of dominant groups. For that we might look to wealth, class, political control, military strength, and so on, but there is no doubt that dominance is practised and reproduced through language.¹²⁵

In discussing the language of colonial government in Australia, Bruce Buchan emphasises ‘the ways in which the conceptual language spoken by the colonists framed their understanding of the policies and techniques of government they adopted’.¹²⁶ According to Buchan:

...when colonists used terms drawn from the traditions of Western political thought, such as ‘government’, ‘property’, ‘sovereignty’, ‘society’, ‘savagery’ or ‘civilization’, they did not use them simply as descriptions. Rather, these terms formed part of a *wider discourse* in which moral and political claims about themselves and others were advanced.¹²⁷

This thesis demonstrates that in colonial and post-federation Australia the term ‘alien’ was also part of a ‘wider discourse’ in which not only moral and political but also *legal* claims about Anglo-Celtic colonists and others were advanced. Portrayal of non-Anglo-Celtic

¹²³ Ibid 51-52.

¹²⁴ See Ian Welch, *Alien Son: The Life and Times of Cheok Hong Cheong, 1851-1928* (PhD thesis, Australian National University 2003) 327, citing John Docker, ‘Opening remarks’ (Paper presented Conference on *Reconceptualising the Southern Chinese: From Community to Diaspora*, Australian National University, 27 February 1999). Emphasis added.

¹²⁵ Meriel Bloor and Thomas Bloor, *The Practice of Critical Discourse Analysis. An Introduction* (Hodder Education, 2007) 85.

¹²⁶ Bruce Buchan, *Empire of Political Thought: Indigenous Australians and the Language of Colonial Government* (Pickering and Chatto 2008) 2.

¹²⁷ Ibid. Emphasis added.

‘others’ as ‘aliens’ in a racial sense influenced the policies and techniques of government in Australia before and after federation. This included incorrectly treating all non-Europeans as ‘aliens’ in legislation, prosecutions and other legal contexts - despite the inconsistency of such an approach with the concept of ‘alienage’ under the rule of law.

Notwithstanding their different beginnings, the Australian colonies developed a common discriminatory discourse in relation to the word ‘alien’. This was shown most clearly at the 1890s constitutional conventions where representatives from the various Australasian colonies uniformly employed the phrases ‘alien races’ and ‘coloured aliens’ to describe people of non-European origin.

The ambiguity of the word ‘alien’ made it especially valuable for discrimination in law. This was particularly the case in Queensland after federation. Contrary to current understanding,¹²⁸ there remained a justified fear in Queensland until well after World War One that royal assent would be withheld for legislation contravening the imperial policy against open discrimination.¹²⁹ The following dilemma confronted imperial authorities towards the end of the nineteenth century:

[Racist] sentiments from self-governing territories found much sympathy in the corridors of power in London but also proved to be a source of public embarrassment, especially when the statements involved people from within the empire itself. Any open discrimination would belie the stated Imperial philosophy of the equality of all British subjects, provoke liberal opposition at home, and cause great indignation in areas like India.¹³⁰

As Quick and Garran documented, in 1896 the Australian colonies intended to extend restrictive legislation aimed at Chinese immigrants to all ‘coloured races’ because of ‘increasing immigration of Indians, Afghans, and other Asiatics, many of whom were British subjects’. Laws to this effect passed by New South Wales, South Australia and Tasmania did not receive royal assent.¹³¹ In 1899 legislation passed by the Canadian province of British Columbia preventing Japanese working in coal mines met a similar fate.¹³² In 1903 Joseph Chamberlain, Secretary for the Colonies, expressed Britain’s strong objection to the new Commonwealth Government’s *Post and Telegraph Act 1901*, which permitted only white labour to be used in any official mail contract.¹³³ While royal assent was not withheld,

¹²⁸ Aitken and Orr above n 11, 39-40, 44. See further discussion in Chapter Six.

¹²⁹ See Chapter Six.

¹³⁰ Lauren, above n 118, 52.

¹³¹ John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Legal Books, first published 1901, 1995 ed) 626-7.

¹³² Lake and Reynolds, above n 117, 179.

¹³³ Section 16 *Post and Telegraph Act 1901* (Cth).

enactment of this legislation led to termination by the British of joint arrangements with Australia for the carriage of mail. In a blunt dispatch admonishing the new federal parliament for passing the statute, Chamberlain set out the history of the imperial commitment to non-discrimination in legislation.¹³⁴ This public castigation¹³⁵ of Australia's parliament by a senior imperial statesman emphasises the strength of the British objection to explicit racial discrimination. However this is not to suggest the British Government opposed racial discrimination in practice. Britain's concern was for its international relations (and relations within its empire) rather than an absolute commitment to non-discrimination on the grounds of race. But to avoid antagonising Britain's Indian subjects and to protect its developing relationship with Japan, imperial authorities intervened - where they thought it was in their interests to do so - to prevent openly prejudicial laws put forward by colonial and dominion parliaments from being enacted.

As discussed further in Chapter Six, in conjunction with the education or 'dictation' test borrowed from the new Commonwealth, the term 'alien' was an important linguistic mechanism used in Queensland legislation until well after federation to avoid imperial

¹³⁴ As Chamberlain said:

'His Majesty's Government much regret that the legislation which has recently been passed in Australia has made it impossible to be associated in future with the Government of the Commonwealth in any mail contract...the legislation in question, affecting as it does principally Indian subjects of His Majesty, leaves no other course open to them. By the Mutiny Proclamation of 1858 the Crown declared itself bound to the natives of its Indian territories by the same obligations of duty which binds it to all its other subjects, and undertook faithfully and conscientiously to fulfil those obligations. It would not be consistent with that undertaking for His Majesty's Government to become parties to a contract in which employment of His Majesty's Indian subjects is in terms forbidden, on the ground of colour only. His Majesty's Government have shown every sympathy with the efforts of the people of Australia to deal with the problem of immigration, but they have always objected, both as to aliens and as to British subjects, to specific legislative discrimination in favour of, or against, race and colour... Even if the service were one upon which His Majesty's Indian subjects had not hitherto been employed, it would destroy the faith of the people of India in the sanctity of the obligations undertaken towards them by the Crown if the Imperial Government should become in any degree whatever party to a policy of excluding them from it solely on the ground of colour. But where they have already been employed in the service for a long period of years, to proscribe them from it now would be to produce justifiable discontent amongst a large portion of His Majesty's subjects. His Majesty's Government deeply regret that their feeling of obligation in this matter is not shared by the Parliament of the Commonwealth, and that in regard to a matter which cannot affect the conditions of employment in Australia, and in no way affects that purity of race which the people of Australia justly value, they should have considered it desirable to dissociate themselves so completely from the obligations and policy of the Empire'.

Arthur Berriedale Keith, *Responsible Government in the Dominions* Volume II (Clarendon Press 1912) 1084-1085; citing *Parliamentary Papers*, cd, 1639, 4,5; *Commonwealth Parliamentary Papers* 1903, Nos 21 & 40.

¹³⁵ Chamberlain's admonishment was published, interestingly, in the *New York Times* on 26 July 1903.

rejection of discriminatory laws. This racially neutral legal term was used for discriminatory purposes despite the inconsistency with its meaning under the ‘British’ common law.

Aliens as threat

Various groups of inhabitants were classed as ‘aliens’ in Australia if they were ‘different from’ the Anglo-Celtic colonisers and especially if they were seen as any form of threat. When key figures in colonial and post-federation Australia referred to ‘aliens’ they invariably raised the menace such people posed to the security, health, labour or living standards of the Anglo-Celtic population. Indeed, it seemed almost a pre-requisite for particular groups of ‘outsiders’ to be regarded as a danger before they were categorized as ‘aliens’.

In the early decades of European settlement aboriginal people were seen as a threat and labelled as ‘aliens’ by prominent colonial figures. According to Peter Bayne:

Many settlers in violent contact (or, as was often said, at war) with the Aborigines held the view that the Aborigines were not to be regarded as British subjects. Sometimes they were regarded as ‘enemy aliens’ to justify the use of force against them. Some senior officials, such as the explorer Thomas Mitchell, certainly took this view and acted upon it.¹³⁶

In 1836 Mitchell, then Surveyor-General of New South Wales, conducted an expedition in which a large number of Aborigines were killed. Bayne states that Mitchell’s report ‘caused consternation at the Colonial Office...due to the fact that Mitchell regarded the Aborigines as “Aliens with whom war can exist, and against whom HM’s Troops may exercise belligerent right”’.¹³⁷

However the main groups regarded and targeted as ‘aliens’ in colonial and post-federation Australia were the non-European settlers who arrived from the 1850s onwards. In 1919 the Queensland Court of Industrial Arbitration held three days of hearings in Cairns to consider an application from the Australian Workers Union (AWU) for the exclusion of ‘coloured aliens’ from the sugar industry. When the Southern District Secretary of the AWU, Frederick William Martyn, was asked by Justice McCawley who the union meant by ‘aliens’, he replied ‘Chinese, Japanese, Afghans, etc., and issue of mixed parentage, excepting American negroes. That is our rule’.¹³⁸ When the judge queried whether that amounted to ‘preference for American negroes’, Mr Martyn said it did not because ‘they are not a menace’.¹³⁹ In other

¹³⁶ Peter Bayne, ‘Politics, the Law and Aborigines’, in James Jupp (ed), *The Australian People: An Encyclopedia of the Nation, its People and their Origins* (Angus and Robertson 1988) 212, 213.

¹³⁷ Ibid 214, citing HRA (Historical Records of Australia) I, vol. 19, 48.

¹³⁸ ‘Sugar Workers’ Conditions’, *Cairns Post*, 2 May 1919, 2.

¹³⁹ Ibid.

words, unlike workers of Asian origin, the number of ‘American negroes’ in the Queensland sugar industry was insufficient to threaten the employment or labour conditions of white workers. Therefore, black Americans were not categorised by the AWU as ‘aliens’ who should be excluded from the industry.

The importance of a perceived threat to white living standards in the categorisation of non-Europeans as ‘aliens’ was shown in a 1913 proposal from a Queensland parliamentarian that ‘coloured aliens’ could remain in the sugar industry if they received equal pay. As the *Morning Bulletin* reported:

Then came a suggestion for a solution of the difficulty from the Labour benches. It was to the effect that if the Government decreed that the coloured aliens were to receive equal pay to the whites no objection could be raised to their remaining in the country! Fancy such a proposal coming from the party which a short time before had been accusing Government supporters of ‘loving’ the coloured races. It seems after all that it was not the coloured aliens but the rates of pay which they desired to see dealt with.¹⁴⁰

A report in Brisbane’s *Courier Mail* from the 1948 Empire Parliamentary Conference demonstrated the enduring perception of ‘coloured aliens’ as a threat to the living standard of white workers in Australia:

The ‘White Australia’ policy...was embodied in one of the first Acts of Federal Parliament in 1901...It arose from economic conditions following the entrance of aliens, particularly Asiatics, to Australia in the previous century...The problem of foreign labour became acute in the Victorian gold-rush days of the 1850s. It was then claimed that Australian living standards were being lowered by Chinese. Queensland later in the 19th century had two experiences — an influx of Chinese to northern gold fields, and introduction of Kanaka labour from the Solomons to the sugar fields.¹⁴¹

According to the newspaper, Queensland Premier Edward Hanlon ‘played a leading part in discussions on British Commonwealth racial problems’ at the 1948 Conference, emphasising ‘how black labour in the sugar industry resulted in Australians walking the streets unemployed, and a Chinese ‘invasion’ had similar dire economic effects’.¹⁴²

There was a deep-set belief on the part of the white community in Australia that ‘coloured aliens’ not only undermined working conditions and living standards but also threatened the health of white society. An editorial in the *Worker* following a bubonic plague outbreak in 1900 brought these elements together:

The advent of the plague...forces to the front again the burning question of *alien* and coloured immigration. The debasing influence of *coloured servile aliens* must now become a large part of the important question of sanitation and health. Asiatics and kanakas are of a different civilisation to ours, we cannot blend with them, unless at the cost of degrading our race to their

¹⁴⁰ ‘The White Australia Principle’, *Morning Bulletin* (Rockhampton), 7 July 1913, 6.

¹⁴¹ ‘First Parl. set policy’, *The Courier-Mail* (Brisbane), 21 October 1948, 1.

¹⁴² ‘Hanlon in “Black v White” debate.’, *The Courier-Mail* (Brisbane), 21 October 1948, 1.

bestial level. They are noted for their filthy and unclean habits, being satisfied to live in a much lower hygienic plane than the lowest members of our civilisation, and their peculiar susceptibility to dirt diseases makes their presence now a danger of greater gravity than ever... We may, with success, enforce cleanliness on our own people, but the task of enforcing it on *coloured aliens* is impossible, and especially in a country like Australia. We cannot have Health Boards and Health Inspectors on every sugar plantation or farm to look after the *coloured aliens* and their ways...¹⁴³

The *Worker* warned that if bubonic plague broke out 'amongst the aborigines, Kanakas, Chinese, Japs, and Hindoos...we may well cry, "May the Lord have mercy on us" for our neglect of nature's laws, for the plagues of Asia will have none'.¹⁴⁴

More fundamentally, the very presence of 'coloured aliens' threatened the existence of 'White Australia'. For the Anglo-Celtic establishment, the prospect of a blending of white and coloured races, or 'miscegenation', caused particular anxiety. An 1896 editorial in a Western Australian newspaper entitled 'The Alien Danger' declared:

By admitting the colored alien now we are tying our hands, or at least storing up much future trouble...The blending of the European and Asiatic is not desirable, and with 'free' colored labor that is bound to occur...the Chinese are not desirable citizens, and we in these colonies do not desire to raise up a race of almond eyed, whitey-brown people, with few good characteristics, but possessing the concentrated vices of the Occident and Orient.¹⁴⁵

In 1901 Alfred Deakin, first Attorney-General of the Commonwealth of Australia, urged the passage of legislation enabling deportation of Pacific islanders because their continued presence, in his view, would irreparably:

...impair the principle of a 'White Australia'. If these people were allowed to settle permanently without any restriction of any kind as to their occupation or supervision, they might become a source of real danger. The marked disparity between the number of men and women suggests that alliances with persons of other races...will be continued and multiplied to the danger of that purity of race, the preservation of which is one of the objects of the legislation.¹⁴⁶

Similarly, in 1902 John Watson, leader of the Federal Labor Party, warned in an article titled 'A White or Piebald Australia' that:

In the Northern Territory of South Australia...we find the Chinese largely outnumber the white population; and in Queensland...(t)aking adults, the proportion is 1 alien to 11.3 whites; but, more significant still, if adult males only are taken into account, the proportion is 1 alien to 6.6 whites. Who will say it is not a menace that already every seventh man in Queensland is a coloured alien?¹⁴⁷

¹⁴³ 'Aliens and the Plague', *Worker* (Brisbane), 5 May 1900, 2. Emphasis added.

¹⁴⁴ Ibid.

¹⁴⁵ Editorial, 'The Alien Danger', *The Inquirer & Commercial News* (Perth) 18 December 1896, 8.

¹⁴⁶ Tracey Banivanua-Mar, *Violence and Colonial Dialogue, The Australian-Pacific Indentured Labor Trade* (University of Hawai'i Press, 2007) 115, citing Alfred Deakin, 'Correspondence Relating to the Pacific Island Labourers Act, 1901', Commonwealth Parliamentary Papers (1903), 982.

¹⁴⁷ 'United Australia', *Sydney Stock and Station Journal* (New South Wales) 8 January 1902, 6.

Reporting Mr Watson's remarks, a Sydney paper declared 'Our white hearts recoil from miscegenation, and our common sense teaches us that amalgamation means degradation'.¹⁴⁸

As the *West Australian* declared in 1913:

While the deep-seated repugnance to miscegenation persists among the white peoples, the coloured alien must always be refused freedom of entry. The growth in a country of an alien element virile and capable, but which could not be absorbed, would create an impossible situation.¹⁴⁹

As McGregor notes, there was also fear of interbreeding between 'alien coloured races' and indigenous Australians.¹⁵⁰

Contrary to the rule of law, protection against and if possible removal of the perceived menace posed by 'coloured aliens' was more important than respect for the legal status of non-European British subjects who were not aliens under the law applying in Australia.

Existing literature

Historical and legal commentators on colonial and post-federation Australia have not identified that a society that supposedly revered the 'rule of law' ignored the law in labelling non-European settlers and even indigenous Australians as 'aliens'. Henry Reynolds observes that frontier violence against Australia's aboriginal population involved scant respect for the rule of law:

How did so many people who were nominally British subjects end up dead without having been arrested, charged, tried or sentenced and the circumstances of their death presented to a coroner?...How had it happened in colonies that venerated the rule of law, where members of the legal profession wrapped themselves in the robes and mystique of the common law? So much about the frontier conflict was against both the spirit and the letter of the law, and not the law now but the law then.¹⁵¹

The same was true in relation to who was regarded as 'belonging' in colonial and post-federation Australia. When categorising inhabitants as 'aliens', 'foreigners' or 'outsiders', the British colonisers paid little attention to the common law. The widespread and enduring misuse of the term 'alien' in Australia played a significant role in determining which groups of people were allowed to fully participate in national life. It follows that a failure to identify and discuss the misuse and manipulation of this term is an important omission from the legal and racial history of Australia. This thesis aims to fill that gap.

¹⁴⁸ Ibid.

¹⁴⁹ 'The White Peril', *The West Australian* (Perth) 10 July 1913, 6.

¹⁵⁰ Russell McGregor, ' "Breed out the colour" or the importance of being white' (2002) 33 *Australian Historical Studies* 286, 294.

¹⁵¹ Henry Reynolds, *Forgotten War* (UNSW Press 2013) 135-6.

One of the most notable examples is John Quick and Robert Garran's *Annotated Constitution of the Australian Commonwealth* published in 1901. According to Emeritus Professor of Law Leslie Zines from the Australian National University, this was 'a most remarkable work of over 1,000 closely printed pages...it is a classic study, invariably called simply 'Quick and Garran', and referred to as an authority by counsel and judges to this day'.¹⁵² Its respected status meant this work had the capacity to influence government and legal decisions. Had Quick and Garran noted the misuse of 'alien' in the colonial era and used the word correctly, further misapplication of the term might have been prevented or at least reduced. Like many delegates at the 1890s constitutional conventions, however, Quick employed the word 'alien' with its racial not legal meaning, incorrectly suggesting that 'coloured races' and 'aliens' were interchangeable terms.¹⁵³ As discussed in Chapter Three, Quick and Garran made a similar mistake in their 1901 work when explaining the 'aliens', 'races' and 'immigration' powers in the new Constitution.

Myra Willard's *History of the White Australia Policy to 1920* - described as the 'standard work' on the subject¹⁵⁴ - retains iconic status in the history of race relations in Australia. Phillip Griffith says this was 'the pioneering history, regarded as sufficiently authoritative that there was no new book-length account for over half a century'.¹⁵⁵ However this book also perpetuates the view that all non-European settlers were 'aliens' whose presence threatened Australia's living standards and fledgling democracy. There is no reference in Willard's book to the legal meaning of 'alien'. According to Willard, all 'Asiatics' were 'aliens' and remained so after settling in Australia:

To preserve the unity of their national life, a people can admit emigrants from *alien races* only if within a reasonable time they show a willingness and a capacity to amalgamate ideally as well as racially with them...The Chinese in Australia, for instance, tended to congregate into communities of their own, living their own life uninfluenced by the ideas and customs of the people amongst whom they had settled. In other words, they *remained aliens*...It seemed to Australians that the reason why immigrant Asiatics, especially the Chinese, *remained aliens* in

¹⁵² Leslie Zines, 'Sir Robert Garran', *Papers on Parliament No. 44* (Commonwealth Parliament, 2006). See also Robert Garran's own view of the authoritative nature of this work, in R R Garran, *Prosper the Commonwealth* (Angus and Robertson 1958) 138.

¹⁵³ See eg *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 246.

¹⁵⁴ 'Willard, Myra (1887 - 1971)', *The Encyclopedia of Women & Leadership in Twentieth-Century Australia* (Australian Women's Archives Project 2014) www.womenaustralia.info/leaders/biogs/WLE0730b.htm.

¹⁵⁵ Philip Gavin Griffiths, *The making of White Australia: Ruling class agendas, 1876-1888* (PhD thesis, Australian National University, 2006) 6.

ideas and habits, was to be found in the antiquity of Eastern civilisation and its dissimilarity to the Western.¹⁵⁶

Willard does not identify that any non-European inhabitant with British subject status was necessarily not an ‘alien’ under the law. While she recognised that settlers from the Indian sub-continent were subjects,¹⁵⁷ she did not identify that other non-Europeans might also have this status. She wrote that ‘the great majority of Chinese immigrants came from the British Crown Colonies of Hong Kong and the Straits Settlements’,¹⁵⁸ but did not appreciate or acknowledge that settlers born in those colonies were British subjects. Instead she said the Chinese were ‘a people who seemed to remain *permanently alien*, and one therefore that could not share in aspirations that were beginning to assume a distinctly Australian character’.¹⁵⁹ Despite her acceptance that at least some Asian settlers were subjects, she adopted the discourse that non-Europeans were a ‘resident alien people’ posing a threat to Australian society and government:

A considerable number of *alien* non-European people in Australia would injuriously affect Australian industrial life...their very commercial and industrial virtues made them dangerous competitors for Australians, because their standard of living was much lower...Political inclusion of *alien peoples* like those from Asia would, under a representative system of Government, destroy that unanimity on national matters which is essential to the general welfare of a community, and if their numbers became large, it would be the deliberate giving away of the Australian political birthright.¹⁶⁰

Like Willard, G.A. Oddie in *The Chinese in Victoria 1870-1890* (1959) said that while Chinese settlers were often forced to conform to white European society, they remained ‘thoroughly alien in their attitudes, habits and beliefs’.¹⁶¹ Ian Welch titled his PhD thesis *Alien Son: The Life and Times of Cheok Hong Cheong, 1851-1928*, but did not examine whether the subject of his thesis was an ‘alien’ under Australian law. Welch did not critique the portrayal of Chinese settlers as ‘aliens’. As he said, ‘the Colony of Victoria had a European identity against which the Chinese were seen to cast an alien shadow’.¹⁶² Even landmark works in Australian legal history assumed Chinese and other non-European inhabitants were ‘aliens’. In *The Making of the Australian Constitution* (1972) – praised for

¹⁵⁶ Myra Willard, *History of the White Australia Policy to 1920* (Melbourne University Press, first published 1923, 1967 ed) 190. Emphasis added.

¹⁵⁷ Ibid 99.

¹⁵⁸ Ibid 80.

¹⁵⁹ Ibid 70. Emphasis added.

¹⁶⁰ Ibid 194, 195, 197. Emphasis added.

¹⁶¹ G A Oddie, *The Chinese in Victoria 1870-1890* (Master of Arts thesis, University of Melbourne 1959) 118. Emphasis added.

¹⁶² Welch, above n 124, 301.

‘its meticulous attention to a large body of evidence on the Federal deliberations, its comprehensive grasp of a long and complex process, its lucid analysis and its precision of exposition’¹⁶³ - prominent historian J.A. La Nauze said colonial legislation discriminated ‘against Chinese and other coloured aliens resident in Australia’.¹⁶⁴

In 1974 Charles Price published *The Great White Walls are Built, Restrictive Immigration to North America and Australasia 1836-1888*, the next major history of ‘White Australia’ following Willard’s 1923 work. Price referred to the British subject status of many Chinese settlers, stating that ‘by 1888 it seemed clear that many Chinese immigrants had been either born or naturalised in British territories such as Hongkong and Singapore and therefore possessed British citizenship’.¹⁶⁵ However, the proper description for legal membership under British law was ‘subject’ not ‘citizen’ and it is not accurate to state that naturalisation in another British colony conferred subject status in Australia. Nonetheless, as Price acknowledged, many Chinese did have full legal membership as British subjects either through birth in British territory or by naturalisation in an Australian colony. But Price did not question the use by prominent colonial figures of the term ‘alien’ as an accurate description for all Chinese residents in Australia. Both Price and Oddie note Victorian Premier Gillies’ statement to the Imperial Parliament in 1887 that the Chinese in Australia were ‘not only an alien race, but remain aliens’.¹⁶⁶ Based on such remarks, Price makes the important observation that ‘the colonies eventually decided that racial homogeneity and national unity were more important than British citizenship [sic], and that Chinese remained eternally Chinese no matter what their citizenship was’.¹⁶⁷ However neither Price nor Oddie indicate any appreciation of the legal meaning of ‘alien’, let alone the routine misuse of this term in Australia.¹⁶⁸ Hence neither recognises that such statements by Gillies (and similar

¹⁶³ Stuart Macintyre, 'La Nauze, Andrew John (1911–1990)' in *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/la-nauze-andrew-john-575/text25044>.

¹⁶⁴ J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press 1972) 232.

¹⁶⁵ Charles A Price, *The Great White Walls are Built, Restrictive Immigration to North America and Australasia 1836-1888* (Australian Institute of International Affairs in association with ANU Press 1974) 271.

¹⁶⁶ Ibid 256; Oddie, above n 161, 108.

¹⁶⁷ Charles Price, above n 165, 271 – 272.

¹⁶⁸ See for example, Charles Price, above n 165 at 182 in relation to the exclusion of ‘Asiatic and African aliens’ from goldfields in Western Australia.

claims by Henry Parkes and other prominent colonial figures)¹⁶⁹ were - in relation to many Chinese inhabitants - contrary to the law applying in Australia.

Evans, Saunders and Cronin's *Race Relations in Colonial Queensland* (1975), described as a 'pioneering classic in the study of Australian race relations',¹⁷⁰ falls into the same discourse. Throughout this book the authors wrongly use the terms 'alien' and 'coloured alien' to refer to all non-indigenous coloured people in Australia, despite this being incorrect as a matter of law.¹⁷¹ They note claims that Pacific islanders were British subjects, but refer to them as 'alien, servile workers who could provide regulated, cheap and tractable labour'.¹⁷² In particular they use 'Chinese' and 'alien' as interchangeable terms. For example, they refer to calls from the anti-Chinese league in the lead-up to the 1888 Queensland elections that 'only those candidates who guaranteed to legislate against the *aliens* should be supported' and the consequent 'rush amongst political aspirants...to find "all constitutional means and others if necessary to keep *Chinese* out of Queensland"'.¹⁷³ They observe that:

Acts of larrikinism against *coloured aliens* increased sharply, and on the 11th May a full scale riot occurred in the centre of Brisbane. A crowd estimated at 1,000 rampaged through the *Chinese* quarters smashing the windows of their shops and terrorizing individual *aliens* they caught in the streets.¹⁷⁴

An appreciation that a significant proportion of Chinese settlers were not 'aliens' but British subjects is an important contribution of this thesis,¹⁷⁵ not identified in Evans, Saunders and Cronin's discussion of key events in Queensland's colonial history. This includes their account of restrictions imposed on 'Asiatic or African aliens' in the 1870s¹⁷⁶ and the failure of the court system to protect Chinese residents under British law.¹⁷⁷

In *Race Relations in Australia* (1982), A.T. Yarwood and M.J. Knowling comment that:

Also of national significance was the refusal of Royal Assent to Queensland's 1876 Goldfields Bill, which imposed a discriminatory licence fee on resident Asiatic and African *aliens*. Refusal

¹⁶⁹ See Chapter 2.

¹⁷⁰ R L Evans, K E Saunders, K Cronin, *Race Relations in Colonial Queensland* (University of Queensland Press, 3rd ed, 1993) end paper, citing Ann McGrath, *Australian Journal of Politics and History*.

¹⁷¹ For example, see *ibid* 258, 259, 262-266, 269.

¹⁷² *Ibid* 150. Emphasis added.

¹⁷³ *Ibid* 315. Emphasis added.

¹⁷⁴ *Ibid* 315. Emphasis added.

¹⁷⁵ See Chapter Two.

¹⁷⁶ Evans, Saunders and Cronin, above n 170, 268-269.

¹⁷⁷ *Ibid* 276.

was related to possible breaches of the Convention of Peking and the absence of exemption for British subjects of Chinese race.¹⁷⁸

Yarwood and Knowling do not analyse the use of the phrase ‘Asiatic and African aliens’ in this Queensland legislation. Consequently they do not make the point that ‘British subjects of Chinese race’ would not have required an exemption had the term ‘alien’ been applied with its proper legal meaning.

Similarly, in *Topsawyers: the Chinese in Cairns 1870 to 1920* (1984), Cathie May notes that in 1912 the ‘Leases to Aliens Restriction Act prohibited *Chinese* from leasing more than five acres of land each’.¹⁷⁹ While the policy intention behind this Act was indeed to exclude Chinese settlers from agriculture in Queensland,¹⁸⁰ the law itself imposed restrictions merely on ‘aliens’, with no reference to race or ethnic origin.¹⁸¹ Hence the key point that such restrictions were unlawfully imposed on Chinese residents with British subject status is not identified by May.¹⁸² In the same way, Barry York in his article ‘The Chinese in Australia: exclusions and admissions, 1901-1957’ highlights the purpose of the dictation test provision in the Commonwealth *Immigration Restriction Act 1901*, ‘namely: to keep out *alien races*, especially Asian peoples, in keeping with the efforts of the former Australian colonies’.¹⁸³ Writing in 1993, York uses the same discourse of ‘alien race’ employed by many key figures in colonial and post-federation Australia without noting that under British and Australian law the legal status of ‘alien’ was not governed by race.

An important recent addition to the racial history of Australia, discussed in Chapter 2, is Kevin Wong Hoy’s *Becoming British Subjects 1879-1903: Chinese in North Queensland*

¹⁷⁸ A T Yarwood and M J Knowling, *Race Relations in Australia* (Methuen Australia 1982) 181. Emphasis added.

¹⁷⁹ Cathie May, *Topsawyers: the Chinese in Cairns 1870 to 1920* (James Cook University 1984) 29. Emphasis added.

¹⁸⁰ See Chapter Two.

¹⁸¹ *Leases to Aliens Restriction Act 1912* (Qld) s 3.

¹⁸² May does state that ‘the Act could be circumvented to a large extent by means of naturalised Chinese leasing large parcels of land and sub-letting to their countrymen’. May, above n 179, 291. However there was no such exemption under either the Act or regulations made under the Act. In any case, this comment ignores the status of the (more numerous) natural-born Chinese British subjects. May’s comment seems to be based on a remark by the Queensland Attorney-General that a person was not an ‘alien’ if he was naturalised. See Queensland, *Parliamentary Debates*, Legislative Council, 12 December 1911, 2848.

¹⁸³ Barry York, ‘The Chinese in Australia: exclusions and admissions, 1901-1957’, in Paul Macgregor (ed), *Histories of the Chinese in Australasia and the South Pacific* (Museum of Chinese Australian History 1993) 361, 362. Emphasis added.

(2006).¹⁸⁴ Hoy identifies the use of ‘alien’ to denigrate Chinese Australians.¹⁸⁵ More significantly, however, the word ‘alien’ was used by key political and legal figures not only to denigrate but also discriminate against Chinese and other non-European inhabitants, despite their awareness that many such people were British subjects and not ‘aliens’ under the common law. Hoy suggests Chinese settlers had to be naturalised or born in one of the Australian colonies to have British subject status in Australia,¹⁸⁶ stating that ‘a subject from one part of the Empire was not necessarily recognised as such in another’.¹⁸⁷ However under the common law natural-born British subjects retained this status wherever they went in the Empire. Hoy notes that only 110 Chinese settlers were naturalised in Queensland between 1876 and 1903,¹⁸⁸ observing that ‘naturalised persons never achieved the unassailable status of subjects who were born British’.¹⁸⁹ But there were a far greater number of Chinese settlers in Queensland who were *natural-born* subjects through birth in Hong Kong, Singapore and other British colonies.¹⁹⁰ These people had ‘birthright nationality’ as subjects of the British Crown. Far from being ‘unassailable’ their subject status was routinely ignored. In colonial and post-federation Queensland, not only naturalised but also natural-born British subjects of Chinese and other non-European origin were regarded and treated as ‘aliens’, despite not having this status under the law.

A similar omission of the relevant law affects Bruce Buchan’s analysis of legal belonging in *Empire of Political Thought: Indigenous Australians and the Language of Colonial Government* (2008). Buchan refers to Alastair Davidson’s claim that the legal doctrine of *terra nullius* ‘caused immense complications for Aboriginal people, whose citizenship should have been automatic according to the British rules of citizenship’.¹⁹¹ According to Buchan:

This view poses some serious problems...not least in the dubious assertion that the British in 1788 possessed “rules” by which “citizenship”...could be accorded to Indigenous peoples...the very assumption that the British had uniform ‘rules’ of citizenship in 1788 is as problematic as

¹⁸⁴ Kevin Wong Hoy, *Becoming British Subjects 1879-1903: Chinese in North Queensland* (Master of Arts thesis, La Trobe University, 2006).

¹⁸⁵ Ibid 33.

¹⁸⁶ Ibid 139.

¹⁸⁷ Ibid 24.

¹⁸⁸ Ibid 88.

¹⁸⁹ Ibid 23.

¹⁹⁰ See Chapter Two.

¹⁹¹ Buchan, *Empire of Political Thought*, above n 126, 5-6, 75, citing Alistair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge University Press 1997) 189.

the assertion that the notion of citizenship could be extended to the Indigenous peoples of Australia.¹⁹²

But the British did have ‘uniform rules’ for legal belonging or ‘citizenship’ that remained unchanged from 1608 until after World War Two. Under these rules the indigenous peoples of Australia were as much entitled to ‘birthright nationality’ through birth in the territory of the sovereign as other members of the British Empire. Buchan misunderstands the relevant legal principle when he states:

What made one a subject under British statutes was being born within the territories of the British sovereign (*jus soli*) and being born of parents who were themselves free ‘British subjects’ (*jus sanguinas*).¹⁹³

However under the common law any person born on British territory was a ‘natural-born’ subject and not an ‘alien’, whether the parents were British subjects or not.¹⁹⁴ Contrary to Buchan’s assertion, therefore, ‘citizenship’ – or at least British subject status – should indeed have been (and was as a matter of law) automatic for any indigenous person born after 1788 in that part of Australia claimed by the British.

Alison Bashford and Catie Gilchrist’s article on ‘The Colonial History of the 1905 Aliens Act’ (2012)¹⁹⁵ is an example of the danger of historians focussing on ‘alien’ legislation without identifying the legal meaning of ‘alien’. The article concerns the influence of restrictive colonial immigration legislation on the United Kingdom’s *Aliens Act 1905*. The statute defined an ‘immigrant’ as an ‘*alien* steerage passenger’¹⁹⁶ but contained no definition of ‘alien’. As a matter of law, the common law meaning therefore applied. However the fact that ‘alien’ had a set legal meaning which for centuries had been central to imperial membership law is not engaged with by the authors.¹⁹⁷

¹⁹² Ibid.

¹⁹³ Ibid 72. Emphasis added.

¹⁹⁴ With the exception of children of foreign diplomats and ‘enemy aliens’. *Singh* (2004) 222 CLR 322, 389 [172] (Gummow, Hayne and Heydon JJ).

¹⁹⁵ Alison Bashford and Catie Gilchrist, ‘The Colonial History of the 1905 Aliens Act’ (2012) 40(3) *Journal of Imperial and Commonwealth History* 409.

¹⁹⁶ Section 8(1).

¹⁹⁷ The authors do not properly explain that the prohibition on ‘*alien* immigrants’ in the *Aliens Act 1905* (UK) could not apply to British subjects from Hong Kong, Singapore, British India and other British colonies and dominions. They merely note the explanation of another writer that ‘alien’ meant somebody ‘not subject to the crown’. Bashford and Gilchrist, above n 195, 426. The key point about the Aliens Act was that it could not lawfully apply to someone who was a British subject, regardless of his or her colour or race, even if that person was an ‘immigrant’ in the ordinary sense of the word. In other words it could not apply to African, Indian, or Chinese British subjects. The authors do say (at 427) that the Aliens Act ‘had nothing to do with colonial subjects’ but this is in contrast to Australia and Canada turning back ‘unfit Britons’.

Similarly, in a PhD thesis on alien legislation in Australia, *Alien Acts: The White Australia Policy, 1901 to 1939* (1999),¹⁹⁸ Paul Jones includes just one sentence on the different meanings of ‘alien’, stating that ‘the generic *Alien* was...unevenly excluded. In some cases this would mean any non-British person; in others, it implied persons not specifically naturalised in Australia’.¹⁹⁹ However in its non-legal, racial sense, ‘alien’ was more commonly used as a label for people of non-*European*, not simply non-*British* ethnic origin. European settlers, especially those from the north of the continent, were not generally regarded or treated as ‘aliens’. In addition, the many natural-born British subjects of Asian origin who came to Australia had no need to be ‘specifically naturalised’. Despite this, they were subject to ‘alien’ legislation, including prosecution, when they should have been beyond the scope of such laws. Jones does not address this issue and states that with changes to the Commonwealth’s immigration legislation after the First World War, ‘in both the policy and administrative spheres, associations of “aliens” with “coloureds” developed’.²⁰⁰ There was of course, as this thesis argues, legal difficulty with such an approach, namely that alien status under the law was not based on the colour of a person’s skin.

In *Unravelling Identity. Immigrants, Identity and Citizenship in Australia* (2005), Trevor Batrouney and John Goldlust state that:

Equally important, in the context of the normative notions of citizenship, was the introduction of the term ‘alien’ (meaning ‘belonging to another’), which first appeared in the *Commonwealth Nationality Act* (1920).²⁰¹

Two decades before this, however, the term ‘alien’ had already been included in the Commonwealth Constitution as a source of legislative power.²⁰² This is not to mention, moreover, its continued use by the courts since *Calvin’s Case* three centuries before to define someone not entitled to legal membership of the British Empire.

Ann-Mari Jordens in *Redefining Australians. Immigration, Citizenship and National Identity* (1995) comments that:

A nation’s understanding of itself is revealed by the categories of people it regards as foreign, as alien, as ‘other’. From 1948 to 1987 the Nationality and Citizenship Act defined an alien as ‘a person who *does not have the status of a British subject* and is not an Irish citizen or a

¹⁹⁸ Paul Jones, *Alien Acts: The White Australia Policy, 1901 to 1939* (PhD thesis, Melbourne University 1998).

¹⁹⁹ Ibid 152.

²⁰⁰ Ibid 304.

²⁰¹ Batrouney and Goldlust, *Unravelling Identity*, above n 1, 28.

²⁰² Section 51(xix) – power to make laws with respect to ‘naturalization and aliens’.

protected person'. That is, the image of Australians enshrined in Australian citizenship legislation was that of *an Anglo-Celtic people*.²⁰³

After the Second World War there remained many British subjects of Asian, African and Pacific islander origin. 'British' in this statutory context did not mean 'white' or 'Anglo-Celtic' but merely a 'subject of the British Crown'. Based on the language of the statute, therefore, if there was an 'image of Australians' enshrined in the 1948 citizenship legislation, it was not one of an 'Anglo-Celtic people'.

In her article 'Aliens: The Outsiders in the *Constitution*' (1996), Belinda Wells observes that:

The Australian *Constitution* confers a power to legislate with respect to 'aliens'. 'Alien' is a term of ancient origin, which connotes 'belonging to another person or place'. The term is regarded by the High Court as synonymous with the term 'non-citizen', yet it carries with it far more sinister overtones. Referring to a person as an alien 'calls attention to their "otherness", and even associates them with non-human invaders from outer space'.²⁰⁴

While Wells identifies the multiple meanings of 'alien', her article does not address the extensive use of the term in nineteenth and twentieth century Australia to denigrate, discriminate against and prosecute non-European inhabitants, many of whom were not 'aliens' under the law. Nor does she examine whether it is appropriate to retain a term with such pejorative connotations and negative history both as a source of extensive Commonwealth power and as the key concept against which constitutional membership of the nation is determined.²⁰⁵

In the same vein, Michele Langfield's article entitled "'White aliens": the control of European immigration to Australia 1920 - 1930'²⁰⁶ contains no definition of the term 'alien' and does not discuss whether people labelled as 'white aliens' were in fact 'aliens' under the law. The distinction between different 'types' of aliens is grappled with in *One of Us? A Century of Australian Citizenship* (2002), where David Dutton includes sections on 'The

²⁰³ Ann-Mari Jordens, *Redefining Australians. Immigration, Citizenship and National Identity* (Hale and Iremonger 1995) 1. Emphasis added.

²⁰⁴ Belinda Wells, 'Aliens: The Outsiders in the *Constitution*' (1996-97) 19 *University of Queensland Law Journal* 45, 46.

²⁰⁵ See below pp 42-43. Similarly, other recent articles which focus on constitutional concepts of citizenship and 'alienage' do not identify the use of 'alien' in a racial sense to denigrate non-European inhabitants of nineteenth and twentieth century Australia. See, for example, Karen Schultz, 'Future Citizens or Intergenerational Aliens? Limits of Australian Constitutional Citizenship', (2012) 21 *Griffith Law Review* 36, 51-52 and Sangeetha Pillai, 'Non-immigrants, non-aliens and people of the Commonwealth: Australian Constitutional Citizenship Revisited', (2013) *Monash University Law Review* 568, 588ff.

²⁰⁶ Michele Langfield, ' "'White aliens": the control of European immigration to Australia 1920-1930', (1999) 12(2) *Journal of Intercultural Studies* 1.

Dangers of Aliens’ and ‘Aliens Reconsidered’.²⁰⁷ These sections examine the perception and treatment in Australia of ‘enemy aliens’ during the two world wars and the inter-war period. Dutton notes that ‘the definition of *enemy alien* was rigidly applied to all people born within the boundaries of enemy states. The fact of naturalisation was mostly considered irrelevant.’²⁰⁸ However it was not only naturalised subjects who were treated as enemy aliens. According to Christine Piper, for example, ‘one hundred *Australian-born* Japanese’ were interned as ‘enemy aliens’ during World War Two.²⁰⁹ The point could therefore have been made that neither ‘natural-born’ nor naturalised subjects could lawfully be subject to internment and other restrictions²¹⁰ on the basis that they were ‘*enemy aliens*’.

Moreover, Dutton does not include in his discussion the extensive use of the term ‘alien’ in colonial and post-federation Australia as a mechanism for discrimination against and unlawful treatment of non-Europeans.²¹¹ His book does not address the issue that any person with British subject status, whatever their racial or ethnic origin, was - until 1948 at least - a full member or ‘citizen’ *under the law* in Australia. As he says:

Legal discourse in British jurisdictions was slow to reformulate the relations between Crown, state, society and citizen along national lines, particularly since national forms remained in tension with imperial frameworks.²¹²

However, while British (and Australian) law on nationality and membership may have been slow to change, it is the argument of this thesis that a society governed by the ‘rule of law’ was obliged to adhere to this law.

This section has shown that those writing on ‘belonging’, ‘identity’ and ‘citizenship’ in colonial and post-federation Australia have not addressed an essential starting point, which is central to this thesis. Once British sovereignty had been proclaimed over Australian territory, the common law inherited from the United Kingdom determined legal membership. Either a person was a ‘subject’ or an ‘alien’. After *Calvin’s Case* in 1608, there was no change in this

²⁰⁷ David Dutton, *One of Us? A Century of Australian Citizenship* (UNSW Press 2002) 91-104.

²⁰⁸ Ibid 92.

²⁰⁹ Christine Piper, ‘Their country shunned them’, *Canberra Times* (Canberra), 15 August 2014, 4. Emphasis added.

²¹⁰ E.g. Aliens Restriction Order 1915 made under *War Precautions Act 1914* (Cth); *Aliens Registration Act 1920* (Cth); National Security (Aliens Control) Regulations (1939) made under *National Security Act 1939* (Cth).

²¹¹ Dutton, above n 207, 31-40, discusses the ‘Purpose and Machinery of White Australia’, highlighting the key role of the dictation test under Commonwealth *Immigration Restriction Act 1901*. But he makes no mention of the role of the term ‘alien’ for exclusionary and restrictive purposes, let alone that use of this term was contrary to the law.

²¹² Ibid 91.

law for three and a half centuries. Historical and legal commentators in Australia have not included critical evidence showing the rule of law was less important than race in determining who could participate in national life as legal members of the community.

Contrary to longstanding principles of the common law, all non-Europeans, especially Chinese but also people of other ethnic backgrounds, were regarded and treated as ‘aliens’ whether they were legally subjects of the Crown or not. Why this has not been a focus of modern Australian history is discussed later.²¹³ This omission is now fully addressed in this thesis, contributing to our historical understanding of membership as a matter of law and practise in Australian history, with implications for constitutional law to the present day.

Structure and content

This thesis follows a largely chronological order, examining the main groups of people regarded and treated as ‘aliens’ in Australia’s history, at variance with the rule of law. It covers a period of a little over a hundred years, from early New South Wales Supreme Court cases in the 1820s until roughly the Second World War.

In the 1820s and 1830s the New South Wales Supreme Court, contrary to the common law, could not bring itself to declare that indigenous Australians had equal legal status as subjects of the Crown and were not ‘aliens’ under British law. The arrival of Chinese settlers in considerable numbers from the mid-nineteenth century was portrayed as an ‘alien’ threat to Anglo-Celtic society despite many coming from British colonies in Asia. The right of hundreds of millions of Indian subjects to move freely within the British Empire caused anxiety about ‘alien races’ at the 1890s constitutional conventions. And Pacific islanders who had been part of the Queensland community for a generation were expelled as ‘aliens’ in the early 1900s when the new federal Government implemented its ‘White Australia’ policy.

Queensland is a particular focus for this thesis after 1901. Immediately after federation the State was a key battleground for White Australia. Coloured labour had been imported for agricultural industries from the 1860s amid claims that white men could not work in the tropics.²¹⁴ Chinese and other non-Europeans were drawn to Queensland goldfields later in the nineteenth century than in other Australian colonies. In addition, Chinese settlers played a

²¹³ See Conclusion pp 266-267.

²¹⁴ Warwick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia* (Melbourne University 2005), 73-74, 79.

key role in opening up north Queensland for the sugar, banana and other industries.²¹⁵ By the time of federation Pacific islanders, ethnic Chinese and other non-European settlers were well-established in the north Queensland community.²¹⁶ The significant non-European involvement in agricultural industries seen as important for the local and Australian economy attracted the scrutiny of imperial authorities. Legislation with overt discrimination that might offend Britain's Indian subjects or its new ally Japan faced a real risk of imperial rejection. Contrary to existing accounts, potential refusal of royal assent remained an important factor for Queensland until the 1920s or later.²¹⁷ Queensland lawmakers deliberately used the word 'alien' as a language tool to avoid rejection of discriminatory legislation.

The history set out in this thesis is important, not least because it adds to the story of discrimination in this country and links it to the central constitutional role still played by the term 'alien'.²¹⁸ In twenty-first century Australia the word 'alien' remains a fundamental marker of 'belonging'. It remains the case that only 'non-alien' have full membership of the Australian community under the Constitution.²¹⁹ Contrary to popular belief, becoming a 'citizen' does not guarantee constitutional membership of the nation. The legal status of 'citizen' has existed in Australia since 1949 but is merely a creation of legislation and is not recognised in the Constitution. In addition, the Commonwealth retains wide-ranging legislative power over 'aliens'. According to Justice McHugh in *Re Patterson* (2001):

...as long as a person falls within the description of 'aliens', the power of the parliament to make laws affecting that person is *unlimited* unless the Constitution otherwise prohibits the making of the law.²²⁰

The lack of restraint on use of the 'aliens' power reared its head again in 2015 with proposed new laws stripping dual citizens of their Australian citizenship. As the explanatory

²¹⁵ Acknowledged by some members of the Queensland Parliament, see for example remarks by Hon G W Gray, Hon W V Brown, Hon A Gibson, Queensland, *Parliamentary Debates*, Legislative Council, 12 December 1911, 2848. See also May, above n 179, 21, 30.

²¹⁶ For a comprehensive account of the non-European community in North Queensland, see Henry Reynolds, *North of Capricorn, the untold story of Australia's north* (Allen & Unwin 2003).

²¹⁷ See Chapter Six (section on 'Imperial oversight' pp 213 ff).

²¹⁸ In relation to the use of history in constitutional interpretation generally, see Helen Irving, 'Constitutional Interpretation, the High Court and the Discipline of History', (2013) 41 *Federal Law Review* 95.

²¹⁹ *Re Minister for Immigration and Indigenous Affairs; ex parte Ame* (2005) 222 CLR 439.

²²⁰ *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 424. Emphasis added. In *Al-Kateb v Godwin* (2004) 219 CLR 562 for example, the High Court said that under the *Migration Act 1958* (Cth) an 'alien' can be detained without trial and for an indefinite period for the purpose of segregating the person from the Australian community, even if this is not necessary. See Peter Prince, 'The High Court and indefinite detention: towards a national bill of rights?', *Research Brief* no 1, 2004-05 (Parliamentary Library, Canberra, 2004).

memorandum for the Australian Citizenship (Allegiance to Australia) Amendment Bill 2015 states:

...the Bill introduces three new ways in which a person, who is a national or citizen of a country other than Australia, can cease to be an Australian citizen...The principal source of power for a person's Australian citizenship ceasing is the alien's [sic] power in section 51(xix) of the Constitution.²²¹

Chapter One examines early New South Wales Supreme Court cases about the murder of one indigenous inhabitant by another. It was claimed the Court had no jurisdiction because neither attacker nor victim were 'subjects' of the King, so could not be 'subject to' or under the protection of British law. Commentators such as Lisa Ford, Bruce Buchan and Henry Reynolds note the Supreme Court's reference to *Calvin's Case* in considering whether indigenous people were 'aliens' or 'subjects'. However, like the Court itself, these authors do not apply the key membership principle from that case. It was significant, as these writers say, that the Supreme Court used a *conceptual* concept of subject status (involving reciprocal obligations of allegiance and protection of rights) derived from seventeenth and eighteenth century Enlightenment philosophers. The Court thought aborigines not capable of exercising rights and liberties as 'subjects' because of their 'savage', 'barbarous' and 'uncivilised' way of life. Of greater importance, however, was that the Supreme Court ignored the longstanding legal membership rule laid down by Coke in *Calvin's Case*. Once the British proclaimed sovereignty over New South Wales, any person born within the territory was a natural-born British subject. Contrary to this common law rule, the Court emphasised the *social* characteristics of indigenous people when considering if they were 'aliens' or 'subjects'. The disregard shown by Chief Justice Forbes and his fellow judges for the rule of law and their focus on non-legal factors foreshadowed the way non-European inhabitants of Australia were characterised as 'aliens' for the rest of the period covered by this thesis.

Chapter Two considers the portrayal of Chinese settlers as 'aliens' in nineteenth century colonial Australia. Leading political figures including Queensland Premier Sir Samuel Griffith (later first Chief Justice of the High Court of Australia) and 'father of federation' Sir

²²¹ Explanatory Memorandum, Australian Citizenship (Allegiance to Australia) Amendment Bill 2015, 2, 3. The proposed legislation removed Australian citizenship from dual citizens engaging in or convicted of terrorism and certain other crimes. As originally proposed, this included offences which in themselves do not necessarily involve actions contrary to a person's allegiance to Australia, such as intentionally destroying any Commonwealth property. See s 33AA (Renunciation by conduct), s 35A (Conviction for terrorism offences and certain other offences), referring to, *inter alia*, s 29 *Crimes Act 1914* (Cth) (Destroying or damaging Commonwealth property).

Henry Parkes²²² promulgated the view that the Chinese were ‘alien’ across all measures of comparison with ‘Her Majesty’s subjects’. In fact many were subjects from Hong Kong and other British colonies in Asia and not ‘aliens’ at all under the law applying in Australia. Modern histories of the Chinese in Australia have not addressed this key point. Evans, Saunders and Cronin in *Race Relations in Colonial Queensland* (1993), for instance, use the term ‘alien’ and ‘coloured alien’ to refer to all Chinese and other coloured settlers despite the fact many were not aliens according to the law.²²³ Inter-colonial conferences in 1881 and 1888 on the ‘Chinese question’ and the ensuing debates in colonial parliaments about exclusionary legislation show how misuse of the term ‘alien’ became embedded in the political discourse during this period. Bigotry, racism and a failure to respect the common law meant settlers of Chinese descent were seen as indelibly foreign or ‘alien’ because of their race. Legal cases from this period demonstrate a presumption that any person who looked Chinese could not be a British subject. Even official census records failed to accurately register the number of Chinese British subjects in Australia. Similarly, key parliamentary reports assumed all inhabitants of ethnic Chinese origin had been born in China and were of Chinese nationality. The extent to which ‘alien’ was misused at this time made its further misapplication inevitable in the lead up to federation.

Chapter Three discusses the constitutional convention debates of the 1890s. Delegates to the conventions, including the leading lawyers from the Australian colonies, referred extensively to the danger posed by ‘alien races’ and ‘coloured aliens’. ‘British Indians’ (with the same right as other subjects to travel freely across the Empire) were a key concern. Samuel Griffith, Chairman of the 1891 constitutional drafting committee, said they were an ‘alien race’ to be excluded from Australia. The proper legal meaning of ‘alien’ was never explained at any of the conventions, causing delegates to misunderstand the role of major law making powers. The ‘races power’ (along with the ‘immigration and emigration’ power) was seen as the main means for regulating and excluding ‘coloured aliens’. But this left little room for the ‘naturalization and aliens’ power itself. Now considered a source of extensive Commonwealth authority, during the conventions it was regarded merely as a technical provision about the *process* of naturalisation. Even in debates about formal membership of the new Commonwealth, the word ‘alien’ was used in its racial not legal sense. Chairman of

²²² A W Martin, ‘Parkes, Sir Henry (1815–1896)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/parkes-sir-henry-4366/text7099>.

²²³ Evans, Saunders and Cronin, above n 170, see, for example 16, 362.

the judiciary committee in 1897-98, Josiah Symon QC, for example, opposed citizenship for ‘persons owing allegiance to the Queen’ because such people in his view included ‘aliens’.²²⁴

Chapter Three also considers John Quick and Robert Garran’s *Annotated Constitution of the Australian Commonwealth* (1901), still regarded as an authoritative source of constitutional interpretation. Along with other delegates, Quick used ‘alien’ during the conventions as a synonym for ‘coloured races’ he wished to see excluded from the new federation. Contrary to the established law, Quick and Garran’s 1901 work also employed the term ‘alien’ in a racial not legal sense when explaining the ‘races’ power in section 51(xxvi) of the Constitution, the ‘aliens’ power itself in section 51(xix) and the ‘immigration power’ in section 51(xxvii).

Chapter Four examines use of the term ‘alien’ at the federal and state level after 1901. Commonwealth lawmakers passed the *Immigration Restriction Act 1901* to keep ‘coloured aliens’ out of Australia. The Commonwealth also enacted domestic restrictions on coloured inhabitants (including indigenous Australians). But the vast majority of internal restrictions on those regarded as not ‘belonging’ were imposed at State or Territory level. Legal mechanisms varied between the States. South Australia’s *Northern Territory Mining Act 1903* prohibited ‘Asiatic aliens’ from working on any new goldfield. Western Australia’s *Firearms and Guns Act 1931* prevented any ‘Asiatic or African alien or person of Asiatic or African race claiming to be a British subject’ from holding a firearms license. In both cases ‘alien’ was intended to be read and applied using its racial, non-legal meaning.

Chapter Five highlights the role of Samuel Griffith in the expulsion of Pacific islanders from Queensland after federation. Their removal had been a key aim for Griffith as Queensland Premier in the 1880s and 1890s. In 1906 as Chief Justice of the High Court in *Robtelmes v Brennan*,²²⁵ Griffith said it was ‘indisputable’ they were ‘aliens’ who could forcibly be expelled from the country. However their status was very disputable. Some had been born in Britain’s South Pacific colonies, others in Australia itself. Many came from the Solomon Islands, British New Guinea and the Gilbert Islands, all British protectorates. There were also those from the New Hebrides (under joint British and French protection from 1878).²²⁶ Later British and Australian legislation recognised that people under the protection of the Crown

²²⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 676.

²²⁵ (1906) 4 CLR 395.

²²⁶ See Chapter Five for a more detailed description of the complicated colonial history of the New Hebrides.

were neither subjects nor ‘aliens’. In *Robtelmes*, none of this concerned the High Court, which looked in a cursory way at the law concerning ‘aliens’. Like Griffith, fellow judges Barton and O’Connor had pre-determined positions on the islander issue. In many ways, the High Court’s defective decision in *Robtelmes* represented the culmination of decades of misuse of the term ‘alien’ by key Australian political and legal figures.

Chapters Six and Seven look at the use of ‘alien’ after federation as a legal tool for exclusion in Queensland. In conjunction with the education or dictation test borrowed from the Commonwealth, the term ‘alien’ was used in a deliberate and calculated way by Queensland authorities to exclude non-Europeans from key economic and other activities.

Chapter Six examines the dictation test and alien legislation for Queensland’s sugar and banana industries, aimed particularly at inhabitants of Chinese ethnic origin. As parliamentary debates indicate, the dictation test and ‘alien’ mechanisms were employed together to avoid rejection by imperial authorities. The debates show the legal meaning of ‘alien’ was understood but that race was more important than the rule of law for Queensland lawmakers. Government ministers stated openly that the legislation was directed at those regarded as ‘aliens’ in the racial sense of the word, i.e. all non-Europeans, especially Chinese Australians. They also said people ‘of European descent’ who were aliens under the law would not be subject to the legislation. As this shows, racial factors were more significant than nationality or allegiance in determining who would be treated as legal members of the Queensland community.

Chapter Seven considers ‘alien’ prosecutions across North Queensland after the First World War. Employers of Chinese, Indian and Malay workers – many of whom were British subjects - were prosecuted for unlawfully engaging ‘coloured aliens’. There was little or no regard for the proper legal meaning of ‘alien’. Contrary to former Commonwealth Solicitor-General K.H. Bailey’s view that such laws were ‘not really being enforced’,²²⁷ these prosecutions helped ensure the exclusion of ‘undesirable races’ from the State’s key agricultural industries. The chapter considers the case of See Chin, one of the biggest employers in the Australian sugar industry, charged with ‘employing coloured aliens’ under the *Sugar Cultivation Act 1913*. His unsuccessful appeal to the Supreme Court of Queensland provides an example of the continued misuse of ‘alien’ and other nationality related terms in this period of Australian history.

²²⁷ K H Bailey, ‘The Legal Position of Foreigners in Australia’, in N Mackenzie (ed), *The legal status of aliens in Pacific Countries* (Oxford University Press 1937) 32, 42.

Coverage and argument

This thesis does not purport to be a comprehensive examination of all possible references to ‘aliens’ by key political and legal figures over the century or more of Australian history that it covers. For example, it only briefly considers use of the terms ‘white alien’ and ‘enemy alien’. While those labels were used for the purpose of exclusion and deportation, especially after World War One, for the most part those described in such a way *were* legally aliens under the law applying in Australia. There were exceptions - for example, settlers from the British colony of Malta were labelled, along with other southern Europeans, as ‘white aliens’ despite their legal status as British subjects.²²⁸ In addition, settlers of German descent – even if natural-born or naturalised subjects and no matter how long they had lived in Australia – were interned as ‘enemy aliens’ during both world wars and even deported afterwards.²²⁹

While some European inhabitants with British subject status were wrongly regarded and treated as ‘white’ or ‘enemy’ aliens, misuse of the term ‘alien’ in relation to non-European British subjects was far greater. Despite the significant proportion of settlers in Australia with Chinese, Indian or Pacific islander ethnic background who were British subjects, all were regarded as ‘coloured aliens’, including for the purpose of major Commonwealth and State exclusionary legislation. The thesis is primarily about these people, although it also looks at the labelling of aboriginal inhabitants of Australia, who were considered and treated as ‘aliens’ more routinely than some commentators have assumed.

The central argument in this thesis, therefore, is the lack of regard for the rule of law in a society which supposedly revered it. Anglo-Celtic lawmakers disregarded the legal meaning of ‘alien’, instead using the word in its ‘ordinary’, non-legal, racial sense. In this way the boundaries of colonial and post-federation Australian society were enforced contrary to the law. People who were not aliens under the law were treated as if they were; others who were aliens in a legal sense were treated as if they were not. Imperial concepts of legal membership laid down in *Calvin’s Case* as part of the binding common law were ignored. The birthright entitlement to subject status and the protection of the common law itself was wrongly denied to non-European subjects of the British Crown. These people were unlawfully categorised as ‘aliens’ and excluded from full participation in the community. In contrast, white European settlers who were not British subjects received preference and were exempt from ‘alien’ laws.

²²⁸ See Chapter Six.

²²⁹ Dutton, above n 178, 92, 118. See, however, the greater debate during the Second World War about the legal status of naturalised subjects. Ibid 98-99.

The term ‘alien’ was an important language tool in the creation and maintenance of White Australia. The discourse and description of non-European inhabitants as ‘aliens’ reinforced the dominance of the Anglo-Celtic community and supported the political philosophy of key figures. Parkes, Griffith and others thought Chinese and other non-Europeans were irredeemably ‘alien’, so had no place in a society where all men were equal before the law.²³⁰ More than this, however, the dual meaning of the word made it an important device for legal exclusion. The perception that Pacific islanders were ‘aliens’ in a racial sense allowed the High Court to authorise their forced removal under the ‘aliens power’ even though many were British subjects. In Queensland the word ‘alien’ was deliberately used as an ostensibly neutral term in legislation intended to have a discriminatory effect. Such laws had significant consequences for those they were directed against. As explained in the chapters that follow, the term ‘alien’, along with other methods such as the education or dictation test, contributed materially to the establishment and continuation of a racially exclusive society and its legacy is present to this very day.

²³⁰ See Chapters Two and Five.

CHAPTER ONE Indigenous Australians: ‘aliens in their own country’?

*‘Back in 1972, the embassy was a bold response to what was seen as a deeply inflammatory speech by Prime Minister Billy McMahon, dashing long-cherished hopes for land rights....On the very night of his speech, four men – Billy Craigie, Tony Coorie, Michael Anderson and Bertie Williams – drove to Canberra and planted the beach umbrella. They declared it the site of the Aboriginal embassy, explaining that because McMahon had relegated them to the status of aliens in their own country, they needed their own representation’.*²³¹

Bruce Buchan explains the importance of language in situating aboriginal Australians in the new colonial order after European settlement:

...colonists in Australia...constructed images of the Indigenous peoples they found already inhabiting the land based on a series of concepts associated with European understandings of ‘savagery’ and ‘civilisation’...descriptions of Indigenous peoples as ‘savages’ with no ‘society’ or a limited ‘government’ also operated as a foundation for advancing claims about how they should be treated in the new colonial order. Consequently, the ongoing struggle of Indigenous peoples for genuine recognition of the continuity of their evolving identities has been one fought as much against the language as against the institutions of colonization.²³²

The legal status of indigenous Australians, as determined by the New South Wales Supreme Court from the 1820s to 1840s, set the scene for the treatment of other non-European ethnic groups throughout the period covered by this thesis. Chief Justice Sir Francis Forbes proclaimed the ‘supremacy of law’²³³ but in a series of cases concerning indigenous inhabitants the Supreme Court disregarded the law with respect to ‘aliens’ and membership. Under common law principles unchanged from *Calvin’s Case*, the aboriginal people of New South Wales were subjects with equal legal status and not ‘aliens’. However the Court ignored this law, categorising indigenous people using the type of non-legal descriptions set out by Buchan. Similar language was later used to target other racial groups as ‘aliens’ in colonial and post-federation Australia.

Rebellious subjects or foreign enemies?

Some commentators say it was quickly accepted that under English law aborigines born in Australia under the sovereignty of the English king were British subjects and not ‘aliens’. But early New South Wales cases where Supreme Court judges could not bring themselves to

²³¹ Jane Lydon, ‘A thorn in our pride’, *The Age*, 30 January 2012, 13.

²³² Buchan, *Empire of Political Thought*, above n 126, 2-3. Emphasis in original.

²³³ See above p 6.

declare that people they saw as ‘barbaric’ had equal subject status with white settlers indicate this was not so. Indeed, as late as the 1960s Western Australia retained legislation treating aborigines as non-subjects (in other words, as ‘aliens’) unless they applied for a ‘certificate of citizenship’ under State law. This was only granted if, amongst other things, the applicant had practised the ‘manner and habits of civilised life’ for at least two years, could ‘speak and understand the English language’ and was ‘not suffering from active syphilis, leprosy, granuloma or yaws’.²³⁴

Commentators such as Peter Bayne, and Chesterman and Galligan, argue that after European settlement Australia’s aborigines were soon acknowledged as ‘subjects’ and not ‘aliens’ but that recognition of their formal status did not assist them, with substantial denial of their rights and entitlements under various pieces of legislation both before and for many decades after federation.²³⁵ In Bayne’s view, Australia’s colonial courts accepted that annexation of New South Wales as a British possession on 26 January 1788 (and the later annexation in 1827-1829 of Western Australia) meant these territories became ‘settled colonies’ of the Crown.²³⁶ In relation to the status of the indigenous people, the consequence was that:

The land became dominions of the Crown, and thus, by a rule of the common law, all those born in the dominions were British subjects. Therefore, those Aboriginal people resident in the colonies at the time of annexation are regarded as having become British subjects.²³⁷

Bayne states that in the early years of the new settlement there was a muddled view of the legal status of aboriginal inhabitants,²³⁸ but ‘by 1836...in the New South Wales colony, it was settled at the highest official levels that for all purposes the Aborigines were to be regarded as British subjects’.²³⁹ Bayne cites the New South Wales Supreme Court’s decision in *R v Murrell* (1836),²⁴⁰ arguing that from this time it was accepted that ‘the Aborigines were in the eyes of the common law, entitled to the same rights as *other subjects* of the Crown’ (although he notes that ‘so far as the application of the law to them was concerned, the

²³⁴ *Natives (Citizenship Rights) Act 1944* (WA) ss 5, 6. See also Sawyer, ‘National Status of Aborigines in Western Australia’, above n 70.

²³⁵ Bayne, ‘Politics, the Law and Aborigines’, above n 136, 214-215; John Chesterman and Brian Galligan, *Citizens without rights, Aborigines and Australian Citizenship* (Cambridge University Press 1997) 42.

²³⁶ Bayne, ‘Politics, the Law and Aborigines’, above n 136, 212.

²³⁷ *Ibid.* Van Dieman’s Land (later Tasmania) was separated from New South Wales and became a separate British colony in 1825 under the *New South Wales Act 1823* (Imp).

²³⁸ *Ibid.* 213-214. See also Yarwood and Knowling, *Race Relations in Australia*, above n 178, 109-111.

²³⁹ Bayne, ‘Politics, the Law and Aborigines’, above n 136, 214.

²⁴⁰ *R v Murrell* [1836] NSWSupC 35. See also Bruce Kercher, ‘*R v Ballard, R v Murrell and R v Bonjon*’ [1998] *Australian Indigenous Law Reporter* 27; (1998) 3(3) AILR 410, www.austlii.edu.au/au/journals/AILR/1998/27.html.

principle of legal equality was, from the middle of the nineteenth century, abandoned in most other respects’).²⁴¹ As discussed below, however, in fact the Supreme Court in *Murrell* did not conclude that aboriginal people were subjects of the British Crown.

Chesterman and Galligan note that ‘there had been some debate in the early nineteenth century between colonial officials and the British Colonial Office as to whether Aborigines were British subjects’.²⁴² However, they state in relation to the Port Phillip Protectorate which existed from 1839 to 1849 as part of the colony of New South Wales, that:

Aborigines in Victoria occupied the special position of ‘protected persons’ rather than citizens. Although Aborigines were, by virtue of birth in one of the King’s dominions, British subjects who were subject to the law, they were not entitled to the benefits of citizenship.²⁴³

Use of the terms ‘citizen’ and ‘citizenship’ in this context is misleading since there was no such thing as colonial ‘citizenship’ and no Australian citizenship in a formal sense until 1949. Moreover, as the *Bonjon* case discussed below shows, the New South Wales Supreme Court did not agree that aborigines in the Port Phillip area were subject to British law. In particular, the Supreme Court could not decide whether the indigenous inhabitants of the Port Phillip Protectorate and the colony of New South Wales as a whole were British subjects or ‘aliens’.

At this time in New South Wales the formal legal status of aboriginal inhabitants was not at all settled in the way that Bayne, and Chesterman and Galligan, suggest. As Bruce Kercher notes, ‘the legal status of Aborigines was the subject of passionate debate among the colonists and imperial officials for a hundred years’.²⁴⁴ Henry Reynolds refers to the tradition that ‘the Aborigines had from the very first day of settlement been British subjects’, but says that ‘in the colonial period many people argued that this was a legal fiction that stood in the way of a clear understanding of the relations between settlers and indigenes’.²⁴⁵

Bruce Buchan notes that there was ‘continuing confusion over the legal status of Indigenous peoples’ during the time of Governor King (1800-1806). King directed that any injustice or wanton cruelty against aborigines should be dealt with ‘in the same manner *as if* this had

²⁴¹ As Bayne said, from the middle of the nineteenth century, ‘a massive edifice of law’ discriminating against indigenous people was erected in each of the Australian colonies (except Tasmania, where only remnants of the Aboriginal people were left). Writing in 1988 he said that ‘Much of this legislation was removed in the period after the Second World War, *although a great deal remains in Queensland*’ (emphasis added). Bayne, ‘Politics, the Law and Aborigines’, above n 136, 214-215.

²⁴² Chesterman and Galligan, *Citizens without rights*, above n 235, 81.

²⁴³ *Ibid* 16.

²⁴⁴ Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1995) 5.

²⁴⁵ Reynolds, *Forgotten War*, above n 151, 29.

been committed against ‘any of His Majesty’s Subjects’. As Buchan says, ‘although seeming to recognise Indigenous peoples as “British subjects”, the term ‘*as if*’ carried an important proviso’.²⁴⁶ Lisa Ford observes that Governor Brisbane’s declaration of martial law in 1824 ‘declared war on Aborigines as British subjects in rebellion against their rightful government. As such, it contained within it a new assertion of governmental jurisdiction over Aborigines as British subjects’.²⁴⁷ According to Ford, however, the Governor’s declaration:

...did not answer the question of Aboriginal subjecthood definitively. It seemed instead to have reflected the peculiar bent of his new attorney-general. Metropole and colony remained deeply ambivalent about the status of indigenous people.²⁴⁸

It may be that when compared to his colleagues in the colonial administration, recognition of the subject status of aboriginal people was indeed the ‘peculiar bent’ of New South Wales Attorney-General Saxe Bannister.²⁴⁹ As explained below, however, recognition of this status was the only interpretation available under British law.

Reynolds notes the decision in 1825 to treat aborigines as if they were foreign enemies against whom war could be waged. Secretary for the Colonies Lord Bathurst directed Governor Darling of New South Wales and Governor Arthur of Tasmania that they must:

...understand it to be your duty, when such disturbances cannot be prevented or allayed by less vigorous measures, to oppose force by force, and to repel such Aggressions in the same manner *as if* they proceeded from the subjects of any accredited State.²⁵⁰

As Buchan said in relation to Governor King, the words ‘as if’ contain an important qualification. Bathurst’s statement seems to recognise that aborigines were not foreigners or ‘aliens’, instead directing the Governors to treat them ‘as if’ they were. Understandably, the directions caused ‘much confusion among officials as to the legal status question’.²⁵¹ Moreover, the practical effect on aborigines was no different whether they were regarded as if they were ‘British subjects in rebellion’ or foreign enemies at war with Britain. As with Governor Brisbane’s declaration, Lord Bathurst’s direction provided authority for the use of military force against indigenous people. As Reynolds explains:

²⁴⁶ Buchan, *Empire of Political Thought*, above n 126, 83.

²⁴⁷ Lisa Ford, *Settler Sovereignty, Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Harvard University Press, 2010) 173.

²⁴⁸ Ibid 174.

²⁴⁹ C H Currey, ‘Bannister, Saxe (1790–1877)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/bannister-saxe-1738/text1919>

²⁵⁰ Reynolds, *Forgotten War*, above n 151, 62, citing H. Bathurst to R. Darling, 14 July 1825, *Historical Records of Australia*, vol. 12, 21. Emphasis added.

²⁵¹ Buchan, *Empire of Political Thought*, above n 126, 87.

By 1825 it had become apparent to both the imperial and colonial governments that the Aborigines were not going to melt away or be peacefully absorbed within the two settler colonies. The response of the imperial government was to treat the hostile tribes as foreign enemies against whom war could be waged. This is a crucial factor in understanding Arthur's use of martial law and his implementation of the Black Line. At every step he took to escalate the conflict he was careful to read Bathurst's instructions to his executive council.²⁵²

For more than a hundred years there was an ongoing state of warfare with hostile aboriginal tribes who resisted invasion of their homelands and were treated by colonial authorities 'as if' they were foreign enemies. As Reynolds notes, it was apparent to the Protector of Aborigines for the Port Phillip district that 'although they have been taken under the British power, and are declared subjects of the British Crown, it is entirely without their knowledge and concurrence'.²⁵³ This remained the situation on the edges of European settlement throughout the colonial period. Given the ever-present violence on the Queensland frontier in the second half of the nineteenth century:

...few colonists subscribed to the view that hostile Aborigines were rebellious subjects. To most people on the frontier they were enemies who were engaged in a war for control of the territory. The same views, expressed during the 1850s, were common currency forty years later...It seemed the height of folly to suggest that their enemies were British subjects and should be treated as such.²⁵⁴

This view of indigenous Australians as 'enemies' or foreigners laid the foundation for continued treatment of other non-European British subjects as the 'alien Other'.

The New South Wales Supreme Court and indigenous legal status

As Buchan says, 'by the early 1840s it was clear that the legal status of Australia's Indigenous inhabitants was still prey to much confusion'.²⁵⁵ A central cause was the ambivalence of the New South Wales Supreme Court on the issue. Despite the clear principle laid down in *Calvin's Case*, in cases from the 1820s to the early 1840s the Supreme Court was unable to decide whether Australia's indigenous people were 'natural-born subjects' or 'aliens'. The Court's confusion arose partly from the uncertainty about the mode of acquisition of the Australian colonies and hence what law applied to the indigenous inhabitants. But its analysis was also strongly affected by a perception that native inhabitants belonged to a different and inferior civilisation and were unworthy of equal legal status with English subjects of the Crown. The focus on such non-legal factors, rather than the criteria of

²⁵² Reynolds, *Forgotten War*, above n 151, 62.

²⁵³ Ibid 164-165.

²⁵⁴ Ibid 76-77, 166-167.

²⁵⁵ Buchan, *Empire of Political Thought*, above n 126, 96.

birth and allegiance laid down by British common law, became an enduring theme for groups regarded as ‘aliens’ in the emerging Australian nation.

Uncertainty about indigenous status

The uncertainty in the New South Wales legal community about the status of indigenous people was demonstrated in *Lowe’s Case* (1827), where a jury of seven military officers acquitted Lieutenant Lowe of the murder of an aboriginal man in the Hunter Valley.²⁵⁶ Lowe engaged ‘two of the best defence barristers in the colony’ to represent him.²⁵⁷ Dr Robert Wardell argued that the Supreme Court had no jurisdiction because the indigenous victim had no status recognised by British law:

I ask what this aboriginal native is with regard to the British Sovereign, and in contemplation of the law of England. Is he an alien enemy? He is not, because his tribe is not in hostilities with the British Sovereign. Is he an alien friend? He is not, because his tribe may be, and in fact is in a state of public hostility with individual subjects of the British Sovereign, and because no friendly alliance has ever been entered into. He is not a subject of the British King, because his tribe has not been reduced under his Majesty’s subjection, and because there has been no treaty, either expressed or understood, between his country and that of the British King, and because in fact there could be no treaty between him as a member of the commonwealth and the British King.²⁵⁸

Lowe’s other barrister, William Charles Wentworth, also said the Court had no jurisdiction because the aboriginal inhabitants were neither ‘subjects’ nor ‘aliens’. The aborigines, he suggested, barely deserved recognition as ‘people’ at all:

...these people, by the law of nature, are not subject to the jurisdiction of this Court...they are men, no more subject to punishment by our code, than a set of idiots or lunatics...Here are a set of natives one degree *just above the beasts of the field* - possessing no understanding beyond a confused notion of right and wrong, and that is all. Men, who are certainly in such a state of barbarism and ignorance, that they could not be legally sworn in any Court of Justice.²⁵⁹

As Lisa Ford explains, Chief Justice Forbes and Justice Stephen:

...seemed to prevaricate about whether Aborigines could be tried without a mixed jury of Aborigines and British subjects, or whether they could be tried at all as British subjects when they were denied access to many of the benefits of British law...In law, the question rested on a determination that Aborigines were not aliens under the protection of the colony. In common law, aliens under the protection of the Crown were entitled to be tried by a mixed jury of an equal number of Englishmen and their countrymen.²⁶⁰

²⁵⁶ *R v Lowe* [1827] NSWSupC 32, [1827] NSWKR 4 (18 May 1827). The Duke of Wellington requested the trial notes from Chief Justice Forbes so he could explain any impropriety to King George IV. See Kelly K Chaves, ‘“A solemn judicial farce, the mere mockery of a trial”: the acquittal of Lieutenant Lowe, 1827’ (2007) 3 *Aboriginal History* 122, 135, 137-138.

²⁵⁷ Chaves, above n 256, 134.

²⁵⁸ *R v Lowe* [1827] NSWSupC 32; [1827] NSWKR 4.

²⁵⁹ *Ibid.* Emphasis added.

²⁶⁰ Ford, *Settler Sovereignty*, above n 247, 163. Ford is referring to the doctrine of ‘*jury de meditate lingue*’. As Blackstone explained in his Commentaries, ‘where either party is an alien born, the jury

As Ford says, the Supreme Court avoided a decision about whether the aboriginal victim was a subject or alien by declaring that in either case he was ‘protected by British territorial jurisdiction or, at the very least, by British jurisdiction to try a British citizen’ (or ‘subject’).²⁶¹ This approach shielded the Court from properly accepting the rule of law in this situation, which would have demanded the indigenous victim be identified as a British subject.

‘Internal’ indigenous cases: *Ballard, Murrell and Bonjon*.

A more difficult issue confronting the New South Wales Supreme Court during this period was whether it could hear matters solely involving aboriginal people. As Ford says, ‘as late as 1834, high-ranking members of the colonial administration contended over whether or to what degree Aborigines and their crimes fell within the purview of British law’.²⁶²

Contrary to the law, the Court could not bring itself to say that indigenous people were British subjects and therefore within its jurisdiction. According to Ford:

...the officers of the Crown and the new Supreme Court together invented jurisdiction over Aboriginal Australians in New South Wales...The court wrought a revolution in the theory and practice of jurisdiction in New South Wales...a revolution grounded in the logic of territoriality.²⁶³

But the Supreme Court had no need to ‘invent jurisdiction’ over indigenous people within the boundaries of the colony of New South Wales. Under the established common law, any person ‘habitually resident’ or born in territory annexed by the British in 1788 had the status

shall be one-half denizens, and the other half aliens (if so many be forthcoming in the place), for the more impartial trial...But where both parties are aliens, no partiality is to be presumed to one more than another, and therefore it was resolved...that where the issue is joined between two aliens...the jury shall all be denizens’. William Blackstone & Thomas M. Cooley, *Commentaries on the Laws of England* (Callaghan and Company 1884) 359 (‘Of the Trial by Jury’).

²⁶¹ Ibid 163. While Chief Justice Forbes said that ‘this native must be considered, whatever be his denomination, a British subject’, he added that if not, the aboriginal victim would be ‘an alien friend, or an *alien ami*, in any case he is entitled to *lex loci*, and it is only under peculiar circumstances he can be excluded from that right’. In a similar way, Justice Stephen said he had not been presented with any fact ‘from which the Court were to infer but that he was a subject of his Majesty’. However, he said, ‘there were such contradictions with writers with respect to the situation of people living in a state of nature, that it was difficult to arrive at any fixed opinion’. *R v Lowe* [1827] NSWSupC 32; [1827] NSWKR 4. There was no doubt about the Supreme Court’s jurisdiction in any matter involving British colonists. As Justice Windeyer said, ‘Without any statutory enactment, the law of England was immediately in force...according to the common law principle that colonists carry the law with them. And...it was really that principle, aided and recognized by the Act 27 Geo. III, c. 2 [1828] and the First Charter of Justice, that brought the law of England to eastern Australia with the First Fleet’. Windeyer, above n 2, 669.

²⁶² Ford, *Settler Sovereignty*, above n 247, 178.

²⁶³ Ibid 158.

of a subject under English law, and was within the jurisdiction of colonial courts on that basis.

R v Ballard (1829),²⁶⁴ *R v Murrell* (1836)²⁶⁵ and *R v Bonjon* (1841)²⁶⁶ were all cases requiring the New South Wales Supreme Court to consider the legal status of aborigines. Each concerned the alleged murder of one indigenous inhabitant by another. Pondering its jurisdiction, the Court failed to conclude aborigines were subjects not aliens as required by law.

Damen Ward explains the broader imperial context of these cases:

Disputes over the operation of courts in relation to indigenes were...of wider importance in colonial politics. By the late 1830s, colonial governors were increasingly asserting a general territorial political authority and the general (statutory) territorial jurisdiction of the Supreme Court. The notion that indigenous peoples within colonies were not fully subject to the authority of the Crown's courts was increasingly unacceptable to governments.²⁶⁷

The approach in British colonies to jurisdiction over internal indigenous violence contrasted to that in the United States. Paul McHugh identifies that:

In the United States the jurisdictionalism of the colonial era represented by the Royal Proclamation (1763) was transmuted by the court of Chief Justice Marshall into a doctrine of residual tribal sovereignty. The British rejected that approach and lurched from episode to episode in the second quarter of the nineteenth century towards a more absolutist and thoroughgoing concept of Crown sovereignty over tribal peoples. This process came about mostly through the need to define more precisely the Crown's criminal jurisdiction over the tribes as British settlement spread in the post-Napoleonic period.²⁶⁸

More generally, debates about the jurisdiction of colonial courts over Aboriginal 'crime' formed part of a 'much deeper discourse around the conditions under which indigenous people would be accommodated in settler societies'.²⁶⁹

In *Murrell*, Mr Stephen, counsel for the accused, argued that the New South Wales Supreme Court had no jurisdiction because neither his client nor the aboriginal victim were 'subjects of the King', so they could be neither 'subject to' or under the protection of the King's laws.²⁷⁰

²⁶⁴ *Ballard*, NSW Sup Ct, 13 June 1829, above n 12.

²⁶⁵ *Murrell*, NSW Sup Ct, 5 February 1836, above n 13.

²⁶⁶ *R v Bonjon*, NSW Sup Ct, Port Phillip District, 16 September 1841, Macquarie University Division of Law, *Decisions of the Superior Courts of New South Wales 1788-1899* www.law.mq.edu.au/research/colonial_case_law/nsw/cases/port_phillip_district/1841/r_v_bonjon/

²⁶⁷ Damen Ward, 'Imperial Policy, Colonial Government, and Indigenous Testimony in South Australia and New Zealand in the 1840s', in Shaunnagh Dorsett and Ian Hunter (eds), *Law and Politics in British Colonial Thought. Transpositions of Empire* (Palgrave Macmillan 2010) 229, 233.

²⁶⁸ P G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination* (Oxford University Press, 2004), 117.

²⁶⁹ Mark Finnane, 'The Limits of Jurisdiction. Law, Governance, and Indigenous People in Colonized Australia' in Dorsett and Hunter, above n 267, 148, 154.

No man, without he was a subject of his Majesty, could be tried by the laws of Great Britain; this man was not so, but had been long residing here before the country was taken possession of.²⁷¹

The Court rejected the argument that it lacked jurisdiction because the aborigines involved were not British subjects.²⁷² However as Bruce Kercher notes, it did not decide that Australia's native inhabitants were subjects under British law:

Contrary to a common misconception, the case is not authority for the proposition that all Indigenous people in New South Wales were automatically British subjects.²⁷³

Justice Dowling in *Ballard* did not believe the aboriginal race could owe allegiance as subjects to the British Crown:

Amongst civilized nations this is the universal principle, that the *lex loci*, shall determine the disputes arising between the native and the foreigner. But all analogy fails when it is attempted to enforce the laws of a foreign country amongst a race of people, *who owe no fealty to us*, and over whom we have no natural claim of acknowledgement or supremacy'.²⁷⁴

In the same case Chief Justice Forbes thought the Supreme Court could not have jurisdiction because 'I am at a loss to know how, or upon what principle this court could take cognizance of offences committed by a *barbarous people* amongst themselves'.²⁷⁵ In *Murrell* Justice Burton said the practices of the indigenous people:

...are only such as are consistent with a *state of grossest darkness & irrational superstition* and...are founded entirely upon principles particularly in their mode of vindication for personal wrongs upon the wildest most indiscriminatory notions of revenge.²⁷⁶

In Justice Burton's view the rules of indigenous society could not be regarded as 'laws':

It cannot be said...that these practices are 'the actual laws of the Country' & that they remain until conquest or cession and a change of laws by the King. They are to be regarded only in the

²⁷⁰ *Sydney Gazette and New South Wales Advertiser* (Sydney) 23 February 1836, 3. Mark Finnane notes that the missionary Lancelot Threlkeld told the Attorney-General that other aborigines wanted Murrell and his accomplice Bummaree tried by the English for murdering another aborigine. Finnane, above n 269, 153.

²⁷¹ *Murrell*, NSW Sup Ct, 5 February 1836, above n 13. See also *Sydney Gazette and New South Wales Advertiser* (Sydney) 23 February 1836, 3.

²⁷² Burton J, 'Arguments and notes for judgment in the case of Jack Congo Murrell', February 1836, *Original Documents on Aborigines and Law 1797-1840*, Document 48 (Centre for Comparative Law History and Governance, Macquarie University and State Records NSW), [241]. Justice Burton apparently prepared the notes in case his two colleagues held Murrell to be outside the court's jurisdiction. See Kercher, '*R v Ballard* etc', above n 240.

²⁷³ Kercher, '*R v Ballard* etc', above n 240. Cf Bayne, 'Politics, the Law and Aborigines', above n 136, 214.

²⁷⁴ *Ballard*, NSW Sup Ct, 13 June 1829, above n 12. Kercher, '*R v Ballard* etc', above n 240. Emphasis added. See also Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7, 8-9.

²⁷⁵ *Ballard*, NSW Sup Ct, 13 June 1829, above n 12. Kercher, '*R v Ballard* etc', above n 240. Emphasis added.

²⁷⁶ Burton J, 'Arguments and notes for judgment', above n 272, [239]. Emphasis added.

light of the lewd practices entitled not to so much respect as the Brehon laws of the Wild Irish.²⁷⁷

On this basis Justice Burton rejected the argument that aboriginal people were beyond the jurisdiction of the Supreme Court because they were part of a sovereign entity controlled by their own system of law:

I do not think therefore that the aboriginal natives of this Colony were or are entitled to be considered as Independent States governed by laws which *civilized* men can recognise...& respect & consequently that the reasoning founded upon that assumption fails.²⁷⁸

In *Bonjon* Justice Willis adopted opposite reasoning, stating that:

...the Aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs. If this be so, I strongly doubt the propriety of my assuming the exercise of jurisdiction in the case before me.²⁷⁹

However Justice Willis shared Burton's opinion about the level of civilisation of the aboriginal people. While he said imperial authorities had been influenced by incorrect statements about the primitive way of life of the aborigines, nevertheless in his view the indigenous people of Australia were 'wretched beings' and an 'unhappy race', comprising 'a vast and hitherto neglected, oppressed, and deeply injured multitude...'.²⁸⁰

In each case the Supreme Court gave indications of what it thought the legal status of Australia's indigenous inhabitants might be under the common law. Justice Burton in *Murrell* referred to the principles set down by Lord Coke in *Calvin's Case*, noting that under English law the indigenous inhabitants of Australia '*must be either subjects or aliens*'.²⁸¹ He said the murdered aborigine was entitled to the protection of the British Crown in the same way as 'an *alien* living therein under the King's Peace'.²⁸² In contrast Justice Willis in *Bonjon* said that the aborigines '*cannot be considered as Foreigners in a Kingdom which is their own*' and

²⁷⁷ Ibid [239-40].

²⁷⁸ Ibid [240]. Emphasis added.

²⁷⁹ *Bonjon*, above n 266. Kercher, '*R v Ballard* etc', above n 240. As Kercher notes, Justice Willis expressly reserved 'the point as to jurisdiction'.

²⁸⁰ *Bonjon*, above n 266. Kercher, '*R v Ballard* etc', above n 240. Justice Willis referred to the precedent of the Charibs, native inhabitants of the Caribbean island of St. Vincent (ceded by the French to Great Britain in 1763) who 'uniformly and absolutely denied any right in any of the Sovereigns of Europe to their allegiance' and who were 'a rude and savage race certainly not greatly superior, from Mr Edwards' account of them, to the aborigines as described by Mr Batman in *Australia Felix*.'

²⁸¹ Burton J 'Arguments and notes for judgment', above n 272, [257]. Emphasis added. In Burton's notes the second passage reads '...as there is a *local protection* on the K's part so there is a local ligenance of the *subject's* part'. This is presumably a mistake on Burton's part. Under the common law, 'local allegiance' was not sufficient for 'subject' status.

²⁸² 'Judgment of Mr. Justice Burton in the Case of Jack Congo Morral on a charge of Murder', *Original Documents on Aborigines and Law 1797-1840*, Document 47 (Centre for Comparative Law History and Governance, Macquarie University and State Records NSW), [214]. Emphasis added.

that, at least in relation to ‘protection from the aggressions of the colonists’, they were ‘entitled to be considered and treated...*as if* they were British subjects’.²⁸³ Both judges in *Ballard* agreed that it was the British settlers and not the aborigines who were the ‘foreigners’ or outsiders in Australia.²⁸⁴

But the Supreme Court was unable to decide what the legal status of Australia’s aborigines actually was under the common law. In *Ballard* and *Bonjon* the Court did not conclude that the native people were British subjects despite declaring they were not ‘foreigners’. Indeed in *Ballard*, as Bruce Kercher notes, Justice Dowling ‘seemed to agree that Aborigines were *not* British subjects’.²⁸⁵ In *Bonjon* Justice Willis said the aborigines were ‘distinct though dependent allies, not British subjects’.²⁸⁶ Justice Burton in *Murrell* recognised there were only two choices under the common law, but thought it legitimate to apply the thinking of Swiss jurist, Emmerich de Vattel,²⁸⁷ indicating that indigenous inhabitants were akin to ‘strangers’ who had entered the territory of the sovereign and were subject to the laws of New South Wales so long as they remained within the Colony.²⁸⁸ As Henry Reynolds says:

Burton...up-ended the Willis view that the ‘colonists, and not the aborigines are the foreigners’. His argument also begged the question of where the Aborigines had come from if they were legally equivalent to foreigners who had entered the society from outside unless, of course, he conceded that unsettled ‘Aboriginal’ Australia was in effect a foreign country. But this proposition, which made sense of colonial reality, could not be sustained while the overarching theory remained that British sovereignty reached to the farthest corners of the continent.²⁸⁹

While Reynolds exposes the flaw in Justice Burton’s logic, more significantly Burton’s judgment in *Murrell* was contrary to established law. And as Reynolds himself might say,

²⁸³ *Bonjon*, above n 266. Kercher, ‘*R v Ballard* etc’, above n 240. Emphasis added.

²⁸⁴ Justice Dowling said they came from a ‘foreign country’ and Chief Justice Forbes thought they were a ‘race of people...fixed in a country to which they did not originally belong’. *Ballard*, NSW Sup Ct, 13 June 1829, above n 12. Kercher, ‘*R v Ballard* etc’, above n 240. See also Kercher, ‘Indigenous Legal Autonomy’, above n 274, 8-9.

²⁸⁵ Kercher, ‘Indigenous Legal Autonomy’, above n 274, 9. Emphasis added.

²⁸⁶ Kercher, ‘*R v Ballard* etc’, above n 240; see also Kercher, *Unruly Child*, above n 244, 11.

²⁸⁷ Vattel applied theories of natural law to the conduct of states and sovereigns in *The Law of Nations or the Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758). See Lonang Institute, ‘The Law of Nations or the Principles of the Law of Nature (1758). Emmerich de Vattel’, <http://www.lonang.com/exlibris/vattel/>; and Duhaime.org, ‘Emerich de Vattel, 1714-1767’, *Law Hall of Fame*, www.duhaime.org/LawMuseum/LawArticle-589/Emerich-de-Vattel-1714-1767.aspx.

²⁸⁸ Justice Burton suggested that if the aborigines were ‘*strangers* then also they are subject to the laws of the Country so long as they remain within it’. Burton J, ‘Arguments and notes for judgment’, above n 272, [251-252]. Emphasis added.

²⁸⁹ Henry Reynolds, *Aboriginal Sovereignty: Reflections on race, state and nation* (Allen & Unwin, 1996) 72.

‘not the law now but the law then’.²⁹⁰ In other words, if ‘British sovereignty reached to the farthest corners of the continent’, under the law applying at the time the Supreme Court had to recognise indigenous inhabitants as subjects of the British Crown and could not lawfully treat them as ‘foreigners’, ‘strangers’ or ‘aliens’.

Social not legal factors

Lisa Ford points out that from the 1820s ‘Anglophone settler polities’ such as New South Wales and Georgia in the United States shared philosophical works such as Vattel’s *Treatise on the Law of Nations* (1758), ‘peddling a powerful synthesis of neo-Lockean legal and racist thought about indigenous people in North America and Australasia’.²⁹¹ But according to Ford, in the landmark *Murrell* judgment which ‘ended in the juridicial death of Aboriginal people in Australia’:²⁹²

...nineteenth-century notions of race and savagery *did not determine the outcome of the case*. They merely provided ‘scientific’ bases for a new juridicial science of perfect settler sovereignty.²⁹³

This depends what ‘outcome’ of the *Murrell* case is being referred to. As the earlier discussion shows, ‘notions of race and savagery’ were an important factor in the Supreme Court’s failure in *Murrell*, *Bonjon* and *Ballard* to find that aborigines had equal legal status as subjects of the Crown. In *Murrell* and *Bonjon*, the Supreme Court especially focussed on the social characteristics of the aboriginal inhabitants (particularly their level of ‘civilisation’) rather than the common law criteria of birth and allegiance - because the former issue was seen as central in determining the extent to which English law applied in the colony. As explained below, this depended on whether New South Wales was an *uninhabited* country settled by the colonisers or an *occupied* territory conquered by the British. The Court had difficulty deciding that question. Drawing on Vattel, however, it found that the aboriginal people did not properly cultivate the land so as to be regarded as *inhabiting* or being in possession of the territory on which they lived. Both Justice Burton in *Murrell* and Justice Willis in *Bonjon* quoted with approval the principle from Vattel’s *Law of Nations* that:

...those who pursue an erratic life, and live by hunting rather than cultivate their lands, usurp more extensive territories than with a reasonable share of labour they would have occasion for,

²⁹⁰ Reynolds, *Forgotten War*, above n 151, 135-6. See above p 30.

²⁹¹ Ford, *Settler Sovereignty*, above n 147, 9.

²⁹² *Ibid* 198.

²⁹³ *Ibid* 201. Emphasis added.

and have, therefore, no reason to complain if other nations, more industrious, and too closely confined come to take possession of a part of those lands.²⁹⁴

Justice Burton used a mixture of this extract from Vattel and his own words, referring to ‘they who refusing to cultivate the earth choose to lead *an idle & wandering life* instead’.

Applying Vattel’s principle to the case before him, Justice Burton declared that:

...it will immediately be seen that the aboriginal natives of this Colony, had not at the time of first settlement of the English so appropriated the territory as to...exclude others of the common family of mankind from so doing, & that consequently they had not acquired the rights of domain & empire.²⁹⁵

As Lisa Ford observes:

...by the end of the eighteenth century, Enlightenment philosophy had created a new ideological universe – a universe in which Australian aborigines were a people so savage that they were unable to claim property or to constitute a political society.²⁹⁶

It is consistent with the theory that aboriginal people did not properly cultivate or occupy the land so as to deserve acknowledgment in the eyes of the colonisers as a ‘civilised people’ that the judges could not recognise them as either ‘subjects’ or ‘aliens’, despite having only those two choices under British law. Indeed, some of the discussion in these cases suggested that the Supreme Court thought aborigines might not have been human or a ‘people’ at all (see, for example, the comment noted above by Justice Willis that aborigines were ‘wretched beings’ and by Justice Burton that they lived in ‘grossest darkness’). This was a theme repeated in later attitudes in colonial and post-federation Australia towards Chinese and other non-European settlers. The idea that Australia’s indigenous people were less than human was expressed by prominent colonial figures in other settings. Demonstrating his consistency on this issue, one of the barristers from *Lowe’s Case*, William Charles Wentworth, stated in 1844 when opposing a bill in the New South Wales Legislature to allow aboriginal evidence in court proceedings, that it was:

...quite as defensible [sic] to receive as evidence in a Court of Justice the *chatterings of the ourang-outang as of this savage race*, and he for one would as soon vote in favour of a Bill for that purpose as for the present measure.²⁹⁷

The clearest evidence that ‘notions of race and savagery’ did in fact influence judgments in these indigenous cases is the Supreme Court’s conclusion in *Ballard* that aborigines were a

²⁹⁴ Willis J. in *Bonjon*, see Kercher, ‘*R v Ballard* etc’, above n 240.

²⁹⁵ Burton J, ‘Arguments and notes for judgment’, above n 272, [248-249].

²⁹⁶ Ford, *Settler Sovereignty*, above n 247, 74-75.

²⁹⁷ *Sydney Herald*, 21 June 1844, see Kercher, *Unruly Child*, above n 244, 16-17. Emphasis added. For similar sentiments in relation to indigenous people in North America under British rule, see Eve Darian-Smith, *Religion, Race, Rights. Landmarks in the History of Modern Anglo-American Law* (Hart Publishing 2010) 71.

‘barbarous’ people incapable of owing the ‘fealty’ or ‘allegiance’ characterising a subject of the Crown under British law. This was directly at odds with the rule of law.

Mode of acquisition and legal status

Uncertainty about the mode of acquisition of New South Wales affected the Supreme Court’s analysis of the legal status of the colony’s indigenous inhabitants. This issue may have been relevant in deciding whether aboriginal people were subject to the Court’s jurisdiction (although the outcome in *Murrell* suggests it was not).²⁹⁸ However in relation to the legal status of the native people, the only relevant fact was that Great Britain had ‘acquired’ (or at least claimed to exercise sovereignty over) the colony of New South Wales, not the particular mechanism by which this ‘acquisition’ had been achieved.

By the nineteenth century, there were clear legal precedents in relation to what law applied in the case of different forms of acquisition. As Blackstone said in his *Commentaries on the laws of England*, ‘if an uninhabited country be discovered and planted by English subjects all the English laws then in being, which are the birth right of every English subject, are immediately there in force’.²⁹⁹ Similarly, in *Blankard v Galdy* (1673) the court said that ‘in the case of an uninhabited country newly found out by English subjects, all laws in force in England, are in force there...’.³⁰⁰ In contrast, the situation of a ‘conquered’ territory was different. As Lord Mansfield CJ stated in *Campbell v Hall* (1774), ‘a country conquered by the British arms becomes a dominion of the King in the right of his crown, and, therefore, necessarily subject to the legislature, the Parliament of Great Britain’. In such cases English law does not apply automatically. Instead, ‘the laws of a conquered country continue in force until they are altered by the conqueror’.³⁰¹

Justice Willis in *Bonjon* declared that the Australian situation did not fit accepted precedents, stating that:

²⁹⁸ Justice Burton concluded that whatever the legal status of Australia’s aboriginal people, disputes between them were within the jurisdiction of the Supreme Court: ‘...it is evident that not only all those who are subjects but all who live within any country of the realm are under the King’s peace or protection, & that any offence committed against any local person is committed against the King’s peace...’. Burton J, ‘Arguments and notes for judgment’, above n 272, [261].

²⁹⁹ Blackstone, above n 31, 108. This principle was cited by the New South Wales Supreme Court in *R. v The Magistrates of Sydney*, 14, 21 October 1824. See Ford, *Settler Sovereignty*, above n 247, 166.

³⁰⁰ *Blankard v Galdy* Holt KB 341, 342, cited in Peter Hanks and Deborah Cass, *Australian Constitutional Law: Materials and Commentary* (Butterworths 6th ed, 1999) 56.

³⁰¹ *Campbell v Hall* 1 Cowp 204; 98 E.R. 1045 (K.B.).

Colonies ...are acquired by conquest; by cession under treaty; or by occupancy. This colony stands on a different footing from some others for it was neither an unoccupied place, nor was it obtained by right of conquest and driving out the natives, nor by treaties [i.e. by cession].³⁰²

In the notes prepared for his judgment in *Murrell*, Justice Burton also recognised the lack of authority about the acquisition of the Australian colonies, stating that ‘I admit that Our own law writer Blackstone does not include in his statement of the mode in which Plantations & Colonies are established the precise case of relation to this colony’.³⁰³ As John Hookey says:

Interestingly, the Supreme Court in the *Murrell* case did not hold that Australia was a settled colony. If anything, the reasons of Burton J are consistent with [defendant counsel] Stephen’s submission that the colony was neither conquered, ceded, nor settled.³⁰⁴

Bruce Kercher refers to ‘the ambiguity of the legal position of Aborigines’ caused by confusion over the mode of acquisition in the early years of the New South Wales colony:

The assumption of both local officials and those in London was that New South Wales had been acquired by peaceful settlement of an empty land, rather than by conquest or cession by the original occupiers. From the colonists’ viewpoint this was merely a technical distinction, but from the Aborigines’ viewpoint, the difference was crucial. In a settled colony, they became British subjects from the moment the occupation began.³⁰⁵

According to Kercher:

...if the Aborigines had been classified as enemies in a conquest rather than subjects in a settled colony, they might have been accorded some dignity and a morally strong claim to retain some of their pre-existing rights. One makes treaties with one’s enemies, not with fellow subjects.³⁰⁶

However it is not correct to say that Australia’s aborigines might still have been considered under the common law as enemies (and therefore ‘aliens’) if the colony of New South Wales was regarded as ‘conquered’ and not ‘settled’. It would only be if the territory inhabited by aboriginal tribes was regarded as ‘unconquered’ that they could be treated, as Mitchell asserted, as ‘aliens...against whom H.M.’s Troops may exercise belligerent right’. As Salmond pointed out, under the common law once an enemy’s territory had been conquered the population no longer answered to the former ruler but owed allegiance to the new sovereign. This principle of English law was set down in *Campbell v Hall* where Lord Mansfield declared that ‘the conquered inhabitants once received under the King’s protection

³⁰² Kercher, ‘*R v Ballard etc*’, above n 240.

³⁰³ Burton J, ‘Arguments and notes for judgment’, above n 272, [247].

³⁰⁴ John Hookey, ‘Settlement and Sovereignty’, in Peter Hanks and Bryan Keon-Cohen, *Aborigines and the Law* (George Allen & Unwin 1984) 1 at 3.

³⁰⁵ Kercher, *Unruly Child*, above n 244, 4-5.

³⁰⁶ *Ibid* 5.

become subjects, and are to be universally considered in that light, and not as enemies or aliens'.³⁰⁷

While it was unclear about the precise mode of acquisition of the colony, the New South Wales Supreme Court was in no doubt that sovereignty over the land in which the indigenous people lived belonged to Britain.

As Justice Burton said in *Murrell*:

The Sovereignty of the Country thus belonging to the English nation – it is next to be considered in what light are the Aboriginal natives to be regarded. [B]y the law of nations they can belong only to one of two classes – Subjects or Strangers...³⁰⁸

In *Bonjon*, Justice Willis noted that after the first fleet of British convicts landed at Sydney Cove in January 1788:

...at a meeting of the whole colony, formal possession was taken of that part of New Holland which extends from York Cape to the South-eastern Cape, and from the coast to the 135° of east longitude; a country, to which was given the denomination of New South Wales, much more extensive than all the British dominions in Europe.³⁰⁹

On this basis there should have been no question that inhabitants of the vast colony of New South Wales were British subjects. As Professor Salmond observed in 1902, in contrast to Roman law, which decreed that occupants of conquered lands remained 'peregrini' or 'aliens', under English feudal and common law inhabitants of acquired territories became subjects owing allegiance to the British sovereign. If the King of England acquired new territories – whether by cession, conquest or occupation (or by some other method) – the inhabitants of these territories 'cease to be aliens and become forthwith British subjects'.³¹⁰

This is consistent with customary international law on the succession of states. As Professor

³⁰⁷ *Campbell v Hall*, (1774) 1 Cowp. 204, 98 E.R. 1045 (K.B.), 1047; see Salmond, 'Citizenship and Allegiance', above n 81, 55.

³⁰⁸ Burton J, 'Arguments and notes for judgment', above n 272, [251-252].

³⁰⁹ Kercher, '*R v Ballard* etc', above n 240. The Museum of Australian Democracy explains that 'Captain Arthur Phillip's Commission as New South Wales Governor made the boundary of the Colony 135 degrees east longitude, a convenient line which included only the eastern one-third of the future Northern Territory. This provision continued in the Commissions of the Governors until the British government decided to establish a military and trading post on the north coast of Australia. The site of the first trading post set up in 1824, Fort Dundas on Melville Island, was some five degrees west of the boundary of the Colony. Earl Bathurst, at the Colonial Office, saw to it that this Commission issued to the next Governor of New South Wales, Ralph Darling, extended the western boundary of New South Wales to 129 degrees east longitude'. [Http://foundingdocs.gov.au/item-did-41.html](http://foundingdocs.gov.au/item-did-41.html).

³¹⁰ Salmond, above n 81, 55. See also Parry, *British Nationality*, above n 83, 32; Mervyn J Jones, *British Nationality Law and Practice* (Clarendon Press 1947) 42 n 1. See also the discussion in Chapter Two about British acquisition of Hong Kong, Kowloon and the New Territories (pp 92-93).

Brownlie states, ‘the evidence is overwhelmingly in support of the view that the population follows the change of sovereignty in matters of nationality’.³¹¹ According to Lord McNair:

The normal effect of the annexation of territory by the British Crown, *whatever may be the source or cause of the annexation*, for instance, a treaty of cession, or subjugation by war, is that the nationals of the State whose territory is annexed, *if resident thereon*, become British subjects...³¹²

Similarly Clive Parry concludes that:

In general it rested with the Crown to decide how far it would exercise the somewhat ill-defined powers it derives from international law. In the absence of any regulation of the matter by the Crown...it might be presumed that nationals of the former sovereign *resident in the territory annexed* became British subjects ipso facto and without any special act of allegiance or election...³¹³

The above analysis demonstrates this principle was routinely avoided by the Supreme Court when it came to the formal legal status or nationality of aboriginal Australians.

Applicable law and legal status

When discussing these cases in the New South Wales Supreme Court, Reynolds, Ford and Buchan each indicate that the legal status of indigenous inhabitants was dependent on whether they were subject to British or some form of local law. In support of this argument, each author refers to remarks by Sir Edward Coke in *Calvin’s Case* about the extension of English law to newly acquired territory.³¹⁴ Ford highlights Coke’s statement that if a ‘Christian King’ conquers the kingdom of an ‘infidel’, then the laws of the infidel are abrogated.³¹⁵ She notes that by the eighteenth century this formula was:

...translated by many to mean that North America was held by fictive conquest under English and later British law. Yet, importantly, insofar as it *purported to determine indigenous legal status*, Coke’s maxim was never put into legal practice...³¹⁶

Buchan says the problem of asserting sovereignty over multiple legal systems was:

³¹¹ Ian Brownlie, *Principles of Public International Law* (Clarendon Press, 6th ed, 2003) 628. Cited by Kirby J in *Ame* (2005) 222 CLR 439, 484 [122].

³¹² Arnold Duncan McNair, *International Law Opinions* Vol. II: Peace (Cambridge University Press 1956) 24. Emphasis added.

³¹³ Parry, *Nationality and Citizenship Laws*, above n 70, 275. Emphasis added.

³¹⁴ Reynolds, *Aboriginal Sovereignty*, above n 289, 76; Ford, *Settler Sovereignty*, above n 247, 14; Buchan, *Empire of Political Thought*, above n 126, 61-62.

³¹⁵ *Calvin’s Case* (1608) 7 Coke Report 17b, 77 Eng. Rep. 377, 397-398.

³¹⁶ Ford, *Settler Sovereignty*, above n 247, 14. Emphasis added. But as Gavin Loughton points out, this statement by Coke in *Calvin’s Case* was an obiter remark and was in any case an exception to the rule on conquest which ‘failed to survive into modern law’. As Loughton says, ‘the correctness of Coke’s remarks about infidels were hotly debated in subsequent cases’ and ‘the whole idea of an exception as to infidels’ had ‘almost completely disappeared from English law’ by the late eighteenth century. Gavin Loughton, ‘Calvin’s Case and the Origins of the Rule Governing ‘Conquest’ in English Law’ (2004) 8 *Australian Journal of Legal History* 143, 166, 179-180.

...addressed in *Calvin's Case* (1608) in which it was determined that the monarch alone could decide whether one were an enemy alien (the subject of a monarch at war with England), an alien friend (the subject of a monarch at peace with England), a denizen (a person made a subject by royal charter) or a natural born subject (born of parents who were themselves subjects of the English monarch). Sir Edward Coke argued in *Calvin's Case* that *English law (and hence subject status)* automatically extended across lands conquered by the English monarch. Francis Bacon...was of the opinion that the English monarch must first expressly declare 'conquered' peoples to be British subjects. Despite the difference, *Calvin's Case* appeared to extend the status of 'British subject' to all people born within the territory (and colonies) of the British sovereign.³¹⁷

Such statements, however – as with the judgments of the Supreme Court itself – fail to identify the starting point for determining the legal status of indigenous inhabitants. *Calvin's Case* did not allow the 'monarch alone' to determine subject or alien status. Instead it set down common law principles for legal membership that even the monarch was required to follow. It was not the case under this law that a person was only a natural-born subject if his or her parents were also British subjects. In particular *Calvin's Case* did not make subject status dependent on first determining that English law had been extended to the people of a conquered territory. In *Calvin's Case* Sir Edward Coke said explicitly that allegiance (and hence subject status) was a matter of 'natural law' and was not dependent on 'judicial or municipal' law:

...first that the ligeance or faith of the subject is due unto the King by the law of nature: secondly, that the law of nature is part of the law of England: thirdly, that the law of nature was *before any judicial or municipal law*: fourthly, that the law of nature is immutable...By this law of nature is the faith, ligeance, and obedience of the subject due to his Sovereign or superior...Now it appeareth by demonstrative reason, that ligeance, faith, and obedience of the subject to the Sovereign, was *before any municipal or judicial laws*...For that government and subjection were long before any municipal or judicial laws...For that it had been in vain to have prescribed laws to any but to such as owed obedience, faith, and ligeance before, in respect whereof they were bound to obey and observe them ...³¹⁸

As Professor Price states, 'Coke...resoundingly rejected the idea that the allegiance owed at birth was tied to municipal law. Instead, Coke maintained that it was required by the divine law of nature.'³¹⁹ Keechang Kim notes that the focal issue in *Calvin's Case* was:

...whether allegiance was a bond of subjection institutionalised by the law of the kingdom or archetypal submission grounded upon the law of nature...the overwhelming majority of the judges (12 out of 14) and Lord Chancellor Ellesmere concurred in the opinion that allegiance was grounded upon the law of nature; and, therefore, it ought not to be confined within the kingdom of England...*A founding stone of the British Empire* was now securely laid upon the law of nature.³²⁰

³¹⁷ Buchan, *Empire of Political Thought*, above n 126, 61-62. Emphasis added.

³¹⁸ (1608) 7 Coke Report 5 b, 77 Eng. Rep. 377, 391-392. Emphasis added.

³¹⁹ Polly Price, above n 7, 114.

³²⁰ Kim, above n 7, 159-160. Emphasis added.

In other words, *Calvin's Case* established as part of the common law that allegiance and subject versus alien status was a matter of natural law and was not dependent on what particular system of laws and rules applied. As Professor Price says, 'Coke's report of *Calvin's Case* emphatically placed acquisition of birthright status in the realm of the law of nature...*Calvin's Case* settled the issue into a rule of common law'.³²¹ She notes the importance of this rule for early United States cases:

Calvin's Case and its aftermath illustrate the tenacity of a legal doctrine accorded 'natural law' status in the late medieval period, long after the political and social situation prompting its formulation changed. *Calvin's Case*, born of natural law in a feudal system, was the bridge for adoption of the *jus soli* in the United States. Courts in the early United States firmly grasped *Calvin's Case* and used it precisely to define the relationship of allegiance owing by birth.³²²

In contrast, courts in colonial and post-federation Australia did not 'firmly grasp' the common law principle of birthright allegiance or subject status set down in *Calvin's Case*. The Supreme Court of New South Wales in the indigenous cases referred to above failed to apply the long established common law in this area.

Sovereignty and birthright subject status

Recent works on sovereignty and the extension of territorial jurisdiction over indigenous Australians and other native people in the British Empire have not discussed the common law principle of birthright allegiance laid down by Coke in *Calvin's Case*. Consequently, what British sovereignty should have meant for the status of indigenous Australians under British law – and what this might in turn have signified for jurisdiction – has not been properly critiqued.

In *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination* (2004), Cambridge University Professor Paul McHugh discusses the legal status of aboriginal people across the British Empire. However, he does so without any reference to the ongoing significance of the principle of birthright allegiance or subject status set down in *Calvin's Case*.³²³ Associate Professor Lisa Ford in *Settler Sovereignty*,

³²¹ Polly Price, above n 7, 142. As Lobban says, in drawing on the 'law of nature' in this way, 'Coke was using the principle to answer a question for which there was no clear solution in the common law: whether a subject of the king of Scotland, born in Scotland after James VI's accession to the throne of England, was an alien in England'. Michael Lobban, 'The common law mind in the age of Sir Edward Coke' (2001) 33 *Amicus Curiae* 18, 19.

³²² Polly Price, above n 7, 144-5.

³²³ Like Ford, Buchan and Reynolds, McHugh refers to 'obiter' remarks by Sir Edward Coke in *Calvin's Case* about the extension of English law to newly acquired territory. P G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status and Self-Determination* (Oxford University Press, 2004) 26, 40, 47, 70, 86-7.

Jurisdiction and Indigenous People in America and Australia, 1788-1836 describes *Calvin's Case* as 'long abandoned by the courts of the United Kingdom',³²⁴ despite its continued importance for legal membership under American, British and Australian law.³²⁵ Similarly, in an important article drawing parallels between colonial cases and modern litigation in the Australian High Court, Shaunnagh Dorsett and Shaun McVeigh also refer to *Calvin's Case*, but only in relation to the obiter statement on abolition of the 'Brehon law' of the Irish.³²⁶ Each of these contributions discusses the nineteenth century indigenous cases in the New South Wales Supreme Court.³²⁷ As McHugh states, the judgment of Justice Burton in *Murrell* 'rested entirely on the assertion of sovereignty by the Crown'.³²⁸ However the omission of any discussion of Coke's enduring principle of birthright allegiance and nationality means these works do not assess what this 'assertion of sovereignty' should have meant for the legal status of the indigenous population of Australia.

Whether the British properly acquired sovereignty over the Australian continent, there is no doubt that domestic courts had to operate on this basis. Justices Deane and Gaudron explained in *Mabo* (1992) that there were problems about establishment of the colony of New South Wales in 1788 'in so far as the international law of the time' was concerned:

...contemporary international law would seem to have required a degree of *actual occupation* of a 'discovered' territory over which sovereignty was claimed by settlement and it is scarcely arguable that the establishment by Phillip in 1788 of the penal camp at Sydney Cove constituted occupation of the vast areas of the hinterland of eastern Australia designated by his Commissions.³²⁹

Critically, however, they went on to say that:

...in so far as the establishment of British sovereignty is concerned, *those problems do not exist for the purposes of our domestic law*. Under British law in 1788, it lay within the prerogative power of the Crown to extend its sovereignty and jurisdiction to territory over which it had not previously claimed or exercised sovereignty or jurisdiction...*The validity of such an act of State...could not be challenged in British courts*.³³⁰

Dorsett and McVeigh dispute the British claim to territorial sovereignty over eastern Australia in 1788 on the basis of international law, stating that 'symbolic acts of possession,

³²⁴ Ford, *Settler Sovereignty*, above n 247, 190.

³²⁵ See above pp 12-18.

³²⁶ Shaunnagh Dorsett and Shaun McVeigh, 'Just so: "the law which governs Australia is Australian law"', 2002 (13(3) *Law and Critique*), 289, 297.

³²⁷ McHugh, above n 323, 161-162; Dorsett and McVeigh, above n 326, 295-296; Ford, *Settler Sovereignty*, above n 247, 168 (*Ballard*), 196-203 (*Murrell*).

³²⁸ McHugh, above n 323, 162.

³²⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 78 (Deane, Gaudron JJ). Emphasis added.

³³⁰ *Ibid* 78-79. Emphasis added. See also 31 (Brennan J); *New South Wales v Commonwealth* (1975) 135 CLR 377, 388 (Gibbs J); *Coe v Commonwealth* (1993) 118 ALR 193, 200 (Mason CJ).

such as raising the flag, were insufficient to confer sovereignty'. In their view, 'jurisdiction was asserted, although sovereignty had not yet been acquired. As the settlers pushed out from Sydney Cove, towards the Blue Mountains and beyond, sovereignty followed in their wake'.³³¹ They criticise the High Court's decision in *Mabo* for perpetuating 'jurisdictional spaces and places created through colonisation'.³³² Similarly, Ford states that the High Court in *Mabo* 'refused to inquire into the fiction of settler sovereignty'.³³³

However, as noted above, Justice Burton in *Murrell* and Justice Willis in *Bonjon* did not question British sovereignty over New South Wales. The High Court in *Mabo* confirmed this was the correct approach in domestic courts under British law. Moreover, as noted earlier,³³⁴ the High Court in *Ame* (2005) also confirmed that the common law on alien status had not changed in the four centuries since *Calvin's Case*. Proper analysis of the Supreme Court's decisions in *Ballard*, *Murrell* and *Bonjon* requires consideration of the combined significance of these two areas of law for indigenous legal status and jurisdiction in colonial New South Wales.

The New South Wales Supreme Court ignored the common law criteria for determining subject versus alien status set down in *Calvin's Case* – despite considering the case in relation to the issue of jurisdiction.

In *Murrell*, Justice Burton focussed on Coke's statement in *Calvin's Case* that 'when an alien that is in amity cometh into England...he is within the King's protection; therefore so long as he is here, he oweth to the K a local obedience or ligeance'.³³⁵ Hence, according to Burton, even if the indigenous inhabitants were aliens, 'then they are subject as long as they reside in the Colony to the laws, & must conform to them – they owe a temporary allegiance like all other aliens'.³³⁶ Despite having Coke's dicta from *Calvin's Case* laid out before him, Justice Burton (and the other judges – Chief Justice Forbes and Justice Dowling) failed to apply the principle from that case that any person born within the sovereignty or jurisdiction of the British Crown was a 'natural-born' subject and not an alien.

³³¹ Dorsett and McVeigh, above n 326, 294-295.

³³² Ibid 302.

³³³ Ford, *Settler Sovereignty*, above n 247, 207.

³³⁴ See above p 15.

³³⁵ Burton J, 'Arguments and notes for judgment', above n 272, [257]. Emphasis added.

³³⁶ Ibid [241]. Emphasis added.

In Justice Burton's view, once the British had proclaimed sovereignty over and taken possession of New South Wales, the local aboriginal people owed, at the least, 'local' or 'temporary' allegiance to the British monarch.³³⁷ As Coke said, if a parent within the sovereignty of the Crown owed such allegiance, this was 'strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject'.³³⁸ In an advisory opinion in 1830 concerning the legal status of a man born to French parents on board a British ship, Chief Justice Forbes himself noted that:

Had the Parents been on the Land, within the Dominions of the Crown of Great Britain, at the moment of P. Demestre's being born, there could be no question but that he would be a Native Subject of His Majesty; the law upon this point is stated by a text Writer of Authority in the following manner:- '*The issues of an Alien, born within the Realm, are accounted Natural Subjects*, in which respect, there is not any difference between our Laws and those of France. In each Country, Birth confers the rights of Naturalization'.³³⁹

As Professor Geoffrey Sawer informed a Parliamentary Committee in 1961, under the common law 'every aboriginal native of Australia born in Australia after [annexation]... became a British subject by birth; his race was irrelevant, and there were no other circumstances capable of qualifying the allegiance'.³⁴⁰

Despite the focus in *Murrell* on *Calvin's Case* and the prior acceptance by Chief Justice Forbes of the relevant legal principle, the Supreme Court failed to apply the established law in relation to the status of the indigenous inhabitants. As Henry Reynolds has said, the decision in *Murrell*:

...cast a long shadow over Australian jurisprudence. The total disregard for Aboriginal law propelled the courts away from any concept of legal pluralism and helped undermine traditional authority all over the continent.³⁴¹

³³⁷ The argument that the aboriginal people owed at least 'local' or 'temporary' allegiance to the British sovereign was also made in *Bonjon*. The case report published by Bruce Kercher notes that:

'Mr Croke, the Crown Prosecutor, replied that...(a)s a consequence of such settlement, the common law of England was transferred to the Port Phillip District of New South Wales. All persons within that area owe a local allegiance to the Queen, and are bound by English law even for conflicts inter se. They are protected by the law and are bound to obey it...*Bonjon* is as much amenable to English law as a British subject'.

Kercher, '*R v Ballard* etc', above n 240.

³³⁸ 7 Coke Report 6 b, 77 Eng. Rep. 377, 384. Cited in *Wong Kim Ark* 169 US 649, 693 (1898) (Gray J); and *Te and Dang* (2002) 193 ALR 37, 63 (Gummow J).

³³⁹ *In re de Mestre* [1830] NSWSupC 31 (23 April 1830). Emphasis added. See Forbes CJ to Governor Darling, 23 April 1830, *Historical Records of Australia*, Series 1, Vol. 15, 453-454. www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWSupC/1830/31.html?stem=0&synonyms=0&query=alien.

³⁴⁰ Sawer, 'National Status of Aborigines in Western Australia', above n 70.

³⁴¹ Reynolds, *Aboriginal Sovereignty*, above n 289, 73.

But if there was a ‘total disregard’ for Aboriginal law in *Murrell*, there was also a total disregard for British law. That is what makes *Murrell* and similar cases even more significant than commentators have said to date. Reynolds himself cites Coke in *Calvin’s Case* - using ‘obiter’ statements by Coke to dispute that the British had sovereignty over Australia.³⁴² The key point that such commentators have not considered, however, is that under the enduring common law on legal membership of the Empire, once the British had proclaimed sovereignty what followed was subject and not alien status for indigenous inhabitants of the colonised territory. According to Lisa Ford, in *Murrell*:

Burton... resolved a decade of uncertainty about whether indigenous people were aliens or subjects of Great Britain. He argued that they were neither. He categorized them instead...as ‘perpetual inhabitants...who have received the rights of perpetual residence. These are certain of citizens of an inferior order, & are united & subject to Society without participating in all its advantages’. As such they could be denied fundamental rights as subjects and defendants, yet still fall within the purview of British sovereignty and common law.³⁴³

While Ford is correct in her analysis of Burton’s findings and the consequences for aboriginal people, Justice Burton did not ‘resolve the uncertainty’ about the legal status of indigenous inhabitants; instead he perpetuated it. Burton’s categorisation of indigenous people was contrary to the law. Ford also states that:

Settler jurisdiction...displaced neither Aboriginal customary law nor frontier settler violence. Despite *Murrell*, Aboriginal communities on New South Wales peripheries continued to regulate themselves for generations to come...The real significance of *Murrell*, then, was not what it changed about jurisdictional practice, but the way that it defined settler sovereignty by subordinating indigenous people and their law.³⁴⁴

In fact, indigenous people and indigenous law were subordinated by the case of *Murrell* because the Supreme Court ignored established legal principle. Under British law indigenous people were entitled to equal legal status with British settlers. The failure of the Supreme Court (led by a Chief Justice who proclaimed the rule of law) to apply guiding legal precedent laid down centuries before is the real significance of *Murrell*.

Conceptual subjects and legal aliens

While they do not consider compliance of the New South Wales Supreme Court with established law on membership and aliens, the analysis by Ford, Reynolds and Buchan helps explain why the Court could not bring itself to declare that aboriginal people were subjects with equal legal status. Buchan notes that:

³⁴² Ibid 76.

³⁴³ Ford, *Settler Sovereignty*, above n 247, 202.

³⁴⁴ Ibid 203.

Official discourse of this period...implies that the Indigenous people were not regarded as having the same status or rights as white, European 'British subjects'. This is because the very concept of the 'British subject'...entailed a particular view of the subject as a rights-bearing individual...in a mutual relationship of rights and obligations with the British sovereign.³⁴⁵

Buchan notes the influence of seventeenth and eighteenth century Enlightenment philosophers (Grotius, Milton, Hobbes, Filmer) on the intellectual concept of 'the subject'.³⁴⁶ According to these philosophers, a subject's allegiance was '*conditional on the effective fulfilment of the duties of sovereignty, namely, the protection of the rights and liberties of free subjects*'.³⁴⁷ As Ford observes, Justice Burton in his judgment in *Murrell*:

...mixed Enlightenment stadial logic with law. If savagery came in many stages, Burton reasoned that indigenous Australians occupied too low a stage to profit by legal recognition of their customs and institutions.³⁴⁸

In other words, since the Supreme Court thought aboriginal people too 'uncivilized' or 'savage' to have rights and liberties worthy of protection, they could not owe any reciprocal obligation of allegiance and the Court could not recognise them as subjects of the Crown.

While this helps illuminate the thinking behind the Supreme Court's judgments, a critical point is that such reasoning was contrary to the law. In these cases the Supreme Court confused the *conceptual* idea of a 'subject' with the *legal* distinction between a 'subject' and 'alien'. According to Buchan:

By the early eighteenth century...British political discourse had come to be characterised by a notion of the subject as a rights-bearer whose legal status could be conceptualized in terms of a contractual relation binding the sovereign and the people.³⁴⁹

While subject status could be conceptualised like this, it was not determined in this way under the law. As Justice Windeyer noted, when the law of England arrived with the foundation of New South Wales, there was 'no element of social contract'.³⁵⁰ The idea of subject status as a contract-like relationship of mutual obligations may have been true in a philosophical sense. It was also at least partly true in practice. For example, breaking of the 'contract' by the sovereign through a failure to honour the 'rights and liberties' of subjects could lead to rebellion. But under the common law it was not the case that allegiance and subject status were conditional on protection by the sovereign. Failure by the sovereign to effectively protect his or her subjects or respect their rights and liberties did not end the

³⁴⁵ Buchan, *Empire of Political Thought*, above n 126, 56.

³⁴⁶ Ibid 62-63.

³⁴⁷ Ibid 63. Emphasis added.

³⁴⁸ Ford, *Settler Sovereignty*, above n 247, 200.

³⁴⁹ Buchan, *Empire of Political Thought*, above n 126, 64.

³⁵⁰ Windeyer, above n 2, 639.

relationship of ‘subjecthood’ and convert subjects into ‘aliens’. Allegiance was owed not to the sovereign in person but to the Crown as a political entity.³⁵¹ Moreover, under the law set down in *Calvin’s Case*, from the moment of birth a ‘natural-born subject’ owed permanent and indelible allegiance to the sovereign.

Allegiance owed by a subject arose from natural and not contract law. As Keechang Kim notes, the argument put forward in *Calvin’s Case* by Coke and Sir Francis Bacon (Solicitor-General to King James 1) was based on the following statement by a sixteenth century Elizabethan writer:

...legiaunce...is the bonde of faith swallowinge up all others, and the greatest amongst creatures, religion to the Creator reserved, due by the lawe of god and nacions from the subject to the prince...This legiaunce hath bin from the beginning between prince and subjects by the Lawe of nations.³⁵²

Similarly Professor Price points out that the most important constitutional aspect of *Calvin’s Case* was:

...its support for the idea that a King ruled by the law of nature, thereby requiring “natural” allegiance of all subjects wherever they may be located. The case emphasized the allegiance due to a sovereign solely by virtue of the circumstances of birth; the inquiry was never concerned with conscious choice of allegiance or membership in a corporate body’.³⁵³

As Salmond pointed out, a subject was permanently bound by the bond of fealty, and in return was permanently entitled to the protection of the Crown.³⁵⁴ While protection was an entitlement in return for allegiance, this does not mean allegiance was conditional on protection or that allegiance and subjecthood would cease if rights and liberties were not protected.

To understand how the New South Wales Supreme Court ignored the rule of law, it is important to consider legal precedent and not merely the Enlightenment philosophies behind the Court’s thinking. In 1837 in response to Surveyor-General Mitchell’s treatment of aborigines as ‘aliens with whom war can exist’, Secretary for the Colonies Lord Glenelg pointed out to New South Wales Governor Sir Richard Bourke that:

Your Commission as Governor of N.S. Wales *asserts H.M.’s Sovereignty* over every part of the Continent of New Holland which is not embraced in the Colonies of Western or Southern Australia. *Hence I conceive it follows that all the natives inhabiting those Territories must be considered as Subjects of the Queen, and as within H.M.’s Allegiance.* To regard them as Aliens with whom a War can exist, and against whom H.M.’s Troops may exercise belligerent

³⁵¹ *Re Stepney Election Petition* (1886) LR 17 QBD 54, 66. See Parry, *British Nationality*, above n 83, 7.

³⁵² Kim, above n 7, 163.

³⁵³ Polly Price, above n 7, at 84.

³⁵⁴ Salmond, above n 81, 50. See above p 16.

right, is to deny that protection to which they derive the highest possible claim from the Sovereignty which has been assumed over the whole of their Ancient Possessions.³⁵⁵

If the legal status of ‘subject’ involved a ‘social contract’ with the King or Queen with allegiance conditional on protection, Glenelg could not have concluded that the assertion of sovereignty over Australian territory in itself made the native inhabitants subjects of the Crown and not aliens. Glenelg took this view because it was the long established position under the common law. The Supreme Court’s error was not to apply the established law in a similar way, mistaking social philosophies for legal precedent when considering the status of aboriginal people.

The omission of discussion in recent works about territorial sovereignty and jurisdiction in the British Empire of the relevant connection with Coke’s principle on birthright nationality from *Calvin’s Case* means those scholars have not properly assessed the compliance of the New South Wales Supreme Court with the rule of law. By the time *Ballard*, *Murrell* and *Bonjon* were heard by the Supreme Court, the colony had adopted - in no small part due to the determination of Chief Justice Forbes himself - the rule of law at least in a formal or ‘thin’ sense (under which courts independent of executive government were supposed to apply established legal principles to particular cases).

As noted in the introduction to this thesis, not all English common law was transferable to Australia. Colonial courts had to determine ‘whether unenacted law was sufficiently general in its import to be receivable’.³⁵⁶ In contrast to arcane examples such as ‘gavelkind’ and rules for ecclesiastical courts not applicable beyond unique and specific English circumstances, it would be difficult to find a rule intended to be more ‘general in its import’ than Coke’s common law principle for membership of the British Empire. On this basis, it was not open to the New South Wales Supreme Court to reject the overarching principle of imperial membership set out in *Calvin’s Case*. While the doctrine of precedent may not have been consolidated until later in the nineteenth century, there is no reason why Coke’s rule on birthright nationality and imperial membership should not have been regarded, to use Forbes’ own words, as one of those ‘essential principles of English law’ that could only be departed from on ‘grounds of extreme necessity’.

³⁵⁵ Lord Glenelg to Sir Richard Bourke 26 July 1837, Australia, *Historical Records of Australia Series* 1 vol 19 (first published Library Committee of Commonwealth Parliament 1923, 2009 ed) 48. Emphasis added. See also Kercher, *Unruly Child*, above n 244, 12; Bayne, ‘Politics, the Law and Aborigines’, above n 136, 214; Buchan, *Empire of Political Thought*, above n 126, 90.

³⁵⁶ See above p 11.

Lord Glenelg succinctly stated the relevant common law rule. Once sovereignty had been asserted over New Holland, the indigenous people inhabitants ‘must be considered as Subjects of the Queen’. Forbes himself stated the applicable rule in his opinion in *de Mestre* (1830).³⁵⁷ Justice Burton in *Murrell* also cited principles of allegiance from *Calvin’s Case*.³⁵⁸

David Neal concludes that ‘for the original inhabitants of the colony, the Aborigines’, the rule of law in New South Wales in the Forbes era ‘provided cold comfort’. As he says:

For the white free settlers, convicts and emancipists, it provided a measure of protection against power from the top, and eventually was the instrument through which their claim to political status was realised; for the Aborigines, its authority stood behind their forceful dispossession, its protections proved largely illusory, its courts were closed to Aboriginal testimony, and its principles denied the existence of their own laws...legal rules...could mean little without the mechanisms and the will to realise the protections promised by the rule of law...Aborigines were excluded from the rule of law just as surely as they were from their land.³⁵⁹

Consistent with Neal’s assessment, the indigenous cases in the New South Wales Supreme Court discussed above involved a refusal to apply established principles of membership and alienage law that had remained unchanged for centuries.

Conclusion: aliens, foreigners and strangers

The uncertainty in these cases about the status of the native inhabitants arose partly from confusion about the mode of acquisition of the Australian colonies. But it was also due to confusion between legal and non-legal notions of belonging and ‘foreignness’ and an unwillingness to apply the correct legal meaning of terms such as ‘subject’ and ‘alien’ dating back to *Calvin’s Case* in 1608. In these cases the Supreme Court employed non-legal terms such as ‘foreigner’ or ‘stranger’, contrary to the ‘subject’ versus ‘alien’ dichotomy set down in *Calvin’s Case*. In *Ballard* and *Bonjon*, the Supreme Court said that the colonists and not the aborigines were the ‘foreigners’,³⁶⁰ confusing ‘foreign’ in the general or common sense of the word (British settlers were plainly ‘foreign’ in this sense when compared to the indigenous inhabitants) with the issue of who was ‘foreign’ or ‘outside’ the British system of law as applicable in the Australian colonies.³⁶¹

³⁵⁷ See above p 70.

³⁵⁸ See above p 69.

³⁵⁹ Neal, *The Rule of Law in a Penal Colony*, above n 37, 78-79.

³⁶⁰ Kercher, ‘*R v Ballard* etc’, above n 240.

³⁶¹ As subjects of the British Crown, colonists from Britain were subject to, and under the protection of, British law in Australia. As Justice Willis noted, the Supreme Court plainly had jurisdiction where British colonists attacked aborigines and where aborigines were victims of ‘the aggressions of the colonists’. *Ibid*.

In international law at the time the ‘foreigner’ was a respected figure who did not match the Supreme Court’s perception of Australia’s indigenous people. Eve Lester explains that there has been:

...an historical favouring of the foreigner as international law’s (colonising Christianising European) insider - international law’s “self” – over the (citizen/resident) barbarian outsider - its “other”.³⁶²

As Lester says, in the nineteenth century the European ‘foreigner’ was ‘an imperializing inside-self, conquering and claiming the coastlines of the uncivilised “barbarian” outside-other, armed with and enabled by a host of self-proclaimed rights’.³⁶³ In these terms, from the perspective of the Supreme Court in *Ballard* and *Bonjon*, the British settlers were the ‘foreigners’ *inside* or *belonging to* the colonial establishment, and the aborigines were the barbarian *outsiders* who did not *belong*, even in their own land.

In *Murrell* Justice Burton equated ‘aliens’ with ‘strangers’, suggesting the accused be treated as if he were in the latter category, confusing Blackstone’s definition of an ‘alien’ as a ‘stranger-born’, meaning a person born out of the jurisdiction, with a mere ‘stranger’ in a non-legal sense, i.e. an ‘outsider’ or someone who was ‘not one of us’. Burton seemed to regard the phrase ‘*subject or stranger*’ as equivalent in legal terms to ‘*subject or alien*’. Referring to the accused, Burton said he ‘ought to be amenable to the laws of the Country (w)here the offence was committed whether he be a Subject or a Stranger’.³⁶⁴ The mistake Burton made in terms of the common law was that someone who was merely a ‘stranger’ might nevertheless be a British subject and not an ‘alien’ in a legal sense. There is no question that Australia’s aborigines were regarded and treated as ‘strangers’. As Justice Holdroyd said in *M’Hugh v Robertson* (1885):

From the first the English have occupied Australia as if it were an uninhabited and desert country. The native population were not conquered, but the English government and afterwards the colonial authorities, assumed jurisdiction over them *as if they were strangers* who had immigrated into British Territory, and punished them for disobeying laws they could hardly understand, and which were palpably inapplicable to their condition.³⁶⁵

³⁶² Eve Lester, ‘Finding the figure of the foreigner in (migration) law: legacies of Empire’ (Paper presented at International Conference on the Legal Histories of the British Empire, Singapore, 5-7 July 2012) 5.

³⁶³ Ibid 5.

³⁶⁴ Justice Burton noted that ‘Blackstone says (1 Vol p 370) Local allegiance is such as is due from an alien, a stranger born, for so long time as he continues within the Kings dominion’. Burton J, ‘Arguments and notes for judgment’, above n 272, [255].

³⁶⁵ *M’Hugh v Robertson; Benn v Symes* (1885) 11 VLR 410, 431. Emphasis added.

While Australia's indigenous people were 'strangers' from the perspective of the Anglo-Celtic colonisers, under the common law they were also 'subjects' and not 'aliens' because of their birth on territory claimed by the English King and/or by virtue of the acquisition of their homeland by the British sovereign.

The misuse in these cases of terms such as 'subject', 'alien', 'foreigner' and 'stranger' was connected with the Supreme Court's view of indigenous society. They saw native inhabitants as inferior and uncivilised, and perhaps not as human or 'people' at all. The judges were uncomfortable with the idea that aborigines could have the legal status of 'natural-born subjects' owing personal allegiance to the English monarch and permanently bound by a bond of 'fealty' or loyalty to the British sovereign.

Over the next century in imperial and post-federation Australia, the failure to properly apply common law definitions of membership became more prominent, not least through application of the term 'alien' to any person regarded as not 'belonging to' the dominant Anglo-Celtic colonial society.

CHAPTER TWO Chinese Australians: ‘the stranger within your gates’

*Robert Ding appeared on Channel Nine’s A Current Affair this week conducting an auction in Mandarin. The article was named ‘Chinese buyers taking over the housing market...The article blamed booming house prices on Chinese investors... “I’m a true-blue Australian ... been here for 43 years... if I buy a property, does that make me a foreign investor?”*³⁶⁶

Chinese Australians and the rule of law

The main targets of the term ‘alien’ in colonial and post-federation Australia were those of ethnic Chinese origin. A belief that Chinese Australians were inherently ‘alien’ in a racial sense not only led to restrictive or exclusionary laws but also affected perceptions of their legal status. Key figures in colonial Australia understood that Chinese settlers from British colonies in Asia³⁶⁷ were ‘British subjects’ having equal status under imperial law, with the right to travel freely within the Empire,³⁶⁸ and that they were not ‘aliens’ in a legal sense. But this did not stop them regarding and treating all Chinese settlers as ‘aliens’.

Numbering almost 40,000 by the 1860s³⁶⁹ - including about one-sixth of the recorded male population³⁷⁰ - Chinese settlers played an important role on the Australian goldfields and in agriculture and mining in northern Australia, as well as by establishing key businesses in the

³⁶⁶ ‘Auctioneer slams *A Current Affair*’, *The Age* (online), 30 October 2014 <http://theage.domain.com.au/real-estate-news/auctioneer-slams-a-current-affair-20141031-11ejsr.html>.

³⁶⁷ British colonies in Asia with significant ethnic Chinese populations in the nineteenth century included Hong Kong, the Straits Settlements (Penang, Malacca and Singapore), Labuan and the Malay States.

³⁶⁸ Helen Irving, ‘Still Call Australia Home: The Constitution and the Citizen’s Right of Abode’ (2008) 30 *Sydney Law Review* 133, 144.

³⁶⁹ Charles Price, *The Great White Walls are Built*, above n 165, 277. According to colonial census figures, in 1857 there were some 25,000 persons living in Victoria who had been ‘born in China’, comprising around 10 per cent of the male population. See Victoria, *Census of Victoria, 1861* (John Ferres, Government Printer, Melbourne) http://hccda.anu.edu.au/pages/VIC-1861-census_01-07_5. Victoria’s 1861 census noted that ‘Of foreigners by far the largest number were Chinese. These amounted to 24,732, or one in every 22 of the population’. Ibid, http://hccda.anu.edu.au/pages/VIC-1861-census_01-06_vi. Macgregor notes the higher figure of 46,000 ethnic Chinese living in the colony of Victoria in 1859 estimated in 1880 by Charles Powell Hodges, Chinese interpreter to the Premier. Paul Macgregor, ‘Chinese Political Values in Colonial Victoria: Lowe Kong Meng and the Legacy of the July 1889 Election’, in Sophie Couchman and Kate Bagnall (eds) *Chinese Australians: politics, engagement and resistance* (Brill 2015) 53, 65.

³⁷⁰ Charles Price, *The Great White Walls are Built*, above n 165, 71.

south of the country.³⁷¹ However even today the Chinese are not generally accepted as one of the founding settler communities of modern Australia. As Professor John Fitzgerald says, the ‘Big White Lie’ in Australia is that the Chinese did not belong here:

The cultural legacy of White Australia is powerful and persistent...[The] challenge is to embed Chinese-Australian stories in Australian history to the point of demonstrating that so-called anti-Chinese attitudes were not anti-Chinese at all but anti-Australian, even in White Australia.³⁷²

The failure to accept the role of the Chinese community in building modern Australia is due both to the considerable reduction in their presence under the White Australia Policy (formally implemented by the new Commonwealth government from 1901)³⁷³ and because they were persistently classed as the ‘aliens’ or ‘outsiders’, despite having as much right as other settler groups to be seen as ‘belonging’ or as ‘one of us’. Sophie Couchman observes that:

Despite the sojourning character of their immigration, Chinese Australians were settlers and an integral part of the colonisation of Australia. At the same time they were also excluded from the imaginative construction of the Australian nation...the Australian nation was imagined and built around the exclusion of Chinese and other ‘coloured’ peoples...this had a real and very painful impact on the lives of Chinese Australians.³⁷⁴

As Adam McKeown notes, ‘the significance of the Chinese in Australian history lies not only in their numbers, but also in their ideological use as the Other in formulations of Australian identity’.³⁷⁵ Professor Kim Rubenstein observes that the ‘fear and antagonism toward Chinese aliens forged a particularly “Australian” sense of nationhood’.³⁷⁶ Many, however, were not

³⁷¹ See C F Yong, *The new gold mountain: the Chinese in Australia, 1901-1921* (Raphael Arts 1977) 35-58; C Y Choi, *Chinese Migration and Settlement in Australia* (Sydney University Press 1975) 29-35; John Fitzgerald, *Big White Lie: Chinese Australians in White Australia* (UNSW Press 2007) 177-209.

³⁷² As Fitzgerald notes, ‘Despite the brouhaha surrounding multiculturalism many whites still reserve the word ‘Australian’ for themselves and many Chinese Australians refer to whites as ‘Australians’ and to themselves as ‘Chinese’. Fitzgerald, above n 371, 4-5. In relation to the lack of recognition of the Asian contribution to colonial Australia more generally, see Greg Lockhart, ‘Absenting Asia’, in David Walker and Agnieszka Sobocinska (eds), *Australia’s Asia. From yellow peril to Asian century* (UWA Publishing 2012) 269. As Lockhart says, ‘For the most part, Asia still falls outside the scope of “Australian” history: it is most notable for its absence...the [white, imperial] settler narrative continues to dominate’ (273, 285).

³⁷³ For an official account of the White Australia Policy, see Commonwealth, Department of Immigration and Border Protection, *Fact Sheet 8 – Abolition of the White Australia Policy*, <https://www.immi.gov.au/media/fact-sheets/08abolition.htm>.

³⁷⁴ Sophie Couchman, *In and Out of Focus: Chinese and Photography in Australia, 1870s – 1940s* (PhD Thesis, La Trobe University, 2009) 17.

³⁷⁵ Adam McKeown, ‘The Continuing Reformulation of Chinese Australians’ in Sophie Couchman, John Fitzgerald & Paul Macgregor (eds), *After the Rush. Regulation, Participation and Chinese Communities in Australia 1860 – 1940* (2004) 9 *Otherland Literary Journal* 3.

³⁷⁶ Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook 2002) 38.

aliens under the law. Moreover, as Fitzgerald says, Chinese Australians, whatever their origin and legal status, belonged as much as other settler groups.

Like Couchman, Fitzgerald says the exclusion of people of Chinese descent was central to nation building in Australia. This was of particular importance in the lead up to federation in creating the image of a new Australian nation ‘able to exercise its independence by shutting its gates to non-Whites’, especially the Chinese.³⁷⁷ As Fitzgerald says:

Inadvertently, people of Chinese descent helped to shape the national imaginary of the country from which they were excluded, and indirectly to shape the national vision of what this new country was to be, or to become.³⁷⁸

Of course, such an image did not accord with the role Chinese settlers anticipated for themselves in the new Australia. Chinese Australians:

...saw themselves as part of exciting new developments in the Australian colonies, and were puzzled that others could not make room for them in a shared vision of Australia. The Chinese-Australian vision was one of a new nation in which all ‘races’ would be counted equal.³⁷⁹

Couchman notes that little notice was taken of the specific origin of ethnic Chinese settlers. In English language records of the time:

Regardless of their birthplace, residents of Chinese background were morphed together into anonymous stereotypes that were part of a racist ideology which permeated Australian society throughout the 19th and 20th centuries. Often authors of these records made little attempt to even identify the names of individuals discussed – they were simply ‘a Chinaman’, ‘John Chinaman’ or ‘Charlie’. By denying these people their individuality, society was able to create a dichotomy whereby ‘the Chinese’ could be shaped as an undesirable element, the antithesis of ‘an Australian’. This provided a justification for denying them a place in Australia.³⁸⁰

As discussed below, even official census records failed to properly record the birthplace of ethnic Chinese residents. Similarly, colonial parliamentary reports, cited by contemporary historians for the origin of ethnic Chinese settlers, were not intended to provide any such record. The number of Chinese inhabitants in colonial and post-federation Australia with British subject status through birth in a Crown colony or dominion was greater than census records indicate. However even the inaccurate colonial and Commonwealth census records

³⁷⁷ John Fitzgerald, ‘Visions of Australian Federation: the View from the Chinese Press Gallery’ in Henry Chan, Ann Curthoys and Nora Chiang (eds), *The Overseas Chinese in Australasia: History, Settlement and Interactions* (National Taiwan University and Australian National University 2001) 102, 107.

³⁷⁸ Ibid.

³⁷⁹ Ibid 114.

³⁸⁰ Sophie Couchman, ‘From Mrs Lup Mun, Chinese Herbalist, to Yee Joon, Respectable Scholar: A Social History of Melbourne’s Chinatown, 1900-1920’, in Henry Chan, Ann Curthoys and Nora Chiang (eds), *The Overseas Chinese in Australasia: History, Settlement and Interactions* (National Taiwan University and Australian National University 2001) 125, 125.

show that a significant proportion (at least one third) of Chinese Australians were British subjects and not ‘aliens’ under the law.

Because they were seen as ‘outsiders’ or the ‘other’, Chinese Australians were labelled as ‘aliens’ by the Anglo-Celtic community. As Kevin Wong Hoy states, ‘during the nineteenth and twentieth centuries, the term ‘alien’ was used to denote a foreigner or outsiders, but it was also employed by those hostile to the Chinese as a term of racial denigration’.³⁸¹ As noted in the Introduction, a critical point not raised by Hoy or other commentators on the Chinese in Australia during the colonial period (Willard, Price, Oddie, Yarwood and Knowling, Evans, Saunders and Cronin) is that the word ‘alien’ was applied in parliamentary debates, legislation and cases to many inhabitants of ethnic Chinese origin who legally ‘belonged’ as British subjects.

While the way the Anglo-Celtic community encountered ethnic Chinese settlers varied from colony to colony,³⁸² the use of ‘alien’ was generally similar amongst the different Australian territories. Key lawmakers used the threat of invasion, disease and degradation of white living standards to depict the Chinese as an ‘alien race’. Bigotry and racism were underlying factors in this portrayal of Chinese Australians. Legislation and cases from this period reflected the assumption that all Chinese were ‘alien’, often leaving Chinese British subjects with an impossible task to prove otherwise.

Political and legal figures in colonial and post-federation Australia described Chinese inhabitants as inherently ‘alien’ despite their awareness that many were natural-born British subjects and not ‘aliens’ under the law. Queensland Attorney-General Samuel Griffith brushed aside a formal reminder from imperial authorities that many Chinese settlers were British subjects. He also ignored statements from parliamentary colleagues that ‘alien’ was a legal not racial term.³⁸³ New South Wales Premier Sir Henry Parkes played a major role in spreading fear of ‘Chinese aliens’ amongst the white community. Parkes understood many Chinese residents were subjects of the British Crown but said exclusion of such ‘pestilent’ aliens was more important than obedience to the law.³⁸⁴ Griffith, Parkes and their political

³⁸¹ Hoy, *Becoming British Subjects*, above n 184, 33.

³⁸² See eg Charles Price, *The Great White Walls are Built*, above n 165, 67 ff (Victoria), 74-75 (South Australia), 76-77 (New South Wales), 90-92 (Queensland, Tasmania, Western Australia); Andrew Markus, *Fear and Hatred, Purifying Australia and California 1850-1901* (Hale & Iremonger 1979) 67-97.

³⁸³ See below p 103.

³⁸⁴ See below p 116.

colleagues embedded the misuse of 'alien' in colonial Australia. This inevitably fed into the constitutional convention debates of the 1890s and led to further misuse after federation.

This chapter looks first at census records and parliamentary reports which did not distinguish properly between 'alien' and 'British subject' ethnic Chinese. This meant there was no accurate record of how many inhabitants of Chinese origin had equal legal standing as subjects of the Crown. The chapter then shows that, as with colonial attitudes towards indigenous people discussed in Chapter One, perceived racial and social differences were more important than the law in categorising Chinese Australians as 'aliens'. Next the chapter describes the role of colonial leaders such as Samuel Griffith and Henry Parkes in promulgating a view of ethnic Chinese as an 'alien race'. Finally the chapter examines how, contrary to the rule of law, British subject Chinese faced a presumption that they were 'aliens' in legislation and in the courts.

The chapter shows that in colonial Australia executive, legislative and judicial pronouncements all played into a discourse of alienage overriding the common law meaning regarding Chinese Australians. Each fed into the other in defying the rule of law when it came to the correct identification of Chinese Australians and a proper legal assessment of whether they were aliens or not. This has implications for modern constitutional law, not least in relation to colonial era cases still uncritically cited in support of a far-reaching Commonwealth power over 'aliens'.

Census figures and British Chinese

Analysis of colonial and post-federation census records suggests they contributed significantly to the 'big white lie' that ethnic Chinese did not belong in Australia. In particular, by failing to record the birthplace of ethnic Chinese inhabitants they understated the number who legally belonged as British subjects and could not lawfully have been regarded or treated as 'aliens'.

Victoria

Census records in colonial Australia failed to accurately differentiate between settlers from Imperial China and those of Chinese ethnic origin born in British colonies. Victoria's 1871 census, for example, recorded 17,826 male and 31 female 'natives of China' resident in the colony. The census noted that:

The Chinese were not all born in China. The returns show that 24, viz 12 males and 12 females, were born in this colony. Seventy-two of them also, all males, were born in the British colony of Hong Kong, and were therefore *British subjects by birth*.³⁸⁵

In this document the census recognises that Chinese settlers born in Hong Kong were natural-born British subjects. However the recorded number is questionable considering the imperial links and transport connections between that colony and Australia.³⁸⁶ In 1881 Victoria's Government Statist provided an explanation for the low number of natural-born British subjects of ethnic Chinese origin in official census records:

Of the 11,869 Chinese males returned – which include half-castes – 126 were set down as being born elsewhere than in the Chinese Empire, viz: 81 in Victoria, 4 in New South Wales, 38 in the British Possession of Hong Kong, and 2 in that of Singapore, and 1 in the Portuguese Possession of Macao...*It is probable that many more of the Chinese were born in Hong Kong, and possibly a few more in Macao, it being almost certain that some of the sub-enumerators did not realize the necessity of noting the distinction between British or Portuguese China, and China proper.*³⁸⁷

This suggests that despite the large ethnic Chinese populations in Great Britain's colonies in the Far East and Southeast Asia, those responsible for collecting census figures in the Australian colonies assumed any settler of Chinese appearance had been born in China itself. The above extract indicates that only in rare cases did the 'sub-enumerators' realise the importance of recording the birth of such people in a British colony. Therefore, as the Government Statist said, the number of Chinese British subjects who settled in Australia in the colonial period appears to have been greatly understated in official census returns. This appears to be confirmed by the 1891 Victorian census which included a table that 'contains a statement of the country of birth of all the Chinese living in Victoria in 1891'. Of the 9,377 people of Chinese race recorded as living in Victoria, only three were listed as born in the Straits Settlements (Singapore, Penang, Malacca), with none recorded as having a place of birth in Hong Kong or other British colonies.³⁸⁸

The 1891 Victorian census did record the increasing number of Chinese residents born in Australia, reporting that '876, viz., 103 of pure and 773 of mixed race, were born in Victoria; and 17, viz., 2 of pure and 15 of mixed race, in other Australasian colonies'.³⁸⁹ But in contrast

³⁸⁵ Victoria, *Census of Victoria, 1871* (John Ferres, Government Printer, Melbourne) 18. Emphasis added.

³⁸⁶ See, eg Phillip Mar, *Accommodating Places: a migrant ethnography of two cities (Hong Kong and Sydney)* (PhD thesis, University of Sydney, 2002) 98.

³⁸⁷ Victoria, *Census of Victoria, 1881* (John Ferres, Government Printer, Melbourne) 1883, parts (i) to (viii) 28. Emphasis added.

³⁸⁸ Victoria, *Census of Victoria, 1891* (Robt. S. Brain, Government Printer, Melbourne) Parts i to ix, 67.

³⁸⁹ *Ibid* 66.

to the 1871 census, there was no accompanying statement that these people had the legal status of British subjects (and were not aliens) by virtue of their birthplace.

New South Wales

The Registrar-General for New South Wales observed in his report on the 1871 census for that colony that:

At the previous Census the information obtained about the Chinese population was limited almost entirely to their gross number. In order to arrive at better results on this occasion, a larger number of interpreters were appointed to accompany the collectors who had to visit localities where Chinese were congregated. Thus, while in 1861, when the Chinese element numbered nearly 13,000, only 5 interpreters were engaged; in 1871, when their number had decreased to 7,220, 21 interpreters assisted in gathering the information. The result has been very satisfactory, as will be seen by the large decrease of numbers in the column devoted to "Unspecified" throughout the compiled tables, if compared with the Census Returns of 1861.³⁹⁰

Despite the resources devoted to questioning the Chinese population, it appears neither the collectors nor the interpreters were instructed to ask where individual Chinese settlers came from. In its table on 'nationality' listing the birthplaces of inhabitants, the 1871 census only includes - apart from the British isles and 'foreign countries' - the general heading of other 'British possessions', with no specific reference to colonies such as Hong Kong or the Straits Settlements.³⁹¹ In other words, there is no record in the census of how many of the Chinese inhabitants came from such colonies.

The 1881 New South Wales census recorded the number of 'British subjects' born in various places, including the Australian colonies, the British Isles (including Ireland), New Zealand and Fiji, as well as 'Other British possessions'. Again, however, there is no record of specific numbers from British colonies in Asia. The census also recorded the number of residents born in 'foreign countries'. While countries such as the United States, France, Belgium, Russia etc were listed by name, the census merely recorded that 10,205 'Chinese' were resident in the colony, without specifying what country these residents were born in.³⁹² The 1891 New South Wales census recorded 13,157 residents born in the 'Chinese Empire (including Tartary)', including 126 who had become British subjects by naturalisation. It also listed numbers born in different places in the 'British Empire', but listed only 64 residents

³⁹⁰ New South Wales, *Census of 1871* (Thomas Richards, Government Printer, Sydney, 1873) 02_ii http://hccda.ada.edu.au/pages/NSW-1871-census-02_ii.

³⁹¹ Ibid 03_324 http://hccda.ada.edu.au/pages/NSW-1871-census-03_324.

³⁹² New South Wales, *Census of 1881* (Thomas Richards, Government Printer, Sydney, 1883-84) Table No. 26, Birthplaces. http://hccda.anu.edu.au/pages/NSW-1881-census-03_xxxiv. In contrast, Table No 27 which lists the percentage of the population born in various places, does include 'China' in the list of 'foreign countries'.

born in Hong Kong and 50 in the Straits Settlements, figures which (as for Victoria) appear too low.³⁹³ The census also recorded approximately 1,000 ‘Chinese half-castes’ in New South Wales.³⁹⁴ While the census made no reference to their legal status, most if not all would have been British subjects as a consequence of their birth in the colony.

Unlike Victoria’s census reports, neither the 1871, 1881 nor 1891 New South Wales census reports referred to the British subject status of ethnic Chinese people born in British colonies nor to the importance of distinguishing between ‘British China’ and ‘China proper’ in relation to place of birth. Even in Victoria, recognition by the Government Statist in 1881 of the importance of this information for the legal status of inhabitants did not result in accurate figures in later census records on the number of Chinese settlers with British subject status. Given the lack of any reference to this issue in the New South Wales census reports, it is reasonable to conclude that, as for Victoria, the authorities did not know how many ethnic Chinese residents were British subjects (and therefore not ‘aliens’) under the law applying in the colony.

Queensland

The 1861 Queensland census recorded 538 Chinese settlers in the colony,³⁹⁵ with the number growing to 3,305 by the time of the 1871 census.³⁹⁶ Table XII of the 1871 census listed:

...by Electoral Districts and Census Districts the Chinese (with whom Japanese, if any, are included), Polynesians, prisoners, lunatics, and inmates of charitable institutions, all of whom would be deducted from the gross population in any electoral scheme.³⁹⁷

This table indicates the standing in the Queensland community of the Chinese, Japanese and ‘Polynesians’ (i.e. Pacific islanders, in fact largely ‘Melanesian’ in origin), grouping them with members of society deprived of their freedom or regarded as less than equal. In addition the recording of ethnic or racial origins was so imprecise that ‘Japanese’ were included in the number of ‘Chinese’ for the purpose of Table XII. Similarly, Table XXIX (Birth Places of the Population) gave a combined figure for inhabitants born in ‘China and Japan’.³⁹⁸ There is no

³⁹³ New South Wales, *Census of New South Wales 1891* (Charles Potter, Government Printer, Sydney 1894) Table IV, http://hccda.anu.edu.au/pages/NSW-1891-census-02_439.

³⁹⁴ Ibid, Ages Table 1, ‘Number of Persons, Males and Females, at each Period of Age’. http://hccda.anu.edu.au/pages/NSW-1891-census-02_2.

³⁹⁵ Queensland, *Third Census of the Colony of Queensland 1868* (James C. Beal, Government Printer, Brisbane, 1869) Table M ‘Table showing the number of the population, by native country, in 1861, 1864, and 1868’ http://hccda.ada.edu.au/pages/QLD-1868-census-02_21.

³⁹⁶ Queensland, *Census of 1871* (James C. Beal, Government Printer, Brisbane).

³⁹⁷ Ibid http://hccda.ada.edu.au/pages/QLD-1871-census_01-02_8.

³⁹⁸ Ibid http://hccda.ada.edu.au/pages/QLD-1871-census_01-05_174.

indication in the 1871 census of any attempt to record the number of ethnic Chinese inhabitants born in British colonial possessions in Asia.³⁹⁹

Queensland's 1871 census declared that 'neither Chinese nor Polynesians can, as a general rule, be looked upon as permanent settlers in the Colony', observing that amongst the Chinese inhabitants there was only one woman.⁴⁰⁰ But contrary to this, it also highlighted marriage between Chinese male settlers and white women, remarking that 'it must be borne in mind...that in not a few cases Chinamen are married to European wives, it is popularly supposed chiefly Irish, but really the English predominate'.⁴⁰¹ The census omitted to mention that children of such marriages were British subjects - and not aliens - by virtue of their birth in the colony.

The 1881 Queensland census stated that the number of inhabitants 'born in China' had increased to 11,253 but again reflected no understanding that some Chinese settlers came from British colonies in Asia, including no record of birth in such places.⁴⁰²

South Australia

South Australia's 1881 census recorded the number of inhabitants 'born in British Possessions'. However, as in New South Wales, the census only provided figures for people born in the British Isles, the Australian colonies and New Zealand together with unidentified 'Other British Possessions'.⁴⁰³ The census listed 4,151 inhabitants born in China, stating that 2,734 were residents of the Northern Territory, with another 1,070 'in transit on board vessels at Port Darwin, the remainder (347), being in South Australia proper'.⁴⁰⁴ There was no recognition of the importance for the legal status of Chinese settlers of recording birth in Hong Kong, the Straits Settlements or other British possessions in Asia.

³⁹⁹ See, for example *ibid*, Table XXX 'Comparing the Nationalities of Population in Census Returns for 1868 and 1871' http://hccda.ada.edu.au/pages/QLD-1871-census_01-05_178.

⁴⁰⁰ *Ibid* http://hccda.ada.edu.au/pages/QLD-1871-census_01-02_16.

⁴⁰¹ *Ibid*.

⁴⁰² Queensland, *Sixth Census of the Colony Of Queensland 1881* (James C. Beal, Government Printer, Brisbane, 1882) Table CXLII 'Showing the Birthplaces of Persons, Males, and Females as returned at the Census Enumerations of 1861, 1864, 1868, 1871, 1876, and 1881 respectively' http://hccda.anu.edu.au/pages/QLD-1881-census_01-06_268.

⁴⁰³ South Australia, *Census—April 1881* (E. Spiller, Government Printer 1884) http://hccda.anu.edu.au/pages/SA-1881-census-02_289: Table I.

⁴⁰⁴ *Ibid*.

Commonwealth census reports

The first Commonwealth census in 1911 only partly rectified the failure of colonial censuses to record the number of ethnic Chinese residents with British subject status. The 1911 census recorded 22,753 ‘full blood’ and 3,019 ‘half-caste’ Chinese as residents of Australia.⁴⁰⁵ 5,187 of the ‘full-blood’ Chinese and 3,009 (i.e. all except ten) of the ‘half-caste’ Chinese were listed as British subjects by birth, parentage or naturalisation. In other words, according to the official census 8,196 - or approximately 32 per cent - of Chinese residents in Australia were British subjects.

However while the 1911 census recorded that practically all the ‘half-caste’ Chinese British subjects gained their subject status – as might be expected – through birth in Australia, nearly three times as many ‘full-blood’ Chinese were listed as having become British subjects by naturalisation as were subjects by place of birth.⁴⁰⁶ Given the obstacles faced by Chinese settlers seeking naturalisation in Australia, especially in the later colonial period, the recorded number of subjects by birth in the 1911 census appears disproportionately low. According to Cronin, only 0.8 per cent of the estimated 20,000 Chinese who arrived in the colony of Queensland succeeded in complying with required qualifications and obtained naturalisation.⁴⁰⁷ Only 110 Chinese people were naturalised in Queensland between 1876 and 1904.⁴⁰⁸ Nearly 3,000 Chinese people were naturalised in Victoria between 1870 and 1887,⁴⁰⁹ but Victoria refused to naturalise Chinese people after that date.⁴¹⁰ In South Australia naturalisation of ‘Asiatic aliens’ required the specific approval of the House of Assembly. In 1903 the Chief Secretary of South Australia observed that ‘For many years every Government that had been in power had practically refused all Asiatics. He did not know of an exception’.⁴¹¹

⁴⁰⁵ Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), Vol 1 Part 1 ‘Statistician’s Report’, 224-225.

⁴⁰⁶ Ibid 227-228.

⁴⁰⁷ K Cronin, *The Chinese community in Queensland in the Nineteenth Century – A Study of Racial Interaction* (BA Hons thesis, University of Queensland) Appendix IV, cited in Evans, Saunders and Cronin, above n 170, 323, endnote 150.

⁴⁰⁸ Paul Jones, *Alien Acts*, above n 198 Appendix II. See also Hoy, *Becoming British Subjects*, above n 184, 88.

⁴⁰⁹ Paul Jones, *Alien Acts*, above n 198 Appendix II.

⁴¹⁰ Couchman, *In and Out of Focus*, above n 374, 133-34.

⁴¹¹ South Australia, *Debates in the House of Assembly during the second session of the seventeenth Parliament of South Australia*, 14 October 1903, 587. The House of Assembly was debating a motion requesting the Chief Secretary to approve the naturalisation of Mr Salim Eblem, born in Palestine and who had resided in South Australia for 14 years. The Chief Secretary said the previous Government decided it ‘could not grant any more letters of naturalization to Asiatic aliens’

After federation, under section 4 of the *Naturalization Act 1903* (Cth) settlers of Chinese origin already naturalised in one of the former Australian colonies were deemed to be British subjects,⁴¹² but section 5 prohibited ‘aboriginal natives of Asia, Africa, or the Islands of the Pacific, excepting New Zealand’ from becoming subjects.⁴¹³ As Paul Jones points out, this meant that people of non-European background, including Chinese settlers, were in practice ‘barred from naturalisation under Australian law from 1903’.⁴¹⁴

This suggests that the number of natural-born subjects of ethnic Chinese origin may again have been understated in the Commonwealth’s 1911 census, probably because - as noted by the Victorian Government Statist in 1881 - census collectors assumed that persons of Chinese appearance had been born in ‘China’, not recognising the importance in terms of legal status of recording birth in a British colony or dominion.

The 1936 Year Book for the Commonwealth of Australia prepared by the Bureau of Census and Statistics included tables comparing the number of ‘persons of Chinese race’ and the number of ‘Chinese persons of foreign nationality’ in Australia in the 1921 and 1933 censuses. According to the Year Book, in 1921 there were 17,157 persons of Chinese race plus 3,669 ‘half-caste’ persons of Chinese race in Australia. In that year there were 13,799 ‘Chinese persons of foreign nationality’ in Australia.⁴¹⁵ This means, based on official figures, there were 3,358 persons of (full) Chinese race in Australia in 1921 who were not of ‘foreign nationality’, in other words who were British subjects. In addition, practically all of the ‘half-caste’ persons of Chinese race are likely to have been - as the 1911 census indicated - British subjects through birth in Australia. Hence according to official figures as recorded in the Year Book, out of almost 21,000 full or half-caste ‘persons of Chinese race’ in Australia in 1921, nearly 7,000 (or one-third) had British subject status and were therefore not aliens

until ‘requested by the House to do so’. In this case, however, the House of Assembly supported the motion (at 590). See also above n 105.

⁴¹² Section 4 of the Naturalization Act stated that ‘A person who has before the passing of this Act obtained in a State or in a colony which has become a State a certificate of naturalization or letters of naturalization shall be deemed to be naturalized’. This provision overcame the difficulties of naturalisation by individual Australian colonies. As noted above at pp 18-19, while colonial parliaments could naturalise foreigners, the effect of their legislation was limited to their own territory.

⁴¹³ Aboriginal natives of New Zealand were already ‘natural-born subjects’ of the British Crown with no need to be naturalised.

⁴¹⁴ Paul Jones, *Chinese-Australian Journeys, Records on Travel, Migration & Settlement 1860-1975* (National Archives of Australia 2005) 17. The prohibition became effective when the Naturalisation Act came into force on 1 January 1904.

⁴¹⁵ Commonwealth Bureau of Census and Statistics, *Official Year Book of the Commonwealth of Australia*, No. 29, 1936, 425-426.

under the law applying in the country. On the same basis, in 1933 around 6,500 or some 45 per cent of the 14,349 persons of Chinese race in Australia were British subjects and not aliens in a legal sense.⁴¹⁶

Apart from showing the effect of the White Australia Policy in dramatically reducing the overall number of Chinese in Australia, even the official figures from the 1911, 1921 and 1933 censuses - which probably understated the number of those born in British colonies and dominions - indicate that a substantial proportion of 'persons of Chinese race' in Australia were British subjects and not 'aliens'.

The colonial and Commonwealth census information set out above shows a lack of regard for the legal significance of birth in territory, and this continues into research and writing in modern times. For example, an article by Andrew Markus entitled 'Government Control of Chinese Immigration to Australia, 1855-1975' includes a table purporting to show the number of Australian residents born in 'China, Hong Kong and Taiwan' at every census from 1861 to 1996. There are no residents recorded as having been born in Hong Kong until the 1947 census.⁴¹⁷

In summary, colonial and post-federation census records did not accurately record the number of British subjects of ethnic Chinese origin in Australia. For census officials assumptions based on race overrode considerations of legal status. It was assumed that all inhabitants of ethnic Chinese origin had been born in China and were of Chinese nationality. There was little or no recognition of the different standing under the law of ethnic Chinese inhabitants born in British colonies, naturalised as British subjects in Australian colonies or born in Australia to Chinese fathers. Census collectors and those instructing them did not recognise the importance in terms of legal status of recording birth in a British colony or dominion. It is reasonable to conclude therefore that the number of Chinese British subjects in late colonial and post-federation Australia was understated in official census figures. However even official census figures indicate that a considerable proportion (at least one-third) of Chinese settlers living in Australia during this period were British subjects and not 'aliens' under the law applying in the country.

⁴¹⁶ Ibid.

⁴¹⁷ Andrew Markus, 'Government Control of Chinese Immigration to Australia, 1855-1975' in Henry Chan, Ann Curthoys and Nora Chiang (eds), *The Overseas Chinese in Australasia: History, Settlement and Interactions* (National Taiwan University and Australian National University 2001) 69, 79, Appendix 1.

The failure to properly identify Chinese Australians with legal subject status resulted from confusion about who was an ‘alien’ under the law. In turn this contributed to a continuing presumption in colonial parliaments and the courts, contrary to the rule of law, that all ethnic Chinese inhabitants were ‘aliens’.

Colonial parliamentary reports

Apart from census records, other official sources in relation to the origin of Chinese settlers include inquiries conducted by colonial parliaments. In 1857 and 1868 Victoria’s Parliament commissioned reports on the Chinese population in that colony. According to Geoffrey Serle, these are ‘the two main sources on the Chinese in Victoria in this period’.⁴¹⁸

In 1857 when Chinese businessman Lowe Kong Meng was asked by the *Select Committee on Chinese Immigration* ‘From what part of China do the Chinese now in the Colony chiefly come?’, he replied ‘All from Canton; they are all Canton people... Some from country and some from town’.⁴¹⁹ In his 1868 report to the Victorian Parliament, the Reverend William Young said that:

The Chinese who emigrate from China to this country are chiefly from the province of Canton. They generally belong to the rural agricultural population, spread over the country from 70 to about 150 miles south of Canton, and perhaps about the same distance westward of Hong Kong and Macao.⁴²⁰

The 1868 report is an important source for contemporary accounts of the origin of Chinese migrants to Australia in the colonial era. Yong (1966)⁴²¹ and Choi (1975)⁴²² both refer to this report. In turn Ryan (1995) refers to Yong and Choi for her conclusion that after gold was discovered in Australia in 1850:

By far the majority of Chinese migrating from Hong Kong to the eastern colonies of Australia were Cantonese, from the thirteen counties on the fertile delta of the Pearl River, in Kwantung Province.⁴²³

⁴¹⁸ Geoffrey Serle, *The golden age: a history of the colony of Victoria, 1851-1861* (Melbourne University Press 1968) 321 (footnote).

⁴¹⁹ Victoria, ‘Report of the Select Committee of the Legislative Council on the subject of Chinese Immigration: together with the proceedings of the Committee and minutes of evidence’, *Parliamentary papers 1856-57*, no. D 19 (John Ferres, Government Printer, 1857) 10.

⁴²⁰ Victoria, ‘Report of the condition of the Chinese population in Victoria’, *Parliamentary Papers* 1868, no. 56 (Rev. William Young) 21.

⁴²¹ C F Yong, ‘The Chinese in New South Wales and Victoria 1901-1921’ (PhD Thesis, Australian National University, 1966) 403.

⁴²² Choi, *Chinese Migration and Settlement in Australia*, above n 371, 78.

⁴²³ Jan Ryan, *Ancestors. Chinese in Colonial Australia* (Fremantle Arts Centre 1995) 16 (where the author refers to the works by Yong and Choi).

Similarly, Serle (1968) - in turn cited by Charles Price (1974)⁴²⁴ – refers to the above statement by Reverend Young when claiming that most of the Chinese who came to Victoria in the 1850s were from the area south of Canton and west of Hong Kong.⁴²⁵

However neither the 1857 nor the 1868 reports provide any kind of definitive record of the number of ethnic Chinese settlers from different places of origin, nor is there any indication that the reports were intended to be read in that way. Both Lowe Kong Meng and Reverend Young were reporting on migrants ‘from China’. Kong Meng said all such people were ‘from Canton’, but he was a British subject himself, having emigrated four years before from the colony of Penang.⁴²⁶ While Reverend Young said Chinese settlers in Victoria were chiefly from Canton province, the figures in the 1868 report do not in themselves substantiate this claim. Of the 11 districts in Victoria for which numbers of Chinese residents are provided in the report, there is only one where there is any reference to migrants from Canton province.⁴²⁷ Moreover, the 1868 report itself indicates the existence of British subject Chinese in colonial Victoria, referring to settlers originally from Singapore,⁴²⁸ others naturalised in Victoria⁴²⁹ and ‘between 50 and 60’ Chinese settlers married to European women with an estimated 130 locally born children (who were therefore natural-born British subjects).⁴³⁰

According to Price, by the 1880s nearly 90 per cent of Chinese in Victoria came from the four districts south of Canton, with more from other areas of China itself. Price cites Yong and Choi in making this assessment.⁴³¹ Yet Price also states, inconsistently, that a major issue at the 1888 ‘Inter-Colonial Conference on the Chinese Question’ (discussed below) was that ‘it seemed clear that many Chinese immigrants had been either born or naturalised in British territories such as Hong Kong and Singapore and therefore possessed British citizenship’.⁴³²

⁴²⁴ Charles Price, above n 165, 70.

⁴²⁵ Serle, above n 418, 320.

⁴²⁶ ‘Mr Lowe Kong Meng’, *Australian News for Home Readers* (Melbourne) 20 September 1866, 4. Despite his British subject status, Kong Meng was identified in the 1857 report merely as a ‘Chinaman’ (Victoria, above n 374, v).

⁴²⁷ Victoria, above n 420, 6. Smythesdayle was the one district where the report made specific reference to settlers from Canton.

⁴²⁸ Ibid 6.

⁴²⁹ Ibid 6, 7, 9, 10, 14, 15.

⁴³⁰ Ibid 22.

⁴³¹ Charles Price, *The Great White Walls are Built*, above n 165, 219.

⁴³² Ibid 271. As noted above, the correct legal status of such people was ‘British subject’. There was no such thing as ‘citizenship’ under the common law. In addition, as also noted, naturalisation in a British possession had effect only within the territory of that possession. So under the common law

Histories of colonial Victoria which have drawn, directly or indirectly, on the 1857 and 1868 reports to Victoria's parliament have therefore continued the confusion about the origin of ethnic Chinese resident in the colony and how many could properly be regarded as 'aliens' under the law.

Imperial queries about legal status

Importantly, legal advice to the imperial government confirmed the British subject status of ethnic Chinese residents in colonial territories which were major departure points for emigration to nineteenth century Australia.

The colony of Hong Kong was a particular focus. As Phillip Mar observes:

From the mid 19th century, Hong Kong was a major embarkation point for southern Chinese emigration to much of the Pacific, including Australia. At least 6 million Chinese emigrants apparently passed through Hong Kong to various parts of the world up to 1939. Shipping statistics tell us that some 10,500 departed from Hong Kong for Melbourne in just eleven months up to September 1855 at the height of gold rush emigration.⁴³³

After the original acquisition of Hong Kong in 1842 under the Treaty of Nanking, its territory was twice expanded - under the Treaty of Beijing in 1860 (Kowloon) and the Convention for the Extension of Hong Kong Territory in 1898 (New Territories). Clive Parry explains the general rule regarding acquisition of British nationality in such circumstances:

On the annexation of territory by the Crown before 1949 all subjects of the former sovereign resident in such territory became British subjects unless other provision regarding their nationality was agreed to, proclaimed, or enacted by the Crown.⁴³⁴

Since there was no relevant statutory provision⁴³⁵ and no agreement to the contrary in the treaties of 1842, 1860 or 1898,⁴³⁶ the residents of Hong Kong, Kowloon and the New Territories became British subjects on the date of annexation of the relevant territory. This

Chinese naturalised in Hong Kong and Singapore did not retain British subject status on arrival in the Australian colonies.

⁴³³ Mar, above n 386, 98, citing Elizabeth Sinn, 'Emigration from Hong Kong before 1941: General Trends' in Ronald Skeldon (ed) *Emigration from Hong Kong. Tendencies and Impacts* (Chinese University Press 1995) 12, 21.

⁴³⁴ Parry, *British Nationality*, above n 83, 32. See also the discussion in Chapter One (pp 64-65) on this issue.

⁴³⁵ Ibid 155.

⁴³⁶ *Treaty between Her Majesty and The Emperor of China* (signed Nanking, August 1842, ratifications exchanged Hong Kong 26 June 1843). www.thegazette.co.uk/London/issue/20276/page/3597

Convention Of Peking (signed 1860), ratifying *Treaty of Tientsin* (signed 26 June 1858) www.chinaforeignrelations.net/sites/default/files/1860%2C%20Beijing%20Conv.%20%28Br.%29.pdf; www.chinaforeignrelations.net/sites/default/files/1858%2C%20Tianjin%20%28Br.%29.pdf;

Convention for the Extension of Hongkong (signed Peking, 9 June 1898) www.chinaforeignrelations.net/sites/default/files/1898%2C%20Hong%20Kong%20%28Br.%29.pdf

was confirmed by lawyers to the British government in an 1898 opinion obtained by Mervyn Jones:

Hong Kong acquired new territory, under a lease for 99 years from the Chinese Government, in 1898...The British Government was advised by the Law Officers of the Crown that 'persons inhabiting the new territory who were before the cession Chinese subjects are to be regarded as British subjects for all purposes as from 16th April 1899'. The latter was the date of the actual taking over (annexation) of the territory.⁴³⁷

In other words, according to an official legal opinion to the British government, after cession of territory from China the inhabitants became subjects of the British Crown under imperial law. Contrary to the law, however, Australian authorities and key political figures continued to label and treat ethnic Chinese people from Hong Kong and other British territories in Asia as 'aliens'.

'Always an alien people'

Racial prejudice and not the common law determined the standing of ethnic Chinese residents in the eyes of the white colonial community in Australia. Settlers of Chinese descent were seen as indelibly foreign or 'alien' because of their race. In her paper on 'mixed race' children born in Australia (who were, therefore, 'natural-born' British subjects), Kate Bagnall highlights an 1881 newspaper article which declared:

The two races are so opposite that they cannot exist together. One must make room for the other. If they were, say, Russians who came to settle among us, whether they took wives from our circle or brought their own wives with them, their children would be white, and we should soon be one people. But with the Chinese the case would be different. No matter who the child's mother was, or where he was born, *he would be a Chinese still*.⁴³⁸

In 1888 the President of the Victorian Trades Hall Council said that 'any Chinaman who...retained his pigtail was still a Chinese subject'.⁴³⁹ This might suggest that Chinese settlers who 'abandoned their pigtails' could become accepted in the colonial Australian community. Indeed, Bagnall refers to 'four markers of identity...through which mixed Chinese Australians might be able to negotiate...their identity as the Other', including appearance, education, language and naming.⁴⁴⁰ But adopting the clothing and mannerisms of

⁴³⁷ Mervyn J Jones, *British Nationality Law and Practice*, above n 310, 42 n 1.

⁴³⁸ Kate Bagnall "'He Would be a Chinese Still": Negotiating Boundaries of Race, Culture and Identity in Late Nineteenth Century Australia' in Sophie Couchman, John Fitzgerald & Paul Macgregor (eds), *After the Rush. Regulation, Participation and Chinese Communities in Australia 1860 – 1940* (2004) 9 *Otherland Literary Journal* 153-155, citing 'Chinese Question No 1' (c. early 1881), *Newspaper Cuttings vol. 57*, Mitchell Library. Emphasis added.

⁴³⁹ Oddie, above n 161, 112, citing *The Age* 30 April 1888.

⁴⁴⁰ Bagnall, above n 438, 158.

European settlers did not ensure acceptance by Anglo-Celtic colonial society. In 1888 the Government Resident of the Northern Territory declared that:

...the Chinese will always be and remain foreigners, as were the Moors in Spain, and the Turks in South-Eastern Europe. As they were, and are distinct and separate races, so the Chinese *will always be an alien people*...The wearing of slop clothes and felt hats is but a superficial recognition of European surroundings. In Sydney and Melbourne, as well as in Port Darwin, the Chinese is a Chinese and he holds fast to his national habits and customs.⁴⁴¹

Colonial leaders in nineteenth century Australia showed little respect for the legal status of Chinese British subjects. The dominant view was that it made no difference if settlers of ethnic Chinese origin were 'natural-born subjects' from Australia or another British colony or 'naturalised subjects', they should all be regarded and treated as 'aliens'. Premier of South Australia Sir Thomas Playford said birth as a British subject should carry no weight in the case of the Chinese, declaring that 'a Chinaman was not the less a Chinaman because he was born under the British flag in Hongkong or Singapore'.⁴⁴² Victorian Premier Gillies reported to the Imperial Parliament that 'the Chinese, from all points of view, are so entirely dissimilar as to render a blending of the two peoples out of the question'. They were, he said, 'not only an alien race, but remain aliens',⁴⁴³ explaining that 'naturalised British subjects are still Chinese and are as objectionable as if they were to come from the centre of China'.⁴⁴⁴ Such views from the colonial leadership, completely at odds with established legal principle, ensured racial prejudice continued to disrupt the law on 'alienage' in Australia.

The Chinese 'threat'

In the minds of white colonial politicians, there were many factors in addition to different skin colour or race justifying their portrayal of Chinese Australians as 'aliens' - including the different civilisation, religion and clothing of Chinese settlers; their supposedly lesser aspirations for political and labour rights; the poorer living conditions they were allegedly satisfied with; their supposed prevalence to, and role in spreading, disease; the transient

⁴⁴¹ Parliament of South Australia, *Government Resident's Report on Northern Territory for the Year 1887*, paper no 53, 31 May 1888. Emphasis added.

⁴⁴² South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 202.

⁴⁴³ *The Daily Telegraph*, 17 April 1888, cited in Welch, above n 124, 237-238. See also Charles Price, *The Great White Walls are Built*, above n 165, 256; Oddie, *The Chinese in Victoria*, above n 161, 108.

⁴⁴⁴ Marilyn Lake, 'Chinese Colonists Assert Their "Common Human Rights"; Cosmopolitanism as Subject and Method of History' (2010) 21(3) *Journal of World History* 375, 385, citing Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 1888, 2357.

nature of some Chinese migrants; and the relative lack of women amongst Chinese arrivals.⁴⁴⁵

Above all, there was the notion of a threat. Chinese settlers were seen by the Anglo-Celtic colonisers of Australia as a threat to the security of the country, to their standard of living and health, and, of course, to the racial purity of the emerging 'white Australian' nation. There were repeated references to a horde of hundreds of millions of 'alien' Chinese about to swamp Australia, and to how unfair it was that people from an 'alien race' should be able to charge less for their labour, thereby depriving white settlers of an honest living.

In 1876 the Hon W.H. Yaldwyn told the Queensland Legislative Council about the threat posed by the Chinese:

We were near neighbours to a teeming mass of Chinese - nearly 400,000,000 of them were separated from us by a narrow stretch of placid ocean. It was a stern struggle for existence in that closely packed country, and the advantages possessed by a rich and sparsely inhabited colony like Queensland must be only too apparent to them. The peaceful invasion had begun; it was idle to think that it would cease. It behoved the rulers of this colony to step boldly forward and slaughter the giant whilst he was young and his bones were soft. Let them take a high hand and forbid those people to land upon our shores...it was now our duty to refuse to allow this fair colony to be overrun by the offscourings of the Chinese Empire. Queensland was like a young and vigorous forest-tree, giving promise of a magnificent maturity; but a parasite was at its root, insidious in its approach, inevitable as fate; it grew on and on, and unless pruned away with a ruthless hand, the noxious growth would involve the whole fabric in decay and death.⁴⁴⁶

The small size of the white colonial population in Australia relative to the vast populace of China produced an abiding fear of imminent invasion. According to David Walker, 'the Chinese presence in the colonies stirred many Australian anxieties...They suspected Australia might be on a great Chinese flood plain'.⁴⁴⁷ As Charles Pearson declared in 1881 in a debate in the Victorian Legislative Assembly on the Chinese Influx Restriction Bill, the 'mere natural increase' in China's vast population in a single year:

...would be sufficient to swamp the whole white population of the colony. Australia was now perfectly well known to Chinese; communication between the two countries was thoroughly

⁴⁴⁵ Ann Curthoys discusses the factors producing a fear of and objection to Chinese settlers on the part of white Anglo-Celtic colonists in her article '“Chineseness” and Australian identity' in Henry Chan, Ann Curthoys and Nora Chiang (eds), *The Overseas Chinese in Australasia: History, Settlement and Interactions* (National Taiwan University and Australian National University 2001) 16, 25-26.

⁴⁴⁶ Queensland, *Official Record of the Debates of the Legislative Assembly and Legislative Council*, Legislative Council, 6 September 1876, 619.

⁴⁴⁷ David Walker, *Anxious Nation. Australia and the Rise of Asia 1850-1939* (University of Queensland Press 1999) 37.

established; and in the event of famine or war arising in China, Chinamen might come here at any time in hordes.⁴⁴⁸

There was also a pervasive fear amongst the white community about infection from Chinese arrivals who were often wrongly blamed for introducing disease. In 1877 the Vice-President of Queensland's Executive Council wrote to the Chief Secretaries of the other Australasian colonies claiming that smallpox was a 'practical evil connected with the unrestricted immigration of Chinese'.⁴⁴⁹ In 1881 Mr O'Connor declared in the New South Wales Parliament that:

We were within a comparatively short distance of an overcrowded, poverty-stricken nation, which was anxious to find an outlet for millions of its inhabitants...How could we expect an Englishman to compete with small-pox and other pestilential diseases which the Chinese introduced with them?...We must take care...that our civilisation was not broken down by the influx of one of the most demoralising races on the face of the earth.⁴⁵⁰

The same year the *South Australian Register* warned that 'we cannot be indifferent to the mischief of a possible Mongolian invasion...we cannot be regardless of the introduction of such fell diseases as leprosy and smallpox'.⁴⁵¹

As Greg Watters comments, it is surprising that the historiography of Australia's nineteenth century engagement with China has 'neglected the importance played by contamination fears':

...given the belief, held by many Australians at the time, that the Chinese were a diseased and dirty people. This image prefigured the first significant contacts between Australians and Chinese and it continued to be popularly accepted, despite conflicting evidence, throughout much of the nineteenth and twentieth centuries...Contamination anxieties introduced a stridency and phobic quality to Australia's challenge of facing China.⁴⁵²

As well as invasion and disease, there was a particular fear of the threat to white prosperity and labour standards posed by 'alien' Chinese workers. In 1886 the Sydney *Bulletin* pointed to the United States where 'ignorance of the Mongolian Octopus in San Francisco permitted

⁴⁴⁸ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly*, Vol. XXXVIII, 4 October 1881, 220. Pearson has been described as 'the outstanding intellectual of the Australian colonies'. In 1893 he published *National Life and Character. A Forecast* which foretold the rise of China and was used as justification for racial exclusion in colonial and post-federation Australia. See John M. Tregenza, 'Pearson, Charles Henry (1830–1894)', *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/pearson-charles-henry-4382/text7133>; Marilyn Lake, 'The Chinese Empire Encounters the British Empire and Its "Colonial Dependencies": Melbourne, 1887' in Couchman and Bagnall, above n 369, 98, 98-99.

⁴⁴⁹ Queensland, *Journals of the Legislative Council, Fourth Session of the Seventh Parliament of Queensland, Session of 1877*, 534 (circular letter from Vice-President Executive Council of Queensland to Chief Secretaries Australasian colonies 20 April 1877).

⁴⁵⁰ New South Wales, *Parliamentary Debates, Session 1881*, 3 November 1881, 1809.

⁴⁵¹ *South Australian Register* (Adelaide) 12 August 1881, 5.

⁴⁵² Greg Watters, 'Contaminated by China', in Walker and Sobocinska, above n 372, 27, 41-42.

the nuisance to spread', observing that 'men do not like Mongolian neighbours, and as there was a difficulty in getting tenants for buildings near the Chinese quarter, the aliens were enabled to buy up more houses ...and so the colony spread'.⁴⁵³ The article painted an image of sub-human Chinese creatures draining the source of life from honest white workers, declaring:

[F]rom this Chinese quarter, slave labour stretches forth a grimy sinewy hand to clutch the bread for which free and honest men and women would willingly work. Shoemakers, laundrymen, cigar-makers, cabinet-makers, and other tradesmen slave away there in narrow and pestiferous dens from dawn until midnight working out their own enfranchisement, and by the price of their freedom pauperising, and in a manner enslaving, those citizens who formerly were free...⁴⁵⁴

In 1888 Mr Cotton warned the South Australian Parliament about restricting 'the field of work for our own laboring classes by putting them into competition with the hordes of an alien race'.⁴⁵⁵ Premier Thomas Playford said Chinese storekeepers in the Northern Territory:

...had beaten the European storekeepers and merchants out of the field...The Chinamen would work for a European at 6s per day, but would work for his own countrymen for 3s per day. How on earth could a European stand against such competition? The Chinaman did not work the European out by fair means....The English laborer would have to work for the same rate of wages as the Chinese or leave the country. He could not possibly support himself and his wife and family on the wages that a Chinaman would live upon.⁴⁵⁶

Playford lamented that 'we simply stand by' and let the riches of the Northern Territory 'flow into the coffers of the Chinese Empire', agreeing it was 'folly...to let this alien people quietly carry them away'.⁴⁵⁷

Perceptions of Chinese Australians as different or 'alien' in a racial sense were so deep-set that extreme claims could influence official colonial policy.

Bigotry and Chinese Australians

As Bill Hornadge explains, because Chinese migrants were almost invariably male and lived together in camps, they were accused by Europeans 'with vivid imaginations' of the routine practice of sodomy, which became known in colonial Australia as the 'Chinese Vice'.⁴⁵⁸ This allegation was used to justify exclusionary laws aimed at Chinese settlers. In 1862 Secretary

⁴⁵³ 'The Chinese in Australia', *North Australian* (Darwin) 1 October 1886, 3, reprinting an article from the *Bulletin* (Sydney) 21 August 1886. Emphasis added.

⁴⁵⁴ Ibid.

⁴⁵⁵ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 271 (debate on Chinese Immigration Restriction Bill).

⁴⁵⁶ Ibid 206.

⁴⁵⁷ Ibid. Playford was quoting the words of Rev J E Tennison Woods.

⁴⁵⁸ Bill Hornadge, *The Yellow Peril. A Squint at some Australian attitudes towards Orientals* (Review Publications 1971) 18-20.

for the Colonies Lord Newcastle stated, when advising Queen Victoria not to refuse assent to New South Wales legislation restricting the immigration of Chinese settlers, that:

Her Majesty's Government cannot shut their eyes to the exceptional nature of Chinese Immigration, and the *vast moral evil* which accompanies it. The entire absence of women among the immigrants, their addiction to the *peculiar vices* thence arising, their paganism and idolatrous habits must make them, where they bear any considerable proportion to the general population, a misfortune to any Colony situated as are the Australian colonies. In New South Wales the Chinese Immigrants amount...to about 21,000, or about 1 in 16 of the whole population, and...a very much larger proportion of the adult males. I could not advise Her Majesty to refuse her assent to a measure which the Legislature of New South Wales consider necessary to protect the Colony against so *undeniable an evil*.⁴⁵⁹

In 1876 Queensland Premier George Thorn used a similar justification when introducing the Goldfields Act Amendment Bill, intended to exclude Chinese settlers from Queensland goldfields. According to Premier Thorn:

It was very well known that the presence of the Chinese was very detrimental on the northern gold fields...it was also well known to honourable members that the Chinese were not from their *degraded habits* a desirable class on the northern gold fields.⁴⁶⁰

These irrational presumptions about behaviour amongst ethnic Chinese settlers are a clear example of racial prejudice feeding into law through colonial legislation.

Racism and legal standing

The equal standing under the common law of ethnic Chinese British subjects living in Australia was ignored or lost in the depiction by white British lawmakers of all Chinese as inferior and 'alien' in a general, non-legal sense. When Victoria's Legislative Assembly was asked in 1881 to deny non-subject Chinese the right to vote, Mr R.M. Smith observed that 'it was worth consideration that *almost every Chinese immigrant to Victoria came from Hong Kong*'.⁴⁶¹ Any migrant born in Hong Kong or 'habitually resident' there at the time of its colonisation was a British subject with equal legal status and not an 'alien' under imperial and Victorian law.⁴⁶² Yet in the same debate another speaker not only refused to recognise Chinese as equal subjects but claimed they were weak and barely human, declaring that:

...there never could be any competition between a rice-eating man and a beef-eating man...In fact, a Chinaman was a *mere dumb animal* – he was never anything but a Chinaman, and never could be anything else...It would be less objectionable to drive a *flock of sheep* to the poll than

⁴⁵⁹ Lord Newcastle to Governor of New South Wales Sir John Young, 26 February 1862, New South Wales, *Votes and Proceedings of the Legislative Assembly During the Session of 1881, with the various documents connected therewith*, Vol IV. Emphasis added.

⁴⁶⁰ Queensland, *Official Record of the Debates of the Legislative Assembly and Legislative Council*, Legislative Assembly 3 August 1876, 371. Emphasis added.

⁴⁶¹ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly*, Vol. XXXVIII, 4 October 1881, 224-225 (Mr R.M. Smith). Emphasis added.

⁴⁶² See above pp 92-93. See also Chapter One (pp 64-65).

to allow Chinamen to vote. The sheep, at all events, would be harmless. To claim for Chinamen the right to have a voice in the making of the laws of this country was a monstrous absurdity.⁴⁶³

Lawmakers in the Australasian colonies commonly used animal or other derogatory terms to describe Chinese settlers. Another member of the Victorian parliament said that ‘the Chinamen who were in the habit of crossing the border were simply a lot of *wretched mongrels*...What did the colony want with Chinamen at all?’⁴⁶⁴ Mr V. Solomon, an influential Northern Territory member in the South Australian Parliament and a key figure in the local anti-Chinese campaign (which served his business interests),⁴⁶⁵ stated in 1888 that:

The Australian population is Anglo-Saxon, and does not mean to be swallowed up in its youth by a flood of immigration from the densely populated territories of China...He would only remind members of *two other pests*, with regard to which it would have been better had we taken action at the outset - *sparrows and rabbits* (Hear, hear). Were we to wait until the country was overrun with Chinese and then take action?⁴⁶⁶

The description of Chinese in sub-human terms was combined with the assertion they looked so alike it was impossible to tell one from another. When wrongly accusing Chinese immigrants of bringing smallpox to Sydney in 1881, Vice-President of the New South Wales Executive Council Sir John Robertson declared that:

Our medical men cannot be to blame for the introduction of diseases under these circumstances. How can they examine carefully such a number of men who are *so much alike to each other as pease [sic] or sheep*, and cunning as a *wagon-load of monkeys*?⁴⁶⁷

The claim that Chinese could not be distinguished from each other was used to oppose exemptions from restrictive entry laws for Chinese settlers who were long-term Australian residents and/or British subjects. In 1881 a member of the Victorian Legislative Assembly, Major Smith, said that giving a Chinese resident an exemption certificate when he temporarily left the colony:

...would open the door to fraud...a Chinaman having left the colony with a certificate, who could say, when it was again presented, that it was in the hands of the same man? Who, in the vast majority of cases, could distinguish one Chinaman from another? Even to photograph a

⁴⁶³ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly, Vol. XXXVIII*, 10 November 1881, 699 (Mr Woods). Emphasis added.

⁴⁶⁴ *Ibid* 22 December 1881, 1362 (Mr Bowman). Emphasis added.

⁴⁶⁵ Timothy Jones notes that Solomon’s business interests in the Northern Territory were threatened by Chinese settlers and that anti-Chinese agitation in the region ‘was started by V.L. Solomon and some of his store-keeping friends and the essential motivation was profit’. Jones also notes that Solomon’s campaign against the Chinese continued well into the 1890s. Timothy Jones, *The Chinese in the Northern Territory* (NTU Press 1990), 60. See also Stephen Gray, ‘“Far Too Little Flogging”: Chinese and the Criminal Justice System in the Northern Territory’, *Research Paper No 2011/37 Monash University Faculty of Law*, 17 and n 80.

⁴⁶⁶ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 10 July 1888, 377-378. Emphasis added.

⁴⁶⁷ New South Wales, *Parliamentary Debates, Session 1881 (5 July to 20 December 1881)*, 18 August 1881, 633-634. Emphasis added.

likeness of the holder of a certificate upon the face of the document would be no real safeguard.⁴⁶⁸

Mr Chubb told the Queensland Parliament in 1884 that certificates of exemption for existing residents should be done away with:

It has been said, and with a good deal of truth, that *Chinamen resemble each other as much as peas*, and for that reason the country has very often been *defrauded to a large extent by Chinamen* obtaining these certificates of exemption and passing them on to fellow-Chinamen.⁴⁶⁹

Similarly, Victorian Premier Duncan Gillies wrote to Governor Loch in April 1888 stating that one reason it was easy for naturalisation certificates to be used fraudulently was because the ‘similarity in personal appearance (at least to the European eye) of all Chinese’ meant ‘it was almost impossible for the Customs authorities to detect the imposture’.⁴⁷⁰

Fear of the fraudulent use of exemption or naturalisation certificates by Chinese who lawmakers regarded as less than human and claimed to be unable to tell apart led to some extreme proposals. In 1876 the Queensland Postmaster-General asked ‘how were Chinamen already in the colony to be distinguished from those who were to arrive? They would have to be marked somehow’.⁴⁷¹ Another member, Mr McDougall, ‘concurred...as to the impossibility of distinguishing the Chinamen’, suggesting that the solution was to ‘square their tails and brand them’.⁴⁷² In 1881 Mr R.M. Smith told the Victorian Parliament, when criticising provisions in the Chinese Influx Restriction Bill, that:

...it would be quite in accordance with the spirit of some portions of the Bill to suggest that every Chinaman leaving Victoria should be branded on some portion of his body, or subjected to some painful mutilation by which he could be ever afterwards identified.⁴⁷³

Bigoted views of the sub-human character of Chinese settlers and the idea that they could not be distinguished from each other meant many lawmakers in colonial Australia regarded all Chinese as the ‘alien’ or the ‘Other’, both in a racial sense and legally. In 1886 at ‘one of the

⁴⁶⁸ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly, Vol. XXXVIII*, 224. Shortly after this, exemption certificates with photographs were introduced in Victoria under restrictive legislation aimed at Chinese. See Couchman, *In and Out of Focus*, above n 374, 124-125.

⁴⁶⁹ Queensland, *Official Record of the Debates of the Legislative Assembly, First Session of the Ninth Parliament, 1883-84*, 13 February 1884, 351 (Chinese Immigrants Regulation Amendment Bill). Emphasis added.

⁴⁷⁰ Couchman, *In and Out of Focus*, above n 374, 135.

⁴⁷¹ Queensland, *Official Record of the Debates of the Legislative Assembly and Legislative Council, Session 1876*, 7 September 1876, 633-634.

⁴⁷² Ibid 634. ‘Square their tails’ = cut off their pigtaails.

⁴⁷³ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly, Vol. XXXVIII*, 224-225.

largest public meetings ever held in Port Darwin’,⁴⁷⁴ Mr Solomon supported a protest by businessman W.E. Adcock against the importation of Chinese for mining and railway projects in the Northern Territory. Ignoring the subject status of arrivals from British colonies, Mr Adcock said this meant ‘hundreds of thousands of pounds wrung from the sweat and hard toil’ of Territory pioneers would be ‘given away to aliens... the coolie offscourings of Hongkong and Singapore’.⁴⁷⁵

Such bigoted views were not limited to backbenchers or minor political players but were also held by the leading politicians of the day.

Samuel Griffith and ‘alien’ Chinese

Queensland’s Attorney-General in 1876 was Samuel Griffith, later Premier of Queensland for two periods, President of the Federal Council of Australasia, chairman of the 1891 drafting committee for the new federal constitution and first Chief Justice of the High Court of Australia. In these various capacities he was a central figure in the regulation of ‘aliens’ in Australia for three decades. In his biography of Griffith, Roger Joyce makes numerous references to his subject’s ‘deep-seated belief in the rule of law’.⁴⁷⁶ Throughout his period in public office, however, Griffith paid scant regard to the law about the term ‘alien’.

Clause 2 of Queensland’s Goldfields Act Amendment Bill 1876 stated that ‘No Asiatic or African *alien* shall be permitted to mine upon any gold field until two years after the proclamation of such gold field’. According to Attorney-General Griffith:

...the most important feature of the Bill was that it would discourage a large influx of *Chinese* emigration to the colony...the Bill related entirely to gold fields; to *aliens* who were in the habit of rendering absolutely worthless the land in which they had no interest.⁴⁷⁷

In the Legislative Council the Post Master-General suggested that all of the new arrivals on the goldfields were subjects of the Chinese Empire (and therefore ‘aliens’ under British law).

According to the last census, he said:

...nearly seven thousand Chinamen congregated on the Palmer gold field...their numbers were...increasing almost daily, for every steamer that arrived from the north brought a large

⁴⁷⁴ ‘Public Meeting’, *North Australian* (Darwin) 17 September 1886, 3

⁴⁷⁵ *Ibid.*

⁴⁷⁶ Roger B Joyce, *Samuel Walker Griffith* (University of Queensland Press 1984) 336, see also 54, 113, 179, 219, 245, 278, 353.

⁴⁷⁷ Queensland, *Official Record of the Debates of the Legislative Assembly and Legislative Council, Session 1876*, 3 August 1876, 376.

number of Chinese immigrants to this colony. Unless Parliament was prepared to hand over to the Emperor of China the whole of our northern territory, it must do something at once.⁴⁷⁸

Leader of the Opposition Arthur Palmer pointed out, however, that settlers from British colonies in Asia, including many Chinese immigrants, were ‘British subjects’ and not ‘aliens’ and that it would be unjust to require such people to prove their status under imperial law:

He would like to know how the Government were going to treat the Chinese immigrants from Hong Kong – those undesirable immigrants as the honourable Premier had called them; they were British subjects....How again were the Government going to treat the natives of British India – were they aliens? (An honourable member: “No”)...that being the case, the onus of a man proving that he was not an alien would be thrown upon himself. Was that law or justice, or what was it? Why the Bill was a perfect farce from beginning to end.⁴⁷⁹

The longstanding President of the Legislative Council Maurice O’Connell said that in his view ‘the right to mine on the goldfields of this colony was an inherent right of British subjects’, stating that:

He...did not know why the legislature should...draw a distinction between Asiatic and African aliens and those from the Continent of Europe or elsewhere...(W)hy the African or Asiatic alien should be selected for charge, in preference to the Frenchman, or German, or Russian, was not, he thought demonstrable.⁴⁸⁰

When Governor Sir William Cairns referred the 1876 Bill to Imperial authorities, Secretary for Colonies Lord Carnarvon withheld approval. He said Great Britain opposed such ‘exceptional legislation intended to exclude subjects of a State’ (China) it was at peace with.⁴⁸¹ He also expressed his ‘regret that the Legislature of Queensland should now have thought it necessary to enact a measure of this character’, stating that the law was one of ‘extraordinary nature, whereby the rights of Her Majesty’s subjects, not residing in the colony, may be prejudiced’.⁴⁸² As he said:

...there are now, as Governor Cairns very properly points out to Ministers, growing and grown up in Hong Kong, Labuan and the Straits Settlements, *large numbers of British subjects of Chinese origin*; and these persons, in virtue of their birth-right, have acquired the status of natural-born British subjects.⁴⁸³

⁴⁷⁸ Ibid 6 September 1876, 618.

⁴⁷⁹ Ibid 3 August 1876, 372.

⁴⁸⁰ Ibid 7 September 1876, 637.

⁴⁸¹ Lord Carnarvon said the Bill contravened the 1842, 1858 and 1860 treaties between Great Britain and China. The 1860 Convention of Peking not only guaranteed freedom of movement between the British and Chinese empires, but also, as Lord Carnarvon noted, declared ‘that Chinese are at perfect liberty to enter into engagements with British subjects for service in British colonies’. ‘Despatch from Colonial Secretary Lord Carnarvon 27 March 1877’, Queensland, *Journals of the Legislative Council, Fourth Session of the Seventh Parliament of Queensland, Session of 1877*. See also Yarwood and Knowling, *Race Relations in Australia*, above n 178, 181.

⁴⁸² ‘Despatch from Colonial Secretary Lord Carnarvon 27 March 1877’, Queensland, *Journals of the Legislative Council, Fourth Session of the Seventh Parliament of Queensland, Session of 1877*.

⁴⁸³ Ibid. Emphasis added.

Lord Carnarvon's statement, prompted by criticism of the Bill by Governor Cairns,⁴⁸⁴ amounted to a recognition by imperial authorities both that there were British subjects of Chinese origin in Queensland and that their ethnic or racial background should not debar them from the privileges of subject status. In the Queensland Legislative Assembly, John Macrossan warned that 'in passing a law to keep out all aliens they must bear in mind that there were a large number of Chinese in Hongkong who were *not aliens*'.⁴⁸⁵ Attorney-General Griffith responded by quoting a report from the United States Congress describing 'swarms' of Chinese immigrants entering that country as a race 'alien in all its tendencies', saying all he had read in that report was applicable to Queensland.⁴⁸⁶ In his view, 'the Government would be wanting in its duty to the British race if they did not do all in their power to prevent this colony from becoming a dependency of the Mongolian Empire'.⁴⁸⁷

Despite the explicit objection of Lord Carnarvon, Griffith refused to accept that Chinese settlers from British colonies should be treated as British subjects in Queensland, declaring that 'it was not their desire to see the colony turned into a gigantic Singapore or Hongkong'.⁴⁸⁸ According to Griffith:

No doubt the civilization of those places might be all very well in its way; but opinions differed on that subject, and the Government did not desire to see the country governed, or a state of society established, upon principles similar to those which prevailed in these two dependencies of the British Empire.⁴⁸⁹

Legislative Council President O'Connell was concerned by loose use of the term 'alien' on the part of the Attorney-General and other parliamentarians in the goldfields legislation

⁴⁸⁴ R B Joyce, 'Cairns, Sir William Wellington (1828–1888)', *Australian Dictionary of Biography*, (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/cairns-sir-william-wellington-3141/text4683>.

⁴⁸⁵ Queensland, *Official Record of the Debates of the Legislative Assembly, Fourth Session of the Seventh Parliament, Session of 1877*, 26 June 1877, 359. Emphasis added.

⁴⁸⁶ *Ibid.*, 352. The same congressional report (including the same passage) was quoted to the Legislative Assembly seven years later by Macrossan. See Queensland, *Official Record of the Debates of the Legislative Assembly, First Session of the Ninth Parliament*, 13 February 1884, 346-7 (debate on Chinese Immigrants Regulation Amendment Bill 1884). This is a good example of the influence of anti-Chinese sentiments in the United States on the views of colonial lawmakers in Australia.

⁴⁸⁷ Queensland, *Official Record of the Debates of the Legislative Assembly, Fourth Session of the Seventh Parliament, Session of 1877*, 26 June 1877, 352. The emperors of China at this time were not Mongolian but were from the Manchu Qing dynasty. At the time of Griffith's statement the ruler of China was Emperor Guangxu. Jonathan Fenby, *The Penguin History of Modern China: The Fall and Rise of a Great Power 1850-2009* (Penguin Books 2009) 1, 741.

⁴⁸⁸ Queensland, *Official Record of the Debates of the Legislative Assembly, Fourth Session of the Seventh Parliament, Session of 1877*, 26 June 1877, 351.

⁴⁸⁹ *Ibid.*

debate.⁴⁹⁰ In one of the few statements by an official figure during the colonial or post-federation periods explaining the proper legal meaning of the word, O'Connell noted that all 'alien meant was, that the person to whom it applied was not a subject of the British sovereign'. However, in a scathing comment directed at the willingness of his political colleagues, not least Attorney-General Griffith, to substitute prejudice for imperial law, he observed that despite its established meaning under the common law:

...from the legal knowledge which had been laid before the [Parliament], it appeared that the real signification of the term alien depended not on whether persons were subjects of the Queen, but *whether we liked them or not*.⁴⁹¹

O'Connell's comment sums up the way the term 'alien' was used by key figures in colonial and post-federation Australia. Rather than respecting the word as a common law term with a straightforward legal meaning, it was employed as a convenient linguistic tool to denigrate members of disliked ethnic groups, especially Chinese Australians, whether they were aliens under the law or not.

Henry Parkes and 'obedience to law'

Sir Henry Parkes – an iconic figure in modern Australian history as the 'father of federation'⁴⁹² – was another prominent colonial politician who misused and manipulated the word 'alien' as a derogatory label for Chinese settlers. As records from inter-colonial conferences and debates in the New South Wales Parliament show, racial exclusion was more important to Parkes than following the law, not least in relation to the term 'alien'.

From the time he was first elected to the Legislative Council of New South Wales in 1854, Parkes was critical of Chinese immigration. The *Report of the Committee on Asiatic Labour* released that year by the New South Wales Parliament was prompted in part by expressions of concern from Parkes about the prevalence of disease amongst Chinese 'coolies' and their willingness to accept inferior labour conditions. The final report found little evidence of

⁴⁹⁰ Historian Charles Price mentions that 'Asiatic and African aliens' were differentiated from other 'aliens' in this legislation but does not question whether 'alien' was used in its correct legal sense by Queensland lawmakers. Charles Price, *The Great White Walls are Built*, above n 165, 159.

⁴⁹¹ Queensland, *Official Record of the Debates of the Legislative Assembly and Legislative Council*, 7 September 1876, 637. Emphasis added. Griffith took a similar approach in relation to the *Mineral Lands Act 1882*. As the *Queenslander* noted, in the debate on this law 'Mr. Griffith called attention to the new departure in legislation—of which, however, he fully approved—prohibiting Asiatic or African aliens from holding mining licenses, and consequently from engaging in mining avocations'. 'The Mineral Lands Bill', *Queenslander* (Brisbane) 12 August 1882, 208.

⁴⁹² Martin, 'Parkes, Sir Henry (1815–1896)', above n 222. For the significance of both Griffith and Parkes in the movement towards federation and development of the Australian Constitution, see Aitken and Orr, *Sawyer's The Australian Constitution*, above n 11, 5.

problems in either respect.⁴⁹³ Parkes was accused of inciting fear of Chinese settlers for his own political purposes and to build support for the idea of federation. In 1881 when Parkes as New South Wales Premier urged Parliament to support anti-Chinese laws, Legislative Council member Mr Piddington observed that ‘the Government, wishing for a popular cry, gave way to people out of doors, and made political capital by the measure’.⁴⁹⁴ In 1895 President of the Tasmanian Legislative Council Adye Douglas said a federal union required:

...outside pressure to bring it into operation...Now the only outside pressure talked about in New South Wales when we were in Sydney was by Sir Henry Parkes, and that was that we were afraid of the Chinese. They were going, he said, to seize upon Australia if it did not go in for Federation.⁴⁹⁵

Parkes played a central role in promulgating use of the term ‘alien’ as a description of the inherent nature of Chinese Australians. In public comments he made little distinction between Chinese settlers from British colonies and those from China itself. In a major speech to the ‘working men’ of Mudgee in 1878, Parkes spoke of the threat to Australia’s ‘British character’ posed by ‘alien’ Chinese, warning that:

...the Chinese belonged to a nation too numerous for us to sanction a wholesale immigration from, because we were not to admit a people who were *aliens to us in language, blood, and faith*...⁴⁹⁶

Intercolonial Conference 1881

In the 1880s Parkes presided over two inter-colonial conferences on the ‘Chinese question’. At the first conference in January 1881 he initiated a formal ‘remonstrance’ to the Secretary for the Colonies, Earl Kimberley, objecting to Western Australia’s use of public money to import Chinese labourers.⁴⁹⁷ Signed by the leaders of all colonies except Western Australia,⁴⁹⁸ the remonstrance stated that:

⁴⁹³ Charles Price, *The Great White Walls are Built*, above n 165, 47.

⁴⁹⁴ New South Wales, *Parliamentary Debates, Session 1881* (‘Free conference’), 2120. The ‘free conference’ – involving members of both the Legislative Assembly and the Legislative Council – was held to resolve difference between the houses over the bill.

⁴⁹⁵ Federal Council of Australasia, *Official Record of Debates*, Sixth Session of the Council, Hobart, 1 February 1895, 82.

⁴⁹⁶ Griffiths, above n 129, 391, citing speech at Mudgee, New South Wales, Tuesday 30 July 1878, reported in *Sydney Morning Herald*, 2 August 1878, 3. Emphasis added.

⁴⁹⁷ The remonstrance called for imperial intervention to reverse the colony’s actions. As Chairman of the conference, Parkes drew the attention of the delegates to the Western Australia Government Gazette dated 28 December 1880, which stated that ‘The Legislature having sanctioned the introduction of Chinese immigrants into the colony at the public expense...’, applications were invited from settlers ‘desirous of employing such immigrants’, South Australia, *Intercolonial Conference, Minutes of Proceedings*, Blue Book No. 28 (Adelaide 1881), 7.

⁴⁹⁸ As well as Parkes from New South Wales, the representatives of Victoria, South Australia, Queensland, Tasmania and New Zealand signed the remonstrance to Earl Kimberley. The

The objection to the Chinese is not altogether one of prejudice of color or race, but is founded in a rational view of the dangers to these British communities which might in the course of time flow from a people numbering more than 400,000,000, whose *language, laws, religion and habits of life are alien* to those of Her Majesty's subjects in Australasia, and whose geographical position makes the danger more imminent.⁴⁹⁹

In this statement, Parkes and other colonial leaders put their names to a description of Chinese people as 'alien' across all measures of comparison with 'Her Majesty's subjects'. They ignored the fact that, as Lord Carnarvon had reminded the Queensland Parliament in 1877, many Chinese residents were themselves subjects of the Crown through birth in a British colony or in Australia itself.⁵⁰⁰ Such endorsement by political leaders of the 'alien' character of the Chinese inhabitants of Australia inevitably influenced public perceptions and attitudes. In July 1881 tin miners petitioned the New South Wales Parliament declaring that they viewed 'with alarm the great increase in the number of Chinese arriving in this Colony', claiming that Chinese labourers 'at present outnumber the male European population on these mines':

...although their labour being cheap, it is profitable to the few, it is not so to the country at large; and it is manifestly unfair that *a race alien in blood, religion, customs, and every way*, should be allowed to enter in such numbers as to seriously injure men who are struggling to obtain an honest and respectable living for themselves and their families.⁵⁰¹

The 1881 conference agreed to 'uniform legislation on the part of all the colonies to restrict the influx of Chinese.' Parkes presented a model bill prepared for this purpose.⁵⁰² He urged the New South Wales Parliament to pass the law because of the threat posed by 'alien Chinese', referring to:

The four hundred millions of this *human hive*; the danger to the institutions and character of the country that would arise from the *introduction of swarms of aliens*, who would not amalgamate

representative of Western Australia said that his government had 'called his attention to... the impossibility of his being a party to a vote which might be opposed to Imperial policy'. Ibid 6.

⁴⁹⁹ Text of Remonstrance to Colonial Secretary Earl Kimberley 'against the introduction of Chinese by the Government of Western Australia at the public expense'. Ibid 43-44. Emphasis added.

⁵⁰⁰ Earl Kimberley refused to intervene, stating that 'strong evidence of injury sustained or likely to be sustained' by neighbouring colonies would be needed to justify interference by the Imperial Government with arrangements sanctioned by the Western Australia legislature 'for the very limited immigration now proposed'. He noted that it had not been alleged that Chinese settlers already in Western Australia had passed into other Australasian colonies, and that each of these other colonies 'already contains a much greater number of Chinese than Western Australia will have after the new immigrants have arrived'. Earl Kimberley to Governor Jervois, 11 May 1881, South Australia, *Despatches from Secretary of State Re Inter-Colonial Conference* (tabled House of Assembly 5 July 1881).

⁵⁰¹ Petition from 'Storekeepers, Miners, and others, Residents of Vegetable Creek, and the surrounding tin mines' tabled 6 July 1881. New South Wales, *Votes and Proceedings of the Legislative Assembly During the Session of 1881, with the various documents connected therewith*, Vol IV. Emphasis added.

⁵⁰² South Australia, *Intercolonial Conference, Minutes of Proceedings*, Blue Book No. 28 (Adelaide 1881) 9.

with our race nor assist in building up an empire here; the dissatisfaction that the working classes might righteously feel to see their walks of labour crowded upon by a people who would work like slaves and live on next to nothing; the great popular voice, which demanded that this question should be settled by law...⁵⁰³

In particular he used fear of disease, including an additional clause in the Chinese Influx Restriction Bill requiring ships arriving with any Chinese passenger to be quarantined for at least 21 days - whether there was any sickness on board or not.⁵⁰⁴ Strong opposition in the Legislative Council eventually forced Parkes to drop his quarantine provision.⁵⁰⁵ But leading New South Wales politicians continued to use anxiety about disease to support the exclusion of Chinese settlers under Parkes' proposed legislation. Vice-President of the Executive Council and former Premier Sir John Robertson blamed the Chinese for a recent outbreak of smallpox in Sydney:

There is no country from which we are so liable to receive small-pox, leprosy, and other diseases as from China...All reasonable men will think, having a regard to the state of the Chinese in Sydney, that the disease came from China...⁵⁰⁶

The 1881 debate in New South Wales, however, revealed more support for Chinese Australians than similar parliamentary debates after 1900.⁵⁰⁷ As Fitzgerald observes, the place of the Chinese in Australia 'was more readily acknowledged under British colonial rule

⁵⁰³ 'New South Wales', *South Australian Register* (Adelaide) 12 August 1881, 5. Emphasis added.

⁵⁰⁴ See debate on Influx of Chinese Restriction Bill 1881, New South Wales, *Parliamentary Debates, Session 1881*, 18 August 1881, 683-686 (Darley). The quarantine provision provided explicit legislative authority for the type of treatment experienced by the *SS Ocean* when it arrived in Sydney in June 1881. The ship left the British colony of Hong Kong with several hundred Chinese on board and was held in quarantine in Port Jackson supposedly on suspicion of carrying smallpox, even though none of the passengers was ill. As the New South Wales Legislative Council heard, there was an attempt to put an actual quarantine patient on board to justify the ship's detention. In his report tabled in the Legislative Council the master of the vessel, Mr Henry Webber, stated:

'The climax of despotism was reached this morning, when the whole of the property was taken from 228 passengers (among whom there had been no sickness of any kind for sixty-two days) and burnt, themselves stripped naked on the beach, and in exchange for the loss of their all given one suit of clothes and a blanket. That such was done on the express orders of the Government will be a lasting disgrace to New South Wales'.

New South Wales, *Parliamentary Debates, Session 1881*, 15 September 1881, 1130-31.

⁵⁰⁵ *Ibid* 28 September 1881, 1357.

⁵⁰⁶ *Ibid*, 17 August 1881, 633-634. Frederick Darley, later Chief Justice of New South Wales, said the Chinese were wrongly blamed for the smallpox outbreak as a pretext for the new law, declaring that the legislation was:

'...the offspring of a scare in respect to the disease of small-pox, and we have no more evidence that this disease was introduced by the Chinese than by the Germans or the French...the Bill...is a most un-English measure, which reflects no credit upon us as a community'.

Ibid 18 August 1881, 683-686.

⁵⁰⁷ See for example the debates on Queensland's alien and dictation test legislation discussed in Chapter Six.

than in White Australia after federation'.⁵⁰⁸ In the Legislative Council Mr J. Smith said it was 'nonsense to talk of our being overwhelmed by hordes of Chinese', observing that 'we shall have ample opportunity to prevent an inundation without treating the Chinese as rattlesnakes or crocodiles'.⁵⁰⁹ His colleague Sir Alfred Stephen referred to treaties between Great Britain and the Chinese Empire allowing freedom of movement, and also reminded the Parliament that royal assent for Queensland's 1876 goldfields legislation had been refused because of the many Chinese born in Hong Kong and the Straits Settlements 'who are British subjects'.⁵¹⁰

Despite some vocal opposition to Parkes' legislation,⁵¹¹ the New South Wales Parliament was determined to act against Chinese 'aliens'. The final New South Wales law severely restricted Chinese migration by imposing a landing or 'poll' tax of £10 per head on Chinese immigrants and a limit of one Chinese passenger per 100 tons of the ship's tonnage.⁵¹² As Mr O'Connor said in the Legislative Assembly, '...this Bill had been brought forward in response to the voice of the country to effect that object – to throw every obstacle we could in the way of any further influx of this *alien* race'.⁵¹³ There was an exemption for British subjects who could provide evidence of their status,⁵¹⁴ but as Parkes declared:

As I have explained on several occasions, the Bill is not simply one to regulate Chinese immigration; its object is to put a stop to it. The whole tendency of the Bill is to surround the traffic with such restrictions as will put an end to it. We do not want the Chinese to come here in the proportion of one to 50 tons of ship's tonnage, or one to 100 tons; in fact, *we do not want them here at all*.⁵¹⁵

⁵⁰⁸ Fitzgerald, *Big White Lie*, above n 371, 217.

⁵⁰⁹ New South Wales, *Parliamentary Debates, Session 1881*, 658.

⁵¹⁰ *Ibid*, 653-657.

⁵¹¹ As one newspaper noted, Parkes was opposed by a 'small but resolute and pertinacious band that fought the obnoxious features of the measure'. *South Australian Register* (Adelaide) 12 August 1881, 5.

⁵¹² *Chinese Influx Restriction Act 1881* (NSW) (45 Vict. No. 11).

⁵¹³ New South Wales, *Parliamentary Debates, Session 1881*, 3 November 1881, 1807. Emphasis added.

⁵¹⁴ Section 10 provided an exemption for British subjects who produced evidence of their status in the form of a certificate from the British Governor in any colony. However, as Secretary for the Colonies Lord Carnarvon observed in 1877, unlike 'naturalised' subjects of the British Crown, 'natural-born' subjects would have no occasion to obtain any such certificate. 'Despatch from Colonial Secretary Lord Carnarvon 27 March 1877', Queensland, *Journals of the Legislative Council, Fourth Session of the Seventh Parliament of Queensland, Session of 1877*. See below p 118. Moreover, in the case of naturalised subjects, naturalisation in another colony would not confer subject status in New South Wales. In *Ex parte Lau You Fat* (1888) 9 NSWLR(L) 269, the applicant was prevented from disembarking in Sydney without paying the landing tax required under the 1881 legislation. He applied for a writ of *habeus corpus*, providing letters of naturalisation obtained in 1886 in Victoria. The Supreme Court held that 'he was not a British subject in New South Wales, Victorian naturalisation having no extraterritorial effect'.

⁵¹⁵ New South Wales, *Parliamentary Debates, Session 1881*, 28 September 1881, 1368. Emphasis added.

Parkes explained that Chinese settlers should be kept out because they had no place in a society where all men were equal before the law. In his view Chinese could never have equal legal status:

I desire to see all persons who come here put on an equal footing, and it is because I cannot place Chinese on a footing of equality with ourselves that I wish to restrict their coming here...⁵¹⁶

Even if Chinese settlers had taken all steps formally available to them to become full legal members of the community, they were still regarded as ‘foreigners’ or outsiders whose presence undermined the British character of society. As one of Parkes’ colleagues, Mr Garrett, declared when supporting the prohibition in the new legislation on ownership of land by Chinese settlers naturalised as British subjects under New South Wales law:

He defended the provision on the highest grounds of national policy. It was unwise to amend our naturalisation law as we had done, as it gave too wide a scope for *foreigners* to acquire a *partnership in the nationality*. Any naturalised subject could, without competition, take up 640 acres of land...We should not be justified in discarding all safeguards to the preservation of the national character...If we allowed *foreigners* to join in the *partnership in the nationality*, we should not preserve the character of the country as we wished to do.⁵¹⁷

For Parkes and his colleagues, any Chinese immigrant naturalised as a British subject remained a ‘foreigner’. In other words, naturalisation was not respected as a formal legal means for welcoming new subjects into the imperial family, but feared as a mechanism by which foreigners or aliens could infiltrate British society.⁵¹⁸ This was consistent with Parkes’ lack of respect for formal nationality status more generally. Despite including an exemption for Chinese British subjects in his legislation, Parkes persisted in portraying Chinese Australians as ‘alien’ in every respect even though many were not ‘aliens’ as a matter of law.

‘Inter-Colonial Conference on the Chinese Question’ 1888

In 1888 fears of the ‘infiltration’ of Chinese into the Northern Territory (administered at that time by the colony of South Australia) embarrassed the South Australian government into organising another inter-colonial conference, again presided over by Sir Henry Parkes.⁵¹⁹

⁵¹⁶ Ibid.

⁵¹⁷ Ibid 1373. Emphasis added.

⁵¹⁸ While endorsed by the Legislative Assembly, the Legislative Council defeated the prohibition on ownership of land by naturalised Chinese settlers. ‘Chronicle’, *Australasian Sketcher with Pen and Pencil* (Melbourne) 19 November 1881, 370.

⁵¹⁹ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 201 (Debate on Chinese Immigration Restriction Bill 1888). Mr Rounsevell told the South Australian Parliament there was no formal record of the 1888 Inter-Colonial Conference because the press was excluded and no note taker was present. *Debates* 5 July 1888, 247. See also Charles Price, *The Great White Walls are Built*, above n 165, 198. However Premier Thomas Playford presented an extensive report on the 1888 Conference to the Legislative Assembly: see *Debates* 3 July 1888, 201-206. See also South Australia, ‘Minutes of

Members of the South Australian parliament questioned the need for the conference.⁵²⁰ Mr Horn said unnecessary alarm had been spread about the Chinese population in the Northern Territory by the government administrator:

The whole of this absurd scare was caused chiefly by a panic-stricken telegram sent down by the Government Resident of the Northern Territory, who said that 400 Chinamen were to be sent to the MacDonnell Ranges ruby fields.⁵²¹

The Chief Secretary of South Australia said a telegram had also been received from Queensland Premier Sir Samuel Griffith⁵²² expressing ‘great alarm’ about reports of a ‘contemplated large immigration of Chinese’ to the Northern Territory. Griffith urged South Australia to use its existing laws to restrict or delay the landing of Chinese and, if these were not sufficient, to recall Parliament at an early date to deal with this ‘question of extreme urgency’. South Australia, he said, would have the ‘moral support of all the rest of Australia’ and their ‘warm gratitude’ if it did so.⁵²³ The New South Wales Colonial Secretary backed Griffith’s call, ‘expressing sympathy with any well-devised scheme to arrest the excessive immigration of Asiatic or African *aliens* into the northern part of Australia’.⁵²⁴

Proceedings of Conference on the Chinese Question 1888’, *Parliamentary Papers* 1888 (3) No 52. For a detailed account of the events of 1888, see Eric Rolls, *Sojourners. The epic story of China’s centuries-old relationship with Australia. Flowers and the Wide Sea* (University of Queensland Press 1992) ‘Chapter 9. The Division between Sojourners and Citizens’.

⁵²⁰ In the Legislative Assembly, Mr Horn and Mr Rounsevell observed that the number of Chinese in Australia had decreased over the past two decades. Only in the Northern Territory had there been an increase and this was largely ‘occasioned by the Parliament itself’ when it awarded the Darwin to Pine Creek railway contract to a firm which charged less because it recruited non-European labour. The number of Chinese settlers in the Northern Territory had grown from 4,400 to 7,700 over the previous 18 months. South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 207-210 (Horn), 5 July 1888, 247 (Rounsevell). See also 1886 criticism of the plan to save money on the railway by using Chinese labour from Mr Solomon, who was, as noted above at p 99, a key anti-Chinese figure in the South Australian Parliament. ‘Public Meeting’, *North Australian* (Darwin) 17 September 1886, 3.

⁵²¹ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 209. Mr Tomkinson supported this criticism, referring to ‘...excitable telegrams from the Government Resident’, noting that these had an undue influence on the makeup of the South Australian parliament:

‘These telegrams came in just in time to influence the Legislative Council elections, and by causing a demonstration amongst the leaders of the unions in support of the candidates dead against the Chinese and in favor of the Government policy. The result was that most of the new members were returned chiefly for this reason’. Ibid 269-270.

⁵²² Griffith was Premier of Queensland from November 1883 until June 1888, and again from August 1890 until March 1893. He received a knighthood (KCMG) in 1886. R B Joyce, ‘Griffith, Sir Samuel Walker (1845–1920)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/griffith-sir-samuel-walker-445/text11119>. See also Joyce, *Samuel Walker Griffith*, above n 477.

⁵²³ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 219. Griffith complained in particular that Chinese settlers could disembark at Port Darwin without paying a head or poll tax.

⁵²⁴ Ibid 5 July 1888, 252 (Mr Glynn). Emphasis added.

The 'Inter-Colonial Conference on the Chinese Question' held in Sydney from 12 to 14 June 1888 included prominent colonial politicians soon to play a major role in preparing a new federal constitution, including Alfred Deakin from Victoria and Charles Kingston from South Australia. A committee comprising Deakin, Kingston and influential Queensland figure John Macrossan was set up to draft a representation to the Imperial Government and to prepare another model bill for adoption by the Australasian colonies with additional restrictions on entry of Chinese.⁵²⁵ Macrossan had warned the Queensland Parliament a decade before that many Chinese were not 'aliens' under British law.⁵²⁶ But for Macrossan and his colleagues racial exclusion was more important than respect for legal status. In 1884 he proclaimed:

I have done more to keep Chinese out than any other man in the colony...I am well-known all over the colony as being opposed to Chinese...Every man who knows me knows that I am opposed to Chinese, and have been opposed to them all my lifetime, and will be opposed to them...So great do I think the evil of allowing Chinese to come to the country that I would not allow one to come to the country.⁵²⁷

Secretary for the Colonies Lord Knutsford sent a telegram to the conference, calling for any restrictive legislation to be non-discriminatory for the sake of Great Britain's relations with China.⁵²⁸ He said the Chinese would not like being singled out by oppressive laws, so any new legislation should apply to everyone, with 'power to admit those whom we liked'.⁵²⁹ The colonial representatives rejected Lord Knutsford's call, refusing 'to say that they would exclude Europeans by any law'.⁵³⁰ South Australian Premier Sir Thomas Playford successfully moved that 'the desired Australasian legislation' should apply to 'all Chinese', with, critically, no distinction 'between Chinese who are British subjects and those who are not, both because of the difficulty of distinguishing individuals, and because the objection is to race'.⁵³¹

A 'Committee of Chinese residents, Melbourne' wrote to the conference complaining that the alarm about the 'great influx of Chinese' was 'one of those poor hollow things that time and reflection will cause the generous British mind to feel heartily ashamed of'. However, in a

⁵²⁵ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 13 June 1888, 4.

⁵²⁶ See above p 103.

⁵²⁷ Queensland, *Official Record of the Debates of the Legislative Assembly, First Session of the Ninth Parliament, 1883-84*, 13 February 1884, 357.

⁵²⁸ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 13 June 1888, 6.

⁵²⁹ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 203.

⁵³⁰ Ibid 203.

⁵³¹ Ibid 202.

recognition of how Chinese Australians were perceived by the Anglo-Celtic community, the Committee acknowledged the conference was considering a significant matter which ‘touches most intimately international rights and obligations...dealing as it does with the *stranger within your gates*’.⁵³²

The conference also received a memorial from businessman Quong Tart and other Chinese merchants in Sydney, noting the proposed new law would contravene the 1860 Convention of Peking⁵³³ giving members of the Chinese Empire liberty to travel to British colonies. Quong Tart offered his services to the conference as a ‘naturalised British subject...in arriving at the general opinion of the Chinese residents in Australasia’.⁵³⁴ The memorial objected to the severe restrictions agreed by the conference that would ‘effectively ban Chinese from entering Australia, regardless of whether they were British subjects’.⁵³⁵ The memorial noted that ‘Chinese whom may have become naturalised British subjects’ and who owned property in the Australasian colonies would suffer ‘hardship and injury’ if they were not allowed back into Australia.⁵³⁶ Tasmanian Premier Sir Philip Fysh agreed, refusing to accept the model bill for his colony since it ignored ‘the rights of such naturalized British subjects as may be at present absent from the colonies who... have accumulated property under the sanction of the colonial laws’ and because it made ‘no exception in favor of Chinese *born under English rule in Hong Kong and elsewhere*’.⁵³⁷ Similarly, Mr Horn noted in the South Australian Parliament that the model bill:

...proposed further injustice to the Chinese in Hongkong, *who were British subjects*. All those Chinamen who were born under the British flag, of parents domiciled in British territory, and who obeyed no laws but those of Great Britain, were *just as much British subjects* as we were,

⁵³² South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, Adelaide 1888, 11. Emphasis added. The Committee was chaired by Cheok Hong Cheong, a prominent Chinese Australian and longstanding advocate for recognition of Chinese rights in Australia. See ‘Cheong Cheok Hong (1853–1928)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/cheong-cheok-hong-3198/text4803>.

⁵³³ See above n 436 and n 481.

⁵³⁴ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 13 June 1888, 10. See also Chinese-Australian Museum, ‘Tart, Quong (1850 - 1903)’, *Chinese-Australian Historical Images in Australia*, <http://www.chia.chinesemuseum.com.au/biogs/CH00021b.htm>.

⁵³⁵ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 43. The bill agreed by the Conference provided that no vessel was to bring more than one Chinese passenger for every 500 tons burden. South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 8.

⁵³⁶ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 10.

⁵³⁷ *Ibid*, 14 June 1888, 5. Emphasis added.

and we had no more right to exclude them than the children of French, German or Italian parents born in Australia.⁵³⁸

In a cablegram reply to Lord Knutsford (drawn up principally by Deakin),⁵³⁹ Parkes – in his capacity as President of the inter-colonial conference - rejected arguments against the proposed new restrictions. He said the colonies had ‘reason to dread a large influx from China’. Therefore, he declared:

...the several Governments feel impelled to legislate immediately to protect their citizens against an invasion which is dreaded because of its results, not only upon the labor market but upon the social and moral condition of the people.⁵⁴⁰

Parkes said the conference was ‘most anxious’ that Great Britain should conclude a new treaty with China as soon as possible, under which ‘all Chinese...should be entirely excluded from the Australasian colonies’. In addition imperial authorities should induce the colonies of Hong Kong, Straits Settlements and Labuan to:

...at once prohibit the emigration of all Chinese to the Australasian colonies [because] the Chinese who may *claim to be considered British subjects* in those colonies are *very numerous*, and the certainty that their migration hither was prevented would give great and general satisfaction.⁵⁴¹

As Parkes’ cablegram to Lord Knutsford indicates, Chinese settlers from British colonies were seen, *because of their subject status*, as a particular threat. As Helen Irving has said, the right of Chinese and other non-European British subjects to travel freely within the British Empire alarmed advocates for a white Australia.⁵⁴² Quong Tart’s wife, Margaret, noted that:

In 1888 a burning Chinese question arose – the Anti-Chinese League had roused a few thousand people in Sydney against an imaginary influx of Chinese. Several ships had left Hong Kong with a few hundred Chinese on board for the Colonies, under the then Poll Tax agreement.⁵⁴³

When Parkes rushed further restrictive legislation⁵⁴⁴ through the New South Wales Parliament:

⁵³⁸ South Australia, *Debates in the Houses of Legislature during the Third Session of the Twelfth Parliament of South Australia*, 3 July 1888, 208. Emphasis added.

⁵³⁹ See Playford’s account of the inter-colonial conference, *ibid* 203-206.

⁵⁴⁰ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 7.

⁵⁴¹ *Ibid.* Emphasis added.

⁵⁴² Irving, ‘Still Call Australia Home’, above n 368, 144.

⁵⁴³ Margaret Tart, *The life of Quong Tart: or, how a foreigner succeeded in a British community* (W.M.Maclardy 1911) 36.

⁵⁴⁴ *Chinese Restriction and Regulation Act 1888* (NSW), under which the poll tax for entry of Chinese into New South Wales was raised to £100 and the number allowed entry reduced to one per 300 tons. This Act removed the (limited) exemption in the 1881 legislation for Chinese immigrants who could produce a certificate from the governor of a British colony showing their subject status.

...its effect being to prevent any of these Chinamen from landing...Quong Tart set to work – he was determined to see what he considered a big wrong righted, as some of the men on board were British subjects.⁵⁴⁵

Despite the objections from Quong Tart, Premier Fysh, Horn and others that many ethnic Chinese were British subjects, Parkes and fellow colonial leaders persisted in penalising them as ‘aliens’. Notwithstanding his own recognition that ‘numerous’ Chinese settlers emigrating to Australia from British territories were subjects and therefore not ‘aliens’ under imperial law, Parkes declared that:

...the Colonial Governments have felt called upon to take strong and decisive action ... to prevent their country from being overrun by an *alien race* who are incapable of assimilation in the body politic, *strangers* to our civilization, out of sympathy with our aspirations, and unfitted for our free institutions, to which their presence in any number would be a source of constant danger.⁵⁴⁶

In one sense Parkes and the other colonial politicians responsible for drafting the 1881 and 1888 representations to the Secretary for the Colonies were merely describing how the Anglo-Celtic community in Australia saw the Chinese – as ‘different’ or ‘alien’, as having no place, as Parkes had said, in a democratic society of equal men and indeed as constituting a danger to it. But the repeated use of the terms ‘alien’ and ‘alien race’ by prominent colonial figures when referring to Chinese settlers complemented their refusal to respect the British subject status of the many Chinese who had emigrated from British colonies, had been born in Australia itself or had been naturalised in one of the Australian colonies. They did this to the extent of wilfully ignoring calls from imperial authorities, other colonial politicians and local Chinese Australians. In this way Parkes and his colleagues embedded a description of Chinese as ‘alien’ across all measures of comparison when they knew (as the warnings by Macrossan and Legislative Council President O’Connell to the Queensland parliament show)⁵⁴⁷ that in the most important respect, namely under the law, many were not ‘aliens’ at all.

This lack of distinction between the legal and racial meanings of ‘alien’ has affected historical assessment of the two inter-colonial conferences. Charles Price, for example, despite noting that ‘many Chinese immigrants’ had been born in British territories,⁵⁴⁸ states that for colonial leaders:

⁵⁴⁵ Tart, above n 544, 36.

⁵⁴⁶ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 7. Emphasis added.

⁵⁴⁷ See above pp 103-104.

⁵⁴⁸ Charles Price, *The Great White Walls are Built*, above n 165, 271.

...it seemed so apparent that the Chinese were *unassimilable aliens*, who could never understand European systems of values and government, that it was pointless to give them citizenship or the vote; those few who did acquire some European notions and customs could be naturalised and enfranchised by a special Act of Parliament...⁵⁴⁹

While this might accurately describe the perception of colonial leaders, Price does not point out that the ‘many Chinese immigrants’ born on British territory were not ‘aliens’ in a legal sense but subjects of the Crown who already possessed ‘citizenship’, i.e. British subject status under the common law. Far from being ‘unassimilable aliens’, they already ‘belonged’ under the law as much as any white settler. They had no need to be ‘naturalised’ under a special Act of Parliament or by any other method. By not addressing the misuse of ‘alien’, the historical analysis to date understates the extent of manipulation of the term by colonial leaders as part of a racist discourse about Chinese Australians.

Parkes and the rule of law

In a series of cases in 1888, the New South Wales Supreme Court granted writs of *habeus corpus* ordering the release of Chinese immigrants held on vessels in Sydney harbour.⁵⁵⁰ As Bennett notes, ‘Parkes was furious at the outcome and took steps to see that the court orders were defied and that the Chinese passengers were not allowed to land’.⁵⁵¹ In *Ex parte Woo Tin* Chief Justice Darley noted that:

...we find that the law so enunciated by us, is for the second time knowingly and of purpose disregarded and set at nought, and this too by those who, above all others in this community, are...bound to see that the law of their country as pronounced by the properly constituted authorities (the Judges of the land), is duly and faithfully carried into execution.⁵⁵²

Only after the third case did Parkes comply with the Supreme Court’s orders, thus narrowly averting a ‘constitutional catastrophe’. As Bennett says:

Parkes...had come close to fracturing the very foundations of Responsible Government and the rule of law. It is one thing for a government, dissatisfied with court adjudications, to nullify them for the future by legislating to the contrary. It is quite another thing for a government to bid defiance to court orders binding on it...⁵⁵³

Similarly, by denying the equal legal status of the many Chinese Australians who were British subjects, Parkes was also defying the law. In Parkes’ view, the Chinese were an unwanted element in a British community whether they were subjects or aliens under the law.

⁵⁴⁹ Ibid 274-275. Emphasis added.

⁵⁵⁰ *Ex parte Lo Pak* (1888) 9 NSWLR(L) 221; *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250; *Ex parte Woo Tin* (1888) 9 NSWLR(L) 493. The Chinese immigrants were held on board the arriving vessels purportedly under the authority of the *Chinese Influx Restriction Act 1881* (NSW). See J.M. Bennett, *Colonial Law Lords* (Federation Press 2006) 31-36. See discussion below at p 126.

⁵⁵¹ Bennett, above n 550, 33.

⁵⁵² *Ex parte Woo Tin* (1888) 9 NSWLR(L) 493, 493-494.

⁵⁵³ Bennett, above n 550, 40.

When urging the New South Wales Parliament in 1888 to pass even more restrictive anti-Chinese laws, Parkes made it clear that racial exclusion was more important than obeying the law. According to the Premier, the colony had to be protected from this ‘alien race’ by lawful or any other means as if it were a plague:

You tell me about *obedience to the law*; you tell me that because I occupy the great place which I am permitted to occupy in this country, that I am to set an example of *obedience to the law*...Would you talk about a technical observance of the law if a *plague* was stalking in our midst—if a *pestilence* was sweeping off our population—if a *famine* was reducing the members of our households to skeletons?...Is it a safe, a wise, or a tolerable thing for us to have nearly 60,000—I mean in all the colonies—of these men, belonging to an *alien race*, out of tone with us in faith, in law, in traditions, in everything that endears life—to have 60,000 of these men, with no natural companions, in the midst of society?⁵⁵⁴

This statement indicates that those who professed a commitment to the rule of law in other respects were not committed to this principle when it came to an understanding or application of ‘alienage’. As the next chapter shows, the denigration of ethnic Chinese (and other non-Europeans) as ‘aliens’ regardless of legal status set the stage for current uncertainties in the Constitution that make those seen as ‘outsiders’ vulnerable even if they do not formally have this status at law.⁵⁵⁵

Parkes and ‘equality’

According to Fitzgerald, Parkes wanted to keep the Chinese out of New South Wales not because of racism but because he feared their ‘hierarchical’ culture would undermine the new ‘egalitarian’ Australian society:

No matter how eloquently they framed their case for equal treatment...Chinese residents were to be denied the equal bounty that only a free and equal people could enjoy because, it was assumed, they were culturally predisposed to be hierarchical...As far as Parkes was concerned, this was *not a matter of racial equality or inequality*...They were to be denied equal access to

⁵⁵⁴ Henry Parkes, *Fifty years in the making of Australian history* (Longmans, Green and Co 1892) 478-479. Emphasis added.

⁵⁵⁵ Chapter Three explains that a major factor in the failure to make citizenship a constitutional and not merely a statutory concept was the fear of delegates to the conventions that this would include those portrayed as ‘aliens’ in a racial sense. This included subjects of the Crown from Britain’s colonies and dominions in Asia and the Pacific. Professor Rubenstein discusses the consequences of not enshrining citizenship in the Australian Constitution. As she says:

‘There is still no constitutional definition or protection of the status of citizenship. What if a government decided to change the meaning of ‘citizenship’?...if it decided to use discriminatory criteria in bestowing the legal status of citizenship, it would not be unconstitutional...The omission of a definition of ‘citizenship’ in the *Constitution*, meant that social issues were not constitutional issues, nor basic, foundation issues for a sense of identity. Therefore there are no basic constitutional values providing a foundation for legislative programs. The current government could override the *Race Discrimination Act 1975* (Cth) without any constitutional consequences’. Rubenstein, *Australian Citizenship Law in Context*, above n 376, 39,44.

Australian citizenship on the ethnographic claims of distinguished sinologists that they could not appreciate equality if it were offered to them on a platter.⁵⁵⁶

However it is difficult to accept that Parkes' repeated and consistent references to Chinese Australians as members of a 'servile race' who were 'alien' in 'faith, in law, in traditions, in everything that endears life' did not have a strong racist element. The way Parkes compared Chinese settlers to a 'pestilence' or a 'plague', deriding them as 'swarms' of a 'human hive', suggests that racism, as well as antipathy to their supposed 'hierarchical' nature, was an important motivation behind his vehement opposition to their presence.⁵⁵⁷

'Chinese aliens' and the onus of proof

Laws introduced in the colonial period reflected the attitude of Anglo-Celtic lawmakers such as Griffith and Parkes that the Chinese were intrinsically 'alien'. In conflict with established common law, colonial legislation allowed officials to deem Chinese Australians as 'alien' because of their appearance, placing the onus on Chinese British subjects to prove otherwise. Some laws made it impossible for Chinese residents to establish their subject status.

Cases from this period show that British subjects of Chinese origin faced similar problems in judicial proceedings. Courts wrongly presumed any person of Chinese appearance was an 'alien'. Judges either ignored the law or saw no need to record evidence supporting such a presumption. To date these errors have passed unnoticed in judicial and academic commentary. Modern cases on the 'aliens power' in the Constitution, for example, still rely on colonial judgments which failed to establish that ethnic Chinese applicants were 'aliens' under the law.

Legislation

(i) Queensland

Clause 3 of Queensland's Goldfields Act Amendment Bill 1876 provided that in any prosecution of an 'Asiatic or African alien':

⁵⁵⁶ Fitzgerald, *Big White Lie*, above n 371, 115-116. Emphasis added. Fitzgerald points out that 'the ethnography of White Australia is fundamentally flawed in picturing Chinese settlers as servile, hierarchical and averse to democracy'. He notes 'the claims of local Chinese Australians that they, like other Australians, were struggling in their own way to free themselves from the status hierarchies of their old society and be counted equal members of a new world in colonial and federation Australia' (at 232-233)

⁵⁵⁷ See more generally Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, for an account of the commitment of nineteenth century 'liberals' to racial homogeneity. As they say, this was an age when 'pride of manhood found expression in pride of race to enshrine the white man as the model democrat' (7, see also 54, 153).

...the averment in the information that any person named therein is an Asiatic or African alien shall be *sufficient proof that he is an alien* unless the defendant shall prove that at the time of committing the alleged offence such person was a naturalized British subject.⁵⁵⁸

The Queensland Government thought it proper to place the onus on the person being prosecuted to prove he had been naturalised and was not an ‘alien’. The legislation also reflected the general belief that non-Europeans could only become ‘non-aliens’ through a formal process of naturalisation. White lawmakers found it difficult to comprehend that non-Europeans, especially ethnic Chinese residents, might already be recognised under the common law as *natural-born* British subjects. As the Post Master-General said in the Legislative Council:

If the Government had to prove that a Chinaman on a gold field who had not a miner’s right or a business licence was not a naturalized British subject, the task imposed upon it would be to prove a negative; this was practically impossible. All that was asked from the Chinaman...if he alleged that he was not an alien, was, to show that he had been properly naturalized. Let him produce his certificate of naturalization.⁵⁵⁹

But as Colonial Secretary Lord Carnarvon observed, under the Goldfields Act Amendment Bill colonial officials could deem ‘natural-born’ subjects from British colonies in Asia to be ‘aliens’ merely because they looked Chinese, and these people would then face the impossible task of proving that they were ‘naturalized’ British subjects to avoid prosecution:

These persons preserve the Chinese dress and mode of wearing the hair, and it is not to be supposed that they would readily be distinguished by Queensland officials from the subjects of the Chinese Empire. Yet...in the event of one of these persons being, on account of his appearance, charged with an offence under this Bill, he would not only be subjected to the annoyance and inconvenience connected with the proceedings, but could not be in a position to produce such evidence as...would exempt him from its penalties, *a natural-born subject of Her Majesty having no occasion to obtain, and being unable to show* a certificate or other proof of his naturalization.⁵⁶⁰

Queensland’s *Chinese Immigrants Regulation Act 1877* included another difficulty for settlers of Chinese ethnic origin from British colonies. Section 9 of the Act provided that:

At the hearing of any prosecution under this Act, the justices may decide *upon their own view and judgment* whether any person charged or produced before them is a Chinese within the meaning of this Act.⁵⁶¹

⁵⁵⁸ Emphasis added.

⁵⁵⁹ Queensland, *Official Record of the Debates of the Legislative Assembly and Legislative Council*, 6 September 1876, 619.

⁵⁶⁰ ‘Despatch from Colonial Secretary Lord Carnarvon 27 March 1877’, Queensland, *Journals of the Legislative Council, Fourth Session of the Seventh Parliament of Queensland, Session of 1877*. Emphasis added.

⁵⁶¹ Emphasis added. A ‘Chinese’ person was defined as ‘Any native of the Chinese Empire or its dependencies not born of British parents’. There was no provision for Chinese British subjects to establish their status and in any case no exemption for those with this status.

As Mr Thompson said in the Legislative Assembly, ‘So that the justices had to discover, by view and judgment, whether the party before them came within this definition. The thing was perfectly absurd’.⁵⁶²

(ii) Victoria

The same approach was adopted in legislation from Victoria. While not included in the final version of the law, the ‘Select Committee of the Legislative Council on the subject of Chinese Immigration’ recommended that the *Chinese Regulation Act 1857* provide:

That any person arrested under this Act as a reputed Chinaman, it shall be sufficient for the accuser to prove that the accused is reputed or is *considered by the accuser to be a Chinaman*. His oath, or the oath of one witness, shall be sufficient proof, *unless the contrary be shown*, to make such person amenable to the provisions of this Act.⁵⁶³

In 1881 Victoria amended the *Chinese Immigrants Act 1865* to prohibit Chinese Australians from voting at mining board, local government or parliamentary elections.⁵⁶⁴ As Premier and Attorney-General Sir Bryan O’Loghlen told the Legislative Assembly, every ‘court for revising citizen or burgess lists’ must expunge the names of all Chinese ratepayers unless they ‘*prove to the satisfaction of the court* that they are natural-born or naturalized subjects of Her Majesty’.⁵⁶⁵ As Premier O’Loghlen declared, the amended Act required every ‘collector, town clerk or secretary’ of every city, borough and shire in Victoria to ‘decide upon *his own belief, or view, or knowledge or judgment* whether any ratepayer is, or is not...an *alien immigrant*’.⁵⁶⁶

(iii) Model bill from Inter-Colonial Conference on the Chinese Question 1888

Similarly, at the 1888 ‘Inter-Colonial Conference on the Chinese Question’, colonial Governments endorsed uniform legislation (drafted by Alfred Deakin) to ‘effectively ban Chinese from entering Australia, regardless of whether they were British subjects’.⁵⁶⁷ The model bill limited the number of ‘Chinese’ arriving at Australian ports to no more than one

⁵⁶² Queensland, *Official Record of the Debates of the Legislative Assembly, Fourth Session of the Seventh Parliament, 1877*, 26 June 1877, 356.

⁵⁶³ Parliament of Victoria, ‘Report of the Select Committee of the Legislative Council on the subject of Chinese Immigration: together with the proceedings of the Committee and minutes of evidence’, *Parliamentary papers 1856-57*, no. D 19 (John Ferres, Government Printer, 1857). Emphasis added.

⁵⁶⁴ Charles Price, *The Great White Walls are Built*, above n 165, 35.

⁵⁶⁵ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly, Vol. XXXVIII*, 10 November 1881, 698. See section 13 *Chinese Immigrants (Amendment) Act 1881* (Vic). Emphasis added.

⁵⁶⁶ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly, Vol. XXXVIII*, 10 November 1881, 698. See section 12 *Chinese Immigrants (Amendment) Act 1881* (Vic). Emphasis added.

⁵⁶⁷ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 43.

per 500 tons of a vessel's tonnage. It defined 'Chinese' to include 'every person of Chinese race' (whether or not they were British subjects) and declared that:

For the purpose of this Act, the Stipendiary or Police Magistrate, or the Justices, may decide, *upon his or their own view and judgment*, whether any person produced before them is a Chinese within the meaning of this Act'.⁵⁶⁸

Cases

(i) Lowe Kong Meng and the residence tax

The 1859 case of Lowe Kong Meng demonstrates the presumption on the part of colonial authorities that any person who looked Chinese could not be a British subject. Born in the British colony of Penang,⁵⁶⁹ Lowe Kong Meng arrived in Victoria in 1853 and became a successful businessman, well-respected amongst the Chinese community and beyond.⁵⁷⁰ But as Mr Walsh said in the Victorian Legislative Assembly:

...it would always be difficult to say of some men whether they were Chinamen or no. For example, supposing Kong Meng, the well-known merchant of Melbourne, presented himself here as a stranger, would he not be taken for a Chinaman? Yet he was, in fact, a British subject, born at Singapore [sic].⁵⁷¹

In 1859 Lowe Kong Meng was prosecuted in the District Court under the *Chinese Emigration Act 1859* for not paying the monthly residence tax imposed on Chinese 'immigrants'. The *Argus* said the case involved 'a nice point of law, and also the compatibility of our restrictions upon Chinese immigration with the rights of persons of the Mongolian race who are born in the Chinese dependencies of Britain'. The paper noted that Lowe Kong Meng:

...claims to be a British subject, and, therefore, exempt from the residence tax. A document, bearing a notarial seal, testifies that he was born in the island of Penang; that his mother was born in the same island; that his father was a contractor to the British Government, and was possessed of considerable property in land in that dependency.⁵⁷²

The prosecution objected to Lowe Kong Meng's claim that his British subject status entitled him to an exemption from the residence tax, stating that 'there were *thousands of Chinese* in the colony who if this exemption were allowed would claim the same privilege'.⁵⁷³ The *Argus* agreed, arguing that:

⁵⁶⁸ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 13 June 1888, 8. Emphasis added.

⁵⁶⁹ A British possession since 1786 and part of the colony of the Straits Settlements since 1826.

⁵⁷⁰ Sophie Couchman, 'Lowe Kong Meng', www.chia.chinesemuseum.com.au/biogs/CH00004b.htm. See also 'Mr Lowe Kong Meng', *Australian News for Home Readers* (Melbourne) 20 September 1866, 4.

⁵⁷¹ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly*, Vol. XXXVIII, 4 October 1881, 225 (Debate on Chinese Influx Restriction Bill).

⁵⁷² *Argus* (Melbourne) 3 June 1859, 4.

⁵⁷³ 'Police', *ibid* 3 June 1859, 5. Emphasis added.

To admit Kong Meng to be a British subject...would be, as everyone possessing any knowledge of the Chinese on the gold-fields must be aware, to admit a multitude of others to the same privileges, as a *very large proportion of the Chinese in the colony* are, or profess to be, natives of the islands in the Malacca Straits.⁵⁷⁴

As the *Argus* reported, after a long discussion the Court held, contrary to the law, that ‘the mere fact of Kong Meng having been born in a British settlement did not constitute him a British subject, without collateral evidence of his parents being British subjects also’.⁵⁷⁵ Under the rule in *Calvin’s Case*, however, even if the parents were foreigners, any person born within the allegiance or jurisdiction of the English Crown was a natural-born British subject. The only exceptions to this rule were children born to foreign invaders or diplomatic representatives living on British soil.⁵⁷⁶

Having wrongly decided that Lowe Kong Meng was not a British subject, the Court did not need to consider whether his subject status might have exempted him from the residence tax imposed on ‘immigrants’. The Court held that Lowe Kong Meng ‘was a Chinese immigrant within the meaning of the Act’.⁵⁷⁷ Under the Chinese Emigration Act, an ‘immigrant’ meant ‘any male adult native of China, or its dependencies, or of any islands in the Chinese Seas, not born of British parents, or persons born of Chinese parents’.⁵⁷⁸ Lowe Kong Meng produced evidence to the Court that his mother was a British subject, being a ‘native of Penang, born after its occupation by the British’.⁵⁷⁹ He also pointed out, as the *Argus* noted, that Penang was not ‘in the Chinese Seas’.⁵⁸⁰ However under the Chinese Emigration Act the court could decide on its ‘*own view and judgment*’ whether a person was an ‘immigrant’.⁵⁸¹ As Kathy Cronin has explained, ‘the magistrate decided that Kong Meng’s physical

⁵⁷⁴ *Argus* (Melbourne) 3 June 1859, 4. Emphasis added.

⁵⁷⁵ ‘Police’, *Argus* (Melbourne) 3 June 1859, 5.

⁵⁷⁶ As Salmond noted in 1902, ‘he may be by blood a Frenchman or a Chinaman, but if he first saw the light on British soil he is a British subject’. Salmond, ‘Citizenship and Allegiance’, above n 81, 53 (including n 1). In any case, Kong Meng also produced evidence to the Court that his ‘mother was a native of Penang, born after its occupation by the British’. ‘Police’, *Argus* (Melbourne) 3 June 1859, 5.

⁵⁷⁷ ‘Police’, *Argus* (Melbourne) 3 June 1859, 5.

⁵⁷⁸ Section 2 *Chinese Emigration Act 1859 (Act to Consolidate and Amend the Laws Affecting the Chinese Emigrating to or Resident in Victoria)*.

⁵⁷⁹ ‘Police’, *Argus* (Melbourne) 3 June 1859, 5.

⁵⁸⁰ *Argus* (Melbourne) 3 June 1859, 4.

⁵⁸¹ Section 22.

appearance showed him to be Chinese⁵⁸² and therefore held that he was an ‘immigrant’ under the terms of the Act.⁵⁸³

Modern accounts still categorize Lowe Kong Meng on the basis of his ethnic Chinese appearance rather than his subject status under British law. Paul Macgregor, for example, states that by the time Lowe Kong Meng was born in Penang, ‘it had been British for forty-five years’ and that earlier generations of his family had carried on business there for a century.⁵⁸⁴ Macgregor lists the things that were ‘British’ about Lowe Kong Meng, including being ‘raised in the British style, with his perfect English’,⁵⁸⁵ having ‘characteristics of a British gentleman’, being ‘taught modern subjects of the English schooling system’, and associating ‘socially and commercially with the British in the settlement’.⁵⁸⁶ Yet Macgregor says he was still a ‘Chinese born in British Penang’. Macgregor notes that ‘Lowe Kong Meng always *claimed* he was a British subject, by right of birth and upbringing in a British colony’, and that he *self-defined* ‘simultaneously as both a subject of the British Empire and an official of the Chinese Empire’.⁵⁸⁷ However, contrary to the suggestion from Macgregor, Lowe Kong Meng’s subject status was not a matter of a mere ‘claim’ or ‘self-definition’. There was no question that according to the longstanding rule from *Calvin’s Case*, Lowe Kong Meng was a ‘natural-born’ British subject.

Similarly, Marilyn Lake observes that Lowe Kong Meng ‘was proud of his Chinese standing, *his status as a British subject* and success as an international trader’.⁵⁸⁸ But she also notes his statement (in a joint petition to the visiting Chinese Imperial Commissioners in 1887) that a colonial poll tax could only be avoided ‘if we choose to expatriate ourselves by becoming naturalised British subjects’.⁵⁸⁹ Lake does not take issue with this statement. Had the established law been applied, Lowe Kong Meng and the ‘thousands of Chinese’ in the colony

⁵⁸² K Cronin, *Colonial Casualties, Chinese in early Victoria* (Melbourne University Press 1982) 99.

⁵⁸³ In 1879, Lowe Kong Meng, Cheok Hong Cheong and Louis Ah Mouy produced ‘The Chinese Question in Australia 1878-79’, declaring that the treatment of Chinese in the Australian colonies contravened accepted international law. Lake, ‘Chinese Colonists Assert Their “Common Human Rights”’; above n 444, 382-383.

⁵⁸⁴ Paul Macgregor, ‘Lowe Kong Meng and Chinese Engagement in the International Trade of Colonial Victoria’ (2012) 11 *Provenance: The Journal of Public Record Office Victoria*.

⁵⁸⁵ Macgregor, ‘Chinese Political Values in Colonial Victoria’, above n 369, 65.

⁵⁸⁶ Macgregor, ‘Lowe Kong Meng’, above n 584.

⁵⁸⁷ Macgregor, ‘Chinese Political Values in Colonial Victoria’, above n 369, 57, 90. Emphasis added.

⁵⁸⁸ Lake, ‘The Chinese Empire Encounters the British Empire’, above n 448, 101. Emphasis added.

⁵⁸⁹ *Ibid* 107.

of Victoria who claimed the ‘same privilege’ would have been accepted as British subjects with no need to consider naturalisation.

These historians have not properly taken into account the legal principles about ‘subjecthood’ and ‘aliens’. Hence they have not recognised that the Victorian District Court acted contrary to the law.⁵⁹⁰ This is not only important for the historical record. In terms of legal foundations, it is also fundamental to current accounts of the scope of the Commonwealth’s power over aliens. As discussed below, colonial era cases are still cited in relation to this issue – but without proper scrutiny of their use of the term ‘alien’.

(ii) *Ex parte Ah Tchin* and ‘Chinese Aliens’

In *Ex parte Ah Tchin* (1864) the New South Wales Supreme Court upheld the conviction of a number of ‘Chinese aliens’ for unlawfully mining for gold outside prescribed areas.⁵⁹¹

According to the Chief Justice:

The words of the statute mean that a Miners’ Right *in the hands of a European* gives a right to mine over all the gold fields, but *in the hands of a Chinese alien* it gives a right to mine only on a prescribed and limited portion of that gold field.⁵⁹²

The Chief Justice said it was ‘conceded that these applicants are Chinese aliens’, without questioning that assumption.⁵⁹³ Under the relevant New South Wales legislation, however, a ‘Chinese’ included ‘any male person born of Chinese parents’.⁵⁹⁴ The definition of ‘alien’ in the legislation was consistent with the common law, namely ‘any person not being a British subject or naturalized subject of Her Majesty’.⁵⁹⁵ Under this statute, therefore, miners born in Hong Kong, the Straits Settlements or other British possessions were not ‘Chinese aliens’ and could not validly be convicted for unlawful mining. But the court did not consider this possibility. Instead, the court appeared to think of ‘aliens’ at least partly in racial terms. It took no account of the fact that some Chinese were not aliens either under the common law or on the terms of the legislation itself, nor that ‘Europeans’ not born or naturalised as British subjects were aliens under the law.

⁵⁹⁰ Macgregor merely notes, for example, that the District Court was ‘unclear’ on the matter of whether Lowe Kong Meng’s ‘birth in the British dependency of Penang qualified him as being British’. Macgregor, ‘Chinese Political Values in Colonial Victoria’, above n 369, 61.

⁵⁹¹ *Ex parte Ah Tchin* (1864) NSW SCR(L) 226.

⁵⁹² Ibid 228-9. Emphasis added.

⁵⁹³ Ibid 228.

⁵⁹⁴ Section 2 of the *Goldfields Act Amendment Act 1861* (NSW) defined ‘Chinese’ as ‘Any male native of China or its Dependencies or of any Island in the Chinese Seas not born of British parents or any male person born of Chinese parents’.

⁵⁹⁵ Ibid section 2. In August 1864 the Governor issued a proclamation allowing ‘Chinese aliens’ to mine only in certain parts of goldfields. *Ex parte Ah Tchin* 1864 NSW SCR(L) 226, 228.

(iii) Ah Toy and the SS Afghan

In *Chung Teong Toy v Musgrove* (1888),⁵⁹⁶ the Victorian Supreme Court held that the prerogative of the Crown to exclude ‘aliens’ did not exist as part of responsible government in Victoria - in other words there was no inherent power of the executive, without a law passed by Parliament, to prevent ‘aliens’ entering the colony. As Justice Williams said:

I have come to the conclusion at which I have arrived with great reluctance. I fully recognise the importance of our decision, and of its possible effect upon the future of this colony. I do not hesitate to say that, if the conclusion at which I have arrived be a right one, we have no legal means of preventing cargoes of alien convicts, if they were sent here to-morrow, from landing on and polluting our shores.⁵⁹⁷

Toy had been refused entry under Victoria’s 1881 law limiting the number of Chinese able to land in the colony to one for every 100 tons of a ship’s weight. The Supreme Court upheld his claim that despite this law he had a right to enter on payment of the ten pound poll tax. But on appeal the Privy Council overturned the Supreme Court’s decision, declaring that it could not:

...assent to the proposition that an alien refused permission to enter British territory could, in an action in a British court, compel the decision of such matters involving delicate and difficult constitutional questions affecting the respective rights of the Crown and Parliament.⁵⁹⁸

As Kim Rubenstein says, ‘one of the most important devices of citizenship was set at this early stage, the right to exclude aliens’.⁵⁹⁹ *Toy v Musgrove* was cited in the constitutional convention debates in the 1890s as justification for not including a power to confer citizenship in a federal constitution. At the 1898 Convention, Mr Bernhard Wise from New South Wales said such a power was not needed because *Ah Toy’s case* indicated the Commonwealth would be able to determine ‘citizenship’ in a practical or ‘inherent’ sense by excluding aliens:

I do not think Dr. Quick’s amendment is necessary. If we do not put in a definition of citizenship every state will have inherent power to decide who is a citizen. That was the decision of the Privy Council in *Ah Toy’s case*.⁶⁰⁰

In neither the Victorian Supreme Court nor the Privy Council was there any analysis of whether Chung Teong Toy was an ‘alien’ under the common law. In the Privy Council the

⁵⁹⁶ (1888) 14 VLR 349.

⁵⁹⁷ Ibid 416.

⁵⁹⁸ *Musgrove v Toy* [1891] AC 272, 283; [1891] UKPC 16, 22. See also ‘Ah Toy V. Musgrove’, *Brisbane Courier* (Brisbane) 20 March 1891, 5.

⁵⁹⁹ Kim Rubenstein, ‘The influence of Chinese Immigration on Australian Citizenship’ in Sophie Couchman, John Fitzgerald & Paul Macgregor (eds), *After the Rush. Regulation, Participation and Chinese Communities in Australia 1860 – 1940* (2004) 9 *Otherland Literary Journal* 24.

⁶⁰⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1785.

Lord Chancellor said ‘the plaintiff was a subject of the Emperor of China and owed allegiance to him and was not a British subject’,⁶⁰¹ repeating Chief Justice Higinbotham’s statement in the Supreme Court,⁶⁰² which in turn copied the argument of Victoria’s Attorney-General Mr Wrixon who led the case for the defence.⁶⁰³ Nowhere in the 130 pages of recorded argument before the Supreme Court⁶⁰⁴ or in the actual judgments of the Supreme Court or the Privy Council is any evidence cited which might support this statement. Chung Teong Toy is described merely as ‘a Chinese’, an ‘alien Chinese’ or a ‘Chinese immigrant’. There is no record of any evidence put to either court as to his place of birth – critical in determining if he was an ‘alien’ or a British subject under the law. Instead, there seems to have been a presumption that Toy was an alien because he was ethnically Chinese. Mr Box for the defence said the 1881 Victorian legislation treated all people of Chinese origin as ‘foreigners’ to be excluded from the colony:

The Chinese Acts in effect say this ‘We don’t like you Chinese; we won’t have you come here. We will do something more to restrict your immigration into this colony than we do to restrict any other class of foreigners. You foreigners say you have a right to come here, but as far as you Chinese are concerned we will fine the captain of any vessel heavily who brings to this colony more than one Chinese passenger for every 100 tons of his ship’s burthen and we will make every Chinese who comes here pay £10 for the privilege of entering the colony’.⁶⁰⁵

The Victorian Legislative Assembly had been told in 1881 that ‘almost every Chinese immigrant to Victoria’ came from the British colony of Hong Kong.⁶⁰⁶ This was true of Chung Teong Toy. As Justice Wrenfordsley said, he ‘was an immigrant on board the British ship *Afghan*, a vessel trading between Hong Kong and certain ports in the Australian colonies’.⁶⁰⁷ Toy may have come from some other part of China and merely boarded the vessel in Hong Kong. But as Victoria’s Government Statist observed a few years before *Toy v Musgrove*, officials often failed to distinguish between migrants from ‘British China’ and

⁶⁰¹ [1891] AC 272, 280; [1891] UKPC 16, 18.

⁶⁰² (1888) 14 VLR 349, 371. For a discussion of how Chief Justice Higinbotham was regarded by colonial society, including admiration from the *Bulletin* for his anti-imperial and pro-labour views, see John Docker, *The Nervous Nineties, Australian Cultural Life in the 1890s* (Oxford University Press 1991) 41-42.

⁶⁰³ Victoria, ‘Ah Toy v. Musgrove’, *Return to an order of the House*, 9 October 1888 (‘Copy of the report of the arguments and judgment in the case of *Ah Toy v. Musgrove*, Supreme Court of Victoria), 3. See also ‘The Lawsuit By Chinese’, *South Australian Advertiser* (Adelaide) 12 July 1888, 5.

⁶⁰⁴ Victoria, ‘Ah Toy v. Musgrove’, *Return to an order of the House*, 9 October 1888.

⁶⁰⁵ *Ibid* 89.

⁶⁰⁶ Victoria, *Parliamentary Debates, Session 1881, Legislative Council and Legislative Assembly, Vol. XXXVIII*, 4 October 1881, 224-225 (Mr R.M. Smith).

⁶⁰⁷ (1888) 14 VLR 349, 435.

those from ‘China proper’.⁶⁰⁸ Both the Supreme Court and the Privy Council treated Toy as an ‘alien’ merely on the basis that he was ‘Chinese’, with no reference to legal criteria for alien status set down in *Calvin’s Case*, and with no evidence put to either Court as to his actual origin or place of birth.

(iv) *Ex parte Lo Pak* and *habeus corpus*

In the same year as *Toy v Musgrove*, there were three similar cases in the New South Wales Supreme Court. Each involved an application for *habeus corpus* to secure the release of Chinese arrivals prevented by the New South Wales Government under Premier Sir Henry Parkes from disembarking in Sydney.⁶⁰⁹ In the leading case, *Ex parte Lo Pak*, lawyers for the Parkes Government asserted that the applicant was an ‘alien’ and therefore not entitled to *habeus corpus*.⁶¹⁰ As in *Toy*, there is no indication in the case report of any evidence as to Lo Pak’s origin or place of birth to support the claim that he was an ‘alien’ under British law. Chief Justice Darley did not question this assertion, merely stating ‘*I assume it to be a fact that he is an alien, and has no letters of naturalisation*’.⁶¹¹ Justice Windeyer went further, declaring that ‘he is a native of China’, without explaining the basis for that statement.⁶¹² However, in contrast to the Privy Council’s decision in *Toy*, Lo Pak’s legal status was not critical for the outcome of the case. The Supreme Court ordered his release, declaring there were ‘abundant authorities’ to show that *habeus corpus* was available whether Lo Pak was a subject or an alien.⁶¹³

Ah Toy’s case and the New South Wales *habeus corpus* matters continue to be cited in the modern era in relation to a sovereign power to exclude ‘aliens’. In *Ruddock v Vardalis* (2001)⁶¹⁴ (the *Tampa* case) the Federal Court said ‘the power of a State under international law to remove aliens’ had been recognised by the Privy Council’s approval of the dissenting judgment in *Toy v Musgrove*.⁶¹⁵ The Court also referred to *Lo Pak’s case* for ‘the contention that the Governor of the Colony of New South Wales had power independent of statute to

⁶⁰⁸ See page 83 above.

⁶⁰⁹ *Ex parte Lo Pak* (1888) 9 NSWLR(L) 221; *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250; *Ex parte Woo Tin* (1888) 9 NSWLR(L) 493. See also discussion above at p 1115-116. .

⁶¹⁰ *Ex parte Lo Pak* (1888) 9 NSWLR(L) 221 at 226-227.

⁶¹¹ *Ibid* 236. Emphasis added.

⁶¹² *Ibid* 240.

⁶¹³ *Ibid* 236.

⁶¹⁴ 110 FCR 491.

⁶¹⁵ *Ibid* 541 (French J).

exclude foreigners from the colony'.⁶¹⁶ But there was no consideration as to whether the applicants in the colonial era cases were aliens under the law and hence whether these matters could validly be cited in this way. Academic commentary has also failed to consider this fundamental starting point.⁶¹⁷

(v) James Toro and the writ of inquisition

In 1902 the Queensland District Court was required under a 'writ of inquisition'⁶¹⁸ to establish whether James Toro, granted state land in Rockhampton in 1864, was an 'alien'. If so the grant would be invalid under Queensland's *Aliens Act 1867* and the property would 'escheat' or revert to the Crown. Witnesses called by the court were unable to say whether Toro was dead or alive but willingly gave their opinion as to his background and legal status. John Muir, an engine driver, 'deposed he had been in Rockhampton since 1865. He had known a man named James Toro. He was a Chinaman'.⁶¹⁹ James Foran, an accountant:

...deposed that he came to the town in 1860. He knew James Toro, he was an alien, a Tartar, Mongolian, or Chinaman, or something of that sort...He was always looked upon as a Chinaman.⁶²⁰

Affidavits were tendered to the court showing there was no record of Mr Toro being naturalised in Queensland. The judge summed up the issue for the jury:

The next question was as to whether Toro was an alien. *A Chinaman was prima facie an alien.* That was to say it was *taken for granted he was an alien* unless he showed he was not... as far as the jury had evidence, Toro had not been naturalised, and *being a Chinaman, prima facie he was an alien.*⁶²¹

As the local paper reported:

The jury found— (1) that James Toro was the registered proprietor of the land in question; (2) that he was an alien; (3) that he had not been naturalised as a British subject. His Honour certified accordingly.⁶²²

⁶¹⁶ Ibid. Justice French also noted another of the 1888 habeus corpus cases, *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250.

⁶¹⁷ See for example John Waugh, 'Chung Teong Toy v Musgrove and the Commonwealth Executive' (1991) 2 *Public Law Review* 160. Apart from Ah Toy's case, the article also refers to the 1888 habeus corpus cases in the New South Wales Supreme Court (172 n 75). Again, however, there is no consideration as to whether the courts hearing these matters had properly established key facts such as the place of birth of the applicants to determine if they were British subjects or aliens under the law.

⁶¹⁸ Issued by the Supreme Court of Queensland under section 5 of the *Escheat (Procedure and Amendment) Act 1891* (Qld).

⁶¹⁹ 'Civil Sitting', *Capricornian* (Rockhampton) 26 April 1902, 38.

⁶²⁰ Ibid.

⁶²¹ Ibid. Emphasis added.

⁶²² Ibid.

The *Toro case* exemplifies how the ‘rule of law’ had evolved in this area by the end of the colonial period in Australia. The Court accepted evidence (for example from Mr Foran) that Toro appeared or looked ‘alien’ in a general, non-legal sense in deciding whether he was an ‘alien’ under the common law.⁶²³ Mr Toro was presumed by the Court to be an ‘alien’ because witnesses said he looked something like a Chinese person and ‘a Chinaman was prima facie an alien’. The Court understood that a naturalised British subject was not an ‘alien’. But it reversed the onus of proof, ‘taking for granted’ that Mr Toro was an ‘alien’ unless shown otherwise. While the Court searched Queensland’s naturalisation records, it made no inquiry as to the more likely possibility that Toro may have been a natural-born British subject, with no need to be naturalised. Indeed there is no indication from reports of the case that the Court understood that a person of non-European ethnic origin born in Australia or another British possession was a British subject by birth.

More generally, the *Toro case* demonstrates that it was difficult if not impossible for those seen as ‘aliens’ or ‘outsiders’ by the Anglo-Celtic community to alter such perceptions. Mr Toro was a freehold land owner for some 30 years.⁶²⁴ Given the significance of land ownership in colonial society, there was little more he could have done to be accepted as a ‘member’ or ‘belonging’. Yet witnesses who gave evidence to the Court and claimed they had known Toro for all of that time still described him as an ‘alien’ in their midst.

Conclusion: ‘alien’ discourse in colonial Australia

As these cases show, the perception that Chinese residents were ‘alien’ in a general or racial sense became so embedded in colonial Australia that it affected their treatment in the legal system. Notwithstanding the lack of any reliable evidence, courts assumed Chinese Australians were ‘aliens’ under the law because they were ‘alien’ in appearance and way of life. Colonial leaders had, after all, regularly and prominently proclaimed that the Chinese were ‘aliens’ across all measures of comparison with Her Majesty’s subjects. This had been formally stated in official communications to the Imperial government after inter-colonial conferences on the ‘Chinese question’. Key political figures were aware - and indeed fearful of - the numerous British subjects of Chinese ethnic origin in Britain’s Asian colonies. They had been told by imperial authorities and their parliamentary colleagues that many Chinese

⁶²³ There was no definition of ‘alien’ in either the *Aliens Act 1867* (Qld) or the *Escheat (Procedure and Amendment) Act 1891* (Qld).

⁶²⁴ Evidence presented to the court indicated that Toro owned the land in question from 1864 to 1892. ‘Civil Sitting’, *Capricornian* (Rockhampton) 26 April 1902, 38.

arrivals were subjects and not aliens. Yet as Parkes himself said, application of the law took second place when it came to exclusion of the Chinese. Legislation allowed magistrates and judges to use their 'own view and judgment' as to the legal status of Chinese Australians. Even census enumerators assumed Chinese residents were not British subjects. As with indigenous Australians, some lawmakers thought Chinese residents were barely human, comparing them to animals or pests. Consistent with this broader prejudice, ethnic Chinese were 'prima facie' aliens for colonial courts. In *Kong Meng's case* the Victorian District Court ignored the law on subject status. The Privy Council in *Ah Toy's case* thought it unimportant to record any evidence showing that Ah Toy was legally an alien. The Chief Justice of the New South Wales Supreme Court in *Ex parte Lo Pak* assumed the Chinese applicant was an 'alien'. The onus fell on ethnic Chinese British subjects to prove their legal status. But as Lord Carnarvon pointed out, most were unable to do so, since, as in the *Toro case*, the proof generally required was a naturalisation certificate, which natural-born subjects had no reason to obtain.

In colonial Australia racial discourse about 'aliens' in Anglo-Celtic society fed into, and in turn was reinforced by, attitudes of the executive, legislature and judiciary. The role of individuals such as Parkes, Griffith and other colonial leaders was critical. Their racial use of 'alien' played into legislative activity, in turn requiring attention by the judiciary.

The failure by colonial lawmakers in the second half of the nineteenth century to respect the legal meaning of the word 'alien' led to its further misuse in the watershed constitutional convention debates of the 1890s. In turn this meant that after federation the Australian states (not least Queensland) wrongly applied the term to exclude Chinese British subjects from key occupations, leaving them, in many cases, with little way to make a living.

CHAPTER THREE Constitutional conventions and ‘the power to deal with aliens’

*‘How can a liberal democratic constitution still allow race-based laws against its citizens? How can it still contemplate barring citizens from voting on account of race? The truth is the founding fathers abandoned liberal democratic principles with respect to race. It was an error reflecting the thinking of the time, but it needs to be rectified’.*⁶²⁵

The description of non-Europeans as members of an ‘alien race’ - embedded in the political discourse of the Australian colonies by prominent figures such as Griffith, Parkes, Playford and Gillies - continued at the constitutional conventions in the 1890s. As Rubenstein says, the public and political debate in colonial Australia about the exclusion of Asian, particularly Chinese, immigration ‘informs an understanding of the [convention] Debates themselves’.⁶²⁶ However it was not just the Chinese who were a source of anxiety for convention delegates.

Several legal writers have examined the Constitutional Convention debates in relation to citizenship.⁶²⁷ This chapter extends their analysis to highlight a point yet to be made prominently – that use of the term ‘alien’ in its non-legal, racial sense underpinned the different purpose envisaged for legislative powers linked to ‘outsiders’ and should be woven into interpretation of the extent of those powers today.

There were extensive references throughout the constitutional conventions about the danger posed by ‘alien races’ to the emerging federation. At the 1890 Australasian Federation Conference, South Australian Premier Dr Cockburn said colonial governments should exclude those ‘*alien races* whose presence would we think be detrimental to our development’.⁶²⁸ At the 1891 Convention Samuel Griffith referred to the ‘burning question’

⁶²⁵ Pearson, ‘A Rightful Place’, above n 116, 45.

⁶²⁶ Rubenstein, *Australian Citizenship Law in Context*, above n 376, 29.

⁶²⁷ John M Williams, ‘Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the “14th Amendment” ’ (1996) 42(1) *Australian Journal of Politics and History* 10; Kim Rubenstein, ‘Citizenship and the Constitutional Convention Debates: a mere legal inference’, (1997) 25 *Federal Law Review* 295; Helen Irving, ‘Still Call Australia Home’, above n 368; Helen Irving, ‘Citizenship before 1949’, above n 110; Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, revised ed, 1999); Geoffrey Sawer, ‘The Australian Constitution and the Australian Aborigine’, (1966) 2 *Federal Law Review* 17; Peter Hanks and Deborah Cass, *Australian Constitutional Law: Materials and Commentary*, (Butterworths, 6th Ed, 1999) (with Chapter 2 by Jennifer Clarke entitled ‘“Indigenous” People and Constitutional Law’).

⁶²⁸ *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 11 February 1890, 46.

of ‘black labour’ in Queensland, declaring that the new federal parliament should have sole power to legislate about ‘the affairs of people of any race’ because:

...the introduction of an *alien race* in considerable numbers into any part of the Commonwealth is a danger to the whole of the Commonwealth, and upon that matter the Commonwealth should speak, and the Commonwealth alone.⁶²⁹

In March 1898 Alfred Deakin, in a major concluding speech to the last of the conventions emphasising the importance of federation, stated that:

At a time like this, when the question of the control of *alien races* and the influx of *alien populations* has become...a still more burning question...it is...not idle to remind our critics that without union we must remain exposed to that and many similar dangers.⁶³⁰

Without exception, delegates to the various conventions used the phrase ‘alien race’ to refer to anyone of non-European origin, including British subjects. There was no explanation at any of the conventions of the legal meaning of ‘alien’. This led to misunderstanding as to who might be covered by key lawmaking powers in the new constitution, including the ‘races power’ in what became section 51(xxvi) and the ‘naturalization and aliens’ power, now in section 51(xix). It also meant that a proposal for federal citizenship was considered by delegates with a partial understanding at best of concepts fundamental to membership status under British law such as ‘alien’ and ‘natural-born subject’.

The failure to explain the proper meaning of ‘alien’ under the law at any of the convention debates is also significant because key delegates - including Griffith, Edmund Barton, Richard O’Connor, Isaac Isaacs and Henry Higgins – were later appointed to the High Court of Australia to be the final arbiters on the meaning of the new constitution. As discussed in Chapter Five, the misuse, misunderstanding and manipulation of the word ‘alien’ at the conventions contributed to a defective decision in at least one of the High Court’s foundational cases, namely *Robtelmes v Brennan* (1906),⁶³¹ which misinterpreted the ‘aliens power’ in section 51(xix) of the Constitution.

The convention debates of the 1890s are now accepted as an important source for interpreting the Constitution. In *Cole v Whitfield* (1988) the High Court overturned previous practice, declaring that:

Reference to the [convention debates] may be made, not for the purpose of substituting for the meaning of the words used [in the Constitution] the scope and effect if such could be established which the founding fathers subjectively intended the section to have, but for the

⁶²⁹ *Official Report of the Australasian Convention Debates*, Sydney, 31 March 1891, 525. Emphasis added.

⁶³⁰ *Official Record of the Debates of the Australasian Federal Convention*. Melbourne, 17 March 1898, 2506. Emphasis added.

⁶³¹ (1906) 4 CLR 395.

purpose of identifying the *contemporary meaning of language used, the subject to which that language was directed* and the *nature and objectives of the movement towards federation* from which the compact of the Constitution finally emerged.⁶³²

While it is not a purpose of this thesis to delve into the debate over the use of convention records in constitutional interpretation,⁶³³ this chapter explains how references to ‘aliens’ in those records should be interpreted if a court chooses to refer to them. In addition, it is historically illuminating to investigate what the delegates meant when they were using this term.

Whatever one’s view on the proper use of the convention debates, the speeches at the conventions remain, as Helen Irving has noted, ‘the primary source for doing history’ for the High Court.⁶³⁴ However, when citing references to ‘aliens’ at the conventions (for example, in relation to the constitutional basis for Australian citizenship), the High Court has not identified that the ‘contemporary meaning’ of ‘alien’ and ‘the subject to which that language was directed’ was contrary to the rule of law. As a consequence, the High Court has not properly understood the roles delegates envisaged for key lawmaking powers - especially the ‘races’ and ‘naturalization and aliens’ powers - as part of the ‘nature and objectives of the movement towards federation’.

This chapter begins by noting the anxiety at the conventions about ‘British Indians’. Far from prompting acceptance, their status as subjects of the British Crown made them a major focus of efforts to exclude ‘coloured aliens’ from a white Australia. The chapter then looks at the debate on the proposed ‘races power’, during which the term ‘alien’ was most extensively (and incorrectly) used. It counters the suggestion that aboriginal Australians were correctly excluded from the power over ‘alien races’ because they were regarded as not ‘aliens’ in a

⁶³² *Cole v Whitfield* (1988) 165 CLR 360, 385. Emphasis added. Professor Geoffrey Sawer, writing in 1966, lamented the earlier exclusion of the constitutional convention debates from High Court constitutional interpretation even though observations by early constitutional commentators could be taken into account, stating that ‘It is absurd to allow reference to the speculations of Quick and Garran and Harrison Moore, themselves obviously based on Convention history, but deny reference to the history itself’. Sawer, ‘The Australian Constitution and the Australian Aborigine’, above n 627, 22.

⁶³³ For discussion of the ‘original intent’ versus ‘progressive’ or ‘living force’ interpretations of the Australian Constitution, and use of the convention debates in that context, see e.g. J D Heydon, ‘One small point about originalism’, (2009) 28(1) *University of Queensland Law Journal*, 7; Michael Kirby, ‘Constitutional interpretation and original intent: a form of ancestor worship?’, (2000) 24(1) *Melbourne University Law Review* 1. For analysis of how the delegates to the conventions themselves may have thought the debates should be used in interpreting the constitution, see Greg Craven, ‘Heresy as Orthodoxy: Were the Founders Progressivists?’ (2003) 31(1) *Federal Law Review* 87. For the use of history more generally by the High Court, including the convention debates, see Bradley Selway, ‘The use of history and other facts in the reasoning of the High Court of Australia’, (2001) 20(2) *University Of Tasmania Law Review* 129.

⁶³⁴ Irving, ‘Discipline of History’, above n 218, 114.

legal sense. Next the chapter considers the ‘naturalization and aliens’ power, concluding that this was seen, in contrast to its expansive modern interpretation, merely as a technical provision about the process of naturalisation.⁶³⁵

The chapter then examines proposals for a ‘citizenship’ power in the Constitution, noting delegates’ misunderstanding of key membership concepts under British law, including ‘subject’ and ‘alien’. Finally, the chapter highlights the incorrect use of ‘alien’ in Australia’s constitutional ‘bible’, the *Annotated Constitution of the Australian Commonwealth*, authored by John Quick (himself a delegate at the conventions) and Robert Garran (first Secretary of the Commonwealth Attorney-General’s Department and first Solicitor-General of the Commonwealth). Given its authoritative nature,⁶³⁶ identification by this work of the misuse of ‘alien’ at the conventions may have prevented further misapplication. Instead the authors helped perpetuate this mistake by also using the word ‘alien’ in a racial sense when explaining major lawmaking powers in the Constitution.

‘British Indians’ and the Australian Constitution

Nothing demonstrates the misuse of the word ‘alien’ better than its application to those of Indian origin acknowledged by convention delegates as subjects of the British Crown. ‘British Indians’ had a significant influence on the development of Australia’s federal constitution – not as a result of the small number already in Australia but due to fear of the millions who could potentially emigrate to the country.

Parry notes that the origins of British rule under the East India Company meant the nationality of inhabitants of the sub-continent remained uncertain until the nineteenth century or later. He observes that ‘the Crown was in a sense the overlord of the Company, and the latter the agent of the former as respected the acquisition of territory within its sphere’. In an 1813 English statute the ‘undoubted sovereignty of the Crown of the United Kingdom’ was asserted and in 1814 the French and Dutch conceded British sovereignty over India.⁶³⁷ The British Raj was divided into the states of ‘British India’ directly ruled by the United Kingdom and the ‘Indian Native States’ ruled by their own princes under the supervision of the British

⁶³⁵ In section 51(xix) of the Constitution the spelling ‘naturalization’ is used, whereas the normal English spelling is ‘naturalisation’.

⁶³⁶ This book ‘remains a classic history of the federating process and commentary on the constitution’. Parker, R S, ‘Garran, Sir Robert Randolph (1867–1957)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University).

⁶³⁷ Parry, *Nationality and Citizenship Laws*, above n 70, 836-7.

Crown. The latter ‘did not form part of the Dominions of the Crown at any time prior to the commencement of the *Indian Independence Act 1947*’. As Parry says in relation to India, ‘a possible view is that the inhabitants of some States were as such British subjects though those of others were not’. Inhabitants of the Native States were at the least, however, ‘British protected persons in the older and broader sense’.⁶³⁸

Marie de Lepervanche notes that Indian settlers in Australia:

...mostly originated in the Punjab or elsewhere in the north and north-west of the sub-continent...The majority of immigrant Punjabis settled in Queensland or northern New South Wales; though most were Sikhs or Moslems, Australians called them ‘Hindoos’.⁶³⁹

The Punjab was a province of ‘British India’ and settlers originating from there were British subjects under the common law. The British subject status of Indian settlers prompted occasional calls for favourable treatment in Australia, but more often this was a cause of fear and concern. The first Commonwealth census in 1911 recorded 3,299 ‘full-blood’ and 399 ‘half-caste’ Australian residents of ‘Hindu’ race, of whom 3,137 (or more than 95 per cent) were listed as British subjects - and therefore not ‘aliens’ - either by birthplace, parentage or naturalisation.⁶⁴⁰ The 1921 census listed 6,918 Australian residents born in British India.⁶⁴¹

In contrast to his alarm about the rush of ‘alien Chinese’ into northern Australia,⁶⁴² the Government Resident of the Northern Territory reported in 1887 that ‘the Tamil coolie from India, who belongs to our own Empire, would be a better labourer’, proposing that - with the agreement of the Imperial and Indian governments - the Government Resident himself could be the ‘immigration agent-general’.⁶⁴³ A more common attitude, however, was expressed by the *Illustrated Sydney News* in 1893:

A large number of *aliens*, consisting of Cingalese,⁶⁴⁴ Hindoos, and other Indians, appeared at the Central Licensing Court on Monday as applicants for hawkers’ licenses...These hawkers

⁶³⁸ Ibid 841-2. Protected persons are discussed later in this thesis – while not ‘subjects’ under the common law, they may not have been ‘aliens’ either, see below pp 193-196.

⁶³⁹ Marie M De Lepervanche, *Indians in a White Australia* (George Allen & Unwin 1984) 12.

⁶⁴⁰ Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), Vol 1 Part 1, Statistician’s Report, 224-225, 227-228.

⁶⁴¹ Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3 & 4 April, 1921* (see Part II Birthplaces, Table 3 ‘Australia - Total Population Of The States And Territories Of Australia Classified According To Birthplace’, 49).

⁶⁴² See above p 110 and n 521.

⁶⁴³ South Australia, *Government Resident’s Report on Northern Territory for the Year 1887*, Paper no 53, 31 May 1888, 13-14. Emphasis added. When referring to ‘Tamil coolies’, the Government Resident most likely meant labourers from the southern Indian state of Tamil Nadu, another province of British India.

⁶⁴⁴ The ‘Cingalese’ or ‘Sinhalese’ were natives of Ceylon (now Sri Lanka), which was a British colony from 1815 to 1948.

are of an extremely treacherous disposition, and no lonely woman in the bush is safe from their detestable advances...We have no means of knowing the history of these *aliens* who are daily landing on our shores. In their own country, many may have been criminals...It is high time to rank them with the Chinamen, and poll-tax them out of the country.⁶⁴⁵

In the same year the *Capricornian* expressed fear that ‘Asiatic aliens’, including thousands of Indians and Ceylonese, might use their standing as British subjects to settle in Australia:

...in Sydney there exists a colony of *Asiatic aliens* whose numbers it is said amount to fifteen hundred... not only are the *aliens* numerous, but...they form an objectionable element in our communities. They are of filthy habits, and have been driven from one part of Sydney to another...If, as we suspect, they are really Cingalese⁶⁴⁶ and Indians there may be some difficulty encountered in dealing with them. *As natives of the British dominions...they may claim the right to settle in any part of the Empire.* If this right is recognised then the door may be opened to the introduction of *aliens by the thousand.* Is that a state of affairs Queenslanders can regard without apprehension?⁶⁴⁷

As the above extract shows, despite recognition of their British subject status, the ‘Hindoos’ or Indian settlers were commonly labelled as ‘aliens’. A 1901 report to Australia’s first Prime Minister, Edmund Barton, from the director of sugar policy for the Queensland Government stated that:

An inquiry into the numerical relations of white and *alien* labour engaged in sugar production in New South Wales led to some approximate results...It was thought possible that some proportion of *aliens* in New South Wales had recently moved North. Inquiries made by the writer with the several shipping companies revealed the circumstance that ‘the only shipment of *aliens* (Hindoos) for the North was direct from Melbourne’. The Hindoos in question were noted by the writer in Mackay, where it was ascertained that they had finally gone to Cairns.⁶⁴⁸

Consistent with the author’s assumption that people were either ‘white’ or ‘alien’, the report noted the presence of German and Scandinavian canegrowers but did not include them in the number of ‘aliens’ recorded in the sugar industry.⁶⁴⁹

Delegates to the constitutional conventions were alarmed by the realisation that British India was populated by hundreds of millions of ‘natural-born’ subjects with the right to travel freely to Australia and other parts of the Empire. As Helen Irving has observed, ‘proponents of a white Australia found this an uncomfortable reality’.⁶⁵⁰

⁶⁴⁵ ‘The Week’, *Illustrated Sydney News* (Sydney), 14 January 1893, 2. Emphasis added.

⁶⁴⁶ See above n 644.

⁶⁴⁷ ‘The Syrian Invasion’, *Capricornian* (Rockhampton), 4 February 1893, 18. Emphasis added.

⁶⁴⁸ Walter Maxwell (Director of the Sugar Experiment Stations of Queensland) to Prime Minister Edmund Barton, ‘Some Factors Relating to the Cane-Sugar Industry of Australia’, *Brisbane Courier* (Brisbane) 12 August 1901, 7. Emphasis added.

⁶⁴⁹ *Ibid.*

⁶⁵⁰ Irving, ‘Still Call Australia Home’, above n 368, 144. Justice Isaacs in *Potter v Minahan* (1908) 7 CLR 277, 310 referred to ‘the right unrestricted at common law of all British subjects wherever born outside Australia to enter the Commonwealth’.

Delegates took comfort, however, from the proposed new federal powers. At the 1898 Convention, Sir Edward Braddon, Premier of Tasmania, said inclusion in the new constitution of a power over immigration would secure to the Commonwealth:

...that its citizens shall not be people of *alien races* to any considerable extent. There are in India some 150,000,000 British subjects, but...very few...could stand the test applied by the Natal Immigration Restriction Act (which)...will be effective in keeping from our shores the natives of India who cannot pass the education test that is applied under the Natal Act.⁶⁵¹

Samuel Griffith also said the ‘immigration and emigration’ power⁶⁵² would enable the new federal parliament ‘to keep out Chinese, Hindoos or *other aliens*’.⁶⁵³

The misuse of the term ‘alien’ by delegates to the Conventions was exemplified at the 1898 Convention by William Trenwith from Victoria who said that delegates were ‘intimately acquainted with constitutional law’ and were ‘experts upon the exact definition of terms’, but then himself referred to ‘the difficulty...in dealing satisfactorily with British subjects coming from Hindostan’, expressing alarm about the potential ‘influx of this *alien population* into Tasmania’.⁶⁵⁴

Section 51(xxvi): the power over ‘alien races’

At the 1891 National Australasian Convention, Sir Samuel Griffith - Premier of Queensland and chairman of the constitutional drafting committee – first proposed what became the ‘races’ power in section 51(xxvi) of the Australian Constitution.⁶⁵⁵ Griffith argued that the new federal parliament should have exclusive legislative power in relation to ‘*alien races*’, declaring that:

The intention of the clause is that if any state by any means gets a number of an *alien race* into its population, the matter shall not be dealt with by the state, but the Commonwealth will take the matter into its own hands...What I have had more particularly in my own mind was the immigration of *coolies from British India*, or any eastern people subject to civilised powers...I

⁶⁵¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1791. Emphasis added. The ‘education’ or ‘dictation’ test under the Natal Immigration Restriction Act was adopted by the new Australian Federal Parliament in the *Immigration Restriction Act 1901*.

⁶⁵² Clause 53(xxiv) of the 1891 draft Constitution.

⁶⁵³ *Official Report of the Australasian Convention Debates*, Sydney, 3 April 1891, 689. Emphasis added.

⁶⁵⁴ *Ibid* 27 January 1898, 237. Emphasis added.

⁶⁵⁵ Clause 53(i) of the draft Constitution adopted by the 1891 Convention gave the Commonwealth exclusive legislative power in relation to: ‘The affairs of the people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorise legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand’. *Official Report of the Australasian Convention Debates*, Sydney, Appendix: ‘Commonwealth of Australia Bill. Draft of a Bill as adopted by the National Australasian Convention, 9th April, 1891’.

maintain that no state should be allowed, because the federal parliament did not choose to make a law on the subject, to allow the state to be flooded by such people as I have referred to.⁶⁵⁶

It is worth noting that despite his leading role in preparing the draft constitution, Griffith had no hesitation in labelling British Indians as an ‘alien race’, even though they were legally British subjects.

In the main debate on the ‘races power’ in Melbourne in January 1898, delegates ignored the legal meaning of ‘alien’, employing the term in its social or racial sense on numerous occasions as a default expression for ‘people of a non-European race’. Indeed, delegates used the word ‘alien’ in this way during the debate more often than they employed the term ‘race’ itself.⁶⁵⁷ Chairman of the judiciary committee and former South Australian Attorney-General Josiah Symon QC - explaining how the legislative power over ‘people of any race’ and the power over ‘immigration’ might work together - said the Federal Parliament:

...may say that they will admit the *coloured races* - those whom we describe, as *aliens* - to the full advantage of the citizenship of Australia...or they may give a limited citizenship ... What I understood my honorable friend to desire was, that the power of regulating these *coloured races*...shall be left entirely with the states.⁶⁵⁸

Richard O’Connor QC, later appointed to the High Court, also referred to ‘the races for whom it is necessary to make special laws’ as ‘aliens’. In the debate on the ‘races power’ in January 1898, O’Connor stated that:

I think it is generally admitted that there should be uniformity of law with regard to the *races* for whom it is necessary to make special laws...Otherwise one state may deal with some particular class of *aliens* upon specially favourable terms, the effect of which would be that *aliens* from all parts of Australia would congregate in that state and make the difficulty of dealing with the whole question very much greater.⁶⁵⁹

When O’Connor then contrasted ‘the making of a law preventing *aliens* from entering the state’ with ‘the making of a law to control their mode of living while in that state’,⁶⁶⁰ he was comparing use of the ‘immigration power’ in what became section 51(xxvii) of the Constitution with the ‘races power’ in section 51(xxvi). He was not discussing the power to make laws with respect to ‘naturalization and aliens’ in what became section 51(xix) of the Constitution. In a similar way, Dr John Quick from Victoria, joint author of the definitive

⁶⁵⁶ *Official Report of the Australasian Convention Debates*, Sydney, 3 April 1891, 701, 703. Emphasis added.

⁶⁵⁷ There were 84 references to the word ‘alien’ in the debate on the races power at the Melbourne Convention compared with 66 references to the word ‘race’. See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27-28 January 1898.

⁶⁵⁸ *Ibid* 28 January 1898, 249-250. Emphasis added.

⁶⁵⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 27 January 1898, 234. Emphasis added.

⁶⁶⁰ *Ibid* 234-235. Emphasis added.

1901 work on the Australian Constitution, said the Federal Parliament should have ‘control over the immigration of *aliens*’ because he was ‘anxious to equip the Commonwealth with every power necessary for dealing with the invasion of outside *coloured races*’.⁶⁶¹

Misuse of the term ‘alien’ during the ‘races power’ debate at the conventions has remained unchallenged. In *Kartinyeri* (1998) Justice Gaudron of the Australian High Court observed that:

There are two matters with respect to s 51(xxvi) which are beyond controversy. The first is that the debates of the Constitutional Conventions relevant to the provision which ultimately became s 51(xxvi) reveal an understanding that it would authorise laws which discriminated against people of ‘coloured races’ and ‘*alien races*’.⁶⁶²

Similarly, in the same case Justice Kirby noted that the constitution of Canada ‘contained no equivalent race power’ but did have a ‘naturalization and aliens’ power exclusive to the federal parliament which the Privy Council said in 1899 ‘rendered invalid a Provincial statute disqualifying *Chinese aliens* from working underground in mines’.⁶⁶³ Neither judge questioned the way ‘alien’ was used in these phrases in its racial not legal sense.

Justice Kirby also noted the importance of the debates on the ‘races power’ at the conventions for establishing the original purpose of section 51(xxvi) of the Constitution:

Although there were differences about whether par (xxvi) was ambiguous and, if it was, as to the use that might be made of the Convention Debates of the 1890s...no objection was raised by any party to the Court's going to these materials in order *to secure a general understanding of the purpose of the race power in its original form...*⁶⁶⁴

A recognition that delegates used the word ‘alien’ in its racial not legal sense is essential for any such understanding. Otherwise the extensive references to ‘aliens’ and ‘alien races’ during the ‘races power’ debate would suggest they intended this provision to apply merely to people of various races who were *not* subjects of the British Crown.

⁶⁶¹ Ibid 246. Emphasis added.

⁶⁶² *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 363. Emphasis added.

⁶⁶³ Ibid 402. Referring to *Union Colliery Company of British Columbia v Bryden* [1899] A.C. 580. Emphasis added. Justice Kirby did not question the Privy Council’s deficient application of the law about aliens in *Bryden*. Section 4 of the *Coal Mines Regulation Act 1890* (British Columbia) said that ‘no boy under the age of twelve years, and no woman or girl of any age, and *no Chinaman*, shall be employed in or allowed to be for the purpose of employment in any mine to which the Act applies, below ground’. Delivering the judgment of the Privy Council, Lord Watson declared that ‘it seems clear that the expression “aliens” occurring in [section 91(25) of the *British North America Act 1867*] refers to, and at least includes, all aliens who have not yet been naturalized; and the words ‘no Chinaman’ as they are used in s. 4 of the Provincial Act, were probably meant to denote, and they *certainly include, every adult Chinaman who has not been naturalized*’ (at 586). In this statement the Privy Council ignored the more numerous category of ‘Chinamen’ who were not ‘aliens’ under the law because of their birth in Great Britain’s colonial possessions and who had no need to be naturalised.

⁶⁶⁴ *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 393. Emphasis added.

In her discussion of the races power debate, Jennifer Clarke notes that:

Samuel Griffith proposed an exclusive Commonwealth ‘race’ power against a background of extensive use of ‘coloured’ (Polynesian and Melanesian) labour in Queensland maritime and agricultural industries...Griffith proposed that the Commonwealth be able to deal with ‘alien races’ in Australia. The power would extend to British subjects.⁶⁶⁵

Clarke notes Professor Sawyer’s observation that the races power debate ‘tended to be in terms of “aliens”, but Barton showed clearly that...the persons coming under it might well be British subjects. Nor need they be migrants; they could be born in Australia.’⁶⁶⁶ Sawyer’s analysis suggests that the term ‘alien’ was misused during the races power debate but, like Clarke, he does not state this outright.

Indigenous Australians and the ‘races power’

Chesterman and Galligan refer to Griffith’s statement in 1891 that the ‘races power’ would allow the new federal parliament to regulate ‘alien races’ in Australia, particularly ‘coolies from British India’. They state that:

In other words, this was a power to deal with, including to protect, *alien races* allowed into Australia. *Aboriginal people were not in that category and were quite properly excluded from its application...* The power was for dealing with people of other races such as the Kanakas in Queensland or Chinese, Indian or Malays who might be brought to Australia as indentured labourers.⁶⁶⁷

However it is not the case that Australia’s indigenous people were ‘properly excluded’ from the application of the races power by Griffith and other delegates to the conventions because they were regarded as not ‘alien’ in a legal sense. As the above extracts show, delegates did not use the phrase ‘alien race’ to refer to those from another race who were not British subjects. As this thesis has demonstrated, by this time ‘alien race’ was a standard phrase used by Anglo-Celtic lawmakers in Australia to refer to those who were different, foreign or ‘not one of us’ in a non-legal, racial sense. British Indians, Malays, Chinese from Hong Kong, the Straits Settlements and other colonies, as well as ‘Kanakas’ (Pacific islanders) from British possessions in the South Pacific were all included, despite their legal status as subjects of the Crown. Chesterman and Galligan note that ‘at Federation there was no doubt of their [aborigines] status as subjects of the Queen’.⁶⁶⁸ But as Chapter One has shown, aboriginal Australians could also be regarded as an ‘alien race’ in this general, non-legal sense. Australia’s indigenous people were excluded from the races power not because it was

⁶⁶⁵ Hanks and Cass, *Australian Constitutional Law*, above n 300, 90.

⁶⁶⁶ Ibid, citing Sawyer, ‘The Australian Constitution and the Australian Aborigine’, above n 627, 20-21.

⁶⁶⁷ Chesterman and Galligan, *Citizens without rights*, above n 235, 69-70. Emphasis added.

⁶⁶⁸ Ibid 81.

recognised they were subjects (and not aliens) under the law, but simply because their regulation was to be left to the States.⁶⁶⁹

Chesterman and Galligan are confronted with the same issue in relation to section 25 of the Constitution ('Provision as to races disqualified from voting').⁶⁷⁰ They say that it was 'not clear from the federation debates whether it was intended that Aborigines should be included in this broader race disqualification'.⁶⁷¹ They note Barton's comment that 'A race not entitled to vote is such an *alien race* as may exist in the community to whom the state in which they live has not conceded the privilege of voting'.⁶⁷² They observe that:

Barton affirmed that it was a matter for determination by the States, but equated 'race' with 'alien race', *a category that could not apply to Australian aborigines...* On this analysis, and indeed on the reasoning that had seen Australian Aborigines excluded from the race power conferred by section 51(26), Australian Aborigines ought not to have been caught by section 25. But the adjective 'alien' did not appear in section 25, theoretically making the phrase 'persons of any race' applicable to Australian Aborigines.⁶⁷³

However like other delegates Barton used 'alien race' as a default description for all those of non-European origin, whether or not they were British subjects. Contrary to Chesterman and Galligan's interpretation, 'alien race' was not a legal term. Under British law 'races' or ethnic groupings were not divided into 'aliens' and 'non-aliens'. As Professor Salmond observed in 1902, 'subject' or 'alien' status was not determined by 'blood' or race but by place of birth.⁶⁷⁴ From the perspective of Anglo-Celtic lawmakers such as Barton, Australian aborigines could be an 'alien race'. It follows that there was nothing in Barton's remarks indicating that aborigines 'ought not to have been caught by' the racial disqualification in section 25.

This shows the importance of appreciating the racial use of 'alien' when considering the role convention delegates envisaged for different constitutional powers. The exclusion of

⁶⁶⁹ As noted above (n 655), clause 53(i) of the 1891 draft constitution stated that 'this power shall not extend to authorise legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand'. With the omission of New Zealand from the new Commonwealth, in its final version the exclusion in section 51(xxvi) referred merely to races 'other than the aboriginal race in any State'. Section 51(xxvi) was amended by the *Constitution Alteration (Aboriginals) Act 1967* (Cth) by exclusion of the phrase 'other than the aboriginal race in any State'.

⁶⁷⁰ Section 25 states: '...if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of the race resident in that State shall not be counted'.

⁶⁷¹ Chesterman and Galligan, *Citizens without rights*, above n 235, 73.

⁶⁷² Citing *Official Record of the Debates of the Australasian Federal Convention*, Sydney 1897, 453. Emphasis added.

⁶⁷³ Chesterman and Galligan, *Citizens without rights*, above n 235, 73. Emphasis added.

⁶⁷⁴ Salmond, 'Citizenship and Allegiance', above n 81, 53. See above p 17.

aborigines from the original coverage of section 51(xxvi) cannot be linked to a ‘proper’ legal application by Griffith of the phrase ‘alien race’. And Barton’s use of that phrase does not suggest any desire to include indigenous Australians - contrary to their exclusion by a State - when determining quotas for the Commonwealth parliament.

Section 51(xix): naturalization of aliens?

Consideration of this section at the conventions shows that an understanding of who the delegates meant by ‘aliens’ is essential for appreciating the respective roles they envisaged for key lawmaking powers in the Constitution. As the above comments indicate, delegates saw the ‘immigration and emigration’ and ‘races’ powers as key weapons for preservation of a ‘white Australia’ since these would enable exclusion and regulation of all ‘coloured aliens’, i.e. non-Europeans.

In comparison to the extensive references to the immigration and races powers in enabling the forthcoming federation of Australia to exclude and regulate ‘aliens’, the proposed power with respect to ‘naturalization and aliens’ received only cursory attention during the constitutional conventions. Ironically, it is now accepted that the power to make laws with respect to ‘aliens’ in section 51(xix) is one of the most far-reaching in the Constitution, conferring extraordinary capacity on the Federal Parliament to constrain the activities of any ‘alien’ as well as providing the constitutional foundation for Australian citizenship.⁶⁷⁵

As Australia’s High Court said in *Re Patterson* (2001), the ability of the Commonwealth Parliament to pass laws with respect to ‘aliens’ under section 51(xix) of the Constitution is a ‘plenary’ or ‘full’ power.⁶⁷⁶ The High Court has rejected the idea that laws made under section 51(xix), including for the deportation of aliens and immigration detention, need to be ‘proportionate’⁶⁷⁷ or limited to what is ‘reasonably capable of being seen as necessary’.⁶⁷⁸ As long as such laws are sufficiently connected with the ‘aliens’ or immigration powers in the Constitution, it does not matter whether they are ‘unjust or contrary to basic human rights’,⁶⁷⁹ contravene the International Covenant on Civil and Political Rights⁶⁸⁰ or infringe the

⁶⁷⁵ See above pp 42-43.

⁶⁷⁶ *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 424 (McHugh J.)

⁶⁷⁷ *Plaintiff S156/2013 v Minister for Immigration* (2014) 88 ALJR 690, 697-698 (the Court)

⁶⁷⁸ *Al-Kateb* (2004) 219 CLR 562, 647 (Hayne J).

⁶⁷⁹ *Ibid* 595 (McHugh J).

⁶⁸⁰ *Ibid* 642 (Hayne J).

common law's 'fundamental and ancient' protection of personal liberty.⁶⁸¹ Provided the law deals with the subject of 'aliens'⁶⁸² and does not impose 'punishment' - which under Chapter III of the Constitution can only be imposed by courts after determining guilt for a particular crime⁶⁸³ - it will be valid. As Chief Justice Gleeson noted in his dissenting judgment in *Al-Kateb* (2004), this means, for example, that a failed asylum seeker (i.e. an 'alien') can be kept in immigration detention indefinitely 'regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond'.⁶⁸⁴

In contrast to the current expansive interpretation of section 51(xix), delegates at the constitutional conventions in the 1890s did not perceive more than a minor role for this provision. The 'naturalization and aliens power' was not formally discussed at any of the conventions. Quick and Garran note that section 51(xix) 'was introduced in its present form in 1891, and was adopted in 1897-8 without debate'.⁶⁸⁵

While the delegates to the constitutional conventions were concerned that the Constitution should contain necessary powers to control membership of the new Commonwealth - for the purpose of ensuring a 'white Australia' - a supporting role only was envisaged for section 51(xix). The immigration power in section 51(xxvii) would restrict or entirely exclude the entry of undesirable races, the races power in section 51(xxvi) would regulate the activities of members of such races already in Australia and the 'naturalization and aliens' power in section 51(xix) would be concerned merely with the process of naturalisation. As Samuel Griffith said in 1891, the provision with respect to 'naturalization of aliens' in the draft Constitution was one of the powers requiring 'no comment - at any rate, not at the present moment'.⁶⁸⁶ Similarly Edmund Barton in 1897 thought this was one of the technical provisions requiring no debate, asking 'who wants a national or dual referendum as to these:

⁶⁸¹ *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664, 678 (Callinan J). See Prince, 'The High Court and indefinite detention', above n 220. For a contrary view that section 51 (xix) of the Constitution only authorises laws 'imposing special obligations or special disabilities on aliens' which are 'appropriate and adapted to regulating entry or facilitating departure', see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 57 (Gaudron J); see also *Leeth v Commonwealth* (1992) 174 CLR 455, 489 (Deane, Toohey JJ).

⁶⁸² *Plaintiff S156/2013 v Minister for Immigration* (2014) 88 ALJR 690, 696 (the Court).

⁶⁸³ *Al-Kateb* (2004) 219 CLR 562, 577 (Gleeson CJ, dissenting)

⁶⁸⁴ *Ibid* 577.

⁶⁸⁵ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 599.

⁶⁸⁶ *Official Report of the Australasian Convention Debates*, Sydney, 31 March 1891, 524. Emphasis added.

Bankruptcy and insolvency, copyrights and patents of inventions, naturalization and aliens, that is the *naturalization of aliens...*⁶⁸⁷ Barton did not see this power as going beyond the process of naturalisation. He explained that ‘we give [the Federal Parliament] power to make persons subjects of the British Empire. Have we not done enough? We allow them to naturalize aliens’.⁶⁸⁸ Other prominent delegates such as future Prime Minister George Reid also said the provision merely covered the ‘naturalisation of aliens’.⁶⁸⁹

Griffith in particular was familiar with a power with respect to the ‘naturalisation of aliens’. This was one of the functions conferred on the Colonial Secretary of Queensland in 1862.⁶⁹⁰ In addition, the *Federal Council of Australasia Act 1885* (Imperial)⁶⁹¹ conferred legislative authority on the Federal Council in relation to various matters that might be referred to it by two or more Australasian colonies, including the ‘naturalisation of aliens’.⁶⁹² When Griffith as Premier of Queensland first attended the Federal Council in 1886, he complained that the power in relation to ‘naturalisation of aliens’ should not be left to the Council⁶⁹³ (because, as he said, ‘one of the colonies at least encourages the introduction of Chinese into a certain portion of its territory’,⁶⁹⁴ again suggesting that Griffith considered any person of Chinese appearance to be an ‘alien’ for lawmaking purposes).

As John Williams explains, in 1890 Griffith wrote a constitution for a federal Queensland divided into three provinces. When Griffith presented his draft to the Queensland Legislative Assembly he said that the proposed ‘Legislature of the United Provinces’ (i.e. the overall Parliament for a federal Queensland) should have power with respect to the ‘naturalisation of aliens, and the status of foreign corporations’.⁶⁹⁵ The proposed legislature would have

⁶⁸⁷ *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 17 September 1897, 751. Emphasis added.

⁶⁸⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1765.

⁶⁸⁹ *Ibid* 21 January 1898, 16. Emphasis added.

⁶⁹⁰ See Queensland, *Guide to the Records of the Colonial Secretary's Office 1859 – 1896* (Queensland State Archives 1976) 3, citing *Queensland Government Gazette*, 1862, vol III, 163-164. Emphasis added. As the Guide explains, the ‘naturalisation of aliens’ was one of many functions that the Colonial Secretary was ‘charged with the business connected with’ through the formal notice published in the Government Gazette.

⁶⁹¹ 48 & 49 Vict. Ch. 60.

⁶⁹² Section 15(i).

⁶⁹³ Federal Council of Australasia, *Official Record of Debates*, First Session of the Council, Hobart, 1886, 17.

⁶⁹⁴ *Ibid*.

⁶⁹⁵ John M Williams, *The Australian Constitution. A documentary history* (Melbourne University Press 2005) 27-30, citing Queensland, *Legislative Assembly debates*, vol. 62, 1890, 1330-31.

lawmaking power over the legal status of foreign corporations and the process for altering the status of ‘aliens’, but no authority – and certainly no ‘plenary’ power - to regulate, restrict or exclude ‘aliens’ in other ways. At the 1890 Federation Conference in Melbourne, Griffith explained the division of power appropriate for an Australasian federation by referring to powers in the Canadian Constitution, including ‘naturalization and *alienage*’.⁶⁹⁶ This was a lawmaking power about the legal status of ‘alienage’ and the process of converting that status into ‘non-alienage’, not a power to make any conceivable law about natural persons who happened to be ‘aliens’.

Attorney-General of Tasmania Inglis Clark’s draft constitution prepared in 1891 gave the federal parliament the power ‘to regulate the *immigration of Aliens* into any part of the Federal Dominion of Australia’ and ‘to make an [sic] uniform law for the *naturalization of Aliens* throughout the Federal Dominion of Australasia’.⁶⁹⁷ This indicates a similar approach to other delegates at the conventions in relation to the provisions needed in the Constitution to protect a ‘white Australia’ (although without reference to the ‘races power’). If people regarded as ‘aliens’ could be excluded from the new federation using a legislative power over ‘immigration’, there would be no need to have a specific and dedicated power to legislate with respect to ‘aliens’. It would be sufficient in this context if the Constitution contained a provision authorising the federal parliament to make laws with respect to the ‘*naturalization of aliens*’.

In *Plaintiff P1/2003 v Ruddock* (2007),⁶⁹⁸ the plaintiff (an asylum seeker from Afghanistan seeking to avoid deportation under the *Migration Act 1958*) argued in the Federal Court that a law passed under the ‘naturalisation and aliens’ power in section 51(xix) of the Constitution must show a sufficient connection both to ‘naturalisation’ and to ‘aliens’. The plaintiff contended that on the plain words of the provision, the framers of the Constitution could not have intended that it should extend to aliens, such as the plaintiff, having no further connection with the Commonwealth following their removal. The defendant argued that this wrongly assumed that the word ‘and’ could not have a ‘disjunctive’ rather than a ‘conjunctive’ meaning and that such an interpretation would have startling consequences for

⁶⁹⁶ Ibid 26. Emphasis added.

⁶⁹⁷ Ibid 85. Emphasis added. See also David Eastman, *The founding documents of the Commonwealth of Australia* (self-published, 1995) 8-9. Possibly, rather than using ‘alien’ in a racial sense, Inglis Clark may have taken into account the right of British subjects to travel freely throughout the British Empire; so this draft provision could then be read as regulating the immigration of ‘aliens’ in a legal sense, whatever their racial background.

⁶⁹⁸ *Plaintiff P1/2003 v Ruddock* [2007] FCA 65 (Justice Nicholson).

other heads of power in the Constitution, for example section 51(xv) ('weights *and* measures'). In addition, the defendant said this would be contrary to a long line of High Court authority establishing that section 51(xix) supports laws that relate to aliens and have no connection to naturalisation. However, while Justice Nicholson did not decide this issue, he refused to strike out the plaintiff's claim, saying that it was not 'obviously futile' and was not 'precluded from argument by the authorities'.⁶⁹⁹ As indicated above, the convention debates and other historical material provide support for the plaintiff's contention that to be valid under the 'naturalization and aliens' power in the Constitution, the law in question should be about the process of naturalisation.

The narrow role perceived by delegates for the future section 51(xix) of the Constitution was consistent with their repeated reference to people of non-European race as 'aliens'. In the delegates' view the 'races power' allowed full regulation of those they regarded as 'aliens' - namely members of undesirable races (i.e. non-Europeans) - so there was no need to discuss whether section 51(xix) conferred an additional plenary power over 'aliens' as well as a power over naturalisation.⁷⁰⁰ After federation, in his capacity as Chief Justice of the High Court, Griffith said that section 51(xix) gave the Commonwealth 'power to make whatever laws it may think fit...with respect to aliens',⁷⁰¹ but this was not consistent with his description at the 1890s conventions and on other occasions of the relevant power as one conferring legislative authority only in relation to the *naturalisation of* aliens.

Citizenship and 'aliens'

John Quick's proposal

In *Singh v Commonwealth* (2004) Justice McHugh noted, in relation to whether section 51(xix) provides a constitutional foundation for Australian citizenship, that at the 1898 Melbourne Convention:

⁶⁹⁹ Ibid 9-10.

⁷⁰⁰ Similarly, when Henry Higgins explained in 1900 that 'The Commonwealth, it is agreed, is to have control of commercial relations with other countries, the tariff (customs and excise), bounties, the postal and telegraph services...[and] *the influx of aliens and criminals...*', this appears to have been a reference to 'aliens' in a racial sense. In other words, Higgins did not envisage the Commonwealth as having a general power over 'aliens' in the legal meaning of the term (for example, in relation to citizenship) but merely the power to exclude or prevent the 'influx' of those not wanted in Australia, including 'criminals' and 'undesirable' aliens, namely people of coloured races. Henry Bourne Higgins, *Essays and Addresses on the Australian Commonwealth Bill* (Atlas Press, Block Place, 1900), 122.

⁷⁰¹ *Robtelmes v Brenan* (1906) 4 CLR 395, 404.

Dr John Quick proposed that the Constitution should confer power on the Parliament to make laws with respect to citizenship. But the delegates rejected the proposal. Mr Richard O'Connor QC said 'It appears to me quite clear, as regards the right of any person from the outside to become a member of the Commonwealth, that the power to regulate immigration and emigration, and the *power to deal with aliens*, give the right to define who shall be citizens, as coming from the outside world'. Mr O'Connor's reference to immigration and emigration and aliens was a reference to what became sections 51(xix) and (xxvii) of the Constitution.⁷⁰²

As the above discussion on use of the term 'alien' at the 1890s constitutional conventions indicates, however, when Richard O'Connor referred during the 1898 convention to the 'power to deal with aliens', he was not referring to section 51(xix) of the Constitution but to the 'races power' in section 51(xxvi). Contrary to Justice McHugh's suggestion in *Singh*, therefore, O'Connor's statement does not support the view that the 'aliens' power in section 51(xix) provides constitutional authority for the creation of Australian citizenship. O'Connor did not mean that section 51(xix) together with section 51(xxvii) of the Constitution would provide the power to define legal membership of Australia. What he was saying was that a combination of the immigration and *races* powers would give the Commonwealth the ability to determine in practical terms who was to have rights and freedoms as a 'citizen' in Australia, by controlling entry to the country and by enabling restrictions to be placed on those regarded as 'aliens' in a racial sense (i.e. non-Europeans) who had already arrived here. Justice McHugh's misunderstanding in a 2004 decision shows the continuing importance for modern constitutional law of the historical misuse of 'alien' in Australia.

The debate at the 1898 convention on Dr Quick's proposal for a power over citizenship provides further examples of the focus of delegates on racial rather than legal criteria for membership of the new Commonwealth. Dr Quick proposed that:

All persons resident within the Commonwealth, being natural-born or naturalized subjects of the Queen, and *not under any disability* imposed by the Parliament, shall be citizens of the Commonwealth.⁷⁰³

The critical point from Quick's perspective was that only those not under a 'disability imposed by the Parliament' would become citizens under this definition. By 'disability' he meant restriction or regulation on the basis of race. As he said:

Such a disability might be imposed under the clause which we put into the Bill some time ago, empowering the Federal Parliament to deal with foreign races and undesirable immigrants. The Federal Parliament is empowered to declare that these races shall be placed under certain disabilities, among which might be that they shall not be capable of acquiring citizenship. The definition which I have suggested would not open the door to members of those undesirable races, and it would empower the Federal Parliament to exclude from the enjoyment of and

⁷⁰² (2004) 222 CLR 322, 345-346. Original emphasis removed. Emphasis added.

⁷⁰³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1788. Emphasis added.

participation in the privileges of federal citizenship people of any undesirable race or of undesirable antecedents.⁷⁰⁴

Attorney-General of Victoria and future Chief Justice of the High Court Isaac Isaacs drew attention to the flaw in Quick's proposal in relation to preservation of a 'white Australia', noting that conferral of citizenship on any subject of the Queen resident within the Commonwealth would 'deprive Parliament of the power of excluding Chinese, Lascars, or Hindoos who happened to be British subjects'.⁷⁰⁵ Similarly, South Australia's Premier and Attorney-General Charles Kingston noted that it was not only natural-born subjects of English birth who would obtain the benefit of citizenship under Quick's proposal:

...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. They are born within the realm of Her Majesty, and are therefore native-born British subjects...Hong Kong is undoubtedly a British possession, and a Hong Kong Chinaman is undoubtedly a native-born British subject. Thus, honorable members will see what difficulties might arise if the privileges of citizenship of the Commonwealth were extended to all British subjects.⁷⁰⁶

Like Justice McHugh, Chief Justice Gleeson in *Singh* also misinterpreted the references to 'aliens' during the debate on Quick's citizenship proposal at the 1898 convention. He stated:

It is impossible to discern in the record of the Convention Debates any specific reason for the rejection of Dr Quick's ambiguous proposal. The discussion throws no light on the purpose or object of s 51(xix), except to the extent that it suggests that *a broad, rather than a narrow, power* with respect to aliens was in contemplation.⁷⁰⁷

This also appears to refer to O'Connor's statement about the 'power to deal with aliens'. Once it is understood that delegates to the conventions used the term 'alien' entirely in its racial sense, the record of debate on Quick's proposal suggests a broad view not of the 'naturalization and aliens power' in section 51(xix) but of the 'races power' in section 51(xxvi). Moreover, contrary to Chief Justice Gleeson's contention, it is possible to discern from the convention debates the reason for rejection of Dr Quick's proposal. As the debates show, Quick's proposal was rejected because delegates thought it would allow British subjects of 'undesirable race' (i.e. 'aliens' in their view) to become citizens of the new Commonwealth.

⁷⁰⁴ Ibid 2 March 1898, 1752.

⁷⁰⁵ Ibid 3 March 1898, 1788. But in Quick's approach, 'Chinese, Lascars, or Hindoos who happened to be British subjects' could be excluded from Australian citizenship because they would be subject to a 'disability imposed by Parliament'.

⁷⁰⁶ Ibid 2 March 1898, 1760.

⁷⁰⁷ (2004) 222 CLR 322, 342. Emphasis added.

The Inglis-Clark alternative

As Helen Irving has recognised, ‘the problem which arose from being subjects of the Empire was that Australians shared this status with a class of people whom they did not wish to regard as citizens of the Commonwealth’.⁷⁰⁸ Concern over British Indians, Hong Kong Chinese and other non-European British subjects led to the defeat of an alternative proposal from Tasmanian Attorney-General Inglis Clark for a federal citizenship (with protection of rights for citizens) based on the 14th amendment to the United States Constitution. Reactions to Inglis Clark’s proposal again showed that delegates to the conventions thought of citizenship in a racial not legal context, with little regard to basic concepts of membership under British law. Inglis Clark’s proposed clause 110 declared that:

The citizens of each state, and *all other persons owing allegiance to the Queen* and residing in any territory of the Commonwealth, shall be citizens of the Commonwealth, and shall be entitled to all the privileges and immunities of citizens of the Commonwealth in the several states, and a state shall not make or enforce any law abridging any privilege or immunity of citizens of the Commonwealth, nor shall a state deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.⁷⁰⁹

The response to Inglis Clark’s proposal from Josiah Symon – Queen’s Counsel, chairman of the convention’s judiciary committee and former first law officer for South Australia – again demonstrated how pre-eminent legal figures in colonial Australia manipulated the term ‘alien’, including in critical debates about formal membership of the Commonwealth:

I would much prefer, if there is to be a clause introduced, to have the amendment suggested by Tasmania, subject to one modification, omitting the words – ‘and *all other persons owing allegiance to the Queen*’. [If those words were included] *That would re-open the whole question as to whether an alien, not admitted to the citizenship here - a person who, under the provisions with regard to immigration, is prohibited from entering our territory, or is only allowed to enter it under certain conditions - would be given the same privileges and immunities as a citizen of the Commonwealth. Those words, it seems to me, should come out, and we should confine the operation of this amendment so as to secure the rights of citizenship to the citizens of the Commonwealth.*⁷¹⁰

Symon did not want ‘*persons owing allegiance to the Queen*’ to have the ‘same privileges and immunities as a citizen of the Commonwealth’ because such persons, in his understanding, included ‘*aliens*’. Under the common law, an ‘alien’ could not ‘owe allegiance to the Queen’, so Symon can only have been referring to ‘aliens’ in a racial sense.

⁷⁰⁸ Irving, ‘Citizenship before 1949’, above n 110, 14.

⁷⁰⁹ John M Williams, ‘Race, Citizenship and the Formation of the Australian Constitution’, above n 627, 12. Emphasis added.

⁷¹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 676. Emphasis added. See also Don Wright, ‘Symon, Sir Josiah Henry (1846–1934)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/symon-sir-josiah-henry-8734/text15293>.

This is demonstrated by Symon's description of an 'alien' as 'a person who, under the provisions with regard to immigration, is prohibited from entering our territory' – in other words, any non-European person prevented from entering Australia under the existing immigration restriction Acts of the colonies.

The response from Western Australia Premier Sir John Forrest similarly showed no concern for the proper meaning of key common law membership terms such as 'alien':

...it seems to me that there will be a difficulty in regard to *coloured aliens and to coloured persons who have become British subjects*. In Western Australia no *Asiatic or African alien* can get a miner's right or go mining on a gold-field...it seems to me that the word 'citizen' should be defined...It is of no use for us to shut our eyes to the fact that there is a great feeling all over Australia against the introduction of coloured persons. It goes without saying that we do not like to talk about it, but still it is so...It seems to me that should the clause be passed in its present shape, if a person, whatever his nationality, his colour, or his character may be, happens to live in one state, another state could not legislate in any way to prohibit his entrance into that state.⁷¹¹

Forrest did not define 'alien' and there is no indication he understood that under the common law applying in colonial Australia an 'alien' (in a legal sense) could not be a 'citizen' or a 'subject'. Forrest wanted 'citizen' defined so it would not include 'coloured aliens' or 'coloured persons who had become British subjects' and seemed to think coloured persons who had become 'subjects' were still 'aliens'. He did not understand that the protections in Inglis-Clark's proposed clause 110 for 'citizens of the Commonwealth' could not by definition apply to someone of another 'nationality' because he thought of 'nationality' in racial not legal terms. His lack of understanding of common law membership concepts was shown when he asked – as part of an exchange in this debate with Edmund Barton - 'would citizen mean an alien?'⁷¹² He was asking whether people of non-European race would be covered by Inglis-Clark's equal protection clause. The question indicates that he had no awareness of the legal meaning of 'alien'.

While Inglis Clark was not present for the debate on his own proposal at the 1898 Melbourne convention, he set out his response to the debate in a letter to one of the delegates:

I have observed in the reports of the debates in the Convention that some objections have been made to the Tasmanian amendment which provides for a citizenship of the Commonwealth, on the grounds that it would confer citizenship upon Hindoos and other Asiatic subjects of the Queen. This danger (if it is one) can be easily met by a provision which will exclude from the benefit of the amendment all persons of Asiatic blood who have not been specially naturalised. At the present time there are many Chinamen and other persons who have been naturalised in one colony, and who are therefore British subjects with all the rights of citizenship in that

⁷¹¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 665-666. Emphasis added.

⁷¹² *Ibid* 665.

colony, but who are aliens in all other parts of the Empire to which they may emigrate and in which they have not been naturalised. There would not therefore be any new practice introduced by providing that persons of Asiatic blood who may be British subjects in India or elsewhere shall not have the rights of citizenship in the territory of the Commonwealth without being naturalised.⁷¹³

This letter indicates that even Inglis Clark misunderstood key common law membership terms. The central point about the debate at the 1898 convention which he failed to appreciate was that critics of his proposal, including Symons and Forrest, gave no recognition to the common law standing of *natural-born* British subjects such as ‘British Indians’ and subjects of Chinese ethnic origin born in Hong Kong, the Straits Settlements or other British colonies. As Clark said, it had long been accepted that the naturalisation of aliens in one British colony or dominion only had effect in that territory. However the main issue was not exclusion from Australian citizenship of (the relatively few) non-Europeans who had undergone a formal process of naturalisation in another colony or dominion. Instead, as Isaacs and Kingston noted in relation to Quick’s proposal, the real question for proponents of a ‘white Australia’ was how to exclude the many *natural-born* subjects of non-European origin who had no need to be ‘specially naturalised’. Under the common law such people gained subject status at birth and retained this status when they migrated to another British territory. Contrary to Inglis Clark’s view, it would indeed have been a ‘new practice’ - as well as being inconsistent with the imperial policy against open discrimination - if the Australian Constitution had denied persons ‘owing allegiance to the Queen’ the same right to citizenship as other British subjects living in the country merely because they were ‘persons of Asiatic blood’.⁷¹⁴

According to Professor John Williams, opposition to Quick and Inglis-Clark’s proposals for recognition of Australian citizenship in the Constitution was driven by the desire of individual colonies to exclude and restrict the activities of ‘aliens’:

Even those, like Reid and Forrest, who consistently raised arguments of states’ rights did so because ‘Commonwealth citizenship’, ‘due process’ and ‘equal protection’ all affected a ‘state’s right’ to discriminate against aliens of ‘undesirable race’.⁷¹⁵

⁷¹³ Inglis Clark’s letter to Wise, 20 February 1898 in Williams, *The Australian Constitution*, above n 695, 848.

⁷¹⁴ Inglis Clark’s statement could also be interpreted as suggesting that, contrary to the common law, he considered ‘persons of Asiatic blood’ - whether or not they were natural-born subjects - to be ‘aliens’ if they had not been ‘specially naturalised’. This would explain the wording of the provision he included in his draft 1891 Constitution giving the Federal Parliament power ‘to regulate the immigration of Aliens’.

⁷¹⁵ Williams, ‘Race, Citizenship and the Formation of the Australian Constitution’, above n 627, 18.

It is important to note that the ‘aliens of undesirable race’ who colonial Premiers wished to discriminate against were not ‘aliens’ in a legal sense but simply those of non-European origin, including many who were subjects under British law.

Professor Kim Rubenstein notes that despite the omission of a power over citizenship, convention delegates were ‘comfortable about depriving some people of their citizenship, namely aliens. They were satisfied that this was provided for under the “naturalisation and aliens” power’.⁷¹⁶ She cites the following statement from Josiah Symon in support of this view:

We must rest this Constitution on a foundation that we understand, and we mean that every citizen of a state shall be a citizen of the Commonwealth, and that the Commonwealth shall have no right to withdraw, qualify, or restrict those rights of citizenship, *except with regard to one particular set of people who are subject to disabilities, as aliens*, and so on.⁷¹⁷

As Symon’s comments mentioned above indicate, however, when he referred to people ‘subject to disabilities, as aliens’ he meant non-Europeans, not any white or other person who was an ‘alien’ in a legal sense. As Symon himself said:

You have given the Federal Parliament power to deal with the question of *aliens*, immigration, and so on, to prevent the introduction of *undesirable races*. Under that provision you enable the Federal Parliament to legislate within certain limits, and in a certain direction. Under that they may, within those limits, take away, or they may restrict, the rights of citizenship in a particular case’.⁷¹⁸

For Symons and other delegates, it was the ‘undesirable races’ who were the ‘aliens’. As O’Connor said, under the ‘immigration power’ the Commonwealth could ‘define who shall be citizens’ by preventing such people entering the country. And as Quick said, under the ‘races power’ those already in the country could be ‘placed under certain disabilities, among which might be that they shall not be capable of acquiring citizenship’. In other words, the delegates thought ‘aliens of undesirable race’ could be dealt with under the immigration and races powers, including by withdrawing or restricting their rights of citizenship. This was not a role they envisaged for the ‘naturalization and aliens’ power in section 51(xix) of the Constitution.

⁷¹⁶ Rubenstein, *Australian Citizenship Law in Context*, above n 376, 34, citing *Official Record of the Debates of the Australasian Federal Convention*, Melbourne 1898, 1764 (Symon).

⁷¹⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 1764. Emphasis added.

⁷¹⁸ *Ibid* 1763. Emphasis added.

Constitutional conventions and the rule of law

During the constitutional conventions, many delegates including Griffith, Braddon, Symon, Quick, Deakin, Barton, O'Connor, Forrest, Trenwith, Cockburn and others misused the word 'alien' with its racial and not its legal meaning as a shorthand description for a person of non-European race. This was the default term for non-white people employed not only in discussions on the 'races' power but also in the very debate about future legal membership of the forthcoming Commonwealth of Australia where it might have been expected (especially given the legal pre-eminence of many delegates) that the word 'alien' would have been employed - to use Trenwith's language - according to 'the exact definition of terms'.

There was no explanation at any of the conventions, even in the debates on proposals for Australian citizenship, of the fundamental distinction under the law between a 'subject' (or 'citizen') on the one hand and an 'alien' on the other. The consequence was that delegates applied the word 'alien' in its racial sense in the same way that Griffith, Parkes and other colonial politicians had in the decades before.

Used with its racial meaning the term 'alien' played an important role at the conventions. The convention records show that a primary concern of delegates was to exclude 'aliens', 'coloured aliens' or 'alien races' from the forthcoming federation. Any person not of European descent would not be permitted to belong to the new Commonwealth of Australia. Under the 'immigration power' the Commonwealth would stop 'aliens' entering the country in the same way the Australian colonies had done in earlier exclusionary legislation. Under the 'races power', members of 'alien races' already in Australia would be regulated and restricted. Since these two powers were envisaged as the main constitutional weapons for a 'white Australia', there was no substantive debate about the 'naturalisation and aliens' power. To the extent it was mentioned, it was envisaged merely as a technical power about the process of naturalisation.

The embedded belief amongst convention delegates that British subjects of non-European origin were still 'aliens', 'outsiders' and 'not one of us' also led to defeat of proposals for inclusion of citizenship in the Constitution. As Western Australian Premier Forrest said, delegates were alarmed by the idea that a 'citizen' in the new federation 'would mean an alien'.⁷¹⁹ Accepting all who 'owed allegiance to the Queen' as citizens would mean

⁷¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 665.

recognising non-European subjects as full members under the Constitution, entitled (as in Inglis Clark's proposal) to all the privileges and immunities enjoyed by white British subjects.

Australia's High Court has not identified the incorrect use of 'alien' at the conventions contrary to the rule of law. This is best shown by Justice McHugh's statement in *Singh* that:

The makers of our Constitution enacted s 51(xix) knowing that the *principle that a person who did not owe permanent allegiance to the Crown was an alien was an entrenched rule of the common law*, a rule as central to the unwritten constitution of the United Kingdom and its colonies as could be found. They also knew that, upon birth in any part of the Crown's dominions, the new born child immediately owed permanent allegiance to the Crown... *In 1900, no-one in Australia who knew anything about the subject would think for a moment that a person, born in any part of the Crown's dominions, was an alien...*⁷²⁰

This passage seems to be an expectation of what delegates at the conventions (including some of the most highly qualified and experienced lawyers in colonial Australia) should have known about the law on 'alienage'. But it is not consistent with analysis of the convention records themselves. As this chapter has shown, despite being engaged in debate on the appropriate language for the new constitution, delegates employed the term 'alien' entirely in its general or racial sense, paying no regard at all to its correct meaning under the law.

It is reasonable to assume that many delegates (especially those with legal training) did understand the common law meaning of 'alien' that had remained unchanged for centuries. But those who knew the law stayed silent while British subjects of non-European origin were denigrated as 'aliens'. Even such a pre-eminent lawyer as Josiah Symon said 'persons owing allegiance to the Queen' included 'aliens', meaning, as he said, the 'coloured' or 'undesirable races'. And of those in Australia 'who knew anything about the subject', Samuel Griffith stood out. Yet he ignored birth in the Crown's dominions when labelling 'Hindoos', 'coolies from British India', 'black labour' and ethnic Chinese (wherever born) as members of an 'alien race'.

The misuse of the term 'alien' in the constitutional conventions set out in this chapter also highlights how successive High Court decisions have relied on a misunderstanding of the historical use of 'alien'. This is significant in the development of modern constitutional law in Australia. As noted above, contrary to Justice McHugh and Chief Justice Gleeson's suggestions in *Singh*, the convention records do not, in fact, indicate that section 51(xix) was originally envisaged as a source of authority over citizenship. O'Connor's statement that the 'power to deal with aliens' would help give the new federal government 'the right to define

⁷²⁰ *Singh v Commonwealth* (2004) 222 CLR 322, 350. Emphasis added.

who shall be citizens’ was another use of ‘alien’ in its racial sense and is properly understood as a reference to the ‘races power’ in section 51(xxvi), not the ‘aliens power’ in section 51(xix).

Aftermath: Quick and Garran

John Quick and Robert Garran’s 1901 work, *The Annotated Constitution of the Australian Commonwealth*, remains a definitive source for constitutional interpretation in Australia. As Garran himself said, ‘it did cover the subject, became the standard work on the Constitution, and for many years was indispensable to the practising constitutional lawyer’.⁷²¹ Quick and Garran’s work was still being cited in High Court judgments a hundred years after it first appeared - including in relation to the meaning of ‘alien’ under section 51(xix) of the Constitution.⁷²²

As noted above, John Quick was one of many delegates at the 1890s constitutional conventions who ignored the legal meaning of ‘alien’, using the word as a synonym for the ‘coloured races’ he wished to see excluded from membership of the new Commonwealth. Quick and Garran continued to misuse the term ‘alien’ in their 1901 work, particularly in their remarks on the ‘races’ power in section 51(xxvi) of the Constitution and the ‘aliens’ power itself in section 51(xix). They also used ‘alien’ in a racial sense when commenting on the ‘immigration power’ in section 51(xxvii).

Section 51(xxvi) of the Constitution (as originally enacted) allowed the Parliament of the Commonwealth to make laws with respect to ‘*the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws*’.⁷²³ In their brief comments on the ‘races power’, Quick and Garran twice said that it enabled the Commonwealth to make laws with regard to any ‘alien race’.⁷²⁴ As Geoffrey Sawer has observed, their use of the phrase ‘alien race’ was ‘unfortunate’. In his view:

⁷²¹ Garran, *Prosper the Commonwealth*, above n 152, 138.

⁷²² *Singh v Commonwealth* (2004) 222 CLR 322, 386, 388 (Gummow, Hayne and Heydon JJ); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 37 (Gleeson CJ, Gummow and Hayne JJ); *Pochi v Macphee* (1982) 151 CLR 101, 108 (Gibbs CJ) (see also 102, cited by counsel for the plaintiff). Helen Irving notes that Quick and Garran continues to be the favourite secondary source for the High Court on the history of federation and the Constitution, ‘referenced in 80 (or 40 per cent) of the constitutional cases since 1988’. Irving, ‘Discipline of History’, above n 218, 114-115.

⁷²³ Section 51(xxvi) was amended by the *Constitution Alteration (Aboriginals) Act 1967* (Cth) by exclusion of the phrase ‘other than the aboriginal race in any State’.

⁷²⁴ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 622.

...probably they did not mean ‘alien’ in any precise sense of nationality law, but merely people of a ‘race’ considered *different from* the Anglo-Saxon-Scottish-Welsh-Cornish-Irish-Norman (etc. etc.) mixture, derived from the United Kingdom, which formed the main Australian stock.⁷²⁵

While Sawyer is correct, what he does not identify is that for many years the phrase ‘alien race’ had been the default description used in Australia for non-Europeans. When referring to an ‘alien race’ Quick and Garran were using the word ‘alien’ in the same way that Quick and other delegates at the constitutional conventions did, that is to say in its ordinary, non-legal, ‘racial’ sense (someone who is not ‘one of us’, particularly someone ‘from another race’) rather than with the meaning we might have expected such leading constitutional authorities to have employed in a commentary on the Constitution, namely its proper legal meaning.

The failure of Quick and Garran to restrict the use of ‘alien’ to the legal sense of the word meant they did not properly distinguish between the coverage of the ‘aliens’ and ‘races’ powers in the new Constitution. In their section on the ‘aliens’ power in section 51(xix), Quick and Garran considered a Privy Council decision on the equivalent power in the Canadian Constitution. As with the Australian provision, section 91(25) of the *British North America Act 1867* (UK) authorised the federal parliament of Canada to make laws with respect to ‘naturalization and aliens’ - although in the Canadian case the power was expressly declared to be ‘exclusive’. As Quick and Garran noted,⁷²⁶ the Privy Council held in *Bryden* (1899) that the Canadian province of British Columbia had infringed upon exclusive federal power by prohibiting ‘*Chinamen who were aliens or naturalized subjects*’ from working in underground coal mines within the province.⁷²⁷ Looking at the Australian situation, Quick and Garran stated that ‘under the Constitution of the Commonwealth, sec. 51-xix., the Federal Parliament will be able to prohibit Chinamen, *whether naturalized or not*, from working in mines’.⁷²⁸

This statement makes no logical sense unless they were applying the word ‘alien’ as they did in relation to section 51(xxvi), i.e. in its non-legal or racial sense rather than with its correct legal meaning. As Quick and Garran themselves said, ‘*naturalization is the process...by*

⁷²⁵ Sawyer, ‘The Australian Constitution and the Australian Aborigine’, above n 627, 19. Emphasis in original.

⁷²⁶ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 603.

⁷²⁷ *Union Colliery Company of British Columbia v Bryden* [1899] A.C. 580. See above n 663 for the Privy Council’s deficient application of the law about aliens in that case.

⁷²⁸ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 603. Emphasis added.

which an alien...is converted into a subject or citizen'.⁷²⁹ People of Chinese descent who had been naturalised were therefore no longer 'aliens' in a legal sense. Instead they received the status of 'British subjects' under the law and were beyond the Commonwealth's power under section 51(xix) of the Constitution to legislate with respect to 'aliens'.

Quick and Garran may have considered that a prohibition on mining and other activities could be imposed as a condition of naturalisation - making it valid under the 'naturalization' arm of section 51(xix). Even if this was so, however, their statement above ignores those Chinese who by birth in the former Australian colonies, the new Commonwealth or elsewhere in the British Empire were 'natural-born' British subjects and therefore neither 'aliens' nor valid objects of the 'naturalization' arm of section 51(xix).

Apart from confusing the racial meaning of alien with its constitutional or nationality meaning, Quick and Garran - perhaps misled by the Canadian *Bryden* case - also misstated the intended role of the 'aliens' power in the Australian Constitution. Contrary to their statement that section 51(xix) could be used to 'prohibit Chinamen' from activities within Australia such as mining, the power to make laws with respect to 'aliens' in the Constitution was not intended to play a major role in maintaining a white dominated society in Australia. At least in relation to internal controls for achieving this aim, the 'races' power in section 51(xxvi) was assigned this task.⁷³⁰ As noted in another authoritative source for constitutional interpretation in the first half of the twentieth century, W. Harrison Moore's *The Constitution and the Commonwealth of Australia* (1910), the 'races' power in section 51(xxvi) of the *Australian Constitution*:

...recalls the various race problems which arise in different parts of Australia, and enables the Parliament to establish laws concerning the Indian, Afghan, and Syrian hawkers; the Chinese miners, laundrymen, market-gardeners, and furniture manufacturers; the Japanese settlers and Kanaka plantation labourers of Queensland, and the various coloured races employed in the pearl fisheries of Queensland and Western Australia.⁷³¹

⁷²⁹ Ibid 601.

⁷³⁰ In relation to 'external' controls, i.e. preventing non-Europeans entering Australia, it was the power to make laws with respect to 'immigration and emigration' in section 51(xxvii) of the Constitution which played the major role. As Isaacs J said in *R v MacFarlane, ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 when discussing the Commonwealth's ability under the Constitution to enforce the White Australia Policy, 'the power as to "aliens" leaves a huge gap, sufficient in itself to paralyse the Commonwealth unless "immigration" covers it' (at 556).

⁷³¹ W Harrison Moore, *The Constitution and the Commonwealth of Australia* (Maxwell, 2nd ed, 1910), 464.

Harrison Moore also refers to *Bryden*, noting that while in Canada, at least according to the Privy Council's decision in that case,⁷³² a law prohibiting 'all Chinamen' from a particular activity might be authorised under the 'aliens' power in the federal Constitution, in Australia 'the class of law in question...appears rather to be embraced' by section 51(xxvi).⁷³³

As Harrison Moore's comments indicate, since the Canadian Constitution does not contain an equivalent power to section 51(xxvi) - enabling the federal parliament to legislate with respect to the 'people of any race' - there was a greater need in Canada, for the purpose of imposing restrictive laws on non-Europeans, to consider whether such laws could validly come within the 'aliens' power. In Australia, the inclusion of the 'races power' circumvented the need to debate whether people 'from another race' could validly be subject to laws made under the 'aliens' power. As Sawyer has observed:

Australian section 51(xxvi) seems in terms designed to avoid in similar contexts the necessity for agonising about the scope of the 'aliens' power (xix), which is in identical terms with the Canadian and involves similar difficulties of interpretation.⁷³⁴

There was no need in Australia, therefore, to argue that the range of Commonwealth legislation passed after federation which discriminated against people of non-European background was valid on the basis that the power to make laws with respect to 'aliens' in section 51(xix) of the Constitution included people 'belonging to another race', and not merely those with another nationality. Instead, such laws were authorised under section 51(xxvi) as being with respect to 'people of any race'.⁷³⁵

In their comments on the 'immigration' power in section 51(xxvii) of the Constitution, Quick and Garran again used the term 'alien' in its racial sense, noting that at the 1897 Jubilee celebrations in London, the Secretary of State for the Colonies, Joseph Chamberlain, 'expressed entire sympathy with the determination of the Australian colonies to prevent the influx of people who were *alien* in civilization, in religion, and in customs'.⁷³⁶

⁷³² See above n 663. Harrison Moore also refers to the conflicting Privy Council decision in another Canadian case shortly afterwards, *Cunningham v Tomey Homma* [1903] A.C. 151. See summary of *Bryden* and *Tomey Homma* decisions (and discussion of Harrison Moore's commentary) in Sawyer, 'The Australian Constitution and the Australian Aborigine', above n 627, 21-22. Sawyer notes that these two decisions 'have since puzzled and divided Canadian judges' (at 21).

⁷³³ Harrison Moore, above n 731, 464.

⁷³⁴ Sawyer, 'The Australian Constitution and the Australian Aborigine', above n 627, 22.

⁷³⁵ See Chapter Four for Commonwealth legislation imposing domestic racial exclusion which could have been justified under section 51(xxvi).

⁷³⁶ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 626. Emphasis added.

In his autobiography, Robert Garran indicated that Quick was by far the more dominant of the two authors:

I soon found out what it was for a young man - he was fifteen years my senior - to be the junior partner of a steam-roller. We were always on first-rate terms as collaborators and the only fault I had to find with him was his excessive thoroughness...Claude McKay observed that my 'lively mind' had been overweighted in this 'monumental tome'.⁷³⁷

This suggests that mistakes in their commentary on the use and application of the term 'alien' in relation to the 'races', 'aliens' and 'immigration' powers were not due to any laxity in research or consideration on the part of Quick or Garran. Instead it indicates - particularly given the dominant role Garran ascribes to Quick - that misuse of the word 'alien' stemmed from Quick's belief, as expressed at the 1890s conventions, that non-Europeans were 'aliens' and that the Commonwealth should control the 'immigration of aliens' to prevent an 'invasion of coloured races'. In Quick's view, the 'aliens' were the 'undesirable races' and such people included 'Chinamen, Japanese, Hindoos, and other barbarians'.⁷³⁸ Because of this subjective perception as to who 'belonged' in Australia, Quick and Garran - when approaching the task of constitutional analysis in relation to the races, aliens (and immigration) powers in the new Constitution - ignored formal legal markers of nationality such as subject status and naturalisation, instead using the normal or 'racial' meaning of 'alien' in place of its correct legal meaning.

Quick and Garran's misuse of 'alien' is significant. As authors of the country's constitutional 'bible', they were important actors in Australia's legal history, not mere commentators. A correct explanation of the legal meaning of 'alien' in their 1901 work may have prevented misuse of this term by the High Court (see Chapter Five). In turn this could have lessened the extensive misapplication of the word by State authorities, not least in Queensland⁷³⁹ (see Chapters Four, Six and Seven).

⁷³⁷ Garran, *Prosper the Commonwealth*, above n 152, 137-138.

⁷³⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1784. Emphasis added.

⁷³⁹ For evidence that Queensland legal authorities were misled by Quick and Garran's commentary in relation to 'aliens', see the brief from Crown Solicitor H J H Henchman in *Brown v See Chin, ex parte See Chin* (1923) 17 QJP 130; 1923 QWN 38. The Crown Solicitor cited Quick and Garran as authority for the view that section 51(xxvi) of the Constitution (the 'races power') conferred on the Commonwealth 'power to make laws for aliens', arguing that Queensland had an equivalent legislative power. Queensland (State Archives), *Briefs etc in the case of Herbert F Brown v See Chin re use of Chinese labour*, Item ID7898.

CHAPTER FOUR Aliens, the Commonwealth and the States

'The existence of a category of citizenship requires the existence of a category of non-citizen or alien...Research into the Commonwealth's treatment of aliens is essential for the study of citizenship in Australia, since the Commonwealth's policies governing aliens are just as significant as its more positive civic policies'.⁷⁴⁰

As this thesis has demonstrated, use of the word 'alien' as the default description for people of non-European origin by prominent colonial figures spilled over into the convention debates of the 1890s, infecting even Quick and Garran's iconic constitutional commentary. It is not surprising then that misuse of the term continued after federation. Employment of the word 'alien' with its racial meaning was in particular an important language tool in national implementation of the White Australia policy.⁷⁴¹

Continued misuse of 'alien' at the federal level reinforced discriminatory use of the word by the Australian States. While federation enabled the Commonwealth to determine exclusion (and therefore 'belonging') at a national level, the States retained substantial power to deny participation in the community to people regarded as not 'one of us'. As Henry Reynolds has observed, after 1901 a proliferation of discriminatory legislation continued in the Australian States.⁷⁴²

This chapter highlights the new Commonwealth Government's exclusion of 'undesirable coloured aliens' using its Immigration or 'Alien' Restriction Act, prohibiting naturalisation and restricting voting and other domestic activities. It then examines legislation in South Australia and Western Australia imposing restrictions on 'Asiatic or African aliens'. It also discusses use of the derogatory term 'white aliens' for 'non-Aryan' and other 'undesirable' Europeans. Later chapters consider the more extensive range of exclusionary laws in Queensland, which (in contrast to its State counterparts) was careful to remove any overt 'colour line', at least in high profile statutes subject to imperial scrutiny and veto.

The Commonwealth and 'undesirable coloured aliens'

At the Commonwealth level, legislation prevented non-Europeans entering Australia (*Immigration Restriction Act 1901*), removed some of those already in the country (*Pacific*

⁷⁴⁰ National Archives of Australia, *Citizenship in Australia: A Guide to Commonwealth Government Records*, <http://guides.naa.gov.au/citizenship/chapter3/aliens.aspx>.

⁷⁴¹ As noted above at n 373, for an official account of the White Australia policy, see Commonwealth, Department of Immigration and Border Protection, *Fact Sheet 8 – Abolition of the White Australia Policy*, <https://www.immi.gov.au/media/fact-sheets/08abolition.htm>. See also above n 79.

⁷⁴² Reynolds, *North of Capricorn*, above n 216, 179.

Island Labourers Act 1901) and denied non-Europeans naturalisation (*Naturalization Act 1903*). Notwithstanding the tight legal barriers against non-white immigration put in place by federal legislation, hundreds of pieces of domestic law were also introduced by the Commonwealth and the States to prevent the small number of non-Europeans officially recorded as remaining in Australia from participating in key aspects of national life.

The ‘Alien’ Restriction Act

The main weapon of the White Australia policy after federation was the control on non-European immigration imposed by the Commonwealth, primarily through use of the ‘education’ or ‘dictation’ test introduced by the first federal parliament in the Immigration Restriction Act. In the High Court in 2001, Justice Kirby observed that:

Many British subjects were “non-white”. Yet they could not be excluded at the borders of Australia *on the ground that they were “aliens”*... Relying on the immigration power, rather than the aliens power, that Act prohibited immigration into the Commonwealth of certain persons without differentiation as to nationality, including those who failed a dictation test in a European language...there was no general exemption from the Immigration Restriction Act on the basis of nationality, British or otherwise.⁷⁴³

However in 1901 the new Commonwealth parliament understood that the education test under the Immigration Restriction Act would keep Australia ‘white’ by preventing ‘coloured aliens’ – people belonging to ‘undesirable’ or ‘alien races’ – from entering the country. Introducing the proposed law, Richard O’Connor, in his capacity as leader of the Government in the Senate and Vice-President of the Executive Council, proclaimed:

The mandate of Australia is that we shall secure the exclusion of *coloured aliens* at the earliest possible moment...it will be a proclamation to the world that *coloured aliens* are no longer to be admitted into Australia.⁷⁴⁴

Western Australian Senator Staniforth-Smith applauded the exclusion of ‘coloured aliens’, but objected to the ‘subterfuge’ of the education or dictation test:

I was pledged to the absolute exclusion of every *coloured alien* from Australia...I want to do it honestly, and to say frankly that for ethnological reasons we do not desire the coloured races to come into Australia. Instead of that, legislation is proposed in which it is suggested that there is no bar to the coloured races whatever, and that we only desire to see that our immigrants are educated people.⁷⁴⁵

In an election speech in 1903, Prime Minister Alfred Deakin declared that the Immigration Restriction Act had greatly diminished the number of ‘colored aliens’ entering Australia:

The *alien colored* population is being steadily reduced. Now, as to the test. Of course this is not much applied, because ship-owners know that if they bring *colored aliens* to this country who

⁷⁴³ *Re Patterson; ex parte Taylor* (2001) 207 CLR 391, 483-484. Emphasis added.

⁷⁴⁴ Commonwealth, *Parliamentary Debates*, Senate, 5 December 1901, 8305. Emphasis added.

⁷⁴⁵ *Ibid* 6 December 1901, 8379-80. Emphasis added.

are not legally entitled to land, they will have the pleasure of taking them back to their native land.⁷⁴⁶

As Deakin's speech indicates, use of the term 'alien' in a racial sense (as in 'coloured alien') remained a central element after federation in the discourse depicting non-white people as 'undesirable', justifying their exclusion as a fundamental part of national policy:

We protect ourselves against *undesirable colored aliens*, why not against the products of the *undesirable alien* labor? (Cheers) A white Australia is not a surface, but it is a reasoned policy which goes down to the roots of national life, and by which the whole of our social, industrial, and political organisations is governed.⁷⁴⁷

A 1948 article in Brisbane's *Courier Mail* observed that the White Australia policy implemented through the Immigration Restriction Act was intended to prevent 'aliens' settling in the country:

The 'White Australia' policy — although not specifically so called in the legislation — was embodied in one of the first Acts of Federal Parliament in 1901. The legislation was the Immigration Restriction Act. It arose from economic conditions following the entrance of *aliens*, particularly Asiatics, to Australia in the previous century. It established the language, or dictation, test as the key to an *alien's* admission.⁷⁴⁸

Consistent with the intention of delegates to the constitutional conventions (discussed in Chapter Three) that '*coloured aliens*' should be kept out of Australia using the 'immigration' power in section 51(xxvii) of the new Constitution, the Immigration Restriction Act was commonly known as the 'Alien Restriction Act' or the 'Alien Immigration Act'. In 1902, the *Worker* declared that 'by the Alien Restriction Act, the flood of immigration from degenerate Asia has been checked, and a grave menace to the material and moral welfare of our race averted'.⁷⁴⁹ In 1905 the *Sydney Morning Herald* reported that Chinese from Hong Kong were exchanging 'naturalisation papers' to evade the 'Alien Immigration Act':

Alien Immigration Act. Chinese Wiles To Circumvent It. Hong Kong, Jan. 23. The instance referred to the admission of *aliens* into Australia, and the regulations regarding the restriction thereof. Ever since the bill for the restriction of *alien* immigration was passed in Australia, the Chinese desiring to reside in or gain admittance to the Commonwealth without complying with the law have been constantly endeavouring to invent a means to circumvent the conditions imposed by the Act. That many have been successful, unfortunately, it must be admitted, is certain, for a peculiar trade has grown here, the commodity sold being naturalisation papers.⁷⁵⁰

In the same year the *North Western Advocate and Emu Bay Times*, under the heading 'Evasion of Alien Restriction Laws', reported that:

⁷⁴⁶ Museum of Australian Democracy, *Election Speeches, Alfred Deakin* (Speech Ballarat 29 October 1903), <http://electionspeeches.moadoph.gov.au/speeches/1903-alfred-deakin>. Emphasis added.

⁷⁴⁷ Ibid. Emphasis added.

⁷⁴⁸ 'First Parlt. set policy', *Courier-Mail* (Brisbane) 21 October 1948, 1. Emphasis added.

⁷⁴⁹ Editorial, 'A Campaign of Triumph', *Worker* (Brisbane) 18 October 1902, 2.

⁷⁵⁰ 'Alien Immigration Act', *Sydney Morning Herald* (Sydney) 16 February 1905, 3. Emphasis added.

An astonishing discovery of Celestial stowaways was made to-day, when 23 Chinese were found secreted in tanks on the German steamer *Prinz Waldemar*. The officers, when interviewed by the authorities, stated they were ignorant of their presence on board. They were apparently fed by the Chinese crew. The *aliens* are being kept under surveillance till the vessel leaves the port.⁷⁵¹

In 1915 the *Morning Bulletin* from Rockhampton reported that at the local Police Court:

...the sub-collector of Customs...charged Tognosuioaki, a Japanese, with having failed to pass the dictation test. [The prosecutor] applied to have the complaint amended by adding the words 'being a prohibited Immigrant within the meaning of the Alien Immigration Act'.⁷⁵²

Under the Immigration Restriction Act it was an offence for 'prohibited immigrants' to enter the Commonwealth.⁷⁵³ But alleged offenders were invariably referred to as 'aliens'. A 1908 report in the *Register* stated:

Prohibited Aliens. Chinese in the Territory. Port Darwin...Three Chinese were prosecuted last week on a charge of being *aliens* within the meaning of the Restriction Act. They wished to proceed south in the steamer Changsha, and posed as old residents. The suspicions of the customs authorities were aroused, and they were arrested...They were each sentenced to two months imprisonment at Fannie Bay, and to be then deported.⁷⁵⁴

As this shows, the public discourse in relation to the central mechanism for implementing the White Australia Policy continued to promote an understanding of the term 'alien' purely in its non-legal, racial sense.

Effect of 'Alien Restriction Act'

Application of the 'education' or 'dictation' test under the Immigration or 'Alien' Restriction Act limited the officially recorded number of non-Europeans resident in Australia to no more than one per cent of the total population throughout the period 1901 to 1939. The first Commonwealth census in 1911 recorded 37,789 non-Europeans of 'full blood' in Australia (excluding 'full-blood' indigenous Australians who were not counted for official census purposes until section 127 of the Constitution was repealed after the 1967 referendum) as well as 14,554 'half-caste' non-Europeans (a figure which included those whose ancestry was partly indigenous because these people were not regarded as 'aboriginal natives' for the purpose of section 127). 13,302 of the 'full-blood' non-Europeans had British subject status, along with 14,505 'half-caste' non-Europeans (mainly those with an Australian aboriginal heritage, but also more than 3,000 with a Chinese background) - so in theory laws intended to prevent non-white participation in the national community had to apply to more than 'aliens'

⁷⁵¹ 'Evasion of Alien Restriction Laws', *North Western Advocate and the Emu Bay Times* (West Devonport and Burnie) 27 May 1905, 2. Emphasis added.

⁷⁵² 'Police Court', *Morning Bulletin* (Rockhampton) 15 April 1915, 3.

⁷⁵³ Section 3 *Immigration Restriction Act 1901*.

⁷⁵⁴ *The Register* (Adelaide) 26 February 1908, 5. Emphasis added.

in the legal sense to exclude them.⁷⁵⁵ By the time of the 1933 census, the number of ‘full-blood’ non-Europeans had declined to 22,780, while ‘half-caste’ non-Europeans had increased to 27,066. Unlike the 1911 figures, the 1933 census did not record the subject status of the different races.⁷⁵⁶

As Barry York has noted, analysis of the returns tabled in the Commonwealth Parliament from 1901 to 1957 on use of the dictation test under the Immigration Restriction Act reveals that ‘the Chinese were the chief target of the Act’.⁷⁵⁷ As York says:

The test was chiefly used against the Chinese between 1902 and 1913. After that, few Chinese attempted to come to Australia unless confident of admission (as former domiciles with re-entry permits or as holders of Certificates of Exemption from the Dictation Test)...The effectiveness of the test lay not only with its almost total guarantee of successful exclusion but in its deterrent effect on shipping companies. Under the Immigration Act, the owners, agents, charterers and masters of ships could be fined the huge sum of £100 for each prohibited immigrant they carried to Australia.⁷⁵⁸

Naturalisation: ‘the process by which an alien is converted into a subject or citizen’⁷⁵⁹

Ironically, those regarded as ‘aliens’ in a racial or non-legal sense had little access to the formal process of naturalisation in post-federation Australia. Naturalisation of non-Europeans had already been strictly circumscribed under colonial laws. For example, under section 4 of the *Aliens Act 1861* (Qld), a male ‘Asiatic or African alien’ could be naturalised, but only if he was married and had resided in the colony for three years. In addition, his wife had to reside with him at the time of naturalisation.⁷⁶⁰ Section 8 of the federal *Naturalization Act 1903* purported to confer equal rights on all people (including non-Europeans) who became subjects through the process of naturalisation.⁷⁶¹ As noted in Chapter Two, however, the

⁷⁵⁵ Importantly, 9,494 of the ‘full-blood’ non-Europeans were unable to read and write either English or a foreign language, which meant that any dictation or reading test under a Commonwealth or State law (such as Queensland’s alien and dictation test legislation, see Chapter Six) would automatically exclude such people. Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), Vol 1 Part 1, Statistician’s Report, 220-230.

⁷⁵⁶ See discussion in Chapter Two indicating that a significant proportion of ‘persons of Chinese race’ in Australia were British subjects. The 1933 Census also did not record the literacy rates amongst different races. Commonwealth Bureau of Census and Statistics, *Census of the Commonwealth of Australia 30th June, 1933* (1940), Statistician’s Report, 118.

⁷⁵⁷ York, ‘The Chinese in Australia’, above n 183, 365.

⁷⁵⁸ Ibid 362, 365.

⁷⁵⁹ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 601.

⁷⁶⁰ The 1861 Act was re-enacted as the *Aliens Act 1867 (Qld)*, containing an identical restriction, see section 6. As Price notes, ‘This curious clause, discriminating against unmarried Asians or those with wives in Asia ... remained on the statute book until 1965’. Charles Price, *The Great White Walls are Built*, above n 165, 92.

⁷⁶¹ The first paragraph of section 8 declared that ‘A person to whom a certificate of naturalization is granted shall in the Commonwealth be entitled to all political and other rights powers and privileges

ability of non-European residents to move beyond the legal status of ‘alien’ through naturalisation was prevented under section 5 which prohibited ‘aboriginal natives of Asia, Africa, or the Islands of the Pacific, excepting New Zealand’ from becoming subjects.

The debate in 1903 in the Commonwealth Parliament on the Naturalisation Bill reflected the enduring mistrust of Australia’s Anglo-Celtic colonisers towards naturalised non-European subjects. As well as doubts about their loyalty and allegiance, there was a belief that Chinese Australians in particular could not be distinguished from each other, which allegedly opened the door to fraud. Senator Pearce said that in the recent prosecution of two Chinese men in the Melbourne Police Court, one of the men ‘told the magistrates...that he and his companion had bought their naturalization papers at Singapore’, adding that:

...one of the defendants possessed a certificate of naturalization which was issued to a man 40 years ago...if the Chinese who produced it had been its rightful owner, he should have been 70 years of age. As a matter of fact he was about 30 years of age.⁷⁶²

According to Senator Higgs, many Chinese men:

...claim to have been in the Commonwealth before, and there is the greatest difficulty in disproving their statements, on account of the resemblance they bear to each other, and because a Chinaman of 20 usually looks quite as old as one of 60.⁷⁶³

In the *Nationality Act 1920* the Commonwealth Parliament inadvertently removed the prohibition on naturalisation of non-Europeans.⁷⁶⁴ However both the Naturalization Act and the Nationality Act authorised the Governor-General, acting on the advice of the federal government, to withhold a certificate of naturalisation without giving a reason.⁷⁶⁵ It remained the policy of Australian governments until 1957 not to allow the naturalisation of people from a non-European background. Consistent with this policy, no more than forty-five Asian settlers were naturalised as British subjects and nationals of Australia between 1904 and 1945.⁷⁶⁶ But equal rights were not assured even for the few non-Europeans who managed to become naturalised. Section 11 of the Nationality Act allowed the Commonwealth and the States to restrict the ‘rights, powers and privileges’ of naturalised British subjects.

and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth’.

⁷⁶² Commonwealth, *Parliamentary Debates*, Senate, 2 July 1903, 1706. See also Paul Jones, *Alien Acts*, above n 198, 88.

⁷⁶³ Commonwealth, *Parliamentary Debates*, Senate, 3 July 1903, 1753. See also Paul Jones, *Alien Acts*, above n 198, 89.

⁷⁶⁴ Dutton, above n 207, 42-43.

⁷⁶⁵ Naturalization Act, s 7; Nationality Act s 7(3). See also J Stacker and P Stewart, *Chinese Immigrants and Chinese-Australians in New South Wales* (National Archives of Australia 2004) 12.

⁷⁶⁶ Dutton, above n 207, 42-43.

Domestic exclusion

There were also exclusionary laws at the federal level on internal issues within the Commonwealth's lawmaking power in the Constitution. In these laws the treatment of aliens (in the legal sense), people of non-European race and indigenous Australians overlapped or was explicitly linked together, with little if any distinction in terms of the practical effect of the legislation. Examples include the *Post and Telegraph Act 1901* stipulating that contracts or other arrangements for delivery or carriage of mail entered by the Commonwealth must contain 'a condition that only white labour shall be employed in such carriage'; the *Invalid and Old-Age Pensions Act 1908*, which prohibited 'aliens, Asiatics (except those born in Australia and Indians born in British India) and aboriginal natives of Australia, Africa, the islands of the Pacific and New Zealand' from receiving pensions; and the *Commonwealth Franchise Act 1902*, which provided that 'no aboriginal native of Australia, Asia, Africa or the islands of the Pacific (except New Zealand)' was entitled to be an elector unless such a person already had the right to vote under State law.⁷⁶⁷

Repeating a theme from earlier colonial laws, there was no recognition in the Commonwealth franchise laws that coloured residents of Australia might have equal legal status with white settlers because of their place of birth. In 1925 voting rights were extended to 'natives of British India'⁷⁶⁸ and people naturalised under Commonwealth or State law.⁷⁶⁹ According to the Museum of Australian Democracy, this amendment 'extended the right to vote in Commonwealth elections to all *naturalised* Australians regardless of their race'.⁷⁷⁰ But as noted above, from 1904 non-Europeans could not be naturalised under Australian law. Even more significantly, the right to vote was not extended to *natural-born* subjects of non-European origin.⁷⁷¹ This reflected an enduring view that coloured or 'alien' people (in the

⁷⁶⁷ This was consistent with section 41 of the Constitution, which protected the right to vote in Commonwealth elections for people who had such a right under State law at the time of federation.

⁷⁶⁸ According to the Museum of Australian Democracy, 'granting the vote to people from India, which was part of the British Empire, was particularly contentious'. Museum of Australian Democracy, 'Commonwealth Franchise Act 1902', *Documenting a Democracy*, <http://foundingdocs.gov.au/item-sdid-88.html>.

⁷⁶⁹ Section 2 *Commonwealth Electoral Act 1925* (Cth). The Commonwealth Franchise Act was repealed by the *Commonwealth Electoral Act 1918*.

⁷⁷⁰ Museum of Australian Democracy, 'Commonwealth Franchise Act 1902', *Documenting a Democracy*, <http://foundingdocs.gov.au/item-sdid-88.html>. Emphasis added.

racial sense) - even if they were already British subjects and moreover even if they had been born in Australia - should undergo a formal process such as naturalisation before they were considered to 'belong' and entitled to exercise rights such as voting that accompanied 'belonging'.

Alien legislation in the States

While the Commonwealth Parliament imposed significant domestic restrictions on non-European inhabitants and indigenous Australians during the period between federation and the Second World War, it was predominantly State legislation that prevented the full participation of these people in the national community. The lawmaking power of the Commonwealth was restricted to specific subject matters under section 51 of the Constitution. Section 107, however, preserved the 'plenary' or full legislative power of the States, subject to section 109 which provided that a Commonwealth law would prevail over the law of a State on the same topic and that the State law would 'to the extent of the inconsistency, be invalid'. After the enactment of the Commonwealth's *Nationality Act 1920* which defined an 'alien' as 'a person who is not a British subject', any State law which treated a British subject as an 'alien' could, in theory, have been challenged on the basis of inconsistency with Commonwealth law.⁷⁷²

After federation, the States used their extensive legislative power to impose a broad range of restrictions on those regarded as not 'belonging' in the new Commonwealth. For example, State laws prevented non-European inhabitants from voting in Queensland, Western Australia and Victoria,⁷⁷³ becoming public servants in Western Australia,⁷⁷⁴ receiving widows pensions in New South Wales,⁷⁷⁵ leasing irrigated land in South Australia,⁷⁷⁶ working in a factory in Western Australia or for more than a certain number of hours in a factory in Victoria,⁷⁷⁷

⁷⁷¹ Section 39(1) of the *Commonwealth Electoral Act 1918* gave a right of enrolment to 'natural-born or naturalized subjects of the King' but this was 'subject to the disqualification set out in this Part'. After the 1925 amendments, persons entitled to vote under section 41 of the Constitution (i.e. under State law), British Indians, and naturalised subjects were exempt from the disqualification, but there was no exemption for 'natural-born' subjects.

⁷⁷² There is no record of any such challenge.

⁷⁷³ *Elections Act 1915* (Qld), *Local Authorities Act 1902* (Qld), *City of Brisbane Act 1924* (Qld); *Electoral Act 1907* (WA), *Municipalities Act 1906* (WA); *Chinese Act 1915* (Vic), *Chinese Act 1928* (Vic), *Local Government Act 1915* (Vic). See also *Elections Act 1885* (Qld).

⁷⁷⁴ *Public Service Act 1904* (WA).

⁷⁷⁵ *Widows Pensions Act 1925-1937* (NSW)

⁷⁷⁶ *Irrigation Act 1930-60* (SA).

⁷⁷⁷ *Factories Act 1904* (WA), *Factories Act 1915* (Vic).

selling gold in Victoria,⁷⁷⁸ manufacturing or selling margarine in Queensland,⁷⁷⁹ serving on a jury in the Northern Territory,⁷⁸⁰ selling gold or pearls in the Northern Territory,⁷⁸¹ or employing aborigines in Western Australia or female aborigines in the Northern Territory.⁷⁸²

Various phrases were used to describe the people on whom these restrictions and prohibitions were imposed, including ‘Asiatic and African aliens’, ‘persons of any Asiatic race’, ‘Aboriginal natives of Australia, Asia, Africa or the Islands of the Pacific’, ‘Chinese or people of other Asiatic race’ and ‘persons other than those of European descent’. In Queensland, to avoid further rejection by imperial authorities, there was deliberate use of the word ‘alien’ on its own without explicit reference to people of another race, but nevertheless with a clear intention to target non-Europeans, especially those of Chinese background. This is discussed further in Chapter Six.

Of some 217 acts, regulations and ordinances introduced across the country between 1901 and 1939 restricting the participation of ‘aliens’, non-Europeans and indigenous people in the Australian community, the vast majority (173) were enacted at State or Territory level. When added to laws enacted before federation by the States (as British colonies), the first as early as 1828, there were at least 300 formal legal barriers to full membership of the community at various times in Australia before World War Two.⁷⁸³ The number and extent of these laws helped entrench the perception amongst the Anglo-Celtic community that non-Europeans in Australia were different or ‘alien’ in a racial or social sense. As Peter Bayne said in relation to State legislation ‘protecting’ aborigines:

...once they were treated differently by the law, it became easy to argue that they should be treated differently for many other reasons. Different treatment thus supported the view that they were different.⁷⁸⁴

Restrictions on non-Europeans varied considerably between States. For example, all non-Europeans were prevented from voting in Queensland and Western Australia, but in Victoria only Chinese residents were excluded from the electoral roll. In other States there was no

⁷⁷⁸ *Gold Buyers Act 1915* (Vic).

⁷⁷⁹ *Margarine Act 1910* (Qld).

⁷⁸⁰ *Supreme Court Ordinance 1911* (NT).

⁷⁸¹ *Northern Territory Pearl Sale and Export Regulation Act 1901* (SA); *Gold Buyers Ordinance 1935* (NT).

⁷⁸² *Aborigines Act 1905* (WA), *Aboriginals Ordinance 1918* (NT).

⁷⁸³ Peter Prince, ‘Chronology: Legislation, cases and government action in relation to “aliens”’ (unpublished chronology, October 2015). See also David Dutton, *Citizenship in Australia, A Guide to Commonwealth Government Records* (National Archives of Australia, 1999).

⁷⁸⁴ Bayne, ‘Politics, the Law and Aborigines’, above n 136, 215.

restriction. As the *Argus* noted in 1909, this meant that in parts of the country ‘coloured aliens’ could be enrolled to vote:

Aliens as Voters. Chinese Registered...At Port Darwin today, the assistant returning officer for the Territory (Mr. Halton) has stated that the first Chinese was registered on the Northern Territory electoral roll this week. This man was born in the Territory of Chinese parents, and there is apparently nothing in the law to prevent him and all other Chinese born in the country from claiming all the rights of Australian citizenship. There is also nothing in the law to prevent the aborigines being registered.⁷⁸⁵

From the perspective of the *Argus*, a Chinese man born in Australia (and therefore a British subject) was still an ‘alien’. It perplexed the paper that such a person could have the same right to vote as a (white) Australian ‘citizen’. The paper was also surprised that indigenous Australians could register their names on the electoral roll. As the Museum of Australian Democracy notes, however, ‘even though Indigenous people in other States were in theory able to vote...few could actually do so’.⁷⁸⁶

‘Asiatic and African aliens’

As noted, by the late nineteenth century use of the word ‘alien’ with its non-legal or racial meaning (someone who was ‘not one of us’, a person ‘from another race’) had been embedded by key Anglo-Celtic colonial figures in the discourse about people of non-European background. The examples that follow show how, contrary to the rule of law, the racial discourse about ‘aliens’ influenced State laws after federation. The parliamentary debate on South Australia’s *Northern Territory Mining Act 1903* demonstrated ignorance of the legal meaning of ‘alien’ and both ‘colour’ and ‘labour’ racism on the part of State lawmakers. In the case of Western Australia’s *Firearms and Guns Act 1931*, the legal difference between an ‘alien’ and a ‘subject’ was understood but ‘alien’ was nevertheless used in its racial sense in the legislation. As discussed in Chapter Six, the misuse of ‘alien’ in Queensland following federation was even more pervasive, occurring in acts of parliament, subordinate legislation and prosecutions under those laws. In addition, ostensible use of the word ‘alien’ in its racially neutral legal sense in high profile Queensland laws involved a level of deception not found in South Australia or Western Australia.

In the South Australian and Western Australian laws discussed below, the expressions ‘*Asiatic aliens*’ and ‘*Asiatic or African aliens*’ were used to describe people subject to various restrictions and prohibitions. The phrase ‘Asiatic or African aliens’ seems to have first

⁷⁸⁵ *Argus* (Melbourne), 23 April 1909, 6.

⁷⁸⁶ Museum of Australian Democracy, ‘Commonwealth Franchise Act 1902’, *Documenting a Democracy*, <http://foundingdocs.gov.au/item-sdid-88.html>.

appeared in Queensland's *Aliens Act 1861* which barred such people from naturalisation.⁷⁸⁷ While this expression may have been intended originally as a racially qualified description of people who were 'aliens' under the law, it quickly became a redundant or repetitive phrase, referring to those classified from the perspective of Anglo-Celtic colonisers as the 'aliens' or the 'Other' in a racial sense, namely people of non-European race, especially and most particularly Chinese settlers and workers, regardless of their actual legal status.⁷⁸⁸ In the *Mineral Lands Act 1882* the Queensland Parliament prohibited 'Asiatic or African aliens' from holding mining licenses or engaging in other mining work. As a report on parliamentary proceedings in *The Queenslander* indicated, however, this was not just a ban on non-British subjects of Asian or African origin:

The adoption of this clause is significant, as showing that legal means can be taken to prevent the competition of *Chinese and other Asiatics* with our own working men, and to confine *coloured labour* to specified callings in which cheap labour will be advantageous to the community in general without being injurious to any class or member of it.⁷⁸⁹

In 1886 South Australia and Western Australia borrowed language from Queensland for their own mining legislation. Under the *Gold Mining Act 1886* (SA), an 'Asiatic alien' could not work on any newly discovered goldfield in South Australia.⁷⁹⁰ Price notes that the aim of the law was to exclude 'Chinese miners' from new goldfields.⁷⁹¹ Similarly, after gold was discovered in its northern Kimberley region, Western Australia enacted the *Goldfields Act 1886* (WA) which excluded 'Asiatic and African aliens' from newly discovered goldfields for 5 years.⁷⁹² According to Price, it was 'clear that, as in Queensland, most colonists were

⁷⁸⁷ Unless the person was married and had resided in the colony for three years, and was accompanied by his wife at the time of naturalisation.

⁷⁸⁸ As Evans, Saunders and Cronin note, the prohibition on naturalization of 'Asiatic or African aliens' was retained in Queensland's consolidated *Aliens Act 1867*, and 'became the legitimization for future discriminatory anti-Chinese legislation'. Evans, Saunders and Cronin, above n 170, 249. While the word 'alien' was not defined in the 1867 Act, the statute appeared to discriminate between 'aliens' in a legal sense with different ethnic backgrounds. Section 5 allowed 'any alien being a native of an European or North American state and not being an alien enemy' to become a naturalised British subject, while section 6 restricted 'Asiatic or African aliens' from becoming naturalised. However, as Queensland census data from this period indicates, colonial authorities did not appear to distinguish between Asian and African settlers according to whether they were 'subjects' or 'aliens' under the law (see Chapter Two).

⁷⁸⁹ 'The Mineral Lands Bill', *Queenslander* (Brisbane), 12 August 1882, 208. Emphasis added.

⁷⁹⁰ Sections 3 and 5.

⁷⁹¹ Charles Price, *The Great White Walls are Built*, above n 165, 183.

⁷⁹² Sections 3 and 8.

worrying very little about Malays, Indians or Africans and were concentrating almost entirely on keeping out “Chinamen and Mongolians” .⁷⁹³

South Australia and the *Northern Territory Mining Act 1903*

As discussed in Chapter Two, the importation of Chinese workers for mining projects and railway construction in the Northern Territory in the 1880s caused anxiety amongst Anglo-Celtic political establishments elsewhere in Australia, prompting the South Australian government to organise the 1888 inter-colonial ‘Conference on the Chinese Question’ and leading to colonial legislation further restricting the entry of Chinese settlers. After federation, South Australia continued to administer the Northern Territory until responsibility was transferred to the Commonwealth on 1 January 1911.⁷⁹⁴

In 1903, South Australia passed the *Northern Territory Mining Act* consolidating seven existing statutes about mining in the Northern Territory into a single new law.⁷⁹⁵ Section 21 prohibited ‘Asiatic aliens’ from working on any new goldfield, stating that:

No miner’s right shall be issued to any *Asiatic alien* for working on any new goldfield, nor shall any *Asiatic alien* work any new goldfield: Provided that this section shall not apply to any goldfield of which the first discoverer was an *Asiatic alien*.⁷⁹⁶

Under section 144, any ‘Asiatic alien’ found mining on a new goldfield could be removed by order of a warden, fined ten pounds and imprisoned for a month ‘with or without hard labor’. Other provisions prevented ‘Asiatic aliens’ from obtaining or having any interest in a mining lease⁷⁹⁷ and limited the areas in which such people could exercise any of the normal rights or privileges granted to miners.⁷⁹⁸ There was no definition in the Mining Act of ‘Asiatic alien’ but a note in the legislation made it evident who was caught by this term. Section 17 stipulated that ‘All miners’ rights, except those issued to *Asiatic aliens*, shall be available for the whole of the Northern Territory’. An explanatory side note said ‘Miner’s right to

⁷⁹³ Charles Price, above n 165, 182, citing Western Australia, *Parliamentary Debates*, 21 September 1885, 365-6. See also Anne Atkinson, *The Socio-Economic Experience of Chinese Sojourners in Perth, Western Australia, 1900-1920* (BA Honours thesis, Murdoch University, 1984) 57. Neither Price nor Atkinson analyse who lawmakers meant by the phrase ‘Asiatic or African aliens’, including whether the word ‘alien’ was used in its racial or correct legal sense.

⁷⁹⁴ The Northern Territory was transferred to the Commonwealth under the *Northern Territory (Administration) Act 1910* (Cth).

⁷⁹⁵ South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 9 September 1903, 111.

⁷⁹⁶ Emphasis added.

⁷⁹⁷ Section 50.

⁷⁹⁸ Section 19.

European available’, making it clear that an ‘Asiatic alien’ was simply a person of non-European racial background.

The Mining Act was initiated as a private member’s bill, supported by the South Australian Government.⁷⁹⁹ The member in the House of Assembly responsible for drafting the bill, Mr Herbert, was complimented on the clarity of the legislation.⁸⁰⁰ The main debate on the new law occurred in the Legislative Council where the restrictions on ‘Asiatic aliens’ were the key issue. However, there was no discussion about who might properly be covered by that phrase if the correct legal interpretation was applied. The established use of the term ‘alien’ in a racial sense meant both supporters and opponents of the bill assumed, in ignorance of the common law, that the word referred not to non-British subjects but merely to people of non-European origin. They all accepted without question use of the racially descriptive phrase ‘Asiatic alien’ as appropriate in the legislation.

The debate in the Legislative Council focussed on the benefits or otherwise of using coloured labour in the Northern Territory’s tropical climate. Supporters of the restrictions on ‘Asiatic aliens’ cited a report by Mr J.V. Parkes, former Inspector of Mines for South Australia,⁸⁰¹ ‘who had lived in the Territory and knew the conditions there obtaining’, which said that a chief cause of the failure of the mining industry in the Northern Territory was the ‘unwise introduction of a low type of Chinese by the Government, and subsequent permission to them to mine on their own account’.⁸⁰² The Parkes report said that the Chinese ‘have been allowed to take out miners’ rights and to hold mining leases, and they are now practically in possession of the gold mines of the Northern Territory’.⁸⁰³ Mr Bice, later Minister for the Northern Territory,⁸⁰⁴ agreed with the Parkes report, stating that:

Another prolific cause of the downfall of mining was the granting of leases to *Asiatics*. It was well known that *aliens* would not work below water level, or that they could not be induced to

⁷⁹⁹ South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 19 August 1903, 77.

⁸⁰⁰ *Ibid* 2 September 1903, 95; 9 September 1903, 111.

⁸⁰¹ ‘Farewell To Mr. J. V. Parkes’, *Chronicle* (Adelaide) 16 November 1895, 19.

⁸⁰² South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 17 September 1903, 130.

⁸⁰³ *Ibid*.

⁸⁰⁴ Maryanne McGill, ‘Bice, Sir John George (1853–1923)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/bice-sir-john-george-5229/text8801>.

develop properties systematically. In every case where the free gold was worked out and water was struck the *Asiatics* stopped further development.⁸⁰⁵

According to both the Parkes report and Legislative Council member Mr Lewis, the Chinese labourers in question were recruited from Singapore in the mid-1890s to work in Territory goldmines.⁸⁰⁶ Any person born in the British colony of Singapore was, of course, a British subject and not an ‘alien’ under the law applying in Australia in 1903.

Opponents of the bill said the restrictions on ‘Asiatic aliens’ excluded ‘the only class of labor that could work in such a climate, so making failure inevitable’.⁸⁰⁷ As Mr Riddoch observed:

It was admitted by all intelligent people that white races could not work in the tropics...the Bill contained too many restrictions on the only people suited for working in those parts of the Northern Territory where gold had been discovered...All agreed that in the richest and most valuable parts of the Northern Territory white men could not do regular manual labor, more particularly in the open, and that much of the land granted would on that account be of no value.⁸⁰⁸

Mr Riddoch called for the restrictions on ‘Asiatic aliens’ to be lifted to allow the employment of Australia’s ‘Indian fellow subjects’, saying he hoped the Parliament ‘might be able to remove some of the disabilities placed by the Bill upon the employment of Indian or other colored labor’.⁸⁰⁹ Mr Brookman agreed, stating that ‘advantage should be taken of alien labor on new [gold]fields as well as on old ones’, asserting that ‘No matter how many aliens might be employed there would still be sufficient work for white men’. Therefore he asked:

In the Northern Territory why could they not avail themselves of the labor they could get in India...They could employ a large number of the best class of Indians in the Northern Territory under engagement. He was quite against allowing them to overrun the country, but was prepared to take the responsibility of introducing a certain number to do work under proper supervision. Nature intended that the black man should work in the tropics.⁸¹⁰

Under the common law, Indian ‘fellow subjects’ were, by definition, not ‘aliens’. If the phrase ‘Asiatic alien’ in the Mining Act had been understood with its correct legal meaning – i.e. a non-British subject of Asian ethnic origin – there would have been no need for Mr Riddoch and Mr Brookman to call for amendments allowing British Indians to be engaged for mining work in the Northern Territory.

⁸⁰⁵ South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 19 August 1903, 77. Emphasis added.

⁸⁰⁶ *Ibid* 16 September 1903, 126; 17 September 1903, 130.

⁸⁰⁷ *Ibid* 16 September 1903, 125.

⁸⁰⁸ *Ibid* 126. For anxieties about the capacity of white settlers to live and work in tropical Australia, see Anderson, *The Cultivation of Whiteness*, above n 214, 82-83, 121-124.

⁸⁰⁹ South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 16 September 1903, 126.

⁸¹⁰ *Ibid* 2 September 1903, 96.

Both supporters and opponents of the legislation, however, thought an ‘Asiatic alien’ included anyone regarded by the Anglo-Celtic establishment as an ‘alien’ in a racial sense; in other words any non-European, whatever their actual legal status and even if they had been born in a British colony or dominion as a subject of the Crown. Mr Lucas, for example, said that ‘in the name of common humanity he objected to the drastic provisions against aliens such as those introduced in the Bill’, urging that ‘the clauses dealing with aliens should either be eliminated from the Bill altogether, or be modified’. He even quoted the statement by Secretary for the Colonies Joseph Chamberlain that imperial authorities had ‘always objected, both as regards aliens and as regards British subjects, to specific legislative discrimination in favour of or against race and color’.⁸¹¹ But Mr Lucas showed no awareness of the difference under the common law between a British subject and an alien. When objecting to clause 17 of the Bill, which restricted the coverage of a miners’ right issued to an ‘Asiatic alien’, Mr Lucas noted that ‘a man who was a natural born subject of his Majesty’ could buy one miners’ right covering all districts in the Northern Territory but that a miners’ right issued to ‘a man...of a little darker hue’ covered one district only.⁸¹² For Mr Lucas, therefore, a ‘natural born subject’ was someone who was not of a ‘little darker hue’. There was no understanding on his part that a person of a ‘little darker hue’ might be a natural born British subject and not an ‘Asiatic alien’ if that term had been correctly interpreted according to the law.

Mr A.A. Kirkpatrick and his Labor Party colleague Mr R. S. Guthrie strongly disputed the claim that coloured labour was required in the tropics and said the restrictions in the Mining Act on ‘Asiatic aliens’ would protect the interests of the white working man. Mr Kirkpatrick noted that his opponents wished to prevent ‘Asiatic aliens’ owning or leasing mines but would allow European mine owners to employ such people for the actual mining work. Mr Lucas, he said, ‘wanted to allow the Chinaman to compete with the white laborer, but to prevent the Celestial from competing with the white capitalist’.⁸¹³ ‘How could it be in favor of the European’, asked Mr Kirkpatrick, ‘when blackfellows and Chinamen competed against

⁸¹¹ Ibid 26 August 1903, 84. See full quote from Chamberlain above n 134.

⁸¹² Ibid 7 October 1903, 188.

⁸¹³ Ibid 30 September 1903, 168.

him, and accepted a fourth of the wages of the white?’⁸¹⁴ Mr Guthrie (Secretary of the South Australian branch of the Federated Seamen’s Union of Australasia)⁸¹⁵ said:

The whole object of Mr Lucas was to bring the white man into competition with the Chinese so as to bring down wages; but under no circumstances to allow a Chinaman to enter into competition with a capitalist.⁸¹⁶

After Mr Riddoch admitted that he would not ‘allow the aliens to own the mines’,⁸¹⁷ Mr Guthrie declared:

Mr Riddoch had said that he would not favor [sic] black men owning the mines, and that translated meant, “Don’t interfere with me as a capitalist; use the blackfellow as much as you like to compete against the white laborer, so long as you don’t touch me”. Was there any logic in that?⁸¹⁸

Mr Guthrie said that in his own practical experience:

...a white man could always work wherever a black man could. He had worked in Bombay and Rangoon, and had humped bags of rice alongside the nigger...The only reason why black labour was suitable in the Northern Territory was because it was cheap, and being cheap it was nasty...Australia was a grand country, and let them keep it white. Mr Riddoch wanted aliens to come here for a while, and then to turn them adrift...A white Australia would ever have his advocacy, and he would not support any measure which would make the Commonwealth any blacker than it was.⁸¹⁹

Mr Guthrie objected to the presence of ‘Asiatics’ anywhere in Australia, even in sparsely settled areas such as the Northern Territory:

White men would settle the country, but Asiatics never, and even if they did of what value were they to the community? If the Northern Territory was to be settled it must be by a population that would assist the producer, and not be parasites.⁸²⁰

The above extracts indicate that lawmakers in the South Australian parliament believed the restrictions on ‘Asiatic aliens’ in the Northern Territory Mining Act applied to all persons of non-European background, including, to use their words, a ‘low type of Chinese’, ‘Chinamen’ and ‘Celestials’; ‘Asiatics’ and men ‘of a little darker hue’; ‘niggers’, ‘blackfellows’, ‘black men’ and ‘black labour’; and even ‘Indian fellow subjects’.⁸²¹ The debates show that parliamentarians routinely used the term ‘alien’ as shorthand for people described in this way.

⁸¹⁴ Ibid.

⁸¹⁵ Soon to be Senator in the Federal Parliament. ‘The Senate Election’, *Advertiser* (Adelaide), 10 December 1903, 8.

⁸¹⁶ South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 30 September 1903, 168.

⁸¹⁷ Ibid 16 September 1903, 125.

⁸¹⁸ Ibid 128.

⁸¹⁹ Ibid.

⁸²⁰ Ibid 30 September 1903, 169.

⁸²¹ As some of these terms indicate, and as the side note to section 17 explains, it appears that the restrictions on ‘Asiatic aliens’ were not intended to apply merely to those of Asian ethnic origin.

The record of debate in the Legislative Council also shows that discourse about aliens at the federal level contributed to misuse of the term ‘alien’ in State legislation such as the Northern Territory Mining Act. Mr Bice, who moved the second reading of the Mining Act in the Legislative Council,⁸²² reminded his colleagues that the Act complemented restrictions on ‘coloured aliens’ enacted by the new Federal Parliament:

The 19th subsection of the Commonwealth Act, which dealt with colored labor, and the Alien Restriction Act, had apparently been forgotten by members...If aliens were shut out from the Territory [under the ‘Alien’ Restriction Act]...then it was only fair to put restrictions on those already there...⁸²³

Mr Bice therefore repeated the misdescription of the Commonwealth’s *Immigration Restriction Act 1901* as the Alien Restriction Act (consistent with the intention behind the federal law to prevent ‘coloured aliens’ entering Australia). Mr Bice also referred to the ‘aliens power’ in section 51(xix) of the Commonwealth Constitution, stating (wrongly) that it dealt with ‘colored labor’, considering this relevant to the debate on the new mining legislation. This is in line with Quick and Garran’s 1901 constitutional commentary indicating incorrectly that section 51(xix) would allow the Federal Parliament to exclude Chinese settlers, whether or not they had subject status, ‘from working in mines’.⁸²⁴

The restrictions on ‘Asiatic aliens’ in the Northern Territory Mining Act were intended to apply to all non-Europeans and were imposed by lawmakers in the South Australian parliament in ignorance of the proper legal meaning of the term ‘alien’. A similar approach was taken after transfer of the Northern Territory to the Commonwealth at the beginning of 1911. Section 10 of the Commonwealth’s *Tin Dredging Ordinance 1911*⁸²⁵ declared that in the Northern Territory ‘No tin dredging lease shall be granted to any *Asiatic alien*, and no *Asiatic alien* shall be entitled to acquire or hold any tin dredging lease or any interest therein’.⁸²⁶ This provision remained part of Commonwealth law until 1963.⁸²⁷ In contrast,

⁸²² South Australia, *Debates in the Legislative Council during the second session of the seventeenth Parliament of South Australia*, 19 August 1903, 76.

⁸²³ *Ibid* 16 September 1903, 129.

⁸²⁴ See Chapter Three.

⁸²⁵ Made under the *Northern Territory (Administration) Act 1910* (Cth), signed by the Minister of State for External Affairs.

⁸²⁶ In theory non-European British subjects could have challenged refusals to grant them a lease under section 10 of the Tin Dredging Ordinance on the basis that they were not ‘aliens’ in a constitutional (i.e. common law) sense and therefore could not validly be subject to a law made under section 51(xix) of the Commonwealth Constitution. However the Commonwealth could have argued that the laws were valid under section 122 which gave the Commonwealth Parliament ‘power to make laws for the government of any territory surrendered by any State’ (the ‘territories power’).

section 11 of the *Pearling Ordinance 1930* (directed at employment of Japanese indentured labourers in the pearling industry in the Northern Territory) provided that:

A licence other than a diver's, diver's tender's or pearl dealer's licence shall not be granted, transferred or renewed to or in favour of any person who is not a natural-born or naturalized British subject.

On its terms, this section contained no express discrimination. However an official list of restrictive legislation prepared by the Prime Minister's Department said that under the Pearling Ordinance, 'No *Asiatic alien* is entitled to a licence to deal in pearls and mother of pearl shells'.⁸²⁸ Despite its non-discriminatory wording,⁸²⁹ therefore, federal officials assumed the Pearling Ordinance imposed restrictions on the same people that the Mining Act and Tin Dredging Ordinance did, namely 'Asiatic aliens' - in other words, all those with an Asian background, whether or not they had British subject status. Other Commonwealth regulations for the Northern Territory continued to impose explicit discrimination. Under section 6 of the Gold Buyers Ordinance 1935, for example, a gold buyer's licence could be issued only 'to a bank or to any person of European race or extraction'.

Western Australia and the *Firearms and Guns Act 1931*

After South Australia enacted the Northern Territory Mining Act, in 1904 Western Australia also introduced new mining legislation, preventing 'Asiatic or African aliens' obtaining a Miner's right or having any interest in such a right. The prohibition also applied to 'persons of Asiatic or African race, claiming to be British subjects', unless they obtained the Minister's approval.⁸³⁰ As the Prime Minister's Department later commented, 'As a matter of policy, the Minister has not agreed to the issue of mining rights to Asiatics for many years'.⁸³¹ As the following example shows, three decades later the same statutory formula was still being used for exclusionary legislation in Western Australia.

⁸²⁷ Northern Territory, *Historical Chronological Table 1911 To 1960, Acts And Ordinances Enacted Or Made 1 January 1911 – 31 December 1960*, <http://notes.nt.gov.au/dcm/legislat/legislat.nsf>.

⁸²⁸ E L Piesse (Director Pacific Branch, Prime Minister's Department), *Rights and disabilities of aliens in Australia 1920–42* (National Archives of Australia, Series A 432, Item No. 1960/3142, Attorney-General's Department) 85, 142. Emphasis added.

⁸²⁹ The side note to section 11, accurately reflecting the common law and section 5 of the *Nationality Act 1920*, explained the effect of the provision as 'Certain licenses not to be granted to aliens'.

⁸³⁰ *Mining Act 1904* (WA), sections 23 and 24. This legislation was still in force in Western Australia in 1964.

⁸³¹ E L Piesse (Director Pacific Branch, Department of Prime Minister), *Disabilities of Aliens and Coloured Persons within the Commonwealth and its Territories* (National Archives of Australia, Series A1, Item No. 1921/13034) 3, 4.

Amongst the many discriminatory laws passed by the Australian States before World War Two, one of the most bizarre was Western Australia's *Firearms and Guns Act 1931*. Section 8(3), which remained in force until 1971,⁸³² stated that:

No Asiatic or African alien or person of Asiatic or African race *claiming to be a British subject* shall hold a license under this Act, unless with the express consent of the Commissioner of Police, who may in his absolute discretion withhold such consent... Provided that this paragraph shall not apply to any person of the Jewish or Lebanese races.⁸³³

Leaving aside the exemption for people of the 'Jewish or Lebanese races',⁸³⁴ it is plain that section 8(3) aimed to prohibit all people with an Asian or African background from possessing a firearms licence. As the Minister for Police explained when the new law was debated in the Legislative Assembly of Western Australia, 'if there is anyone on earth who ought to be prevented from carrying weapons concealed on his person it is the Asiatic or the man of Asiatic temperament'.⁸³⁵ Mr Marshall from the Murchison electorate objected, saying that he did not know why 'only African and Asiatic aliens are precluded' and not 'other foreigners who are still more highly-strung and more in the habit of using firearms'.⁸³⁶ As he said:

...there are in Broome and along the North-West coast Asiatics, principally of Chinese origin, *who have been naturalised* and are carrying on big business, and have shown themselves worthy citizens in every sense. But such Asiatics would not be eligible for licenses needed to protect their lives or property.⁸³⁷

According to the Minister, however:

⁸³² This provision was repealed by the *Firearms and Guns Act Amendment Act 1971* (WA).

⁸³³ Emphasis added.

⁸³⁴ Apart from an inappropriate use of the word 'alien', the exemption for 'any person of the Jewish or Lebanese races' in section 8(3) shows additional confusion between religious and racial distinctions. When debating the legislation in the Legislative Assembly of Western Australia in June 1931, the Hon M.F. Troy noted that the exemption 'will have a wide application because the Jews are not a nation but a sect. We find Jews amongst the Chinese races and among the Africans'. The Minister for Police explained that 'it has been customary to exclude members of the Jewish race because they are British subjects' (resulting, according to the Minister, from the mandate over Palestine granted to Great Britain by the League of Nations after World War One). He went on to say that such people required an exemption 'because they are Asiatics'. When pressed again by the Hon. A. McCallum, who demanded 'Why exempt the Jews?', the Minister responded emphatically that 'They are the chosen people!' It was Mr Troy who proposed that the 'Lebanese' (sic) also be exempt, because, as he said, 'the people of that race are highly cultured and we have some in business in the city'. Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 June 1931, 3478-79. A similar exemption was provided for 'persons of the Jewish race' in a 1922 amendment to the *Licensing Act 1911* (WA) which barred people 'of Asiatic race' from employment in any premises licensed for the sale of liquor, except in the North Province of Western Australia.

⁸³⁵ Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 June 1931, 3474.

⁸³⁶ Ibid 3468.

⁸³⁷ Ibid 3469.

... the member for Murchison misunderstands the temperament of Asiatics...The hon. member has been so much among them that he does not understand them. If he had stood further off from them he would have been able to see them with a better comprehension.⁸³⁸

Since, as the Minister made clear, the legislation was intended to prevent all Asians (and Africans) from owning a gun, the question arises as to why section 8(3) did not simply prohibit all persons ‘of Asiatic or African *race*’ from holding a firearms license, avoiding the need to use the word ‘alien’. The answer appears to be that those with an Asian or African background were regarded not merely as ‘from another race’ but were seen, because of their race, as ‘outsiders’ or ‘foreigners’, as people who were ‘not one of us’ from the perspective of white Australian society during this period. Hence use of the word ‘alien’ with its normal or ‘racial’ meaning - *a person belonging to another family, race, or nation; a stranger, a foreigner* - matched the perception that those of Asian or African race were ‘strangers’ or ‘foreigners’ who did not ‘belong’ in European dominated Australian society at the time.

The wording of section 8(3) indicates an understanding of the distinction between an ‘alien’ (in the legal sense of the word) and a ‘British subject’ (or ‘non-alien’). It suggests a fear on the part of Western Australian lawmakers that Asians or Africans who were British subjects by birth or naturalisation might avoid any prohibition directed at ‘aliens’ by asserting their status as ‘non-aliens’. So for good measure the provision expressly prohibited ‘any person of Asiatic or African race *claiming to be* a British subject’ from owning a firearm without the consent of the Police Commissioner.

However any suggestion that the phrase ‘Asiatic or African *alien*’ in section 8(3) of the Firearms and Guns Act merely referred to an ‘alien’ in the legal sense is countered by section 4(2) which declared that ‘*The Act...shall apply...to any person who is an Asiatic or African alien, or who is an Asiatic or African alien claiming or deemed to be a British subject*’.⁸³⁹ Under Australian law at least until 1949 any person ‘deemed to be a British subject’ could not by definition be an ‘alien’ in the legal meaning of the word. So section 4(2) only makes sense if Western Australian lawmakers intended the word ‘alien’ to be used with its normal or ‘racial’ meaning.⁸⁴⁰ The provision then refers to people regarded by the

⁸³⁸ Ibid 3474.

⁸³⁹ Emphasis added. This provision remained unchanged until 1966 when it was repealed by the *Firearms and Guns Act Amendment Act 1966* (WA).

⁸⁴⁰ According to the record of parliamentary debates, the last phrase of s 4(2) originally read ‘or who is an Asiatic or African claiming or deemed to be a British subject’. One parliamentarian suggested that the phrase refer to ‘an Asiatic or African *aboriginal*’, which - while still proposing a racist application of the Act - would at least have made legal sense. Instead the final wording referred to

dominant Anglo-Celtic community in Australia during this period as ‘from another race’, in this case all those with an African or Asian background, even if they claimed to be or actually were British subjects. Under section 4(2), therefore, the Firearms and Guns Act applied to all those regarded as ‘aliens’ in the normal or ‘racial’ meaning of the word because they were of Asian or African race, even if they were British subjects and not ‘aliens’ in a legal sense at all. As the Minister for Police said, the Act ‘excludes them *even though they are naturalised*’.⁸⁴¹

Mr Marshall summed up the effect of the legislation:

Even though the Asiatic applying for the license be a *naturalised subject*, if the Commissioner thinks he is not a fit and proper person to hold the license, the Commissioner may refuse him a license, and there is no appeal...So a *Chinese born in Australia*, no matter how successful he may be in business, no matter what property he may have, he will not be permitted to take out a license...it is altogether too drastic to declare that a boy *born of Chinese parents* in this country may be denied a gun license by the Commissioner of Police.⁸⁴²

As indicated by this extract, parliamentarians such as Mr Marshall seemed to think a ‘Chinese born in Australia’ was a ‘naturalised’ subject. More importantly, the comments from the Minister and Mr Marshall again show the prevailing attitude amongst lawmakers in Australian parliaments that non-Europeans such as the Chinese had to be ‘naturalised’ to be regarded as subjects, even if they were born in Australia or another British territory and had no need under the common law to undergo any such process to become subjects of the Crown. Moreover, as section 4(2) shows, even those whose status as subjects was accepted (those ‘deemed to be British subjects’) were still regarded and treated as ‘aliens’ (whether they were ‘naturalized’ or ‘natural-born’).⁸⁴³

‘White aliens’

As well as ‘Asiatic or African aliens’, ‘coloured aliens’ and ‘alien races’, another label used by Australia’s Anglo-Celtic community was the term ‘white alien’. This was mainly applied to settlers from southern Europe but was also employed as a derogatory description of ‘undesirable’ ‘non-Aryan’ immigrants from other parts of the continent. The first references

an ‘Asiatic or African *alien*...deemed to be a British subject.’ Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 June 1931, 3477. Emphasis added.

⁸⁴¹ Ibid 3468. Emphasis added.

⁸⁴² Ibid 3470. Emphasis added.

⁸⁴³ This was contrary to the definition of ‘alien’ in section 5 of the Commonwealth *Nationality Act 1920* and the legislation could have been challenged on that basis under section 109 of the Constitution.

in Australia to ‘white aliens’ appeared in the early 1870s,⁸⁴⁴ but it was more commonly used after federation. An editorial on ‘The Alien Question’ published in many papers across eastern Australia in 1902 stated that:

We know at any rate the danger of permitting a large influx of people, alien to ourselves not merely in color, but in thought, traditions, religions, and the aspirations and moral impulses of our race. Now any steps that the Federal Government may take to secure a ‘white Australia,’ must mean the exclusion of Chinese and Japanese. It must also involve the perplexing dilemma of the exclusion of British subjects; for as matters stand the Hindoo trader and the Sikh hawkers have as much legal right to be here as any other British subject... the white man has this just grievance that, while he spends what he earns, and so disseminates his gains among his fellows, the other fellow—the pariah and *alien*—holds on to his money with the grip of a cuttlefish. But the same argument can be advanced against the *white aliens* who now infest our society. The Greek and the Italian, the Russian and Polish Jew subsist under conditions which would appal a Chinaman or a Japanese. And our contention is that if we bar the one we ought to keep out the other.⁸⁴⁵

In a 1925 editorial entitled ‘The Alien Within Our Gates’, the *West Australian* noted that amendments to the Immigration Restriction Act had been introduced in federal parliament providing ‘power ...to deport, in certain eventualities, *white aliens*, who are, or who are expected to become, a menace to the well-being and safety of the Commonwealth’. The paper observed that the new law was:

...plainly aimed at the Communist, whose spiritual home is Soviet Russia, where, although the Communists are but a handful of three or four hundred thousand in a population of 150,000,000, their commissaries, a narrow oligarchy, rule the land with a rod of iron.⁸⁴⁶

In 1928 Sir Neville Howse, the Federal Minister for Home and Territories, described as the Minister responsible for ‘alien’ migration, said that the 1925 changes to the Immigration Restriction Act had allowed the Commonwealth Government to respond to a ‘marked increase in the migration of Southern Europeans’ by limiting the number of visas issued to such people. He commented generally that:

... in the light of the situation which the United States of America and South Africa are facing to-day, one cannot but extol the sagacity of that great statesman the late Sir Henry Parkes, in declaring for a White Australia policy.⁸⁴⁷

Sir Neville said that the number of visas had been reduced for ‘Greeks, JugoSlavs and Albanians’ as well as for ‘Poles, Estonians and Czecho-Slovaks’, adding that ‘other *white alien* nationals, such as Russians, Syrians and Palestinians, are required both to possess the

⁸⁴⁴ See eg *Evening News* (Sydney) 12 July 1872, 2.

⁸⁴⁵ *Evelyn Observer, and South and East Bourke Record* (Victoria) 28 February 1902, 3; *Braidwood Dispatch and Mining Journal* (Braidwood) 17 May 1902, Supplement 2; *Muswellbrook Chronicle* (Muswellbrook) 17 May 1902, 5; *Murrurundi Times and Liverpool Plains Gazette*, 17 May 1902, 3. Emphasis added.

⁸⁴⁶ ‘The Alien Within Our Gates’, *West Australian* (Perth) 29 June 1925, 6. Emphasis added.

⁸⁴⁷ ‘The Migration Position’, *Cairns Post* (Cairns) 8 November 1928, 11.

prescribed landing money of £40 and to obtain from the Minister permission to enter Australia'. On the other hand, he said, 'no specific numerical restriction is placed on Scandinavians, French and Germans; they are regarded as desirable types of immigrants, they are readily assimilable and they have not been coming here in large numbers'.⁸⁴⁸

As with the term 'coloured alien', whether groups of people were included in the phrase 'white alien' was defined largely by their (un)desirability in the eyes of Anglo-Celtic society rather than by their legal status as non-British subjects. As Langfield says, the very term 'white aliens...must have been invidious to those to whom it was directed, mainly Italians, Greeks, Yugoslavs and Poles'.⁸⁴⁹ Even used as a general non-legal description, however, the label 'white aliens' was imprecise, with the nationalities referred to above more accurately coming within the description of '*non-Aryan* aliens'. But unlike many of the Australian residents labelled as 'coloured aliens', those called 'white aliens' *were* (with little exception) 'aliens' under the law applying in Australia. So whilst 'white alien' was employed as a derogatory description of settlers regarded as 'undesirable' (or at least less desirable than 'Aryan' northern Europeans), the people described in such a way were not wrongly regarded and treated *under the law* as 'aliens'. The fact that the term 'white alien' was at least a correct legal description - with the exception being the Maltese⁸⁵⁰ - of 'white' people who were not British subjects, reinforces the conclusion that the real meaning of 'alien' in a legal sense was appreciated by many Anglo-Celtic lawmakers and to some extent within white Australian society generally but was simply ignored when it came to non-European settlers, who were all more or less classed as 'coloured aliens' even if they were British subjects and not 'aliens' at all under the common law.

Conclusion: entrenched misuse

This chapter has shown how deeply entrenched misuse of the word 'alien' was in Australian lawmaking after federation. The new Commonwealth parliament thought the dictation test under the Immigration or 'Alien' Restriction Act would ensure the exclusion of 'coloured aliens'. Under the Naturalization Act, the process for transforming an 'alien' into a British subject was closed to those regarded as 'aliens' in a racial or non-legal sense. People labelled as 'coloured aliens' but who were natural-born subjects of the Crown were denied voting and

⁸⁴⁸ *Western Argus* (Kalgoorlie) 23 October 1928, 15. Emphasis added.

⁸⁴⁹ Langfield, 'White aliens', above n 206, 4.

⁸⁵⁰ Discussed in Chapter Six. See p 234 and n 1085.

other rights that should have accompanied their formal legal status. At the State level a vast number of acts, regulations and ordinances treated ‘coloured aliens’ differently, reinforcing the perception that they were ‘different’, the ‘outsiders’ or not ‘one of us’.

The parliamentary debate on South Australia’s *Northern Territory Mining Act 1903* showed no understanding on the part of lawmakers as to which persons of Asian ethnic origin would be covered by the term ‘Asiatic alien’ if that phrase was applied with its correct legal meaning. Chinese mine workers from Singapore, many if not all of whom would have been British subjects, as well as potential recruits from British India (correctly described as ‘Indian fellow-subjects’) were wrongly assumed by parliamentarians to be caught by the restrictions in the new law. While lawmakers in Western Australia appeared to appreciate the legal meaning of ‘alien’, they chose to disregard this, instead using the phrase ‘Asiatic or African alien’ - as section 4(2) of the *Firearms and Guns Act 1931* shows - in its non-legal, ‘racial’ sense. That Act demonstrated that those thought of as ‘alien’ in the normal or racial meaning of the word could be caught by this term when they would not have been subject to the legislation if the word was applied in a strict legal sense. It also showed that the word ‘alien’ was particularly useful for legislators of the day because, unlike a phrase such as ‘people from another race’, it incorporated the idea of ‘foreignness’ or ‘otherness’, matching the attitude of ‘White Australians’ towards non-European residents of the new Commonwealth.

The South Australian and Western Australian legislation shows how the term ‘alien’ was used in State laws to refer not only to ‘foreigners’ in a formal legal sense, i.e. citizens or subjects of another nation or country, but also to those seen as ‘foreigners’ or ‘outsiders’ merely in the sense of ‘not belonging’ or ‘being different from’ mainstream society of the day. As this thesis has shown, employment of the word ‘alien’ to refer to non-Europeans was part of the established discourse amongst the Anglo-Celtic establishment about who ‘belonged’ in Australia. Those who were regarded, because of colour and/or labour racism, as not ‘belonging’ in white Australia were referred to as the ‘aliens’ (amongst other descriptions). Settlers who were of Chinese origin became a particular target. From the perspective of an Anglo-Celtic society focussed on issues of race and colour it may have been accurate linguistically (but not legally) to describe those of a different racial or ethnic background as ‘aliens’. However, had key Anglo-Celtic political and legal figures focussed on factors of similarity not difference – for example, a shared commitment to building the institutions and economy of a new Australia – settlers of non-European background may not have been labelled by white society in this way. Nevertheless, as these examples show,

because use of the word ‘alien’ in its racial sense was part of the accepted discourse in relation to non-Europeans in Australia, this racial use was incorporated into legislation, contrary to the law applying at that time.

The next chapter shows how the embedded misuse of the term ‘alien’ at the Commonwealth and State level resulted in a failure to apply the rule of law in the High Court of Australia. This was in relation to a key event in modern Australian history - the expulsion of Pacific islanders under the ‘naturalization and aliens’ power in section 51(xix) of the Constitution.

CHAPTER FIVE Pacific Islanders: the ‘alien’ deportation?

‘...any law which purports to give the minister the power to interpret who is an alien is certainly beyond the power of the Parliament...For centuries we have reined in executive power by imposing judicial oversight. It is called the rule of law’.⁸⁵¹

Pacific islanders and the rule of law

A further group targeted as ‘aliens’ in Australia was the Pacific islander or ‘Kanaka’ community. Their expulsion from Australia under one of the first Commonwealth statutes was a key element of the White Australia policy of the new federal government. In 1906 the High Court of Australia - comprising Chief Justice Sir Samuel Griffith and Justices Barton and O’Connor, all delegates to the 1890s constitutional conventions - upheld this expulsion as a valid use of the ‘aliens power’ in section 51(xix) of the Constitution.

Between 1863 and 1904⁸⁵² around 62,000 men, women and children were recruited from the islands of the South Pacific to work in Queensland. As Tracey Banivanua-Mar notes, they ‘labored for bonded periods of at least three years’, mainly in the burgeoning sugar industry.⁸⁵³ Price and Baker note some incompleteness and uncertainty in surviving Queensland records regarding the origins and numbers of islanders.⁸⁵⁴ However the records indicate that the majority came from the New Hebrides (now Vanuatu) with a large number also from the Solomon Islands and some from New Guinea as well as other islands in the South Pacific.⁸⁵⁵

As Clive Moore observes, while many ‘first-indenture labourers’ served out their three year contracts and returned to the islands, there was also a large proportion who ‘re-engaged without leaving Queensland’. Some became ‘ticket-holders’ on the basis of residency for five years or more.⁸⁵⁶ Figures tabled in the Queensland Legislative Assembly in 1877 show that

⁸⁵¹ Crispin Hull, ‘PM fails citizenship test’, *Canberra Times* (Canberra) 13 June 2015, Forum 2.

⁸⁵² Section 4 of the *Pacific Island Labourers Act 1901* (Cth) prohibited entry of Pacific islanders into the Commonwealth of Australia after 31 March 1904.

⁸⁵³ Banivanua-Mar, *Violence and Colonial Dialogue*, above n 146, 1.

⁸⁵⁴ Charles A Price and Elizabeth Baker, ‘Origins of Pacific Island Labourers in Queensland, 1863-1904: A Research Note’, (1976) 11(2) *Journal of Pacific History* 106, 106-107. Price and Baker note some confusion in published Queensland statistics about islands of origin. They also note that recorded numbers do not cover illegal entries, those who entered legally but not in connection with the labour trade or those recruited for work not covered by Queensland’s Polynesian Labourers Acts (such as the pearling industry).

⁸⁵⁵ *Ibid* 110-111; see also Patricia Mercer, *White Australia Defied: Pacific Islander Settlement in North Queensland* (James Cook University 1995) 33.

⁸⁵⁶ Clive Moore, ‘“Good-bye, Queensland, good-bye, White Australia; Good-bye Christians”’: Australia’s South Sea Islander Community and Deportation, 1901-1908’, (2000) 4 *New Federalist*

out of nearly 11,000 islanders who had arrived since 1868, less than half returned to their home islands.⁸⁵⁷ Moore notes that by the mid-1880s, ‘ticket-holders’ and re-engaging labourers comprised 40 to 60 per cent of the islander population, ‘in reality becoming a Melanesian segment of the general working class’. Many islanders ‘had substantial possessions and bank accounts. Some owned property and married outside’ the islander community. By the late nineteenth century, ‘the Islander elite had become colonists and were no longer short-term circular migrants in servile bondage’.⁸⁵⁸ According to Banivanua-Mar, ‘having established a core of permanently settled communities in Queensland, by the turn of the nineteenth century Islanders had also begun to establish familial links and ties to Queensland’.⁸⁵⁹

As Philip Griffiths says, ‘it was not just Chinese people who were judged incapable of assimilating’ in colonial Queensland. He notes this badge of exclusion was extended to Pacific islanders as well.⁸⁶⁰ As an editorial in the *Brisbane Courier* in 1880 said:

...they are *alien particles* intruded into our body politic, which cannot preserve its democratic character unless composed of individuals on whom there rests no bar of race or color that may operate to prevent them from mingling with the general body of citizens, exercising all their privileges and social opportunities.⁸⁶¹

This was another recurring theme in colonial and post-federation Australia: only those already regarded as equal could be admitted to a new democratic society built on egalitarianism and equality. Those of non-European race were, by definition, excluded.

Notwithstanding their established position in the Queensland community, Pacific islanders were routinely described as ‘aliens’, whether this was legally accurate or not. As Rockhampton’s *Morning Bulletin* observed in 1898:

The persistence of the Opposition extracted from the Government a census of the coloured population in the colony, exclusive of aborigines, and the result, which has just been presented to Parliament, is a little disquieting. The census was taken by the police, who found on the 31st of October last that there were 24,336 *coloured aliens* in the colony. If the word ‘alien’ was taken literally it may happen that there were considerably more coloured people in the colony on that date than the total given. But in all probability the police included all coloured people, *whether aliens or British subjects*, in their return. If the different races are taken, the Chinese

22, 23. A ‘ticket holder’ was a person registered under section 11 of the *Pacific Island Labourers Act Amendment Act 1884* (Qld) on the ground of continuous residence in Queensland for a period of not less than five years.

⁸⁵⁷ Queensland, *Official Record of the Debates of the Legislative Assembly, Fourth Session of the Seventh Parliament*, 22 May 1877, 53.

⁸⁵⁸ Clive Moore, ‘Good-bye, Queensland’, above n 856, 24.

⁸⁵⁹ Banivanua-Mar, *Violence and Colonial Dialogue*, above n 146, 115.

⁸⁶⁰ Griffiths, *The making of White Australia*, above n 155, 227.

⁸⁶¹ *Ibid*, citing *Brisbane Courier* (Brisbane) 29 October 1880, 2. Emphasis added.

come first with 10,004, the Pacific Islanders next with 8,428 and the Japanese third with 3,281.⁸⁶²

As this article indicates, in the same way that colonial census figures failed to identify the British subject status of many ethnic Chinese residents (see Chapter Two), the 1898 Queensland police census appears to have listed all ‘Pacific islanders’ as ‘coloured aliens’, whatever their actual status under the law.

This chapter begins by looking at the *Pacific Island Labourers Act 1901* which authorised the expulsion of Pacific islanders from Queensland, before turning to the legal status of the islander community in Queensland, noting protests that they ‘belonged’ as much as other groups. Apart from ‘natural-born’ islander children and married women with British subject status, many islanders came from British territory in the South Pacific. The chapter considers in particular the status of islanders from British protectorates. As a modern Australian case concluded, inhabitants of such protectorates were neither subjects nor aliens. The chapter also looks at evidence that even ‘islanders’ born in Queensland were wrongly categorised as ‘aliens’. Finally the chapter considers the High Court’s decision in *Robtelmes v Brennan* (1906),⁸⁶³ which upheld deportation of the islanders as ‘aliens’ and is still cited today to support far-reaching use of the ‘aliens power’ in Commonwealth legislation.

Pacific Island Labourers Act 1901

Soon after Pacific islanders first arrived in the 1860s, pressure from missionary societies forced the Queensland and Imperial governments to enact legislation to control kidnapping and other mistreatment.⁸⁶⁴ Abuses continued, however, and further protective laws were passed in the 1880s amid calls to end recruitment of islanders altogether.⁸⁶⁵ But the interest of plantation owners in a cheap source of tropical labour prevailed, with the islander workforce remaining important for the Queensland economy for the rest of the colonial era.⁸⁶⁶

⁸⁶² ‘The Coloured Population’, *Morning Bulletin* (Rockhampton) 20 December 1898, 5. Emphasis added.

⁸⁶³ (1906) 4 CLR 395.

⁸⁶⁴ *Polynesian Labour Act 1868* (Qld); *Pacific Islanders Protection Act 1872* (Imp); see Charles Price, *The Great White Walls are Built*, above n 165, 148-149; see also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1901, 5495 (Barton).

⁸⁶⁵ *Pacific Islanders Labourers Act 1880* (Qld), *Pacific Islanders Labourers Act Amendment Act 1884* (Qld). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1901, 5495 (Barton).

⁸⁶⁶ A. Douglas Graham, *The Life of The Right Honourable Sir Samuel Walker Griffith* (John Murtagh Macrossan Lecture, University of Queensland 1938) 43-44.

In December 1901 the new federal parliament enacted the *Pacific Island Labourers Act 1901* (Cth) as part of a ‘package of legislation which marked out the racial boundaries of the new nation’.⁸⁶⁷ The new law prohibited entry of ‘Pacific Island Labourers’ into the Commonwealth of Australia after 31 March 1904. Islanders without a current labour agreement found in Australia before the end of 1906 could be brought before a court of summary jurisdiction and deported. After that date they would be deported by the Federal Minister for External Affairs. A ‘Pacific Island Labourer’ included ‘all natives not of European extraction of any island except the islands of New Zealand situated in the Pacific Ocean beyond the Commonwealth’.⁸⁶⁸ There were a number of exemptions, including for ‘ticket-holders’ registered before 1 September 1884, ship crews and people with an exemption certificate under the Immigration Restriction Act.⁸⁶⁹

At the end of 1904, there were 7,879 islanders still in Queensland, of whom two-thirds were from the Solomon Islands, with the remainder mainly from the New Hebrides.⁸⁷⁰ Henry Reynolds estimates that 4,269 islanders were removed from Australia in 1906-07.⁸⁷¹ 1,654 islanders were granted exemptions allowing them to remain.⁸⁷² Banivanua-Mar observes that:

When the anti-islander sentiments that predominated in Queensland culminated at the turn of the nineteenth century in abolition and the compulsory deportation of Islanders, it was widely assumed that this simply meant a disconnected and temporary population would be returned to their homes. But for the bulk of the Islander population, deportation meant uprooting *settled communities* that had had a presence in Queensland for upwards of twenty years.⁸⁷³

Reynolds notes similarly that:

...the deportation was a traumatic event. Extended families were pulled apart with some members remaining in Queensland and others returning. Friendships were brought to an end. The rigidity of immigration policy and induced Islander poverty prevented the travel to and from Queensland that might have kept friendships alive and networks of kin viable.⁸⁷⁴

⁸⁶⁷ Museum of Australian Democracy, ‘Pacific Island Labourers Act 1901’, *Documenting a Democracy*, <http://foundingdocs.gov.au/item-sdid-86.html>.

⁸⁶⁸ Section 2.

⁸⁶⁹ After a Royal Commission instigated by the Queensland Government in 1906, the federal government agreed to broaden exemptions to include islanders who had lived continuously in Australia since 31 December 1886, the aged and infirm, islanders with children educated in State schools, owners of freehold land, all islanders married before 9 October 1906 to a partner not from their own place of origin and any islanders who could produce evidence they would be in danger if returned to their homeland. Moore, ‘Good-bye, Queensland’, above n 856, 28.

⁸⁷⁰ *Ibid* 27.

⁸⁷¹ Reynolds, *North of Capricorn*, above n 216, 180.

⁸⁷² Kay Saunders, ‘Pacific Islanders’, in James Jupp (ed), *The Australian People: An Encyclopaedia of the Nation, its People and their Origins* (Angus and Robertson 1988) 722, 725.

⁸⁷³ Banivanua-Mar, *Violence and Colonial Dialogue*, above n 146, 101. Emphasis added.

⁸⁷⁴ Reynolds, *North of Capricorn*, above n 216, 180.

As Moore suggests, Pacific islanders remaining in Queensland, who brought up families and owned land and other property, ‘belonged’ in a general sense as much as other settler groups. In addition, however, many islanders belonged legally because they were British subjects and not ‘aliens’ under the common law. But there was no exemption on this ground under the Pacific Island Labourers Act. As the Commonwealth Parliament was told in October 1901, the British subject status of some islanders would not save them from expulsion. Mr Higgins (later Justice Higgins of the Australian High Court) repeatedly asked: ‘Are there not some British subjects among the Pacific Island labourers?’⁸⁷⁵ Leader of the Opposition George Reid said basic principles would be infringed by the new law with regard to these ‘coloured aliens’ because the term ‘Pacific Island Labourer...will include any British subjects’. Reid said it had previously been accepted that ‘when a man of any colour gets beneath the British flag he is safe. Now, however, we must add the proviso - except he be black and born in the South Seas’.⁸⁷⁶

While there was no exemption for British subjects in the actual legislation, the legal status of Pacific islanders was a critical factor in their deportation. As discussed below, in 1906 the High Court of Australia declared that they were ‘aliens’ and that the Pacific Island Labourers Act could validly apply to them as a law ‘with respect to aliens’ under section 51(xix) of the Constitution.

Legal status of Pacific islanders

‘Natural-born’ children and married subjects

In response to the new legislation, a Pacific Islanders Association was formed which fought a ‘valiant, but futile battle against the 1901 Act’.⁸⁷⁷ According to Banivanua-Mar, the islander communities ‘protested hard and emphasised...their distinct identities...as Queensland South Sea Islanders’.⁸⁷⁸ Their protests noted in particular that many islander children had been born in Australia. A petition in 1902 to King Edward VII proclaimed that:

Many of us have been continuously resident in Queensland for upwards of twenty years...we love the land in which we live, and all our friends are here...Many of us have children, who for years have attended the State schools of Queensland and the Sunday schools. They are *free*

⁸⁷⁵ Commonwealth, *Parliamentary Debates*, 9 October 1901, 5829, 5830.

⁸⁷⁶ Commonwealth, *Parliamentary Debates*, 9 October 1901, 5831.

⁸⁷⁷ Clive Moore, ‘Good-bye, Queensland’, above n 856, 24, 28.

⁸⁷⁸ Banivanua-Mar, *Violence and Colonial Dialogue*, above n 146, 101. Emphasis added.

born, and we thought that we had attained at least such freedom as is enjoyed by other *coloured aliens* who came to Australia.⁸⁷⁹

In Rockhampton in 1903 some fifty islanders, ‘many of the number being children’, made a personal appeal to the Governor of Queensland. They were led by ‘a Kanaka of thirty years residence in the State’ who pointed out that islanders brought to Queensland should have been returned to their homes after three years, but instead had to enter fresh agreements with plantation owners. ‘If the Government had stuck to the law’, he said, ‘we would not have had to bother them now. The Government let us settle down in this country’. A ‘tastefully attired Kanaka girl’ then read a petition to the Governor, signed by forty islander children:

The undersigned being *natives of Queensland* desire to approach you as the appointed representative of our King... We regret that the Pacific Island Labourers Act... provides...for the deportation of all islanders...Some of our own parents have been registered exempt. Some of our fathers are exempt, but mothers are not and in some cases neither parent is exempt. Many of them desire to remain here. We therefore appeal to you that representations be made to the proper authorities that separation of families may not take place and that all our parents may be permitted to live in this, *the country of our birth*. *We are his Majesty’s dutiful subjects*.⁸⁸⁰

The Governor appeared to recognise that the children belonged legally in the new Commonwealth by virtue of their birth in Australia. The *Brisbane Courier* said that ‘His Excellency made inquiries to ascertain if the Kanaka children born in Australia were not technically a part of the Commonwealth’. But, as the paper noted, ‘he could elicit no authoritative reply.’⁸⁸¹ In other words no-one was prepared to confirm for the Governor that under the law applying in Australia, birth in the country gave islander children the same right to legal membership as locally born Anglo-Celtic children.

As Banivanua-Mar says, government authorities were especially concerned about settled islander families with children because of the threat they posed to the White Australia policy. She notes that ‘by the 1890s the nature and makeup of Islanders’ families was a source of great anxiety such that extensive...information was collected’.⁸⁸² The 1901 census, for example, recorded nearly 600 locally born islander children living in Queensland.⁸⁸³ As well as those who were still children in the early 1900s, there were also adult islanders who were natural-born subjects (and therefore not ‘aliens’) because of their birth in Queensland. In 1906

⁸⁷⁹ ‘The Kanakas’ Appeal’, *Queenslander* (Brisbane) 15 February 1902, 383. Emphasis added.

⁸⁸⁰ ‘Deportation Of Kanakas’, *Brisbane Courier* (Brisbane), 24 March 1903, 5. Emphasis added. See also George Megalogenis, *Australia’s Second Chance* (Penguin 2015), 162-163.

⁸⁸¹ ‘Deportation Of Kanakas’, *Brisbane Courier* (Brisbane), 24 March 1903, 5.

⁸⁸² Banivanua-Mar, *Violence and Colonial Dialogue*, above n 146, 115.

⁸⁸³ *Ibid*, 115 (citing ‘Ninth Census of Queensland’, *Queensland Parliamentary Papers* (1902), 912, 1053, 1070-71).

the Royal Commission heard testimony, for example, from one Noah Sabbo who had been born in Queensland and did not want to be deported.⁸⁸⁴

Apart from the children born in Queensland, the 1901 census also recorded some 300 islander men and 200 women who had married local residents.⁸⁸⁵ Under Queensland's *Aliens Act 1867*, a woman who married a British subject acquired subject status herself.⁸⁸⁶ This rule remained unchanged after federation.⁸⁸⁷ Any islander woman in Queensland who had married a British subject therefore moved beyond formal 'alien' status.⁸⁸⁸

Islander origins

More significantly, the various origins of the Pacific islander community in Queensland also raise questions about the legal status of islanders deported under the Pacific Island Labourers Act. While the surviving records may not be comprehensive, they indicate nevertheless that the islanders came from locations under varying degrees of British control in the period before 1906.

As noted above, the majority of Pacific islanders who arrived in Queensland between 1863 and 1904 came from the New Hebrides. Great Britain established a protectorate over the New Hebrides as early as 1824 (although this was disputed by France). The island group was then included in the British colony of New Zealand in 1840, before being returned to protectorate status.⁸⁸⁹ In a debate in the Federal Council of Australasia in 1891, the Attorney-General of

⁸⁸⁴ Banivanua-Mar, *Violence and Colonial Dialogue*, above n 146, 117 (citing Report of Royal Commission, *Queensland Parliamentary Papers* 1906, 669).

⁸⁸⁵ Ibid, 115 (citing 'Ninth Census of Queensland', *Queensland Parliamentary Papers* 1902, 912, 1053, 1070-71).

⁸⁸⁶ *Aliens Act 1867* (Qld), section 2.

⁸⁸⁷ See section 9 *Naturalization Act 1903* (Cth), under which the Commonwealth took over responsibility for naturalisation from the former Australian colonies.

⁸⁸⁸ However, aside from naturalisation through marriage, Queensland's *Aliens Act* did not allow Pacific islanders to become subjects by naturalisation. Section 5 of the *Aliens Act* allowed natives 'of a European or North American state' to be naturalised. A (male) 'Asiatic or African' alien could be naturalised under section 6 (although only if he was married and had resided in colony for 3 years. In addition, his wife had to reside with him at the time of naturalisation. See above n 760). When the Commonwealth assumed responsibility for this area in 1903, naturalisation of islanders was expressly prohibited. Under section 5 of the *Naturalization Act 1903* (Cth), no person who was 'an aboriginal native of Asia, Africa, or *the Islands of the Pacific*, excepting New Zealand' could be naturalised (emphasis added).

⁸⁸⁹ An 1883 article in the New Zealand paper *Southland Times* noted that the New Hebrides were part of the colony of New Zealand for some (unspecified) time after that colony's creation in 1840. *Southland Times* (Invercargill) 5 October 1883. In the House of Lords in 1887, the Earl of Harrowby stated, in relation to the New Hebrides, that 'under the Charter of 1840 they were included in the Colony of New Zealand'. United Kingdom, *Debates*, House of Lords, 2 May 1887, vol 314, 496-505. According to Egerton, 'the case of the New Hebrides was fairly simple. Under the Charter of 1840 they had been part of New Zealand, but they had been omitted when defining

Victoria William Shiels noted that ‘...at one time the New Hebrides formed a portion of the dominion of Australasia. In the charter of 1840, granted to New Zealand, we find that the New Hebrides were embraced’.⁸⁹⁰ The British protectorate ended in 1878. As Premier of Victoria Sir George Turner said at another meeting of the Federal Council of Australasia in 1897:

In 1878 and 1883 arrangements were made between the two nations [Great Britain and France] whereby the islands were placed under a kind of joint control. The Commission consisted of naval officers who...have to take care that there is no breach of the peace, and that the regulations, whatever they may be, are fully observed.⁸⁹¹

Under the 1887 Anglo-French Paris Convention, a joint ‘Naval Commission’ was established with responsibility for protecting French citizens and British subjects in the territory.⁸⁹² As Sir George Turner said in 1897, ‘the islands are now under the joint protection of Great Britain and France’.⁸⁹³ In 1906 a formal Anglo-French condominium was established over the New Hebrides, ‘partly to enable policing of the return of the Islanders’.⁸⁹⁴

The Solomon Islands had a more straightforward colonial history, with Germany claiming the northern portion of these islands and Great Britain the southern part in 1886, before the formal declaration of the British Solomon Islands Protectorate in 1893, followed by Germany’s transfer of most of the northern islands to Britain in 1899.⁸⁹⁵

Kay Saunders notes that in the 1880s a shortage of ‘recruits’ from the Solomon Islands and the New Hebrides meant Queensland sugar plantation owners looked to New Guinea ‘to

the limits of that Colony at a more recent date’. Hugh Edward Egerton, *A Short History of British Colonial Policy* (Cambridge University Press, first published 1897, 2010 ed) 402. As this implies, exactly when the New Hebrides ceased to be part of the colony of New Zealand has been a matter of some dispute. ‘New Hebrides. Once Part of New Zealand. A Forgotten Page of History’, *The Press* (Christchurch) 28 February 1914, 9, which suggests the islands were relinquished after a visit by Governor of New Zealand George Grey in 1845 or 1846 but that in 1878 Grey (by then Premier of New Zealand) protested to the Colonial Office that the New Hebrides were still formally part of New Zealand; cf ‘New Zealand’s Former Greatness’, *Evening Post* (Wellington) 14 March 1888, 2.

⁸⁹⁰ Federal Council of Australasia, *Official Record of Debates*, Fourth Session of the Council, Hobart, 21 January 1891, 21.

⁸⁹¹ Federal Council of Australasia, *Official Record of Debates*, Seventh Session of the Council, Hobart, 28 January 1897, 58.

⁸⁹² Federal Council of Australasia, *Official Record of Debates*, Fourth Session of the Council, Hobart, 21 January 1891, 42-43 (Sir Samuel Griffith).

⁸⁹³ Federal Council of Australasia, *Official Record of Debates*, Seventh Session of the Council, Hobart, 28 January 1897, 58.

⁸⁹⁴ Clive Moore, ‘Good-bye, Queensland’, above n 856, 26.

⁸⁹⁵ W P Morrell, *Britain in the Pacific Islands* (Clarendon Press 1960) 308-309, 343; Brij V Lal and Kate Fortune, *The Pacific Islands an encyclopedia* (University of Hawai’i Press 2000) 610; John Dunmore, *Chronology of Pacific History* (Heritage Press 2000) 34-36. See also Clive Moore, ‘Decolonising the Solomon Islands: British Theory and Melanesian Practice’, *Working Paper* no 08 (Alfred Deakin Research Institute 2010).

maintain an expanding supply of cheap, coloured, servile servants'.⁸⁹⁶ Records examined by Price and Baker show that 2,808 islanders were transported from islands in New Guinea between 1883 and 1887.⁸⁹⁷ Queensland annexed Papua (the southern part of New Guinea) and nearby islands in 1883, purportedly on behalf of Britain. The British government quickly renounced this action, but pledges of financial support from the Australian colonies convinced imperial authorities to proclaim a protectorate over the territory in 1884.⁸⁹⁸ After an Imperial Conference in 1887 the administration of Papua was entrusted to Queensland⁸⁹⁹ and in 1888 it was formally annexed by Great Britain as the colony of British New Guinea. In 1905 it was transferred to Australia as the Territory of Papua.⁹⁰⁰

Queensland records also indicate that 191 Gilbert islanders were brought to the colony between 1893 and 1897 to work as labourers.⁹⁰¹ Great Britain proclaimed a protectorate over the Gilbert Islands (now known as Kiribati) in 1892. The Gilbert and Ellice Islands became a British colony in 1916.⁹⁰²

Price and Baker do not refer to any islanders recruited from Fiji for work in Queensland. However Moore notes that the founder of the Pacific Islanders Association formed in Mackay in 1901 to fight deportation was Tui Tonga, 'a Fijian of chiefly status' who had lived in Queensland since 1876.⁹⁰³ Banivanua-Mar also refers to labourers from Fiji.⁹⁰⁴ And in preparing for the expulsion of islanders to their places of origin, the Queensland and Commonwealth governments liaised not only with British Western Pacific High Commission officials in the Solomon Islands and the New Hebrides, but also with the British colonial government of Fiji.⁹⁰⁵ The Fiji islands became a British colony in 1874.⁹⁰⁶ Any Fijian islanders who came to Queensland after that date were British subjects and not aliens under the law applying in Australia.

⁸⁹⁶ Kay Saunders, 'The Pacific Islander Hospitals in Colonial Queensland: The Failure of Liberal Principals', (1976) 11 (1) *Journal of Pacific History* 28, 39.

⁸⁹⁷ Price and Baker, 'Origins of Pacific Island Labourers', above n 854, 116.

⁸⁹⁸ Commonwealth, *Parliamentary Debates*, Senate, 20 November 1901 (Senator Drake).

⁸⁹⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 August 1901 (Barton).

⁹⁰⁰ Peter Nagle, *Papua New Guinea Records 1883–1942* (National Archives of Australia 2002) 6.

⁹⁰¹ Price and Baker, 'Origins of Pacific Island Labourers', above n 854, 116.

⁹⁰² A British protectorate was also declared over the Ellice Islands (now Tuvalu) in 1892. Lal and Fortune, above n 896, 583, 619; Dunmore, above n 896, 35, 37.

⁹⁰³ Clive Moore, 'Good-bye, Queensland', above n 856, 24.

⁹⁰⁴ Banivanua-Mar, 'Violence and Colonial Dialogue', above n 146, 1.

⁹⁰⁵ Clive Moore, 'Good-bye, Queensland', above n 856, 26. Lal and Fortune, above n 895, 568;

⁹⁰⁶ Dunmore, above n 895, 33.

While Pacific islanders from British colonies such as Fiji (and British New Guinea after 1888) clearly had British subject status, the legal position of islanders from British protectorates in the South Pacific – including the Solomon Islands, British New Guinea from 1884 to 1888, the Gilbert Islands and the New Hebrides (at least until 1878) - was more complex. In the case of the New Hebrides, there was the further complication of joint control by France and Britain from 1878 onwards, not to mention its early history as part of the colony of New Zealand.

The inhabitants of British protectorates were the exception to the common law rule that the world was divided into ‘subjects’ and ‘aliens’. In *Re Ho* (1975)⁹⁰⁷ the South Australian Supreme Court held that a man from the British protectorate of Brunei was neither a British subject ‘nor, for many purposes, anyhow, an alien’:

He is, as his counsel... said, in a grey area. Another way of putting it is to say that he possesses some, but not all, of the status of a British subject. He possesses at least so much of it as results from his not being an alien for the purposes of the nationality legislation. And it has been said by an eminent authority that “for the purposes of international law the distinction between ‘British subject’ and ‘British-protected person’ is irrelevant”.⁹⁰⁸

Chief Justice Bray set out the history of protectorates under British common law, stating:

The national status of persons born in a British protectorate or a British Protected State and not qualified for British nationality by reason of the nationality of their ancestors is obscure. Much no doubt depends on the circumstances surrounding the establishment of the protectorate or protected State in question.⁹⁰⁹

The Chief Justice noted the decision of the English Court of Appeal in *Sekgome’s Case* (1910)⁹¹⁰ where the court was uncertain about the legal status of a chief from the Bechuanaland protectorate, who it described as ‘not being *in the strict sense of the term* a British subject’.⁹¹¹ While the inhabitants of such protectorates may not have been subjects, at the same time - because they owed ongoing and not merely temporary obedience to the Crown in return for the formal conferral of protection - they were not ‘aliens’ in the proper legal sense of that term. According to Wade and Phillips, citing *Sekgome* (in the 1947 edition of their book on constitutional practice in the British Commonwealth):

⁹⁰⁷ *Re Ho* (1975) 5 ALR 304.

⁹⁰⁸ 5 ALR 304, 308-309 (citing D. P. O’Connell, *International Law*, vol 2, 736).

⁹⁰⁹ 5 ALR 304, 306. Wade and Phillips explain that ‘A protectorate which is internally autonomous may be called a protected State; a protectorate that is in fact governed by the protecting State may be called a protectorate’. E C S Wade and G Godfrey Phillips, *Constitutional Law: An Outline of the Law and the Practice of the Constitution, Including Central and Local Government and the Constitutional Relations of the British Commonwealth* (Longmans, 3rd ed, 1947) 368.

⁹¹⁰ *R v Crewe; Ex parte Sekgome* (1910) 2 KB 576.

⁹¹¹ (1910) 2 KB 576, 620 (Kennedy LJ); *Re Ho* (1975) 5 ALR 304, 306-7. Emphasis added.

Protectorates are foreign countries, and their inhabitants, known as British protected persons, are not British subjects, though they may *in return for protection owe unlimited duties of allegiance*.⁹¹²

In the 1955 edition, Wade and Phillips amended this statement to read:

Strictly speaking they [the inhabitants of British protectorates] do not owe allegiance to the Crown, but as an equivalent for its protection the duty of obedience may be implied to a practically unlimited extent.⁹¹³

Such ‘practically unlimited’ obedience to the British Crown seems little different to the type of loyalty to the sovereign described by Sir Edward Coke in *Calvin’s Case*, where he used the words ‘obedience’ and ‘allegiance’ as equivalent terms.⁹¹⁴ On this basis the occupants of British protectorates in the late nineteenth and early twentieth centuries were outside the common law definition of an ‘alien’ as someone who owed allegiance (i.e. unqualified loyalty or obedience) to a foreign sovereign power.

In addition to inhabitants of formal protectorates, Andrew Grossman notes, with particular relevance to the New Hebrides, that ‘British jurists were not so certain of the status of the inhabitants of British mandates, trust territories and *condominiums*: they were not aliens’.⁹¹⁵

The uncertainty about the legal status of people living in protectorates, condominiums and similar territories under the supervision of the United Kingdom was recognised – and resolved - by drafters of the watershed nationality legislation enacted in Britain and Australia after World War Two. The common law position that such people were somewhere between ‘subjects’ and ‘aliens’ was reflected in the *British Nationality Act 1948* which defined an ‘alien’ as a person who was not ‘a British subject, a *British protected person* or a citizen of Eire’.⁹¹⁶ Similarly, Australia’s *Nationality and Citizenship Act 1948* defined an ‘alien’ as someone who was ‘not a British subject, an Irish citizen or a *protected person*’.⁹¹⁷ ‘Protected persons’ under the British Act were also deemed to have this status under the Australian

⁹¹² Wade and Phillips (3rd ed 1947), above n 909, 369. Emphasis added.

⁹¹³ E C S Wade and G Godfrey Phillips, *Constitutional Law: An Outline of the Law and the Practice of the Constitution, Including Central and Local Government and the Constitutional Relations of the British Commonwealth* (Longmans, 5th ed, 1955) 444.

⁹¹⁴ See *Calvin’s Case* 77 Eng. Rep. 377, 383. However the type of ‘allegiance’ owed by ‘British protected people’ does not quite fit into Coke’s four types of ‘ligeance’, i.e. it is not merely ‘local’ or ‘temporary’ allegiance, neither is it ‘ligeance by nature and birthright’ or by denization or acquisition either. This may explain the confusion about application of the common law on this issue to inhabitants of protectorates.

⁹¹⁵ Andrew Grossman, ‘Nationality and the Unrecognised State’ (2001) 50 *International and Comparative Law Quarterly* 849, 858 n 59, referring to Mervyn Jones, *British Nationality Law and Practice*, above n 310. Emphasis added.

⁹¹⁶ Section 32(1) *British Nationality Act 1948*.

⁹¹⁷ Section 5(1).

legislation.⁹¹⁸ A ‘protected person’ included any inhabitant of a ‘protectorate, protected state, mandated territory or trust territory’ declared by Order in Council.⁹¹⁹ Solomon Islanders were listed as protected persons by a 1949 United Kingdom Order in Council,⁹²⁰ which also directed that the British Nationality Act applied to the New Hebrides as if it were a protected state.⁹²¹ Inhabitants of both territories were therefore outside the legislated definition of ‘alien’ under the 1948 British and Australian laws. Consistent with this statutory acceptance that such people were not ‘aliens’ or ‘foreigners’, the definition of ‘foreign countries’ under both laws did not include Britain’s protectorates or protected states, or ‘the New Hebrides or Canton Island’.⁹²²

While the 1948 legislation was not in force when Pacific islanders were expelled from Australia in 1906 (under a law purportedly authorised by the ‘aliens power’ in section 51(xix) of the new Constitution), the 1948 British and Australian statutes recognised that there was an existing relationship between Great Britain and protectorates such as the Solomon Islands and the condominium of the New Hebrides which justified acceptance of their inhabitants as beyond ‘alien’ status.

The relationship with Great Britain had its origins at different points in the nineteenth century for the various Pacific island territories. A difficult issue is when this relationship became sufficiently established in the case of particular territories to invoke an enduring (and not merely temporary) obligation of obedience or allegiance on the part of the inhabitants in return for the protection of the British Crown. The New Hebrides involves particular complications given its changing legal relationship with Britain: initially a protectorate, then part of the colony of New Zealand, then a protectorate again, followed by a period under joint French-British control and finally a formal condominium. Nevertheless there are strong arguments that by the late nineteenth century the protection provided by Britain to inhabitants of the two main sources of islander recruitment, the Solomon Islands and the New Hebrides, was formalised enough to invoke reciprocal and enduring obligations of obedience - thus

⁹¹⁸ See definition of ‘protected person’ in section 5(1) *Nationality and Citizenship Act 1948* (Cth). Emphasis added.

⁹¹⁹ Section 32(1) *British Nationality Act 1948*.

⁹²⁰ *British Protectorates, Protected States and Protected Persons Order in Council*, made on 28 January 1949 under s 30(1) and s 32(1) *British Nationality Act 1948* (UK). See ukba.homeoffice.gov.uk/.../policyandlaw/nationalityinstructions/

⁹²¹ Article 6.

⁹²² Sections 30(2), 32(1) *British Nationality Act 1948* (UK); section 5(1) *Nationality and Citizenship Act 1948* (Cth). Canton Island was the sole inhabited island in the Phoenix islands in what is now Kiribati.

moving their inhabitants beyond ‘alien’ status under the common law. In addition, of course, there is no question about the non-alien status of islanders recruited from British colonies such as Fiji after 1874, British New Guinea from 1888 and the Gilbert Islands from 1892 onwards.

There was little appreciation during the colonial and early post-federation era that the status of these territories as British protectorates and colonies might affect the legal standing of their inhabitants under Australian law. Pacific islanders continued to be regarded as ‘aliens’ because of their racial appearance, irrespective of their actual origins. As Adelaide’s *Register* said in 1901 in relation to the proposed acquisition of British New Guinea by the new Commonwealth of Australia:

The new nation does not seek to raise the Papuans to the rank of Australians. The dusky denizens of what was geographically part of this continent will be ruled from a land to the wealth of which they will be expected, in trade at least, to contribute, but on account of their dark pigmented skins *they will be regarded as aliens* and not be permitted even to visit it.⁹²³

There were rare occasions, however, when a lawmaker noted that people denigrated as ‘coloured aliens’ were not in fact ‘aliens’ under the law applying in Australia because they were British subjects. In the Queensland Legislative Assembly in October 1901, Home Secretary Foxton – a ‘keen advocate of black labour for developing northern Australia’⁹²⁴ – drew attention to a particular issue about the origins of some inhabitants of Queensland regarded as ‘Pacific islanders’. In reply to criticism from Opposition Labor members about the number of ‘coloured aliens’, including Pacific islanders, in Queensland’s prisons and asylums, Foxton said his opponents:

...spoke of *coloured aliens* when many of them, as a matter of fact, were *British subjects*. With regard to the Pacific Islanders, he would like to point out that a large number of those who were included in that category had not been brought to Queensland under the Pacific Island Labour Act, but were men who had *drifted in from the Islands of Torres Straits*.⁹²⁵

As Foxton indicated, since the Torres Strait islands were formally part of Queensland,⁹²⁶ any ‘Pacific islander’ who had come from there was a natural-born British subject under the common law and could not be an ‘alien’ in a legal sense.

⁹²³ *Register* (Adelaide) 2 December 1901, 4. Emphasis added. As the High Court said in *Ame’s Case* (2005), despite their birth on Australian territory, Papuans were always regarded and treated as people who were not ‘real Australians’. Yet the Court did recognise they were Australian citizens and not aliens. See Prince, ‘Mate! : citizens, aliens and ‘real Australians’’, above n 85.

⁹²⁴ D B Waterson, ‘Foxton, Justin Fox Greenlaw (1849–1916)’, *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/foxtton-justin-fox-greenlaw-6230/text10719>.

⁹²⁵ ‘The Estimates’, *Brisbane Courier* (Brisbane) 23 October 1901, 9. Emphasis added.

⁹²⁶ Queensland officially annexed the Torres Strait islands in 1879.

An official list prepared in 1913 by the office of the Chief Secretary of Queensland entitled *Coloured labour and Asiatic aliens in Queensland* supports Foxton's contention that Torres Strait islanders – born as British subjects by virtue of their birth in Queensland – were incorrectly labelled as 'coloured aliens'. Some individuals on the Chief Secretary's list whose birthplace was recorded as mainland Queensland were correctly described as 'British subjects'.⁹²⁷ However those born on islands in the Torres Strait had their status wrongly recorded merely as 'not naturalized'.⁹²⁸ In addition, some people with Pacific islander background born in mainland Queensland were also given this incorrect status, including a man described as a 'Knaka' [sic] born in Brisbane in 1868 who had 'lived in Queensland since birth',⁹²⁹ as well as eight members of an extended islander family aged one to 39 all born in Bowen or Ayr in north Queensland.⁹³⁰ Once again, the list demonstrates a lack of understanding of the different ways a person might become a British subject. The only option on the list for indicating legal status was whether an individual was naturalised or not. There was no recognition on this official list that people of non-European ethnic background – including Pacific islanders - might be 'natural-born' British subjects.

Similarly, when the Commonwealth's Pacific Island Labourers Bill was debated in the Senate at the end of 1901, Senator Neild proposed an exemption for 'any Pacific Island labourer who is a naturalized British subject' because in his view 'it would be unreasonable to take power to deport them if they are naturalized British subjects'.⁹³¹ This ignored the fact that under the *Aliens Act 1867* (Qld), Pacific islanders could not be naturalised⁹³² and also that there were islanders resident in Australia who legally possessed the status of 'natural-born' British subjects by virtue of their birth either in Queensland itself or in another territory under the allegiance of the British Crown.

⁹²⁷ For example, Lester Henry Ah Sam, born in Brisbane, and Alexander Tung Yeen, born in Rockhampton. Queensland, State Archives, *Coloured labour and Asiatic aliens in Queensland 1913*.

⁹²⁸ For example, Dick Wathaken from Murray (or Mer) Island and Louie Watson from Thursday Island. Ibid.

⁹²⁹ See entry for 'Jack (a Knaka)'[sic]. Ibid.

⁹³⁰ See entry for Yasso family. Ibid. The family's 70 year old patriarch, born in 1843 in the New Hebrides when it appears to have been part of the colony of New Zealand (see above n 826) had come to Queensland in 1875 (when the New Hebrides was a British protectorate). He too was listed merely as not 'naturalized'. Islanders who arrived in Australia prior to 1 September 1879 were exempt from the Pacific Island Labourers Act.

⁹³¹ Commonwealth, *Parliamentary Debates*, Senate, 5 December 1901, 8283.

⁹³² See above n 888.

Robtelmes v Brennan

In 1906 the High Court of Australia unanimously upheld the deportation of Mr Robtelmes under the Pacific Island Labourers Act.⁹³³ Chief Justice Griffith and Justice Barton said this was a valid use of the ‘aliens’ power in section 51(xix) of the Constitution. Justice Barton found the expulsion of Pacific islanders was also valid under the ‘immigration’ power in section 51(xxvii), the ‘external affairs’ power in section 51(xxix), and possibly also the ‘races’ power in section 51(xxvi). At first impression, a reading of Justice O’Connor’s judgment suggests he also endorsed the deportation under the ‘aliens’ power. Analysis of the historical context, however, indicates he was saying that islanders were members of an ‘alien race’ who could be deported under the ‘races power’ in the Constitution.

As discussed in Chapter Three, in their capacity as delegates to the 1890s constitutional conventions all three judges employed the term ‘alien’ in its non-legal, racial sense, referring to ‘coloured aliens’ and ‘alien races’, by which they did not mean non-British subjects but rather any people with a non-European background. Many delegates used the word in the same way. None explained the proper legal meaning of the term. This was consistent with routine misuse of the word since the 1860s by prominent political and legal figures in colonial Australia. In their seminal 1901 work on the Constitution, Quick and Garran also failed to restrict the use of ‘alien’ to its legal meaning.

All of this was important background to the High Court’s decision in *Robtelmes*. This is not to suggest that the High Court justices necessarily misunderstood the common law concept of an ‘alien’ (although, as explained below, Justice O’Connor’s judgment justifies some strong doubts in this regard). What does appear to be the case, however, is that the view of the three High Court judges recorded during the 1890s conventions - that non-Europeans were ‘aliens’ in a racial sense - affected their judgment in *Robtelmes* as to who could be subject to the Commonwealth’s power over ‘aliens’ in a legal or constitutional sense.

On 21 September 1906, Police Magistrate R.A. Ranking of the Court of Petty Sessions Brisbane, exercising federal jurisdiction under the Pacific Island Labourers Act, ordered the deportation of Mr Robtelmes as an islander found in Australia with no current labour agreement.⁹³⁴ Robtelmes, a native of Vanua Lava in the New Hebrides, had arrived in

⁹³³ *Robtelmes v Brennan* (1906) 4 CLR 395.

⁹³⁴ National Archives of Australia (NAA) file A10044, 1906/8, *On appeal from Police Magistrate, Brisbane, between Robtelmes and Brennan [sic], John O’Neill* (High Court of Australia, Brisbane Registry).

Queensland in 1897.⁹³⁵ The case attracted attention as the first under the ‘deportation clause’ of the Act.⁹³⁶ The prosecution agreed not to enforce the expulsion order until the High Court had considered the matter.⁹³⁷ There is no indication from the High Court file that Robtelmes had any interest in the appeal.⁹³⁸ Instead it appears the Commonwealth was seeking an endorsement from the High Court of the validity of expulsions under the Pacific Island Labourers Act.

Sitting in Brisbane, the High Court heard arguments in the case on 1 October 1906, a mere ten days after Magistrate Ranking issued his deportation order. The High Court’s judgment was handed down the very next day, on 2 October 1906.⁹³⁹ The submission prepared on behalf of Robtelmes asserted that the Pacific Island Labourers Act was ‘ultra vires’ the Constitution and noted that he came from a territory ‘under the joint protection of England and France’. But it raised no arguments about his legal status let alone the significance of this for the legality (or otherwise) of his deportation. Instead the submission merely quoted from Queensland’s 1906 Royal Commission,⁹⁴⁰ referring to the established nature of islander communities in Queensland, ‘many of whom are married and have families, the children attending a State school’.⁹⁴¹ The submission made no claims about what this may have meant for the status of Pacific islanders or the validity of their expulsion (for example that the Act might not have lawfully applied to islanders born in Queensland or those married to British subjects).

The High Court failed to apply any of the principles of the common law in considering whether Robtelmes and other Pacific islanders could validly be subject to a statute based on the ‘aliens’ power in section 51(xix) of the Constitution. By the time of the *Robtelmes* case, Chief Justice Griffith’s misuse of the term ‘alien’ dated back thirty years to 1876. In *Robtelmes*, he did not maintain his position at the conventions that section 51(xix) was only concerned with ‘naturalisation of aliens’. Instead he declared that:

⁹³⁵ Ibid (affidavit of AW Bale).

⁹³⁶ ‘Kanakan Deportation’, *Queenslander* (Brisbane), 29 September 1906, 35.

⁹³⁷ Ibid.

⁹³⁸ NAA file A10044, 1906/8, above n 934.

⁹³⁹ ‘Deportation Of Kanakas’, *Advertiser* (Adelaide), 2 October 1906, 7.

⁹⁴⁰ Interestingly, the report from the Royal Commission was prepared on behalf of Mr Ranking, who had been its Chairman. The Commission reported on 30 June 1906. Queensland, *Parliamentary Papers*, 1906 (2) 395-906.

⁹⁴¹ NAA file A10044, 1906/8, above n 934 (affidavit of AW Bale).

Sub-sec. xix authorizing laws as to aliens implies that the Commonwealth may make any laws with regard to aliens that a sovereign power can make...The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it.⁹⁴²

Griffith's judgment reflected an understanding that alien status was a matter of nationality not race. He gave the example:

...of an alien, whom, for instance, the Swiss Confederation desired to expel from Switzerland. Suppose he was a Russian, or an Englishman, or a Spaniard...that they have the power to expel him from Switzerland is beyond all doubt.⁹⁴³

With respect to Pacific islanders, however, Griffith said merely that their expulsion under the Pacific Island Labourers Act was a valid use of the 'aliens' power because:

What is the status of Pacific Islanders? What are they? *They are aliens: that is indisputable.* Not only are they aliens, but by the law of Australia, so far as I know it, it is impossible for them to become anything else. If that is so, the power resides somewhere of excluding them from Australia, whenever the proper authority determines that they shall be excluded.⁹⁴⁴

Griffith appreciated that the case before him was not just about Robtelmes but a test of the Commonwealth's power to expel Pacific islanders generally. As the *Brisbane Courier* reported when summarising the arguments before the High Court, 'the Chief Justice said the case was one of considerable importance, and they would consider their judgment, which would very likely be given in the morning'.⁹⁴⁵ As the same paper reported the next day:

The court considered that...legislation with regard to Pacific Islanders came within the authorisation of the Constitution Act. It followed, therefore, that the order for deportation in the case in question was declared to be valid, and *generally the power of the Commonwealth to deport Kanakas from Australia was affirmed.*⁹⁴⁶

Griffith was correct when he said it was impossible for Pacific islanders who were aliens in a legal sense to be naturalised under the law applying in Australia.⁹⁴⁷ But otherwise his statement about the legal status of Pacific islanders ignored the possible ways such people may have been British subjects - or at least not aliens - under the common law. The Chief Justice offered no analysis to support his assertion that all Pacific Islanders were 'indisputably aliens'. In terms of the specific case before the Court, neither Griffith nor the other judges mentioned where Robtelmes came from, nor did they examine the colonial

⁹⁴² (1906) 4 CLR 395, 398, 404.

⁹⁴³ (1906) 4 CLR 395, 406.

⁹⁴⁴ (1906) 4 CLR 395, 403. Emphasis added.

⁹⁴⁵ 'Law Report', *Brisbane Courier* (Brisbane) 2 October 1906, 2.

⁹⁴⁶ 'Deportation of Kanakas', *Brisbane Courier* (Brisbane) 3 October 1906, 4. Emphasis added.

⁹⁴⁷ See above n 888.

history of the New Hebrides or how that might have affected the Commonwealth's power to deport him as an 'alien'.

More than anyone else, Chief Justice Griffith had the political and legal background to enable a careful analysis of the status of Pacific islanders. The Pacific islander issue was a central one for Griffith throughout his political life, especially as Queensland Premier from 1883 to 1888 and 1890 to 1893. As Douglas Graham said in a 1938 lecture about Griffith, apart from defeating the power of the 'squattocracy', his other great political struggle concerned 'White Australia, or...the Kanaka question'.⁹⁴⁸ As Griffith himself said when President of the Federal Council of Australasia in 1891, 'I have probably had more experience than any man in Australia of the administration of the law relating to the Pacific Islanders, and I can speak with some knowledge of the subject'.⁹⁴⁹

In 1901 Barton, then Prime Minister, told federal parliament that 'in introducing the [Pacific Island Labourers Bill], the Commonwealth Government is carrying out only what has been the declared policy of Queensland for the last 20 years at least'.⁹⁵⁰ He highlighted Griffith's central role as Premier in attempts to replace islanders with white men, especially in Queensland's profitable sugar industry.⁹⁵¹ Griffith's opposition to islander labour stemmed partly from humanitarian concerns but also had a strong element of racism. According to Douglas Graham, 'if the squatters and planters hated Griffith' (because he planned to remove black labour), 'the White Australia party loved, admired and almost worshipped him'.⁹⁵² Griffith strongly opposed the use of coloured labour in northern Australia. As he said:

If, then, tropical Australia is to be inhabited by a coloured population, not only will a new form of government be required, so that there will be two distinct and probably antagonistic forms of government on the Australian continent, but ultimately the standard of comfort for the working population of all Australia will be in danger of being reduced to that of the coloured races. If, on the other hand, the faith of those who believe that tropical Australia can become the permanent home of the white races turns out to be well founded, a future which most people will regard as fairer and happier is open for that part of the continent...⁹⁵³

⁹⁴⁸ Graham, *Sir Samuel Walker Griffith*, above n 866, 2, 35.

⁹⁴⁹ Federal Council of Australasia, *Official Record of Debates*, Fourth Session of the Council, Hobart, 1891, 45.

⁹⁵⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1901, 5493.

⁹⁵¹ *Ibid* 5496-5497.

⁹⁵² Graham, *Sir Samuel Walker Griffith*, above n 866, 40.

⁹⁵³ 'Australia And The Coloured Races', *Sydney Morning Herald* (Sydney) 20 July 1894, 2. This extract is from an article by Griffith originally published in a prominent United States journal. See Sir Samuel Walker Griffith, 'Australia and the coloured races', 9 *Review of Reviews* (American ed, 5 May 1894)) 577-578, cited in Lauren, above n 118, 52, n 38.

Just as Henry Parkes believed that ‘inferior’ Chinese had no place in a society where all men were equal before the law, Griffith declared in relation to Pacific islanders that ‘the permanent existence of a large servile population amongst us, not admitted to the franchise, is not compatible with the continuance of our free political institutions’.⁹⁵⁴

After receiving reports in 1884 of the deaths on a plantation in Mackay of a large number of islanders, mainly from New Ireland, Griffith instructed all Government agents sailing from Queensland that ‘no islanders were to be brought from New Ireland or New Britain, as the natives were totally unfit for the work, and only came to the colony to die’.⁹⁵⁵ In the same year, after further revelations of the inhumane recruitment and treatment of islanders, the Griffith government passed legislation effectively abolishing the use of ‘black labour’ in Queensland from the end of 1893.⁹⁵⁶ However a financial depression and a shortage of white labour forced Griffith to rescind this decision in 1892, delaying the prohibition on islander labour for a further ten years.⁹⁵⁷ While even his critics admitted that Griffith ‘saved the valuable sugar industry of Queensland’, Graham believes that Griffith ‘never ceased regretting that he had ever...turned aside from the path in which he had set his feet’ (i.e. the removal of Pacific island labour from Queensland).⁹⁵⁸

Griffith was also very familiar with, and indeed played an important role in, the colonial history of the South Pacific. Graham points out that while the British Government at first disavowed the action of Queensland Premier McIlwraith in 1883 in raising the British flag in New Guinea, this action ‘paved the way for annexation which Sir Samuel later forced on the vacillating Secretary of State for the Colonies, Lord Derby’.⁹⁵⁹ Similarly Roger Joyce notes in relation to British New Guinea that ‘Griffith was at the centre of planning for the protectorate and eventual colony’.⁹⁶⁰ Colonial rivalry in the South Pacific was also a key issue in the 1880s and 1890s for the Federal Council of Australasia, in which Griffith had a central

⁹⁵⁴ Graham, *Sir Samuel Walker Griffith*, above n 866, 43-44, citing what he calls Griffith’s ‘Black Labour Manifesto’ of 13 February 1892.

⁹⁵⁵ Queensland, *Official Record of the Debates of the Legislative Assembly*, 4 March 1884, 565.

⁹⁵⁶ *Pacific Islanders Labourers Act Amendment Act 1884* (Qld). See Graham, *Sir Samuel Walker Griffith*, above n 866, 37.

⁹⁵⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1901, 5498 (Barton); see Graham, *Sir Samuel Walker Griffith*, above n 866, 44.

⁹⁵⁸ Graham, *Sir Samuel Walker Griffith*, above n 866, 48. See also Megalogenis, *Australia’s Second Chance*, above n 881, 130-132.

⁹⁵⁹ Graham, *Sir Samuel Walker Griffith*, above n 866, 55.

⁹⁶⁰ Joyce, *Samuel Walker Griffith*, above n 476, 127.

role.⁹⁶¹ As President of the Federal Council in 1891, Griffith presided over a long debate on the New Hebrides, in which he observed that the Anglo-French Paris Convention of 1887 had established a joint Naval Commission ‘charged with the duty of maintaining order, and of protecting the lives and property of British subjects and French citizens in the New Hebrides’.⁹⁶²

Apart from Griffith’s familiarity with both the history of Pacific islanders in Queensland and the colonial status of the various islands they originated from, there was no shortage of other relevant information. There was the Royal Commission that had taken evidence earlier in 1906, including from islanders born in Queensland, the protests and petitions on behalf of islanders and official census figures on their numbers. There had also been statements in the Queensland parliament, for example from Home Secretary Foxton, about the subject status of islanders incorrectly labelled as ‘coloured aliens’. Notwithstanding the speed of the hearing and judgment in *Robtelmes*, there was considerable information available to Griffith (albeit not put forward in the submission by Robtelmes’s lawyer) which, had it been presented to the Court, would have shown that Pacific islanders living in Queensland were not ‘indisputably aliens’.

Justice Barton in his judgment said the Commonwealth had power to legislate for the deportation of Pacific islanders under ‘the 19th sub-section of sec. 51’.⁹⁶³ He identified the fundamental issue in relation to use of the ‘aliens’ power, referring to a case where ‘it was decided that the status of a person residing in Mauritius, then and now a British colony or possession, that is to say, *whether he is an alien or not*, must be determined by the laws of England’.⁹⁶⁴ However Justice Barton failed to apply the relevant principles of English law with regard to ‘aliens’, either in relation to Robtelmes or Pacific islanders generally. Instead he concluded merely that:

⁹⁶¹ For example, at the second session of the Federal Council in Hobart on 17 January 1888, Victorian Attorney-General Wrixon expressed his fear that criminals sent by France to New Caledonia were escaping to Australia, declaring ‘we are stared in the face by an increase in this danger’. Griffith as Queensland Premier supported Wrixon, alleging that escaped criminals from New Caledonia were responsible for an increase in burglaries in his colony. Federal Council of Australasia, *Official Record of Debates*, Second Session of the Council, Hobart, 1888, 14-16.

⁹⁶² Federal Council of Australasia, *Official Record of Debates*, Fourth Session of the Council, Hobart, 21 January 1891, 42-43.

⁹⁶³ (1906) 4 CLR 395, 415.

⁹⁶⁴ *Ibid* 408. Emphasis added.

...if the power to legislate exists with respect to the conditions of entry or residence of the *subjects of civilised powers*, it would be idle to attempt to deny that it is also included with respect to *Pacific Islanders*.⁹⁶⁵

As this statement shows, in Justice Barton's view a 'Pacific islander' could not be a 'subject of a civilised power' such as Great Britain. Moreover the above extract indicates that Justice Barton saw Pacific islanders as a single racial and legal group, leaving no room for consideration of the particular circumstances of *Robtelmes* or the different origins of the various islander communities in Queensland.

In Justice O'Connor's judgment, he concluded that:

...the *power to legislate with regard to aliens* and to immigration, given to the Commonwealth Parliament under the Constitution, includes the power to deport an alien under such circumstances as the Commonwealth Parliament may think to enact.⁹⁶⁶

At first glance this seems to be a reference not only to the 'immigration and emigration' power in section 51(xxvii) of the Constitution but also to the 'aliens power' in section 51(xix). However O'Connor did not specifically refer to section 51(xix) in his judgment. Instead he used the word 'alien' consistently with the way he and fellow delegates had employed the term during the 1890s constitutional conventions – as a synonym for 'people of another race'.

For example, he stated in *Robtelmes* that:

Many years before the establishment of the Commonwealth several of the Australian Colonies had passed Acts for regulating the admission of *aliens* into their several territories. In relation to the immigration of *Chinese* they enacted not only conditions of admission but also those under which they should be absolutely excluded.⁹⁶⁷

This was a reference to the colonial legislation of the 1880s, directed (especially the new laws enacted after the 1888 Inter-colonial conference) not at 'aliens' in a legal sense but at people of Chinese origin, even if they were British subjects. Similarly, in relation to Pacific islanders, Justice O'Connor stated that:

Those Acts in the different States dealing with *aliens* remained in force under the State Constitutions until the Parliament of the Commonwealth entered the same field of legislation, and in regard to *Pacific Islanders* the Commonwealth legislated by the Act which is now under consideration.⁹⁶⁸

In 1901, as a Senator and Vice-President of the Federal Executive Council, O'Connor used similar language to describe the background to the Immigration Restriction Bill:

When the representatives of the various States of Australia met in London on the occasion of the interview with Mr. Chamberlain in 1896, they had all passed Bills prohibiting the introduction of these *coloured aliens*. Those Bills set out in plain language that the persons

⁹⁶⁵ Ibid 415. Emphasis added.

⁹⁶⁶ Ibid 418. Emphasis added.

⁹⁶⁷ Ibid 417. Emphasis added.

⁹⁶⁸ Ibid 418. Emphasis added.

therein described, and they included all *coloured aliens*, were to be prohibited from entering Australia, and they were all reserved.⁹⁶⁹

When another Senator said a tax on ‘aliens’ should be part of the Bill to prevent ‘hordes of Hindoos, Chinamen, and other Asiatics...concentrating in the northern portion of Queensland’,⁹⁷⁰ O’Connor replied:

This Bill is to regulate immigration, and it seems to me that it would be a very unnecessary and harsh proceeding to place under special disabilities aliens who are already in the Commonwealth. If it is found that, in carrying on the business of the Commonwealth, it is necessary to make special laws dealing with any particular class of *coloured aliens*, there will be power to do so under *sub-section (26) of section 51* of the Constitution [the ‘*rac*es’ power].⁹⁷¹

In his judgment in *Robtelmes*, Justice O’Connor identified people of Chinese and Pacific islander origin as ‘aliens’ because of their race. As with the decisions of his two colleagues, there was no analysis in O’Connor’s judgment as to whether Mr Robtelmes or the various groups of Pacific islanders to be expelled from Australia were ‘aliens’ in a legal sense. Justice O’Connor assumed that Pacific islanders were ‘aliens’ because of their non-European ethnic origins and on that basis declared they were validly subject to the Commonwealth’s legislative power. There is no proof from the words of his judgment that he did *not* mean that the lawmaking power over ‘aliens’ was to be found in section 51(xix) of the Constitution. However the way he used the term ‘alien’, especially when seen in the light of his own remarks and those of his colleagues at the constitutional conventions and in Federal Parliament, indicates that by ‘the power to legislate with regard to *aliens*’ he meant the ‘*rac*es’ power in section 51(xxvi) of the Constitution. In *Robtelmes* Justice O’Connor stated that:

On the establishment of the Commonwealth the powers of *dealing with aliens, the naturalization of aliens, and emigration and immigration*, passed to the Commonwealth, and [are] amongst the powers with which the Commonwealth legislature was invested under sec. 51.⁹⁷²

At the constitutional conventions O’Connor and other delegates (including Griffith and Barton) envisaged an expansive role for the immigration and ‘*rac*es’ powers (in controlling the entry of non-Europeans and in regulating the activities of those already within Australia) but only a narrow role for section 51(xix) (limited to the naturalisation function). It is consistent with the respective roles that delegates at the conventions saw for these powers that in the above extract from *Robtelmes*, O’Connor was referring to the *rac*es power in

⁹⁶⁹ Commonwealth, *Parliamentary Debates*, Senate, 5 December 1901, 8302-3. Emphasis added.

⁹⁷⁰ *Ibid* 6 December 1901, 8377 (Senator Higgs).

⁹⁷¹ *Ibid* 8377. Emphasis added.

⁹⁷² (1906) 4 CLR 395, 417. Emphasis added.

section 51(xxvi), the *naturalization* arm of section 51(xix) and the immigration power in section 51(xxvii).

In summary, none of the judges in *Robtelmes* properly examined the constitutional status of Pacific islanders, assuming or at least pronouncing that all were ‘aliens’ for the purposes of section 51(xix) of the Constitution, without analysis as to whether this was actually the case. Chief Justice Griffith said all islanders in Queensland were ‘indisputably aliens’ despite published evidence that this was not so; Justice Barton said they ‘could not be subjects of civilised powers’ when many *were* in fact British subjects; and Justice O’Connor considered all were ‘aliens’ simply because they belonged to another race. The High Court upheld the deportation provisions of the Pacific Island Labourers Act as within the scope of the ‘aliens’ power in the Constitution, with no consideration of the extent to which the power in section 51(xix) validly applied either to *Robtelmes* specifically or to Pacific islanders living in Australia more generally. At the constitutional conventions in the 1890s, each of the judges in *Robtelmes* supported the view that non-Europeans, including Pacific islanders, were members of an ‘alien race’. This suggests that because the judges saw Pacific islanders as ‘aliens’ in racial terms, they thought the islanders were validly within the Commonwealth’s law making power over ‘aliens’ in the Constitution. Griffith and Barton believed this brought islanders within the scope of the ‘naturalisation and aliens power’ in section 51(xix), whereas Justice O’Connor appeared to think the relevant authority in the Constitution was the provision intended by Convention delegates to apply to ‘aliens’ in a racial sense, namely section 51(xxvi) (the ‘races power’).

Apart from deficiencies in the High Court’s constitutional analysis in *Robtelmes*, there is also the question of conflict of interest. Until the mid-nineteenth century, a direct financial interest in a matter being heard was the only basis for judicial disqualification under the common law. However in 1866 the Court of Queen’s Bench laid down the rule that ‘wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong [for] him to act’.⁹⁷³

In late 1901 Barton, as Australia’s first Prime Minister and O’Connor, as leader of the government in the Senate, secured the passage through Parliament of the Pacific Island Labourers Bill. Barton told the House of Representatives that:

This measure... embodies the policy, not merely of the Government, but of all Australia, for the preservation of the purity of the race and the equality and reasonableness of its standard of

⁹⁷³ *R v Rand* (1866) LR 1 (QBD) 230 (Blackburn J).

living... I hope to be able to say before this year closes that Australia will have this measure to accompany the [Immigration Restriction Bill] which we had in committee yesterday, the two together being not merely the realization of a policy, but a handsome new year's gift for a new nation.⁹⁷⁴

Barton explained to the House how section 8(1) of the Bill, the provision later challenged in *Robtelmes*, would operate, noting that it would:

...empower an officer, having authority for the purpose, to bring before a justice of the peace any Pacific Island labourer found in Australia during that period whom he has reason to suppose is not employed under agreement. Upon the justice being satisfied that he is not thus employed, and has not been so employed for one month prior to that date, he may be returned to the place from which he was originally brought into Australia.⁹⁷⁵

When Mr Solomon questioned whether the Commonwealth had the power to expel Pacific islanders in such a way, Barton replied 'I think we have the power, and ...I will take the risk. It is clear that no Pacific Islander ought to be in Queensland after 1906'.⁹⁷⁶ In *Robtelmes* Barton sat in judgment on the legislation he had introduced, supporting the view he had expressed in 1901 that the Commonwealth had the constitutional power to expel Pacific islanders from Australia.

The long standing determination of Sir Samuel Griffith to rid Queensland of Pacific island labour has been set out above. As Barton told the House of Representatives when introducing the Pacific Island Labourers Act, Griffith declared to the Queensland Parliament in 1884 that 'when the time had arrived for the prohibition of black labour, the Government would take the responsibility for doing it'.⁹⁷⁷ In *Robtelmes*, Chief Justice Griffith returned to - and asserted the validity of - the path that he and the colonial government of Queensland had followed for over two decades.

Conclusion: future use of *Robtelmes*

The 1911 Commonwealth Census recorded 2,068 'full-blood' and 174 'half-caste' 'Polynesians' resident in Australia.⁹⁷⁸ The term 'Polynesian' had been used for many years to refer, inaccurately, to persons of ethnic Pacific islander origin.⁹⁷⁹ 1,183 of the 'full-blood'

⁹⁷⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 2 October 1901, 5492, 5505. See also Barton's election campaign speech 17 January 1901 in which he expressed 'strong objection' to 'Polynesian or Kanaka labour' in any circumstances. 'The Policy of the Commonwealth', *Maitland Daily Mercury* (Maitland) 18 January 1901, 2.

⁹⁷⁵ Ibid 5505.

⁹⁷⁶ Ibid.

⁹⁷⁷ Ibid 5496.

⁹⁷⁸ Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), Vol 1 Part 1, Statistician's Report, 224-225.

⁹⁷⁹ See, for example, 'Parliamentary', *Rockhampton Bulletin* (Rockhampton) 20 June 1877, 2.

and 169 of the ‘half-caste’ Polynesians were listed as British subjects – or over 65 per cent of the total.⁹⁸⁰ In other words, based on the census figures, a high percentage of the Pacific islanders remaining in Australia in 1911 were not ‘aliens’ in a legal sense. Since British subject status was not a valid ground for claiming an exemption from expulsion under the Pacific Island Labourers Act, it could not be argued that the islander community remaining in Australia after 1906 included a higher proportion of British subjects than before this date. It is valid to conclude, therefore, that in *Robtelmes* the Australian High Court authorised the involuntary expulsion under the ‘aliens’ power in section 51(xix) of the Constitution of many Australians of Pacific islander origin who were not ‘aliens’ under the law applying in Australia at the time.

The High Court of Australia’s decision in *Robtelmes v Brennan* continues to be cited as a foundational precedent on the extent of the ‘aliens power’ in section 51(xix) of the Constitution, including in significant recent cases such as *Ruddock v Vardalis* (2001) (the Tampa case)⁹⁸¹ and *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) (the indefinite detention case).⁹⁸² According to Justice Drummond of the Federal Court in *Li* (2000), citing the High Court in *Chu Keng Lim* (1992), ‘*Robtelmes* remains good law’.⁹⁸³ Apart from citing the case in support of an expansive use of section 51(xix), Australian courts also wrongly endorse the conclusion in *Robtelmes* that ‘deportation of kanakas’ generally was within the ‘aliens power’.⁹⁸⁴ There is no appreciation in current Australian case law that many Pacific islanders were beyond this power because they were not ‘aliens’ under the law.

The material in this chapter could therefore be drawn on in future constitutional matters involving the aliens power. It could be used to argue that *Robtelmes* should no longer be seen as a precedent but should be identified as a case illustrating the violation of the rule of law.

⁹⁸⁰ Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), Vol 1 Part 1, Statistician’s Report, 227-228.

⁹⁸¹ (2001) 110 FCR 491, 495, 498 (Black CJ), 543 (French J) See also *Schlieske v Minister for Immigration and Ethnic Affairs* 84 ALR 719, 725 (Wilcox and French JJ).

⁹⁸² (2013) 251 CLR 322, 329 n 19 (J T Gleeson SC, Solicitor-General for the Commonwealth). *Robtelmes* was cited by the Commonwealth as authority for Australia’s ‘sovereign right and power to decide whether to admit or exclude an alien who physically enters Australian territory without permission’.

⁹⁸³ *Li v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 125, 128, citing *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26 (Brennan, Deane and Dawson JJ). See also *Chu Keng Lim* at 57 (Gaudron J) and 65 (McHugh J).

⁹⁸⁴ *Li v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 125, 127-128 (Drummond J).

The following two chapters concern misuse of the term ‘alien’ contrary to the law in Queensland after federation. They illustrate how the racial meaning of the word was so embedded in that State that it became the law, in place of the correct legal meaning. This culminated after World War One in numerous prosecutions of ‘coloured aliens’, with little or no regard to whether those brought before the courts were British subjects or not.

CHAPTER SIX Alien and dictation test legislation in Queensland

'In 1881, the British colony of Queensland was home to more migrants from Asia than from Europe... Today, that diversity defines Australia almost everywhere except Queensland. People born in Asia are the largest ethnic group in the country, accounting for 10 per cent of the total population. In New South Wales and Victoria they are closer to 12 per cent, and the only mainland state below 6 per cent is Queensland'.⁹⁸⁵

After federation, the most systematic misuse of the term 'alien' occurred in Queensland. The State was a major focus of efforts to ensure a 'White Australia' through expulsion of Pacific islanders and removal of Chinese settlers and other 'coloured aliens' from key agricultural industries such as dairy, sugar and bananas. Of the various Australian States and territories, it was Queensland which enacted the largest number of laws between federation and the Second World War restricting participation in the community of those regarded as not 'belonging'. Thirty-six laws were approved by the Queensland Parliament in this period restricting the access of various groups of people to key aspects of the economic and social life of the State.⁹⁸⁶ These laws were predominantly aimed at those considered to be 'aliens' in the broader non-legal sense, especially people 'from another race'.

Since the British Colonial Office had made it clear that high profile laws openly discriminating along racial lines would not receive Royal Assent, Queensland chose the fiction of an education or dictation test as the main tool of exclusion. This copied the approach set out in the Commonwealth's Immigration Restriction Act, with the explicit approval of the Australian Prime Minister. The new Queensland legislation also employed the word 'alien' as an ostensibly neutral legal term to assist the aim of racial exclusion.

These new laws were directed towards Chinese Australians, including British subjects, categorised by the majority of lawmakers in the Queensland Parliament as 'aliens' because they did not 'belong' in the mainstream society of the day. The reduction in the number of persons of Chinese ethnic origin resident in Australia in Commonwealth census records after federation has been noted earlier. However, as Barry York has observed:

The historian's reliance on census data...conceals the numerical significance of the Chinese presence...the annual returns on Chinese persons admitted into Australia during...1921 to 1933

⁹⁸⁵ George Megalogenis, *Australia's Second Chance*, above n 881, 276.

⁹⁸⁶ Prince, 'Chronology', above n 783.

inclusive, reveal that 19,344 Chinese admissions took place. In other words, there was considerable flux, the coming and going of individuals under special circumstances.⁹⁸⁷

Importantly, as York says, ‘perhaps the figures suggest that the Chinese presence in Australia was more substantial during the post-federation White Australia era than is generally understood’.⁹⁸⁸

Queensland’s alien and dictation test legislation was directed towards the involvement of ethnic Chinese in agricultural production. As May identifies, it was not until federation ‘that agricultural labour, the main Chinese undertaking, began to engage the attention of legislators’.⁹⁸⁹ In common with much of Australia, agriculture was the mainstay of the Queensland economy at the end of the nineteenth and early twentieth centuries. As the Secretary for Public Lands explained in 1910 when introducing new legislation to consolidate land laws in Queensland:

We have some of the best wheat areas in Australasia, and the day will come when they are largely availed of. Our sugar areas will also be extended; and the same may be said of tobacco; and, as for fruit, we hardly know how far that may be developed. The most sanguine of us can scarcely picture what may be in the womb of the future. One need only notice the big steamers lying at our wharves and the large warehouses being erected at the present time to recognise how big an element in our progress are our primary industries. We are not secondary producers; we are primary producers, as is evidenced by the bulk of goods produced for export across the sea. Our prosperity depends on land settlement...⁹⁹⁰

This chapter explains the pressure from the Imperial government leading Queensland to adopt the ‘alien’ and dictation test devices in discriminatory legislation. It notes open statements by Government ministers that ‘alien’ would be used for racial exclusion, contrary to the law, before examining misuse of the term ‘alien’ in legislation for the sugar industry, which was critical to Queensland’s economy. It highlights how an Imperial veto on use of the sugar laws against European settlers displayed the shallowness of Britain’s concern about discrimination. It notes that as well as residents of ethnic Asian origin, ‘swarthy’ Sicilians and southern Europeans were labelled as ‘coloured aliens’ in a 1925 Royal Commission on the sugar industry. The chapter also examines banana industry laws aimed at excluding ‘coloured aliens’. Parliamentary debates on these laws reveal racial motives similar to those for the colonial era legislation discussed in Chapter Two. Finally this chapter looks at exemptions from the alien and dictation test laws confirming the racial basis of the legislation, notwithstanding its supposedly neutral wording.

⁹⁸⁷ York, ‘The Chinese in Australia’, above n 183, 366-67.

⁹⁸⁸ Ibid.

⁹⁸⁹ May, *Topsawyers*, above n 179, 290.

⁹⁹⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1910, 1218.

Chapter Seven then considers the many prosecutions of ‘coloured aliens’ in north Queensland after World War One.

These two chapters show the contamination of Queensland law with the racial version of ‘alien’, to the extent that northern Europeans who were legally ‘aliens’ were considered beyond the reach of this term, while ethnic Chinese and other non-European inhabitants (many of whom were British subjects) were automatically treated as ‘coloured aliens’ whether they lawfully came within this phrase or not.

Imperial oversight

Queensland used the alien and dictation test mechanisms in legislation as a central device to maintain a white-dominated society. In doing so, Queensland lawmakers were concerned primarily to avoid rejection by British imperial authorities. Until the 1926 Imperial Conference, which established ‘equality of status from a constitutional...as distinct from a legal point of view...between Great Britain and the self-governing Dominions’,⁹⁹¹ the Colonial Office kept watch on behalf of the British Government over the legislation of the Australian States.⁹⁹² All Australian State constitutions gave State governors power to reserve bills passed by parliament for the monarch’s personal assent. They also empowered the monarch to disallow State Acts assented to by governors within one or two years of their enactment.⁹⁹³

Imperial scrutiny and the possibility that royal assent would be withheld was more of a factor in the drafting of colonial and State legislation than some commentators say. In *Sawer’s The Australian Constitution*, Guy Aitken and Robert Orr note that the right of State governors to reserve bills for the monarch’s personal assent was not repealed until the *Australia Act 1986*, but state that ‘after 1880, no colonial Act was disallowed, and after 1900 no bill was reserved under [this] discretionary power’.⁹⁹⁴ However, this PhD research has identified that after

⁹⁹¹ *Sue v Hill* (1999) 199 CLR 462, 496 (Gleeson, Gummow and Hayne JJ)

⁹⁹² Robert Garran noted that at the 1926 Imperial Conference, the Inter-Imperial Relations Committee ‘made the celebrated Balfour Report’ which identified ‘a number of matters in which either the practice or law of the Commonwealth had lagged behind and was not in conformity with the declared constitutional position’ that Great Britain and the Dominions ‘are autonomous communities within the British Empire equal in status, in no way subordinate to one another in any respect of the domestic or external affairs’, including ‘the practice of submitting Dominion legislation to the Secretary of State for allowance, and the reservation of certain Dominion legislation for the signification of His Majesty’s pleasure’. Garran, *Prosper the Commonwealth*, above n 152, 313-314.

⁹⁹³ See Aitken and Orr, *Sawer’s The Australian Constitution*, above n 11, 38.

⁹⁹⁴ *Ibid* 39-40, 44.

federation assent continued to be withheld for openly discriminatory State legislation. Not only in 1900 but also in 1904, imperial authorities refused royal assent for Queensland laws in the agricultural sector which contained express racial restrictions on the face of the statutes.⁹⁹⁵ An earlier version of Queensland's *Sugar Cultivation Act 1913* (Qld) was also reserved for royal assent.⁹⁹⁶

The Queensland legislation denied royal assent concerned agricultural production, central to the local economy and individual advancement within the State, giving it a high profile, not least with imperial authorities. Laws with similar racial restrictions in lower profile fields – railway regulation, for example – were not rejected.⁹⁹⁷

Queensland's exclusionary legislation had a prominence for the Colonial Office in London which is perhaps difficult to appreciate a century or more later. As Marilyn Lake and Henry Reynolds explain, the British Government was acutely aware that exclusionary legislation in its dominions and colonies was regarded, particularly in Asia, as a statement about the relative merits of different races in the world.⁹⁹⁸ Quick and Garran note that at the 1897 Jubilee celebrations the assembled Australian Premiers were told by Colonial Secretary Joseph Chamberlain that 'exclusion of all Her Majesty's Indian subjects, or even of all Asiatics, would be so offensive to those people that it would be most painful to Her Majesty to sanction it'.⁹⁹⁹ Royal assent for a number of openly discriminatory immigration restriction Acts passed by Australian colonial parliaments was withheld around this time not only 'out of consideration for the feelings of Her Majesty's Indian subjects' but also under pressure from Japan (which was soon to become, in 1902, a formal ally of Great Britain).¹⁰⁰⁰

⁹⁹⁵ Sugar Works Guarantee Act Amendment Bill 1900, Agricultural Bank Act Amendment Bill 1904. These statutes imposed express restrictions on 'aboriginal natives of Asia, Africa, or the Pacific Islands.' 'Anti-Alien Legislation', *Brisbane Courier* (Brisbane) 23 August 1905, 5. The Advances to Settlers Bill 1904 and the Dairy Produce Bill 1904 were also refused royal assent for similar reasons. Queensland, *Parliamentary Debates*, Legislative Assembly, 9 January 1912, 3136 (debate re Leases to Aliens Restriction Bill 1912).

⁹⁹⁶ 'Future Of Queensland', *Cairns Post* (Cairns) 4 October 1928, 8.

⁹⁹⁷ *Gladstone to Callide Railway Acts 1900 and 1902; Glassford Creek Tramway Act 1900; Mount Garnet Freehold Mining Companies Railway Act 1900*.

⁹⁹⁸ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 145-146, 155, 186-189.

⁹⁹⁹ Quick and Garran, *Annotated Constitution of the Australian Commonwealth*, above n 131, 626-627.

¹⁰⁰⁰ Alexander T Yarwood, 'The Dictation Test - A Historical Survey', (1958) 30(2) *Australian Quarterly* 19, 20. William Pember Reeves noted the acceptance by colonial Premiers of the alternative method of exclusion using the education test in the Natal Act. As he said, 'the Premiers acquiesced in the fiat of the Colonial Office and accepted the Natal Act as the basis of future laws. They were quite acute enough to perceive that it mattered little to them whether an undesirable alien was to be shut out for being a Hindoo or for being unable to write in English, French, or German; until Asiatics are highly educated the result would be much the same, and if the new method

Laws concerning employment in Queensland's sugar and other agricultural industries attracted particular attention.¹⁰⁰¹ In 1901 Richard O'Connor as leader of the federal government in the Senate noted that before federation 'the Queensland Sugar Works Guarantee Act Amendment Bill was reserved, and that, as we all know, provided a direct prohibition on the ground of a colour line'. As Senator O'Conner noted, the Imperial despatch refusing Royal assent declared that:

An attempt to impose disqualifications on the base of such distinctions, besides being offensive to a friendly power, is contrary to the general conceptions of equality which have been the guiding principle of British rule throughout the Empire. Disqualification by educational tests...is not a measure to which the Government of Japan or any other Government can take exception...¹⁰⁰²

In 1905 Queensland Premier Arthur Morgan, speaking in the Legislative Assembly, presented a short history of the rejection by Imperial authorities of discriminatory Queensland legislation. He said the Secretary of State for the Colonies had objected to clause 3 of the Agricultural Bank Act Amendment Bill of 1904 (which was similar to a provision in the Sugar Works Guarantee Act Amendment Bill) that read 'No advance under the principal Act or this Act shall be made to any aboriginal native of Asia, Africa, or the Pacific Islands'. According to the Premier:

...the Imperial Government hoped that we would see our way to repealing clause 3 and substituting for it a provision making all aliens alike, irrespective of race or colour.... a bill was already drawn amending clause 3 by making all aliens ineligible for advances.¹⁰⁰³

Mr Morgan noted that the Queensland Parliament was considering a new Land Bill which disqualified 'an alien who by lineage belongs to any of the Asiatic, African or Polynesian races' from owning land. He said if this clause was passed in its original form, 'the inevitable result would be that the measure would be reserved for the royal assent'.¹⁰⁰⁴ The Minister for Lands, Mr Beal, agreed that 'the words in the bill - bearing in mind what had happened to other enactments - would probably lead to the reservation of the bill for the consideration of the Colonial Office authorities'.¹⁰⁰⁵ Mr Beal said that:

At the present time there was a possibility of Austrian immigrants coming in who were aliens and could not under the Federal Government, be naturalised for two years. He proposed to allow aliens to select in Queensland, but to bar as far as possible Asiatic aliens, and to do it and

pleased the English Government, so much the better'. William Pember Reeves, *State Experiments in Australia & New Zealand* (Grant Richards, 1902) 342. See also above n 652.

¹⁰⁰¹ Reeves, above n 1000, 344.

¹⁰⁰² Commonwealth, *Parliamentary Debates*, Senate, 5 December 1901, 8303.

¹⁰⁰³ 'Anti-Alien Legislation', *Brisbane Courier* (Brisbane) 23 August 1905, 5.

¹⁰⁰⁴ *Ibid.*

¹⁰⁰⁵ *Ibid.*

carry out the wishes of Parliament he proposed the educational test of the Federal authorities.¹⁰⁰⁶

This statement by the Minister for Lands shows an understanding of the legal meaning of ‘alien’, i.e. someone who was not a British subject. Mr Beal wanted to allow ‘Austrian aliens’ to own land in Queensland but to prevent ‘Asiatic aliens’ doing so. Unlike delegates to the 1890s constitutional conventions and other Australian lawmakers, he did not use the word ‘alien’ merely as shorthand for any person of non-European race. Instead, as the Minister admitted, there were Europeans who were ‘aliens’ and, as Premier Morgan had said, there were also ‘aliens’ who were ‘Asiatics’. Since ‘alien’ in its legal sense was a racially neutral term, a prohibition could be applied in legislation to ‘all aliens alike, irrespective of race or colour’ without offending the ‘general conceptions of equality which have been the guiding principle of British rule throughout the Empire’. The prohibition could then be administered to exclude only aliens of non-European race without having to state this expressly. For example, section 3 of the *Advances to Settlers Act 1905* stated that ‘No advance...shall be made to any alien’. The 1904 version of this statute had ‘discriminated against certain nationalities’ and had been refused royal assent, hence it had been amended so the prohibition on advances, at least on the terms of the legislation, applied to ‘aliens’ generally.¹⁰⁰⁷ However, as Premier Morgan pointed out in the Queensland Legislative Assembly in 1905, legislation with the latter form of words would achieve the original discriminatory aim:

...exception had been taken by the Imperial Government to a discrimination against Asiatic and African aliens and Pacific Islanders in the Agricultural Bank Act Amendment Bill of 1904, and a new bill was drafted, and would be submitted to Parliament this session, omitting the objectionable feature, but *at the same time achieving the original object*.¹⁰⁰⁸

This material helps explain how the British policy against open discrimination in legislation encouraged obfuscation about the meaning and application of the term ‘alien’. As Queensland discovered, the word could not be used in its correct legal sense together with a racial disqualification (for example ‘aliens of Asiatic or African lineage’). So it had to be employed on its own with no accompanying reference to race. The prohibition on ‘aliens’ was then on its face racially neutral. However it was understood to apply to any ‘non-European’. Hence British policy inadvertently encouraged greater discrimination since Queensland amended bills submitted to Parliament which originally applied only to persons

¹⁰⁰⁶ Ibid.

¹⁰⁰⁷ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 January 1912, 3136 (debate re Leases to Aliens Restriction Bill 1912). It was noted during this debate that the Dairy Produce Bill 1904 was refused royal assent for similar reasons.

¹⁰⁰⁸ ‘Anti-Alien Legislation’, *Brisbane Courier* (Brisbane) 23 August 1905, 5. Emphasis added.

of Asian or African lineage who were also ‘aliens’ (non-subjects) so they applied in their final form to ‘aliens’ generally, understood to mean all people of Asian or African origin, including those who were British subjects.

According to Paul Jones, ‘British protests and threats to withhold Royal Assent for bills employing racial terminology, evident in the immediate post-federation years, had been short-lived’.¹⁰⁰⁹ However, this understates the role of imperial oversight in Queensland’s post-federation legislation. Fear of imperial repudiation influenced the drafting of Queensland legislation until the late 1920s at least.¹⁰¹⁰ For legislation supporting key agricultural and other primary industries, Queensland found methods of racial exclusion that did not contravene the imperial edict against open discrimination. The main legal mechanism was the ‘education’ or ‘dictation’ test, suggested by Chamberlain himself to Australian Premiers in 1897¹⁰¹¹ and adopted in the Commonwealth’s *Immigration Restriction Act 1901*. The dictation test was then specifically endorsed by Australia’s Prime Minister for use in Queensland’s exclusionary legislation.¹⁰¹² As Prime Minister Deakin said, this mechanism ensured equality of treatment for all imperial subjects ‘*only on the surface*’ so that ‘in fact, and in effect, our colourless laws are administered so as to draw a *deep colour line* of demarcation between Caucasians and all other races’.¹⁰¹³

Some Queensland laws enacted between federation and the Second World War did prescribe a ‘colour line’ in the actual legislation. For example, the *Elections Act 1915* (Qld) prohibited ‘Aboriginal natives of Australia, Asia, Africa or Islands of the Pacific’ from voting in elections for the Queensland Legislative Assembly.¹⁰¹⁴ There was a similar exclusion in the *City of Brisbane Act 1924* (Qld) in relation to the entitlement to vote for the Brisbane City Council.¹⁰¹⁵ Openly discriminatory Queensland legislation from the colonial era also remained on the statute books, being replaced only in some cases by an education or dictation

¹⁰⁰⁹ Paul Jones, *Alien Acts*, above n 198, 146.

¹⁰¹⁰ ‘Future Of Queensland’, *Cairns Post* (Cairns) 4 October 1928, 8. The dictation test mechanism was still being used in Queensland legislation in the late 1930s. See e.g. *Rural Development Co-ordination of Advances Act 1938* (Qld).

¹⁰¹¹ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 145. See also above n 651 and n 1000.

¹⁰¹² ‘Parliament. The Sugar Industry’, *Brisbane Courier* (Brisbane) 16 July 1913, 6.

¹⁰¹³ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 164, citing *Morning Post* 28 May 1906. Emphasis added.

¹⁰¹⁴ Section 11 *Elections Act 1915* (Qld).

¹⁰¹⁵ Section 11 *City of Brisbane Act 1924* (Qld).

test.¹⁰¹⁶ But in relation to the key employment and money-making agricultural industries, the prohibitions and exclusions enacted by the Queensland Parliament after federation were primarily imposed through the mechanism of the dictation test.

The term ‘alien’ was an important device used in Queensland legislation in conjunction with the education or dictation test to avoid imperial rejection. The dual meaning of ‘alien’ increased its value as an exclusionary language tool. Employed in a legal context, the term ‘alien’ could be presented, like the dictation test, as racially neutral and hence consistent with imperial policy. As debates in the Queensland Parliament and prosecutions under various Queensland laws show, however, the word was understood both by lawmakers and those administering the legislation as a reference to non-Europeans, not least settlers of Chinese ethnic origin. While deferring to imperial authorities when drafting the legislation, therefore, Queensland lawmakers targeted the laws at ‘aliens’ in a racial sense, purposely closing their eyes to centuries of established law on use of this term.

Alien and dictation test laws

The Queensland Parliament passed eighteen Acts between 1910 and 1938 prohibiting involvement in an industry or occupation - or access to land and finance - without a certificate showing that a person was able to read and write from dictation not less than fifty words in any language determined by the relevant Minister or head of the particular organisation. These laws were aimed in particular at excluding Chinese settlers from opportunities to earn money in key agricultural industries. Penalties could be severe: growing sugar cane or bananas without a certificate, for example, incurred a £100 fine (a huge sum for the time) plus confiscation of the entire crop.¹⁰¹⁷

The *Land Act 1910* (Qld) prohibited ‘aliens’ from owning land in Queensland unless they had first passed a dictation test in any language that the Secretary for Agriculture might specify.¹⁰¹⁸ Whatever the proper legal meaning of ‘alien’ for the purpose of the Act, members

¹⁰¹⁶ See, for example, the *Mining Act 1898* (Qld) and the *Pearl-shell and Bêche-de-Mer Fishery Act 1881* (Qld) (amended in 1913 to include a dictation test).

¹⁰¹⁷ The legislation also included a range of other penalties. If a sugar cane or banana grower employed a person who did not have a certificate, the fine was £5 per day. For a person who worked without a certificate, the penalty was 40s per day. *Sugar Cultivation Act 1913* (Qld) ss 3, 4; *Banana Industry Preservation Act 1921* (Qld) ss 3, 4.

¹⁰¹⁸ Section 59(1) of the *Land Act* stated that ‘no person who is...an alien who has not first obtained in the prescribed manner a certificate that he is able to read and write from dictation words in such language as the Minister may direct...shall be competent to apply for or hold any selection’.

of the Queensland Parliament were in no doubt who the law should be directed against. As one member of the Legislative Assembly declared in 1910:

The colour line should be drawn in regard to anyone taking up land in Queensland...We want our own British subjects...and we will welcome all Scandinavians and all Europeans to take up land, but what we object to is the bringing in of Asiatics, Japanese and Chinese. We do not want these people here - we want men who are up to the standard of white living...I have travelled through most of northern Europe, and I know that their conditions of life are far higher and of far more benefit to the general community than is the case in connection with any of the Asiatic races. Therefore the languages [for the dictation test] should be designated with strict reference to the colour line.¹⁰¹⁹

The Land Act was followed by the *Leases to Aliens Restriction Act 1912* (Qld), preventing any 'alien' leasing a parcel of land greater than 5 acres without first passing a dictation test in any language the Secretary for Public Lands might direct.¹⁰²⁰ This was enacted because of a belief that Chinese 'aliens' had circumvented the prohibition on land ownership through leasing arrangements with white property owners. As May explains, the Act 'was a direct result of agitation against the leasing of land to Chinese at Atherton' (in north Queensland).¹⁰²¹ According to future Premier E.G. Theodore:

The leasing of land to aliens in North Queensland has been a very great evil...It amounts almost to a public scandal – the number of Chinese who occupied land in that district to the exclusion of white people.¹⁰²²

The Attorney-General claimed there were several places in northern Queensland where this had happened, for example at Freshwater near Cairns:

...where about 5,000 acres had been leased to Chinese, who went in for growing bananas, rice, and maize. They exhausted the fertility of the soil, and now the place was a wilderness. Then, there was Green Hills, a very rich estate, near Cairns, where the same thing had happened...The result was that a very considerable quantity of fertile land had got into the hands of aliens, who had not cultivated the land, but had robbed it of its fertility, and the land had been abandoned, and was now overgrown with weeds.¹⁰²³

Some of the Queensland legislation prohibited 'aliens' from involvement in an industry or occupation without having passed a dictation test;¹⁰²⁴ other statutes excluded all 'persons'

¹⁰¹⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1910, 1241.

¹⁰²⁰ Section 3(1) made it unlawful to grant any lease or enter any agreement for leasing 'any parcel of land exceeding 5 acres' to any 'alien' who had 'not first obtained...a certificate that he is able to read and write from dictation words in such language as the Secretary for Public Lands may direct'. Section 3(2) prohibited an 'alien' who had not obtained such a certificate and who was the current lessee of land of 5 acres or less from entering any lease or agreement which extended the total area of leased land over 5 acres.

¹⁰²¹ May, *Topsawyers*, above n 179, 291.

¹⁰²² Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 1911, 2528.

¹⁰²³ *Ibid*, Legislative Council, 13 December 1911, 2887.

¹⁰²⁴ *Land Act 1910* (Qld), s 59(1)(b); *Agricultural Bank Act (Consolidated) 1911* (Qld) (amended in 1923 to 'persons'); *Leases to Aliens Restriction Act 1912* (Qld); *Miner's Homestead Leases Act*

who had not passed the test.¹⁰²⁵ These terms appear to have been used interchangeably in the various statutes,¹⁰²⁶ with no particular date signalling a change from one to the other, although ‘persons’ became more common in the later post-World War One legislation.¹⁰²⁷ The legislation making it unlawful for ‘aliens’ to participate in an industry or occupation without passing a dictation test contained no definition of ‘alien’.¹⁰²⁸ As a matter of statutory interpretation this meant that the common law meaning of ‘alien’ - a citizen or subject of a foreign state - should apply, including in any court proceedings where this might be in issue. In practice, by not specifically restricting the application of the dictation test legislation to non-British subjects, the legislation allowed those administering the laws to apply the more common, broader meaning of the term - i.e. those who did not ‘belong’, particularly those ‘from another race’ - in deciding which people should be required to pass a dictation test.

None of the dictation test legislation, with one exception, specifically imposed a ‘colour line’ in the statute itself.¹⁰²⁹ Whatever their actual intention, the terms of the statutes appeared to treat all ‘aliens’ or ‘persons’ equally, thus satisfying the demands of the Colonial Office to avoid open offence to non-European powers. This caused lively debate in the Queensland Parliament about who the legislation was really directed at. In 1913 a member of the Legislative Council observed that the Sugar Cultivation Bill ‘was certainly very drastic, and

1913 (Qld); *Queensland Government Savings Bank Act 1916* (Qld), s 25; *State Advances Acts 1916* (Qld).

¹⁰²⁵ *Local Authorities Act 1902* (Qld), as amended 1910; *Sugar Works Act 1911* (Qld); *Pearl-shell and Bêche-de-Mer Fishery Acts Amendment Act 1913* (Qld), s 7; *Sugar Cultivation Act 1913* (Qld), ss 3, 4; *Dairy Produce Act 1920* (Qld), s 35; *Banana Industry Preservation Act 1921* (Qld); *Electrical Workers’ Act 1927* (Qld); *Rural Development Co-ordination of Advances Act 1938* (Qld).

¹⁰²⁶ For example, section 28 of the *Local Authorities Act Amendment Act 1910* introduced a dictation test for any ‘person’ wishing to be employed on a tramway or omnibus service. However, the explanatory marginal note for the provision read ‘*Alien* labour on tramways, &c’. As the Attorney-General explained in the Legislative Council, while the legislation used ostensibly non-discriminatory language, the intention was to exclude those of non-European origin. Queensland, *Parliamentary Debates*, Legislative Council, 22 November 1910, 2214.

¹⁰²⁷ The *Aliens Act 1965* (Qld) - described as ‘An Act to...Revise the Statute Law of Queensland so far as it relates to *Aliens*’ (emphasis added) - repealed several dictation test laws, including eg the *Banana Industry Preservation Act 1921* which imposed a prohibition on ‘persons’ who had not passed a dictation test. In other words, consistent with the intention of the legislation to exclude ‘aliens’ in a racial sense, the *Banana Industry Preservation Act* was listed as a statute ‘relating to aliens’ even though it did not use this term.

¹⁰²⁸ *Land Act 1910* (Qld); *Leases to Aliens Restriction Act 1912* (Qld); *Agricultural Bank Act (Consolidated) 1911* (Qld); *Miner’s Homestead Leases Act 1913* (Qld); *Queensland Government Savings Bank Act 1916* (Qld); *State Advances Acts 1916* (Qld).

¹⁰²⁹ The sole exception was the *Margarine Act 1910* (Qld) which specified that ‘*No person...not being of European descent or an aboriginal native of Australia*’ could be employed in any factory licensed under the Act without passing the dictation test. This was also the only statute out of more than 300 exclusionary laws passed between 1828 and 1939 by the Commonwealth and the colonies/states with a specific *inclusion* for indigenous Australians.

would mean that no farmer in Queensland could grow so much as a half-acre of cane for his dairy cattle without being liable to be called upon to submit to a language test'.¹⁰³⁰ The Attorney-General, however, noted that the new law:

...had been submitted confidentially to the Federal Prime Minister, who had approved of its present terms ...The wide scope of the Bill had been fully recognised, but it was necessary, in order to secure the Royal assent, that there should be no discrimination against any race or colour.¹⁰³¹

As with its use in the federal *Immigration Restriction Act 1901*, the dictation test mechanism allowed the Queensland Government to assert that the relevant legislation contained no discrimination on its face. In 1910, the Queensland Attorney-General explained the importance of adopting such a measure. The intention of the dictation test clause, he said:

...was only to exclude Asiatic or African aliens, but not to exclude others ...a bill which was passed a few years ago differentiating against Asiatic aliens so as to exclude Japanese was refused the Royal assent.¹⁰³²

As the *Townsville Daily Bulletin* observed in 1912:

Under the provisions of the Sugar Works Act (1911) *Aliens* are debarred from growing cane for the New Central Mills and if the much debated Liquor Bill be passed by the Denham Government in April, the *Aliens* will (to use a vulgarism) be fired out of the Hotels. These expulsions will be worked by that cunningly contrived trap the "Education test": and the same will also be applied to future Alien lessees.¹⁰³³

A mere façade of non-discrimination seemed sufficient to satisfy the Colonial Office. While the dictation test laws did not exclude non-Europeans directly, there was little attempt beyond this to disguise the aim of the legislation. The long title of the *Sugar Cultivation Act 1913* stated that the purpose of the new law was 'to prohibit the employment of certain forms of labour in the production of sugar'. As Professor of Public Law at the University of Melbourne, K.H. Bailey, later Solicitor-General of the Commonwealth,¹⁰³⁴ explained in 1937 in an article entitled '*The Legal Position of Foreigners in Australia*':

¹⁰³⁰ 'Parliament. The Sugar Industry', *Brisbane Courier* (Brisbane) 16 July 1913, 6. See also Queensland, *Parliamentary Debates*, Legislative Council, 22 November 1910, 2214, where Mr Cowlishaw complained that the requirement for all 'persons' to pass a dictation test in the Local Authorities Act Amendment Act 1910 'might prevent a British labourer getting employment if he were unable to read and write. He did not think that was the intention at all'.

¹⁰³¹ 'Parliament. The Sugar Industry', *Brisbane Courier* (Brisbane) 16 July 1913, 6.

¹⁰³² Queensland, *Parliamentary Debates*, Legislative Council, 22 November 1910, 2214 (debate on Local Authorities Act Amendment Bill).

¹⁰³³ 'Silkwood Notes', *Townsville Daily Bulletin* (Townsville) 18 March 1912, 5. Emphasis added. The exclusion of 'aliens' from the liquor industry was eventually enacted in 1923: see 'Liquor Act Amendments', *Townsville Daily Bulletin* (Townsville) 28 July 1923, 6.

¹⁰³⁴ Jack E. Richardson, 'Bailey, Sir Kenneth Hamilton (1898–1972)', *Australian Dictionary of Biography* (National Centre of Biography, Australian National University) <http://adb.anu.edu.au/biography/bailey-sir-kenneth-hamilton-9404/text16529>.

The dictation test is clearly traceable to the Commonwealth Immigration Acts, and it is understood that, though general in form, the Queensland legislation was *in fact directed against the employment of coloured labour...*(T)he legal discriminations against *resident aliens* in Australia are really the corollary of the immigration policy of the Commonwealth. And it is this which, of course, explains the fact that most of the restrictions *operate specifically, in fact if not in form, against Asiatic labourers.*¹⁰³⁵

The discrimination was justified, according to Bailey, in order to protect the labour conditions of white workers:

Most of the disabilities of *aliens* in Australia ... are devised to preserve Australian wage standards, and to prevent Australians being driven out of certain avenues of employment by the competition of people who would undercut them if not prevented. The discriminations against *aliens* are scarcely the product of a systematic and general policy of attrition directed against the *alien population, and more particularly the Asiatic part of it.* The protection afforded to Australian labour has resulted (as is indeed suggested irresistibly by an examination of the haphazard patchwork of disabilities already discussed) simply from the urgent pressure of local interests.¹⁰³⁶

Professor Bailey's choice of language when writing an article on the legal position of certain people in Australia is interesting in itself. While he recognised that the 'Asiatic part' was only one element of the 'alien population' in the country, it is unclear whether in his view the other parts included non-British subjects of European origin or merely other coloured Australian residents of various backgrounds besides Asian. What these statements do indicate, however, is that despite the article's pretensions as an authoritative analysis from an eminent legal figure, Professor Bailey automatically categorised 'Asiatic labourers' as 'resident aliens' with no recognition that some of these workers were in fact British subjects and not aliens as a matter of law. In other words, Professor Bailey did not consider the significance of their actual legal or constitutional status.

Professor Bailey's observations indicate the important role of Queensland's alien and dictation test laws as part of the domestic arm of the White Australia policy. However Professor Bailey downplayed the significance of these laws:

It is believed, however, that some at least of the Acts are not really being enforced, and are retained in the statute book not so much for the sake of the policy they embody, as because they afford a means of dealing with troublesome cases.¹⁰³⁷

This statement belies the importance to Queensland of this legislation. Contrary to Professor Bailey's view, the alien and dictation test laws were 'the product of a systematic and general policy of attrition', directed in particular against Chinese Australians, and they were enforced. Backed by prosecutions in the Queensland court system (see Chapter Seven), the

¹⁰³⁵ Bailey, 'Legal Position of Foreigners', above n 227, 42, 46. Emphasis added.

¹⁰³⁶ Ibid 46. Emphasis added.

¹⁰³⁷ Ibid 42.

laws imposed a significant barrier against non-European participation in key industries and occupations in the State.

The enactment of the *Miner's Homestead Leases Act 1913* shows the success of the 'neutral' dictation test and 'alien' formula in gaining royal assent for discriminatory legislation. Under this Act, 'homestead leases' (granted to encourage permanent residency on goldfields and other places of mineral prospecting)¹⁰³⁸ could not be granted to an 'alien' who had not passed the dictation test. As the *Worker* reported in 1914:

A despatch has been received by the Government notifying that the King has been advised not to exercise his power of disallowance with regard to the two Acts passed last session to deal with miners' homesteads. When the original Act was passed some question arose regarding the provision relating to aliens and an Amending bill was at once submitted so as to remove any likelihood of the bill being disallowed by his Majesty on the ground that it contravened the terms of the existing treaties and regulations.¹⁰³⁹

Open manipulation of the law

While accepting the need, in deference to the sensibilities of the imperial authorities, to avoid a specific 'colour line' in the actual legislation, the Queensland Government openly stated the racial basis of the alien and dictation test laws. In 1921 the Secretary for Agriculture declared (in relation to new banana industry legislation) that 'white men...will be exempt' from the test.¹⁰⁴⁰ As one of the Minister's parliamentary colleagues said, only 'Asiatics or persons of Polynesian origin' would be excluded through the dictation test mechanism.¹⁰⁴¹ Consistent with the Commonwealth Immigration Restriction Act, the Queensland dictation test would not be applied to people of European race.

In response to objections that the Leases to Aliens Restriction Bill applied on its face to European as well as non-European 'aliens', the Secretary for Public Lands explained the constraints imposed by the British Colonial Office. While the terms of the legislation indicated that all 'aliens' in a legal sense would have to pass a dictation test, in fact people of European descent who had yet to become British subjects would not be targeted. But the exemption for European settlers could not be stated in the legislation itself:

We cannot legislate for a particular set of aliens. If we attempt to do so, assent to the Bill will probably be withheld. We have therefore to deal comprehensively with the subject of aliens, making no distinction against any particular race. There are persons in the community who come under the description, persons of European descent who have not obtained letters of

¹⁰³⁸ Queensland (State Archives), 'Miners' Homestead Leases', *Brief Guide* 48.

¹⁰³⁹ 'Miners' Homesteads', *Worker* (Brisbane), 30 April 1914, 16.

¹⁰⁴⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 653.

¹⁰⁴¹ *Ibid.*

naturalisation, and until they do obtain letters of naturalisation they remain aliens. It would not be suggested that it would be an improper thing to grant a lease or enter into an agreement with those particular aliens.¹⁰⁴²

In this instance, the Minister responsible for the new legislation endorsed the use of ‘alien’ in the Leases to Aliens Restriction Act as an exclusionary language tool contrary to the rule of law. The Secretary for Public Lands clearly understood the legal meaning of ‘alien’ and that this status was not determined by the race or colour of the individual. As his comments indicate, however, the Queensland Government was not concerned with a proper legal interpretation of the new provisions. Instead, it intended the legislation to be applied on a racial basis contrary to the law under the pretence of being non-discriminatory.

The member for Fassifern, Mr Wienholdt, was re-assured by the explanation of the Minister that the new law would not apply to ‘desirable aliens’ such as German settlers:

I do not believe at all in aliens, undesirable aliens, being allowed to come into the country...But it seems to me that there is just a possibility that a German may come out here and get a lease of a small area...(and when a) new owner comes into possession, that man may be told to clear out, because, according to this measure, that agreement is null and void...That is all right so far as the Minister is concerned. He is not going to prosecute anyone who is a desirable alien.¹⁰⁴³

There had been a longstanding view in Queensland that settlers from Europe – especially those from northern Europe – should immediately be accepted as full members of the community. As Queensland Attorney-General Byrnes said during the debate on the Aliens Naturalisation Bill at the 1897 Federal Council of Australasia in Hobart:

We encourage the inoffensive, hard-working Scandinavians and Germans, who take up and settle on the Crown lands of the colony, to become British subjects. So we could not possibly take up a law which said they must be there three years before they were naturalised.¹⁰⁴⁴

In Queensland’s Legislative Assembly in 1910, Mr Mann, the member for Cairns, objected to the ostensibly non-discriminatory nature of the proposed dictation test in the Land Bill, reminding members of his alternative proposal:

...under this clause a German, a Frenchman, or a Dane must come in under it. My amendment only precluded undesirable aliens - natives of Asia, Africa or Polynesia. This clause puts all aliens on the same footing...I prefer myself to discriminate against undesirable aliens, but I believe in allowing Germans and other Europeans to take up land without let or hindrance. I have no objection to them taking up land as long as they become naturalised subjects.¹⁰⁴⁵

Labor’s Mr O’Sullivan was also concerned that on its face the legislation appeared to apply to all those who were aliens in a legal sense, including settlers from Europe:

¹⁰⁴² Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 1911, 2527.

¹⁰⁴³ Ibid 2528.

¹⁰⁴⁴ Federal Council of Australasia, *Official Record of Debates*, Seventh Session of the Council, Hobart, 1897, 106.

¹⁰⁴⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 4 October 1910, 1229.

They ought to take a lesson from what they saw as taking place in California in connection with the Japanese and Asiatics and guard against such a thing as that happening in Queensland...They should do something to enable the white aliens from Northern Europe to become full citizens and have the full rights of taking up land.¹⁰⁴⁶

As the member for Moreton, Mr Forsyth, said, 'it would be a very great hardship for men coming from European countries, who are *not aliens in the general acceptance of the term*, if they were not allowed to take up land'.¹⁰⁴⁷

Queensland's Attorney-General at the time of the Leases to Aliens Restriction Bill, Thomas O'Sullivan, while not using the language of 'desirable' versus 'undesirable' aliens, advocated exactly this type of distinction for the legislation. Parliamentary records show that the Attorney-General appreciated the legal significance of naturalisation and understood the formal legal concept of 'alien'. They also show, however, that like his colleagues he believed non-Europeans were 'aliens' in a racial sense and that this racial meaning should be used *in place of* the legal meaning in Queensland's dictation test legislation.

In reciting the alleged abuses of agricultural land which Chinese settlers were supposedly responsible for (and which were the declared motive behind the Leases to Aliens Restriction Bill) the Attorney-General, like other members of parliament, used the words 'aliens' and 'Chinese' interchangeably. The Attorney-General noted that he:

...was informed that the *Chinese* had not troubled to cultivate the land. They did not use the plough, but simply cultivated with the hoe...As far as sugar-growing was concerned, prior to the passage of the Commonwealth excise and bonus legislation, *aliens* were able to compete with white men, who were very seriously handicapped, and, if the Federal Parliament should remove the excise and bonus there would not be sufficient protection for white men, and the same thing would happen again.¹⁰⁴⁸

In response to concerns about the fate of naturalised Chinese Australians under the Leases to Aliens Restriction Bill, the Attorney-General said that a person was 'not an alien if he is naturalised.'¹⁰⁴⁹ But he rejected a call to amend the legislation to exempt naturalised Chinese residents from the dictation test, stating that he 'could not accept an amendment, because it would open the door to evasion, as it would be very hard to prove identity, although personally he had no objection to such an amendment'.¹⁰⁵⁰ This shows that while the Attorney-General understood the legal significance of naturalisation, he thought it was not a

¹⁰⁴⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 1911, 2535.

¹⁰⁴⁷ Ibid 2529. Emphasis added.

¹⁰⁴⁸ Ibid 13 December 1911, 2887. Emphasis added.

¹⁰⁴⁹ Ibid 12 December 1911, 2848.

¹⁰⁵⁰ Ibid. The Attorney-General did not point out that a 'naturalised' Chinese Australian had no need to seek exemption from a law prohibiting 'aliens' from certain activities.

workable test of whether a person was an ‘alien’ for the purpose of the new law. As noted earlier in this thesis, a recurring theme in colonial and post-federation Australia was a mistrust of the ‘naturalised’ non-European. The Attorney-General suggested that if naturalised persons were exempt from the dictation test, Chinese settlers might pass themselves off as a naturalised relative or friend. In other words, contrary to the law, naturalisation as a British subject was not regarded, even by Queensland’s first law officer, as having any effect on whether Chinese and other non-Europeans should be treated as ‘aliens’ under the dictation test legislation. Instead, government authorities would use racial appearance not legal status to distinguish ‘aliens’ from ‘non-aliens’.

The belief that non-Europeans could do nothing to change their ‘alien’ status was perhaps best expressed by the Hon C.S. McGhie in the debate on the Leases to Aliens Restriction Bill. Mr McGhie understood that a person naturalised under Australian law had formally gained nationality of the state and was legally a British subject, observing that if a Chinese settler had been ‘naturalised, he is in as good a position as you or I’.¹⁰⁵¹ But having successfully gone through the naturalisation process made no difference to Mr McGhie in relation to how Chinese Australians should be regarded under Queensland legislation. When Mr Gray called for naturalised Chinese to be excluded from the operation of the Bill, Mr McGhie retorted bluntly, ‘You can never make a Britisher of a Chinaman’.¹⁰⁵²

Even for leading legal figures such as the Attorney-General whose business it was to understand the legal definition of ‘alien’ and how people could (theoretically) move beyond this term, the prohibition in the legislation on the leasing of land over 5 acres to ‘aliens’ was directed not at aliens in the correct legal sense but at those regarded by Queensland society as ‘aliens’ in the ordinary, non-legal or racial meaning of word, namely any people with an Asiatic or other non-European background, especially Chinese migrants to Australia.

The statements by the Secretary for Public Lands and the Attorney-General demonstrate how ethnic appearance was used instead of the law to determine who would be prohibited as ‘aliens’ from owning or leasing land. This identifies clearly how senior ministers in the Queensland government had no hesitation in discarding or ignoring the law for the purpose of racial exclusion.

¹⁰⁵¹ Ibid, Legislative Council, 12 December 1911, 2848.

¹⁰⁵² Ibid 2846.

Aliens, the dictation test and sugar

The sugar industry was a particular focus of Queensland's alien and dictation test legislation. The new State laws were a practical consequence of the federal White Australia policy. The deportation of Pacific islanders under the Commonwealth's Pacific Island Labourers Act threatened the supply of cheap coloured labour for the industry. Queensland Premier Philp warned Prime Minister Barton in 1901 that this might 'entirely destroy the sugar industry' in the State.¹⁰⁵³ The Commonwealth subsequently imposed an excise on sugar manufacturers to allow a rebate or bounty to be paid to cultivators of 'white-grown' sugar.¹⁰⁵⁴ As Evans, Saunders and Cronin note, this 'provided a bounty payment to planters employing European labourers, and thus made it too expensive for them to take on coloured workers'.¹⁰⁵⁵ According to May, the effect on Chinese Australians was twofold:

By subsidising the employment of white labour, [Commonwealth bounty laws] directly discouraged Europeans from employing Chinese. Secondly, as growers were themselves classified as labour used in sugar production, Chinese growers were automatically debarred from receiving the rebate. However the Acts were not a complete deterrent to the employment of Chinese, as indicated by the substantial number of Chinese who took up sugar work after the banana industry declined.¹⁰⁵⁶

In 1910 Dr Walter Maxwell, director of government policy for the Queensland sugar industry, reported that the excise and bounty system 'had almost exactly reversed the situation as between the relative amounts of sugar produced by white and coloured labour respectively', from over 85 per cent grown by coloured labour in 1902 to almost 88 per cent grown by white labour in 1908.¹⁰⁵⁷ Nevertheless, he said:

Notwithstanding the increase of bounty on white-grown sugar, and notwithstanding the deportation of all able-bodied kanakas, a very considerable proportion of all Australian grown sugar is still being produced by coloured labour. Queensland still produces over 10 per cent of its sugar by *alien* labour...¹⁰⁵⁸

As this statement indicates, by 'alien labour' Dr Maxwell meant simply 'non-European'. Queensland cane-growers and mill-owners had earlier warned that 'considerable areas of land

¹⁰⁵³ Alan Birch, 'The Implementation of the White Australia Policy in the Queensland Sugar Industry 1901-12', (1965) 11(2) *Australian Journal of Politics and History*, 189, 201, citing letter from Queensland Premier to Prime Minister, Chief Secretary's Office, Brisbane, 7 October 1901, Commonwealth Archives, CP 677 01/2721.

¹⁰⁵⁴ *Excise Tariff Act 1902* (Cth); *Sugar Bounty Act 1903* (Cth); *Sugar Bounty Act 1905* (Cth); *Bounties Act 1907-1912* (Cth).

¹⁰⁵⁵ Evans, Saunders and Cronin, *Race Relations in Colonial Queensland*, above n 170, 251, including n 148.

¹⁰⁵⁶ See May, *Topsawyers*, above n 179, 290.

¹⁰⁵⁷ Birch, above n 1053, 209.

¹⁰⁵⁸ *Ibid* 209, citing Dr W. Maxwell, *Report to Commonwealth Parliament*, January 1910, 4. Emphasis added.

in tropical Queensland are already passing into the occupation of Chinese and other Asiatics for the purpose of sugar-growing' and that 'the whole of the tropical portion of Australia will eventually pass into the hands of Asiatics'.¹⁰⁵⁹

Sugar growers were unhappy with the bounty for employing white workers because it was less than the excise extracted from them.¹⁰⁶⁰ In 1911 a Royal Commission into the sugar industry appointed by the Commonwealth Government recommended that:

...the bounty and excise be abolished provided that the Commonwealth Government, by co-operation with the States or otherwise, take whatever steps may be necessary to promote the white labour policy and to ensure the maintenance of a living wage in the sugar industry generally.¹⁰⁶¹

As Alan Birch states, 'the way was open for the total banning of "coloured" sugar and this was to be legislated by the Queensland parliament'.¹⁰⁶² The *Townsville Daily Bulletin* noted that the Queensland Premier had already told the Commonwealth Government that 'if the Excise and Bounty Act were repealed he would be prepared to submit legislation for the exclusion of coloured labour'.¹⁰⁶³ Consequently the Queensland Parliament introduced new laws to exclude non-white labour from the sugar industry. Under the heading 'Alien labour on sugar works', the *Sugar Works Act 1911* prohibited 'any person...who has not passed a dictation test in English' from employment in or in relation to any sugar works managed or worked under the Act.¹⁰⁶⁴ The *Sugar Cultivation Act 1913* likewise prohibited 'any person who has not first obtained...a certificate of having passed the dictation test in any language directed by the Secretary for Agriculture' from cultivating or being employed in, or in connection with, the cultivation or manufacture of sugar cane.¹⁰⁶⁵ As the *Bulletin* commented, however:

The object of this Act was to shut out certain *coloured labour or aliens* as might be required, or to prevent such persons from owning or cultivating land for sugar-growing - all this in furtherance of the growing of cane by white labour.¹⁰⁶⁶

¹⁰⁵⁹ Ibid 206, citing *V & P Queensland*, 1904-5, 401.

¹⁰⁶⁰ 'The Sugar Injustice', *Queenslander* (Brisbane) 3 May 1913, 3.

¹⁰⁶¹ 'The Queensland Sugar Industry', *Townsville Daily Bulletin* (Townsville) 10 June 1930, 9.

¹⁰⁶² Birch, above n 1053, 210.

¹⁰⁶³ 'The Queensland Sugar Industry', *Townsville Daily Bulletin* (Townsville) 10 June 1930, 9. Cathie May notes that from 1910 the dictation test was introduced as the mechanism of exclusion in Queensland legislation 'to reinforce or replace' the Commonwealth rebate or bounty system. May, *Topsawyers*, above n 179, 290.

¹⁰⁶⁴ Section 9(8). Emphasis added.

¹⁰⁶⁵ Sections 3 and 4. Emphasis added.

¹⁰⁶⁶ 'The Queensland Sugar Industry', *Townsville Daily Bulletin* (Townsville) 10 June 1930, 9. Emphasis added.

According to Birch, the Sugar Cultivation Act ‘imposed a dictation test and persons of European descent were, of course, exempt from this’.¹⁰⁶⁷

When a member of the Queensland Legislative Assembly suggested that ‘naturalised aliens’ should be exempt from the Sugar Cultivation Act, the Attorney-General replied, disingenuously, that the dictation test would apply ‘to every one of any race or colour’, even ‘natural born subjects’, and in particular that it would apply ‘no more to Chinese than to white men’.¹⁰⁶⁸ However, as Rockhampton’s *Morning Bulletin* reported, the Act ‘was drafted with the express object of making the sugar industry one in which only white people could engage’. In tabling the legislation:

...the Premier was fulfilling an agreement with the late Prime Minister of the Commonwealth—that in return for legislation which would comply with the wishes of the canegrowers on the excise and bounty question, the State Parliament would make every provision humanly possible to prevent the employment of coloured labour in the industry... The Sugar Cultivation Bill...*totally excludes coloured people* from being employed in either the cultivation or the manufacture of sugar in Queensland. It thus ensures that both farming and milling shall be white man’s work and heavy penalties are provided for any infringement of the Act. The *coloured alien* who has been growing sugar is to be retired from this branch of agriculture.¹⁰⁶⁹

The paper noted that the Government used the ‘education test’ mechanism to remove ‘alien Asiatic’ labour from the sugar industry to ensure Royal assent for the legislation:

...some members of the Labour party tried to resurrect the old black labour cry: the bill did not expressly declare that no coloured person could engage in the industry; and after all what good was the education test? In moving the second reading of the bill Mr. Blair had given a full explanation of the reason for the education test. If specific disqualification of coloured labour such as Hindoo or *alien* Asiatic were mentioned there was danger that the bill would not receive the Royal assent. The dictation test had been sanctioned by the Imperial authorities in connection with the Commonwealth Immigration Restriction Act, and that was the safest plan to follow in order to make certain that no trouble would be experienced in obtaining the signature of His Majesty’s representative.¹⁰⁷⁰

Representatives of white workers had little faith that the legislation would achieve its aim of excluding ‘coloured aliens’ from the sugar industry. When the new law was enacted, the *Worker* published the report of one union organiser:

During my travels I have noticed the C.S.R. Co. dearly loves the *coloured alien*. One day I met five Chinamen working on the tramline near the Hambledon mill, at the same time the Company is employing a number of *coloured aliens* in the mill. Dictation tests, equal pay for

¹⁰⁶⁷ Birch, above n 1053, 210, n 41.

¹⁰⁶⁸ ‘Parliament. The Sugar Industry’, *Brisbane Courier* (Brisbane) 16 July 1913, 6.

¹⁰⁶⁹ ‘The White Australia Principle’, *Morning Bulletin* (Rockhampton) 7 July 1913, 6. Emphasis added. In relation to the agreement between the federal and Queensland governments for removal of the bounty and excise on the sugar industry on condition coloured labour was excluded from the industry, see also *Western Champion and General Advertiser for the Central-Western Districts* (Barcaldine) 26 July 1913, 7.

¹⁰⁷⁰ ‘The White Australia Principle’, *Morning Bulletin* (Rockhampton) 7 July 1913, 6. Emphasis added.

coloured aliens, will not get rid of them, for their [sic] can be no doubt that the Company dearly loves the coloured person.¹⁰⁷¹

The Attorney-General's assertion that the dictation test for the sugar industry would apply to everyone regardless of race was refuted in a 1915 letter to the *Cairns Post* from a writer claiming to be 'in close touch with the inside working of this whole business' with 'inside and absolutely reliable sources' within the Government. The writer said it was his 'duty to give a word of warning to those who contemplate using *coloured alien* labour in the cultivation, harvestings, or other handling of their cane crops'. He observed that the Sugar Cultivation Act provided for:

...the dictation test in the Immigration Restriction Act applied in a new field for an identical purpose, the exclusion of *coloured aliens* without the necessity of hurting the susceptibilities of the nations to which those '*aliens*' belong.¹⁰⁷²

As the writer observed, because the Act did not expressly prohibit coloured people from engaging in the sugar industry:

...it is true that under the sweeping power which the Government is assuming it could, if it so chose, debar sugar produced from cane handled solely by European labour... but the whole world knew the avowed object of the clause which was to *prevent aliens of certain nationality* immigrating to Queensland, and it was the general knowledge that the test would be applied only to such undesired immigrants that had the effect required. If the Government used its powers to prevent desirable immigrants arriving here there would be such an uproar as would result either in a loss of that power or a stoppage of its misuse.¹⁰⁷³

In the 1920s when there was opposition to an influx of Italian workers on Queensland sugar farms, Mr Swayne proposed in the Legislative Assembly that:

...if the Government objected to the presence of Italians or desired that Italians should not be allowed to enter Queensland, they had the power in their own hands under the Sugar Cultivation Act, which gave the Queensland Government power to apply a dictation test to everyone irrespective of colour engaged in the sugar industry.¹⁰⁷⁴

However the suggestion that the Sugar Cultivation Act could be used to exclude white Europeans from the sugar industry met a robust response from Premier William McCormack who said this would be contrary to an explicit agreement with the Imperial Government:

The Premier said he rose to nail a second lie. That bill was reserved for the Royal assent, and as it was not allowed by the British Government until the [conservative Denham government] gave an undertaking that it would not be applied against Italians and other Europeans, the suggestion that the act in question could be applied to European nationals without the consent of the British Government was false. Did Mr. Swayne urge that they should exclude European

¹⁰⁷¹ 'Organisers' Reports', *Worker* (Brisbane) 7 August 1913, 16. Emphasis added.

¹⁰⁷² 'Correspondence', *Cairns Post* (Cairns), 20 September 1915, 3. Emphasis added.

¹⁰⁷³ Ibid. Emphasis added.

¹⁰⁷⁴ 'Future Of Queensland', *Cairns Post* (Cairns) 4 October 1928, 8.

nationals from the sugar industry? Did he suggest that the Government should break an undertaking with the British Government and exclude Italians?¹⁰⁷⁵

Premier McCormack's statement raises a significant issue. It indicates that the Sugar Cultivation Act enacted in 1913 was originally reserved for royal assent, which was only given when the Queensland Government gave the undertaking referred to, namely that the dictation test would not be used to exclude 'Italians or other Europeans'. This shows the superficial nature of Britain's concern for non-discrimination. At the insistence of the Colonial Office, Queensland used the supposedly neutral mechanism of the education or dictation test in the Sugar Cultivation Act, applying this on the terms of the legislation only to 'aliens' or 'persons' so there was no discrimination on the face of the law. At the same time, according to Premier McCormack, Britain refused to give assent to the legislation unless the Queensland Government gave an assurance that the test would not be applied to people of European race. In other words, imperial authorities insisted on non-discriminatory language on the face of the statute, otherwise royal assent would be refused, while requiring racist implementation of the legislation contrary to the law.

More generally, the above discussion illustrates how pervasive the expression 'coloured aliens' had become in early twentieth century Queensland. The phrase was a derogatory label for non-European inhabitants, appearing in union reports on the sugar industry and 'insider' accounts of State Government policies. To meet the federal government's condition for removal of the bounty and excise regime without offending imperial authorities, Queensland borrowed the Commonwealth's education or dictation test mechanism, using this to exclude 'coloured aliens' from the sugar industry at odds with the neutral language of the enabling legislation.

This targeting of 'coloured aliens' under the sugar industry statutes provides further evidence of Queensland's manipulation of the law during this period for the purpose of racial exclusion. Chapter Seven sets out how these statutes were enforced through a range of prosecutions of 'coloured aliens' across north Queensland, with little attention to whether those brought before the courts were 'aliens' under the law.

'Foreigners', sugar and aliens

As further examples from Queensland show, while non-Europeans were regarded by the dominant Anglo-Celtic society as 'aliens' because of their race and white European settlers

¹⁰⁷⁵ Ibid.

were in general automatically accepted as ‘non-aliens’, there was not a strict nor absolute boundary on application of the term ‘alien’ in its non-legal, racial sense when used to refer to people who were ‘not one of us’.

In 1920 the Australian Workers Union described workers of Asian origin as ‘aliens’ and those from southern Europe as ‘foreigners’ when giving evidence on the ‘alien labour question’ before Queensland’s Court of Industrial Arbitration. The AWU representative in North Queensland, Mr Morrissey said the amended Sugar Field and Sugar Mill Workers and Cooks Award:

...had not had the effect of diminishing the numerical strength of the coloured sugar workers, who were principally Hindoos, Chinese, Japanese, Javanese, Malays, and kanakas. He estimated there were 600 Hindoos, and perhaps 1000 Chinese... Land was being leased to *coloured aliens*, and *coloured aliens* were employed in many instances because they would give their services for less than the award rates, and were content with indifferent living conditions...Inversely there were a number of white British labourers who were compelled to accept police rations in order to live. In the Babina, South Johnstone, and Herbert River districts cane cutting was performed by labour of which 75 per cent was *foreign*, an element composed of Spaniards, Greeks, Russians, and Maltese.¹⁰⁷⁶

In terms of the general, non-legal use of these terms, there was an imprecise and not necessarily consistent geographic border or cut off point between white ‘foreigners’ and coloured ‘aliens’.¹⁰⁷⁷ The dividing line was around the middle of the Italian peninsula. Once the threat from the Chinese had been dealt with, primarily through the dictation test legislation, the ‘alien’ language tool was used against the next group of arrivals who threatened ‘white’ interests in the North Queensland sugar industry, namely non-Aryan ‘southern Europeans’.

The arrival of labourers from southern Italy and Greece in 1924 and 1925 caused particular concern for white labour representatives. As with the Chinese, the new arrivals were seen as a

¹⁰⁷⁶ ‘Sugar-Workers’, *Sydney Morning Herald* (Sydney) 15 May 1920, 13. Emphasis added.

¹⁰⁷⁷ As Lyng explained in 1927, in the eyes of Anglo-Celtic Australian society ‘aliens’ were more different and even less ‘one of us’ than ‘foreigners’:

‘In their general application, the words ‘alien’ and ‘foreign’ are synonymous terms. Applied to human beings in connection with place of birth or race, daily use has, however, created a distinction in so far as ‘alien’ is further removed from the root idea than ‘foreign’. Thus in Australia, by ‘aliens’ are generally understood persons substantially different in race and culture from the British, and by ‘foreigners’ those who differ only in regard to nationality. Scandinavians, Germans, French, etc., are ‘foreigners’, whereas Indians, Chinese, and other coloured people are ‘aliens’’. J Lyng, *Non-Britishers in Australia; influence on population and progress* (Macmillan 1927) 237. Emphasis added. For part of this quote, see also Batrouney and Goldlust, *Unravelling Identity*, above n 1, 28.

In other words, white Europeans who were legally ‘aliens’ were regarded merely as ‘foreigners’ because they differed ‘only in regard to nationality’, whereas coloured people who were ‘substantially different in race and culture’ were seen as something worse, namely the ‘aliens’ or real outsiders, even if they were British subjects who legally ‘belonged’ in Australia.

threat to the employment and labour conditions of white workers. The *Brisbane Courier* reported in 1925 that:

Representatives of the Australian Workers' Union have called on the Premier and urged upon him the need for State action in respect of the large arrivals in the North of *Southern Europeans*. They maintained that the arrival of hundreds of *aliens* in the North would mean starvation and misery either for them or for those whose employment they would take.¹⁰⁷⁸

Premier Gillies said he had already telegraphed the Prime Minister warning that 'serious industrial trouble may eventuate in the sugar industry in the coming season' unless the Commonwealth Government took action 'to check or regulate the flow of *aliens* to North Queensland'. Gillies said there had been a 'recent great increase in the number of *alien migrants* arriving in North Queensland' who had been 'sent out against the advice of local Italians' and that he would make a 'public protest against the introduction of any further batches of Southern Europeans'. In addition, a Royal Commission would be 'appointed forthwith to inquire into the whole question of alien migration to North Queensland, and its social and economic effects'.¹⁰⁷⁹ In June 1925 the Royal Commissioner, former magistrate T.A. Ferry (with experience in prosecuting 'coloured aliens' in the sugar industry)¹⁰⁸⁰ reported that over the previous three and a half years the migration to Australia of Italians and Greeks 'had been greater than at any period during the last 40 years'. He noted that:

The population of Italy however, was divided into two distinct groups - the Northern and the Southern Italians. The latter are shorter in stature and more swarthy. In Southern Italy the wages of all classes were very low and living conditions harder than in the North and, consequently, there was a greater desire to emigrate.¹⁰⁸¹

Commissioner Ferry 'emphasised the point that, unfortunately, the majority of the new arrivals in Queensland happened to be of the Southern Italian and Mediterranean type, many of them being Sicilians'. As the *Brisbane Courier* said (under the headline 'Aliens in the North. Are they a Menace?'), 'the point was stressed that the present *alien* influx was largely Sicilian - not of the desirable class of Northern Italian, who had participated in the development of the sugar industry'.¹⁰⁸² In relation to Greek settlers, Mr Ferry noted that:

Whether as employer or employee, the Greek as seen in North Queensland was equally undesirable. Evidence was furnished that constant complaints were being received from girls employed in Greek restaurants of improper suggestions having been made to them by their employers, and that this was frequently the cause of them having to leave their employment.¹⁰⁸³

¹⁰⁷⁸ 'Italian Influx', *Brisbane Courier* (Brisbane) 1 April 1925, 7. Emphasis added.

¹⁰⁷⁹ Ibid.

¹⁰⁸⁰ See Chapter Seven.

¹⁰⁸¹ 'Anti-Foreign Feeling', *Brisbane Courier* (Brisbane) 3 June 1925, 7.

¹⁰⁸² Ibid.

¹⁰⁸³ Ibid.

Commissioner Ferry concluded that ‘the immediate effect of the present rapid increase in the number of *aliens* in North Queensland was the creation of an anti-foreign feeling that was likely to increase in intensity if such migration was not controlled or regulated’.¹⁰⁸⁴

Therefore, in addition to Asian, African and Pacific islander settlers, ‘non-white’ southern Europeans were also denigrated as ‘aliens’ by Anglo-Celtic society. This was part of the attempt to exclude them from the economic and other benefits of full membership in post-federation Australia. Yet, and importantly, unlike Chinese, Indian and Pacific islander settlers from British colonies and dominions, most southern Europeans, including Italians and Greeks, were ‘aliens’ under the law applying in Australia at the time. The exception were settlers from Malta, which was a British colony from 1800 to 1964. Along with Sicilians and Greeks, Maltese settlers in North Queensland, despite their legal status as British subjects, were also a focus of the 1925 Royal Commission into ‘alien’ migration.¹⁰⁸⁵

Bananas and aliens

Apart from sugar production, Queensland’s banana industry was also a particular target of the State’s alien and dictation test legislation. While not as significant as the sugar industry, banana production was nevertheless important for the Queensland economy.¹⁰⁸⁶ Especially in north Queensland it was a crucial source of employment and income for a number of decades. According to historian Cathie May, at the end of the nineteenth century the banana trade was ‘essential to the general prosperity of Cairns and Innisfail’. In some years the value of banana exports from north Queensland actually exceeded that of sugar.¹⁰⁸⁷

In 1921 the Queensland Government, dissatisfied with indirect measures for excluding non-Europeans from the banana industry by restricting access to land, introduced the *Banana*

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Ibid. According to Langfield, Australian inhabitants of Maltese descent ‘objected to the principle of British subjects of “white race” being treated as “aliens”’. Langfield, ‘White aliens’, above n 206, 6. In 1938 Malta’s High Commissioner in Australia was still calling for greater acceptance of settlers from that British colony:

‘Appealing for a better understanding of Malta and its problems as a vital part of the Empire, the Commissioner for Malta in Australia (Captain Henri Curmi), in an address to the Constitutional Club yesterday, said that the 10,000 Maltese in this country had proved valuable citizens. Their combined assets, according to a recent census, had a total value of £4,000,000. Maltese had been coming to Australia for 80 years, but many of their descendants, over about three generations, had passed out of the classification of Maltese’.

‘10,000 Maltese In Australia’, *Argus* (Melbourne) 1 March 1938, 3.

¹⁰⁸⁶ The banana industry was worth around £0.5 million pounds for the Queensland economy in 1921. Queensland, *Parliamentary Debates*, Legislative Council, 22 September 1921, 845.

¹⁰⁸⁷ May, *Topsawyers*, above n 179, 22, 25.

Industry Preservation Act 1921. This prohibited any ‘person’ from carrying on or being employed in the cultivation of bananas unless they had first passed a dictation test in any language that the Secretary for Agriculture might direct.¹⁰⁸⁸ In May’s view, while the Banana Industry Preservation Act affected north Queensland, it ‘was actually an attempt to halt the movement of Chinese growers into Southern Queensland’.¹⁰⁸⁹ Despite the neutral language of the statute,¹⁰⁹⁰ Queensland lawmakers again made it plain who the legislation was aimed at. As one parliamentarian said:

The Chinamen ... are trying to make the industry a Chinese industry, and consequently we look on them as a far greater menace... We do not want those people there. We want a white man’s industry and we stand for a white Australia.¹⁰⁹¹

Observing that it was his party that ‘first started the White Australia cry’, a Labor member expressed the hope that ‘one of the immediate effects of the Bill will be a stimulation of the banana industry and the total elimination of the *coloured alien*’.¹⁰⁹² Another member agreed that the legislation addressed ‘a very pronounced danger – *coloured aliens* growing bananas’.¹⁰⁹³ The aim of the new law, therefore, was to make the banana industry ‘safe for white men – for co-operators... We are going to work the industry on a co-operative basis, and we are going to deal with the *coloured aliens*’.¹⁰⁹⁴

The attitudes expressed by Queensland parliamentarians during the banana industry debates reflect the racial prejudice inherent in the White Australia era. Moreover, as in colonial Australia, a bigoted view of Chinese Australians (and other non-Europeans) affected perceptions of their legal standing. According to one member of the Queensland Legislative Assembly, speaking in 1911:

...what the Chinaman termed ‘soup’, and applied to his vegetables, was composed of blood, urine, nightsoil, and water... the Chinese were a menace to the banana trade, and there was no opportunity for the white man to buy bananas unless it was through the Chinese.¹⁰⁹⁵

Another parliamentarian remarked that ‘personally, he would rather go without vegetables than eat one he knew to have been grown by a Chinaman’.¹⁰⁹⁶ These statements reveal a view

¹⁰⁸⁸ *Banana Industry Preservation Act 1921* (Qld) sections 3 and 4.

¹⁰⁸⁹ May, *Topsawyers*, above n 179, 168.

¹⁰⁹⁰ See above n 1027 for the inclusion of the Banana Industry Preservation Act in a list of statutes regarding ‘aliens’ repealed by the *Aliens Act 1965* (Qld).

¹⁰⁹¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 650.

¹⁰⁹² *Ibid* 654. Emphasis added.

¹⁰⁹³ *Ibid*. Emphasis added.

¹⁰⁹⁴ *Ibid* 649-50. Emphasis added.

¹⁰⁹⁵ *Ibid* 30 November 1911, 2536 (Winstanley).

¹⁰⁹⁶ *Ibid* 2538 (Ferricks).

amongst Queensland lawmakers of the day that the Chinese engaged in practices, including in the banana industry, which were unacceptable to the ‘modern white man’. As with colonial era laws discussed in Chapter Two, they indicate a belief not only that the Chinese were less than equal, but perhaps even that they were less than human. This belief supported the view that the Chinese (and other non-Europeans) did not ‘belong’ in an ‘advanced’ white man’s society - in other words, that they were inherently ‘alien’ in the common, non-legal sense of this word. Consistent with this view, the Chinese in Australia were treated as if they were ‘aliens’ in legislation restricting their participation in the banana industry (and other agricultural occupations), whatever their formal legal status at the time.

As well as ‘colour racism’ of this sort, Queensland lawmakers also exhibited the type of ‘labour racism’ integral to the national make-up of the new Commonwealth. The 1907 *Harvester* decision has legendary status in Australian industrial relations history because it entrenched the right of Australian workers to receive a ‘fair living wage...sufficient to provide frugal comfort’ for the worker and his family.¹⁰⁹⁷ At the same time, however, the *Harvester* judgment has also been described as ‘the keystone of the White Australia policy.’¹⁰⁹⁸ As the Queensland parliamentary debates show, lawmakers of the day did not believe that Chinese settlers and other non-Europeans were entitled to a ‘fair living wage’. There was no comprehension that Chinese workers might aspire to the same conditions as white Australians.¹⁰⁹⁹ To the contrary, Chinese workers were seen as a threat to the standard of living of real ‘Australians’ who should be the only ones able to earn profits behind a tariff wall. As Mr Brand from Burrum said in 1921 during the debate on the Banana Industry Preservation Bill:

I am in favour of carrying on the banana industry with our own Australians...The banana growers in Queensland urgently need that duty. We desire to make this a white man’s industry. If we allow the Chinese to come in now, it will only be a few years before it will be extinct as an industry. We know that the conditions under which the Chinese live make it impossible for white men to compete with them.¹¹⁰⁰

The fear that low cost production by ‘alien’ Chinese would undermine the achievement of the *Harvester* case and the entitlement of white men to a fair living wage to support their families was a specific motive for the introduction of a dictation test for the Queensland banana

¹⁰⁹⁷ In his judgment in the Commonwealth Conciliation and Arbitration Court, Justice Higgins declared that to be exempt from excise duties, employers must pay their workers a ‘fair and reasonable’ wage sufficient to provide ‘a condition of frugal comfort’ for the unskilled worker, married, with three children. *Ex parte H.V. McKay* (1907) 2 CAR 1, 4.

¹⁰⁹⁸ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 156

¹⁰⁹⁹ *Ibid* 154; Fitzgerald, *Big White Lie*, above n 371, 34-36.

¹¹⁰⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 652.

industry. Mr Barber from the Bundaberg electorate said he was ‘not so much concerned about the *coloured aliens* as I am for the white growers that are likely to be engaged in this business’. He read out a letter from the South Coast Fruitgrowers’ Association, which said:

Chinese companies will hop in, and by the time we have worked up to fixed prices for various grades of bananas and have got the selling end of the game on a business-like footing, ‘Chink’ will be well enough established to keep a lot of good men out of this very important and interesting industry. I do hope that you will succeed in preserving this fine industry for our white men and their families.¹¹⁰¹

Land for returned soldiers

After the First World War, there was another reason for excluding ‘alien’ non-Europeans from the banana industry using the mechanism of the dictation test. As Mr Brand observed in the Queensland Legislative Assembly:

The Commonwealth Government (has) spent a large amount of money through the State Government, to settle returned soldiers on the land cultivating bananas. Seeing that the State and Commonwealth are spending these large sums of money, it is necessary that we should pass this legislation, and do all we can to protect the industry.¹¹⁰²

As Evans, Saunders and Cronin note in *Race Relations in Colonial Queensland*, in 1920 ‘the Returned Soldiers Association petitioned to have Asiatics excluded from the banana industry altogether and their farms turned over for soldier settlement schemes’.¹¹⁰³ Yong also notes that white growers, including some returned soldiers, were active after the First World War in campaigns against the involvement of ethnic Chinese people in the banana industry. As Yong says, ‘the returned soldiers, in particular, were dissatisfied with the rising price of land caused by strong Chinese competition’.¹¹⁰⁴

Anxiety about the security of northern Queensland was one reason parliamentarians wanted Chinese banana farmers replaced by returned soldiers. Mr Brand told the Legislative Assembly in 1921 that northern Australia would be more secure if white men took the place of ‘alien’ Chinese:

The sooner we get rid of all the *aliens* in the banana industry the better it will be for the white population. If we have white farmers with their wives and families living on the banana

¹¹⁰¹ Ibid 646-647. Emphasis added.

¹¹⁰² Ibid 652.

¹¹⁰³ Evans, Saunders and Cronin, *Race Relations in Colonial Queensland*, above n 170, 253. See also Cathie May, ‘Chinese in Queensland’ in James Jupp (ed) *The Australian People: An Encyclopaedia of the Nation, its People and their Origins* (Angus and Robertson 1988) 311, 315.

¹¹⁰⁴ C F Yong, ‘The Banana Trade and the Chinese in New South Wales and Victoria, 1901-1921’ (1965-66) 1-2 ANU Historical Journal 28, 31, citing *Tweed Daily* 8 September 1919, 20 September 1919.

industry, it will be much better for Queensland, and they will form a bulwark for the defence of Australia.¹¹⁰⁵

But for Queensland lawmakers, this was about more than military defence. The belief that Chinese Australians were members of a foreign race who could do nothing to alter their status as aliens was accompanied by a perception that their very presence in Australia was in some way a threat to the security of the country. The view that Chinese settlers were ‘aliens’ in the sense of being ‘foreign’ and not belonging meant they were also considered to lack loyalty or allegiance to Britain and the new Australian federation, regardless of the length of time they had spent in the country or whether they had been naturalised or born as British subjects. As Mr Adamson said in 1911, when supporting a call to force Chinese settlers out of the banana industry by reducing the maximum area an ‘alien’ could lease to only three acres:

It was desirable to make the banana industry a white man’s industry, and to get the Federal Government to make it possible for white men to grow bananas. The restriction of the area to 3 acres was one way of getting them out of the country, and on the ground of higher patriotism it was better for them to be in China, and give us the chance to develop the country on the lines of ‘Australia for the Australians’.¹¹⁰⁶

After the Great War, therefore, what better proposal could there be than to replace ‘alien’ Chinese in the banana industry with soldiers who had fought for King and country defending Britain and the Empire?

The banana industry debates emphasise the failure of the rule of law in Australia regarding ‘aliens’. Non-Europeans, especially Chinese settlers, were considered ‘aliens’ for social not legal reasons, continuing a theme from early indigenous cases in New South Wales and colonial parliamentary debates. As in those examples, there were strong elements of bigotry and racism, including a view that non-white inhabitants were less than human. Moreover, in direct conflict with the law, ‘allegiance’ was judged by skin colour not formal nationality status. Lawmakers ignored the allegiance required of British subject Chinese, refusing to accept their loyalty to the Crown under the law, insisting on the ground of ‘patriotism’ that returned soldiers take over their banana farms. Above all, the debates in the Queensland parliament on the banana industry laws again show that contrary to the rule of law, legislation which was ‘racially neutral’ on its face was directed against those regarded as ‘aliens’ in a racial sense, especially Chinese Australians, regardless of their actual legal status. As shown

¹¹⁰⁵ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 651. Emphasis added.

¹¹⁰⁶ *Ibid* 30 November 1911, 2534.

in the next section, this was confirmed by the various exemptions under Queensland's alien and dictation test laws.

Exemptions

The exemption provisions ensured that settlers with a white European background would not be prosecuted as aliens, even if they had not been naturalised and remained aliens under the law. The exemptions were set out in regulations made by the Governor of Queensland on the advice of the State Government's Executive Council.¹¹⁰⁷ The lower profile of such subordinate legislation removed the impetus for imperial intervention. While racial distinctions could not be included in the primary legislation, they were clearly evident on the terms of the regulations. This façade of non-discrimination was generally sufficient to satisfy the Colonial Office.¹¹⁰⁸

The detailed exemptions were similar under different dictation test laws. The exemptions in the Banana Industry Preservation Regulations 1921, for example, were modelled on those developed for the sugar industry under the *Sugar Cultivation Act 1913*.¹¹⁰⁹ The exemptions were primarily determined on the basis of race, including:

- 'all *native-born* residents of Australia of European descent'¹¹¹⁰
- 'all residents of Australia of European parentage'
- 'all residents of Australia...descended from any resident of the Continent of North America other than from any aboriginal native thereof, or negroes or aboriginals of African or Asiatic race'.¹¹¹¹

¹¹⁰⁷ The regulations were published in the *Queensland Government Gazette* and tabled in Parliament and could be disallowed or 'annulled' by either the upper or lower chambers.

¹¹⁰⁸ Discriminatory exemptions in regulations did not always escape attention. Paul Jones refers, for example, to 'the furore following the exclusion of resident British Indians from the (Queensland) sugar industry in 1912'. Paul Jones, *Alien Acts*, above n 198, 278.

¹¹⁰⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 643. See Sugar Industry Cultivation Regulations 1913, *Queensland Government Gazette* Vol CI No 93, 16 October 1913, 989. See also Pearl-shell and Bêche-de-Mer Fishery Regulations made following 1913 amendment to *Pearl-shell and Bêche-de-Mer Fishery Act 1881* reported in 'Pearlshell Fisheries', *Queenslander* (Brisbane) 28 February 1914, 36.

¹¹¹⁰ Emphasis added. 'Native-born' in this context refers to an 'Australian native' meaning not an indigenous person but a person of European origin born in Australia. The 'Australian Natives Association' formed in the nineteenth century was a benevolent society for white people born in Australia, see www.utas.edu.au/library/companion_to_tasmanian_history/A/Australian%20Natives%20Association.htm.

In other words, all residents of Australia with a white European or North American background were automatically exempt from the dictation test requirements, even if they were not British subjects and remained ‘aliens’ in a legal sense. In contrast, with few exceptions there was no exemption from the dictation test for non-European residents of Australia, even if they legally ‘belonged’ as British subjects. All people of non-European race, even if they were subjects by birth or naturalisation and therefore not ‘aliens’ in a legal sense, were subject to the full effect of the legislation, including harsh penalties if they failed to obtain a certificate of having passed the dictation test. Apart from other ‘non-aliens’ such as British subject Chinese Australians, the dictation test requirement also applied under the sugar and banana industry legislation to indigenous Australians.¹¹¹²

‘Aliens’ versus ‘persons’

There was a more extensive list of exemptions under the *Sugar Cultivation Act 1913* and the *Banana Industry Preservation Act 1921* than for other dictation test laws such as the *Land Act 1910* and the *Leases to Aliens Restriction Act 1912*. This was linked to the different wording of the parent legislation.

The Land Act and the Leases to Aliens Act specifically prohibited ‘aliens’ from either acquiring land or leasing parcels of land over 5 acres without passing a dictation test. It was made clear in the Queensland Parliament that this legislation was directed at those regarded as ‘aliens’ in the racial sense, i.e. all non-Europeans, especially Chinese Australians. It was also made clear that people ‘of European descent’ would not be subject to the new laws. Those administering the legislation understood that European settlers, even if they were

¹¹¹¹ Banana Industry Preservation Regulations 1921, Regulation 1, *Queensland Government Gazette* Vol CXVII No 166, 5 November 1921, 1415.

¹¹¹² Under the banana industry regulations made in November 1921, occupiers of banana plantations at the commencement of the parent Act were exempt. Banana Industry Preservation Regulations 1921, Regulation 1(7)(a), *Queensland Government Gazette* Vol CXVII No 166, 5 November 1921, 1415. But there was no similar provision for those running sugar farms. Persons who had already planted a sugar crop before the Sugar Cultivation Act was enacted in 1913 could apply for a certificate of authority to cultivate and harvest the existing crop for a period not exceeding three years (Sugar Cultivation Regulations, Regulation 2). *Queensland Government Gazette* 16 October 1913, 990. Under section 5 of the Act, a person who had been refused such a certificate could apply to the Land Court for compensation. Under the regulations an exemption from the dictation test could also be considered (but not automatically granted) on the basis of ‘the person’s long residence in Queensland or the Commonwealth’. In addition, existing Chinese and other non-European employees in the banana industry were not granted an automatic exemption. Instead they were required to apply within a very short time after the regulations came into force in November 1921 (by 31 January 1922) to the nearest Clerk of Petty Sessions for an exemption certificate. After that date approval from the Secretary for Agriculture had to be obtained in each individual case before existing non-European employees could even apply for an exemption. Banana Industry Preservation Regulations 1921, Regulation 1(7)(b), *Queensland Government Gazette* Vol CXVII No 166, 5 November 1921, 1415.

‘aliens’ in a legal sense, were already ‘exempt’ from the dictation test requirement. Hence it was not necessary to include specific exemptions for them. There were no exemptions under the Land Act when it was enacted and the only significant exemption under the Leases to Aliens Restriction Act covered subjects of foreign countries with a ‘most favoured nation’ treaty with Great Britain.¹¹¹³

In contrast, the Sugar Cultivation and Banana Industry Preservation Acts merely prohibited ‘any *person* who had not first obtained a certificate of having passed the dictation test’ from participation in these industries. Unlike the word ‘alien’, ‘person’ did not have an everyday meaning which could be used to target Chinese settlers and other non-Europeans. While it was still evident (as stated in Queensland Parliament) who the real targets of the new statutes were, use of the term ‘persons’ did not give those administering the legislation or the courts a basis for discriminating against non-white people. Hence specific exemptions were needed to ensure these laws applied only to people with an Asiatic or other non-European background and not to white European settlers.

‘Enemy aliens’

Another example of the dominance of race over the law for Queensland lawmakers is the favourable treatment given to ‘enemy aliens’ from Germany under the State’s dictation test laws.

At the end of the First World War, thousands of ‘enemy aliens’ (those originally from Germany and other countries which had been at war with Great Britain) were deported from Australia under Commonwealth law. The largest group of over 6,000 were expelled in 1919. According to David Dutton:

This group of deportees was interned and expelled principally because of assumptions about their allegiance and the Commonwealth-sponsored climate of anti-German hysteria...With its paranoid attitude towards aliens and dissent of most kinds, the Commonwealth government during the latter stages of, and shortly after, the Great War deported thousands of aliens on political grounds, including many who had been naturalised, and hundreds more British subjects.¹¹¹⁴

¹¹¹³ Leases to Aliens Restriction Regulations 1912, *Queensland Government Gazette* Vol XCIX, No 130, 9 November 1912, 1255; Vol C No 131, 24 May 1913. Apart from subjects of Italy, Russia and Columbia, there was also an exemption for ‘citizens of the Swiss Republic’ so long as the 1855 treaty between that country and Great Britain remained in force in Queensland.

¹¹¹⁴ Dutton, *One of Us?*, above n 207, 118, 120.

As Helen Irving notes, during the war ‘British subjects of German origin were interned...as if they were enemy aliens. From their confinement they protested that their ‘citizenship’ – expressly using the word – was hollow’.¹¹¹⁵

In contrast to the Commonwealth’s harsh treatment of German Australians (including those who were British subjects), ‘enemy aliens’ from Germany were exempt under Queensland’s 1921 banana industry regulations. The exemption provisions for the banana industry were adopted word for word from those promulgated for the sugar industry in 1913. Despite the traumatic experience of the First World War in the intervening years - and notwithstanding that one motive for the banana industry legislation was to provide land for returned servicemen - no consideration was given in the 1921 debates in the Queensland Parliament to excluding those with a German background from the industry. This meant that German settlers who had not been naturalised and legally remained aliens were treated more favourably than Chinese Australians and other non-Europeans who were British subjects and not ‘aliens’ under the law.

The preferential treatment given to ‘enemy aliens’ from Germany shows the degree to which racial factors displaced nationality and allegiance for Queensland lawmakers in determining who should be allowed practical membership of the community through participation in key agricultural occupations such as the banana industry.

British Indians

As Lake and Reynolds explain, imperial authorities in Britain were urged by leading Indian figures, not least Mahatma Gandhi, to dissuade governments in their dominions from discrimination against British Indians.¹¹¹⁶ The 1921 Imperial Conference recognised the ‘incongruity between the position of India as an equal member of the British Empire and the existence of disabilities upon British Indians lawfully domiciled in some parts of the Empire’.¹¹¹⁷ In 1922 prominent Indian politician Srinivasa Sastri was sent to Australia to investigate this issue. He reported that British Indians in Australia faced discrimination under

¹¹¹⁵ Irving, ‘Citizenship before 1949’, above n 110, 19. See also John Chesterman and Brian Galligan, *Defining Australian Citizenship, Selected Documents* (Melbourne University Press 1999) 27.

¹¹¹⁶ Lake and Reynolds, *Drawing the Global Colour Line*, above n 117, 119-125, 219.

¹¹¹⁷ Government of India, *Report by the Right Hon’ble V.S. Srinivasa Sastri, P.C., regarding his Deputation to the Dominions of Australia, New Zealand and Canada* (Government Central Press 1923) 1.

various Commonwealth and State laws.¹¹¹⁸ Sastri highlighted Queensland's dictation test legislation, including the Sugar Cultivation Act and the Banana Industry Preservation Act, which had the effect, he observed, of 'excluding all Asiatics from these trades or occupations'.¹¹¹⁹

After assuring his hosts that the Government of India was not seeking changes to Australia's restrictive immigration laws, he received a pledge that disabilities imposed on Indian subjects under domestic laws would be reconsidered. After his visit to Brisbane, the Queensland Government amended regulations under the Banana Industry Preservation Act, allowing 'British subjects of any native race of India, who were lawfully domiciled in Queensland at the commencement of the Act' to participate in the banana industry.¹¹²⁰

Even in providing this exemption, however, the regulations show the preference given by Queensland lawmakers to racial over nationality considerations in determining which groups of people should have the opportunity of unrestricted access to key agricultural occupations. In contrast to the absolute exemption for people of European or white North American origin - even if not naturalised and hence legally aliens - Queensland residents with an Indian background received no more than a qualified exemption, despite their status as British subjects with full membership under the law. The exemption for British Indians only applied to those who were 'lawfully domiciled in Queensland at the commencement of the Act, and who have continuously remained so domiciled'.¹¹²¹ Should such a person cease to be 'domiciled' in Queensland, even temporarily, they would no longer be exempt from the operation of the legislation. Under the terms of this 'exemption', therefore, Australian residents of Indian origin risked being unable to resume work in the Queensland banana

¹¹¹⁸ According to Sastri, most were 'Mohammadans' with 'only a few Sikhs...in New South Wales and Queensland'. Ibid 3.

¹¹¹⁹ Ibid 2.

¹¹²⁰ Ibid 5. See Banana Industry Preservation Regulations 1921 Regulation 2A added June 1922, *Queensland Government Gazette*, 24 June 1922, No. 209, Vol CXVIII, 1802. Sastri's visit encouraged some Indian Australians to challenge the lack of recognition of their rights as British subjects. In his 1927 book *Non-Britishers in Australia*, Lyng reported that:

'Being born British subjects, the Indians enjoy certain advantages not possessed by other Asiatics. These are the rights to bring their wives and children, to old age pension, and to Parliamentary vote. The latter right was withheld from them till, after a visit of the Indian statesman, Dr. Sastri, in 1925 some Indians in Melbourne tested the matter in court and gained the verdict'.

Lyng, *Non-Britishers in Australia*, above n 1077, 185. See also Chesterman and Galligan, *Citizens without rights*, above n 235, 103-107.

¹¹²¹ *Queensland Government Gazette* Vol CXVIII No 209, 24 June 1922, 1802.

industry if, for example, they visited friends or family in India for an extended period.¹¹²² Importantly, moreover, even this type of limited exemption was not provided for British subjects of Indian origin for the purpose of the sugar industry, Queensland's most profitable agricultural undertaking.

The exemption provisions were contrary to the rule of law in a different way to the primary legislation. They arbitrarily excluded certain groups from key activities in Queensland society on a racial basis, ignoring existing law on membership. Unlike the primary legislation, the exemption provisions did not employ misleading and deceptive terms such as 'alien' and 'person' which were deliberately misapplied. As subordinate legislation unlikely to be reviewed by the Colonial Office, the exemption regulations could operate according to their openly discriminatory wording. Nevertheless, they highlight how nationality or alien status under the law was disregarded in favour of racial considerations in determining who could participate in the banana, sugar and other industries free of the dictation test requirement. Europeans who were aliens or outsiders in a legal sense, even 'enemy aliens', were treated more favourably under the exemption provisions than non-European British subjects with full legal membership of the Commonwealth of Australia.

Conclusion: alien legislation and the rule of law

Queensland parliamentary debates on the dictation test legislation confirm the abrogation of the rule of law regarding 'aliens'. Central to the attitude of members of the Queensland Parliament was their belief that not all 'aliens' were to be regarded equally. They understood that anyone who had not become a British subject, even someone of European origin, was within the legal category of 'alien'. But it did not follow that non-British subjects from Europe should be treated as aliens in Queensland legislation. In their view, European settlers were within the category of 'desirable' aliens, in contrast to Chinese and other races who were 'undesirable'. Any restriction on the participation of 'aliens' in key agricultural occupations such as the sugar and banana industries should not apply, in their opinion, to European migrants who had settled in Queensland.

¹¹²² See discussion of 'domicile' in Irving, 'Still Call Australia Home', above n 368, 143. As she notes, in *Potter v Minahan* (1908) 7 CLR 277, 288 Chief Justice Griffith said that 'domicile' embodied the idea of a 'permanent home'. A particular risk for Australian Indians lay in the requirement under the Banana Industry Preservation Regulations that they be 'continuously' domiciled in Queensland to remain exempt from the legislation.

In contrast to the obstacles faced by non-Europeans, white European settlers, especially those from northern Europe, were automatically accepted as 'non-alien' by Queensland lawmakers. Whatever their actual legal status, they were regarded as naturally 'belonging' to Queensland society. From the perspective of Queensland parliamentarians there were no legal or other obstacles to overcome before white Europeans could move beyond 'alien' status. Naturalisation as a British subject was not essential and their integration into the community was taken for granted. Even if white European settlers were aliens in the legal sense, it was impossible for Queensland parliamentarians to see them as 'aliens' in the normal or common meaning of the word or to accept that they could be treated as aliens under Queensland law.

For Queensland lawmakers, the alien and dictation test legislation needed to reflect the dominant view in Queensland society during the White Australia era that Europeans were not aliens 'in the general acceptance of the term'. The legal meaning of 'alien' - a citizen or subject of a foreign state - could not be used in applying the legislation since this would catch European as well as non-European settlers. Instead, the normal or racial meaning of 'alien' (someone who was not 'one of us', especially someone 'from another race') should be applied *in place of* the actual legal meaning. The alien and dictation test laws could then achieve their primary aim - the exclusion of non-Europeans, especially the Chinese, from the sugar, banana and other agricultural industries.

The debates on the alien and dictation test laws again illustrate the paradoxical attitude towards naturalisation on the part of Anglo-Celtic lawmakers in Australia. Parliamentarians appeared to believe that non-Europeans had to be naturalised to move beyond the legal status of alien. There was little awareness that non-Europeans might be born as British subjects, nor that many Chinese living in Australia were natural-born subjects. Moreover, while understanding the process of naturalisation, many parliamentarians refused to accept that naturalised non-Europeans could have become 'British', insisting they be treated as 'aliens' under the dictation test laws.

Given its sustained history of misuse in Australia dating back to early indigenous cases in the New South Wales Supreme Court, it is unsurprising - at least from an historical perspective - that after federation Queensland lawmakers saw no issue with using the racial meaning of 'alien' as the law. They deliberately included the word 'alien' in legislation as a neutral legal term to avoid rejection by imperial authorities, but always intended - and openly stated - that the new laws would only be used against non-Europeans or 'coloured aliens'. Even legislation which applied on its terms to 'persons' without further qualification was only

intended to operate against ‘coloured aliens’, those whose racial appearance made them the ‘aliens’ or ‘the Other’ from the perspective of the Anglo-Celtic community.

The records of debate show, therefore, that many Queensland parliamentarians understood both the legal concept of ‘alien’ and the significance of naturalisation for formal nationality status, but ignored this in advocating that the dictation test legislation should be directed only at those who were ‘aliens’ in the normal or racial sense of the word. This was not a case of misunderstanding or confusing the common understanding of ‘alien’ with the strict legal meaning of the term. Instead the proper legal meaning of ‘alien’ was both understood and intentionally disregarded by Queensland lawmakers who advocated that the non-legal, normal or racial meaning of the word be applied *as the legal meaning* for the purpose of the legislation.¹¹²³

The following chapter sets out how the term ‘alien’ was used in its racial sense contrary to the rule of law after the First World War in a range of prosecutions in north Queensland under the dictation test legislation and other subsidiary rules.

¹¹²³ In Queensland misuse of the word ‘alien’ spread beyond prosecutions under agricultural legislation and subsidiary laws. The term was also used as an official means of racial segregation in the State’s welfare and health system, especially in hospitals but also in aged care homes. The use of ‘alien wards’ in Queensland from 1900 until at least the 1950s is the subject of a separate article by the author. The Queensland Government approved funding for ‘alien wards’ and gave official endorsement to less favourable treatment for their occupants, for example during a bubonic plague outbreak in 1921. See eg ‘Hospital Committee’, *Cairns Post* (Cairns) 21 October 1921, 2. For an account of alien wards in aged care, see ‘Life In Dunwich, III’, *Brisbane Courier* (Brisbane) 15 March 1906, 6.

CHAPTER SEVEN Prosecuting coloured aliens in Queensland

*'The major questions...must be whether the business of having an efficient, impartial law enforcement service in Queensland is being properly attended to...and whether probity in the police force is any longer either a reasonable hope or a serious proposition...'*¹¹²⁴

This chapter demonstrates that Professor K.H. Bailey's 1937 claim that Queensland's alien and dictation test laws were 'not really being enforced' (see Chapter Six) was misleading. As the chapter establishes, after World War One Queensland actively enforced laws barring 'coloured aliens' from key occupations and industries. Contrary to the rule of law, legislation that was racially neutral on its face was used for racial exclusion.

The dictation test legislation was employed to exclude 'coloured aliens', especially in the sugar industry, with the main basis for prosecution being failure to obtain a 'certificate of exemption' from the test. This avoided the bureaucratic challenge of widespread administration of an actual dictation test, potentially in a multitude of languages.¹¹²⁵ Subsidiary rules, especially industrial awards, were also used to exclude non-Europeans from various occupations. In these rules a more explicit discriminatory approach could be adopted since they were not submitted to the Governor for assent or reserved for approval by the Colonial Office. These secondary laws prohibited 'coloured aliens' from engaging in various activities and means of earning a livelihood and were used to prosecute non-white people (and their employers) with little regard for the proper legal meaning of 'alien'.

¹¹²⁴ Article in *The Australian* (undated), Hugh Lunn, *Joh. The Life and Political Adventures of Johannes Bjelke-Petersen* (University of Queensland Press 1978) 248.

¹¹²⁵ Prosecutions under the alien and dictation test legislation were largely effective without the expense and difficulty of administering the dictation test itself, although such a test does appear to have been applied occasionally. However, as a 1928 report in the *Brisbane Courier* headed 'Dictation Test and Banana Culture' indicates, this was not necessarily with the exclusionary outcome intended by Queensland lawmakers:

'The question of restricting the ownership or leasehold of banana land...has been exercising the minds of those in authority for some time past. It was felt that there was a grave risk of owners leasing their land in 10-acre blocks to certain classes of Asiatics...a partial solution at least has been discovered under the Banana Preservation Act of 1921. Section 3...makes it unlawful for 'any person who has not... passed the dictation test to engage in or carry on the industry or culture of bananas'. The first application under this section ...recently came before Mr. H. Clegg, J. P., the applicant being an Indian. The applicant had no difficulty in writing the dictation test correctly'. 'Dictation Test and Banana Culture', *Brisbane Courier* (Brisbane) 24 October 1928, 12.

This chapter also examines the case of See Chin, leaseholder of the largest sugar plantation in north Queensland. In another failure of the rule of law, the Queensland Supreme Court in 1923 endorsed his prosecution for employing ‘coloured aliens’.¹¹²⁶

Finally the chapter considers the overall effect of Queensland’s alien and dictation test laws and prosecutions, highlighting the detrimental consequences for Chinese Australians and other non-European communities in the State.

Prosecutions under statute

Sugar Cultivation Act

The *Sugar Cultivation Act 1913* was used to exclude non-Europeans or ‘coloured aliens’ from the sugar industry in Queensland. The first prosecutions did not occur until some years after the passing of the Act. Under section 8, prosecutions were not to be instituted ‘except by the direction of the Attorney-General, Solicitor-General, or Minister of Justice’.¹¹²⁷ It was later claimed that:

When the sugar industry was receiving the first measure of protection...a Tory Government passed an Act of Parliament which empowered the Government to apply a dictation test to people engaging in the sugar industry and thus *prevent aliens from taking any part in it*. The Government...allowed that Act to lie in abeyance whilst the sugar industry to a large extent *passed into the hands of aliens*.¹¹²⁸

By 1919, however, as Constable Nugent of Babinda told the Industrial Arbitration Court, prosecutions were being pursued in North Queensland at the ‘direction of the Attorney-General...for breaches of the Sugar Cultivation Act by the employment of *colored aliens* [sic] without permits’.¹¹²⁹ Section 4 of the Act prohibited ‘any person’ who had not passed a dictation test or who did not have a certificate of exemption ‘from being employed in or in connection with the cultivation of sugar cane and the manufacture of sugar’. Despite the non-discriminatory wording of the statute, there was no attempt to hide the racial focus of prosecutions under the Act. After receiving the Attorney-General’s direction, the police diligently pursued ‘colored [sic] aliens’ in the north Queensland sugar fields. As the *Cairns Post* reported:

¹¹²⁶ *Brown v See Chin, ex parte See Chin* (1923) 17 QJP 130; 1923 QWN 38.

¹¹²⁷ See also ‘The New Sugar Bill’, *Townsville Daily Bulletin* (Townsville) 27 June 1913, 10.

¹¹²⁸ ‘Correspondence’, *Townsville Daily Bulletin* (Townsville) 24 February 1927, 4. Emphasis added. As Neville Meaney explains, in 1915 Australian Prime Minister Andrew Fisher pressured Queensland Labor Premier Thomas Ryan not to implement the racially exclusive provisions of the Sugar Cultivation Act following protests from Japanese Consul-General Shimizu. Neville Meaney, *Australia and world crisis, 1914-1923* (Sydney University Press 2009) 107-108.

¹¹²⁹ ‘The Sugar Case’, *Worker* (Brisbane) 22 May 1919, 17. Emphasis added.

Constable Nugent, of Babinda, and Constable Mullins, of Edmonton, initiated 27 prosecutions against employers and employees for contraventions of the Sugar Cultivation Act of 1913, concerning the employment of *colored aliens* not in possession of certificates that they had passed the dictation test.¹¹³⁰

To avoid prosecution, those regarded as ‘colored aliens’ had to obtain either an exemption certificate or a certificate of having passed the dictation test and were also required to present their certificates to the local Clerk of Petty Sessions. As the *Townsville Daily Bulletin* reported in 1925:

CAIRNS, January 15. Mr A. H. Scott, C.P.S. notifies those holding certificates of exemption and certificates of having passed the Dictation test under the Sugar Cultivation Act, that they must lodge same at the C.P.S. Office, Cairns, not later than 31st March next, otherwise they will be liable to a penalty not exceeding £10.¹¹³¹

Prosecutions under the Sugar Cultivation Act seem to have been most frequent for several years after the First World War. In 1918 Constable Mullins told the Cairns Summons Court that:

He went to a farm on 21st June occupied by C. Butler. There were eleven Hindoos there cutting cane. He said to them: ‘Have you got a certificate of exemption under the dictation test to allow you to work in the sugar field’. Six produced their certificates and five said they had none. The five stated they had been working for a number of years cutting cane and never had certificates, and they did not intend to get them.¹¹³²

The lawyer for the plantation owner, Mr Butler, pointed out to Magistrate T.A. Ferry that the men were working as contractors and were not in contravention of legislation that merely prohibited the ‘employment’ of a person who had not passed the dictation test.¹¹³³

Nevertheless Magistrate Ferry convicted Butler and the men without exemption certificates of offences under the legislation. Moreover, as the *Northern Miner* reported:

...a large number of similar prosecutions were adjourned to the Circuit Court at Cairns on October 16th, pending appeals against the convictions. There are indications for a far-reaching effect from the prosecutions and if the appeals are not upheld there is a probability of a strong fund being collected by both employers and employees to contest the action.¹¹³⁴

Similarly in December 1918 the *Brisbane Courier* noted that:

¹¹³⁰ ‘Edmonton Hindus’, *Cairns Post* (Cairns) 22 October 1918, 4. Emphasis added.

¹¹³¹ ‘Cairns Chronicles’, *Townsville Daily Bulletin* (Townsville) 28 January 1925, 7.

¹¹³² ‘Working Without a Permit’, *Cairns Post* (Cairns) 17 August 1918, 3.

¹¹³³ Ibid.

¹¹³⁴ *Northern Miner* (Charters Towers) 20 August 1918, 2. Emphasis added. The matter was appealed to the full bench of the Queensland Supreme Court which upheld the convictions but given the consequences of its decision for the sugar industry gave leave to appeal to the Privy Council. ‘An Important Appeal’, *Brisbane Courier* (Brisbane) 6 December 1918, 6. The Privy Council dismissed the appeal, noting that the term ‘employment’ in the Sugar Cultivation Act had the same meaning as in the *Industrial Arbitration Act 1916* (Qld) where it was defined to include those working under contract only. *Addar Khan v John Mullins* [1920] AC 391, [1919] UKPC 118 (2 December 1919).

...a large number of persons engaged in the industry were affected by this, the number in the Cairns district being estimated at about 1500, comprising Indians, Malays, Japanese, Chinese, and other Asiatics.¹¹³⁵

In 1919 the Australian Workers Union told a Royal Commission into the sugar industry that there were 20,898 people employed in the industry, of whom an estimated 2,500 to 3,000 were 'colored aliens'. However only 1,558 certificates of exemption had been granted under the Sugar Cultivation Act. The Southern District Secretary of the AWU, Frederick Martyn, said the 'different nationalities' to whom certificates of exemption had been granted were:

Chinese 506, Indians 161, Javanese 107, Malays 71, Native-born (sons of Kanakas, Indians etc.) 46, Japanese 357, Polynesians 166, others 36; total 1,750 (less 192 returned from Clerks of Petty Sessions as not being claimed).¹¹³⁶

This indicates that the AWU's register of 'colored aliens' in the sugar industry included workers who were most likely British subjects through birth in British colonies or dominions - Indians, Malays and an unknown proportion of 'Chinese' and 'Polynesians' - as well as 'native-born' workers who were without question subjects by birth in Australia. While the prohibitions in the Sugar Cultivation Act applied to all 'persons' without the relevant certificate of exemption, 'colored aliens' were the focus of police prosecutions as lawmakers in the Queensland Parliament had intended. Despite the neutral language of the legislation, it was enforced entirely on a racial basis. Those regarded as 'aliens' in a racial sense were the target of the laws. It is probable, however, that a substantial proportion of workers prosecuted under this legislation were not 'aliens' in any legal sense.

It appeared to be of no concern to the police whether the 'colored aliens' they prosecuted under the Sugar Cultivation Act were 'aliens' under the law. Constable Nugent told the Arbitration Court of a case where two white men who had been refused work on a sugar farm:

...found that a gang of Hindoos had been at work on the Sunday. This meant a loss to the white workers of four or five days. It was obvious that these Hindoos cut for less than the 1s. rate, and obviously had done the work on Sunday, and the employers acquiesced in their so doing. He had seen white men carrying their swags through the district while *colored aliens* were employed.¹¹³⁷

If the term 'Hindoos' was an accurate description of the ethnic background of the particular workers, it is likely they were British Indians (as the 1911 and 1921 Commonwealth censuses indicated) and not 'aliens' under the law in Australia.

¹¹³⁵ 'An Important Appeal', *Brisbane Courier* (Brisbane) 6 December 1918, 6. Emphasis added.

¹¹³⁶ 'Complete Summary of the Sugar Industry', *Worker* (Brisbane) 12 June 1919, 11.

¹¹³⁷ 'The Sugar Case', *Worker* (Brisbane) 22 May 1919, 17. Emphasis added.

Prosecutions of ‘colored aliens’ and their employers under the Sugar Cultivation Act continued at least until the mid-1920s. As the *Townsville Daily Bulletin* reported in 1924:

On Monday, at the Cairns Summons Court Alfred James Broughton pleaded guilty to three charges of having employed *colored aliens* without their having passed the dictation test...Delger Singh, Radja Singh, Gowad Singh and Brahu Singh were each fined 30/- with 3/6 costs, in default two weeks imprisonment, for an infringement of the Sugar Cultivation Act...¹¹³⁸

Again, it is likely that the workers in question were British subjects of Indian descent and not ‘aliens’ under Australian law.

Sugar Works Act

Owners of Queensland sugar farms were also prosecuted under the *Sugar Works Act 1911* for unlawfully employing ‘colored aliens’. As noted above, section 9(8) of the Act excluded ‘Alien labour on sugar works’. The provision prohibited ‘any person from employment in or about the construction, maintenance, management or working of any sugar works managed or worked under the Act who has not passed a dictation test in English’. In the Innisfail Summons Court in March 1924:

Lorocco, charged with unlawfully employing a *colored alien* contrary to the Sugar Works Act, pleaded guilty. Inspector Watt visited the defendant’s farm and saw a Malay driving horses. The Malay admitted that he was working for Lorocco. Malay said that he was receiving a white man’s wages.¹¹³⁹

As this indicates, while the heading of section 9(8) referred merely to ‘alien’ labour and the text to any ‘person’ who had not passed a dictation test, the provision was understood and applied as a prohibition on the employment of any ‘colored alien’ - namely any non-European - in or about any sugar works, with no consideration as to whether or not the employee was an ‘alien’ in the legal sense of the word. In this case, the term ‘Malay’ was another of the ambiguous, generic descriptions applied to people of Asian origin who had settled in Australia. It may have referred merely to someone from the vast ‘Malay archipelago’ to Australia’s north – including the Dutch East Indies (later Indonesia) – or it could have been a more specific reference to a person from the Federated Malay States, at that time a British colony. If the latter, then the employee was a British subject and a ‘non-alien’ under the law applying in Australia at the time. The 1911 Commonwealth census

¹¹³⁸ ‘Cairns Chronicles’, *Townsville Daily Bulletin* (Townsville) 28 May 1924, 10. Emphasis added.

¹¹³⁹ ‘Innisfail Cases’, *Cairns Post* (Cairns) 8 March 1924, 5. Emphasis added. See also Queensland, *Bench Record and Summons Book*, Court of Petty Sessions, Innisfail, 8 March 1924, 80.

recorded 1,161 ‘Malays’ in Australia, 772 or 66 per cent of whom were listed as British subjects.¹¹⁴⁰

Prosecutions under industrial awards

Sugar Workers Award

The fiction of the dictation test was unnecessary for prosecutions under subordinate rules not subject to imperial scrutiny, including Queensland’s industrial awards made and amended by the Court of Industrial Arbitration. Since imperial approval was not required, there was also no attempt in these laws to hide the discriminatory use of the term ‘alien’ in its racial sense.

In North Queensland in the 1920s there was a long list of prosecutions under the Sugar Field and Sugar Mill Workers and Cooks Award (Sugar Workers Award) for employing ‘coloured aliens’ on sugar farms and for failing to pay ‘coloured aliens’ working on such farms in the presence of an authorised officer. The Sugar Workers Award was made by Queensland’s Court of Industrial Arbitration under the *Industrial Arbitration Act 1916*.

Clause 4 of the Sugar Workers Award prohibited ‘coloured labour’ in cane cutting or the cultivation of sugar cane. Prosecutions under this provision were commonly reported as convictions for employing ‘colored aliens’. Clause 12 of the award, headed ‘Payment to Aliens’, said that ‘all persons being aboriginal natives of Asia, Africa or the islands of the Pacific, or substantially of that origin’ employed as sugar-field workers should be paid their wages ‘in the presence of an officer of police, clerk of petty sessions, or other officer in that behalf duly authorised and appointed by the Government’. As the *Cairns Post* reported in 1921:

A remarkable feature of the Cairns Court proceedings during the past few weeks has been the number of offenders being proceeded against for breaches of the Industrial Arbitration Act in the matter of *employing colored aliens and failing to pay such aliens* in the presence of an officer authorised to witness such payments...W.W. Mason was the latest offender. He came before [Industrial Magistrate] Mr.W. Simpson, and, for *failing to pay his colored alien employees* in the presence of an authorised officer, was fined £5.¹¹⁴¹

Clause 12 of the award appears to have been beyond the authority of or ‘ultra vires’ its parent legislation. Section 8 of the Industrial Arbitration Act allowed the Arbitration Court, in making any award, to regulate any ‘industrial matter’. This included ‘the question whether

¹¹⁴⁰ Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), Vol 1 Part 1, Statistician’s Report, 227-228.

¹¹⁴¹ ‘An Expensive Oversight.’, *Cairns Post* (Cairns) 12 October 1921, 4. Emphasis added. The prosecution of William W. Mason is also recorded in the *Queensland Industrial Gazette*, 10 November 1921, 741 (listed as a breach of clause 21 of the award).

any persons shall be disqualified for employment' and any claim 'to dismiss or to refuse to employ any particular person or persons or class of persons'.¹¹⁴² While the prohibition on 'coloured labour' in the Sugar Workers Award was therefore within the scope of the Act, nothing in the statute authorised discrimination in relation to payment on racial grounds.

Another feature of clause 12 of the Sugar Workers Award was its heading. Unlike primary legislation there was no attempt to hide the racial use of 'alien'. The 'aliens' caught by the provision were 'aboriginal natives of Asia, Africa and the islands of the Pacific', including natural-born subjects from British colonies and dominions who were not 'aliens' in a legal sense. In the heading 'Payment to Aliens' we see, therefore, that the racial meaning of 'alien' had become the (de facto) law. This is confirmed by the numerous prosecutions about 'colored [sic] aliens'.

Also in 1921, the *Cairns Post* reported under the heading '*More Colored Alien Employers*':

Samuel Christensen, charged with failing to pay Hindoo laborers employed by him in the presence of an authorised officer, was fined £5, in default levy and distress, in default three weeks in gaol.¹¹⁴³

While the labourers in question may have been Sikh rather than 'Hindoo',¹¹⁴⁴ they were likely in either case to have been of 'British Indian' origin and therefore not 'aliens' under the law.

Consistent with the heading of clause 12, magistrates hearing cases under this provision described coloured workers as 'aliens' whether or not that was legally correct. In 1922 the *Cairns Post* reported that Edward Earle was fined £7 10 shillings in the Cairns Summons Court for paying an 'alien employee' when an officer appointed by the Crown was not present. Mr Earle's lawyer said his client was unaware of previous similar cases being heard in that Court, as he had been away for some time, and that in any event he had only acted out of kindheartedness:

The Chinaman had pressed him for money and it meant either getting an officer out or going in four miles to the Police Station. In a weak moment, he had paid the man... Chinamen were fearfully persistent in the matter of payment and worried the employer.¹¹⁴⁵

Police Magistrate Mr W. Simpson rejected Earle's defence, stating:

He must know that a good deal of publicity has been given to these matters. He can hardly plead ignorant and that he could not understand ... I think it was made fairly public. The cases have been extending over six months ... A number of cases have been dealt with in this Court

¹¹⁴² Section 4.

¹¹⁴³ 'More Colored Alien Employers', *Cairns Post* (Cairns) 6 October 1921, 5.

¹¹⁴⁴ The *Queensland Industrial Gazette* 10 November 1921, 741, records that Samuel Christensen was fined £5 for 'failing to pay Ball Singh, coloured labourer, in the presence of an officer'.

¹¹⁴⁵ 'Fearfully Persistent', *Cairns Post* (Cairns) 25 February 1922, 3.

for *neglecting to pay aliens* before an authorised officer. I have pointed out that I intended to inflict a severe penalty for such breaches.¹¹⁴⁶

No discussion was reported as to whether the ‘Chinaman’ in this case was an ‘alien’ under the law. However clause 12 was not intended to restrict payments only to ‘aliens’ in a legal sense. The provision used race as a criterion for prosecution not nationality or legal alienage status. Once again, the racial meaning of ‘alien’ was used instead of the correct legal meaning to enforce a discriminatory law.

Industrial Arbitration Court

Hearings before the Queensland Court of Industrial Arbitration in 1919 about amendment of the Sugar Workers Award to exclude ‘colored aliens’ from the sugar industry show the complicity of legal figures in misuse of the term ‘alien’. When a witness from the Australian Workers Union (AWU) said that in his view preference in sugar industry employment should go to ‘white labor first, returned soldiers second, and *British and Australian-born aliens* next’,¹¹⁴⁷ the presiding judge, Justice McCawley, failed to explain that people born in the British Empire (including Australia) were ‘natural-born subjects’ owing allegiance to the sovereign and could not be ‘aliens’ in a legal sense. Moreover, when AWU officials and other witnesses referred repeatedly to ‘colored aliens’ and ‘colored labour’ as equivalent terms,¹¹⁴⁸ there was no explanation from Justice McCawley that a coloured person born or naturalised as a British subject was not an ‘alien’. Indeed the judge was guilty of the same misuse himself. When AWU representative Mr Martyn presented a telegram stating that ‘alien gangs’ were being engaged at a particular sugar plantation, Justice McCawley promised that he would ‘absolutely...prohibit the employment of *colored gangs* in harvesting’.¹¹⁴⁹ True to its word, the Court amended the Sugar Workers Award by prohibiting coloured labour in the harvesting of sugar cane, and severely restricting use of such labour in cultivation of the crop.¹¹⁵⁰

¹¹⁴⁶ Ibid. Emphasis added.

¹¹⁴⁷ ‘Industrial Court’, *Cairns Post* (Cairns) 30 May 1919, 8. Emphasis added.

¹¹⁴⁸ ‘Sugar Workers’ Conditions’ *Cairns Post* (Cairns) 2 May 1919, 2; ‘Industrial Court’, *Cairns Post* 30 May 1919, 8; ‘The Sugar Case’, *Worker* (Brisbane) 22 May 1919, 17; ‘Sugar Workers’ Claim’, *Cairns Post* 13 June 1919, 8.

¹¹⁴⁹ ‘Sugar Workers’ Claim’, *Cairns Post* (Cairns) 13 June 1919, 8. Emphasis added.

¹¹⁵⁰ The amended *Award for Sugar Field and Sugar Mill Workers and Cooks* handed down by the Court of Industrial Arbitration (No 50 of 1919) prohibited ‘employment of coloured labour’ in cane *cutting*, as well as restricting use of such labour in *cultivating* sugar cane to plantations of less than 75 acres, which was further restricted in 1921 to plantations of less than 40 acres. *Queensland Industrial Gazette* 11 August 1919, 521; 11 July 1921, 532.

Further hearings before the Court in 1923 confirm that Justice McCawley did not understand the legal meaning of ‘alien’ and the role of this term in determining membership of the community. Following its success in excluding ‘coloured aliens’ from the sugar industry, the AWU argued such people should also be prohibited from working as ‘hotel, cafe and restaurant employees in all divisions of Queensland, excepting the southern division’. Mr W. Dunstan, for the AWU:

...based his argument on the principle of a White Australia. Women and young girls, through the cowardice of legislature, were compelled to associate with *aliens*. He had come to the court to ask for some measure of relief.¹¹⁵¹

Justice McCawley refused the AWU’s application, saying that ‘*an alien could not change his caste* and to throw him right out of employment was absolutely prohibited by legislature’.¹¹⁵²

While this decision contradicted his 1919 ruling for the sugar industry where he ‘absolutely prohibited’ the employment of ‘alien gangs’ in sugar harvesting, it also shows that Justice McCawley understood the term ‘alien’ in a racial not legal sense, declaring that an ‘alien’ would always remain an ‘alien’ because of his ‘caste’ or race. As well as confusing the legal and racial concepts of ‘alien’, there was no comprehension on Justice McCawley’s part that an ‘alien’ could move beyond this status under the law, for example through naturalisation or marriage to a British subject.

McCawley’s lack of understanding of the legal concept of ‘alien’ was later repeated as Chief Justice of the Supreme Court of Queensland in *Brown v See Chin* (1923), discussed below.

Station Hands Award

It was not just sugar and other primary production industries in Queensland where prosecutions were used to exclude ‘coloured aliens’. Clause 7 of Queensland’s *Station Hands Award 1917* declared that:

No *coloured alien* shall be employed...or continued in employment...at any of the work for which rates of pay are prescribed by this Award, except cooking, gardening and prickly pear cutting. Provided that in future engagements in cooking, gardening and prickly pear cutting, preference shall be given to competent white workers.¹¹⁵³

In 1923 the manager of Corona Station appeared before the Industrial Magistrates Court in Longreach charged with employing a ‘coloured alien’ as a cook when a white man was available. Industrial Inspector Lomas gave evidence that a white cook was denied a position

¹¹⁵¹ ‘Aliens In Hotels’, *Townsville Daily Bulletin* (Townsville) 10 November 1923, 5. Emphasis added. See also ‘The Week at a Glance’, *Queenslander* (Brisbane) 17 November 1923, 30.

¹¹⁵² ‘Aliens In Hotels’, *Townsville Daily Bulletin* (Townsville) 10 November 1923, 5. Emphasis added.

¹¹⁵³ Emphasis added.

by the manager because a ‘Chinaman’ had been engaged in this role a few days earlier. The prosecutor argued a white cook should have been preferred ‘notwithstanding any arrangement...between the employer and any alien’.¹¹⁵⁴ The Inspector said he went to the station and found that a cook named John Jimmy had commenced work there, telling the court ‘this man is a Chinaman’. The Inspector said that he:

...saw a man cooking in the kitchen. He was a coloured man. He could not state what his *nationality* was until he had a conversation with him. As a result of the conversation, he concluded that he was a *coloured alien*.¹¹⁵⁵

The defence objected that ‘this evidence was inadmissible as it was hearsay and witness was *not an expert in nationality*’.¹¹⁵⁶ The prosecutor complained, asking whether it was ‘necessary to go to China to obtain the necessary qualifications for the proof of a Chinaman, as there was no registration certificates of birth’. He requested that the magistrate give:

...an ex parte opinion as to whether he would be satisfied upon the evidence given by the Inspector that John Jimmy was a *coloured alien* without the necessity of calling the alleged *alien*.¹¹⁵⁷

When the magistrate said the cook had to be called before the court to prove he was a ‘Chinaman’, based on ‘the usual rule of evidence that the Court would not be safe in accepting evidence which was only of a secondary nature when primary evidence could be produced’, the prosecutor stated that the magistrate’s approach:

...amounts to this - that, without the production of the *coloured alien*, no prosecution could be successful under this section...The defendant is shielding himself behind a *quibble as to the nationality* of John Jimmy...In face of the fact that we are unable to produce the Chinaman to prove that he was a *coloured alien*, I do not intend to tender further evidence.¹¹⁵⁸

As this shows, contrary to the rule of law, those enforcing the prohibition on ‘coloured aliens’ in the Station Hands Award regarded a person’s nationality as a mere ‘quibble’. There was some recognition that nationality was an issue and that a coloured person was not necessarily an ‘alien’. Nevertheless, the prosecution wanted the court to accept, as in the *Toro* case in 1902, that a person of non-European appearance, in this case a ‘Chinaman’, was *prima facie* an alien under the law and there should be no need to prove his actual legal status.

In this matter the prosecutor was surprised to come up against a magistrate who demanded proof the cook was a ‘coloured alien’. However, while the magistrate refused to accept ‘hearsay evidence’ from the Inspector and wanted Mr Jimmy to appear in court to establish

¹¹⁵⁴ ‘Longreach’, *Capricornian* (Rockhampton) 15 December 1923, 9.

¹¹⁵⁵ *Ibid.* Emphasis added.

¹¹⁵⁶ *Ibid.* Emphasis added.

¹¹⁵⁷ *Ibid.* Emphasis added.

¹¹⁵⁸ *Ibid.* Emphasis added.

his 'nationality', even the magistrate seemed to think that if Mr Jimmy was a 'Chinaman', this would be sufficient to show he was a 'coloured alien'. The report of the case does not indicate that Mr Jimmy's status as 'subject' or 'alien' in a legal sense was put to the Court or considered by the magistrate.

In the *Corona* case the defence pointed out that the Industrial Inspector was 'not an expert in nationality' and his evidence could not be accepted without question.¹¹⁵⁹ There was no such competent defence, however, in a similar matter in 1935 when the Australian Workers Union complained that the manager of the Stanhope station in the Aramac district had hired a 'coloured alien' as station cook contrary to the Station Hands' award. Compelled to dismiss the cook, the manager had to lay off his other employees as well. The Industrial Court instructed a Longreach magistrate to investigate the matter, but only as to the 'unfair dismissal' of the other employees and not as to whether the dismissed cook was a 'coloured alien' under the law.¹¹⁶⁰

See Chin's case

In 1923 one of the biggest employers in the Australian sugar industry, Jan See Chin¹¹⁶¹ (the former leaseholder of the largest sugar farm in Queensland, at Green Hills near Cairns)¹¹⁶² was convicted on numerous charges of 'employing coloured aliens' contrary to the *Sugar Cultivation Act 1913*. As noted above, the statute prohibited 'any person' who had not passed the dictation test or did not have a certificate of exemption from being employed in the sugar industry.¹¹⁶³ See Chin's case demonstrates the endemic misuse of 'alien' in Queensland at this time (not least by the legal profession), although it also shows how exceptional individuals who offered employment opportunities and business to the white community might rise above the derogatory alien label.

In 1911 Queensland's Attorney-General said the Green Hills plantation was ruined after being leased to Chinese 'aliens' who left it abandoned, 'overgrown with weeds'.¹¹⁶⁴ However

¹¹⁵⁹ Ibid.

¹¹⁶⁰ Nor whether a white worker was available for the cooking task. 'Employment Of Alien Station Cook', *Worker* (Brisbane) 19 March 1935, 14.

¹¹⁶¹ 'Sugar Workers' Conditions', *Cairns Post* (Cairns) 2 May 1919, 2.

¹¹⁶² 'Queensland Cane Crop', *Clarence and Richmond Examiner* (Grafton) 18 July 1914, 6.

¹¹⁶³ Section 4.

¹¹⁶⁴ See above p 219, n 1023.

only a few years later, as the *Townsville Daily Bulletin* reported in 1916, See Chin had turned the farm into a highly profitable enterprise:

Take Green Hills for instance. Grubs ruined a Chinaman named Ah Tong, as it did several Europeans before him. Then another Chinese resident comes along in the person of See Chin, who acquires a long lease of the property. This man, for two years running, cleared £7,600 a year, through the grubs suddenly disappearing for that period. On top of this, See Chin sold the remainder of his lease, and standing crop to a syndicate for £10,000 - thus his bank balance smiled to the extent of £25,000, in, say, three years.¹¹⁶⁵

Sandi Robb notes that the Cairns Branch of the Australian Workers Union was unhappy that Queensland's restrictive legislation 'did not go far enough to protect European workers' and 'kept a constant eye on Chinese labour in the district' for breaches of the laws. As she says, this 'vigilante attitude' may have been responsible for allegations against See Chin.¹¹⁶⁶ In December 1922 See Chin was charged at the Cairns Summons Court with unlawfully 'employing coloured aliens' under the Sugar Cultivation Act.¹¹⁶⁷ As the Queensland Supreme Court was informed when it heard an appeal by See Chin against his conviction:

The offence with which See Chin was charged was that: on his farm at Smithfield, near Cairns, he employed Sun Chun; a prohibited person by the [Sugar Cultivation] Act, whereby *aliens were prohibited* from working in the sugar industry, unless they had passed the dictation test, or held a certificate of exemption under section 4 of the Act.¹¹⁶⁸

See Chin's lawyer argued that the Sugar Workers Award gave him a complete defence.¹¹⁶⁹ The award prohibited 'coloured labour' on sugar farms, but clause 4(3) said nothing in the award 'shall prevent the owner of a sugar-cane farm from employing his *own countrymen* on such farm'. The prosecution said this did not assist See Chin, claiming, despite the wording of the clause, that it 'does not give a Chinaman a free hand to employ his countrymen. The whole object of the award is to restrain a man from employing colored labor'.¹¹⁷⁰

The term 'countrymen' in clause 4(3) provides another example of the confused use of nationality related terms in this period of Australian history. The provision had already provoked hostility from white workers. Delegates of the Australian Workers Union complained in January 1922 that 'under the present system of preference a Chinaman grower could employ his own countrymen', citing 'a case at Innisfail where a Chinese grower

¹¹⁶⁵ *Townsville Daily Bulletin* (Townsville) 23 May 1916, 4.

¹¹⁶⁶ Sandi Robb, *Cairns Chinatown. A heritage study* (Cairns & District Chinese Association 2012) 69.

¹¹⁶⁷ 'Employment of Aliens Case', *Townsville Daily Bulletin* (Townsville) 27 December 1922, 5.

¹¹⁶⁸ Prohibited Labor', *Cairns Post* (Cairns) 8 February 1923, 8. Emphasis added. See also 'Employing an Alien', *Cairns Post* (Cairns) 5 May 1922, 4.

¹¹⁶⁹ 'Employment of Aliens Case', *Townsville Daily Bulletin* (Townsville) 27 December 1922, 5

¹¹⁷⁰ *Ibid.*

employed twenty countrymen with permits and ten without'.¹¹⁷¹ The AWU passed a resolution calling for 'absolute preference' in any award for (white) industrial unionists and financial members. Seconding the resolution, an AWU delegate declared that:

..something would have to be done during this year to exclude the *aliens* from the sugar industry. He suggested a conference with employers with a view to excluding *colored aliens* from the industry'.¹¹⁷²

As the AWU's 1922 complaints indicate, the term 'countryman' – as with the word 'alien' – was used as a racial description, i.e. it did not mean men from the same country whatever their race or ethnic origin but men of the same race whatever country they were from. The AWU wanted clause 4(3) of the Sugar Workers Award repealed because it permitted 'colored aliens' to employ their own 'countrymen', in particular because it allowed Chinese employers to hire workers of the same race.

In *Brown v See Chin* (1923) the full Supreme Court upheld See Chin's conviction, without considering the legal status of See Chin or his employee, finding merely that the prohibition in the Sugar Cultivation Act 'was not affected by the sugar workers' award'.¹¹⁷³ Once this case was decided, See Chin was prosecuted in the Cairns Summons Court in 1923 on an additional 26 charges of '*employing colored aliens*'. Police Magistrate Simpson said See Chin was guilty of 'a flagrant breach of the Act...which deserves a heavy penalty'.¹¹⁷⁴ As the *Cairns Post* reported:

Mr. V. Tabart, who appeared for the prosecution, said he had been instructed to press for a heavy penalty... 'It is a very serious offence,' he added, '*and one against the whole principle upon which the Sugar Cultivation Act is based*'.¹¹⁷⁵

However the Sugar Cultivation Act had been drafted so that on its face it contained no discrimination against non-Europeans or 'coloured aliens'. In practice it was administered through the mechanism of the dictation test so that such people (and especially those of Chinese ethnic origin) were excluded from the sugar industry. But there was nothing in the wording of the statute itself to indicate this was the objective of the Act. The prohibition in the legislation applied merely to any 'person' who had not obtained a certificate of having passed the dictation test, with no reference to 'aliens' or 'colour'. For the prosecutor to argue,

¹¹⁷¹ 'Ninth Annual Delegate Meeting', *Worker* (Brisbane) 2 February 1922, 14.

¹¹⁷² *Ibid.* Emphasis added.

¹¹⁷³ *Brown v See Chin, ex parte See Chin* (1923) 17 QJP 130; 1923 QWN 38, see headnote in Joseph Edward Broadbent (ed), *Queensland Digest* (Queensland Government Printer 1926). See also 'A Full Court Appeal', *Townsville Daily Bulletin* (Townsville) 3 May 1923, 5.

¹¹⁷⁴ 'Employing Colored Aliens', *Cairns Post* (Cairns) 2 June 1923, 4.

¹¹⁷⁵ *Ibid.* Emphasis added.

with the magistrate's concurrence, that the principle behind the Sugar Cultivation Act was to prevent the employment of 'colored [sic] aliens' in the sugar industry shows the extent to which lawyers and members of the judicial profession, contrary to the rule of law, adopted the racial aims behind the supposedly non-discriminatory legislation. This applied also to the full Supreme Court led by Chief Justice McCawley which endorsed See Chin's conviction for employing 'coloured aliens' despite there being no such offence in the Act itself.¹¹⁷⁶ The Supreme Court's finding was consistent with McCawley's lack of understanding of the law with respect to 'aliens' demonstrated earlier in the Court of Industrial Arbitration.

Beyond the alien frontier?

Notwithstanding his conviction for employing 'coloured aliens', See Chin was an example of how (in extraordinary cases) a 'coloured alien' might move beyond this status in the eyes of the local white community. As Helen Irving says, 'an exceptional coloured person might be transformed into an Australian citizen' (using the word 'citizen' in its general, non-legal sense).¹¹⁷⁷ By the time Queensland passed restrictive legislation aimed at excluding ethnic Chinese from major agricultural industries, See Chin had already established himself as a major employer in North Queensland. He was also prominent in the development of the Cairns community. Local papers reported his donations to the District Hospital¹¹⁷⁸ and his role as a founding member of one of the first cricket clubs in the area.¹¹⁷⁹

The consequence of this leading role in the local economy and society was that See Chin was not himself regarded or treated as a 'coloured alien'. For the Anglo-Celtic community a

¹¹⁷⁶ See 'A Full Court Appeal', *Townsville Daily Bulletin* (Townsville) 3 May 1923, 5 and www.sclqld.org.au/judicial-papers/judicial-profiles/profiles/twmccawley.

¹¹⁷⁷ Irving, 'Citizenship before 1949', above n 110, 12. Irving refers to Quong Tart, Sydney's famous tea importer of the late nineteenth century, who was 'a successful Chinese born businessman, philanthropist, socialite, honoured by both the Chinese and New South Wales governments, as well as within both the Chinese and the white colonial communities.' See also Tart, *The life of Quong Tart*, above n 543. Quong Tart is mentioned in Chapter Two in connection with the 1888 'Inter-Colonial Conference on the Chinese Question'.

¹¹⁷⁸ 'Hospital Meeting', *Cairns Post* (Cairns) 18 January 1913, 4. 'Cairns Hospital Committee.', *Cairns Post* (Cairns) 16 June 1921, 5.

¹¹⁷⁹ 'Freshwater Cricket Notes', *Cairns Post* (Cairns) 30 September 1921, 2. See Chin not only contributed to the local Anglo-Celtic community but actively supported political causes in China. When a personal representative of Chinese Nationalist Party leader Sun Yat Sen visited Cairns, the *Cairns Post* reported that he 'was entertained by a large gathering at the Chinese Nationalist Party's rooms in Sachs street, Mr See Chin presiding'. See 'Visit of Chinese Diplomat', *Cairns Post* (Cairns) 20 June 1923, 4. In 1922 See Chin was elected Joint Honorary Secretary of the Cairns Branch of the Chinese Nationalist Association in support of Sun Yat Sen. 'Chinese Nationalists.', *Cairns Post* (Cairns) 19 June 1922, 2.

major employer such as See Chin provided important economic opportunities. As Henry Reynolds explains, in north Queensland wealthy Chinese merchants such as See Chin:

...were treated as honorary Europeans, living in ordinary residential areas and travelling first-class on the trains. They often had extensive dealings with local banks, law firms, insurance companies and shipping agents.¹¹⁸⁰

See Chin continued to run his sugar plantations after the enactment of the Sugar Cultivation Act in 1913. There is no indication that he was required to obtain a certificate of exemption from the dictation test to remain in business.¹¹⁸¹ He returned to Hong Kong for the last years of his life, but his death in 1928 was noted with a short but magnanimous obituary in the local Cairns newspaper praising his contribution to the development of the sugar industry in Queensland.¹¹⁸²

Alien prosecutions and the law

The ‘coloured alien’ prosecutions in North Queensland were an important weapon for ‘white Australia’. The motive behind Queensland’s alien and dictation test legislation was to exclude ‘aliens’ in a racial sense, especially Chinese Australians, from profit-making agricultural industries. Prosecutions after World War One gave these laws teeth.

Legislation such as the Sugar Cultivation Act and Sugar Works Act merely prohibited ‘persons’ from engaging in the sugar industry without passing the dictation test. In contrast, industrial awards such as the Sugar Workers Award and Station Hands Award, safe from imperial scrutiny, were explicit about racial exclusion. But prosecutions under both legislation and awards were directed at ‘coloured (or colored) aliens’. ‘Hindoos’, Malays and Chinese were automatically categorized as ‘colored aliens’ even if they were British subjects. Contrary to long established legal principle, there was no recognition that many were natives of British dominions or colonies, let alone that this was significant in terms of their legal status. The Queensland legal system at both the local and superior court level, including the Court of Industrial Arbitration and the full Supreme Court, was complicit in this failure of the rule of law. Even the Chief Justice showed little understanding of the law with respect to ‘aliens’. The *Corona* case was an exception where a competent defence lawyer insisted that

¹¹⁸⁰ Reynolds, *North of Capricorn*, above n 216, 69.

¹¹⁸¹ See Chin was granted a certificate of exemption from the dictation test under the Commonwealth *Immigration Restriction Act 1901*, allowing him to travel in and out of Australia. National Archives of Australia, *Invisible Australians, Living under the White Australia Policy*, <http://invisibleaustralians.org/resources/items/42275/>.

¹¹⁸² ‘Obituary’, *Cairns Post* (Cairns) 27 April 1928, 5.

admissible evidence as to nationality – and not merely the casual observations of an industrial inspector – would be required to establish that a person was a ‘coloured alien’.

In short, prosecutions in Queensland after World War One under the dictation test legislation and industrial awards confirm that at a practical level the racial meaning of ‘alien’ became the law. The prohibitions under these statutes and rules were enforced against those regarded as ‘aliens’ in a racial sense with no regard to the proper legal meaning of the word established under British law centuries before.

Aftermath: Effect of alien and dictation test laws

The effect of Queensland’s alien and dictation test laws on the various non-European communities living in the State was substantial. In 1930 the Consul-General for China, Mr. F.T. Sung, wrote to Queensland Premier Arthur Moore complaining that Chinese Australians had suffered greatly under the State’s exclusionary laws which wrongly singled them out as ‘aliens’. He said in 1913 there were over 10,000 Chinese in Queensland but that presently ‘the number does not exceed 2,000’. Official census figures support this observation.¹¹⁸³ The Consul-General blamed this decline on:

...the hardships inflicted by the terms of the Act to Restrict the Leasing of Land to Aliens, assented to in January 1912, the Sugar Cultivation Act of 1913, and the Banana Industry Preservation Act of 1921. Close study has convinced the Consul-General that, although these Acts, to outward appearances, seem to be directed against aliens in general, the term ‘*alien*’ is used in such a restricted sense as to refer exclusively to Chinese nationals.¹¹⁸⁴

While seemingly unaware that many ethnic Chinese in Australia were British subjects and not aliens under the law, the racist impact of the supposedly non-discriminatory legislation was quite apparent to the Consul-General.

The Consul-General said the Chinese belonged in Australia just as much as other settler communities, noting that ‘the Chinese now living in Queensland and against whom these laws discriminate are residents of long standing, having come there before federation’. Moreover they had contributed greatly to the development of the State:

In the North of Queensland in particular there is ample evidence of the great pioneering work of the Chinese labourers and gardeners, while at the various centres that I visited men of standing in the community paid high tribute to the patience and endurance of these fine men...I would earnestly request that your Government show more consideration and give them their due - at

¹¹⁸³ See Australian Bureau of Statistics, ‘The Chinese in Australia’, *Year Book Australia, 1925*; Australian Bureau Of Statistics, ‘TABLE 75. Population, sex and country of birth, states and territories, 1933 census’, *Australian Historical Population Statistics*, www.multiculturalaustralia.edu.au/doc/abs_qld_pop_20th_c.xls.

¹¹⁸⁴ ‘Chinese In Queensland’, *Morning Bulletin* (Rockhampton) 16 July 1930, 10. Emphasis added.

least, the right to enjoy such privileges as enjoyed by *aliens of other nationalities*. My nationals by long residence have merged themselves into the life of the community. All their interests are in Australia, since they have no homes in China, while they have proved themselves honest, peaceful and hard-working members of the community of which they are a part.¹¹⁸⁵

Mr Sung particularly objected to the expulsion of Chinese farmers from agricultural land under the alien and dictation test laws, observing that ‘many, who had spent years in the development of their acres, were deprived of the results of their life-work, and turned out of their homes’.¹¹⁸⁶ Many of these expulsions made way for returned soldiers after World War One. As the Governor of Queensland declared in 1919, ‘In the Atherton district no fewer than 14,000 acres of freehold land...*occupied by coloured aliens*, have been resumed, and are being made available for soldiers.’¹¹⁸⁷ Cathie May has noted that around Atherton in North Queensland, ‘the main Chinese activity was maize-growing. To a slightly lesser extent than the banana industry, this was also a Chinese preserve’.¹¹⁸⁸ As she observes, however, ‘after the First World War, a soldier settlement scheme finally forced Chinese farmers out of maize growing on the Atherton Tablelands, ending the last major Chinese agricultural initiative in Queensland’.¹¹⁸⁹ However returned soldiers’ associations continued to complain about the engagement of ‘aliens’ in the Queensland agricultural sector. As Rockhampton’s *Morning Bulletin* reported in 1924 under the heading ‘*Returned Soldiers. Objection to Aliens*’:

When the State Executive of the Returned soldiers’ and sailors’ Imperial League resumed its sittings to-day strong views were expressed, particularly by the northern members, on the number of *alien immigrants*...Figures were quoted to show the *preponderance of aliens* employed in certain work in the northern cane fields. A motion was carried to the effect that the conference deplored the lack of supervision regarding the *entry of aliens*...¹¹⁹⁰

The Consul-General was wrong to suggest that Queensland’s exclusionary laws only affected ethnic Chinese. In 1936 Srinivasa Sastri’s former secretary P. Kodanda Rao also visited Australia to interview Commonwealth and State governments about conditions under which Indians lived in the country. He learned that ‘the status of British Indians in Australia had improved greatly’ since Sastri’s visit. He thought the various Australian governments

¹¹⁸⁵ Ibid. Emphasis added.

¹¹⁸⁶ Ibid.

¹¹⁸⁷ ‘The Governor’s Speech’, *Queenslander* (Brisbane) 9 August 1919, 10. Emphasis added.

¹¹⁸⁸ Cathie May, ‘The Chinese Community In North Queensland’, http://espace.uq.edu.au/eserv/UQ:241794/Lectures_on_NQ_History_S1_CH9.pdf, 126.

¹¹⁸⁹ May, *Topsawyers*, above n 179, 315. See also Robb, *Cairns Chinatown*, above n 1166, 68. As Robb says, Chinese dominance in the north Queensland maize industry ‘continued until after WW1 and was halted only by the resumption of land for returned soldiers’.

¹¹⁹⁰ ‘Returned Soldiers’, *Morning Bulletin* (Rockhampton) 25 February 1924, 7. Emphasis added.

‘realised that Indians were members of the Empire and treated them as such’.¹¹⁹¹ But he criticised Queensland’s continued exclusion of Indian Australians from various occupations, including the sugar industry, under its alien and dictation test laws:

...in Queensland there was a dictation test from which Europeans were exempted, but to which Indians were submitted in order to disqualify them. This applied to the sugar industry among other industries. It would appear that there was no reason for discrimination, as it would not at this stage advantage the domiciled Indian or disadvantage any white Australian.¹¹⁹²

In relation to Pacific islanders who avoided expulsion under the Pacific Island Labourers Act and remained in Queensland, Kay Saunders observes (referring to the Sugar Cultivation and Leases to Aliens Restriction Acts) that:

For those who remained (given as about 3,000 in the 1947 Census), the future was hardly more optimistic or sustaining. Denied membership in the...Australian Workers’ Union...Pacific Islanders were thereby prohibited from working in many industries in which they had previously secured employment. Other legislation made it illegal for any *resident alien* to own or lease land for the purpose of cane cultivation. People built makeshift houses, worked intermittently and frequently illegally, and attempted to eke out a living. So they stayed for generations – despised, destitute and largely forgotten.¹¹⁹³

As noted above, many Pacific islanders were not ‘aliens’ in a legal sense and should not have been subject to Queensland’s Leases to Aliens Restriction Act or prosecuted as ‘coloured aliens’ under the State’s other dictation test and alien laws.

Queensland’s alien and dictation test laws and awards did not succeed in entirely excluding non-Europeans from the State’s agricultural industries. Despite its central role in encouraging the exclusion of ‘coloured aliens’, the AWU appeared to accept there would always be some non-European labour. In 1926 the AWU successfully argued that the Sugar Workers Award should be amended to increase ‘protection for alien workers in the sugar industry against the exploitation to which they are at present subjected’.¹¹⁹⁴

Moreover, despite their serious impact these laws and awards were applied in a somewhat haphazard manner. In 1933 the Townsville Police Court was told that a Japanese man charged with being a ‘prohibited immigrant’ under the Commonwealth’s Immigration Restriction Act arrived in Australia in 1906, ‘had registered as an alien, had worked at various sugar mills and had not attempted to evade the officials’. While he had recently been subject to a dictation test under Commonwealth law in order to deport him from the country,

¹¹⁹¹ ‘Indians In Australia’, *Courier-Mail* (Brisbane) 17 November 1936, 17. See biography of Kokanda Rao at <http://www.trivenijournalindia.com/mrpkodandaraoprofilejul75.htm>.

¹¹⁹² ‘Indians In Australia’, *Courier-Mail* (Brisbane) 17 November 1936, 17.

¹¹⁹³ Saunders, ‘Pacific Islanders’, above n 872, 725. Emphasis added.

¹¹⁹⁴ ‘Exploiting Aliens’, *Worker* (Brisbane) 1 September 1926, 10; ‘Variation Sugar Industry Award’, 24 August 1926, 3.

there was no indication that Queensland's dictation test laws for the sugar industry had been applied to him.¹¹⁹⁵ The same year the AWU complained to the Minister for Agriculture about the 'increase in the number of Hindus as canegrowers and as laborers employed by these canegrowers', protesting that:

...no examination of the exemption certificates had been made in the Cairns district for many years, and many of those engaged in growing cane were probably in occupation of the land in contravention of the Sugar Cultivation Act of 1913...In connection with these exemption certificates, it has been stated that none has been issued to Asiatics, either as growers or laborers in the industry since 1914. It is understood that the certificates provide for the passing of a dictation test by the applicant.¹¹⁹⁶

Notwithstanding that some non-Europeans remained in North Queensland, as the Consul-General's comments (and Commonwealth census figures) indicate, Queensland's alien and dictation test laws and awards were an effective weapon for white Australia. The term 'alien' was a valuable language tool for Anglo-Celtic lawmakers in this context. The word was employed in the State's dictation test legislation ostensibly in its non-racial legal sense as part of a façade of non-discrimination. But its use was a signal to exclude those derided as 'coloured aliens' - especially (but not only) Chinese Australians. Subordinate industrial awards stated this objective explicitly.

In a failure of the rule of law, the Queensland legal system (including prosecutors, magistrates and even the Supreme Court) accepted the use of 'alien' in its non-legal sense, endorsing the prosecution of Chinese and other non-Europeans as 'coloured aliens' when many were British subjects and not aliens under the law applying in Australia.

¹¹⁹⁵ 'Case Dismissed', *Townsville Daily Bulletin* (Townsville) 12 May 1933, 4.

¹¹⁹⁶ 'Sugar Industry', *Cairns Post* (Cairns) 24 March 1933, 8.

CONCLUSION 'Alien' and the rule of law in Australia

*'Citizenship really is a secure status that should be affirmed to create a sense of national cohesion and inclusion. But what governments are doing is actually the opposite. They're using citizenship as a frame for creating the 'other' within our own society, and creating more division'.*¹¹⁹⁷

The journey through colonial and post-federation Australia in this thesis has lessons in three distinct and important ways: for 'history', for 'law' and for our understanding of the 'rule of law'. In the context of history there is a need to appreciate legal as well as everyday meanings of a word like 'alien,' a term still used as a fundamental marker of 'belonging'. For law there are lessons, not least the importance of 'doing history' properly. Finally there are conclusions for understanding the operation of the 'rule of law' in Australia. While this work is not about Australia's overall compliance with that concept, it does reveal that an endemic misuse of 'alien' occurred in breach of the 'rule of law'. This must now be factored into the country's historical and legal record, which could have far-reaching consequences.

Lessons for history

Why have existing secondary sources largely missed the essential point that the legal and racial meanings of 'alien' do not sit together and the rule of law ramifications that flow from this? The main cause seems to be the minimal overlap between legal and historical writing. As Helen Irving observes, 'it would appear, indeed, that the "history" done by judges occupies a different hermeneutical space from the "history" done by historians'.¹¹⁹⁸

Historical works – unlike legal judgments - are not subject to analysis in relation to precise use of terms according to the law. Hence descriptions in existing histories of Australia after 1788 of all non-Europeans as 'aliens' without reference to the word's legal meaning have not been criticised or yet corrected. Historians have not appreciated that the word 'alien' has a distinct legal meaning, nor that the extensive use of 'alien', 'coloured aliens', 'alien races' and similar phrases as part of the language or discourse of white Australia to refer to people of non-European ethnic origin was contrary to the law. This thesis adds to our history by showing that the commitment to 'whiteness' was more extensive than may have been

¹¹⁹⁷ 'Citizenship expert, Kim Rubenstein, questions PM's claim potential terrorists given 'benefit of the doubt'', *The World Today*, 17 February 2015, www.abc.net.au/news/2015-02-17/expert-questions-tony-abbotts-citizenship-security-claims/6129248.

¹¹⁹⁸ Irving, 'Discipline of History', above n 218, 97. 'Hermeneutics' is the science of interpretation.

thought. This extended to defying the binding common law on nationality established centuries before.

In addition to showing how race ‘trumped’ the rule of law in relation to the meaning and application of the term ‘alien’, this thesis also helps Australia confront its history in other ways. Chengxin Pan from Deakin University argues that Australia must face up to the anxieties of its past to engage with Asia with less anxiety now. Pan says ‘the antidote to anxiety about China’ in the twenty first century ‘is not the imagery of the China opportunity’. Instead, he argues that:

What we need is a critical examination of Australia’s self-identity and self-knowledge as manifested in its historical construction of an Asian-Chinese Other...it requires confronting ‘a traditional Australian style of thought that is still unconsciously mired in some of the values of white Australia’...A concurrent, more fundamental debate should begin over the problematic historical configurations of Australian (and Asian) identity and difference...strategic analysts and international relations scholars equally need to engage more closely and critically with history in general and Australia’s Asian pasts in particular.¹¹⁹⁹

An essential starting point in a debate over the ‘historical configurations of Australian and Asian identity and difference’ is that ‘construction of an Asian-Chinese Other’ in nineteenth and twentieth century Australia involved disrespect for the rule of law. Properly confronting Australia’s past means acknowledging that inhabitants of non-European ethnic background were often wrongly categorised as ‘aliens’ or the ‘Other’ contrary to the law, when they should have had equal legal membership under the law with white Australians as subjects of the British Crown.

Lessons for law

Turning to ‘law’, legal judgments and commentaries focus on doctrine and precedent rather than everyday historical use. If there is no definition in legislation, courts do turn to the ‘ordinary and natural’, ‘grammatical’ or dictionary meaning.¹²⁰⁰ But in the case of the term ‘alien’, the Australian High Court has to date merely noted the word’s ordinary *legal* meaning (a ‘citizen or subject of another state’) without explaining its everyday *racial* meaning, let alone its standard use in a racial sense in the white Australia era.¹²⁰¹

¹¹⁹⁹ Pan, Chengxin, ‘Getting excited about China’, in Walker, David and Sobocinska, Agnieszka (eds), *Australia’s Asia. From yellow peril to Asian century* (UWA Publishing 2012), 245, 257, 259, 261-262.

¹²⁰⁰ Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (Lexis Nexis, 7th ed, 2011) 27-29 (see discussion on ‘Literal Approach’ and ‘Golden Rule’ in statutory interpretation).

¹²⁰¹ See *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 183 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey JJ), citing *Milne v Huber* 17 Fed. Cas. 403, 406; see also Gibbs CJ in *Pochi v MacPhee* (1982) 151 CLR 101, 109.

As far as the validity of precedents used in modern constitutional litigation is concerned, the New South Wales *habeus corpus* cases (*Ex parte Lo Pak*,¹²⁰² *Ex parte Leong Kum*¹²⁰³), the Privy Council's decision in *Ah Toy*¹²⁰⁴ and the High Court's landmark judgment in *Robtelmes*¹²⁰⁵ are still cited without acknowledging or even appreciating the racial use of 'alien' at the time. In any future challenge to the use of section 51(xix) of the Constitution, this thesis would give counsel making submissions to a court the basis for arguments about whether those cases can validly support the extensive sweep of the 'aliens power'.

The thesis also enables more critical analysis of the constitutional conventions of the 1890s in relation to the role envisaged for key powers in the Constitution. As Irving writes about *Cole v Whitfield*¹²⁰⁶ (the significant High Court case on the use of the convention debates in constitutional interpretation), 'How well did the justices perform as historians?...the respectful answer must be: not brilliantly'.¹²⁰⁷ If the debates are to remain the 'primary source for doing history' for the High Court,¹²⁰⁸ it is important to look more carefully at how constitutional terms were used at the time when discerning what delegates to the conventions may have meant. This requires going back earlier in Australian history. As this thesis has demonstrated, an appreciation that key colonial figures in prior decades had embedded the racial use of 'alien' is critical for understanding how delegates used the term at the conventions. As Helen Irving writes, 'This is not to suggest that the Debates give no historical guidance to the public meaning of constitutional provisions but, rather, that they should be treated as one source among others'.¹²⁰⁹ This thesis provides many sources and further context for future use of the convention debates.

¹²⁰² *Ex parte Lo Pak* (1888) 9 NSWLR(L) 221.

¹²⁰³ *Ex parte Leong Kum* (1888) 9 NSWLR(L) 250.

¹²⁰⁴ *Musgrove v Chung Teong Toy* [1891] AC 272 [1891] UKPC 16.

¹²⁰⁵ *Robtelmes v Brenan* (1906) 4 CLR 395.

¹²⁰⁶ *Cole v Whitfield* (1988) 165 CLR 360.

¹²⁰⁷ Irving, 'Discipline of History', above n 218, 109.

¹²⁰⁸ *Ibid* 114.

¹²⁰⁹ *Ibid* 112.

‘Alien’ and the rule of law

The remarks by Justice Windeyer, Chief Justice Gleeson and Justice Kirby in the introduction to this thesis¹²¹⁰ emphasise that the ‘rule of law’ is still venerated as an unquestionable foundation of Australian society post-European settlement.

Legal writers have placed weight on the observation by Marxist historian E.P. Thompson, who wrote: ‘the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good’.¹²¹¹ Thompson also concluded, however, that ‘for many of England’s governing elite the rules of law were a nuisance, to be manipulated and bent in what ways they could’.¹²¹²

In his 2007 article, Lord Bingham, Senior Law Lord of the United Kingdom, identified a number of ‘sub-rules’ in the ‘rule of law’, including:

- the law must be accessible and so far as possible intelligible, clear and predictable (first sub-rule)
- questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion (second sub-rule)
- the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation (third sub-rule), and
- adjudicative procedures provided by the state should be fair (seventh sub-rule).¹²¹³

The examples in this thesis show key institutions in colonial and post-federation Australia largely failing to comply with the rule of law even in the formal or ‘thin’ sense reflected in Lord Bingham’s first three sub-rules. Despite having Coke’s principles in *Calvin’s Case* in front of it, the New South Wales Supreme Court ignored the established law laid down by that case when failing to find that indigenous people were ‘subjects’ not ‘aliens’. Instead the

¹²¹⁰ See above pp 1, 5-11.

¹²¹¹ E P Thompson, *Whigs and hunters: the origin of the Black Act* (Allen Lane 1975) 266. See Daniel H Cole, “‘An Unqualified Human Good’: E.P. Thompson and the Rule of Law”, (2001) 28(2) *Journal of Law and Society* 177; Cameron Stewart, ‘The Rule of Law and the Tinkerbelle Effect’, above n 31, 159. Iain Stewart, ‘Men of Class: Aristotle, Montesquieu and Dicey on ‘Separation of Powers’ and ‘The Rule of Law’’, (2004) 4 *Macquarie Law Journal* 187, 189. As the Legal Exchange notes, Thompson ‘shocked his left-wing associates’ by this pronouncement of his faith in the rule of law. <https://thelegalexchange.wordpress.com/2012/06/03/the-rule-of-law-is-an-unqualified-human-good-e-p-thompson/>.

¹²¹² Thompson, above n 1211, 265.

¹²¹³ Bingham, ‘The Rule of Law’, above n 34, 69-80. Lord Bingham set out four other sub-rules which are not directly relevant to this thesis.

Court focussed on levels of ‘civilisation’ and other non-legal, social factors. Similarly the High Court authorised expulsion of Pacific islanders by pronouncing them ‘indisputably aliens’ contrary to the law. Legislation in South Australia and Western Australia treated British subjects as ‘Asiatic or African aliens’ at odds with established legal principle. Queensland’s alien and dictation test laws were the opposite of ‘intelligible, clear and predictable’. Designed for a White Queensland, they pretended to apply in a non-discriminatory way to all ‘persons’ or legal ‘aliens’. Some dictation test laws were supported by racially worded exemptions, which at least made them compliant with the rule of law in a formal sense. But the discriminatory content of the exemptions - and Queensland’s subordinate laws and awards targeting ‘coloured aliens’ - fails Lord Bingham’s third sub-rule requiring equal treatment under a substantive conception of the rule of law.

Prosecutions under Queensland’s alien and dictation test laws also contravened Lord Bingham’s second sub-rule. As he says, ‘there can...be no discretion as to the facts on which a decision-maker, official or judicial, proceeds’.¹²¹⁴ Contrary to this principle, Queensland magistrates and judges prosecuted ‘coloured aliens’ even if the authorising law did not refer to such people and without requiring proof they were ‘aliens’ under the law. The same was true of colonial legislation allowing officials to deem ethnic Chinese settlers to be ‘aliens’ merely because of their non-European appearance.

Lord Bingham’s seventh sub-rule (fairness) requires:

First and foremost...that decisions are made by adjudicators who... are independent and impartial: independent in the sense that they are free to decide on the legal and factual merits of a case as they see it, free of any extraneous influence or pressure, and impartial in the sense that they are, so far as humanly possible, open-minded, unbiased by any personal interest or partisan allegiance of any kind.¹²¹⁵

Chapter Two shows how courts in colonial Australia were far from open-minded about the legal status of Chinese Australians. Judicial officers thought it unimportant to record evidence proving the status of Chinese settlers, presuming they were ‘aliens’ because they were ‘alien’ in appearance and way of life. In addition, as Chapter Five explains, it would be difficult to find a case with less impartial judges than *Robtelmes*.¹²¹⁶ Each had a pre-determined position on the issue before the Court. Barton and O’Connor introduced the contested legislation in the new Commonwealth Parliament, advocating its constitutional

¹²¹⁴ Ibid 72.

¹²¹⁵ Ibid 80.

¹²¹⁶ *Robtelmes v Brenan* (1906) 4 CLR 395.

authority.¹²¹⁷ Griffith was famous for his twenty year campaign to expel ‘servile’ Pacific islanders.¹²¹⁸ The failure by the High Court in *Robtelmes* to properly consider whether Pacific islanders could be deported under a ‘power to deal with aliens’ also, therefore, contravenes Lord Bingham’s fairness sub-rule.

It was not as if the law regarding ‘aliens’ and ‘subjecthood’ was unknown in Australia. Lord Glenelg directed that indigenous people could not be considered as aliens.¹²¹⁹ Justice Burton in the New South Wales Supreme Court said native people had to be ‘either subjects or aliens’¹²²⁰ (but was unable to decide which). In 1876 Griffith was told by no less than the Colonial Secretary, the Queensland Governor, the President of the Legislative Council, the Opposition Leader and influential parliamentarian John Macrossan about the ‘large numbers of British subjects of Chinese origin’ from Hong Kong and other British colonies.¹²²¹ And Griffith, as the pre-eminent jurist of his day, could hardly claim ignorance of the law.¹²²² Henry Parkes admitted that ‘Chinese who may claim to be considered British subjects in those colonies are very numerous’.¹²²³ In the 1890s it was the very subject status of British Indians that caused consternation at the constitutional conventions (‘there are in India some 150,000,000 British subjects’, warned Tasmanian Premier Braddon).¹²²⁴ The Commonwealth and Queensland Parliaments were both told that Pacific islanders, described as ‘coloured aliens’, included many British subjects.¹²²⁵ Queensland Government Ministers intentionally ignored the law about ‘aliens’, directing the word be used with its racial not legal meaning when administering the State’s dictation test legislation.¹²²⁶

¹²¹⁷ See pp 207-208.

¹²¹⁸ See pp 202-203, 208.

¹²¹⁹ Lord Glenelg to Sir Richard Bourke 26 July 1837, Australia, *Historical Records of Australia Series 1* vol 19 (first published Library Committee of Commonwealth Parliament 1923, 2009 ed) 48.

¹²²⁰ Burton J ‘Arguments and notes for judgment’, above n 272, [257].

¹²²¹ See Chapter Two, pp 102-103.

¹²²² According to Joyce, Griffith’s ‘intellectual brilliance and achievements especially in law are unchallengeable’. Joyce, ‘Griffith, Sir Samuel Walker’, above n 522.

¹²²³ South Australia, *Conference on the Chinese Question, Proceedings of the Conference held in Sydney in June 1888*, 7.

¹²²⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1791.

¹²²⁵ Commonwealth, *Parliamentary Debates*, 9 October 1901, 5829, 5830; ‘The Estimates’, *Brisbane Courier* (Brisbane) 23 October 1901, 9.

¹²²⁶ See Chapter Six: Minister for Lands 1905 pp 215-216; Attorney-General, Secretary for Public Lands 1911, pp 223-226.

As Thompson said about England and the rule of law, it has to be concluded that for much of the nineteenth and twentieth centuries the law about aliens was also, for Australia's governing elite, 'a nuisance, to be manipulated and bent in what ways they could'.¹²²⁷

Why did this happen?

Why was the term 'alien' misused and manipulated in Australia contrary to ancient legal principle laid down by the revered champion of the rule of law himself, Sir Edward Coke?

While the law about 'aliens' was a nuisance for the Anglo-Celtic elite, the opposite was true of the word with its racial meaning. For the white colonists, the term encapsulated their view of non-European races, especially (but not limited to) Chinese settlers, encompassing the sense of 'not belonging', referring in particular to those who because of their race and different culture (and supposedly lower work and labour standards) were seen as 'not one of us', as 'outsiders' or 'foreigners' who did not 'belong' in European-dominated Australian society at the time.

'Alien' was also a useful term because it included a sense of 'threat'. European society in nineteenth and twentieth century Australia saw itself as 'threatened' by other races: both in terms of the danger to its standard of living (from, as Mr Roberts told the Queensland Parliament in 1921, the 'yellow races, who work such long hours and live so very cheaply')¹²²⁸ and in a vaguer but nevertheless palpable sense of a physical or military threat (replace the aliens in the banana industry with white farmers, said Mr Brand, and 'they will form a bulwark for the defence of Australia').¹²²⁹

At the hands of Griffith, Parkes, Gillies, Playford and other colonial lawmakers, the use of 'alien' as a term of racial denigration became pervasive. Once the description of non-Europeans as 'aliens' was embedded in the discourse of nineteenth century Australia, it became part of the mind-set of lawmakers. The inter-colonial gatherings on the 'Chinese question' in the 1880s and associated debates in colonial parliaments were particularly important, heavily influencing the subsequent constitutional conventions. Tasked with drafting the new constitution in precise terms, delegates employed 'alien' entirely in its non-legal racial sense.

¹²²⁷ Thompson, above n 1211, 265.

¹²²⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 657.

¹²²⁹ Queensland, *Parliamentary Debates*, Legislative Assembly, 9 September 1921, 651. Emphasis added.

Queensland's long-lasting and deliberate use of the term 'alien', ostensibly with its neutral legal meaning, to camouflage the exclusion and prosecution of those regarded as 'aliens' in a racial sense stands out in terms of institutionalised manipulation of the word. Queensland's dictation test laws involved deliberate and calculated misuse of 'alien', and a measure of deception. The usefulness of the word as a discriminatory language tool was particularly evident in this legislation. Legislators understood the legal meaning of 'alien', assuming it would be read this way by the Colonial Office, making the new laws seem neutral and non-discriminatory. As the Secretary for Public Lands said, 'we have...to deal comprehensively with the subject of aliens, making no discrimination against any particular race'.¹²³⁰ However lawmakers used 'alien' with one meaning when seeking royal assent and another when describing the real aim of the legislation ('we cannot get the protection which is necessary simply because the areas are leased to Chinamen...That is ... the object of the Bill – that the aliens won't be allowed to lease these farms').¹²³¹

Behind the use of 'alien' in racial discourse was a refusal by the Anglo-Celtic elite to accept non-Europeans as part of an equal society entitled to the rule of law. As Griffith said, 'they cannot be admitted to an equal share in the political and social institutions of the colony'.¹²³² Democracy and the rule of law were only for those already regarded as equal before the law.¹²³³ Because of racial and philosophical prejudices, non-European and indigenous subjects were not accepted as equal. 'I cannot place Chinese on a footing of equality with ourselves', said Parkes.¹²³⁴ Despite their birthright entitlement to subject status and protection of the common law, they were therefore excluded as racial 'aliens' from the rule of law.

Another enduring theme behind the misuse of 'alien' was the view amongst significant elements of the white settler community that non-Europeans were less than human, equivalent to animals or pests who were, therefore, ineligible for an equal society. This was an important part of the discourse portraying non-white Australians as 'alien' in a general sense, flowing into use of the word in a legal context.

¹²³⁰ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 1911, 2527.

¹²³¹ Ibid 2530.

¹²³² Joyce, 'Griffith, Sir Samuel Walker', above n 522.

¹²³³ See also Tim Soutphommasane, *I'm not racist but...40 years of the Racial Discrimination Act* (New South 2015), 23-24.

¹²³⁴ New South Wales, *Parliamentary Debates, Session 1881*, 28 September 1881, 1368.

In contrast to the weight given to such non-legal factors, the legal concept of ‘allegiance’ - still used today to distinguish ‘aliens’ from those who belong under the law¹²³⁵ - was ignored by the white British establishment in colonial and post-federation Australia. They especially discounted or disregarded allegiance and equal subject status obtained through birth in (non-European) territory under British sovereignty. For Anglo-Celtic colonisers and lawmakers, shared ‘allegiance’ meant far less than racial, cultural, religious and other perceived or imagined differences – as well as perceptions of ‘threats’ to security, health and living standards - in determining whether some of Australia’s pioneering settler groups were regarded and treated as ‘aliens’.

The incompatibility of the common law with intellectual and racial prejudice against non-Europeans led to the law being ignored or manipulated in colonial and post-federation Australia. The idea that aboriginal people were too ‘barbarous’ and ‘uncivilised’ to share subject status was followed by the emergence of the modern form of racial discrimination directed against the Chinese and other non-European immigrant peoples. But there was no accompanying evolution (or perhaps ‘descent’) in the law about ‘aliens’ to accommodate this thinking. The common law remained firmly based on the concept of ‘allegiance’, with no allowance for ethnic origin or perceived level of civilisation.

Aliens today

*‘To their minds, the outsiders, the aliens, are among us. They do not dress like us, they do not pray like us. They do not build churches. They build mosques’.*¹²³⁶

The following statement by Chief Justice Gibbs in *Pochi* (1982) remains the starting point for judicial consideration of the limits on the Commonwealth’s power to make laws with respect to ‘aliens’:

...the Parliament cannot, simply by giving its own definition of ‘alien’, expand the power under section 51(xix) [of the Constitution] to include persons who could not possibly answer the description of ‘aliens’ in the *ordinary understanding* of the word.¹²³⁷

In this statement Chief Justice Gibbs used very similar language to that of Mr Forsyth in the Queensland Legislative Assembly in 1911 who said settlers from European countries were

¹²³⁵ *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex parte Ame* (2005) 222 CLR 439, 458.

¹²³⁶ ‘The last refuge of ignorance’, *Sunday Age* (Melbourne) 11 October 2015, 32.

¹²³⁷ *Pochi v MacPhee* (1982) 151 CLR 101, 109. Emphasis added.

‘not aliens in the general acceptance of the term’.¹²³⁸ It is unlikely, however, that the Chief Justice had in mind the same people as Mr Forsyth.

The fact that the word ‘alien’ could be used by colonial and post-federation politicians, lawmakers and constitutional commentators as well as in legislation, cases and prosecutions with different, even multiple meanings and in many cases primarily with its non-legal ‘racial’ meaning should raise questions about continued use of the term in the Australian Constitution. The examples in this thesis illustrate dramatically that both in colonial Australia and after federation the word ‘alien’ was used in a legal context contrary to the rule of law.

One reason for this misuse, at least after 1901, was the absence of specific membership criteria in the Constitution itself. Australia’s guiding legal document contains no rules requiring lawmakers to apply normal concepts of nationality law in deciding who should be treated as legal members of the nation with full protection before the law. The lack of a membership definition means there is no clear context against which to measure the scope of the ‘aliens power’.¹²³⁹ Instead, any constitutional constraints as to who can be treated as an ‘alien’ have to be inferred or implied from the meaning of the word itself - starting, according to current High Court authority, with Chief Justice Gibbs’ ambiguous concept of the ‘ordinary understanding’ of the word.

As this thesis has shown, the ‘ordinary understanding’ and application of the term ‘alien’ both in colonial times and between federation and the Second World War was inherently racial, with the word used to exclude non-white settlers and support the legal position of the dominant Anglo-Celtic community of the day. One important issue in any review of the Constitution, whenever that occurs, should be whether a word so infected with racial meaning in colonial and post-federation Australia - but which still determines constitutional membership of Australia and supports extensive, practically ‘unlimited’ Commonwealth power over individuals - should be replaced with a more inclusive concept without such negative historical baggage.

¹²³⁸ Queensland, *Parliamentary Debates*, Legislative Assembly, 30 November 1911, 2529. Emphasis added.

¹²³⁹ More generally, as Rubenstein says, ‘A large part of the problem regarding the scope of the ‘aliens’ power is that the absence of a constitutional understanding of membership of the Australian community has resulted in a lack of clarity about who Australians are as a people’. Rubenstein, ‘From Supranational to Dual to Alien Citizen’, above n 105, 47.

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