# CITIZENSHIP AND INDIGENOUS AUSTRALIANS

## CHANGING CONCEPTIONS AND POSSIBILITIES


EDITED BY NICOLAS PETERSON AND WILL SANDERS

# CITIZENSHIP AND INDIGENOUS AUSTRALIANS

## Changing Conceptions and Possibilities

EDITED BY
NICOLAS PETERSON
AND
WILL SANDERS

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge CB2 2RU, UK http://www.cup.cam.ac.uk
40 West 20th Street, New York, NY 10011–4211, USA http://www.cup.org
10 Stamford Road, Oakleigh, Melbourne 3166, Australia



First published 1998

Printed in Australia by Brown Prior Anderson

Typeset in New Baskerville 10/12 pt

*A catalogue record for this book is available from the British Library*

*National Library of Australia Cataloguing in Publication data*

Citizenship and indigenous Australians: changing
conceptions and possibilities.
Bibliography.
Includes index.
ISBN 0 521 62195 X.
ISBN 0 521 62736 2 (pbk).
1. Aborigines, Australian – Citizenship. 2. Aborigines,
Australian – Legal status, laws, etc. 3. Citizenship –
Australia. I. Peterson, Nicolas, 1941– . II. Sanders,
Will. (Series: Reshaping Australian institutions).
323.60899915

ISBN 0 521 62195 X hardback
ISBN 0 521 62736 2 paperback

# CITIZENSHIP AND INDIGENOUS AUSTRALIANS

## Changing Conceptions and Possibilities

For most of Australia's colonial history Aboriginal people and Torres Strait Islanders have been denied full membership of Australian society. This book examines the history of indigenous peoples' citizenship status and asks, 'It is possible for indigenous Australians to be members of a common society on equal terms with others?' Leading commentators from a range of disciplines examine historical conceptions of indigenous civil rights, consider issues arising from recent struggles for equality and consider possibilities for multicultural citizenship that recognise difference. Topics include self-determination, the 1967 referendum, resource development, whether Australian Aborigines *and* white Australians can belong, the international law context, and sovereignty. This book makes a crucial intervention in current debates by providing the context for understanding struggles over distinctive indigenous rights.

Nicolas Peterson is a reader in anthropology at the Australian National University. He has had a long-term involvement with land rights issues, beginning with his work as research officer for the Woodward Royal Commission into Aboriginal Land Rights. He has taught at universities in the USA and Canada and, apart from publishing widely in key journals, is the author or editor of five books on Aboriginal issues. Will Sanders is a research fellow at the Centre for Aboriginal Economic Policy Research at the Australian National University. He has published widely, and edited *Mabo and Native Title: Origins and Institutional Implications.*

## RESHAPING AUSTRALIAN INSTITUTIONS

Series editors: Geoffrey Brennan and Francis G Castles, Research School of Social Sciences, Australian National University.

Published in association with the Research School of Social Sciences, Australian National University.

This program of publications arises from the School's initiative in sponsoring a fundamental rethinking of Australia's key institutions before the centenary of Federation in 2001.

Published in this program will be the work of scholars from the Australian National University and elsewhere who are researching and writing on the institutions of the nation. The scope of the program includes the institutions of public governance, intergovernmental relations, Aboriginal Australia, gender, population, the environment, the economy, business, the labour market, the welfare state, the city, education, the media, criminal justice and the Constitution.

Brian Galligan *A Federal Republic*
0 521 37354 9 hardback 0 521 37746 3 paperback
Patrick Troy (ed.) *Australian Cities*
0 521 48197 X hardback 0 521 48437 5 paperback
Ian Marsh *Beyond the Two Party System*
0 521 46223 1 hardback 0 521 46779 9 paperback
Elim Papadakis *Environmental Politics and Institutional Change*
0 521 55407 1 hardback 0 521 55631 7 paperback
Chilla Bulbeck *Living Feminism*
0 521 46042 5 hardback 0 521 46596 6 paperback
John Uhr *Deliberative Democracy in Australia*
0 521 62458 4 hardback 0 521 62465 7 paperback
Mitchell Dean and Barry Hindess (eds)
*Governing Australia*
0 521 58357 8 hardback 0 521 58671 2 paperback

# *Contributors*

BAIN ATTWOOD is a senior lecturer in the Department of History at Monash University.

GEOFFREY GRAY is a research fellow at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

ANDREW MARKUS is an associate professor in the Department of History, Monash University.

RICHARD MULGAN is a professor in the Public Policy Program, Faculty of Arts, Australian National University.

GARTH NETTHEIM is Chair of the Indigenous Law Centre and of the Australian Human Rights Information Centre and Visiting Professor in the Faculty of Law at the University of New South Wales.

NICOLAS PETERSON is a reader in the Department of Archaeology and Anthropology, Australian National University.

PETER READ is an ARC fellow in the Department of History at the Australian National University.

HENRY REYNOLDS is Professor of History in the Department of History and Politics, James Cook University.

TIM ROWSE is a research fellow in the Department of Government and Public Administration at the University of Sydney.

WILL SANDERS is a research fellow at the Centre for Aboriginal Economic Policy Research at the Australian National University.

DAVID TRIGGER is a senior lecturer in the Department of Anthropology, University of Western Australia.

MARILYN WOOD is a postgraduate research student in the Department of Archaeology and Anthropology, Australian National University.

# *Preface*

This book arose from a conference on citizenship and indigenous Australians. When we originally started thinking about that conference, we imagined a small workshop in which there would be only limited interest. As it turned out, there was much greater interest than we had expected – in part, we believe, because citizenship provides a focus for people with diverse interests in Aboriginal studies and can energise interdisciplinary discussion. It enables academics, indigenous people and policy makers to meet on common ground because it brings together, within a single framework, theoretical debates, political issues and practical concerns. It also provides a key focus for reconciliation and dialogue between indigenous and other Australians.

The conference was sponsored by three bodies from within the Australian National University: the Reshaping Australian Institutions project of the Research School of Social Sciences; the Centre for Aboriginal Economic Policy Research; and the Department of Archaeology and Anthropology. Participation was sought from numerous indigenous and non-indigenous people and organisations. Yet, disappointingly, very few indigenous people eventually took part. One reason for this was that the Aboriginal and Torres Strait Islander Commission (ATSIC) called, at short notice, a major meeting of indigenous organisations to be held at the same time as the conference, and several people who had planned to attend our citizenship conference felt compelled to go to the meeting.

We would like to thank Jon Altman for his unfailingly generous support for the whole project; Jack Barbalet and Barry Hindess for helpful advice; and Richard Eves and Rebecca Morphy for invaluable help in organising the conference and subsequently in preparing the manuscript for publication.

NP & WS

# *Abbreviations*

| | |
|---|---|
| AA | Australian Archives |
| ABM | Australian Board of Missions |
| ALP | Australian Labor Party |
| AGPS | Australian Government Publishing Service |
| ANRC | Australian National Research Council |
| APNR | Association for the Protection of Native Races |
| ATSIC | Aboriginal and Torres Strait Islander Commission |
| AWB | Aborigines Welfare Board |
| CAR | Council for Aboriginal Reconciliation |
| CDEP | Community Development Employment Projects |
| DAA | Department of Aboriginal Affairs |
| DEIP | Department of Employment and Industrial Relations |
| DSS | Department of Social Security |
| EP | Elkin Papers |
| FCAATSI | Federal Council for the Advancement of Aborigines and Torres Strait Islanders |
| HALT | Healthy Aboriginal Life Team |
| HREOC | Human Rights and Equal Opportunity Commission |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of all Forms of Racial Discrimination |
| JSA | Job Search Allowance |
| NAC | National Aboriginal Conference |
| NACC | National Aboriginal Consultative Committee |
| NMC | National Missionary Council |
| NPY | Ngaanyatjarra, Pitjantjatjara and Yankunytjara |
| NRMA | National Roads and Motorists Association |

| | |
|---|---|
| NSA | Newstart Allowance |
| NTA | Native Title Act |
| RDA | Racial Discrimination Act |
| UB | unemployment benefit |

# *Contents*

# CHAPTER 1

# *Introduction*

Citizenship defines the membership of a common society and the rights and duties of that society's members. 'Citizenship' is usually used for 'membership' in a state society where there is a strong emphasis on individual rights as a result of the development of commoditisation and the economy. Throughout this book the word 'citizenship' is sometimes used in the looser sense of full membership in any society.

For most of Australia's colonial history the great majority of Aboriginal people and Torres Strait Islanders have been denied full membership of Australian society and consequently the rights and equal treatment that other Australians take for granted. Further, the settler society has, since the earliest decades of colonisation, ignored the existence in Australia of indigenous societies or social orders,[1] which have provided, and continue to provide, the first locus of social membership and identity for most Aboriginal people. The fact that, after a long hard struggle, indigenous people finally secured full formal equal rights within the encapsulating settler society in the 1960s, gaining access to the same set of citizenship rights as non-indigenous Australians, was a vital step, but the question of the recognition of membership in their own indigenous social orders remains unaddressed.

The failure of the colonists to recognise, at the outset of colonisation, the rights of the people who were here first has left not only a moral and legal taint on the nation's title to the country but also many unanswered questions about the articulation of settler and indigenous societies. Among these questions are: how is it possible for people from different cultural and historical backgrounds to be members of a common society on equal terms? What is a fair and equitable relationship between indigenous Australians and non-indigenous Australians? How much difference in rights between citizens can (or will) other citizens tolerate?

And, if indigenous citizens have distinctive rights, what will hold the Australian nation and society together?

These questions, which are being faced because of the persistence of indigenous social orders, are now unavoidable in Australia, because of the Mabo and Wik judgments, trends in international law, the growing demand by indigenous people for the right to self-determination internationally, and the process of globalisation itself. The questions raise broad theoretical issues related to notions of justice, equality, equity, difference and fairness, and the changing relationship between nation and state, all of which find expression within the idea of citizenship. The questions also raise issues that are emotive and contentious in everyday political life, particularly where they are seen to confer advantage and to be dependent on redistribution by the state. How do equal rights, indigenous rights, compensation and restoration fit together in the context of Australian political life, mateship, the 'fair go' and a growing emphasis on economic rationalism and the market?

The liberal democratic principles on which Australian citizenship is based may seem to be challenged by demands for recognition of the existence of indigenous social orders through an additional set of distinctive indigenous rights – broadly called self-determination. Under those principles both equity and equality may seem to be formally achieved when every citizen is treated in the same way and has the same rights. For indigenous Australians to have additional rights, where they are not special rights to facilitate catching up to other citizens, may seem to fly in the face of the fundamental principles of citizenship. Yet, over the last twenty-five years, and particularly following the High Court Mabo decision in June 1992, indigenous Australians have already been successful in having some such distinctive rights recognised by the state, and the same process is going on elsewhere in the world.

The history of modern citizenship in western societies is a history of social and political struggle arising out of class relations in state formations. T H Marshall's analysis of modern citizenship distinguished three components – civil rights, political rights and social rights – which emerged sequentially with the development of capitalism.[2] Given the impact of commoditisation and the growth of the market-place it became essential for property rights to be formalised and protected by law so that trade and the economy could expand. By the eighteenth century these pressures had given rise to formal civil rights, which covered not only property rights and the rights of contract (both integral to the market-place), but freedoms of speech, religious practice and assembly. These freedoms prevent the state interfering in people's everyday lives.[3]

Political rights were granted by the British elites in response to demands by the emergent working class political movements of the

nineteenth century, in what might be broadly seen as a containment strategy.[4] These rights were granted to adult males in the middle of the century and only extended to women early in the twentieth century.

Social rights finally started to emerge in the twentieth century. Marshall argues that these were largely to reduce class conflict further; but war, with its full employment, need for national solidarity and the common purpose resulting from external threat, also played a part (although, as Barbalet argues, its contribution can be over drawn).[5] While social rights emerged well before the welfare state, they received their maximum expression during its flowering after World War II. Social rights differ from civil and political rights in that they are provided by the state to ensure that people achieve a minimum standard of living.[6]

These ideas about citizenship developed in the heyday of nationalism, when state and nation were closely identified and were under the influence of liberal political theory, with its concern for formal political and legal equality. But now, at the end of the twentieth century, there is a decline in the identity of state and nation. World-wide those who feel that existing states and current concepts of citizenship have a cultural and gender bias are starting to demand the recognition of differences and to test the extent to which such differences can be accommodated within the liberal democratic framework.[7] The strongest challenge comes from those first-citizens, first nations or national minorities, as they are variously called, in settler societies. Their loyalty is usually primarily to their own communities, which often, but by no means always, have quite distinct cultural and social practices; and only secondarily to the encapsulating settler society.

In this introduction we examine the ways in which ideas about the citizenship status of indigenous Australians have been shaped and reshaped over the last two centuries and the influences likely to shape and reshape them in the coming decades. These changing ideas have been institutionalised in ordinances, state and federal legislation, the Constitution and the many rules, regulations and structures that have affected and still do affect the treatment of different classes of citizens, whether they be war veterans, elderly members of the armed forces, women, children or indigenous people.

Central to this history is an attitude of ambivalence and inconsistency towards formally incorporating Aboriginal people into a common Australian society and a failure by the settler society to come to grips with the persistence of indigenous identities and social orders.

The first part of this book (chapters 2 and 3) considers historical conceptions of indigenous people's civil rights; the second part (chapters 4 to 8) examines issues arising out of the more recent struggle to achieve equal rights; the third part (chapters 9 to 12) considers issues relating to

the recognition of indigenous rights, and emerging possibilities for the development of multicultural citizenship.

## Becoming colonial subjects, 1788–c1836

It took nearly fifty years from first settlement for the settler state to fully encompass Aboriginal people as colonial subjects. The main reason for this was that, in the early days of the colony, the area occupied by Europeans was quite circumscribed and Aboriginal people were able to continue a fully independent life, appearing and disappearing at will. Indeed settlers had no direct contact with Aboriginal people outside the Port Jackson area for the first three years.[8] Aboriginal people clearly had their own autonomous way of life, as well as radically different social and cultural practices barely glimpsed by the Europeans, and they were beyond the fledgling colony's control. It is not surprising, therefore, that there was an initial acceptance by the settlers of the separate existence of indigenous societies. However, Aboriginal people were soon treated inconsistently as this acceptance began to falter.

In the early days of colonial settlement, official correspondence frequently drew a distinction between British subjects and 'Natives', treating the two groups differently and separately. However, as interaction between the groups increased, Aboriginal people came to be treated as if they were British subjects for some purposes. In a Governor's proclamation of 1802, for example, British subjects were forbidden to commit:

> any act of injustice or wanton Cruelty towards the Natives, on pain of being dealt with in the same manner as if such act of Injustice or wanton Cruelty should be committed against the Persons and Estates of any of His Majesty's Subjects.[9]

As the victims of settlers' crimes, then, indigenous Australians were to be treated as the equals of British subjects, without actually being British subjects, in order to allow the Governor some semblance of control over actual British subjects. As the perpetrators of crimes – or rather what the settlers saw as crimes – they were treated somewhat differently. This same Governor's proclamation went on to state that, while settlers were not to 'suffer' their 'property to be invaded' or their 'existence endangered', they should observe 'a great degree of forbearance and plain dealing with the Natives' as this offered the 'only means ... to avoid future attacks'.[10] Natives, then, were not to be dealt with under the law applying to British subjects, but rather were to be treated as external third parties, for this purpose.

The official tolerance of this initial period lasted until May 1816, when Aboriginal ways for settling disputes among themselves, which often involved much loss of blood, were prohibited on the grounds that they were a 'barbarous custom repugnant to British Laws, and strongly militating against the Civilization of the Natives which is an Object of the highest Importance to effect'.[11] Yet, despite this, the New South Wales Supreme Court, established in 1823, continued to decline to hear charges involving only Aboriginal people. It was not until 1836, in the case of R v. Jack Congo Murrell, that an authoritative statement was made by the court that there was no difference between an offence committed by an Aboriginal person on a European and one committed on another Aboriginal person.[12] This case is sometimes cited as marking the end of 'legal pluralism' in Australia,[13] or as the end of British settler recognition of distinct and separate status for indigenous peoples. However, as Reynolds has recently pointed out, some of Australia's supreme court judges continued to ponder the question of whether it was in fact within their jurisdiction to hear cases of crimes alleged to have been 'committed by Natives against other Natives' well into the 1840s.[14]

The racialised attitudes that permeated the thinking of the vast majority of the members of colonial society, allied with economic self-interest, made it easy and convenient for them to overlook the shared status of colonial subject or even the shared humanity of Aboriginal people. The difference was constructed as dramatic inferiority, and their social practices as barbaric, releasing those at the frontier from the normal moral constraints on behaviour towards other human beings.

The section of the population that was broadly committed to a notion of common humanity were the missionaries.[15] But even in their eyes a recovery of the equal relations implied by recognising the humanity of Aboriginal people was only possible if these people acquired the cultural and social competencies of the colonisers and if difference was erased. In effect, assimilation has long been the principal term on which Aboriginal people could redeem themselves and become citizens of the settler society.

Significantly, as early as 1815 the government set about making this assimilation possible with the establishment of the Native Institution at Parramatta. This institution, which was founded by a former member of the London Missionary Society, was for children between the ages of four and seven who, like their predecessors at the turn of the century, were mostly taken from their parents without consent.[16]

Thus, during the first half of the nineteenth century, there was a tendency for the settlers gradually to discount, ignore or simply forget the membership of indigenous people in their own societies and to regard them instead as just another group of colonial subjects.[17]