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‘Our Natives Have No Constitutional Right to Equal Privileges with White People’ Western Australia’s *Natives (Citizenship Rights) Act 1944*

Peter Prince

Note of warning

This chapter references deceased Aboriginal people, their words, names and images. Although all such words and images are already in the public domain, individuals and communities should be warned that they may read or see things in this chapter that could cause distress. In addition, some statements by white officials, politicians and newspapers that are recognised as racially offensive today are quoted to illustrate the thinking at the time. These quotations include derogatory terms such as ‘native’, ‘full-blood’ and ‘half-caste’, which were part of the colonial language of subjugation. As Bruce Buchan observes, ‘the ongoing struggle of Indigenous peoples … has been one fought *as much against the language* as against the institutions of colonization’.[1]

1 Bruce Buchan, *Empire of Political Thought: Indigenous Australians and the Language of Colonial Government* (London: Pickering and Chatto, 2008), 2–3. Original emphasis.

Figure 6.1: Sally Morgan, *Citizenship*, 1988.

Source: © Sally Morgan/Copyright Agency, 2022/Copyright Agency, 2023. Powerhouse collection. Purchased 1989. Photograph: Marinco Kojdanovski.

Introduction

Sally Morgan's painting (Figure 6.1) mocks Western Australia's *Natives (Citizenship Rights) Act 1944*, showing that Aboriginal Australians derided their 'certificate of citizenship' as a derogatory 'dog licence'. In 2002, Wongutha man Leo Thomas told the Federal Court:

> When I was about 21 years old … [the] football team would go drinking, but if I was caught getting a beer at a hotel my mate would be fined … The President of the football club asked for me one day they said that we have to go to court … so they ended up giving me the citizenship rights … a little black book … *the dog collar, I used to call it* … Getting citizenship rights meant that you were no longer dealt with as an Aborigine under the Act.[2]

As Western Australia's solicitor-general told the commissioner of native affairs in 1951, unlike the United States, 'our natives have no constitutional right to equal privileges with white people'.[3] This included the 'privilege' of legal belonging and Australian citizenship itself.[4] Until 1971, Western Australia forced Aboriginal Australians to 'dissolve tribal and native associations' and display 'the manner and habits of civilised life' for two years before they could apply for the 'privilege of citizenship' to escape apartheid-type restrictions under state law.

This chapter uses personal stories to argue that the history of the Natives (Citizenship Rights) Act was largely one of disrespect for the rule of law. Those administering the Act showed little regard for the proper legal status of Aboriginal people or for the actual requirements of the legislation itself. Disdain for the law was accompanied by humiliation of First Nations peoples. Applicants suffered intrusive medical examinations, personal inspection of their homes, had to separate from traditional clan groups and were treated like accused criminals by magistrates hearing their applications. Worst of all, if successful, they were deemed 'no longer a native or aborigine' for the purpose of state law.

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2 *Harrington-Smith v. Western Australia* (No. 9) [2007] FCA 31, Annexure F [5966]. Emphasis added.

3 State Records Office of Western Australia (hereafter SRWA): S2030 Cons1733, 1263/45, folio 48.

4 At least until the High Court's decision in *Love & Thoms* (2020) 397 ALR 597, 94 ALJR 198, which held that First Nations peoples could not be 'aliens' or treated as not 'belonging' under the Australian Constitution.

There has been passing reference to the Natives (Citizenship Rights) Act in other works.[5] In 1973, Peter Biskup wrote that the 1944 Act 'was one of the strangest enactments … lifted almost verbatim from U.S. legislation promulgated in 1886 relating to American Indians … and repealed by Congress a decade earlier'.[6] Tamara Hunter, in 2001, noted that, under the Commonwealth *Nationality and Citizenship Act 1948*, Aboriginal people in Western Australia 'were declared subjects of Her Majesty and considered to be Australian citizens'. However, 'being citizens of the Commonwealth did not mean that they were full citizens in their own state'.[7] Both Biskup and Hunter relied heavily on evidence to the 1961 federal parliamentary inquiry into 'Voting Rights of Aborigines'.[8] This chapter adds more detailed analysis, using files from the State Records Office of Western Australia, including correspondence between ministers and senior bureaucrats, as well as publicly available court records about individual 'citizenship' applications.

The 'Citizenship' Lie

There is a reason why most references to 'citizenship' in this chapter are in quotation marks. An obvious point, but one ignored in Western Australia, is that, from the time of Federation in 1901, nationality and 'Australian citizenship' were matters of federal not state law.

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5 Richard Broome, *Aboriginal Australians*, 5th ed. (Crows Nest, NSW: Allen & Unwin, 2019), 209–10; Brian Galligan and John Chesterman, 'Citizenship and Its Denial in Our Federal State', in *Citizenship in Australia: Democracy, Law and Society*, ed. S. Rufus Davis (Carlton, Vic: Constitutional Centenary Foundation, 1996), 171, 183–86; John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge: Cambridge University Press, 1997), 132–33, 165–69, doi.org/10.1017/CBO9780511518249; John Chesterman and Brian Galligan, eds, *Defining Australian Citizenship – Selected Document*s (Carlton, Vic: Melbourne University Press, 1999), 32–33; J. C. McCorquodale, *Aborigines and the Law: A Digest* (Canberra: Aboriginal Studies Press, 1987), 98–101; Garth Nettheim and Larissa Behrendt, 'Aborigines and Torres Strait Islanders, Constitutional Status, Citizenship and Electoral Rights', as at 1 January 2010, *Laws of Australia*, online resource (Pyrmont, NSW: Lawbook Co); Kim Rubenstein, *Australian Citizenship Law*, 2nd ed. (Pyrmont, NSW: Thomson Reuters, 2017), 64; Christine Choo, 'A Challenge to Human Rights: Aboriginal Women in the West Kimberley', *Studies in Western Australian History* 19 (1999): 48, 55.

6 Peter Biskup, *Not Slaves Not Citizens. The Aboriginal Problem in Western Australia* (St. Lucia, Qld: University of Queensland Press, 1973), 207–8.

7 Tamara Hunter, 'The Myth of Equality: The Denial of Citizenship Rights for Aboriginal People in Western Australia', *Studies in Western Australian History* 22 (2001): 69. See also Tamara Hunter and Tony Ozies, 'Just an Ordinary Thing': Tony Ozies' Application for an Aboriginal Citizenship Certificate', *Studies in Western Australian History* 22 (2001): 63.

8 Commonwealth of Australia, *Report of Select Committee on Voting Rights of Aborigines* (Canberra: Parliament House, 1961).

In 1961, World War II (WWII) soldier and long-term Aboriginal activist George Abdullah[9] wrote to the *West Australian* demanding that Aboriginal people be given the 'rights of citizenship' to which their legal citizenship status entitled them. Abdullah had a better understanding of nationality and citizenship law in Australia than state government ministers and officials. He wrote:

> *The Australian aboriginal is a natural-born citizen* … The aboriginal people will not be satisfied with any half-hearted measure. We are demanding freedom from restrictive legislation, with equal rights and opportunities as our white brothers and sisters, and then we can join them in developing a greater Australia.[10]

The following year, Abdullah called for a 'more militant native approach to citizenship problems', observing that:

> Every native child born in Australia was hamstrung from birth because he was not free. *Full Australian citizenship was the natives' birthright*, but even the most degraded white Australian had more rights than the native. To deprive a person of civil rights was to destroy his self-esteem and his incentive to become a responsible citizen.[11]

Under the law imposed from 1788 with European settlement, First Nations peoples always had full legal membership status, first as 'British subjects', then, from 1949, also as 'Australian citizens'. As the High Court of Australia noted in 2020:

> two distinct rules of the common law operated in temporal sequence to confer the status of a British subject on the indigenous inhabitants of Australia. The first, applicable at the time of acquisition of sovereignty over territory, was that by which *every inhabitant of that territory alive at that time immediately became a British subject*. The second … was that by which *every person born within that territory became a British subject from birth* simply by reason of their place of birth … *neither drew any distinction based on race or indigeneity*.[12]

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9 Yasmin Jill Abdullah, 'Abdullah, George Cyril (1919–1984)', *Australian Dictionary of Biography*, National Dictionary of Biography, 2007, adb.anu.edu.au/biography/abdullah-george-cyril-12117.

10 *West Australian*, 13 September 1961, SRWA: S2030 Cons 993 1961-0854, folio 117. Emphasis added.

11 *West Australian*, 17 September 1962, SRWA: S2030 Cons 993 1961-0854, folio 117, item 77. Emphasis added.

12 *Love & Thoms* (2020) 94 ALJR 198 [104] (Justice Gageler). Emphasis added.

The Commonwealth *Nationality Act 1920* confirmed the principle of 'birthright nationality' under which Aboriginal and Torres Strait Islander people became 'natural-born' British subjects from the moment of birth. Under the Nationality and Citizenship Act 1948, all British subjects in Australia, including all Indigenous people, received the new status of 'Australian citizen', while retaining their subject status.

Dating back to early colonial times, however, Anglo-Celtic institutions in Australia repeatedly denied First Nations people equal membership status under the law.[13] In Western Australia, this extended into the 1970s. Government ministers and bureaucrats peddled the lie that Aboriginal people had to apply under the Natives (Citizenship Rights) Act to become 'Australian citizens'. In doing so, they were responsible for promoting the wilful confusion between 'citizenship' as a 'bundle of rights' and 'citizenship' as formal legal membership status. As the minister for the north-west, A. M. Coverley, stated in September 1944 when introducing the Natives (Citizenship Rights) Bill to parliament:

> This Bill while being quite a small one, is in my opinion, very important. It consists mainly of one principle, contained in one clause … The main principle underlying the Bill is to provide an opportunity for adult natives to apply for *full citizenship as Australians*.[14]

Mr Graham from East Perth supported the legislation but said successful applicants should not be in danger of having their 'Australian citizenship' suspended or stripped:

> when natives have made application to a magistrate and been accepted, they should be *Australian citizens* in fact … [There] should be no discrimination against those who, though previously natives, have been *accepted as Australian citizens* … Either a person is or is not a *citizen of this country*; that is how I view the position.[15]

State government files show wilful confusion on the part of government officials between the 'rights of citizenship' and citizenship as legal status. Reviewing the operation of the Natives (Citizenship Rights) Act in 1950,

13 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), ch. 1, openresearch-repository.anu.edu.au/handle/1885/101778.

14 Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 September 1944, 825. Emphasis added.

15 Ibid., 5 October 1944, 970. Emphasis added.

District Officer Anderson from the Department of Native Affairs admitted his ignorance of Australia's nationality law. He had heard of the federal Nationality and Citizenship Act but was unfamiliar with its contents, fearing it meant 'citizenship' given to Aboriginal people in Western Australia could not be taken away:

> About a year ago some legislation was passed by the Commonwealth Government declaring all residents within the Commonwealth to be citizens of Australia. *I am not versed with this bit of legislation* but I fear that it means that if a native becomes a citizen he cannot lose those rights.[16]

Applicants themselves (at least according to records made by court clerks) appeared to believe they would be getting formal citizenship. Court files list their applications for 'citizenship' or 'native citizenship'.[17] In 1948, Eva Bickley, aged 47, told Magistrate Taylor in Derby: 'I require citizenship as I live a civilised life and I think I am entitled to the privileges of the Act.'[18] In 1949, Agnes Molloy, aged 21, a worker at the Derby Hospital, said: 'I require my citizenship in order that I may live and have the privileges of white person.'[19] In 1955, Jack Shandley, head stockman at Gogo Station near Fitzroy Crossing, travelled 300 kilometres to the Derby court declaring he wanted 'to be Australian and be free to travel'. His application was refused, with no reason given.[20] Some magistrates hearing these matters called themselves 'Courts of Citizenship',[21] recording the outcome as 'Citizenship granted'.[22]

As Chapter 1 discussed, the word 'citizenship', like other terms of identity and belonging, has more than one meaning. In a non-legal sense, it means, essentially, freedom to participate in the political and social community. After Federation, regulation of the lives of First Nations peoples in Australia and control of their 'citizenship' in this non-legal sense remained with the

16 SRWA: S2030 Cons993 1944/0463, folio 52. Emphasis added.
17 SRWA: S1629 Cons1404, folios 78, 85, 88, 97, 105–8, 110 ff.
18 SRWA: S1103 Cons 4706 1, folio 33.
19 Ibid., folios 36–37.
20 Ibid., folios 60–61. Mr Shandley was forced to re-apply a year later. Along with his wife Rita and three children he was then granted a certificate of citizenship with the support of a local Citizenship Board member, Mr Rowell. Ibid., folio 69. Western Australia, *Gazette*, 11 January 1957, 29.
21 SRWA: S1103 Cons 4706 1, folios 88 (Margaret Albert), 89 (Gladys Edgar).
22 SRWA: S1629 Cons1404, folios 70–72 (Sylvia Newman, Millicent Daisy Bell Smythe, Josephine Pandi, Millie Long, William Albert Cooper).

states.[23] In 1962, Shirley Andrews, campaign organiser for the Federal Council for Aboriginal Advancement, summarised the legal restrictions on First Nations peoples across Australia. All mainland states, including Western Australia, expressly restricted the political and social freedom of Aboriginal Australians.[24] But Western Australia was the only state to add 'citizenship' legislation on top of this.

In 1942, future federal minister for territories and later governor-general, Paul Hasluck – born in Western Australia and with a strong interest in Aboriginal affairs in his home state – detailed the extensive control over people categorised as 'natives' under Western Australia's *Native Administration Act 1936*,[25] including those described by the derogatory term 'half-caste':

> By the 1936 Act no native parent or other relative living has the guardianship of an aboriginal or half-caste child … no native … can move from one place to another without the permission of a protector and the giving of sureties … Natives may be ordered into reserves or institutions and confined there … the property of any native may be taken over by consent or if it is considered necessary to do so to provide for its due preservation … Natives may be ordered out of town or from prohibited areas … Subject to the right of appeal, the Commissioner of Native Affairs may object to the marriage of any native.[26]

As Hasluck pointed out, in the period before the introduction of the Natives (Citizenship Rights) Act:

> The native's only escape … is through a certificate of exemption from the [Native Administration] Act granted by the Commissioner and experience does not indicate that the procedure is as satisfactory as it might be.[27]

23 Until section 51(xxvi) of the Australian Constitution (the notorious 'races power') was amended in 1967 to allow federal parliament to legislate for Aboriginal Australians.

24 Shirley Andrews, 'The Australian Aborigines: A Summary of Their Situation in All States in 1962', accessed 11 August 2022, www.nma.gov.au/__data/assets/pdf_file/0005/697091/australian-aborigines.pdf. Hard copy reference: State Library of Victoria, Council for Aboriginal Rights (Vic.) Papers, MS 12913, Box 3/4.

25 The *Native Administration Act* became the *Native Welfare Act* in 1954.

26 Paul Hasluck, *Black Australians: A Survey of Native Policy in Western Australia, 1829–1897* (Melbourne: Melbourne University Press, 1942), 160–61.

27 Ibid., 161.

The Department of Native Affairs admitted that 'natives … have been refused exemptions on the flimsiest of grounds'.[28] Moreover, an exemption under the Native Administration Act offered only partial escape from draconian state control. As Chief Secretary Kitson explained in the Legislative Council:

> An exemption certificate does not relieve them of disabilities and disqualifications imposed on native persons by various Acts, such as the Land Act, the Mining Act, the Electoral Act, the Licensing Act and others. They are still *natives in blood* and this disqualifies them from enjoying any of the rights which a white man has under the Acts I have mentioned.[29]

In contrast, under the *Natives (Citizenship Rights) Act 1944*, which commenced operation in early 1946, a successful applicant was deemed to be no longer 'a native or aborigine' and, therefore (in theory), beyond the reach of state laws controlling Aboriginal people. So it is not surprising that many Aboriginal applicants under this Act used the term 'citizenship' as a synonym for freedom from state control. But they were encouraged by the government to believe the 1944 Act conferred something more – namely, formal 'Australian citizenship', even though they already possessed full membership status under federal law. As the inscription on Sally Morgan's painting (Figure 6.1) states: 'In 1944 Aborigines were allowed to become Australian citizens.' This misrepresentation by state authorities exasperated Aboriginal activists who (like George Abdullah) understood nationality law in Australia better than their white counterparts.

In 1954, Noongar man George Howard, a 33-year-old Department of Native Affairs welfare officer who described himself as 'a Native and … proud of that fact', addressed a Rotary luncheon at the Savoy Hotel, Perth. His very presence at the event contravened a prohibition on 'natives' entering licensed premises.[30] As Perth's *Daily News* reported, Mr Howard's exemption certificate under the Native Administration Act 'did not bar him from restrictions' under the *Licensing Act* and other legislation. The newspaper pointed out that 'he could get full legal rights by getting a certificate of citizenship'. But, as Mr Howard remarked:

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28 W. A. Gordon to acting commissioner of native affairs, 11 September 1947, SRWA: S2030 Cons 993 1944/0463, folio 79.

29 Western Australia, *Debates*, Legislative Council, 18 October 1944, 1174. Emphasis added.

30 His entry into the Savoy Hotel, Perth, to speak on Aboriginal rights is listed by the Australian Broadcasting Commission as one of the significant events of the 1950s. See '1950s', ABC Archives and Library Services, [entry 30 April 1954], accessed 21 August 2022, www.abc.net.au/archives/timeline/1950s.htm.

> to get this certificate, I must pay fees and undergo personal investigation by a board, *with the end result of being told I am what I am – a natural-born Australian*.[31]

Moreover, he continued:

> neither of these two certificates secures me from personal interrogation or investigation. I have to produce them on demand, like a tram ticket, presumably to show that I have paid my way.[32]

In the parliamentary debate on the Natives (Citizenship Rights) Bill in October 1944, Mr Needham from Perth observed that:

> The tenor of the debate so far suggests that all members will vote for this measure. All contend that the natives should be granted the status of full citizenship … I am of the opinion that before a measure of this nature was submitted to Parliament some attention should have been given to the education of natives as to what is meant by citizenship.[33]

Given their lack of knowledge about nationality law, it might have been better if members of parliament and state officials had been educated about 'citizenship' in Australia.

What the Legislation said

In force until 1971, the Natives (Citizenship Rights) Act purported to grant 'rights of citizenship' to Indigenous applicants who 'adopted the manner and habits of civilised life'. A successful applicant received 'all the rights, privileges and immunities … of a natural-born or naturalised subject of His Majesty'. The person was given a 'certificate of citizenship' signed by a magistrate that had 'affixed thereto a photographic likeness of the applicant in the manner of a passport'.[34] The certificate granted in 1950 to James Brennan, one of Australia's 'Rats of Tobruk' in WWII,[35] is shown in Figure 6.2.

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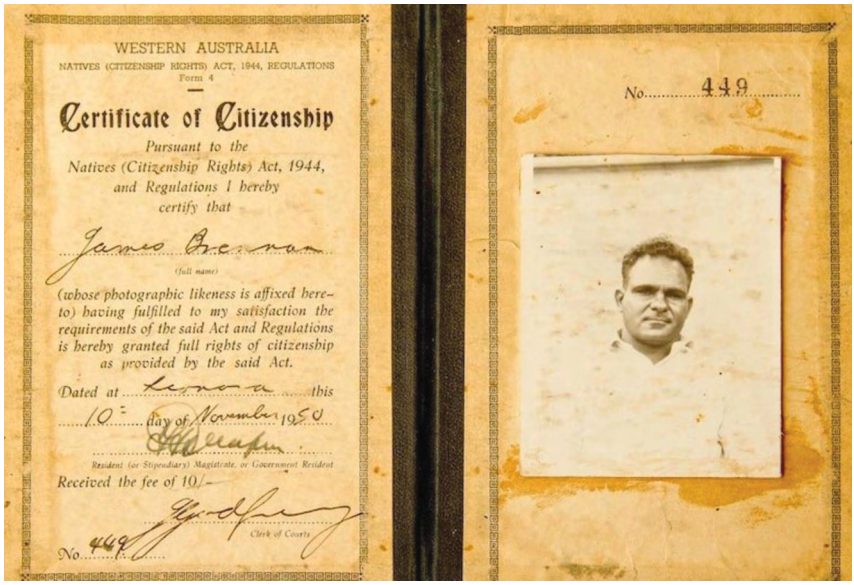
31 'Native Breaks Law to Talk on Law', *Daily News*, 30 April 1954, SRWA: S76 Cons1910 1964–1910, folios 20–21. Emphasis added.

32 Ibid.

33 Western Australia, *Parliamentary Debates*, Legislative Assembly, 5 October 1944, 971.

34 Section 5(4).

35 Nathan Morris, 'Meet James Brennan, an Aboriginal Stockman Turned Guerrilla Fighter', *ABC News*, 17 October 2016, www.abc.net.au/news/2016-10-17/aboriginal-stockman-turned-guerrilla-fighter/7934792.



WESTERN AUSTRALIA
NATIVES (CITIZENSHIP RIGHTS) ACT, 1944, REGULATIONS
Form 4

Certificate of Citizenship

Pursuant to the Natives (Citizenship Rights) Act, 1944, and Regulations I hereby certify that

James Brennan
(full name)

(whose photographic likeness is affixed hereto) having fulfilled to my satisfaction the requirements of the said Act and Regulations is hereby granted full rights of citizenship as provided by the said Act.

Dated at Kununurra this 10th day of November 1950

Resident (or Stipendiary) Magistrate, or Government Resident

Received the fee of 10/-

Clerk of Courts

No. 449

No. 449

Figure 6.2: Certificate of citizenship issued to James Brennan, 10 November 1950.

Source: Nathan Morris, 'Meet James Brennan, an Aboriginal Stockman Turned Guerrilla Fighter', *ABC News*, 17 October 2016.[36]

Any adult who was 'a native within the meaning of the Native Administration Act'[37] could apply for a citizenship certificate. Written references were required from two 'reputable citizens', together with a signed statutory declaration saying that the applicant had 'dissolved tribal and native association' for the past two years 'except with respect to lineal descendants or native relations of the first degree'. A magistrate had to be satisfied that the person had adopted a 'civilised life', was 'of good behaviour and reputation', 'reasonably capable of managing his own affairs', and that the 'full rights of citizenship' were 'desirable for and likely to be conducive to' his or her welfare.[38] In addition, the applicant had to be 'able to speak and understand the English language' and could not be suffering from 'active

36 Ibid.

37 Under the Native Administration Act 1936, a 'native' was defined as 'any person of the full blood' or 'less than full blood' 'descended from the original inhabitants of Australia' not including 'quadroons' (unless a Magistrate decided otherwise) or 'a person of less than quadroon blood'. The 'blood test' remained in use in Western Australia until 1972. John McCorquodale, 'The Legal Classification of Race in Australia', *Aboriginal History* 10 (1986): 7, 13, doi.org/10.22459/AH.10.2011.02.

38 Sections 4 and 5.

leprosy, syphilis, granuloma[39] or yaws'.[40] It was Minister Coverley himself who insisted that these diseases should disqualify Aboriginal people from 'citizenship'.[41]

The grant of a certificate of citizenship was conditional only. A magistrate could suspend or cancel a certificate upon complaint *from any person* if the holder contracted one of the specified diseases, committed even a minor offence or was not adopting a 'civilised' life.[42]

Copying America's 'Black Laws'

In the breakthrough 'Aboriginal belonging' case *Love & Thoms* (2020), the High Court of Australia stated that, after European settlement, First Nations peoples were always regarded as British subjects and part of the Australian political community.[43] Indeed, as Justice Gageler remarked, in Australia it had:

> never been thought necessary to enact legislation along the lines of the *Indian Citizenship Act 1924* (US), specifically conferring the status of subjects or citizens on members of indigenous societies.[44]

Chapter 7 discusses the High Court's idealised version of the history of Indigenous belonging in Australia after 1788 in more detail. For the purpose of this chapter, it must be concluded that, in *Love & Thoms*, the High Court overlooked Western Australia's Natives (Citizenship Rights) Act – even though it remained in operation until the early 1970s, forcing First Nations peoples to apply for 'certificates of citizenship' on their own land. Justice Gageler's remark that it was never thought necessary to copy United States' legislation because Aboriginal Australians were already accepted as subjects or citizens could not have been more misleading. In fact, Western Australia did look to the United States. However, rather than replicate the 1924 federal legislation conferring citizen status on Indian tribes,[45] it adopted nationality laws from an earlier (racist) generation.

39 A cluster of inflammation, often in the lungs, as in tuberculosis.
40 A skin disease with swelling and ulcers.
41 Commissioner of native affairs to state crown solicitor, 11 September 1944, SRWA: S2030 Cons993 1944/0463, folio 109.
42 Section 7.
43 *Love & Thoms* (2020) 94 ALJR 198, see e.g. 261 [314] (Justice Gordon); 287 [449] (Justice Edelman).
44 Ibid., 223 [103].
45 Under US law, Indian tribes were treated as independent political powers and until 1924 were not automatically citizens.

In 1943, at the suggestion of State Solicitor-General James Walker,[46] Commissioner of Native Affairs Francis Bray asked the American consul in Perth 'whether the Red Indians [*sic*] of the United States enjoy the ordinary rights of citizenship', explaining that he was considering a proposal for 'certificates of citizenship' to be issued in Western Australia 'to some of our *better types of Australian natives*'.[47] The US consul replied in terms of 'citizenship status', stating that American Indians were recognised as birthright citizens under the *Nationality Act 1940* (US),[48] which confirmed America's 1924 federal legislation. But Commissioner Bray refused to recommend similar recognition for First Nations peoples in Western Australia, despite the birthright nationality and 'citizenship' they were already entitled to under Australian law.

In July 1944, Solicitor-General Walker alerted Minister Coverley to the forthcoming federal '14 powers referendum', which, among other measures, proposed giving the Commonwealth power to make laws about 'aboriginals or natives'. The solicitor-general recommended postponing the Natives (Citizenship Rights) Bill 'until the result of the referendum is known in August', warning the minister about the potential inconsistencies with federal law should the referendum succeed:

> if the Commonwealth Parliament should make laws *with respect to aboriginals*, such laws will automatically supersede State laws relating to aboriginals insofar as the latter are in any respect inconsistent with such Commonwealth laws.[49]

As Charlie Fox notes: 'The referendum failed and so did the Aboriginal clause … [meaning] that power over Aboriginal people remained with the States for a further 23 years.'[50] The solicitor-general did not warn the minister or Commissioner Bray about inconsistencies with the existing Commonwealth nationality law. Despite the Natives (Citizenship Rights) Bill deeming the holder of a certificate of citizenship to have 'all the rights, privileges and immunities … of a natural-born or naturalised subject of His Majesty', the solicitor-general made no mention of federal legislation expressly excluding state law in these areas (see below).

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46 SRWA: S2030 Cons993 1944/0463, folio 121.
47 Ibid., folio 132. Emphasis added.
48 Ibid., folio 129.
49 Ibid., folio 121. Emphasis added.
50 Charlie Fox, 'The Fourteen Powers Referendum of 1944 and the Federalisation of Aboriginal Affairs', *Aboriginal History* 32 (2008): 27, doi.org/10.22459/ah.32.2011.02.

Instead of adopting the current US legislation recognising the birthright nationality of First Nations peoples, Commissioner Bray copied racially discriminatory provisions on citizenship from the outdated 1918 United States Federal Code (also supplied by the US consul) into Western Australia's 1944 legislation.[51] As Biskup observed, these were 'lifted almost verbatim'.[52] So, at the same time as the United States was going through a fundamental change in relation to who should properly be regarded as legal members of society as part of its leading role in promoting a new world after WWII, it bequeathed a regressive, deeply racist legislative legacy on citizenship to Australia, with strong echoes of the notorious 'Black Laws' from the American South in the 1820s and 1830s.[53]

'Some of Our Better Types of Australian Natives'

In October 1944, Chief Secretary Kitson told the Western Australian Parliament who the 'better types of Australian natives' intended to benefit from the new measure were:

> It is an inspirational measure for *those natives who live under white standards*, and it opens up more clearly the transitional path from native circumstances to white standards for detribalised natives, *particularly the half-caste* who is justly deserving of consideration *since he is no more black than white*.[54]

Forwarding the draft Natives (Citizenship Rights) Bill for Minister Coverley's approval, Commissioner Bray noted:

> an enlightened policy is desirable in respect of those natives who by reason of character, standards of intelligence, and development, are deserving of consideration in connection with the acquisition of citizenship rights, and in my opinion this worthy progressive amelioration of their conditions might be achieved by the issue of certificates of citizenship.[55]

51 SRWA: S2030 Cons993 1944/0463, folios 127–29.
52 Biskup, *Not Slaves Not Citizens*.
53 See Martha S. Jones, *Birthright Citizens: A History of Race and Rights in Antebellum America* (Cambridge: Cambridge University Press, 2018).
54 Western Australia, *Debates*, Legislative Council, 18 October 1944, 1176. Emphasis added.
55 Commissioner of native affairs to minister for north-west, 23 May 1944, SRWA: S2030 Cons993 1944/0463, folio 122.

According to political scientist Colin Tatz, A. O. Neville, the notorious chief protector of Aborigines in Western Australia from 1915 to 1940, believed that the government:

> could do nothing for Aborigines, who were dying out, but … *could absorb the* '*half-castes*' … These were the sort of people who should be elevated 'to our own plane'. In this way, it would be possible to 'eventually forget that there were ever any Aborigines in Australia'.[56]

Tatz argued that 'Neville's legacy – his mishmash of nineteenth-century race theory, twentieth-century eugenics, his own brand of assimilationism, and illogic – [was] to be found in the quite astonishing' Natives (Citizenship Rights) Act.[57] As Kitson stated, 'citizenship' in Western Australia was intended to reward 'detribalised natives', especially 'the half-caste who is … no more black than white'.

The First Approvals

In January 1946, the first 'certificate of citizenship' was granted in the Geraldton Court of Petty Sessions to Patrick Farrell – a labourer who did tomato gardening work – despite objections from the Department of Native Affairs. The magistrate ruled that evidence that Farrell was an industrious worker with a clean house living 'according to a white man's standard' outweighed his sole conviction for drunkenness.[58]

The next month, Commissioner Bray appeared in person at the Perth Police Court to support the state's second application, this time by 66-year-old Samuel Isaacs. Later, the *Mail* announced: 'For the second time in history, a half-caste aboriginal has been admitted to rights of full citizenship of Australia.'[59] Samuel's father had received the Bronze Medal of the Royal Humane Society for his role in a famous sea rescue in 1876.[60] In addition, four of Samuel's sons had served with the Australian military, including two

56 Colin Tatz, *Genocide in Australia*, AIATSIS Research Discussion Papers, no. 8 (Canberra: Aboriginal Studies Press, 1999), 25, aiatsis.gov.au/publication/35772.
57 Ibid.
58 'Citizenship Rights Case in Geraldton. Successful Application', *Geraldton Guardian and Express*, 9 January 1946, 4.
59 'Full Citizen Status to Half-Caste', *Mail*, 23 February 1946, 3.
60 *West Australian*, 23 February 1946, 6.

overseas with the AIF in World War I.[61] Newspaper reports found it 'most fitting' that 'citizenship' had been granted to a member of a family that had served the white establishment so well.

Disregarding Their Own Law

In April 1946 the *Northern Times* announced the first approvals in the north of Western Australia under the Natives (Citizenship Rights) Act:

> *Three new Australian citizens were created* in the Broome Police Court on Monday by Mr M. Harwood, R.M. They were Robert Hunter (28), Mary Bernardine Puertollano and Monica Dolby (25). All were natives within the meaning of the Native Citizenship Rights Act of 1944 … the trio hold certificates of citizenship number four, five and six.[62]

The *Daily News*, in the state capital Perth, reported that the three new certificates of citizenship would 'permit these natives to proceed south of the line' – referring to the 'leper line' that forbade Aboriginal people living above 20 degrees latitude (a little to the north of Port Hedland) travelling south of that boundary.[63] The paper reassured its white readers anxious about 'natives' flooding into the south of the state that 'migration of northern natives to southern areas is not expected. In most instances northern natives have no desire to proceed south of their usual habitat.'[64]

The Broome cases reveal much about the thinking behind the 'citizenship' legislation, the operation of the Act itself and official attitudes to the rule of law. All three applications were opposed by Police Inspector O'Neill on behalf of Commissioner Bray. Bray thought the three Broome applicants were not the 'better type of Australian natives' he intended to reward with

61 'Citizen Rights. Award to Half-Caste', *West Australian*, 23 February 1946, 6. Records indicate that a fifth son, Henry Isaacs, enlisted but was discharged on racial grounds, i.e. for 'not being of substantially European origin'. National Archives of Australia (hereafter NAA): B2455, Isaacs Henry. This, in turn, meant his own application in 1946 for a certificate of citizenship was refused because he did not receive an 'honourable discharge' from the military in accordance with section 4(2)(a) of the 1944 Act.

62 'Citizens' Rights Native Applications. Three Granted at Broome', *Northern Times*, 12 April 1946, 15. Emphasis added.

63 Imposed in 1941: see *Native Administration Act Amendment Act 1941* (WA) section 2. For a great account of the leper line and protests against it by Indigenous people, see Anne Scrimgeour, '"Battlin' for Their Rights": Aboriginal Activism and the Leper Line', *Aboriginal History* 36 (2012), 43, doi.org/10.22459/ah.36.2013.03.

64 'Natives Become Citizens', *Daily News*, 10 April 1946, 6.

'citizenship'. He made his 'personal reasons for objection' available to Police Magistrate Harwood before the hearings[65] and was angered when he was ignored. Despite legal advice from the state Crown solicitor supporting Harwood's approvals,[66] Bray complained strongly to Minister Coverley about the decisions.[67]

Inspector O'Neill provided a detailed report on the Broome proceedings. Mary Puertollano's application was heard first.[68] She 'was represented by Bishop Raible and Dr Oldmeadow who were both subject to cross-examination by myself and questioning by the Magistrate, as also was the applicant herself'.[69] Bray complained that Mary had 'not dissolved native association for two years' prior to her application and that 'her misconduct with at least one Asiatic' meant 'the full rights of citizenship were not desirable for and likely to be conducive to the welfare of the applicant'.[70] He claimed that Harwood's approval of Mary's application would cause 'apprehension as to the success of the new law at Broome in view of the sordid reputation of that town as regards association between natives and Asiatics'.[71] However, as Inspector O'Neill reported:

> With regard to association between Asiatics and coloured women, I do not think the Magistrate is impressed by any expression of 'National Policy' unless it is supported by legislation which would enable him to deal with offenders.[72]

In other words, as Magistrate Harwood had noted, there was no provision in the Natives (Citizenship Rights) Act allowing him to take into account prejudice against relationships between Aboriginal women and Asian men in deciding 'citizenship' applications. But Bray waved Harwood's finding

65 SRWA: S2030 Cons 1733 1945–1263, folio 96.
66 Ibid., folio 83.
67 Ibid., folio 82.
68 The Puertollanos were a well-established family in the north of Western Australia. Their name appears many times in Broome and Derby 'citizenship' hearings. In 2019, David Puertollano from Broome's Yawuru people attended a ceremony in Germany where remains of more than 40 Indigenous Australians, including seven Yawuru, were handed back to their community. Nick Miller, 'Enslaved, Exported, Then Made into an Artefact, One Young Girl Is Finally Coming Home', *Age*, 16 April 2019, www.theage.com.au/world/europe/enslaved-exported-then-made-into-an-artefact-one-young-girl-is-finally-coming-home-20190416-p51ejh.html.
69 SRWA: S2030 Cons 1733 1945-1263, folio 96.
70 Ibid., folio 86. Emphasis added.
71 Ibid., folio 85. Emphasis added.
72 Ibid., folio 94.

aside, insisting that the Department of Native Affairs interpret the Act's requirement for 'good behaviour and reputation'[73] according to the racial bias of the day:

> the Department will continue to observe the law as it stands and will object on the grounds of … unfavourable reputations, including association with Asiatics … If the Magistrate feels that association with coloured persons is not a good reason [for rejecting an application], *even though the Act stipulates that it is* … then I am unable to do anything about the difficulties in question.[74]

Robert Hunter was also granted a citizenship certificate in Broome that day. His case shows that Bray's refusal to accept the wording of the legislation he helped create was not the only aspect of established law he ignored. Bray objected that Hunter, too, had 'not dissolved native association for two years prior to his application' and was 'not of industrious habits and of good behaviour and reputation'. Two years previously, Hunter had been convicted of 'disorderly conduct' and 'resisting arrest', receiving a caution on both charges.[75] According to O'Neill, Magistrate Harwood 'expressed the opinion that two convictions did not debar a man from Citizenship rights'[76] and that he required actual proof of Hunter's 'bad reputation and behaviour'. Much to the consternation of Commissioner Bray, O'Neill explained that:

> before [Magistrate Harwood] will refuse an application [he] will require definite proof of previous continued misconduct, in this I mean he will be unlikely to accept the opinion of Police Officers or Departmental officers unless the opinions *can be substantiated by actual evidence*.[77]

Bray rejected the need for allegations to be backed by 'actual evidence', declaring:

> it seems to me that Hunter is not a person of good reputation. *This is a question of fact*, and in my opinion it should be accepted in its aspects.[78]

73 Section 5(1)(e).
74 SRWA: S2030 Cons 1733 1945–1263, folio 93. Emphasis added.
75 Ibid., folio 86.
76 Ibid., folio 96.
77 Ibid., folio 94. Emphasis added.
78 Ibid., folio 92. Emphasis added.

As this shows, Bray thought it was his prerogative to determine the 'better types of natives' deserving 'citizenship', and he demanded that his view of a person's character and reputation be accepted by magistrates regardless of evidence.

In the case of Monica Dolby, Inspector O'Neill said there was 'no suggestion of any previous misconduct', but Bray opposed her application anyway – again because she had 'not dissolved native association for two years' and the 'full rights of citizenship' were 'not desirable for and likely to be conducive to' her welfare.[79]

As the Broome hearings demonstrate, a failure to 'dissolve tribal and native association' was a major ground for opposing applications for 'citizenship'. Yet this was not consistent with the wording of the Natives (Citizenship Rights) Act. As Bray admitted to Minister Coverley, while applicants had to sign a statutory declaration saying they had dissolved 'native associations', this was not one of the criteria in the Act for granting a certificate of citizenship:

> Section 4 provides that an applicant must have dissolved native associations for two years before applying. In the issue of a Certificate, however, the Magistrate only has to be satisfied as regards the stipulations in section 5. These stipulations *do not mention the question of association with natives*.[80]

As Magistrate Harwood understood, this enabled a commonsense approach. Inspector O'Neill reported that:

> [The Magistrate] holds the view that the average half-caste or coloured person is not accepted by white persons in the North therefore they cannot do other than associate with persons of the same colour as themselves therefore it is impossible that they could avoid association with natives in law.[81]

The Crown solicitor told Bray that Harwood acted within his jurisdiction under the Act by overruling 'evidence of previous association with natives' and 'there is therefore no ground for reviewing his decision … There is no other way of attacking his decision through the court.'[82] But the commissioner ignored this formal advice from Western Australia's highest-ranked government lawyer. As Bray told the minister:

79 Ibid., folio 96.
80 Ibid., folio 82. Emphasis added.
81 Ibid., folio 94.
82 Ibid., folios 83, 86.

> It was never intended that an associate of natives should be eligible for a Certificate. This is the view held by the Magistrates, except Mr Harwood … The question of non-eligibility on the ground of association with natives is an important aspect. It is as much an important consideration as the requirement that the applicant must be a native.[83]

Contrary to the Crown solicitor's legal advice, and at Bray's urging, the Department of Native Affairs continued to oppose applications for 'citizenship' on this basis.[84] Moreover, as Bray indicated, other magistrates did not follow Mr Harwood's example:

> Mr Ansell, the Magistrate at Geraldton … refused to grant an application by a man named Harris at Mullewa recently on the grounds that he associated with natives. This decision was of interest, since it was in direct contradiction to the decision of Mr. Harwood in the three cases he dealt with at Broome.[85]

Rewarding Aboriginal people who 'dissolved native associations' (i.e. abandoned their own communities) to live 'according to white standards' was fundamental to the national policy of 'assimilation'. As Hasluck said when federal minister for territories in 1951, 'it is expected that in the course of time all persons of aboriginal blood or mixed blood in Australia will live like White Australians'.[86] In Western Australia, according to Biskup:

> The heyday of this policy was the twenties and thirties, but as late as 1944 the Natives (Citizenship Rights) Act required that a candidate for citizenship rights should have dissolved all 'tribal and native' associations … and even four years later the Bateman Report saw the splitting of generations as the only solution to the aboriginal problem.[87]

83 Ibid., folio 82.

84 See e.g. SRWA: S1629 Cons 1404-1, folios 34 (Herbert Binder, 31 July 1946); 41 (Jack Hume October 1946); 49 (Raymond Smith, 19 November 1947); acting commissioner native affairs to Mr T. Ansell, magistrate, Geraldton, 14 January 1948 (re Robert Drayton), SRWA: S2030 Cons 1733 1945–1263, folios 74–5.

85 SRWA: S2030 Cons 1733 1945–1263, folio 85.

86 Commonwealth of Australia, *Native Welfare, Meeting of Commonwealth and State Ministers held at Canberra*, 3–4 September 1951 (Canberra: Commonwealth Government Printer, 1951).

87 Biskup, *Not Slaves Not Citizens*, 264.

The 1946 Broome hearings show the scant respect of Commissioner Bray and his officials for the 'rule of law' even in the 'formal' or 'thin' sense of that concept.[88] Bray and the Department of Native Affairs thumbed their noses at established law, denying the need for evidence to support allegations of bad reputation and insisting that not associating with either 'natives' or 'coloured persons' was a prerequisite for 'citizenship', despite the absence of any such requirement in the Natives (Citizenship Rights) Act itself.

Besides a failure to adhere to the provisions of the legislation or to basic principles of common law, there were also broader questions about the legality of the Natives (Citizenship Rights) Act.

Contrary to the Constitution

In 1951, Bray's replacement as commissioner of native affairs, Stanley Middleton, notified his department of six new 'certificates of citizenship' granted in various towns in Western Australia:

> Accordingly the said Regina Manado, Charles Olocko Councillor, Ivan Williams, Margaret Shiosaki, Gloria Mary Fogarty, and Rosie Gilligan are deemed to be no longer natives or aborigines, and *shall have all the rights, privileges and immunities and shall be subject to the duties and liabilities of natural-born or naturalised subjects of His Majesty* unless and until the certificates are cancelled.[89]

Yet, after Federation, Western Australia had no power to grant either British subject status or legal citizenship. At the time the Natives (Citizenship Rights Act) came into force in 1944, the Commonwealth Nationality Act operated to nullify any conferral of British subject status ('naturalisation') under state law:

> The right to issue certificates of naturalization in the Commonwealth shall be exclusively vested in the Government of the Commonwealth, and no certificate of naturalization or letters of naturalization issued … under any State Act shall be of any effect.[90]

88 Denise 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 compatible with great iniquity in the law', and, conversely, a 'substantive conception' that also involves 'moral constraints on the exercise of state power'. Denise Meyerson, 'The Rule of Law and the Separation of Powers', *Macquarie Law Journal* 4 (2004): 1, 2.
89 SRWA: Item 1948/1149 AU, WA S268 cons 1003, folios 117–18. Emphasis added.
90 Section 33.

In the same way, from 1949, the federal Nationality and Citizenship Act invalidated any conferral under state legislation of either British subject status or Australian citizenship:

> The provisions of this Act shall apply to the exclusion of any provisions, providing for British nationality or Australian citizenship, of any law of a State, whether the law was passed or made before or after the commencement of this section.[91]

In *Australian Citizenship Law* (2017), Kim Rubenstein argues that the Natives (Citizenship Rights) Act 'was inconsistent with the Commonwealth legislation and, therefore, unconstitutional by virtue of s 109 of the *Constitution*'.[92] Similarly, Garth Nettheim and Larissa Behrendt in *Laws of Australia* (2010) argue that the Western Australian law 'throughout its life was inconsistent with the Commonwealth legislation'[93] and was, therefore, unlawful.

'Freedom … for the Children's Sake'

Obtaining 'citizenship' in the sense of freedom from government control was the main motivation for applications under the Natives (Citizenship Rights) Act. Applicants were lured by the prospect of freedom from laws controlling where they could live and work, banning them from voting or buying alcohol, and even restricting who they could marry. In 1947, Rita Bargas told Magistrate Harwood in Derby that she wanted a certificate of citizenship 'to enable me to live as a free citizen'.[94] Petronella Puertollano said she sought a certificate 'to get away from control by Native Affairs'.[95] Dorothy Roberts stated: 'I desire certificate in order to improve my position and live as white people and to be out of native control' (i.e. beyond the restrictions over 'natives').[96] In 1948, David Bickley told Acting Magistrate Hogg in Derby: 'I am applying for citizenship rights for the reason that I wish to be free from the Native Affairs Department.'[97] Twenty-seven-year-old Catherine Frazer Rodriguez – married to a Spanish national working as

91 Section 52.
92 Rubenstein, *Australian Citizenship Law*, 64, fn 9.
93 Nettheim and Behrendt, 'Aborigines and Torres Strait Islanders'.
94 SRWA: S1103 Cons4706 1, folio 19.
95 Ibid., folio 18.
96 Ibid., folio 27.
97 Ibid., folio 31.

a carpenter across the north – told Magistrate Taylor: 'I require citizenship because my husband does not come within the Act and I desire to move freely wherever he does.'[98]

Apart from their own freedom, applicants also sought 'freedom' for their children. Under section 8 of the Native Administration Act:

> The Commissioner [of Native Affairs] shall be the legal guardian of every *native child* notwithstanding that the child has a parent or other relative living, until such child attains the age of twenty-one years.[99]

A daughter or son included in a certificate of citizenship would be deemed to be no longer a 'native child' under state law and, therefore, supposedly, beyond the power of the commissioner to remove against the parents' wishes. A consolidated list of 'Citizenship holders' at the end of June 1954 sent by Commissioner Middleton to the commissioner of public health contains many entries listing children on the citizenship certificates of their parents.[100]

In March 1954, Robert Hunter's name appeared again, this time in the Derby Magistrates Court. In 1953, his certificate of citizenship had been suspended for 12 months 'for supplying liquor to natives'.[101] This meant he was deemed once more to be 'a native or aborigine' for the purpose of state law.[102] As a consequence, he had also been convicted and fined for 'receiving liquor as a native'.[103] Pleading for the return of his citizenship certificate, Hunter promised that he had 'learned [his] lesson' and had been 'in no trouble since' losing his certificate. Declaring that he 'would like rights back for the children's sake', he asked for his seven children to be added to his certificate. 'All children of age are going to school. There are beds for all the children.' His request was approved.[104]

98 Ibid., folios 33–34.
99 Emphasis added.
100 Commissioner of native affairs to commissioner of public health, 25 August 1954, SRWA: S268 cons1003 1948/1149, folio 4.
101 An offence under section 48(1) of the Native Administration Act.
102 Section 7(2) *Natives (Citizenship Rights) Act*.
103 Under section 48(2) of the Native Administration Act, it was an offence for any 'native to knowingly receive any liquor or opium'.
104 SRWA: S1103 Cons 4706 1, folio 45.

However, far from conferring equal rights and 'freedom' from racist laws, gaining 'citizenship' in Western Australia could mean increased racial targeting. After the 1944 Act came into effect, the commissioner of police warned that 'the holder of citizenship rights will have all the privileges and rights of a white person, including the right to purchase intoxicating liquor', which could be illegally supplied to 'natives'.[105] In 1947, Police Constable Brown observed suspicious activity in Wellington Street, Perth:

> I saw the native, Sport Charles Jones, holder of the certificate of citizenship No. 152 walking across the street from the direction of the Imperial Hotel. He was carrying two bottles bearing labels, which appeared to be Emu Bitter Beer Labels.[106]

Constable Brown arrested Jones, who was 'convicted and fined £4 with 4/6 costs' for supplying beer to a 'native'.[107] On another occasion, Brown:

> questioned a native named Samuel Charles Isaacs, holder of Certificate No. 50, concerning his attempting to obtain bottled liquor after having been seen talking to some natives in Royal St, East Perth. I was satisfied that Isaacs intended obtaining the bottles of liquor for these natives. He did not get his Bottles as the Hotel … closed in the meantime.[108]

Samuel Isaacs was the son of the second certificate holder (see above) in Western Australia. He was a decorated WWII soldier, having fought in Africa, New Guinea and the Pacific.[109] But neither his certificate of citizenship nor distinguished war service saved him from humiliation when buying a beer. As 'Rotten Legislation for Coloured Australians', an article 'prepared by natives and written by a native',[110] observed:

> The ex-serviceman who is prepared to sink his pride and apply for the right to carry one of these *dog licences* must, often in the presence of a crowd of white citizens, at the demand of a none-too-polite barman or barmaid, or white-coated waiter present this card as evidence of his right to join his white friend in a social drink. 'A State which dwarfs its men'. Indeed![111]

105 Western Australia, *Notice for Gazette*, 9 November 1945, SRWA: 1964–1910, folio 39.
106 SRWA: S2030 Cons993 1944/0463, folio 77.
107 Ibid., folios 75–76.
108 Ibid., folio 76.
109 NAA: B883, WX19177.
110 Similar articles a few weeks before in the same paper were written by Commissioner Middleton. Biskup, *Not Slaves Not Citizens*, 251–52.
111 *West Australian*, 5 November 1952, 3. Emphasis added.

As well as being targeted as potential suppliers of liquor, 'citizenship' holders required a special permit to visit Aboriginal reserves or missions.[112] And, despite 'becoming white' under state law, they were not wanted where white people lived.[113]

Humiliation

There were many humiliations in Western Australia's 'citizenship' process. Aboriginal applicants had to find two well-known white people to certify that they were of 'good character and industrious habits'. Mary Puertollano in Broome had asked the town doctor and Catholic bishop to support her. Further, applicants were required to sign a statutory declaration, punishable by imprisonment for a false statement, in front of the local postmaster, schoolteacher or policeman stating that they kept away from traditional Aboriginal people and were living, in effect, as a white person. They also faced the ignominy of personal inspection of their homes to ensure they were kept to a 'civilised' or 'white' standard. During Robert Hunter's hearing in Broome, 'the Court was adjourned to allow the Magistrate to personally inspect the dwelling house of the applicant and observe his living conditions'.[114] As the *Northern Times* informed its readers, Hunter's 'home on the foreshore was … inspected by the magistrate, who found it of reasonable standard and in a high state of cleanliness'.[115] In 1948, the Derby Magistrates Court granted Catherine Rodriguez 'citizenship', noting: 'House inspected and found to be clean and tidy and applicant herself seems to have adopted and be capable of maintaining civilised standards of living.'[116] Eva Bickley's application was also approved, with the court declaring: 'Applicants living quarters inspected. Everything clean, tidy and well-kept, and in accordance with civilised standards.'[117]

In 1944, the Women's Christian Temperance Union of Western Australia strongly objected to the proposal for 'citizenship' applicants to show they were free from certain diseases, claiming this 'was outside the realm of any government to legislate upon … Since when has health and morals been a bar

112 Section 39, Native Administration Act.
113 See e.g. Secretary Katanning Road Board to Mr Nalder MLA, 13 October 1955, SRWA: S2030 Cons 1733, 1945/1263, folio 32.
114 Ibid., folio 96.
115 *Northern Times*, 12 April 1946, 15.
116 SRWA: S1103 Cons 4706 1, folios 33–34.
117 Ibid., folio 33.

to Citizenship anywhere?'[118] But the requirement for a humiliating medical inspection was included in the final legislation. Applicants had to show proof to the court. In 1949, 31-year-old labourer George Ryder told the Derby Magistrates Court: 'I produce a medical certificate … showing that I am free from active syphilis, granuloma, leprosy or yaws.'[119] As social historian Tamara Hunter observes: 'For many Aboriginal people this was a humiliating and degrading process and they resented having to expose their private lives in open court.'[120] No consent was required for these medical examinations. Under the Native Administration Act, an 'authorised person' could use 'such means as may be necessary to compel any native to undergo examination'. Refusing to submit to an examination was a criminal offence.[121]

There was further degrading treatment in the 'citizenship' hearing itself, which was conducted more like a criminal trial. Applicants appeared before a police magistrate[122] with local police attending as key witnesses. In Robert Hunter's case in Broome, Inspector O'Neill 'called Sergt. Campbell to give evidence as to Hunter's general reputation and behaviour'.[123] In their conflicting role as 'protectors of natives',[124] the police acted at the behest of the commissioner of native affairs.[125] In 1945, Western Australia's chief of police told his officers that the native affairs commissioner 'requests that every care be exercised … to see that certificates are not issued to *doubtful types of natives*'.[126] As O'Neill reported in relation to the Broome cases, applicants and their supporting referees were 'subject to cross-examination' by both the magistrate and police.

Some magistrates openly treated 'citizenship' applicants as if they were accused criminals. In 1950, Magistrate Smith in Perth granted a certificate to Alfred James Mippy but warned 'should he appear before him in Court again he would appear as a white man and in view of his past crime record, he would have *no hesitation in sending him to gaol*'.[127] The magistrate dealt with Mippy as if he was on his last warning before being sent to prison.

118 SRWA: S2030 Cons993 1944/0463, folio 93.
119 SRWA: S1103 Cons4706 1, folios 34–35.
120 Hunter, 'The Myth of Equality', 78.
121 Section 16.
122 In 1951, the Act was amended so that hearings were held by a board consisting of a magistrate 'and a person nominated by the Minister as a district representative'.
123 SRWA: S2030 Cons993 1944/0463, folio 96.
124 Biskup, *Not Slaves Not Citizens*, 230.
125 Or, as Biskup puts it, the Department of Native Affairs was 'for all practical purposes an appendage of the Police Department'. Biskup, *Not Slaves Not Citizens*, 179.
126 SRWA: Item 1964/1910, folio 39. Emphasis added.
127 SRWA: S2030 Cons993 1944/0463, folio 56. Emphasis added.

In a final humiliation, the original version of the Natives (Citizenship Rights) Act deemed successful applicants for 'citizenship' 'to be no longer a native or aborigine'. In 1951, Commissioner Middleton argued for removal of this provision, saying it 'implies black can be made white by Act of Parliament; at least it tends to destroy a pride of race which should not be the intention of any legislation'.[128] Minister for Native Affairs Victor Doney agreed, declaring:

> No Act of Parliament should have the effect of depriving a person of his race … an aborigine or part-aborigine never can be a European, and there seems to be no sound reason why Parliament should seek to make him other than what he is.[129]

Middleton recognised the humiliation for Aboriginal people, telling all 'Field Officers, Missions and Institutions' that 'this offensive section has been deleted so pride of race can be maintained even under Citizenship'.[130]

The Hollowness of Aboriginal 'Citizenship'

For some time after his appointment as commissioner in 1948, Middleton had little knowledge of the relevant nationality law. In 1951 he had to ask Solicitor-General G. W. Wood: 'does a state of citizenship exist in law?' Middleton was about to attend the inaugural conference of the Australian Council of Native Welfare in Canberra at which 'citizenship status' was the lead item. The solicitor-general's response appears to have been a turning point for Middleton. In a handwritten note, Middleton observed: 'Citizenship is already vested in natives. Their very birth in Australia confers on them automatic citizenship.'[131] He concluded that if Aboriginal people were already 'Australian citizens', only discriminatory state and federal legislation prevented them having 'full citizenship' in the broader sense. He urged the Canberra conference to 'press for the removal of all discriminatory legislation, and insist on the recognition of all aboriginal natives as native citizens of Australia having full citizenship rights'.[132] But federal and state ministers said Australia's First Nations peoples still had to earn the right to

128 Ibid., folio 36.
129 Western Australia, *Debates*, Legislative Assembly, 30 October 1951, 317.
130 SRWA: S2030 Cons 993 1944/0463, folio 16.
131 SRWA: S2030 Cons 1733 1945/1263, folios 45–50.
132 Western Australia, *Annual Report of the Commissioner of Native Affairs for the Year Ended 30th June, 1952* (Western Australia: Department of Native Affairs, 1953), 4.

'full Citizenship'.[133] Reporting on the conference, Minister for Territories Hasluck made no mention of equal rights for Aboriginal Australians based on equal citizenship, emphasising instead the Australian Government's objective of 'assimilation'.[134]

In 1959, Mr Sandy McDonald, born in the Northern Territory, wrote to Hasluck stating that he was living with his son 'as an Australian citizen' at Hall's Creek in Western Australia. However, when they went to the 'pub to buy few bottles beer, publican refuse to serve us because we have not got WA Citizenship rights'.[135] McDonald particularly objected to the treatment of his son who had been born in Western Australia:

> how could the State by-laws class a man with his birthright and civic status as ward of the State and you know Mr Hasluck that not right. I am British Subject, citizen of Empire and Australian citizen and therefore I know that I am Australian – law must give me my right to defend my status as Australian. Well Mr Hasluck would appreciate it if you could get this for us.[136]

Hasluck had extensive experience as a federal minister and he also had considerable knowledge of Aboriginal affairs. Yet he had to ask the federal attorney-general, Sir Garfield Barwick QC, 'whether a person who has obtained full and irrevocable Australian citizenship in a Commonwealth territory can lose that citizenship when he crosses the border into a State of the Commonwealth', adding 'I ought to be better informed about the legal questions that may be raised than I am'.[137] Barwick's response reflected the lack of value for Aboriginal people of formal citizenship under federal law:

> Mr McDonald is an Australian citizen wherever he may be in Australia … but this does not mean that he is necessarily entitled to all the rights enjoyable by a non-Aboriginal citizen throughout Australia.[138]

133 Ibid., 3–4.
134 Ibid., 4. In *Black Australians*, Hasluck acknowledged that First Nations peoples had equal membership status as 'British subjects' under the law applying in Australia. However, he asserted that 'it was impracticable for them to have, and in fact they never did have, exactly the same position at law as other British subjects'. See Hasluck, *Black Australians*, 129.
135 NAA: A432 1966/3171, folio 29.
136 Ibid., folio 21.
137 Ibid., folio 20.
138 Ibid., folio 13.

The senior legal officer in Hasluck's department advised that all mainland states had legislation 'relating to the welfare and control of persons wholly or partly descended from aboriginal natives of Australia', and noted that:

> any person who satisfies the definition of 'native'… is, while present in the State in question, subject to the provisions of the legislation in force in that State relating to 'natives' … This is so irrespective of citizenship.[139]

As John Chesterman and Brian Galligan argue: 'Divorcing citizenship status from rights and benefits facilitated exclusion on racial grounds, but it also debased Australian citizenship status as a hollow, even hypocritical, formality.'[140] Barwick discounted assertions that the Natives (Citizenship Rights) Act conferred either Australian or state citizenship, advising that the 'so-called certificate of citizenship … is really no more than a certificate of exemption from the operation of certain statutes of Western Australia'.[141]

While modern-day legal commentators such as Kim Rubenstein, Garth Nettheim and Larissa Behrendt state that Western Australia's Natives (Citizenship Rights) Act was unconstitutional, in his 1959 legal advice to Minister for Territories Hasluck, Barwick (soon to be appointed chief justice of the High Court) made no mention of any potential inconsistency under the Australian Constitution.[142] Similarly, Commonwealth Solicitor-General Kenneth Bailey said nothing about any possible constitutional invalidity in his evidence to a federal parliamentary inquiry in 1961, remarking only that:

> the language [of the Citizenship Rights Act] is not very apt because of course under the law of the Commonwealth an Australian aboriginal is a natural-born subject of Her Majesty, and the terms of the provision rather imply the contrary.[143]

139 Ibid., folio 26.
140 Chesterman and Galligan, *Defining Australian Citizenship*, 9–10.
141 NAA: A432 1966/3171, folio 6.
142 Ibid.
143 K. H. Bailey, 'Voting Rights of Aborigines', Commonwealth of Australia, *Report of Select Committee on Voting Rights of Aborigines* (Canberra: Parliament House, 1961), Appendix VIII.

Conclusion

In a 2017 native title hearing, the Federal Court explained the ongoing 'human tragedy' caused by Western Australia's Natives (Citizenship Rights) Act:

> Lindsay Todd said that his father was Kariyarra,[144] his parents were married and had *citizenship cards* … He said that the '*[c]itizenship right* meant that you had to act as white people … and you had no contacts with the, well, I'd hate to say it, full bloods' … his parents could not teach him Aboriginal language and the family could not associate with the Aboriginal population …
>
> The *human tragedy* is that, although the Todd respondents undoubtedly have indigenous ancestry, they appear to have lost the ability to identify accurately, and connect fully with, their heritage or to enjoy the benefit of inclusion as part of a claim group in a determination of native title … Accordingly, I do not accept … that they have any knowledge that is relevant to establishing their claim to be Yindjibarndi.[145]

The Federal Court found that the constraints of 'citizenship' had been imposed 'inappropriately with the benefit of hindsight',[146] but it did not consider legal opinions regarding the validity of Western Australia's 1944 law or how this would affect the native title claimants.

The story of the Natives (Citizenship Rights) Act involves an overwhelmingly negative reflection on the myth that modern Australia has been built on the 'rule of law'. Government ministers and officials wrongly conflated legal and non-legal types of citizenship in describing the 1944 Act. The minister sponsoring the legislation disregarded the obvious point that nationality was a federal not state responsibility, insisting that the Act conferred 'Australian citizenship' despite no such legal status existing at the time. Solicitor-General Walker failed to advise Commissioner Bray or Minister

144 One of the many language groups in the Pilbara, see 'Kariyarr', Wangka Maya Pilbara Aboriginal Language Centre, accessed 16 December 2022, www.wangkamaya.org.au/pilbara-languages/kariyarra.
145 *Warrie (on Behalf of the Yindjibarndi People) v. Western Australia* [2017] FCA 803 (20 July 2017) [438], [450], [453]. Emphasis added. The Yindjibarndi are another language group in the Pilbara. See "Yindjibarndi', Wangka Maya Pilbara Aboriginal Language Centre, accessed 16 December 2022, www.wangkamaya.org.au/pilbara-languages/yindjibarndi. Similar cases include *Daniel v. Western Australia* [2003] FCA 666; *Moses v. Western Australia* [2007] FCAFC 78; *Harrington-Smith on Behalf of the Wongatha People v. Western Australia* (No. 9) [2007] FCA 31.
146 *Warrie* [2017] FCA 803 [452].

Coverley about any inconsistency between the Western Australian Act and federal nationality law. Commissioner Bray wanted to personally determine the 'better types of natives' deserving of 'citizenship', and demanded that his department's prejudiced views on character and reputation be accepted by magistrates regardless of evidence. Bray and the Department of Native Affairs persisted in treating 'tribal and native association' as a disqualifying factor, disregarding explicit advice to the contrary from the state's most senior lawyer. Native title claimants continue to be hamstrung today by this unlawful application of the legislation. While Magistrate Harwood refused to accept prejudiced 'national policy' about associating with 'natives' or 'coloured persons' (instead applying the actual criteria in the legislation), he was, as Bray caustically observed, the exception among the magistrates in Western Australia. The local police failed to act as an impartial arm of the law, actively opposing applications on behalf of the commissioner of native affairs. And, in the actual 'citizenship' hearings, applicants were treated like accused criminals, facing cross-examination along with their supporting witnesses.

As Marxist historian E. P. Thompson says about England and the rule of law, it has to be concluded that, for Western Australia's governing elite, the law about nationality and citizenship was, in relation to First Australians, 'a nuisance, to be manipulated and bent in what ways they could'.[147] Commissioner Middleton eventually realised that white lawmakers and bureaucrats in Western Australia had the 'citizenship' process the wrong way round. They should have used as a starting point the irrevocable legal membership status of First Nations peoples under Australian law. But wilful ignorance of federal nationality law and a racist, Darwinian view that Aboriginal Australians could not be their equals meant that white officials in Western Australia could not accept their equal legal status – let alone that they should have full 'citizenship rights' as a logical consequence of such equal status. Instead, white administrators saw 'citizenship' as a 'privilege' that the 'better types' of Australia's original inhabitants had to earn through the process of 'assimilation'.

Far from gaining 'full citizenship as Australians', as Minister Coverley claimed, successful applicants faced increased racial harassment, not least being targeted as potential suppliers of liquor. As Middleton said, they were 'suspended between two communities, that of the white man on the one

147 E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), 266.

side and of the aboriginal native on the other'.[148] Even those who showed the ultimate commitment to their nation by fighting for Australia had to show their citizenship 'dog tag' to get a drink in a hotel.

According to Justice Edelman of the High Court in *Love & Thoms*:

> The Aboriginal inhabitants of Australia had community, societies and ties to the land … that established them as belonging to Australia and therefore to its political community. Whatever the other manners in which they were treated … Aboriginal people were not '*considered as Foreigners in a Kingdom which is their own*'.[149]

The First Nations peoples of Western Australia, forced until 1971 to apply for 'citizenship' to obtain a 'passport' with freedom to travel and enjoy other rights as Australians, might question Justice Edelman's view that they were not treated as foreigners in their own country.

148 Western Australia, *Annual Report of the Commissioner of Native Affairs for the Year Ended 30th June, 1952*, 4.

149 *Love & Thoms* (2020) 94 ALJR 198 [392]. Emphasis added.

This text is taken from *Subjects and Aliens: Histories of Nationality, Law and Belonging in Australia and New Zealand*, edited by Kate Bagnall and Peter Prince, published 2023 by ANU Press, The Australian National University, Canberra, Australia.

doi.org/10.22459/SA.2023.06