

Submission to the Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples.

Appendage 1-Right to a Nationality, but whose Nationality?

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Introduction

I, Peter Wayne Fisher, as the holder of Australian nationality and citizenship, write this in good faith to assist the Commonwealth of Australia settle the past and secure the future for all citizens of Australia. This submission should be read in conjunction with the original submission as uploaded on Friday the 5th of May 2018.

In contemplating the issues surrounding the constitutional recognition of the Aboriginal and Torres Strait Islander peoples within the Australian Constitution, the subject of nationality is just ‘a part of the whole’ that I did not address in the first submission. Within the realm of the United Nations and international law, the Commonwealth of Australia is the alleged source of nationality for all persons within the geographical location known as Australia and associated surrounding islands. The issue of nationality needs to be addressed, as the members of the numerous continuing pre-settler Indigenous Nations being excluded from, or not contractually linked to the Commonwealth of Australia retain sovereignty that co-exists with the sovereignty of the Crown. They possess an equal if not superior sovereignty to that of the Commonwealth of Australia, and if the Commonwealth of Australia can determine the nationality of its members under its sovereignty, then so can the numerous continuing pre-settler Indigenous Nations determine who their nationals are under their own sovereignty. Once again, this brings about the purpose of the “Constitutional Recognition” of other “...sovereign Nations...”¹ if the Commonwealth of Australia is not properly and legally empowered by some form of formal agreement or treaty to decide that the members of these numerous excluded continuing pre-settler Indigenous Nations are nationals of the Commonwealth of Australia.

“Every indigenous individual has a right to a nationality.”²

From the United Nations Declaration on the Rights of Indigenous Peoples, such a simple sentence has far-reaching implications for the Commonwealth of Australia. Possibly, as far as a rewrite of the legal foundation of the Commonwealth of Australia, the Australian Constitution.

Nationality and citizenship are intertwined and “...through them society was constructed around the state”³ allowing the citizens to participate in the life of the state, a state that then can determine who it recognises as its nationals. Some peoples by being excluded from

¹ Uluru Statement from the Heart

² United Nations Declaration on the Rights of Indigenous Peoples, article 6

³ Citizenship and Nationality, <http://guides.naa.gov.au/citizenship/chapter1/citizenship-nationality.aspx>

citizenship would be massively disadvantaged by such an arrangement until it is too late, and then they are allowed, possibly forced, to participate in the already established nation-state. This is why I have combined in this submission the subjects of nationality and citizenship, both are part of the problem.

What is nationality? What is the nationality of the members of the continuing pre-settler Indigenous Nation? Where is the territory of that nation? What is that nation? Where is the territory of the Commonwealth of Australia? Where is the Commonwealth of Australia? Who are nationals of what nation and to whom do those nationals owe allegiance to?

A nationality is “...*fundamental legal bond between an individual and a state giving rise to reciprocal rights and duties*”⁴ Nationality is about identity, whilst citizenship is about membership. Nationality is the legal bond that a society of peoples utilise to determine who are of their society, but, by what legal authority empowers the Commonwealth of Australia to determine that the peoples of the excluded continuing pre-settler Indigenous Nations are nationals of the Commonwealth of Australia, continuing pre-settler nations whose sovereignty co-exists with the sovereignty of the Commonwealth of Australia? This raises the question, does the international community understand that the Commonwealth of Australia is occupying, without consent, the territories of other sovereign Nations whose sovereignty is equal to if not superior to that of the Commonwealth of Australia?

This fundamental legal bond comes about in a number of ways, but it is really about the legal definition of the word “in”, for when used in a legal sense “in” means “*under or based on the laws of*”⁵ “To live in Australia” in a legal sense means “to live under or based on the laws of the Commonwealth of Australia”. Thus, Australian nationality “is based on the laws of” the Commonwealth of Australia. The national identity commences in Australia through an “...*Australian Birth Certificate- original Australian birth certificate, extract or birth card in your name/ former name...*”⁶ all created on the flawed legal foundations of the Australian Constitution

Nationality and citizenship is integral to the modern nation-state, but so easily overlooked by governments who are busy governing those who agreed to be governed by their elected representatives. As to how man-made law applies to the man or woman who are nationals and or holding citizenship, the majority of Australians nationals and or citizens do not have a

⁴ Dictionary of International & Comparative Law 3rd edition

⁵ Black’s Law Dictionary 9th Edition

⁶ ‘Proving your identity’ Australian Government Centrelink Form SS231.1206

clear comprehension or understanding of such matters. This leaves the Commonwealth of Australia vulnerable to legal issues of full disclosure in a manner that all parties understand, of the terms and conditions of the social contract, let alone having the issues of forced assimilation of the members of the numerous continuing pre-settler Indigenous Nations into the Commonwealth of Australia or unauthorized representation of these sovereign Nations in issues of international law, just to name a few.

Concept of Nationality

“It is for each State to determine under its own laws who are its nationals...”⁷ and “Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the laws of that State”⁸

The concept of Australian nationality is a creature of legal system of the United Nations member states, termed international law in which “...nationality...born of the modern-state system...The globe is now partitioned into discrete nation-states which exercise sovereignty within precise territorial boundaries”⁹.

Nationality is one half of the person that constitutes the frame for political action to construct the state. Nationality is crucial in modern systems of governance of populations.

The identity of those people who have received the nationality of the Commonwealth of Australia is Australian. I am seen legally amongst the people of the other member states of the United Nations as an Australian, and further I hold Australian citizenship to participate in the life of the Commonwealth of Australia. The person that I am seen legally and politically through is created within the Commonwealth of Australia, and as a citizen of such, have the obligation to assist and defend the Commonwealth of Australia from any injury or harm, either from externally or internally, this is one of the obligations of Australian citizenship and nationality.

Can we as holders of Australian citizenship and identity, allow the Australian Constitution to be harmed or brought into disrepute by members of the Commonwealth of Australia enforcing the authority vested in the Australian Parliament by the Australian Constitution, on other foreign nations whose sovereignty co-exists with the sovereignty of the Commonwealth of Australia?

⁷ Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague 1930, Art.1

⁸ Convention on Certain Questions Relating to the Conflict of Nationality Laws, The Hague 1930, Art.2

⁹ Citizenship and Nationality, <http://guides.naa.gov.au/citizenship/chapter1/citizenship-nationality.aspx>

Whilst multiple nationalities are possible, the Commonwealth of Australia does not possess the free, prior, and informed consent of the members of the numerous continuing pre-settler Indigenous Nations authorizing the Commonwealth of Australia to confer Australian nationality and citizenship to those members.

Nationality and Territory

“The globe is now partitioned into discrete nation-states which exercise sovereignty within precise territorial boundaries.”¹⁰

The concept of nationality and territory are in the minds of humans, there is no defined concept of nationality or territory in the natural world, this phenomenon is confined to the human mind alone. It is generally understood that nationality is a certain society of certain territory, it is of a system of authority and decision-making originating in a location as defined by the maps and surveys of the order of international law- the United Nations.

Territorial Sovereignty

“...for each state to determine who are its nationals, especially in the case of conquered or ceded territory...according to customary international law when territory is transferred to a new sovereign by conquest or cession the people of the territory become nationals of the new government only by their consent.”¹¹

This link of nationality to territorial location has implications to the Commonwealth of Australia when the very foundation of the Commonwealth of Australia was based on a false idea of *terra nullius*¹² and the territories of the numerous continuing pre-settler Indigenous Nations was neither conquered or ceded. The High Court of Australia overturned the concept that the Australian continent and surrounding islands were *terra nullius* with the Mabo decision in 1992. This meant that there were systems of authority and decision-making or sovereignty that could be quantified and qualified enough to be acknowledged and recognized by the Commonwealth of Australia as “...sovereign Nations...”¹³. This meant that the land belonged to someone and it is not the Commonwealth of Australia.

Where is the territory of the Commonwealth of Australia if it is established on and or within the territories of the numerous continuing pre-settler Indigenous Nations?

¹⁰ Citizenship and Nationality, <http://guides.naa.gov.au/citizenship/chapter1/citizenship-nationality.aspx>

¹¹ Tji, Lay Kon v Minister for Immigration & Ethnic Affairs [1998] FCA 1380

¹² Native Title act 1993

¹³ Uluru Statement from the Heart

The territories “...ownership of the soil...”¹⁴ of the numerous continuing pre-settler Indigenous Nations “...has never been ceded or extinguished...”¹⁵ and “No treaty was ever made...”¹⁶ It is getting too late for the Commonwealth of Australia to claim territorial sovereignty over the numerous continuing pre-settler Indigenous Nations in the wake of the Uluru Statement from the Heart without some form of formal agreement or treaty.

*“The state territory and its appurtenances, together with the government and population within its frontiers, comprise the physical and social manifestations of the primary type of international legal person, the state. The legal competence of states and the rules for their protection depend on and assume the existence of a stable, physically delimited, homeland. The competence of states in respect of their territory is usually described in terms of sovereignty and jurisdiction”*¹⁷ The Uluru Statement from the Heart and numerous Native Title Determinations handed down by the Federal Court of Australia have demonstrated that the members of the numerous continuing pre-settler Indigenous Nations are the true and correct owners of the material continent, such “...ownership has existed since before European settlement...”¹⁸

Australian Constitution

*“...the Constitution as enacted in 1901 did not reflect their interests or aspirations”*¹⁹
[of the indigenous people]

The Australian Constitution established the Commonwealth of Australia on the 1st of January 1901. With the establishment of the Commonwealth of Australia, the peoples who “...agreed to unite...under the Constitution...”²⁰ reflected their interests and aspirations (White Australia) of those who agreed. This was not or may not have been the interests and aspirations of the members of the numerous continuing pre-settler Indigenous Nations, this is now immaterial as it has now been acknowledged that these continuing pre-settler Indigenous Nations still retain sovereignty. “There has never been a moment in Australia’s history where a formal agreement has been made with Aboriginal and Torres Strait Islander peoples”²¹

¹⁴ Uluru Statement from the Heart

¹⁵ Uluru Statement from the Heart

¹⁶ Rachael Siewert, Senator, Open Letter to the Prime Minister, 9th February 2016

¹⁷ I. Brownlie, Principles of Public International Law, 7th edition

¹⁸ Mundraby on behalf of the Combined Mandingalbay Yidinji- Gunggandji People v State of Queensland [2012] FCA 1039

¹⁹ G Williams, S Brennan, A Lynch, Australian Constitutional Law & Theory 6th edition, p 137, (4.15)

²⁰ Commonwealth of Australia Constitution Act

²¹ S. Bennan, L Behrendt, L Strelein, G Williams, “Treaty”

makes clear that the interests and aspirations were never considered in establishing the nation that now the alleged source of their nationality. Any such interests and aspirations would have been negotiated on through the treaty process.

Subject to the Australian Constitution, the Commonwealth of Australia was empowered to determine who its nationals were and are, once again this is the interests and aspirations of the “White Australia” and cannot be considered as that of those who were excluded.

Citizenship is Contractual

“...Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia... involving reciprocal rights and obligations...”²²

“...principles of membership to connect the member to the State as the social contract is itself sufficient explanation of membership. The law of citizenship, being the general will of the citizens according to the social contract, determines who the members are.”²³ It is this social contract of the Commonwealth of Australia conferring the privileges of citizenship in return for that person’s obedience and to defend the Commonwealth of Australia, in simple terms you get this if you do this. This social contract becomes binding through a “*Pledge of Commitment*”²⁴ express or implied

“The State receives the power to command the citizens, that is, to make laws for its citizens, through a social pact. This contract makes the people subject to the laws of the State...”²⁵

It is the acceptance of the terms and conditions of citizenship and acceptance of the authority of the Australian Constitution that empowers the Australian Parliament to make laws for the members of the Commonwealth of Australia. It is through this contract that those who are born “in” the Commonwealth of Australia automatically acquire Australian Nationality. However, contracts that do not have the free, prior, and informed consent of both parties to the contract are void or invalid contracts, and this may be the case in which people have taken membership without the terms and conditions being explained to them in a manner and language that they understand. How can the Commonwealth of Australia demonstrate that it has provided such information explaining the terms and conditions of membership to the numerous continuing pre-settler Indigenous Nations in which the English language is not their primary language?

²² Australian Citizenship Act 2007, preamble

²³ D. Wishart, *Allegiance and Citizenship as Concepts in Constitutional Law*

²⁴ Australian Citizenship Act 2007

²⁵ D. Wishart, *Allegiance and Citizenship as Concepts in Constitutional Law*

Membership and allegiance

“Membership in Constitutional Law- The State expects people to obey it. Most States, including Australia, expect all people within their boundaries to comply with their laws...”²⁶

“A person born in Australia...owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligations to obey its laws, and correlatively entitled to all rights and benefits which membership of the community involves...”²⁷

How can the members of the numerous continuing pre-settler Indigenous Nations pledge allegiance to the Commonwealth of Australia which is belligerently occupying their territories without their free, prior, and informed consent? For as stated in the first submission earlier this month, the inhabitants of an occupied territory neither owe the belligerent allegiance nor are compelled to obey its laws. Belligerent occupation is a *“condition arising when a state occupies territory of another sovereign State and does not attain sovereign sovereignty over the territory”²⁸* as highlighted in the Uluru Statement from the Heart. Can the Commonwealth of Australia force the membership of citizenship on the members of these sovereign Nations without their free, prior, and informed consent, considering that membership is contractual. And, can the Commonwealth of Australia forcefully compel the members of these sovereign Nations to be obedient to the domestic laws of the Commonwealth of Australia by forcefully compelling them to be considered Australian nationals against their free, prior, and informed consent, and, can the Commonwealth of Australia forcefully compel the members of these sovereign Nations to pledge allegiance to the commonwealth of Australia, something that was not and still is not reflecting their interests and aspirations?

“The Constitution was drafted at a time when...Aboriginal and Torres Strait Islander peoples were considered a ‘dying race’ not worthy of citizenship or humanity”²⁹

This statement raises the question, “When and why do the Australians now consider the Aboriginal and Torres Strait Islander peoples worthy of citizenship?” Is it because, we, as Australian citizens realise that we are occupying the territories of the numerous continuing pre-settler Indigenous Nations without consent, and, would it not be in our interests to not let

²⁶ D. Wishart, *Allegiance and Citizenship as Concepts in Constitutional Law*

²⁷ *Potter v Minahan* [1908] HCA 63

²⁸ *Dictionary of International & Comparative Law* 3rd edition

²⁹ About Constitutional Recognition <https://www.humanrights.gov.au/publications/about-constitutional-recognition>

them realise that their systems of authority and decision-making still exist and that they still retain all the original root titles to land pursuant to their system of land tenure?

“No treaty was ever made between the Aboriginal and Torres Strait Islander peoples and European settlers, or as many would call them, invaders.”³⁰ This is the foundational mistake, and this mistake in the Australian Constitution now recognized must be remedied, for not to do so would leave all else created on the weakened foundation in a legal limbo. This should be the highest priority of the Commonwealth of Australia and its members.

Contract and Full Disclosure

“...the Minister upon being satisfied that nine conditions are met: The conditions are of residence and intention to reside, age, good character, basic knowledge of the English language, an understanding of the nature of the application of citizenship and adequate knowledge of the responsibilities and privileges of citizenship”³¹

The reference to the Minister being satisfied of certain conditions is crucial in the binding of the social contract. Conditions such as “understanding of the nature of the application” and “adequate knowledge of the responsibilities and privileges”. How can any contract be binding once it is shown that one of the parties to the contract did not have either full disclosure to the terms and conditions in a manner and language that they could understand, or they did not possess adequate knowledge responsibilities and privileges that are associated with that contract?

Further, how can a party to a contract be bound by it if they did not realise that they were entering into a contractual relationship with the other party, or that they do not understand how such a social contract exists or operates. For most Australian citizens just grow up with the fact that there is some almighty system of governance regulating their everyday life. What instrument can the Commonwealth of Australia produce to demonstrate that the man or woman being conferred citizenship understood exactly what it was that they were entering into. Basically, what we have at present is an invisible contract between the Commonwealth of Australia and the men and women that hold a social contract commonly referred to as nationality and citizenship with the vast majority of them not understanding this situation.

³⁰ Rachael Siewert, Senator, Open Letter to the Prime Minister, 9th February 2016

³¹ D. Wishart, Allegiance and Citizenship as Concepts in Constitutional Law

Consent makes Law

“Consensus facit legel- agreement makes law. The rule that parties to a contract are legally bound to perform the obligations they have undertaken.”³²

It is the consent to the social contract of citizenship that obliges the people who are conferred citizenship to “...pledge loyalty to Australia...uphold and obey the laws of Australia.”³³ The question that must be asked in relation to this theory is that, did the members of the numerous continuing pre-settler Indigenous Nations who consented to the rights and obligations do so with a full and complete understanding of the terms and conditions of the social contract in a language that they understand, and do they possess adequate knowledge of those responsibilities and privileges conferred with citizenship?

For if it can be shown that the members of the numerous continuing pre-settler Indigenous Nations did not understand the terms and conditions, and or, did not have adequate knowledge of the responsibilities and privileges of citizenship then the consent that was given may not have been sufficient to make the social contract binding and enforceable, or entered into by mistake, for *“consensus tollit errorem- mistake destroys consent.”³⁴*

Should they want Australian Nationality?

“Cuis est solum ejus est usque ad coelum, et ad inferos- whoever has the soil, also owns the heavens above and to the centre beneath.”³⁵

With the acknowledged “...ownership of land...”³⁶ of their respective territories, why would they want to forgo that to be a member of the unauthorized settler state within the boundaries of their own territory?

We, as Australian citizens, must want to make it as attractive as possible to encourage these people to participate in the life of the Commonwealth of Australia to be seen legally and politically in the international law arena through the Australian nationality. It is for our benefit as well as theirs, that the people of these numerous continuing pre-settler Indigenous Nations unite with the Commonwealth of Australia to settle the past and secure the future for their continuing pre-settler Indigenous Nation and the Commonwealth of Australia. The

³² LexisNexis Concise Australian Legal Dictionary 4th Edition

³³ Australian Citizenship Act 2007

³⁴ LexisNexis Concise Australian Legal Dictionary 4th Edition

³⁵ LexisNexis Concise Australian Legal Dictionary 4th Edition

³⁶ *Mundraby on behalf of the Combined Mandingalbay Yidinji- Gunggandji People v State of Queensland* [2012] FCA 1039

Commonwealth of Australia through such a unification process would be a world leader, and through giving a little, would gain so much. The Commonwealth of Australia would be a world leader.

What If?

We, as holders of Australian citizenship, must face the very real possibility that one of the continuing pre-settler Indigenous Nations ceding their sovereignty to another member state on the United Nations, how this play out can only be speculated on. As mentioned in the first submission, there is no guarantee that the continuing pre-settler Indigenous Nations is compelled to cede such sovereignty to the Commonwealth of Australia should they wish to do so. Further, there is no guarantee that these continuing pre-settler Indigenous Nations have to enter into a treaty with the Commonwealth of Australia. This can be remedied through the terms and conditions negotiated in the treaty process, guaranteeing that the Commonwealth of Australia would be granted the first right to accept or decline that cession of sovereignty and or territory.

Statelessness

“...except those unfortunates who fall through the gaps (such as refugees and stateless people)”³⁷

The members of the numerous pre-settler Indigenous Nations did not fall through the gap, they were actively excluded by the “White Australia” They were never Australians, never considered worthy of citizenship, they were pushed through the gaps, this is the history of the commonwealth of Australia.

“...the Minister must not decide...to revoke a person’s citizenship if...become a person who is not a national of any country”³⁸

The Minister cannot make any decision for the people who were excluded from the Commonwealth of Australia, these people are already stateless by exclusion. These people may appear to be stateless in the commonly recognized sense of international law, they are however, due to the exclusion not Australian nationals or Australian citizens, they are nationals of their own continuing pre-settler Indigenous Nation. Remember this Act and the associated Minister are created within the Commonwealth of Australia on the legal

³⁷ Citizenship and Nationality, <http://guides.naa.gov.au/citizenship/chapter1/citizenship-nationality.aspx>

³⁸ Australian Citizenship Act 2007

foundation created by the Australian Constitution, all of which originally excluded the members of the numerous pre-settler Indigenous Nations.

The members of the numerous continuing pre-settler Indigenous Nations have the right to a nationality, and by being excluded from the Commonwealth of Australia have the right to a nationality that is determined by their institutions in a similar fashion to what the member states of the United Nations do. The members of these numerous continuing pre-settler Indigenous Nations are in the true sense not stateless people, but nationals of a Nation that is being occupied by the Commonwealth of Australia.

By properly concluded treaties the members of these numerous continuing pre-settler Indigenous Nations can authorize the Commonwealth of Australia to represent them in the international arena as “Australian Nationals”

Conclusion

The unauthorized determination that members of the numerous continuing pre-settler Indigenous Nations, who are acknowledged as possessing an equal sovereignty to that of the Commonwealth of Australia in the same geographical location, is the core of the matter. The Commonwealth of Australia just assumed that it was the master, the superior law maker within the geographical location and that all people would be compelled to obey that authority, this is now shown not to be the case.

The Commonwealth of Australia through its initially flawed racially discriminatory “White Australia” policy is now impaled on the annals of history. With the initial exclusion it limited to whom it could assert its sovereignty, its authority and decision-making, its governance.

Until we as the holders of Australian citizenship agree to invite the members of those excluded continuing pre-settler Indigenous Nations to participate in the life of the Commonwealth of Australia, there can be no ability for them to hold Australian nationality without our consent. This is about positively changing the intention of the Australian Constitution and the Commonwealth of Australia reflecting our modern nonracist views and all Australians being conferred equality of citizenship.

Until there is a treaty in place designating that the Commonwealth of Australia is authorized to determine that the members of the numerous continuing pre-settler Indigenous Nations will be known internationally as “Australian Nationals”, we will forever be weakened by our racially discriminatory past.

We as the holders of Australian nationality and citizenship can keep blundering along trying to right the wrongs of the past within the Commonwealth of Australia, achieving little more than band-aid solutions, or we can develop the moral and legal fortitude to face our wrongs and correct the mistakes for all generations to come. The further the Commonwealth of Australia tries to remedy this foundational issue the deeper the division and disunity becomes.

The Commonwealth of Australia would be considered a world leader amongst its peers if it can unify the relationship between the numerous continuing pre-settler Indigenous Nations and the Commonwealth of Australia. Never again would the Commonwealth of Australia have to face the issue of the establishment of the Commonwealth of Australia upon and within the territories of the numerous continuing pre-settler Indigenous Nations.

The leadership of all political spectrums of the Commonwealth of Australia need to unite to make a statement to the Australian citizens explaining the situation. Do not treat the Australian citizens as fools, as this breeds contempt and dissention.

This is beyond politics, this is the Australian Nation maturing into an all-inclusive nation, one that is unified by consent and equality. Make the doorway for the members of the continuing pre-settler Indigenous Nations to enter and participate in the life of the Commonwealth of Australia.

Settle the past and secure the future.

Peter Wayne Fisher

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18th May 2018