LOOKING FOR THE 'HEART' OF THE NATIONAL POLITICAL COMMUNITY: REGULATING MEMBERSHIP IN AUSTRALIA

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When a community determines who can come into its territory, and who can later become full members, it reflects upon and reaches, in the words of United States academic Linda Bosniak, 'deep into the heart of the national political community, and profoundly affects the nature of relations among those residing within.'[1] Given Australia is fundamentally a nation of people who have at some point relatively recently been outsiders,[2] let in by those who have arrived ahead of them, there is a lot unresolved within the 'heart' of Australia.[3]

In this article, I draw from my work on Australian citizenship to argue that the phenomenon of offshore processing is part of an overall policy that forces outside of the community, and further from citizenship and membership, the 'alien'. It is a product of the Australian Constitution which defines who its members are, by who they are not. This is a consequence of a constitution that gives the Commonwealth immense power over 'aliens'—a power that reflects back upon those who are not aliens, and impacts upon the identity of all Australian citizens. Finally, it is a result of

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1 Linda Bosniak, 'Universal Citizenship and the Problem of Alienage' (2000) 94 *Northwestern University Law Review* 963, 966.

2 On Census night 2006, 4.4 million people (22 per cent of the population) were born overseas, and another 3.6 million were second-generation Australians—people whose parents were born overseas (18 per cent of the population). Together these figures represent a significant number of dual citizens by virtue of birth in another country or citizenship and by descent of another country.

3 Indeed, Indigenous Australians did not 'let in' those who arrived in Australia after them. Father Frank Brennan SJ, in a speech delivered at the University of Tasmania on 24 October 2002 recalled the following: 'Recently at Sydney airport, I met a young Palestinian asylum seeker who had been held in detention at Woomera for many months. I then had the privilege of introducing him to Geoff Clark, the (then) Chairman of ATSIC. Mr Clark observed, 'We have the same minister.' (At that time, it was the Department for Immigration and Multicultrual and Indigenous Affairs—DIMIA). Mr Clark went on to describe a recent conversation with the minister when he opined that any laws for detention of asylum seekers should be made retrospective because, and pointing at me, 'They're all boat people. They've been doing it for 200 years and now they think they own the place.' See <http://www.safecom.org.au/brennan2.htm.>.

a belief by those in power that the state has an absolute right to determine who comes into its borders.

What is perhaps most profound and dramatic in thinking about offshore processing, is that the nation is prepared to reduce its territorial self, and treat as outside, territory that is otherwise inside Australia, in order to keep out those who are others and outsiders as far as law can contain.

This article sets out the place of alienage in the Australian Constitution, concentrating first on the public law context for determining membership and placing the offshore program in that domestic framework. It then turns to some international law material on the significance of the concept of sovereignty in reflecting upon Australia's readiness to define itself, territorially, by whom it seeks to keep out. Concepts of sovereignty, relevant to both public and international law, involve foundational questions of membership, domestically and internationally. The offshore processing program, a device used to discourage those who seek membership of the Australian community, highlights that both public law and international law presently allow such a system to be in place. Moreover, the article argues that the questions and issues relevant to off shore applicants (those farthest from membership in a formal sense in Australia) are also relevant to those who have either lived in Australia all their lives but are not formal citizens, and indeed may also be relevant to Australian citizens who also hold another citizenship.

Citizenship and the Australian Constitution

The word citizenship does not appear in the Australian Constitution, aside from being mentioned in s 44(i), disqualifying those who are *citizens* of foreign countries from becoming members of the Australian Parliament. There is no head of power under s 51 of the Constitution identifying citizenship, despite much discussion in the Convention debates around the topic.[4] At the time of Federation, and up to the introduction of the *Nationality and Citizenship Act* of 1948, later to become the *Australian Citizenship Act* 'British subject' was the term for full membership in Australia. Indeed, Australians were both British subjects and Australian citizens until 1987 when the term British subject ceased to represent full membership and citizenship became the sole status.

The key head of power relied upon in legislating about citizenship is the 'naturalization and aliens' head of power.[5] Moreover, and quite importantly for Australia's mindset about citizenship and its links to immigration, the 'immigration and emigration' power in s 51 is not relied upon to the extent that the 'naturalization and aliens' head of power is, when it comes to

4 I have discussed this omission in 'Citizenship in the Constitutional Convention Debates: A Mere Legal Inference?' (1997) *Federal Law Review* 295, 316 and also in Kim Rubenstein, *Australian Citizenship Law in Context* (2002) chapter 2.

5 *Australian Constitution*, s 51(xix).

immigration legislation. This is largely because of the difficulties for the Commonwealth associated with determining the breadth of the immigration power—does someone who becomes 'absorbed' into the community still come within that power? Absorption and normative notions of membership have become irrelevant when determining full membership in Australia, as people who have lived most of their lives in Australia can constitutionally be deported under the aliens and naturalization power as they are aliens in the constitutional sense of the term. Aliens can be regulated, and indeed, the *Migration Act's* terminology of regulating 'non-citizens' revolves around the formal status that citizenship allows legislatures to control—'aliens' are central to both migration law and citizenship law.

This has given rise to most High Court cases dealing with the meaning of aliens—who Australians are not rather than the meaning of citizenship —who they are. The power to regulate non-citizens, and those caught by the off shore processing framework (who are no longer in the territory of Australia for the purposes of the *Migration Act*) when they arrive unlawfully on Australian territory (or arrive in specifically excised areas) is legislated within the 'aliens and naturalization power' of the Constitution.

The appropriateness of the breadth and extent to which the Commonwealth can regulate under this head of power perhaps is not of great concern to the average Australian thinking about it in the context of 'unlawful non-citizens', but one wonders whether the general community's response would be the same if the government used the power more aggressively in relation to those Australian citizens who are dual citizens and who, according to the High Court judgement in *Singh v Commonwealth*[6] are aliens given they hold another citizenship, or if the Commonwealth sought to be even more assertive in the context of citizens.

It is not clear whether the government can do whatever it likes with its citizens given citizenship is not strictly a constitutional concept. At the moment, the *Migration Act 1958* is an act that is directed to non-citizens, and by virtue of that fact, it does not extend to citizens—that is citizens can travel, presently, freely within and out of Australia. Indeed, one of the practical advantages of citizenship is that a citizen does not need a visa to enter Australia—although the citizen does need a passport to evidence the citizenship, and to that extent, the *Migration Act* does regulate citizens in that citizens are bound by the Act to identify themselves as such in order to enter without a visa.

But if the government sought to deny re-entry to Australians who have been abroad for a particular period—or citizens who associated with 'terrorists' overseas, what then? Some discussion about the breadth of the Commonwealth's power in this area was raised in argument in *Re MIMIA;*

6 (2004) 222 CLR 322.

Ex parte Ame (2005).[7] Before 1975, and indeed since Federation, Papua had been part of Australian territory and all Papuan-born individuals were British subjects and part of the Commonwealth of Australia since Federation and then became Australian citizens when the term came into force on 26 January 1949. But those Papuan-born Australian citizens were not entitled to free movement into their country of citizenship, mainland Australia; they were required to get permits to enter. It was part of Mr Ame's case that while this might have been so in practice, it was not constitutionally valid, as all citizens should have the capacity to enter their country of citizenship—without this right, what value is there to being a citizen?

The Commonwealth disagreed. When asked by the bench about the ability of the government to require its citizens to get a permit to enter Australia, the Solicitor-General was prepared to argue that a need for a permit need not only apply to citizens based in external territory:

> **MR BENNETT**: Yes, your Honour. [say] Parliament passed a law saying if an Australian citizen lives overseas for more than three years he or she needs an entry permit to return. That would be a valid law. Let me take that in stages. Certainly we could do that in relation to an Australian citizen born overseas of Australian parents. Such a person who comes to Australia comes as an immigrant. They may not be what would have been thought of as a settler by the founding fathers, but the concept to immigration encompasses that. The dictum in *Air Caledonie* was not a statement of constitutional principle but simply a statement of what the law in fact provided at the time, there being no prohibition, no requirement for a visa on an Australian citizen entering Australia, the Australian citizen has a right to do so. One has a right to do what is not prohibited and the Act merely prohibited people who were not Australian citizens coming without visas.
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> **KIRBY J**: We do not really have to resolve it in this case, but I really doubt that you could impose a duty on any Australian citizen to get a visa or something, some permission to get back into Australia because they are just not immigrants. They are not within the immigration power.
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> **MR BENNETT**: Your Honour, if one looks at the cases like *Potter v Minahan* and *Donohoe v Wong Sau*, the early cases, the test they adopt for whether it is immigration is whether one is returning to one's home. In defining that they specifically eschew, or Justice Isaacs specifically eschews in both cases, the relevance of nationality or domicile. In *Potter v Minahan* (1909)7 CLR 277 at 308, his Honour said this, and he cited it again in *Donohoe v Wong Sau* (1925) 36 CLR 404 at page 407:
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> > *The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.*
>
> Nationality and domicile are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate or decisive considerations.

7 <http://www.austlii.edu.au/au/other/HCATrans/2005/66.html>.

> **GUMMOW J:** He is talking in an era of British subjects, is he not, particularly, coloured British subjects.
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> **MR BENNETT:** Yes, in the context of that case, yes.
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> **GUMMOW J:** You might be able to win this case without enticing us into what seems to me rather dangerous waters. You will be advocating a system of internal passports next.[8]

Underlying the approach by the Commonwealth Solicitor-General is that citizenship, as a purely statutory concept, is subject to the whims of any parliament. This approach, and indeed, the approach of the Commonwealth in relation to anyone seeking to come into Australian territory by sending them off shore for processing, reflects upon basic notions of membership—it speaks to what Australia represents as a nation, constitutionally and morally.

The fact that off-shore processing is legally possible, revolves around a central constitutional starting point; the sovereign right of a state to determine its membership. This concept is understood as a principle accepted in both public and international law, and it is to the international that this article now turns.

Membership and International Law

International law is often quoted as standing for the principle that it is the sovereign right of a state to determine its membership. A foundational decision in the International Court of Justice of *Nottebohm*[9] did qualify that right, in terms of its international consequences. For a state to have its conferral of nationality recognised internationally 'the individual's genuine connection with the State' must be accepted. This involves 'a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.' This proviso deals with situations when a state claims someone as its national and it is disputed. The concern in this article is with the opposite, when the state denies nationality (which is the end point of membership after entry) to a person seeking entry.

It appears to have been almost universally accepted by the legislators, the judiciary, commentators, policy makers, and large sections of the public expressing support for the government's policy of offshore processing, that Australia's sovereignty as an independent nation provides a legitimate foundation for the government's emphasis on border protection and its right to excise its own territory, or treat its territory differentially depending upon who is arriving on it, and to send aliens to other shores.[10]

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8 Ibid.

9 *Liechtenstein v Guatemala* [1955] ICJ 4, 23.

10 See the language in both <http://www.immi.gov.au/media/fact-sheets/76offshore.htm> and <http://www.pm.gov.au/news/media_Releases/media_Release1988.html>.

The judges in the Tampa cases[11] in the Federal Court refer to Australia's sovereignty in discussing the legality of the government's actions. Where does the sovereign's right to exclude emanate from and is it as absolute as everyone seems to agree?

Professor James Nafziger has sought to challenge this presumption on several grounds in his article 'The General Admission of Aliens under International law'.[12] He points out that the jurisprudential writing relied upon to support this approach actually requires legitimate reasons for exclusion in individual cases, such as necessity or self preservation.[13] Examples may include public safety, security, public welfare or a threat to essential institutions. None of those specific matters has been raised in the context of offshore processing, although since the September 11 terrorist attacks in the United States, politically, the language of sovereignty has incorporated assumptions about security and public safety and threats to our civilised society.

Nafziger, more importantly, argues that judicial opinions often misinterpret authority, contradict contemporaneous statements of opinion, and rest on questionable, presumptions. Moreover, I am persuaded by his argument that 'the international significance of migration and the interdependence of states lends support to the argument that the general admission of aliens should *not* be regarded as an untrammeled discretionary power within the exclusive domestic jurisdiction of states.'[14] Just as I have expressed a concern above the fact that citizenship (and the statutory rights that go with it) appear to be within the wide discretionary power of the state (i.e. not constitutionally entrenched), the same concern applies to the wide discretion regulating those seeking entry and membership—particularly when the power is expressed through the capacity to excise territory for the purpose of doing so. These issues of power and sovereignty and the links between the public and international frameworks can be further analysed in connection with the Tampa matter.

Sovereignty in *VCCL v MIEA* and *Ruddock v Vadarlis*, the MV *Tampa* Case[15]

North J in *VCCL v MIEA* refers to the High Court decision of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (Lim)*[16] in considering the Commonwealth's power to exclude. In determining that

11 *VCCL v MIEA* [2001] FCA 1297, (2001) 182 ALR 617 and *Ruddock v Vadarlis* (2001) 110 FCR 491, The MV *Tampa* Case.
12 (1983) 77 *American Journal of International Law* 804–47.
13 Ibid, 804.
14 Ibid, 805, my emphasis.
15 The material in this section is largely drawn from my earlier article, Kim Rubenstein, 'Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community' (2002) 13 *Public Law Review* 102, 110.
16 (1992) 176 CLR 1.

the *Migration Act 1958* (Cth) was intended to regulate the whole area of removal of aliens he cites the passage in *Lim* referring to Lord Atkinson in *Attorney-General (Canada) v Cain and Gilhula*:

> The power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in *Attorney-General (Canada) v Cain and Gilhula:*
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> *One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel,* Law of Nations, *book 1, s. 231; book 2, s.125.*[17]

This citation is also used by Beaumont J in the full Federal Court decision[18] in finding the asylum seekers had no legal right at common law to enter Australia and that there was no foundation for the prerogative writ of habeas corpus compelling entry into Australia. Moreover, he was of the view that 'there is nothing in any of the authorities to contradict the principle that an alien has no common law right to enter Australia.'[19] For that reason alone he stated he would allow the appeal.

Vattel's *Law of Nations*[20] is often referred to in judicial pronouncements in this area. Nafziger persuasively argues, however, that Vattel's *Law of Nations* has been selectively used and, in fact, there are other parts of his treatise that compel the opposite conclusion. He explains:

> Vattel distinguished the internal law of nations, rooted in natural law, from the external law, rooted in what today one might call positivism. Internal law establishes sovereign duties as a matter of conscience and principle, whereas external law establishes sovereign rights as a matter of will.[21]

It is Vattel's external law that is repeatedly cited in these authorities and his internal law has been ignored. Again, Nafziger argues that Vattel's 'right "of fugitives or exiles" is particularly illuminating as an exception to sovereign prerogatives under his concept of positive external law'.[22] Moreover, he 'took sovereign duties as well as rights seriously. Even if the sovereign theoretically has the right, or 'inherent power' in modern terminology to exclude aliens absolutely, [the sovereign] cannot

17 North J [119], citing Lim [29–31].
18 (2001) 110 FCR 491.
19 Ibid [125].
20 Le droit des gens, ou, Principles de la loi naturelle / appliques a la conduite et aux affaires des nations et des souverains par m. de Vattel, with an introduction by Albert de Lapradelle; (Washington, DC: Carnegie Institution of Washington, 1916) Title of v.3 is in English: The law of nations, or, The principles of natural law: applied to the conduct and to the affairs of nations and of sovereigns, v.3, translation of the edition of 1758 by Charles G Fenwick, with an introduction by Albert de Lapradelle.
21 Nafziger, above n, 812.
22 Ibid, 813.

do so in some instances because of [the] qualified duty to admit some foreigners.'[23]

Black CJ in *Ruddock v Vadarlis* in minority was conscious of the limitations on the executive in exercising the prerogative power to exclude aliens: He analysed the juristic writings in the latter part of the nineteenth and twentieth centuries including those of Sir William Holdsworth:

> *During the greater part of the eighteenth century, there appear to be very few instances in which the Crown used its prerogative to exclude or to expel aliens; and when, at the end of the century, it was thought desirable to exclude aliens, statutory powers were [enacted] ... These statutes were passed to exclude aliens who, it was though[t], might spread in England the ideas of the French Revolution. They were therefore opposed by the new Whigs who sympathized with these ideas. In 1816 Romilly, Mackintosh, and Denman denied that the Crown had the wide prerogative attributed to it by Eldon and Ellenborough; the same thesis was maintained in 1825 in a learned article in the* Edinburgh Review*; and in 1890 it was supported by Mr. Craies.* [citations omitted]
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> — Sir William Holdsworth, *A History of English Law*, Vol. X, Sweet and Maxwell, (1938) at 396–97.[24]

Moreover, Black CJ concluded that:

> The preponderance of opinion by the text writers supports the view that, by the end of the nineteenth century, in English jurisprudence, the power to exclude aliens in times of peace was not considered to be part of the prerogative.[25]

In contrast, French J concentrated on the sovereign power to exclude.

> The power to determine who may come into Australia is so central to its sovereignty that it is not to be supposed that the Government of the nation would lack under the power conferred upon it directly by the Constitution, the ability to prevent people not part of the Australian community, from entering.[26]

French J's statement emphasises the fundamental link between the first part of this article and the second, both in terms of thinking about citizenship, which is at the inner level of membership decisions, and entry to Australia which is the outer point of the decision-making process of membership; both come back to the way sovereignty is proclaimed.

Is sovereignty really so central? And should the power be absolute? Surely there are legitimate restrictions on the Government in exercising any power? Those restrictions could well be based on more inclusive understandings of membership.

Nafziger's concern in challenging the theory itself is motivated by the fact that the proposition of the state's right to exclude aliens has been instrumental 'in shaping exclusionary provisions of municipal law

23 Ibid, 814.
24 Black CJ [22].
25 Ibid.
26 French J [193].

and policy'.[27] It is foundational to offshore processing. He argues that international law should articulate a 'qualified duty of states to admit aliens'[28] and that a state may legitimately exclude aliens only if, individually or collectively, they pose serious danger to its public safety, security, general welfare or essential institutions. While admitting that it needs refining, the philosophical basis is one of inclusion over exclusion. The refinements for instance could involve a requirement that applications for refugee status deserve a hearing onshore unless there is a serious, real risk to the community.

Conclusion

Using the framework of constitutional law in the domestic public setting, and challenging the traditional approach to sovereignty in international law, this article has sought to highlight that the powers exercised by the Commonwealth, in sending offshore those who seek unlawfully to arrive or land in Australian territory, reflect a framework where legal protection of membership of Australia is precarious. This might not yet impact upon the hearts of the average person in the street, but it no doubt would raise more concern if it went beyond those who are presently sent away. Those caught currently by offshore processing are seen as being legitimately outside of the community, far from citizenship and membership; aliens both legally and morally. Yet, they are much closer in legal terms to those who have lived their whole lives in Australia as non-citizens than they realise. Moreover, the current position in Australian law is that anyone who holds citizenship of another country is an alien in legal terms. This means that formally, Australian citizens who are also citizens of another country are aliens. Constitutionally, what would prevent a government, determined to send offshore, to excised territory, any alien, not just those who have arrived unlawfully?

The offshore processing of refugee applicants reflects back upon Australia as a community in law and policy. In pushing offshore people who have arrived on territory that is in all other respects Australian, it makes the domestic 'international'. This is a device of sovereignty relevant to both the domestic and international frameworks in place due to a constitution that failed to define membership and still fails to find an answer, both in moral and legal terms to the boundaries of membership. In defining Australians by the concept of the other, 'outsider' it speaks against a more inclusive, humanitarian approach to membership. This works against the nation if one is interested in a nation with a more compassionate heart.

27 Nafziger, above n 22, 845.
28 Ibid.