

Australia and Nationhood?

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Introduction

I, as the holder of Australian citizenship, through this submission feel that it is my obligation to contribute to the future direction of the Commonwealth of Australia. In doing so there are many issues that need to be addressed, but none more so than those points that are raised by this inquiry into the nationhood, national identity and democracy of the Commonwealth of Australia. I therefore thank the committee for allowing submissions to be made, this is democracy in action.

As strange as the following question may be, it needs to be addressed from both a legal and moral perspective for the advancement and continued security of the Commonwealth of Australia. “What is the Commonwealth of Australia and where is its territory?”

“... by taking over the continent without treaty or consent, the Australian nation-state has a legitimacy problem that remains unresolved.”¹

There has never really been any form of education regarding this in the mainstream Australia and now with the rise of an extreme form of nationalism building, the Commonwealth of

¹ Brennan S., Behrendt L., Strelein L., Williams G. *Treaty* p5

Australia needs a bold plan to ensure peace and security is maintained whilst giving as much freedom to the people as possible.

There are a number of major issues inherited by the Commonwealth of Australia from the departure of the British, in what could be termed as a form of decolonisation, and for this, we must look back into our past and call it for what it was. The problems stemmed right from the very start of Lieutenant James Cook's claim on the entire east of the Australian continent.

“You are with the consent of the Natives to take possession of convenient situations...”²

For the want of a better term, it was the start of what was later construed as terra nullius and this is the fundamental flaw of the modern Australia.

Australia's Foundation

When Cook, at Possession Island, laid claim for the entire east coast he did so without the consent of the Aboriginal and Torres Strait Islander nations, in fact they did not even know he had done so.

“The British took control of the continent without treaty or consent. When the British went out as colonisers from the 1600s onwards, treaty-making with Indigenous peoples was common place Territory was obtained by war and conquest or by negotiation and treaty. For historical reasons that remain unclear Australia remained an oddity because no treaty was made with the Indigenous peoples of the continent despite the existence of polities across the country with whom Britain could have dealt. Instead when the British came, they asserted complete political control and they proceeded to seize Aboriginal land without compensation and grant it to other people. Legally they called this process not conquest but ‘settlement’, as if there were no other rival (indeed pre-existing) claims to political and land ownership.”³

This was to continue for the better part of 220 years after the claim until the High Court's ruling in the Mabo case.

The British and subsequently the Australians entered the territories of the numerous Aboriginal and Torres Strait Islander nations without consent.

The British were, and, the Australian citizens still are in the true sense of the word unlawful non-citizens without valid consent, or just plain intruders.

² Secret instructions to captain Cook, 30 June 1768.

³ Brennan S., Behrendt L., Strelein L., Williams G. *Treaty* p4

“Whether the legal paradigm used to explain colonization is ‘conquest’, ‘cession’, or ‘settlement’, the reality is that the colonizers were intruders.”⁴

This was the initial flaw, however, the problems kept accruing one after the other. The legal sovereignty must be obtained properly through formal agreements with the peoples whose nations were here first and still are here today. The current method of forcing the members of the pre-colonial nations is an act of forced assimilation to which is unacceptable in international law as detailed in article 8 of the United Nations Declaration on the Rights of Indigenous Peoples. Simply giving these people political sovereignty does not gain legal sovereignty for the Commonwealth of Australia.

The federation process is seen by some as a great moment in the history of this continent, but a real problem for modern day Australia started here.

This has been acknowledged by numerous Prime Ministers, and with Prime Minister Turnbull summing it up perfectly.

“We are working with Aboriginal and Torres Strait Islander peoples to right a great wrong... A mistake when our constitution was first framed over a century ago...”⁵

The mistake was the complete exclusion of the Aboriginal and Torres Strait Islander nations from participating in the life of the Commonwealth of Australia, the ‘White Australia’ policy.

“of course, that in interpreting a statute it is necessary to determine the meaning of the words used as they were understood at the time when the statute was passed. But that is not all, particularly when it is a constitution that is being interpreted. For a constitution creates and underpins a body politic, providing an instrument of government that is intended to endure. It may lay down general propositions in terms that are wide enough to be capable of flexible application to changing circumstances.”⁶

The “white Australia” was, and still is, the initial intention of the federation process in which the people of the colonies agreed to federate and hold membership in the white Australia. There are conflicting points of view for what the Australian Constitution reflects, on one hand the circumstances have changed dramatically over the last 30 to 40 years with the rise of the concept of multiculturalism, but on the other hand, the original intention of the Constitution has not changed to keep up with modern values.

⁴ Saunders C., Stone A. *The Oxford Handbook of the Australian Constitution* p32- 33

⁵ Guardian News *Ignoring Indigenous Australians a big error, Turnbull tells referendum council* 2015

⁶ *Brown v The Queen (1986) 160 CLR 171*

“...Prime Minister John Curtin reinforced the philosophy of the 'White Australia' policy, saying 'This country shall remain forever the home of the descendants of those people who came here in peace in order to establish in the South Seas an outpost of the British race.’”⁷

This issue is now playing out with the rise of the ultranationalists and such slogans as “it’s alright to be white.” The intention of the constitution needs to be altered to reflect the modern values of the majority of the Australian citizens, for until this changes, the unrest as demonstrated in the Cronulla riots will persist and possibly worsen.

Citizenship

For citizenship to be fully comprehended it must be understood what we are as “man”. Man is simply a living breathing creation just as any other animal is, we are born, we live, we die, however there is one major difference that sets us apart from the rest of the animal; kingdom, we have a level of intelligence that allows us to make law that regulates the way in which we behave, the way in which we interact with each other; this is commonly referred to as law, law of a society.

“Homo vocabulum est naturae; persona juris civilis- “Man” (homo) is a term of nature; “Person” (persona) a term of civil law”⁸

“Man” accepts this law through holding a legal and political identity referred to as a person. Man is not the person but the holder of the person.

“The so-called physical person, then, is not a human being, but the personified unity of the legal norms that obligate or authorise one and the same human being. It is not a natural but a legal construction, created in the science of law.”⁹

As we are the holder of something that is created we must understand what was authorised to create the legal and political identity, for all Australian citizens that identity was created by the authority of all the humans collectively by subscribing to the Australian Constitution and what it stands for.

“As the preamble to the Australian Citizenship Act shows, however, that Act is concerned only with the "formal membership of the community of the Commonwealth of Australia". The Australian Citizenship Act is not itself concerned

⁷ www.homeaffairs.gov.au/about/corporate/information/fact-sheet/08abolition

⁸ Garner B. *Black's Law Dictionary, ninth edition.*

⁹ Kelsen H. *Pure Theory Of Law*

with creating rights, privileges, immunities or duties. It creates a status upon which other federal legislation, or for that matter State legislation, may operate to confer or deny rights, privileges, immunities or duties.”¹⁰

They subscribe to it by taking membership within the society of the Commonwealth of Australia.

“Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations”¹¹

Membership is contractual in nature, as in Australian citizenship there are reciprocal rights and obligations on all parties to the contract and it is through the contract that man gives life to the law.

“**Consensus facit legem**- agreement makes law. The rule that parties to a contract are legally bound to perform the obligations they have undertaken.”¹²

When man voluntarily takes citizenship in the Commonwealth of Australia, those particular humans empowered the law of the Commonwealth of Australia to be the sovereign law of the nation to which they are a member.

This sovereignty creates the legal and political identity through which that man is seen, that is citizenship. All citizens of that society have all the same basics rights and obligations to which they are created subject to that society’s constitution. All Australians are created equal under the Australian Constitution. This is the main problem for the Commonwealth of Australia, that being that it excluded the members of the pre-colonial societies from participating in the life of the Commonwealth of Australia; “White Australia Policy”.

“...every sovereign country has the undoubted right to determine who shall enter the country and who shall constitute the political membership of the community of that country. That is to say, within the limits of its constitutional powers, every sovereign country has the right to determine who are its citizens and to declare by legislation what are the rights, privileges, immunities and duties of members of that community.”¹³

¹⁰ *Hwang v The Commonwealth; Fu v The Commonwealth* - [2005] HCA 66

¹¹ *Australian Citizenship Act 2007*

¹² *LexisNexis Concise Australian Legal Dictionary 4th ed.*

¹³ *Hwang v The Commonwealth; Fu v The Commonwealth* - [2005] HCA 66

The pre-colonial Aboriginal and Torres Strait Islander people were never afforded the opportunity to enter into the contract of membership of citizenship from the outset in a society whose policies were the “White Australia” British outpost in the south Pacific. The pre-colonial Aboriginal and Torres Strait Islander nations through their continuing sovereignty have every right to create citizens of their own society pursuant to their own systems of decision-making, and, whom would at the very least co-exist with the citizens of the Commonwealth of Australia, whilst not being subject to the authority that the Australian Constitution vests within the decision-making and dispute resolution systems of the Commonwealth of Australia. The holder of citizenship of a particular society is obliged to uphold and obey the laws to which they have subscribed. If the members of the pre-colonial Aboriginal and Torres Strait Islander nations were excluded then they would not be bound by the terms of citizenship of the Commonwealth of Australia.

“**Pacta tertiis nec nocent nec prosunt**- agreements neither harm nor benefit third parties.”¹⁴

These people do not owe neither loyalty nor allegiance to the Commonwealth of Australia that excluded them, but they do owe loyalty and allegiance to their pre-colonial nation. Furthermore, these citizens cannot be forced to participate in the life of the Commonwealth of Australia as once again this would be forced assimilation and not in accord with the United Nations Declaration on the Rights of Indigenous Peoples.

“Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.”¹⁵

This position of an ongoing sovereignty that co-exists with that of the Commonwealth of Australia makes the sovereignty of the Commonwealth of Australia very shaky until there is a formal agreement between the Commonwealth of Australia and the numerous pre-colonial Aboriginal and Torres Strait Islander nations.

Whilst the Commonwealth of Australia has every right to decide who it will allow to hold citizenship through the simple rules of contractual agreements, it also possesses the right to extinguish that contract of citizenship should the holder of that citizenship not uphold the obligations as agreed to in the citizenship negotiations.

“**Extinguish**- To bring contractual rights or obligations to an end. Extinguishment may occur by the act of one or both of the parties concerned or by operation of law.”¹⁶

¹⁴ *LexisNexis Concise Australian Legal Dictionary 4th ed.*

¹⁵ *United Nations Declaration on the Rights of Indigenous Peoples. Article 8*

¹⁶ *LexisNexis Concise Australian Legal Dictionary 4th ed.*

To build the social cohesion that the Commonwealth of Australia so desperately needs a formal agreement is required between all the nation holders of the co-existing sovereignties that are referred to in the Uluru Statement from the Heart. To do this there needs to be a full disclosure of the terms and conditions of citizenship in a manner that all Australians understand. This would be the starting point to empower the Australian Government to go forward and enter into formal agreements with the pre-colonial Aboriginal and Torres Strait Islander nations. The Australian citizens would need to be made fully aware of the consequences of the past exclusions of these pre-colonial nations and the implications that the United Nations Declaration on the Rights of Indigenous Peoples has, especially as and when these pre-colonial nations revitalise their continuing sovereignty and ownership on and of the continent.

The members of these pre-colonial nations has a right to hold Australian citizenship if they so choose, but have the holders of Australian citizenship agreed to allow them to do so?

“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”¹⁷

But, have the existing Australian citizenry agreed to allow in those members who were excluded based on race? There is nowhere to be found that this has taken place formally and it should be carried out by referendum. It should be remembered that membership is taken based on certain conditions and in the Commonwealth of Australia it was clearly shown to be the “White Australia Policy” that gave the Australian Constitution its foundation, the British outpost in the South Pacific.

Identity

All men and women have connection to some portion of the earth’s surface, they are all of a tribal origin from somewhere, no matter in which member state of the United Nations they are holding citizenship. Under the provisions of the United Nations Declaration on the Rights of Indigenous Peoples, they can choose to participate in the life of the State if they so choose. All men and women can choose as it is this action of choosing that they enter into the contractual relationship of membership or commonly referred to as citizenship of a nation.

¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples. Article 5*

All the persons created pursuant to the Australian Citizenship Act 2007 are Australian citizens, the man or woman that holds that identity is not Australian, remember they are merely the holders of the identity.

Just as the members of the pre-colonial Aboriginal and Torres Strait Islander nations have a choice to revitalise all their institutions, the people who hold citizenship within the Commonwealth of Australia have a tribal connection to somewhere else globally.

All men and women have a choice of identity, but it is up to them to decide which identity they want to hold and be seen through legally and politically.

United Nations and Globalisation

With the Commonwealth of Australia being one of the founding members of the United Nations it actually ceded some of its sovereignty to the United Nations. The Commonwealth of Australia has agreed to be subjected to agreements made by a higher sphere of law, that of the United Nations.

“Sovereignty- The independence of a state; freedom from external interference in the conduct of a state’s affairs. Sovereignty is an attribute of statehood from which all the political powers of a state emanate. In law, it implies that there is no legally authorised human authority that is competent to regulate the state’s affairs.”¹⁸

Within the international sphere of law the Commonwealth of Australia being a member of the United Nations, has as in all membership arrangements agreed to uphold all the obligations of being a member of such an organisation. This in essence means that the Commonwealth of Australia must uphold what it has promised to do, and this means that the Commonwealth of Australia has limited its sovereignty, some of which has been handed to the United Nations through the ratifying of such international agreements made by the member states of the United Nations. The Commonwealth of Australia as a good international citizen, is therefore as in the case of any other contractual arrangement, the holder of a limited sovereignty within the sphere of international law.

“Contract theory- The underlying rationale of enforcing contractual obligations. The legal principle that a promise freely made should be performed or enforced is qualified by the movement in some areas of contract law from determining whether a

¹⁸ *LexisNexis Concise Australian Legal Dictionary 4th ed.*

contract was made and broken to determining whether, if a promise was made, it should as matter of policy be enforced.”¹⁹

The Commonwealth of Australia is the holder of international citizenship and is participating in the life of the international world, which could be construed as globalisation. The Commonwealth of Australia has obligations within the sphere of international law, and it is the duty of the Commonwealth of Australia to uphold the laws of the international system that it has agreed to, and the other participating member states have every right to have those obligations enforced, just as the Commonwealth of Australia has the right to enforce the domestic laws of the Commonwealth of Australia upon the holders of Australian citizenship. The Commonwealth of Australia must uphold its obligations in “good faith”.

“Pacta sunt servanda- agreements are to be kept. The fundamental principle of international law that treaties are binding on parties to them and must be performed by them in good faith.”²⁰

The Commonwealth of Australia and its citizenry must participate in the greater globalisation as citizens of good character and good faith. There is no room left for the isolationist state due to the modern systems of communication and transport. The notion of statehood within the Commonwealth of Australia is demonstrated by the intention of the Australian Constitution at the time of which it was created, but this intention needs to be modernised to keep pace with the global world that the Commonwealth of Australia is a member of.

“Qui sentit commodum sentire debet et onus; et e contra- A person who enjoys the benefit ought also to bear the burden.”²¹

The Australian citizens enjoy all the benefits of such a global world, they therefore ought to be bearing the burden placed upon them by the responsibilities of having access to such benefits.

Aboriginal exclusion

“...that Indigenous peoples, as prior owners and occupiers of the continent, feel a strong sense of exclusion from the Australian state and for that reason believe that it lacks legitimacy. They point to a basic flaw in the legal logic by which we govern ourselves in Australia, a flaw that was there from the beginning, and a flaw that Prime

¹⁹ *LexisNexis Concise Australian Legal Dictionary 4th ed.*

²⁰ *LexisNexis Concise Australian Legal Dictionary 4th ed.*

²¹ Garner B. *Black's Law Dictionary, ninth edition.*

Minister John Howard himself acknowledged: this land and its waters were settled as colonies without treaty or consent. A commitment to the inclusion of Aboriginal people within Australia society involves acknowledgement that Australia has so far omitted to take all the steps needed to end that exclusion.”²²

With the High Court of Australia rejecting the belief that the Australian continent was *terra nullius* at the time of arrival of the Europeans meant that all that was created on that foundation was built on a badly flawed foundation.

“The High Court has:

Rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement.”²³

This meant that the continent, or parts of it, belonged to someone and it was not the Europeans. It was determined within the Mabo decision that it was not an act of conquest, but rather an act of settlement to which there was no transfer of sovereignty with no actual physical transfer of any of the titles of those territories. The British simply “took” the place and in modern definitions of taking without consent means “stolen”.

Uluru

Recently the Commonwealth of Australia brought together the best experts in the fields of constitutional and aboriginal law. They eventually released the Uluru Statement from the Heart in mid-2017.

“...Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. ...the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.”²⁴

As clearly understood by those that are suitably qualified to do so, the acknowledgement of the sovereignty of other nations within the so claimed boundary of the Commonwealth of Australia has clearly brought the spotlight onto the so-called supremacy of the sovereignty of the Commonwealth of Australia. It also brings into question as to who must obey what systems of authority and decision-making.

²² Brennan S., Behrendt L., Strelein L., Williams G. *Treaty* p5

²³ *Native Title Act 1993*

²⁴ *Uluru Statement From The Heart 2017*

“Qui in territorio meo est, etiam meus subditus est- that which is in my territory is my subject; old rule of a state’s authority over persons and things found within its territory.”²⁵

Are the pre-colonial first sovereign nations within and or on the Australian territory, or is the Commonwealth of Australia within and or on the collective territories of those pre-colonial sovereign nations?

“Quod prius est verius, et quod prius est tempore potius est jure- What is earlier is more genuine, and what is earlier in time is preferred in law.”²⁶

Is it not the continuing pre-colonial sovereignties that are recognised in the Uluru Statement from the Heart that are first in time and continuing that would be more genuine and preferred in law?

“Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”²⁷

As shown, the members of these pre-colonial nations have a right to participate in the life of the Commonwealth of Australia, but the other side to the statement that must be considered is “what if they do not so choose” to participate in the life of the Commonwealth of Australia. Remember, all contracts, and that includes the contract of membership, is voluntary, they have a choice. Under what sovereignty will they be bound? The only answer to that, would be the other side to article 5 of the United Nations Declaration on the Rights of Indigenous People, their own pre-colonial sovereignty that is now recognised as co-existing with that of the Commonwealth of Australia.

Treaty

The leadership of the Commonwealth of Australia needs to be empowered by the Australian citizenry to enter into formal agreements with all the continuing pre-colonial Aboriginal and Torres Strait Islander nations to gain the legal sovereignty for the Commonwealth of Australia to be present within their respective territories.

²⁵ Fox J.R. *Dictionary of International & Comparative Law 3rd edition*

²⁶ *LexisNexis Concise Australian Legal Dictionary 4th ed.*

²⁷ *United Nations Declaration on the Rights of Indigenous Peoples. Article 5*

It would also be seen as gaining their consent to represent those pre-colonial nations in the international sphere of law that the Commonwealth of Australia is a member of.

“...the Commonwealth as a sovereign body and as the polity who speaks to the world on behalf of Australians.”²⁸

At present those excluded nations are not represented within the jurisdiction of the international sphere of law.

This formal agreement would cure the mistake that made at the inception of the Commonwealth of Australia.

Invitation

For the advancement of the Commonwealth of Australia in these modern times, the Australian citizens need to authorise the Australian Government to go forward on their behalf and offer an invitation to the members of the pre-colonial Aboriginal and Torres Islander nation to participate in the life of the Commonwealth of Australia and unite with all the existing holders of Australian citizenship under the Australian Constitution. This would be in accord with article 5 of the United Nations Declaration on the Rights of Indigenous Peoples. This is then not forced assimilation, but when and if they so choose, done by consent and agreement which is an absolute necessity to any contractual arrangement.

Conclusion

The Commonwealth of Australia has many issues to resolve surrounding the notions of nationhood and citizenship, but there are none more so pressing then resolving the issues of the establishment of the Commonwealth of Australia and its exclusion of the members of the continuing pre-colonial Aboriginal and Torres Strait Islander nations.

Firstly, we as the holders of Australian citizenship, must protect the Australian Constitution and ensure that the Australian citizens and their leaders are not exceeding the authority that the Australian Constitution vests within that leadership.

Secondly we must also as responsible citizens on the global scale to encourage the Commonwealth of Australia to act in good faith as an international citizen of the global world that Australia now finds itself in. We must encourage the Commonwealth of Australia to

²⁸ Hwang v The Commonwealth; Fu v The Commonwealth - [2005] HCA 66

uphold all the obligations that it has signed up for, be it good, bad or indifferent and ensure that the Commonwealth of Australia is an active participant in global affairs for the betterment of all mankind.

The Commonwealth of Australia will never be a singular nation until a member of issues are addressed domestically.

“...until we have acknowledged that, we will be an incomplete nation and a torn people. We only have to look across the Tasman to see how it all could have been done so much better. Thanks to the Treaty of Waitangi in New Zealand two peoples became one nation.”²⁹

It is up to all Australians to do so as it is us who give the Australian Constitution life.

There is also a role for the Commonwealth of Australia to play in all of this, which is the education of all its citizens from the very youngest to the most elderly. Education on what it is to be Australian, what the current problems are facing the Commonwealth of Australia and finally answers to some of those problems. The history will play a large part of that education, but also projecting what the future will be.

I now close in thanking the committee for allowing everyday Australians the chance to have their thoughts aired.

As the holder of Australian citizenship, for and on behalf of that identity.

Peter Wayne Fisher

25/9/2019

²⁹ Abbott A., *Transcript of the Hon Tony Abbott MHR Aboriginal and Torre Strait People Recognition Bill 2013*