Constitutional Law • Human rights • Judiciary

The High Court and Respect for Australian South Sea Islanders

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> '*it is imperative…that the common law should neither be nor be seen to be frozen in an age of racial discrimination*'
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> Justice Brennan, *Mabo v Queensland [No 2]* (1992)

Participants in the Black Lives Matter rallies in Australia last year called for a statue to commemorate civil rights activist Faith Bandler (1918-2015), face of the 1967 referendum on Indigenous Australians. Bandler's father was among 50,000 men, women and children ruthlessly recruited or 'blackbirded' from South Pacific Islands between 1863 and 1904 to work like slaves in Queensland under three-year contracts, mainly in the burgeoning sugar industry. South Sea Islanders were not compelled to return and a large proportion opted to stay, entering new agreements, marrying and having families. By 1901, they formed a permanently settled community in Australia. Historian Clive Moore says Bandler 'was one of the 10 greatest Australians of the 20th century…A statue of Faith in a sensible place would be important to South Sea Islanders'.

As well as gestures like statues, Australia should take other measures to acknowledge its past mistreatment of the South Sea Islander community. One important step would be for the High Court to engage substantively with the judicial precedent emanating from White Australia-era cases and laws that made possible the great suffering of Islanders. We question whether jurisprudence that we regard as unquestionably tainted by the racialised socio-legal context in which it emerged should still be cited by the Court today to uphold the constitutional validity of sweeping powers of deportation and exclusion. We argue that the failure of members of the judiciary to substantively engage with this unedifying jurisprudence means not only that aliens and migration law in Australia will remain entwined with this racialised history, but will perpetuate it.

In this piece we look at two examples of White Australia discrimination and prejudice still affecting rights today. Both originate in the vehement opposition to 'black labour' at the time of Federation.

In the first example, we argue that the 1906 High Court case *Robtelmes v Brenan*, which endorsed the expulsion of thousands of Australian South Sea Islanders under the 'aliens' power in s 51(xix) of the *Constitution*, should now be overruled – and that the expansive view that the legislative power over legal 'aliens' is effectively unlimited, for which the case continues to be cited, should be re-visited. A 2016 AUSPUBLAW blog post and a 2018 article set out the flawed nature of the *Robtelmes* decision. In 2020 the racial injustice underpinning the case was finally acknowledged in the High Court. In the landmark Aboriginal belonging case, *Love & Thoms*, Edelman J said it had been 'persuasively argued' that *Robtelmes* 'implicitly applied criteria based upon racial perceptions' (at [415]). Justice Edelman was saying that his predecessors made their decision based on race not law. That is important and strong criticism from a sitting High Court judge.

In the second example, in the same year as the High Court's decision in *Robtelmes*, Australia eagerly accepted the transfer from Great Britain of the colony of British New Guinea, re-named Papua. As Adelaide's *Register*said, 'the new nation does not seek to raise the Papuans to the rank of Australians...on account of their dark pigmented skins they will be regarded as aliens and not be permitted even to visit it'. Second class citizens in their own territory, Papuans could be issued with Australian birth certificates and passports, but they were prohibited from travelling to the Australian mainland for the 70 years Papua was an Australian territory. As recently as 2005, Australia's High Court used this history of racial exclusion to justify stripping citizenship rights from Papuans born as Australians before Papua New Guinean Independence in 1975. As we will see, it continues to be used today to deprive long term Australian residents of these rights.

Robtelmes v Brenan and expulsion of the 'Alien' South Sea Islanders

Robtelmes was a test case instigated by the Commonwealth following protests from missionaries and humanitarian groups, as well as South Sea Islanders themselves – who petitioned King Edward VII – arguing that inhabitants lawfully in Australia who had committed no offence could not be forcibly deported. But the High Court disagreed, declaring Australian Islanders to be ‘indisputably alien’ for the purpose of the *Pacific Island Labourers Act 1901* (Cth), endorsing their forced removal from their homes in Queensland and northern NSW.

As Edelman J suggests, the expulsion was not only inhumane but also unlawful, with the High Court judges (Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O’Connor) ignoring established nationality law and incorrectly labelling all South Sea Islanders as ‘alien’ on the basis of race. As the first Federal census showed (Statistician’s Report 227-8), two-thirds of the South Sea Islander community in Australia were not ‘aliens’ under the law but ‘British subjects’ and therefore beyond the scope of the Commonwealth’s legislative power over ‘aliens’ in the *Constitution*.

Historians recognise that the expulsion of the entire community of Australian Islanders was a central part of the White Australia policy. The context for the case and its human effects are important. As Professor Moore says, this was ‘one of the cruellest pieces of legislation we had. There is no other ethnic or racial group in Australia where there was specific legislation to deport them’. Leading South Sea Islander spokesperson Emelda Davis says the expulsion was:

> Australia’s most inhumane mass deportation abuse...It was an act of ethnic cleansing. More than 7,000 South Sea Islander descendants and their families were torn apart…The majority of our people were deported, never to return.

As Frank Brennan and Francesca Dominello explain in the *Oxford Companion to the High Court of Australia*, if racial attitudes on the part of the High Court at this time ‘seem inhospitable…it is partly because the Justices themselves were committed to the White Australia Policy that all Australian governments had maintained since the late nineteenth century’. Barton (as Australia’s first Prime Minister) and O’Connor (as Leader of the Government in the Senate) presented the Pacific Island Labourers Bill providing for expulsion of the Islander community to the new Federal Parliament. Together with the *Immigration Restriction Act 1901* (Cth), Barton described the Bill as ‘a handsome gift for a new nation’. Introducing the Bill, Barton highlighted Griffith’s support as Premier of Queensland for abolition of

Islander labour. A driving force of Griffith's political life had indeed been removal of Islander labour from Queensland. In *Robtelmes*, Griffith returned to - and asserted the validity of - the path that he and the colonial government of Queensland had followed for over two decades.

If Barton and O'Connor's ownership of the new federal law and the longstanding support of Griffith for the policy behind it was not seen as invalidating their endorsement of the legislation at the time, it should attract scepticism and scrutiny now. Yet, despite continued citation of *Robtelmes* by the High Court in the modern era, the idea that the political interest of the three judges in the matter may have compromised their judicial responsibility to impartially scrutinise government legislation has never been raised.

Robtelmes is still cited as a foundational precedent affirming the Commonwealth's sweeping lawmaking power over 'aliens' under the *Constitution*, including in such prominent recent cases as *Lim* (1992), *Tampa* (2001), *Al-Kateb* (2004) and by counsel for the Commonwealth in the Indefinite Detention case ((2013) 251 CLR 322 at 330). Most recently, in *Love & Thoms*, *Robtelmes* was cited by Kiefel CJ (at [6]), Bell J ([74]), Keane J ([167]) as well as Edelman J himself ([404], [417]). Justice Edelman referred to *Robtelmes* for the following far-reaching principles:'[t]he most basic power over an alien is the power of exclusion and expulsion' and '[t]he right to deport is the complement of the right to exclude', citing with approval Gibbs CJ in *Pochi* (1982) who said that ever since *Robtelmes*, 'it has been regarded as settled law that the Parliament has power to make laws providing for the deportation of aliens for whatever reasons it thinks fit…One would expect any sovereign legislature to have such a power, which is essential to national security' ([5], emphasis added, cited also by Nettle J in *Falzon* (2018) [92]).

However, an understanding of the conflict of interest of the judges and the racialised underpinnings of their decision in *Robtelmes* should have prompted testing of the powerful legal principles for which the case continues to be cited. In this respect, there are two key issues which need to be addressed.

First, it is axiomatic that binding principles of common and constitutional law can only be drawn from the *ratio* of cases concerning the subject matter of the purported principle. In *Robtelmes* there was a failure to establish the essential jurisdictional fact for valid use of the 'aliens power', namely that the subjects of the case were legal 'aliens'. As Edelman J appears to accept, the *ratio* of *Robtelmes* was that the Commonwealth could legislate to expel communities which were 'alien' in an ethnic or racial sense from the perspective of the dominant Anglo-Celtic colonising society. It follows that *Robtelmes* should not be regarded as establishing precedential authority for use of the s 51(xix) lawmaking power over legal or constitutional aliens. Other cases regarded as foundational precedents for a sovereign

power over 'aliens' can be criticised in a similar way. The 1891 Privy Council case *Musgrove v Chun Teeong Toy* was cited by the High Court in *Lim* (1992) and the Federal Court in *Ruddock v Vadarlis* (the '*Tampa case*') (2001). *Musgrove* was relied on by the US Supreme Court in *Fong* (1893) and the Privy Council itself in *Cain* (1906), both cases also cited by the judges in *Robtelmes*. In 1888 Chun Teeong Toy was refused entry when he arrived in Melbourne from Hong Kong on the British Ship *Afghan*. As Charles Price says, a major issue at that year's Australasian Inter-Colonial Conference was that 'it seemed clear that many Chinese immigrants had been either born or naturalised in British territories such as Hong Kong and Singapore and therefore possessed British citizenship [sic]' (271). Toy may have come from some other part of China and merely boarded the vessel in Hong Kong. But as Victoria's Government Statistician had observed a few years earlier, officials often failed to distinguish between migrants from 'British China' and those from 'China proper' (1881 Census, General Report, 28). In neither the Victorian Supreme Court (at first instance) nor the Privy Council was any evidence referred to as to Toy's actual origin or place of birth. In other words, there appears to have been no attempt to establish whether Chun Teeong Toy was an 'alien' under the common law. Indeed, there seems to have been a presumption that he was an 'alien' because he was ethnically Chinese. In a similar way, a 2019 academic article by Gageler J of the High Court comparing the *Musgrove* and *Tampa* cases does not address this fundamental starting point.

Second, in *Robtelmes* each judge drew on United States, Canadian and British decisions to say it was beyond question that a sovereign government had the right to do whatever necessary not only to exclude but also to deport or expel even a 'friendly alien' whenever public or social interest required. As Griffith CJ noted, these overseas decisions drew heavily on the writings of eighteenth century Swiss legal theorist Emmerich de Vattel. Mr Stumm, barrister for Robtelmes, pointed out that 'Vattel in fact said nothing about expulsion, only exclusion'. These US, Canadian and British cases selectively quoted Vattel, especially by conflating the concepts of 'enemy' and 'friendly' aliens – therefore wrongly claiming a valid intellectual basis for the power to expel both types of 'aliens'. This mistaken application of Vattel was also adopted by the High Court in *Robtelmes* and is reflected in Gibbs CJ's statement above in *Pochi*. This suggests that the doctrine of precedent is serving to perpetuate a racialised legal flaw. In our opinion, it is incumbent upon the High Court to revisit this line of authority by engaging with the exact point raised by the original critics of the expulsion of the South Sea Islanders and by Stumm in the *Robtelmes* hearing – on what basis can the federal government deport long term residents lawfully in Australia who have committed no crime? Plainly, it is not 'essential to national security' that Parliament can legislate to expel non-citizens or foreigners 'for any reason whatsoever'. While activities such as espionage, military-backed action against the state, and terrorism give the term 'national security' substantive meaning, it is hard to envisage what else would be so 'essential to national security' as to justify deporting long-established members of the Australian community yet to formally become citizens. Hundreds of thousands of migrants ('friendly aliens') who have

lived in Australia for decades are in this position. Based on current authority, Parliament could decide to expel such people for any reason – religious beliefs, skin colour, health condition or whatever particular cause had aroused national anxiety, rational or not.

> ‘*Those are the reasons which are…conclusive in the minds of the people of this colony against black labour*’
>
> (Queensland Premier Sir Samuel Griffith, 1889)

We turn now to the continued stripping of Australian citizenship rights in the 21st century because of White Australia fears about an invasion of ‘dark pigmented’ Papuans. Islands off Papua and New Guinea were also ‘blackbirded’ for labour for tropical Queensland in the colonial era. After receiving reports in 1884 of the deaths on a Mackay plantation of scores of New Guinea Islanders, Premier Griffith instructed all Government Agents sailing from Queensland that ‘no Islanders were to be brought from New Ireland or New Britain, as the natives were totally unfit for the work, and only came to the colony to die’ (Queensland Parliament, *Official Record of the Debates of the Legislative Assembly,* 4 March 1884, 565).

Mr Cameron from Tasmania told federal Parliament in November 1901 that the racist policy behind the *Immigration Restriction Act* and the *Pacific Island Labourers Act* should also be used to keep the ‘coloured aliens’ of Papua away from the mainland when it became Australian territory. He supported expansion of Australia’s new Federation into the Pacific as part of its own ‘Monroe Doctrine’. But, he said, ‘there are 350,000 natives at present in New Guinea, and if they become part of the Commonwealth, how can we have a White Australia?’ The exclusion of Papuan Australians continued until they could be kept out as foreigners after Papua New Guinea’s Independence. When Australian citizenship was formally created after World War Two, Papuans (like Aboriginal Australians) were given a form of ‘pretend’ citizenship only. Asked in 1948 if Papuans could travel to mainland Australia and enjoy the right to vote, Immigration Minister Arthur Calwell declared ‘We do not even give them the right to come to Australia…a native of Papua would be an Australian citizen but would not be capable of exercising rights of citizenship’.

The determination throughout the White Australia era to keep dark skinned people away from the mainland meant Papuans lost their Australian citizenship in 1975. Under regulations made by Governor-General Sir John Kerr, Australian nationality was removed from those who became citizens of Papua New Guinea on Independence Day. Only the few Papuans granted permanent residence in Australia did not become Papua New Guinean citizens and kept their Australian citizenship. When challenged in *Ame’s case* (2005), the High Court said Papuans never held ‘real’ Australian citizenship. Federal Parliament had denied them normal citizenship rights like voting, jury service and

freedom of movement in and out of the mainland. As Kim Rubenstein and Jacqueline Field explain, because it was not considered 'real', their Australian citizenship could be unilaterally removed by executive regulation.

Like Edelman J in *Love & Thoms*, Kirby J in the *Ame* decision acknowledged the racism of past Australian lawmakers, saying Calwell's 1948 statement and 'repeated references to ethnicity and race in the parliamentary debates' reflected a concern:

> to preserve to the Commonwealth the power to exclude from entry into the Australian mainland foreign nationals and even British subjects who were 'ethnologically of Asiatic origin' or other 'pigmentation or ethnic origin' (at [70])

But, as Rubenstein and Field note, the High Court in *Ame* saw no need for post-colonial reckoning with past discrimination. The nature and security of Australian citizenship was '*left floating, adrift on…the tides of prejudice*'. In this way, highly racialised policies from early 1900s Australia continue to cause personal hardship into the 21st century. The High Court agreed that Mr Ame's birth in Papua in 1967 meant he had been born in 'Australia' under the *Citizenship Act 1948* (Cth). However it said the meaning of 'Australia' in 1975 under the *Migration Act 1958* (Cth) was different, excluding Papua and other external territories. He was an Australian citizen but also an 'immigrant' and could be kept out of 'Australia proper'. This meant he automatically lost Australian citizenship when he became a Papua New Guinean citizen on Independence Day. And as a non-Australian citizen he was not legally a member of the Australian community and could be deported from this country under the *Migration Act.*

In September 2020 the *Guardian* said that in recent years thousands of Papuans living in this country and born as Australians have lost their Australian citizenship, often without their knowledge. The *Guardian* mentioned Akee Charlie, born on Papua's Daru island in 1970 before moving with his family a short distance across the Torres Strait to Queensland's Erub island. In 2015 he was stripped of Australian citizenship and spent five years in immigration detention. He was released after the High Court's *Love & Thoms* ruling that First Nations people like Mr Charlie were not 'aliens' and could not be deported. But his Australian citizenship was not reinstated. Legally he is stateless. Charlie told the *Guardian* he lives in fear every day. 'When I walk around Cairns…I have no identification to prove who I am… they will have to give me back my citizenship. I was born a citizen and have always been a citizen'.

The High Court's decision in *Ame* means that in 2021 Troyrone Zen Lee, a man born in Papua whose Australian passport was first issued over 40 years ago, may lose his right to stay in this country. Lee was born in Port Moresby a few months before independence. In 1982 Mr Lee's family moved to Brisbane. His Australian passport was renewed at least four times after first being issued in 1979. Imagine his shock in 2016 when told by a Home Affairs official during another routine renewal that he was not in fact an Australian citizen. When he

challenged this decision, the Federal Court said Home Affairs was wrong. But as a lower court it could not question the *Ame* precedent. Instead, it found a way around this, noting that when Mr Lee was a child, Australian authorities did not treat him as an 'immigrant'. This meant he had a right of permanent residence on the mainland and did not become a Papua New Guinean citizen at Independence. So he had never lost the Australian citizenship he was born with. The Commonwealth has appealed the Federal Court decision and Mr Lee may yet lose his birthright Australian citizenship. If the High Court considers the matter it will have the opportunity to reconsider its *Ame* judgment which has led to such cases.

The High Court and rebuilding respect

Recently a new public school in the ACT was named after another great Australian South Sea Islander, the late Dr Evelyn Scott. Like Faith Bandler, Dr Scott also played a major role in the successful 1967 referendum. But we can do more than erect statues and name schools after remarkable South Sea Islanders. It is time for the High Court to play its part too in revisiting the enduring and far-reaching consequences of relying on and therefore perpetuating a highly racialised jurisprudence. Not only is this crucial to Australia's jurisprudential future, a shift in the Court's jurisprudence - as the High Court's decision in *Mabo* demonstrates - could also represent a pivotal moment societally, enabling respect for the contribution of the South Sea Islander community to this country to be rebuilt.

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Habeas Corpus, Jurisdiction, and Aboriginal-Identifying People in Immigration Detention: McHugh v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2020] FCAFC 223 〉