

ONE HUNDRED YEARS OF AUSTRALIAN DEPORTATION

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I

Relative to population Australia today has one of the highest deportation rates among western nations and the deportation power in Australian law is exceptionally expansive.

The expansiveness of the deportation power derives from the Commonwealth Constitution. On the one hand the Constitution gives the Commonwealth parliament multiple heads of power under which it can make laws on deportation – chiefly the immigration, aliens and defence heads of power. On the other hand the Constitution does not set constraints on the exercise of the power such as a charter of constitutional rights, a definition of citizenship, or a sharing of responsibilities under the relevant heads of power with state parliaments.

This does not mean that deportation practices in Australia are necessarily draconian. There have been notable enlightened and humane policies at different times. It does mean, however, that good policies have to be made with deliberation and followed through with determination. In the absence of this, retrograde policies recur. It is the fate of Ministers who have understood the breadth of the deportation power and supervised it carefully to end up being seen as meddling or indecisive such as Alexander Downer senior and Ian Macphie. On the other hand, a Minister like Philip Ruddock who complained about supposed constraints on his powers and swept away checks and balances has left a mess to his successor.

II

It was one hundred years ago that the first mass deportations from Australia took place. The Pacific Island Labourers Act passed by the first Commonwealth parliament set the end of 1906 as the deadline for thousands of Islanders predominantly from Vanuatu and the Solomons to leave Australia or else be deported. The capacity of the Commonwealth to take this action was challenged in the first deportation case before

the High Court. The Court rejected the challenge, stating that at a minimum the Commonwealth's power under the aliens head of the Constitution "includes the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country and the conditions under which they may be deported from it." (*Robtelmes v Brennan*) More effective challenges were mounted at the level of community activism by Pacific Islanders and their supporters, especially the churches. At the eleventh hour in 1906 an amending Act was passed by the Commonwealth parliament. It introduced a range of exemption categories. These genuinely went some way towards recognising humanitarian considerations and the homes that many Islanders had made. Categories included more than twenty years of residence, having a family in Australia and being too old or infirm to be uprooted. Over 4,000 Pacific Islanders were deported but nearly as many stayed, 2,500 legally and an estimated further 1,000 unlawfully but lastingly since staying on was easier amidst a larger remnant community.

The exemption categories won by the Pacific Islanders, though, did not endure. The Pacific Islander program was administered by a small branch of government. When the branch was closed in 1908 knowledge of the exemption categories went with it. Afterwards as new groups have become liable to deportation they have had to fight the same battle for dispensations and exemptions.

III

The first misgivings expressed by a judge about the lack of constraints on the deportation power in Australian law came towards the end of the First World War when Charles Powers, always a black sheep on the High Court bench, questioned the responsible Minister's "unlimited and unqualified right to deport aliens for any reason he thinks fit" (*Ferrando v Pearce*). Powers was referring to deportations up to the end of the war of Italian Australians to force them to do military service for Italy against Germany, but more deportations occurred after the war.

Interned enemy aliens, mainly German Australians, continued to be held months after the Armistice and in August 1919, under pressure from the opposition pointing out that internment had been introduced as a temporary precaution, acting Prime Minister William Watt admitted internees were being deported. He explained that the

government had established a deportation board to deal with those who could mount a case to stay by being what he called “practically Australian”. The German-Australian community was friendless and demoralized at war’s end and protests against the deportation action were muted. Of an internment population of 5_ thousand less than 1,000 cases were heard in great haste by the deportation board between June and August 1919 and only 300 people approved to stay, 179 of them born or naturalised in Australia. Other ties to Australia were disregarded, prompting a mass protest letter by deportees “in the name of our wives, our children, our brides.” One legal challenge was launched by Fredrick Meyer, who was naturalised and married in Australia with a child and had run for state parliament before the war. In May 1920 he was told that his naturalisation had been revoked and that the Minister for Defence had ordered his deportation. He appealed against this as an improper use of power but the High Court found that both deportation and denaturalisation were entirely at the discretion of the Minister and Governor-General respectively and Meyer was deported the next day.

The Nationalist government also used war-time powers to get rid of overseas born communists and people allegedly bent on industrial chaos or the violent overthrow of the government. These decisions were made in secret by cabinet. Their number is still being consolidated as cases are researched but are not likely to exceed 50. Still as it came to light this action caused great agitation among the Labor Party and trade unions and the government was forced to justify its deportation action. It did so in these terms:

The men who are being deported proved in the recent crisis that they were unworthy of Australia’s hospitality... They will be a danger to the Commonwealth if they are allowed to remain here. Therefore we have a right to say that these men should be deported. (John Leckie MP. *Commonwealth Parliamentary Debates* 1917-1918, p.10636)

Deportation is a small step when it is merely regarded as withdrawing a hospitality or generosity that has been abused. It is a rationale that has endured and has been very telling in a country of large-scale immigration.

IV

This rationale was used in the interwar period when Prime Minister Stanley Bruce sought to retain the capacity to deport persons on political grounds. Bruce targeted people with “un-Australian and un-social outlook” from whom he said “it was necessary to withdraw our hospitality”. There was no difficulty retaining the power itself in peacetime, but defining who should be captured by it proved troublesome. Bruce’s government knew that it wanted the power to deport undesirable and dangerous elements but as one parliamentarian ridiculed you might as well legislate to deport “dangerous elephants” (Watson, William. 14/7/1925, *CPD* vol. 10, 979). The definition had to set out who might be considered outside membership of the Australian community and capture what the government considered undesirable political behavior yet be narrow enough so as to prevent it being used against government supporters if the opposition came to power. The Bruce government came up with section 8AA and AB of the Immigration Act, each over 150 words - essentially they said that overseas born industrial troublemakers could be deported (see endnote¹). The broader point to emphasize is that the deportation power, unconstrained and undefined at Federation, was being filled in with detail. By 1949 John Latham, formerly a member of the Bruce government but now Chief Justice of the High Court laid down that the Commonwealth parliament could validly legislate for deportation “by applying any discrimen which it thought proper, based, for example, on age, sex, race, nationality, personal character, occupation, time of arrival or on the order of a Minister or of an official” (*Koon Wing Lau v Calwell*). The case in which Latham was presiding involved 43 individuals among several thousand refugees from Asia given temporary admittance to Australia during the Second World War. At the end of the war their presence was perceived as a problem to which Arthur Calwell Australia’s first Minister for Immigration had a solution, a solution with which we are familiar: “he will probably apply the dictation test, declare them prohibited immigrants if they fail in this, and have them deported to Australian New Guinea or Nauru” (J C G Kevin 28/9/1945). The bills currently before the Commonwealth parliament following the arrival of asylum seekers from West Papua have been dubbed Pacific Solution II, but the plan was first hatched in 1945. It stayed in the bottom drawer then because most of the refugees were from Indonesia and eager to go home to support the independence movement there.

V

The first sustained endeavors by government to set firm constraints to the deportation power began in the early 1950s and were inspired by a range of factors. First were emergent human rights instruments in international law in which deportation loomed large. Being deported to Auschwitz or Siberia were watchwords for the crimes of the totalitarian regimes of the mid century and their remembrance stiffened human rights protests against deportation the world over. The slow death of the White Australia Policy led to a more flexible approach to deporting non-Europeans.

Three other factors involved pressures on the young Department of Immigration by other arms of the Commonwealth government particularly in the context of the mass migration of displaced persons. First, the Department of External Affairs kept a close eye on proposed deportations after it had had to pick up the foreign relations pieces in Asia following a series of controversial deportations shortly after the Second World War. It argued against moves by Immigration to deport displaced persons to their countries of origin behind the Iron Curtain and later of illegal immigrants to communist China. Second employment officers and social workers challenged the assumption that displaced persons who did not live up to their two year work contract with the government should face deportation. Instead they used counselling, persuasion and re-deployment. The Department of Immigration later formally adopted this better approach. Third government health workers became concerned that immigrants were not presenting for medical treatment of conditions that they knew would lead to deportation, such as tuberculosis and psychiatric diseases. Again a better approach evolved whereby the threat of automatic deportation was lifted from people admitted for treatment and this change was formally endorsed later. Deportation on health grounds fell to nugatory numbers from the 1950s.

The final pressure for change came with growing assertiveness from non-British immigrants who felt that their heightened liability to deportation as “aliens” was incompatible with having been accepted by Australia as permanent settlers. The case of Luigi Pochi was one that crystallized many of these concerns. It came from the murky series of drug busts and alleged mafia style organized crime around Griffith in the 1970s. Pochi himself had migrated to Australia from Italy in the early 1950s, married in 1952 and had three children born in Australia. He applied for citizenship in

1974 and was approved but not notified and therefore did not complete the formalities. In November 1975 he was convicted on drug charges and served one year in prison. After that he was served with a deportation order.

For arcane reasons Pochi was liable for deportation although a migrant from Britain would not have been. Under the immigration head of power in the Constitution the High Court had developed the doctrine of absorption. This went back to the prolix sections 8AA and AB introduced by the Bruce government which set the criterion of birth outside Australia as a pre-requisite for deportation. The one case that came before the High Court under this section involved a person who was born in Ireland and was a British subject (as were people born in Australia). The High Court said that in the absence of any need to take on local citizenship there must be a time at which a person is considered to be absorbed into the Australian community. This period came to be regarded as five years and this was what applied to British migrants. Although Pochi was unquestionably a migrant, he did not benefit from this rule because he was an alien, being born in Italy, and his deportation drew on the aliens power of the Constitution to which the absorption doctrine did not apply. The High Court rejected Pochi's appeal against the deportation order and confirmed that "it is settled law that the Parliament has power to make laws providing for the deportation of aliens for whatever reasons it thinks fit" (*Pochi v Macphee*).

There was significant debate about the Pochi case and it became the first time that a specific deportation process was discussed in detail in parliament. In its last months, having won the High Court case, the Liberal government revoked the deportation order and when it came to power in 1983 Labor moved quickly to change the law and to remove the term "alien" from the Immigration Act. The new Human Rights Commission of Australia influenced the 1983 changes and it proceeded to go into bat for them in practice. With good reason commentators welcomed the changes in statements like this by Sornarajah:

Australian law on deportation...has moved to a position where ministerial decisions are subject to review in accordance with liberal, humanitarian standards contained in international conventions on human rights. (*International and Comparative Law Quarterly* 34, July 1985, 498-512, p.512)

VI

Twenty years later we have to conclude that there has been a retreat from the promising stage reached in the mid 1980s. The gradual reforms embarked on after 1950 were never completed and since the late 1980s they have been swamped by new provisions on deportation under successive governments. Some of these were moderate in their intent – for example taking more assertive action against people who overstayed their visas and used their presence to leverage permanent residence – but the impact overall has been to give free rein to the deportation power.

Disastrously in 1989 the Labor government dislodged the tentative foothold that flexibility and consideration of personal circumstances had gained in deportation decision making. The FitzGerald inquiry of the late 1980s argued that immigration policy should unashamedly be determined by national interest and should not apologise for sidelining the interests of non-citizens even when it went to matters of justice. Labor's Minister, Robert Ray, agreed to an extraordinary new section of the Migration Act on the "mandatory deportation of illegal entrants", directed at visa overstayers. Ray resorted to the rhetoric of Australia's abused hospitality to justify the harsh action against overstayers "they are liable to be deported mandatorily... Those who choose to stay and impose themselves on Australia's generosity will feel the full weight of its laws" (Robert Ray. 18/12/1989).

The 1989 changes were soon overtaken by refugee applications arising from the crushing of the democracy movement in the Peoples Republic of China and the reappearance of boat people, precipitating further legislative change in the form of the Migration Reform Act passed in 1992 but so detailed that it was not ready for implementation until 1st September 1994. Legal commentators were relieved to see the section on mandatory deportation disappear, but in fact it had been renamed and expanded. It is now section 189 of the Act which requires the detention and mandatory removal of unlawful non-citizens. Non-citizens are unlawful if they have no valid, current visa or have failed to comply with visa conditions and the visa is cancelled.

This new section reversed the onus of proof. Whilst deportation involves a decision to send a non-citizen away on the basis of a breach of criminal or immigration law, the new removal mechanism followed where a non-citizen failed to establish a right to be in the country. Once there is a lack of citizenship, valid visa or visa application, removal action must commence and officials are obliged to act. “The law demands it” is how officials respond to criticism of removal actions. The unremitting nature of this system came to light in the Cornelia Rau and Vivian Alvarez Solon cases, which involved two individuals who were in no condition to produce proof although Rau was a permanent resident and Alvarez Solon a citizen. In his report on these cases, Mick Palmer was particularly critical of the attitude he found in the Department of Immigration that “the power to remove from Australia a person reasonably suspected of being an unlawful non-citizen ‘does not require a decision’ because it is required by the Act.”

The removal system regularly catches up over 10,000 people per year, most on the basis of expired or breached visas: overstaying, working illegally or too many hours, committing a criminal offence. There are a declining numbers of unauthorised arrivals. The system represents unprecedented activity in compelling people out of the country. It is these recent figures that give Australia one of the highest deportation rates among western nations.

Along with this has come a resurgence of the aliens power. At the height of the reforms in 1983 the Labor Minister for Immigration Stuart West was proud that he had removed what he called the “odious” term of “alien” from the statute books. In fact he had done no such thing because the aliens power remains in the Constitution and can’t be struck out by mere legislation. The aliens power now works together with the removal system to allow action against long term residents, namely child migrants who arrived on their parents visas and have not taken out citizenship. People in this situation are deemed to be visa holders themselves (whether they know it or not). Visas, even permanent ones, can be cancelled under section 501 of the Act on character and conduct grounds. In 1999 the Howard government bolstered these powers in an Act called The Strengthening of Character and Conduct Provisions, supported by the opposition. Under the strengthened provisions a person is automatically defined as not of good character if he or she incurs a prison sentence of

one year or more or is the subject of an adverse security assessment.

Counterbalancing factors such as length of residence in the country, having Australian born children or having undergone rehabilitation in prison carry little weight. Using these strengthened powers was a personal crusade of Philip Ruddock as Minister for Immigration. He cancelled hundreds of visas, most on the grounds of 12 months imprisonment and many of those of child migrants who had lived virtually all their lives in Australia. In 2005 two Federal Court judges were acerbically critical of this practice. This was in the case of Stefan Nystrom, who came to Australia when he was 27 days old and never left. At the age of 30 he faced deportation after being convicted of a serious criminal offence. The judges argued that he was an alien only by the barest of threads and that Australia was exporting its problems unconscionably. The government has appealed against the Federal Court's judgment to the High Court and the case is to be heard shortly.

The final twist in this tale is that British migrants are now hit by these increased powers, having lost the special status they had at the time of the Pochi decision. British migrants have a slow uptake of Australian citizenship and in 2003 the High Court found that without citizenship they are aliens under the Constitution because of the now clear distinction between Australian and British citizenship. This was in the case of Jason Shaw who came to Australia as a two year old and had not returned to Britain since. Following a series of criminal convictions his deemed visa was cancelled. The case created considerable publicity in England where the tabloids screamed that the convicts were coming back after 200 years.

VII

Since 2005 and the Palmer, Comrie and Ombudsman reports into scandalous cases of detention and deportation/removal, there is an opportunity to achieve change in this field. Where is this to come from? The first port of call is frequently thought to be the courts. However, recourse - especially to the higher courts - is not necessarily the best way to keep deportations under control, at least in the absence of binding international law principles. The High Court has set limits to the immigration power of the Constitution but these can be sidestepped under the aliens power. That the Court has made some of its decisions with reluctance indicates that these outcomes would not necessarily change even if the membership of the bench did.

A more promising source of effecting change lies at the community level. Mandatory detention has dominated the headlines in regard to the treatment of non-citizens. Australians have not been prompted by media reporting to take a position on many deportations. Yet the cancellation of visas is done in the name of the people. Time and again in cancelling visas Minister Ruddock gave reasons to the effect that the Australian community would expect the visa to be cancelled. For example, he gave this reason in the case of a person who had been resident in Australia since infancy, had 4 children born in Australia and had been rehabilitated in prison after a series of drug possession offences. Many would oppose Australia exporting its problems in this way. The case of Robert Jovicic, removed to Serbia after a lifetime in Australia, caused considerable disquiet and he and another deportee Ali Tastan have been brought back to Australia.

One remarkable story where local intervention has affected the ultimate outcome of a case is that of an Iranian asylum seeker whose case is known under the number M38/2002. He was refused refugee status but claimed that information had been lost during the assessment process, which would have proved that his fears of persecution and specifically torture were well founded. On appeal the Minister's case argued that even if these claims were true it would not prevent his removal. The Minister's case carried the day in the Federal Court and the High Court stated that it was up to the Australian people to hold the government to account for what might happen to him. In the end it was the love of visitor to Maribyrnong detention centre which interposed. The couple married in another detention centre, Port Hedland, in 2002 and the asylum seeker attained his release from detention two years later on the basis of a spouse visa, albeit with a bill for \$220,000 for 4_ years in detention.

Finally a neglected source for effecting change is departmental officials. Since the late '80s governments have put little faith in immigration officers. Resources have been shifted to the enforcement edge of the department, its compliance arm. Today's mandatory policies reduce the scope for officers to intervene, and the removal system frequently operates without oversight. However the gradual reforms from the 1950s relied on flexibility and sometimes courageous interventions by people working in the system which were only later formally accepted. Recent events show that rigid

policies are no way of avoiding mistakes. In concentrating on its own controls, the Australian system has not taken advantage of initiatives developed in Europe which involve case officers working more cooperatively with people, particularly asylum seekers who may have to leave, including by identifying employment and education opportunities in the state of return.

There is a need for the deportation power, but also for proper checks and balances. Undeniably difficult decisions need to be made and need to be made consciously and deliberately. There are moments in the past to learn from when there's been more equivocation and more flexibility than today. Ultimately there is a need for careful policies because in their absence there's too much scope for treating people as aliens rather than giving due consideration to their human rights and their human ties to Australia.

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¹ “8AA. – (1.) If at any time the Governor-General is of opinion that there exists in Australia a serious industrial disturbance prejudicing or threatening the peace or good government of the Commonwealth, he may make a Proclamation to that effect, which Proclamation shall be and remain in force for the purposes of this section until it is revoked by the Governor-General. (2.) When any such Proclamation is in force, the Minister, if he is satisfied that any person not born in Australia has been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth and that the presence of that person in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws, may, by notice in writing, summon the person to appear before a Board, at the time specified in the summons and in the manner prescribed, to show cause why he should not be deported from the Commonwealth...8AB. – (1.) Where any person who was not born in Australia has, at any time, whether before or after the commencement of this section, within three years before the notice in writing referred to in this section, been convicted in Australia of an offence against the laws of the Commonwealth relating to trade and commerce or conciliation and arbitration for the prevention or settlement of industrial disputes, and the Minister is satisfied that any of the acts constituting the offence were directed towards hindering or obstructing, to the prejudice of the public, the production or transport of goods or the conveyance of passengers or the provision of necessary services, and that the presence of that person in Australia will be injurious to the peace, order or good government of the Commonwealth, the Minister may, by notice in writing, summon the person to appear before a Board, at the time specified in the summons and in the manner prescribed, to show cause why he should not be deported from the Commonwealth.” Parliament of the Commonwealth of Australia. 1925. *Immigration Act 1925*.