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Australia's 'Alien Races' Meet New Zealand's 'Race Aliens'

Peter Prince and Kate Bagnall

Introduction

A sense of belonging is a fundamental human emotion. It can be reinforced by nationhood – witness the pride of those who go through modern citizenship ceremonies. Or it can be undermined by laws and restrictions created by nation-states. As late as 1971 in Western Australia, for example, Aboriginal people had to apply for 'certificates of citizenship' – on land their ancestors had belonged to for over 60,000 years – to escape racist control over where they lived, worked and who they could marry. Their citizenship 'dog tags' were not a source of pride. Such contradictions in who 'belonged' to the nation, in law and in practice, are at the heart of this book.

Subjects and Aliens brings together scholarship exploring legal and social histories of nationality and citizenship in Australia and Aotearoa New Zealand, with a particular focus on the intersections of gender, race and ethnicity with nationality and citizenship. The collection aims to challenge ideas of who historically 'belonged' in Australia and New Zealand and consider how citizenship rights in the two countries have been inconsistent and contested. To do so, the collection examines histories of law and policy surrounding nationality and citizenship rights in Australasia and considers the lived experience of individuals, families and communities as they negotiated their lives as British subjects or 'aliens' (in a legal sense, as non-British subjects). The temporal focus of the collection is the first half of the

twentieth century, up to the introduction of Australian and New Zealand citizenship in 1949,[1] with reference to the earlier colonial period and to significant continuing resonances today.

The volume further speaks to the growing national discussion in the two countries about the shameful, as well as the worthy, elements of our British colonial history and its aftermath. This has been spurred on in Australia's case by the 2017 *Uluru Statement from the Heart* and the campaign for constitutional enshrinement of a First Nations Voice. As Richard Hil explains:

> Yes, we're at an inflection point. The illusion of *Pax Britannica* is just that. The time for a historical reckoning has arrived. Truth told; it's been there for centuries. The gruesome facts of colonial violence and the heroism of past and ongoing Indigenous resistance can no longer be denied. The Voice to Parliament, based on one of the most important and moving documents of recent times, the Uluru Statement of the Heart, has far more historical [resonance] than any number of drumbeats.[2]

While not so singularly focused as, for example, the 2022 *Acts of Reckoning* edition of the *Griffith Review*,[3] this volume seeks to confront the problematic history of belonging in Australia and New Zealand. In that sense, it is not merely a descriptive history. Instead many of the chapters could be described as 'normative' or expressing a value judgment as to what should be. In particular, we draw attention to what we consider a persistent breach of the rule of law, namely the failure of white authorities to follow their own imposed rules about legal belonging, and the right to equal citizenship and protection that should have flowed from this.

A theme running through the collection is the effect of 'race' on belonging. In both countries, race was more important than the law in relation to who 'belonged' or was 'one of us'. As Prince argues in Chapter 7, Papuans born as Australian citizens before Papua New Guinea gained independence in 1975 were excluded from the mainland for reasons linked directly to the White Australia policy. Restrictions on non-European New Zealanders entering

1 The legal status of 'Australian citizen' was created by the *Nationality and Citizenship Act 1948* (Cth) (No. 83 of 1948), which commenced on 26 January 1949. The legal status of 'New Zealand citizen' was created by the *British Nationality and New Zealand Citizenship Act 1948* (NZ) (No. 15 of 1948), which came into effect on 1 January 1949.

2 Richard Hil, 'The Drumbeat of History Sounds for the Monarchy', *Pearls and Irritations*, 2 October 2022, johnmenadue.com/the-drumbeat-of-history-sounds-for-the-monarchy/.

3 Ashley Hay and Teela Reid, eds, *Griffith Review 76: Acts of Reckoning* (Text Publishing, 2022), www.griffithreview.com/editions/acts-of-reckoning/.

Australia ended only in 1973.[4] It was not until 1975 that Australia enacted its *Racial Discrimination Act* (Cth) outlawing discrimination on the basis of ethnicity. Similar legislation had commenced in New Zealand only a few years before.[5]

The historical examples in this book are about belonging in the face of exclusion and discrimination. But in Australia, remarkably, 'belonging' remains a contested constitutional and legal concept more than 120 years after Federation. Delegates to the 1890s constitutional conventions refused to define who 'belonged', focusing on racial rather than legal criteria for national membership. Future High Court chief justice Isaac Isaacs said conferral of 'citizenship' on any subject of the Queen resident in the new Commonwealth would 'deprive Parliament of the power of excluding Chinese, Lascars, or Hindoos who happened to be British subjects'.[6] This omission still causes angst today, leaving Australia to determine constitutional membership by the opposite: who is not an 'alien'. That word remains the most powerful in the Australian Constitution – its meaning is 'very important in determining who is an Australian'.[7] But the way the racial use of 'alien' – as a derogatory label for non-Europeans – infected the law in colonial and post-Federation Australia is little understood. That makes the type of history in this volume all the more important. However, as Chapter 7 contends, the High Court has to date managed only a flawed history of belonging in Australia.

For its part, New Zealand has no single constitutional document, and it removed the archaic term 'alien' from official use in its *Citizenship Act 1977*. So New Zealand has been spared Australia's litigation in recent decades over who 'belongs' and what can be done to those unfortunate enough to be labelled as 'aliens' or as not belonging.[8] Yet the intergenerational trauma of a prejudiced historical approach to 'belonging' remains evident in both countries.

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4 Ian Hoskins, *Australia & the Pacific* (Sydney: NewSouth Publishing, 2021), 343.

5 Ibid. The legislation in both countries implemented the 1969 *United Nations Convention on the Elimination of All Forms of Racial Discrimination*.

6 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1788. For an account of the citizenship proposal at the conventions, see Kim Rubenstein, *Australian Citizenship Law*, 2nd ed. (Pyrmont, NSW: Thomson Reuters, 2017), ch. 2.

7 Rubenstein, *Australian Citizenship Law*, 361.

8 See, most recently, *Commonwealth v. AJL20* [2021] HCA 21; *Chetcuti v. Commonwealth of Australia* [2021] HCA 25; *Alexander v. Minister for Home Affairs* [2022] HCA 19. See also Chapter 7 (this volume). As Chief Justice Gleeson noted in his dissenting judgment in *Al-Kateb* (2004) 219 CLR 562 at 577, 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'.

Displacing Indigenous Law

This collection is concerned with the development, interpretation and application of British law, imposed on people and land already governed by Indigenous laws. In Australia's case:

> Given that there were more than 250 First Nations in Australia and the Torres Strait in 1788 the successful imposition of English law is anomalous and inconsistent with other parts of the British Empire where existing local law was recognised … The British arrived on a continent inhabited for thousands of years by cultures with a deeply embedded sense of law and correct behaviour.[9]

In terms of belonging, 'everyone in Aboriginal society knew their identity and place within their kinship system and from an early age were taught their legal obligations to others'.[10]

In New Zealand:

> When Europeans first sighted these lands in 1642, *Aotearoa* comprised many prosperous Māori tribal nations with an operative system of law based on kinship, seasonal economic activity that valued fish, shellfish, birds, wood and greenstone, and closely managed territorial relationships.[11]

In Australia and New Zealand, non-European as well as European settlers occupied lands belonging to First Nations peoples, made all the worse in Australia by the lack of even the (disputed) agreement-making in New Zealand's 1840 Treaty of Waitangi. Under the third article of the Waitangi treaty (in the English version), Queen Victoria imparted to 'the Natives of New Zealand … all the Rights and Privileges of British Subjects'. However, as Jacinta Ruru and Jacobi Kohu-Morris observe, while this should have given Māori nations undisturbed possession of their lands, estates, forests, fisheries and other properties, in reality, 'the British honoured neither the Māori nor the English version' of the treaty.[12]

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9 Sarah McKibbin, Libby Connors and Marcus Harmes, *A Legal History for Australia* (Oxford: Hart, 2021), 214, doi.org/10.5040/9781509939602.

10 Ibid., 216.

11 Jacinta Ruru and Jacobi Kohu-Morris, '"Maranga Ake Ai" The Heroics of Constitutionalising *Te Tiriti O Waitangi*/The Treaty of Waitangi in *Aotearoa* New Zealand', *Federal Law Review* 48, no. 4 (2020): 556, 558, doi.org/10.1177/0067205x20955105.

12 Ibid.

The Language of Belonging

Key terms of belonging have multiple meanings, in particular, they have racial and legal meanings. 'Nationality', for example, refers to an ethnic group forming part of one or more political nations, as well as to the status of belonging to a particular nation. The word 'alien' – apart from its science fiction use – also has a non-legal meaning ('a person belonging to another family or race, a stranger') as well as a legal meaning ('One who is a subject of another country than that in which he resides. A resident foreign in origin and not naturalised').[13] The ambiguity of such words made them useful tools for racial exclusion in nineteenth- and twentieth-century Australasia. For example, as explained later in this chapter, the perception that South Sea Islanders were 'aliens' in a racial sense allowed the High Court of Australia in 1906 to authorise their forcible removal under the 'aliens power' in the Constitution even though many were British subjects and not 'aliens' at all under the law.

'Citizenship' is another term with multiple meanings, although with less racial connotation. As Kim Rubenstein explains, the formal notion of 'citizenship' is 'primarily concerned with the legal status of individuals within a community'. In contrast, 'citizenship' in a non-legal sense involves 'the collection of rights, duties and opportunities for participation which define the extent of socio-political membership within a community'.[14] Helen Irving notes that, as the Australian colonies moved towards Federation, there was much discussion of 'citizenship' in this informal sense:

> 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.[15]

But, in terms of legal status, 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.[16]

13 *Oxford English Dictionary* (Oxford: Clarendon Press, 1989).
14 Rubenstein, *Australian Citizenship Law*, 6–7.
15 Helen Irving, 'Citizenship before 1949', in *Individual, Community, Nation: Fifty Years of Australian Citizenship*, ed. Kim Rubenstein (Melbourne: Australian Scholarly Publishing, 2000), 9, 10.
16 Guy Aitken and Robert Orr, *Sawer's The Australian Constitution*, 3rd ed. (Canberra: Australian Government Solicitor, 2002), 48.

Until citizenship was formally created in New Zealand and Australia by legislation in 1949, the nationality of their 'citizens' was solely that of 'British subject'. Importantly, this legal status 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 common allegiance to the King or Queen of England. As Justice Higgins said in the 1908 Australian High Court case *Potter v. Minahan*:

> 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 onto the ropes of a New Zealand swing. The top of the pole is the point of the union: *Calvin's Case*.[17]

In *Calvin's Case* (1608), the revered champion of the rule of law, Sir Edward Coke, 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*'.[18]

While there were many other factors that, in practice, determined if a person became a member of the Australian or New Zealand communities, it followed that the only formal legal test under imposed British law until after World War II was whether a person was a 'British subject' or an 'alien'. If someone was a British subject, they could not, under the law applying in the two countries, be a legal outsider or 'alien'. This distinction was, however, routinely ignored by key figures in Australia and New Zealand, 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.

17 (1908) 7 CLR 277, 320–1.

18 *Calvin v. Smith* or the *Case of the Postnati* ('*Calvin's Case*') (1608) 7 Coke Report 1a, 5b; 77 Eng. Rep. 377, 383. Emphasis added. For the facts and analysis of *Calvin's Case*, see Keechang Kim, 'Calvin's Case (1608) and the Law of Alien Status', *Journal of Legal History* 17, no. 2 (1996): 155; Polly J. Price, 'Natural Law and Birthright Citizenship in *Calvin's Case* (1608)', *Yale Journal of Law & the Humanities* 9, no. 1, art. 2. (1997): 73.

Belonging and Race

Australia and New Zealand played a prominent role in global racial discrimination in the nineteenth and twentieth centuries. In 1921, the British Foreign Office observed 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.[19]

An enduring theme in white colonisation has been the confusion of race with nationality and allegiance. As Sophie Couchman (Chapter 2) explains, during World War I government officials in Australia wrongly thought men 'not substantially of European origin or descent' would not fight for their country, assuming they lacked allegiance despite being locally born with British subject legal status. Likewise, in Chapter 4, Margaret Allen's discussion of the remarkable Indian statesman V. S. S. Sastri's visit to Australia in 1922 shows that racial difference was more important for white Australians than common nationality and allegiance as British subjects. At the 1891 National Australasian Convention, Chairman of the Constitutional Drafting Committee Sir Samuel Griffith first proposed what became the notorious 'races' power in section 51(xxvi) of the Australian Constitution, declaring:

> 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.[20]

Notwithstanding his leading role in drafting the Constitution, Griffith had no hesitation in labelling British Indians as an 'alien race', even though they were legally British subjects. A generation later, Sastri encountered similar

19 Public Record Office, Foreign Office, United Kingdom, 371/6684, 10 October 1921, cited in Paul Gordon Lauren, *Power and Prejudice: The Politics and Diplomacy of Racial Discrimination* (Boulder: Westview, 1988), 103.

20 *Official Report of the Australasian Convention Debates*, Sydney, 3 April 1891, 701, 703.

prejudice against Indian people. Despite his standing in the British Empire and his visit as an official guest of the Commonwealth, Sastri's extensive tour of the Australian states resulted in little relaxation of domestic racial restrictions against Indian Australians.

In Australia, key political and legal figures used the term 'alien races' as a derogatory label for Chinese and other non-European inhabitants, despite knowing many were British subjects and not 'aliens' under the law. In 1888, the premier of Victoria, Duncan Gillies, reported to the Imperial Parliament that the Chinese were 'not only an alien race, but remain aliens',[21] explaining that 'naturalised British subjects are still Chinese and are as objectionable as if they were to come from the centre of China'.[22] This racial use of 'alien' spilled over into legal usage, infecting even John Quick and Robert Garran's iconic 1901 commentary on the new Australian Constitution.[23] After Federation, the misuse of 'alien' at the Commonwealth level reinforced the discriminatory use of the word by the Australian states.[24] In Queensland, in particular, the racial meaning of the word was so embedded that it became the law, in place of the correct legal meaning. This culminated after World War I in numerous prosecutions of 'coloured aliens', with little or no regard as to whether those brought before the courts were British subjects or not.[25]

In New Zealand from 1898 until 1954, annual government yearbooks and census records included the population category 'race aliens'. As New Zealand's 1912 yearbook explained: 'Persons of other than European descent are classified in the immigration returns as "race aliens".'[26] In other words, these were New Zealand residents deemed not to belong solely because of their racial background. Inhabitants from British India, Hong Kong, Fiji and other British possessions were labelled in this way even though they legally belonged as British subjects. Even New Zealanders of

21 *Daily Telegraph*, 17 April 1888, cited in Ian Welch, 'Alien Son: The Life and Times of Cheok Hong Cheong, 1851–1928' (PhD thesis, The Australian National University, 2003), 237–38.

22 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 December 1888, 2357, cited in Marilyn Lake, 'Chinese Colonists Assert Their "Common Human Rights": Cosmopolitanism as Subject and Method of History', *Journal of World History* 21, no. 3 (2010): 375, 385, doi.org/10.1353/jwh.2010.0011.

23 See Peter Prince, 'Aliens in Their Own Land. "Alien" and the Rule of Law in Colonial and Post-Federation Australia' (PhD thesis, The Australian National University, 2015), 153ff, openresearch-repository.anu.edu.au/handle/1885/101778.

24 Ibid., ch. 4.

25 Ibid., chs 6 and 7.

26 Statistics New Zealand, 'The New Zealand Official Year-Book, 1912', accessed 30 January 2022, www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1912/NZOYB_1912.html?_ga=2.166736184.787224941.1628550701-1851378558.1628476897#idsect1_1_27390.

part-Māori descent were classified as 'race aliens'. This was inconsistent with New Zealand's own law. The *British Nationality and Status of Aliens (in New Zealand) Act 1923* confirmed the longstanding common law position that an alien 'means a person who is not a British subject'.[27] There was no explanation in the yearbooks that, regardless of their non-European heritage, many 'race aliens' were British subjects and not legal 'aliens'. To the contrary: some yearbooks even included a table listing former inhabitants of 'British possessions' as 'race aliens'.[28] The 1920 yearbook noted that:

> Of the race aliens arriving in New Zealand a large proportion are Chinese, some of whom, however, have been formerly resident in the Dominion. Hindus and other natives of India are also of late years arriving in considerable numbers.[29]

Similarly, in the 1941 yearbook, New Zealand's government statistician stated that:

> The principal race aliens with whom New Zealand is concerned are Chinese, Indians, and Syrians, and the first two are shown separately from other race aliens … At the census of 24th March, 1936, the numbers of the principal alien races in New Zealand (inclusive of persons of mixed blood) were: Chinese, 2,899; Syrian, 1,235; and Indian, 1,157.[30]

Under New Zealand law, inhabitants from the provinces of 'British India' were British subjects.[31] The same was true of Chinese settlers from British possessions in Asia.[32] In addition, people born in New Zealand itself, regardless of ethnic origin (such as most, if not all, of the 'persons of mixed

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27 First Schedule, Part III, section 27(1).

28 Statistics New Zealand, 'The New Zealand Official Year-Book, 1920', accessed 2 March 2023, www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1920/NZOYB_1920.html?_ga=2.166738360.787224941.1628550701-1851378558.1628476897#idsect1_1_4064.

29 Ibid. Emphasis added.

30 Statistics New Zealand, 'The New Zealand Official Year-Book, 1941', accessed 2 March 2023, www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1941/NZOYB_1941.html#idsect1_1_13860. Emphasis added.

31 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 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*'. Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and Republic of Ireland* (London: Stevens & Sons, 1957), 836–37. 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' (841–42).

32 British possessions in Asia with significant ethnic Chinese populations in the nineteenth and early twentieth centuries included Hong Kong, the Straits Settlements (Penang, Malacca and Singapore), Labuan and the Malay States.

blood') were also legal subjects. But, for New Zealand, as in Australia, race and ethnicity were more important than law when categorising the national population. Communities with a non-European ethnic background were branded 'the Other', outsiders, race aliens who did not belong, irrespective of their actual legal status. With its roots in the racial exclusion imposed in the latter half of the nineteenth century, this was a common theme in English settler nations ('white men's countries'). As Mae M. Ngai says about the United States in the 1920s:

> the legal racialization of these ethnic groups' national origin cast them as permanently foreign and unassimilable to the nation … [and] these racial formations produced 'alien citizens' … For Chinese and other Asians, alien citizenship was the invariable consequence of racial exclusion from immigration and naturalised citizenship … While not strictly a legal term, the concept underwrote both formal and informal structures of racial discrimination and was at the core of major, official race policies.[33]

Beyond those of non-European heritage, non-British European communities could also face exclusionary measures. Jane McCabe describes in Chapter 3, for example, how both Chinese settlers and their New Zealand–born descendants who established market gardens on Otago's Taieri Plain, and Dalmatian communities toiling in the Hokianga kauri gum-digging industry, had to navigate legal restrictions that privileged ethnically British families.

One factor in the continuing idea that non-Europeans in Australia and New Zealand, particularly those of Chinese heritage, were 'aliens' was the removal of the right to become a British subject through naturalisation. Australia's first federal *Naturalization Act*, enacted in 1903, prohibited the naturalisation of any person who was 'an aboriginal native of Asia, Africa, or the Islands of the Pacific, excepting New Zealand'.[34] This law codified and broadened a policy in place across the Australasian colonies before Australian Federation whereby Chinese settlers were denied the right to naturalise. New South Wales prohibited Chinese naturalisation by law in 1861, repealed this in 1867, and then reinstated it again in 1888, while other colonies perhaps more opaquely made an administrative decision to no longer grant naturalisation to ethnic Chinese from the late 1880s

33 Mae M. Ngai, *Impossible Subjects. Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2014), 8, doi.org/10.1515/9781400850235.
34 Section 5, *Naturalization Act 1903* (No. 11 of 1903).

onwards. New Zealand unsuccessfully attempted to introduce legislation to prohibit Chinese naturalisation in 1896, ultimately accomplishing this through a decision of Cabinet in 1908.[35] It was not until the 1950s that non-European immigrants in Australia, and Chinese immigrants in New Zealand, were once again able to be naturalised. For half a century, therefore, many long-term residents were denied citizenship rights, while the rights of those naturalised or born as British subjects in Australia and New Zealand or elsewhere in the British Empire were eroded through racist policies and administrative decision-making.

Reckoning with Our History

In 2009 Miranda Johnson asked:

> Why are historians the underdogs in the current legal regime in Australia … When compared, for instance, with the central role that historians in New Zealand's Waitangi Tribunal have played, some of whom have sat as tribunal members, the comparatively weaker influence of historians on the Australian legal scene seems even more striking.[36]

Chapter 7 contends that in the decade or more since this statement there has been little progress in the Australian High Court's preparedness to properly take account of the historical context in an area of major Commonwealth power – the practically unrestrained ability to make laws with respect to 'aliens' in section 51(xix) of the Australian Constitution. The chapter argues that the legacy of the law from the White Australia period lives on in decisions in Australian courts. A man born in Malta who arrived in Australia in 1948 as a small boy with equal membership status as a 'British subject' – that is, before 'Australian citizenship' even existed in a formal sense – lost his appeal against deportation in 2021 because the High Court ruled that he had always been an 'alien' who never legally belonged in the country he had lived in for over seven decades.[37] His banishment was in addition to serving a long prison sentence for a serious crime. A similar

35 Kate Bagnall, 'Circulations of Belonging: Chinese British Subjects in Australasia, 1880–1920', in *The Making and Remaking of Australasia: Mobility, Texts and 'Southern Circulations'*, ed. Tony Ballantyne (London: Bloomsbury Academic, 2022).

36 Miranda Johnson, 'Review of Ann Curthoys, Ann Genovese and Alexander Reilly's *Rights and Redemption: History, Law and Indigenous People*', *History Australia* 6, no. 1 (2009): 25.1, 25.2, doi.org/10.2104/ha090025.

37 *Chetcuti v. Commonwealth of Australia* [2021] HCA 25.

case in 2018 authorised the expulsion of another Australian originally from Malta, also deemed an 'alien' by the High Court despite making Australia his home for over 60 years.[38] Within every community there are those who implicitly renounce the accepted values of a peaceful and ordered society by committing crimes. Society punishes them, but they are not regarded as being outside the community or not belonging simply because they commit such actions. New Zealand was the nation most affected by Australia's 'reverse transportation' policy (modified but not abandoned in 2022 by the new Albanese Labor government),[39] which stripped inhabitants without formal citizenship of their residency rights, expelling them to their places of birth where they might lack any ties and did not belong in any practical sense.

The idea that some people do not belong in Australia today because of their crimes and are undeserving of the benefits of citizenship – including the right to stay in the country – parallels the deep-rooted prejudice in New Zealand and Australia that non-Europeans did not belong because of their ethnicity and were not entitled to the same protection from the Crown as white inhabitants. The treatment of South Sea Islander communities in both countries provides a good example.

In 2021, the New Zealand Government apologised to the country's Pasifika community for the 'dawn raids' in the 1970s when police and immigration officials targeted families with Samoan or other South Sea Islander heritage as visa overstayers on the basis of their racial background. Many Pasifika people were already New Zealand citizens and belonged legally. Others were no more liable to overstay their visas than arrivals from the United States or the United Kingdom, but they were far more likely to be arrested and deported.[40] Prime Minister Jacinda Ardern said New Zealand's 'immigration laws of the time were enforced in a discriminatory manner … Pacific peoples were specifically targeted and racially profiled when these activities were

38 *Falzon v. Minister for Immigration and Border Protection* [2018] HCA 2.

39 In July 2022, the prime minister of Australia, Anthony Albanese, in a joint press conference with his New Zealand counterpart Jacinda Ardern, signalled a shift in Australia's policy of deporting non-citizen convicted criminals, stating 'where you have a circumstance where someone has lived their entire life, effectively, in Australia with no connection whatsoever to New Zealand, then commonsense should apply'. As the *Guardian* reported, this was 'a foreign policy win for Ardern, who has been pushing for years to end the deportations of those with tenuous links to New Zealand'. See Tess McClure and Paul Karp, 'Anthony Albanese Offers New Zealanders Fresh Approach on Voting Rights in Australia and Deportation Policy', *Guardian*, 8 July 2022, www.theguardian.com/australia-news/2022/jul/08/anthony-albanese-offers-new-zealanders-fresh-approach-on-voting-rights-in-australia-and-deportation-policy.

40 Ben McKay, 'New Zealand Pledges Pacific Healing from Apology', *Canberra Times*, 1 August 2021, www.canberratimes.com.au/story/7365944/nz-pledges-pacific-healing-from-apology/.

carried out'. She acknowledged 'the enduring hurt … caused to those who were directly affected … as well as the lasting impact these events have had on subsequent generations'.[41] As she said:

> The dawn raids period is a defining one in New Zealand's history … To this day Pacific communities face prejudices and stereotypes … an apology can never reduce what happened, or undo the decades of disadvantage experienced as a result, but it can contribute to healing for Pacific peoples.[42]

The Australian example shows the importance of acknowledging the type of history examined in this volume. In *Robtelmes v. Brenan* (1906), Australia's newly established High Court said Australia's entire South Sea Islander community were 'indisputably aliens' who did not belong and could forcibly be deported.[43] The High Court's reasoning in *Robtelmes* is still cited today in support of the Commonwealth's sweeping power over 'aliens' under the Constitution.[44] But the significance of the case as a violation of the rule of law has yet to be appreciated.

As explained above, under legal principles unchanged since *Calvin's Case*, nationality and alien status had nothing to do with the colour of a person's skin. Contrary to law, the High Court in 1906 held that all Islanders were 'aliens' because of their race. As Australia's first national census showed, two-thirds of the country's Islander community legally belonged as British subjects and were not 'aliens' under the law.[45] Moreover, each of the

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41 Te Rina Triponel, 'PM Jacinda Ardern Delivers Formal Apology on Dawn Raids at Auckland Town Hall', *New Zealand Herald*, 1 August 2021, www.nzherald.co.nz/nz/pm-jacinda-ardern-delivers-formal-apology-on-dawn-raids-at-auckland-town-hall/5QDI3T3VV4KM5ZCOOQQ4AEUT2I/.

42 AAP, 'Jacinda Ardern to Apologise for 1970s 'Dawn Raids' on Pacific Community', *Guardian*, 14 June 2021, www.theguardian.com/world/2021/jun/14/jacinda-ardern-to-apologise-for-1970s-dawn-raids-on-pacific-community. Ardern's remorse on behalf of New Zealand went beyond mere words, shown by her actions both in wearing a hijab after the Christchurch massacres, and, more recently, with the apology to Pasifika people donning the cloak as part of the *ifoga*, a traditional Samoan reconciliation or forgiveness protocol.

43 *Robtelmes v. Brenan* (1906) 4 CLR 395 (2 October 1906). See Peter Prince and Eve Lester, 'The High Court and Respect for Australian South Sea Islanders', *AUSPUBLAW*, 24 February 2021, www.auspublaw.org/blog/2021/02/the-high-court-and-respect-for-australian-south-sea-islanders; Peter Prince and Eve Lester, 'The God of the "God Powers": The Gaps between History and Law', in *Griffith Review 76: Acts of Reckoning*, edited by Ashley Hay and Teela Reid (Text Publishing, 2022), www.griffithreview.com/articles/the-god-of-the-god-powers/.

44 *Chu Keng Lim v. MILGEA* (1992) 176 CLR 1, 26; *Ruddock v. Vardalis* (2001) 110 FCR 491 (Tampa case); *Al-Kateb v. Godwin* (2004) 219 CLR 562; *Plaintiff M76/2013* (2013) 251 CLR 322; *Falzon v. Minister for Immigration and Border Protection* [2018] HCA 2 at [92]; *Commonwealth v. AJL20* [2021] HCA 21 at [21]; *Alexander v. Minister for Home Affairs* [2022] HCA 19, at [138], [150], [208].

45 Commonwealth Census Bureau, *Census of the Commonwealth of Australia 3rd April, 1911* (1917), vol. 1, part 1, Statistician's Report, 227–28.

High Court justices had a disqualifying conflict of interest in the matter before them, not acknowledged or declared at the time. Edmund Barton (as Australia's first prime minister) and Richard O'Connor (as leader of the government in the Senate) secured passage through the new Australian Parliament of the *Pacific Island Labourers Act 1901*, providing for expulsion of the Islander community. Introducing the Bill, Barton highlighted Samuel Griffith's support as premier of Queensland for abolition of Islander labour. A driving force of Griffith's political life had indeed been removal of Islander labour from Queensland.[46]

Extraordinarily, it took until 2020 for the court's racialisation of the term 'alien' in *Robtelmes* to be acknowledged. In the landmark 'Aboriginal belonging' case *Love & Thoms*, Justice Edelman of the current High Court said it had been 'persuasively argued' that the 1906 case 'implicitly applied criteria based upon racial perceptions'.[47] In *Chetcuti* (2021), Edelman again referred to the 'racially based approach' in *Robtelmes*, saying the decision 'was reached by application of the concept of alienage through a racial lens, irrespective of considerations of British subjecthood'.[48] However, he did not say that the racial branding of Australian Islanders in 1906, with its calamitous consequences for the Islander community, was unlawful. Moreover, the current High Court chief justice, Susan Kiefel, says the *Robtelmes* decision remains authoritative,[49] supporting almost unlimited Commonwealth power over individuals, including the ability to exclude, expel and detain indefinitely without trial.[50]

As Ann Curthoys, Ann Genovese and Alexander Reilly argue in their important study of law and history in Australia:

> the longer the law has relied on a version of the past and the legal norms that have developed around that version, the more disruptive it is to reinterpret the past and to establish new norms. In this sense, the methods of history are antithetical to legal resolution, and historians deal in the type of facts that the law would prefer to leave undisturbed.[51]

46 Peter Prince, '"Australia's Most Inhumane Mass Deportation Abuse": *Robtelmes v. Brenan* and Expulsion of the Alien Islanders', *Law & History* 5, no. 1 (2018): 117.
47 *Love & Thoms* (2020) 397 ALR 597 at 698–99.
48 *Chetcuti v. Commonwealth of Australia* [2021] HCA 25 at [63].
49 Hon Susan Kiefel AC, 'Legacies of Sir Samuel Griffith', *Sir Samuel Griffith Lecture*, Griffith University, Brisbane, 17 November 2020.
50 *Commonwealth of Australia v. AJL20* [2021] HCA 21.
51 Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law, and Indigenous People* (Sydney: UNSW Press, 2008).

One tangible sign of Australia's willingness to confront the racialised socio-legal context of the White Australia era would be for the High Court to engage substantively with the cases and laws from that period that made possible the great suffering of Islanders and other non-European inhabitants.

As the *Robtelmes* case shows, it is important to recognise the different ways in which the language of national belonging is used. The shameful case of Australia's most famous Indigenous artist, Arrernte man Albert Namatjira, discussed in Chapter 7, is another example. The white Australian community – including the responsible Commonwealth minister – believed Namatjira was 'made a citizen' in 1957 when, after a public campaign, his name was not included in a list of 15,000 Aboriginal people in the Northern Territory deemed to be 'wards' requiring 'protection' by the government. Contemporary academic commentary has repeated this view.[52]

When applying a non-legal meaning of 'citizenship' as a 'bundle of rights' (freedom of movement, the right to vote, serve on a jury, decide where to live, work, choose friends, partners, etc.), it may be appropriate to say Namatjira was 'made a citizen' when no longer, in theory, subject to oppressive control by white officials. But, from 1788 under imposed British law, Aboriginal Australians had full membership status, first as 'British subjects' and then, from 26 January 1949, also as legal 'Australian citizens'.[53] A lack of focus in historical commentary on formal nationality means past lawmakers have not been held to account for their failure to respect the legal status of First Nations peoples and other non-Europeans under British law, and the denial of the rights of citizenship and protection that should have accompanied that status. As Namatjira's story shows, the lives of Indigenous Australians were controlled until well after World War II, denying them full 'citizenship' in a practical sense despite their formal legal equality.

As well as race or ethnicity, other factors, including national origin, gender, religion and perceived differences in standard of living, affected perceptions of belonging and citizenship in Australia and New Zealand. Emma Bellino's chapter shows how a combination of gender and racial discrimination affected the belonging of Australian women. Australia's *Nationality Act 1920* copied 1914 Imperial legislation,[54] declaring that 'the wife of an alien

52 Julie T. Wells and Michael F. Christie, 'Namatjira and the Burden of Citizenship', *Australian Historical Studies* 31 (2000), 110, 120, doi.org/10.1080/10314610008596118.

53 Under the *Nationality and Citizenship Act 1948*.

54 *British Nationality and Status of Aliens Act 1914*.

shall be deemed to be an alien'.[55] Australian women who married men of foreign nationality lost their British subject status and became 'aliens' under the law, without the right to vote.[56] In terms of public perception, this loss particularly affected ethnic Chinese and other non-European Australian women because, as Bellino notes, white Australian women continued to be considered 'Australian' regardless of the nationality of their husbands.

In 1923, New Zealand also introduced a 'marital denaturalisation' law.[57] Michael King calls this 'an example of xenophobia made legal', noting that 'Miriam Soljak, a New Zealander of Irish descent who had married a Dalmatian immigrant, spent most of her adult life fighting for the repeal of this legislation'.[58] As Helen Irving says, in 1934, New Zealand 'was the first to adopt a scheme for the restoration of rights to maritally denaturalised women'.[59] Australia followed suit in 1936. But these reforms merely allowed women who married foreign nationals to regain 'the rights of British subjects' and not legal British subject status itself. As Bellino explains in Chapter 5, maritally denaturalised women in Australia who regained British subject rights were still subject to the humiliation of compulsory 'alien' registration in World War II. It was only after the war that Australia and New Zealand, along with other British dominions, repealed their conditional marital nationality laws,[60] giving women their own independent nationality.[61]

Conclusion

This collection is part of a renewed scholarly interest in the history of nationality and citizenship in Australia and New Zealand. A number of substantial book-length studies on Australian citizenship emerged around the time of the centenary of Australian Federation in 2001, when historians and legal researchers, and the national community more broadly, turned

55 Section 18.

56 Under section 39 of the *Commonwealth Electoral Act 1918*, only 'natural-born, or naturalized subjects of the King' could enrol to vote.

57 *British Nationality and Status of Aliens (in New Zealand) Act 1923*, First Schedule, Part III, section 10.

58 Michael King, *The Penguin History of New Zealand* (Penguin Books, 2003), 367. For further discussion of Miriam Soljak's case, see Harriet Mercer, 'Gender and the Myth of a White Zealand, 1866–1928', *New Zealand Journal of History* 52, no. 2 (2018): 23.

59 Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State: A Gendered History* (New York: Cambridge University Press, 2016), 177, doi.org/10.1017/CBO9781107588011.

60 Ibid., 161.

61 Ibid., 367.

their attention to the nation's democratic foundations and legacies.[62] However, New Zealand's less contested citizenship history did not receive the same consideration at the time of its centenary of dominion status in 2008.[63] Since then, historians and legal scholars, including those published in this collection, have turned their attention more directly to the lived experience of subjects and citizens, as well as those who were 'aliens' under the law, and to the intersections of nationality and citizenship with race and gender.[64] While much of this work continues to take a national perspective, comparative and transnational approaches have much to offer our understanding of the legal and social histories of nationality and citizenship rights.[65]

We hope this book enlivens the reader's interest in histories of the varied and remarkable communities – Indigenous, immigrant and settler – that contributed to the fabric of Australian and New Zealand society in the nineteenth and twentieth centuries. For those not of British heritage, this was often in the face of racially based social and institutional prejudice

62 See Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge University Press, 1997), doi.org/10.1017/CBO9780511518232; John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997), doi.org/10.1017/CBO9780511518249; David Dutton, *One of Us? A Century of Australian Citizenship* (Sydney: UNSW Press, 2002); Kim Rubenstein, *Australian Citizenship Law in Context* (Sydney: Lawbook, 2002).

63 On the history of New Zealand citizenship, see, however, J.C. Beaglehole, 'The Development of New Zealand Nationality', *Cahiers d'Histoire Mondiale: Journal of World History* 2, no. (1954): 106; Paul Spoonley, 'Aliens and Citizens in New Zealand', in *Citizenship in a Global World. Migration, Minorities and Citizenship*, ed. A. Kondo (London: Palgrave Macmillan, 2001), 158, doi.org/10.1057/9780333993880_9; K. McMillan, 'Developing Citizens: Subjects, Aliens and Citizens in New Zealand since 1840', in *Tangata: The Changing Ethnic Contours of New Zealand*, ed. P. Spoonley, C. Macpherson and D. Pearson (Southbank: Thomson, 2004), 267; K. McMillan and A. Hood, 'Report on Citizenship Law: New Zealand', EUDO Citizenship Observatory, *Country Report*, RSCAS/EUDO-CIT-CR 2016/9, hdl.handle.net/1814/42648.

64 See, for example, Rachel Bright, 'Rethinking Gender, Citizenship, and War: Female Enemy Aliens in Australia during World War I', *Immigrants & Minorities* 40, no. 1–2 (2022): 13, doi.org/10.1080/02619288.2021.1977126; Andonis Piperoglou, 'Migrant Acculturation Via Naturalisation: Comparing Syrian and Greek Applications for Naturalisation in White Australia', *Immigrants & Minorities* 40, no. 1–2 (2022): 59, doi.org/10.1080/02619288.2021.1974405; Harriet Mercer, 'Gender and the Myth of a White Zealand, 1866–1928', *New Zealand Journal of History* 52, no. 2 (2018): 23; Emma Bellino, 'Married Women's Nationality and the White Australia Policy, 1920–1948', *Law & History* 7, no. 1 (2020): 166; Peter Prince, 'The "Chinese" Always Belonged', *History Australia* 15, no. 3 (2018): 475, doi.org/10.1080/14490854.2018.1485463; Kate Bagnall, '*Potter v. Minahan*: Chinese Australians, the Law and Belonging in White Australia', *History Australia* 15, no. 3 (2018): 458, doi.org/10.1080/14490854.2018.1485503.

65 See, for example, Helen Irving, *Citizenship, Alienage, and the Modern Constitutional State*; Helen Irving, *Allegiance, Citizenship and the Law* (Cheltenham: Edward Elgar Publishing, 2022), doi.org/10.4337/9781839102547; Jatinder Mann, *Redefining Citizenship in Australia, Canada, and Aotearoa New Zealand* (New York: Peter Lang, 2019), doi.org/10.3726/b15770.

that denied their belonging in the national community. But belong they did, as readers will find as they make their way through this collection. Together the chapters explore how laws that governed nationality and citizenship rights were devised by politicians, administered by bureaucrats, interpreted by the courts and understood by the people. Many non-European residents had full membership status under white law as 'British subjects' and so were 'us' in law, while others were denied the possibility of becoming 'us' due to racist policies. These facts, particularly the treatment of legal members of the national community as 'outsiders', 'aliens' or 'the Other' by white authorities, are central to the histories of both countries, yet much work remains to improve our national memories. As well as formally recognising First Nations peoples as the original custodians, we need to acknowledge that non-British immigrant settlers have as much right as British settler groups to belong and be seen as 'one of us' in both New Zealand and Australia.

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