CHAPTER 1

Introduction

Citizenship defines the membership of a common society and the rights and duties of that society's members. 'Citizenship' is usually used for 'membership' in a state society where there is a strong emphasis on individual rights as a result of the development of commoditisation and the economy. Throughout this book the word 'citizenship' is sometimes used in the looser sense of full membership in any society.

For most of Australia's colonial history the great majority of Aboriginal people and Torres Strait Islanders have been denied full membership of Australian society and consequently the rights and equal treatment that other Australians take for granted. Further, the settler society has, since the earliest decades of colonisation, ignored the existence in Australia of indigenous societies or social orders,[1] which have provided, and continue to provide, the first locus of social membership and identity for most Aboriginal people. The fact that, after a long hard struggle, indigenous people finally secured full formal equal rights within the encapsulating settler society in the 1960s, gaining access to the same set of citizenship rights as non-indigenous Australians, was a vital step, but the question of the recognition of membership in their own indigenous social orders remains unaddressed.

The failure of the colonists to recognise, at the outset of colonisation, the rights of the people who were here first has left not only a moral and legal taint on the nation's title to the country but also many unanswered questions about the articulation of settler and indigenous societies. Among these questions are: how is it possible for people from different cultural and historical backgrounds to be members of a common society on equal terms? What is a fair and equitable relationship between indigenous Australians and non-indigenous Australians? How much difference in rights between citizens can (or will) other citizens tolerate?

And, if indigenous citizens have distinctive rights, what will hold the Australian nation and society together?

These questions, which are being faced because of the persistence of indigenous social orders, are now unavoidable in Australia, because of the Mabo and Wik judgments, trends in international law, the growing demand by indigenous people for the right to self-determination internationally, and the process of globalisation itself. The questions raise broad theoretical issues related to notions of justice, equality, equity, difference and fairness, and the changing relationship between nation and state, all of which find expression within the idea of citizenship. The questions also raise issues that are emotive and contentious in everyday political life, particularly where they are seen to confer advantage and to be dependent on redistribution by the state. How do equal rights, indigenous rights, compensation and restoration fit together in the context of Australian political life, mateship, the 'fair go' and a growing emphasis on economic rationalism and the market?

The liberal democratic principles on which Australian citizenship is based may seem to be challenged by demands for recognition of the existence of indigenous social orders through an additional set of distinctive indigenous rights – broadly called self-determination. Under those principles both equity and equality may seem to be formally achieved when every citizen is treated in the same way and has the same rights. For indigenous Australians to have additional rights, where they are not special rights to facilitate catching up to other citizens, may seem to fly in the face of the fundamental principles of citizenship. Yet, over the last twenty-five years, and particularly following the High Court Mabo decision in June 1992, indigenous Australians have already been successful in having some such distinctive rights recognised by the state, and the same process is going on elsewhere in the world.

The history of modern citizenship in western societies is a history of social and political struggle arising out of class relations in state formations. T H Marshall's analysis of modern citizenship distinguished three components – civil rights, political rights and social rights – which emerged sequentially with the development of capitalism.[2] Given the impact of commoditisation and the growth of the market-place it became essential for property rights to be formalised and protected by law so that trade and the economy could expand. By the eighteenth century these pressures had given rise to formal civil rights, which covered not only property rights and the rights of contract (both integral to the market-place), but freedoms of speech, religious practice and assembly. These freedoms prevent the state interfering in people's everyday lives.[3]

Political rights were granted by the British elites in response to demands by the emergent working class political movements of the

nineteenth century, in what might be broadly seen as a containment strategy.[4] These rights were granted to adult males in the middle of the century and only extended to women early in the twentieth century.

Social rights finally started to emerge in the twentieth century. Marshall argues that these were largely to reduce class conflict further; but war, with its full employment, need for national solidarity and the common purpose resulting from external threat, also played a part (although, as Barbalet argues, its contribution can be over drawn).[5] While social rights emerged well before the welfare state, they received their maximum expression during its flowering after World War II. Social rights differ from civil and political rights in that they are provided by the state to ensure that people achieve a minimum standard of living.[6]

These ideas about citizenship developed in the heyday of nationalism, when state and nation were closely identified and were under the influence of liberal political theory, with its concern for formal political and legal equality. But now, at the end of the twentieth century, there is a decline in the identity of state and nation. World-wide those who feel that existing states and current concepts of citizenship have a cultural and gender bias are starting to demand the recognition of differences and to test the extent to which such differences can be accommodated within the liberal democratic framework.[7] The strongest challenge comes from those first-citizens, first nations or national minorities, as they are variously called, in settler societies. Their loyalty is usually primarily to their own communities, which often, but by no means always, have quite distinct cultural and social practices; and only secondarily to the encapsulating settler society.

In this introduction we examine the ways in which ideas about the citizenship status of indigenous Australians have been shaped and reshaped over the last two centuries and the influences likely to shape and reshape them in the coming decades. These changing ideas have been institutionalised in ordinances, state and federal legislation, the Constitution and the many rules, regulations and structures that have affected and still do affect the treatment of different classes of citizens, whether they be war veterans, elderly members of the armed forces, women, children or indigenous people.

Central to this history is an attitude of ambivalence and inconsistency towards formally incorporating Aboriginal people into a common Australian society and a failure by the settler society to come to grips with the persistence of indigenous identities and social orders.

The first part of this book (chapters 2 and 3) considers historical conceptions of indigenous people's civil rights; the second part (chapters 4 to 8) examines issues arising out of the more recent struggle to achieve equal rights; the third part (chapters 9 to 12) considers issues relating to

the recognition of indigenous rights, and emerging possibilities for the development of multicultural citizenship.

Becoming colonial subjects, 1788–c1836

It took nearly fifty years from first settlement for the settler state to fully encompass Aboriginal people as colonial subjects. The main reason for this was that, in the early days of the colony, the area occupied by Europeans was quite circumscribed and Aboriginal people were able to continue a fully independent life, appearing and disappearing at will. Indeed settlers had no direct contact with Aboriginal people outside the Port Jackson area for the first three years.[8] Aboriginal people clearly had their own autonomous way of life, as well as radically different social and cultural practices barely glimpsed by the Europeans, and they were beyond the fledgling colony's control. It is not surprising, therefore, that there was an initial acceptance by the settlers of the separate existence of indigenous societies. However, Aboriginal people were soon treated inconsistently as this acceptance began to falter.

In the early days of colonial settlement, official correspondence frequently drew a distinction between British subjects and 'Natives', treating the two groups differently and separately. However, as interaction between the groups increased, Aboriginal people came to be treated as if they were British subjects for some purposes. In a Governor's proclamation of 1802, for example, British subjects were forbidden to commit:

> any act of injustice or wanton Cruelty towards the Natives, on pain of being dealt with in the same manner as if such act of Injustice or wanton Cruelty should be committed against the Persons and Estates of any of His Majesty's Subjects.[9]

As the victims of settlers' crimes, then, indigenous Australians were to be treated as the equals of British subjects, without actually being British subjects, in order to allow the Governor some semblance of control over actual British subjects. As the perpetrators of crimes – or rather what the settlers saw as crimes – they were treated somewhat differently. This same Governor's proclamation went on to state that, while settlers were not to 'suffer' their 'property to be invaded' or their 'existence endangered', they should observe 'a great degree of forbearance and plain dealing with the Natives' as this offered the 'only means ... to avoid future attacks'.[10] Natives, then, were not to be dealt with under the law applying to British subjects, but rather were to be treated as external third parties, for this purpose.

The official tolerance of this initial period lasted until May 1816, when Aboriginal ways for settling disputes among themselves, which often involved much loss of blood, were prohibited on the grounds that they were a 'barbarous custom repugnant to British Laws, and strongly militating against the Civilization of the Natives which is an Object of the highest Importance to effect'.[11] Yet, despite this, the New South Wales Supreme Court, established in 1823, continued to decline to hear charges involving only Aboriginal people. It was not until 1836, in the case of R v. Jack Congo Murrell, that an authoritative statement was made by the court that there was no difference between an offence committed by an Aboriginal person on a European and one committed on another Aboriginal person.[12] This case is sometimes cited as marking the end of 'legal pluralism' in Australia,[13] or as the end of British settler recognition of distinct and separate status for indigenous peoples. However, as Reynolds has recently pointed out, some of Australia's supreme court judges continued to ponder the question of whether it was in fact within their jurisdiction to hear cases of crimes alleged to have been 'committed by Natives against other Natives' well into the 1840s.[14]

The racialised attitudes that permeated the thinking of the vast majority of the members of colonial society, allied with economic self-interest, made it easy and convenient for them to overlook the shared status of colonial subject or even the shared humanity of Aboriginal people. The difference was constructed as dramatic inferiority, and their social practices as barbaric, releasing those at the frontier from the normal moral constraints on behaviour towards other human beings.

The section of the population that was broadly committed to a notion of common humanity were the missionaries.[15] But even in their eyes a recovery of the equal relations implied by recognising the humanity of Aboriginal people was only possible if these people acquired the cultural and social competencies of the colonisers and if difference was erased. In effect, assimilation has long been the principal term on which Aboriginal people could redeem themselves and become citizens of the settler society.

Significantly, as early as 1815 the government set about making this assimilation possible with the establishment of the Native Institution at Parramatta. This institution, which was founded by a former member of the London Missionary Society, was for children between the ages of four and seven who, like their predecessors at the turn of the century, were mostly taken from their parents without consent.[16]

Thus, during the first half of the nineteenth century, there was a tendency for the settlers gradually to discount, ignore or simply forget the membership of indigenous people in their own societies and to regard them instead as just another group of colonial subjects.[17]

Exclusion and the loss of rights as colonial subjects, c1836–1901

The history of the extension of settlement, of the process of Aboriginal dispossession, of the marginalisation and of the ensuing social relations established between Aboriginal people and the colonisers is enormously varied and complex. However, during the second half of the century, as the colonies became self-governing and the influence of the Colonial Office and others in London declined, Aboriginal people were increasingly set apart, legally and physically, as a distinct class of colonial subjects. Where legislation was introduced it tended to reduce Aboriginal people's rights as colonial subjects – such as limiting their access to firearms (New South Wales 1840), restricting their access to alcohol (Victoria 1862) or prohibiting them from doing particular jobs (Queensland 1867).[18] Much of the early exclusion was done by regulation, administrative practice or piecemeal legislation. Towards the end of the nineteenth century, however, all-encompassing legislation in the form of various Aboriginal protection acts was being introduced.

In Chapter 2, on settler construction of indigenous identities in nineteenth century New South Wales, Marilyn Wood captures many of these changes from the later eighteenth to the late nineteenth centuries. She argues that there was an early period of 'relatively fluid' relations and 'indigenous autonomy' during which some settlers, like Watkin Tench, did try to learn about and, to some extent accommodate, indigenous ways. However, relations soon deteriorated as an ever wider area was settled and the executive government began to lose control of violent exchanges between the races. The indigenous people's rights to continued occupation of their lands became conceptually invalidated by the settlers, through their increasing adoption of the doctrine of *terra nullius*, and the autonomy of the indigenous social systems was rapidly undermined.

The new marginal status of indigenous people in relation to the settler society could be seen, Wood argues, in naming practices and birth and death registration procedures. While Aboriginal people were encouraged to (and did willingly) adopt some European naming practices, these often implied illegitimacy and low social status. Birth registration was also not fully open to Aboriginal people, first because it was the province of the church and later, once civil registration was established, through bureaucratic neglect and failure to adopt a consistent and inclusive approach. One effect of the exclusion of Aboriginal people from the registration procedures was, Wood argues, to support the proposition that they were a disappearing race. Yet some indigenous people, particularly those of lighter appearance, were being conditionally included in these official settler records, either with or without a

'distinguishing comment' which marked them as 'different'. This complex of bureaucratic practices reflected, Wood argues, a wider social belief that conspicuously Aboriginal people could not be accepted into the wider community. The few who were included 'passed' as Anglo-Celts and were divided off from the many who were excluded. Either social difference was erased or the bearers of it were excluded. There was no acceptance of indigenous difference as an element of colonial citizenship.

Significantly, during the latter half of the nineteenth century some Aboriginal people did, in theory, have the political rights of citizenship. In Victoria, New South Wales, South Australia and Tasmania, Aboriginal men were allowed to vote, although in Queensland, and Western Australia after it gained colonial self-government in 1890, they were not able to do so unless they were freeholders.[19]

The formal citizenship status ascribed to Aboriginal people in the late nineteenth century is a difficult terminological issue. Chesterman and Galligan use the phrase 'citizens without rights', although it has been conventionally held that Aboriginal people were simply not citizens during this period.[20] Certainly Aboriginal people were not full and equal members of the colonial societies. An alternative is to describe Aboriginal people in this period as having been subjects but not citizens of the colonial societies. Yet this terminology, too, has its problems, since the term 'subject' was formally used to describe the full members of these colonial societies: the settler British subjects. So the term 'subjects' is clear only if it is understood that they were *indigenous* subjects with a highly restricted set of rights in comparison with those of other citizen subjects.

Federation and the development of a Commonwealth approach

The federation debates in Australia in the 1890s were primarily concerned with developing the institutions of the proposed Commonwealth government and specifying the new government's relationships with the existing governments of the colonies, which were to become the States. A move for the Commonwealth Constitution to include a positive statement of citizens' rights was defeated fairly early on in the debates and reference to Aboriginal people was minimal. As a result, the Commonwealth Constitution of 1901 had only two minor exclusionary references to Aboriginal people, which were to be the focus of the 1967 referendum, and no references at all to citizens or citizenship.

The references to Aboriginal people were at section 51(xxvi) and section 127. Section 51 listed the powers of the Commonwealth and, at subsection xxvi, included a power with respect to: 'The people of any

race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.' The federation debates suggested that the concern of this subsection was to give the Commonwealth a power to deal with matters such as the bringing to (and presence in) Australia of indentured labourers of particular races – a nineteenth century practice that was significantly contested at the time of federation.[21] Subsection xxvi was, as such, seen to be an adjunct to and reinforcement of the Commonwealth's 'immigration and emigration' power at subsection xxvii and was not intended to apply to Aboriginal people.

The second reference to Aboriginal people was at section 127 and stated that: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.' Though this sounds exclusionary and draconian, its purpose, as revealed in the federation debates, was not so entirely unreasonable. The issue at stake related to how the surplus finances of the new Commonwealth government would be divided between the States. Division was proposed to be in proportion to population, and section 127 was seen as adjunct to such division, ensuring that States with larger Aboriginal populations but few financial commitments to them did not benefit financially.[22]

Underlying these sparse references to Aboriginal people in the Constitution was a clear assumption that dealing with Aboriginal people was to be primarily left to the States. The Commonwealth might need to legislate with respect to Aboriginal people for the purposes of its own powers but dealing with them would not specifically be one of those powers. The lack of any reference to citizens or citizenship in the Constitution can be similarly understood. The people of the Commonwealth were designated in the Constitution simply as 'subjects', without specified rights or obligations, and it was left to the Commonwealth and the States, within their respective spheres of jurisdiction, to enunciate their rights and obligations through normal legislation.

The Commonwealth's approach to the rights and obligations of indigenous Australians soon became evident. In 1902, after some heated debate, the Commonwealth passed a Franchise Act which replicated the Queensland and Western Australian approaches of excluding Aboriginal people from the right to vote. This set the pattern for Commonwealth legislation for many years to come, despite some continuing opposition. The term 'aboriginal native' quickly became a standard exclusionary reference in many pieces of Commonwealth legislation establishing both rights and obligations for Australian people. The 1908 Invalid and Old Age Pensions Act excluded 'aboriginal natives' from qualifying for its benefits – as, too, did the 1912 Maternity Allowance Act, to name just two of the more important pieces of Commonwealth legislation. Indeed it

was not just 'aboriginal natives' of Australia who were often excluded from the rights and obligations created by Commonwealth legislation, but also 'aboriginal natives' of Asia, Africa and the Islands of the Pacific.[23]

These exclusionary references to Aboriginal people in early Commonwealth legislation were not always consistently expressed. The Defence Act of 1909 and 1910, for example, adopted a converse terminology, exempting from an obligation to undertake military training and active service those 'not substantially of European origin or descent'.

Commonwealth and State approaches fed on and reinforced each other, and this process of elaboration and reinforcement continued well into the twentieth century. In 1911, for example, when the Commonwealth took over the Northern Territory from South Australia, it incorporated South Australia's existing Aboriginal legislation into its new Northern Territory ordinance governing Aboriginal people. When rewritten by the Commonwealth in 1918, the new Northern Territory Aboriginals Ordinance still maintained a vast array of restrictive rules applying only to Aboriginal people. Under the new ordinance:

> The Northern Territory Chief Protector of Aborigines was vested with all the powers held by Chief Protectors in other jurisdictions. He had the power to provide for the custody and education of Aboriginal children, over whom he was the legal guardian, and he could force Aborigines not 'lawfully employed' to reside on reserves [...] Female Aborigines could not marry non-Aborigines without special permission, and it was an offence for a non-Aboriginal to have 'carnal knowledge' of a female Aboriginal.[24]

Across the continent State Aboriginal protection agencies were generally applying more severe restrictions to Aboriginal people during these early years of the twentieth century and in 1904 the Torres Strait Islanders were brought under the Queensland State legislation.[25] The result was that, by the time of World War I, indigenous people had suffered a loss of rights in settler society that was legally entrenched at State, Territory and federal levels.

Struggling for equal rights as Commonwealth and State citizens, c1914–c1970

Reaction against these growing regimes of exclusion and restriction of Aboriginal and Torres Strait Island people was always evident. In Western Australia, William Harris protested consistently about the lack and loss of rights around the turn of the century.[26] Another form of opposition, which became evident during World War I, was that some Aboriginal men tried to camouflage their Aboriginality in order to enlist for military service. Other Aboriginal men protested more openly about their lack of

a right to fight and in 1917, when the need for reinforcements was growing, the provisions of the Defence Act, which barred those 'not substantially of European origin or descent', were reinterpreted so as to allow 'half-castes' to be accepted into the defence forces. As a result over three hundred men of Aboriginal descent served in the war on an equal footing with other soldiers.[27] Their motivations for enlisting were obviously complex but crucial among these must have been the desire to demonstrate their equality, the pay and the expectation that wartime service would give them full citizenship rights.[28] Yet, on their return, they were re-confronted with all the racial ambiguities of their status.[29] Some successfully applied for exemption from their State Aboriginal acts so that they had the rights of other citizens, but the cost was a prohibition on association with their Aboriginal relatives.

Because some Aboriginal men who served did receive 'exemption certificates' from the various State Aboriginal protection regimes, on their return some received Commonwealth repatriation and social security benefits but they were only a tiny handful, and only one Aboriginal soldier is known to have received a soldier-settlement block of land.[30]

As a result of the wartime experience the first formal attempts initiated by Aboriginal people to recover citizenship rights materialised with Frederick Maynard's establishment of the Australian Aboriginal Progressive Association at the end of 1923.[31] Maynard's immediate demands were for freehold land for farming and for the cessation of the removal of children from their families.

In the 1930s a prominent Aboriginal campaigner was William Cooper, of the Melbourne-based Australian Aborigines League, who had lost a son to World War I.[32] Cooper was a major force behind the 'Day of Mourning' conference which Aboriginal activists Jack Patten and William Ferguson organised expressly for Aboriginal people on 26 January 1938, to mark 'the 150th Anniversary of the Whiteman's seizure of our country', and which passed a resolution calling for 'a new policy which will raise our people to full citizen status and equality within the community'.[33]

In Chapter 3 of this book Geoff Gray examines the call for a new policy in the 1930s from a quite different perspective: that of A P Elkin, Professor of Anthropology at the University of Sydney from 1934, ordained Anglican priest and influential advisor to governments of the time. Elkin was campaigning strongly for 'full citizenship' for Aborigines by the late 1930s but, Gray argues, his conception of citizenship was quite different from that of the Aboriginal activists. Whereas the Aboriginal activists demanded unconditional recognition of Aboriginal citizenship rights, Elkin had a more conditional view. Elkin's citizenship was to be