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Empire, Race, Naturalisation:
the Naturalisation Act 1903 (Cth)

Introduction: Naturalised Australian British Subjects
On 28 March 1906 Ah Sheung, a former resident of Walhalla and Melbourne, was detained on board the Tsinan. The captain, Charles Lindberg feared a one-hundred-pound fine if he allowed a prohibited immigrant to disembark.1 While Ah Sheung carried his Victorian naturalisation certificate with him, he failed the dictation test required under the Immigration Restriction Act 1901 (Cth).2 He was deemed a prohibited immigrant, accused of not being the person named on the naturalisation papers and sentenced to one month imprisonment.3 If he could not prove the naturalisation certificate was his, Ah Sheung would be denied entry into Australia.

Naturalisation is the process which ‘confer[s] the rights and privileges of citizenship upon’ an immigrant resident.4 According to J Mervyn Jones it ‘includes all methods by which nationality is acquired otherwise than at birth’.5 In 1901, Sir John Quick and Sir Robert Garran considered naturalisation to be ‘the process, defined by law, by which an alien renounces his original allegiance and is converted into a subject or citizen, entitled to all the rights and privileges of natural-born subjects and citizens’.6 Eighty years later, Michael Pryles cautioned that naturalisation did not constitute an automatic

1 Ah Sheung v Lindberg [1906] VLR 323, 324 (Cussen J).
2 Immigration Restriction Act 1901 (Cth), s 3(a).
‘entitlement to all the rights and privileges’. This warning is apt, particularly in Australia’s naturalisation history.

Upon the arrival of British law in Australia certain groups were denied rights and privileges we now consider hallmarks of citizenship. Immigrants could become a part of the community in a legal sense by obtaining a certificate of naturalisation. However, under the ‘White Australia Policy’, many political, social and economic rights were limited to natural-born or naturalised subjects of British or European descent. For example, despite obtaining certificates of naturalisation prior to Federation most residents from Asia, Africa and the Pacific Islands could not vote, access welfare assistance or work in certain industries. Under the first naturalisation act in 1903 these residents could no longer be naturalised.

Understanding the evolution of naturalisation policies is important, not only in terms of the domestic White Australia Policy, but also because concepts of naturalisation and citizenship developed through exchanges between Australia, Great Britain and other settler-states. Australia initially referenced British common law, however the influence of other British settler states, such as Canada, New Zealand, South Africa, and the United States of America became increasingly important as these countries gained more independence. According to Daniel Gorman ‘[b]onds of sentiment did not stand the test of politics and burgeoning sovereignty’. In fact Great Britain’s push for an all-encompassing imperial naturalisation scheme was at odds with the settler states’ own formation of the ‘white,’ ‘European’ citizen—a concept rooted in the historical dynamics of colonisation and imperialism. Marilyn Lake and Henry Reynolds explain that Australia:

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8 See for example: Post and Telegraph Act 1901 (Cth), s 16.; Sugar Bounty Act 1903 (Cth) s 2; Sugar Bounty Act 1905 (Cth) s 5; Sugar Bounty Act 1910 (Cth) s 9(1); Commonwealth Franchise Act 1902 (Cth) s 4; Invalid and Old-age Pension Act 1908 (Cth), ss 16(1)(c), 21(1)(b); Maternity Allowance Act 1912 (Cth), s 6(2); Widow’s Pension Act 1942 (Cth), ss 14(1)(f) and (g), 27(1)(d) and (e).
9 Naturalisation Act 1903 (Cth), s 5.
in dividing the world’s peoples between white and non-white, regardless of their standing as powers or status as British subjects, marked a radical new departure in international relations. But the move was a logical development of the binary thinking that governed British imperial rule—the division between Crown colonies and self-governing dominions or between ‘advanced’ and ‘backward’ races—and United States naturalisation laws, that divided the world’s peoples into white and non-white.\footnote{Marilyn Lake and Henry Reynolds, Drawing the Global Colour Line: White Man’s Countries and the Question of Racial Equality (Carlton: Melbourne University Press, 2008), 144.}

Naturalisation became a tension point in terms of immigration, citizenship, race and imperialism. Nonetheless, it is often subsumed within these categories, particularly citizenship. For instance although Lake and Reynolds note that ‘United States naturalisation law rested on the dichotomy of white and non-white’,\footnote{Ibid., 9. See also 19, 265-6.} their discussions focus on the impact of this legislation in terms of immigration or broader citizenship rights such as the right to own property.\footnote{Ibid., 265-7.} Focus on naturalisation policies is negligible.\footnote{See for example: Ibid., 137-165.} This is not to say that analysis of citizenship or immigration is unimportant; as Gorman notes, ‘[i]mmigration issues are a particularly appropriate topic of study for historians of empire because they reveal attitudes and ideologies of citizenship, and help illustrate how imperialism was constituted’.\footnote{Gorman, ‘Wider and Wider Still?’, paragraph 2.} However, naturalisation as a facet of citizenship and immigration deserves exploration in a transnational sense.\footnote{Most studies on naturalisation focus on the policies of specific nation states. See for example Jones, Pryles, Clive Parry, Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland (London: Stevens & Sons Limited, 1957), Kim Rubenstein, Australian Citizenship Law in Context, (Pyrmont: Lawbook Co, 2002), John S Park, Elusive Citizenship, Immigration, Asian Americans, and the Paradox of Civil Rights (New York: New York University Press, 2004).} This article examines naturalisation on a national level in Australia, and a transnational level—referencing Great Britain and the settler states of Canada, New Zealand, South Africa, and the United States. The first section examines how Great Britain influenced colonial naturalisation.
policies. The second section discusses the *Naturalisation Act 1903* (Cth). Following this, the relevance of racial restrictions in debates concerning an imperial naturalisation scheme is explored. Finally the shift from an overtly racially discriminatory Naturalisation Act is considered.

**Aliens, Amendments, and Duplication in the Dominions**

Prior to 1844, naturalisation in Great Britain was effected through ‘letters patent’ granted by the Crown or by private bills introduced to Parliament allowing the naturalisation of individuals or certain classes of people.¹⁷ These systems were transported to the colonies as naturalisation became an important tool in ‘attracting new settlers’.¹⁸ In 1844 British Parliament introduced the *Aliens Act 1844* (Imp).¹⁹ While this provided British colonies with a model, the application in imperial terms was problematic. Clive Parry explains that ‘doubts immediately arose as to whether certificates issued in accordance with its terms had any force in the overseas dominions of the Crown’.²⁰ To clarify this, amendments in 1847 noted that the 1844 Act ‘doth not extend to the said Colonies or Possessions’, although the colonies could enact their own naturalisation legislation;²¹ colonial certificates were valid only where granted.²²

The colonies of Australia imitated the 1844 Act.²³ However in 1871 Western Australia’s first broad Naturalisation Act was passed.²⁴ This act was a local version of British Parliament’s *Naturalisation Act 1870* (Imp). Under the British act those granted certificates of

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¹⁷ Jones, British Nationality Law, 58; Pryles, Australian Citizenship Law, 14-15; Report from the Select Committee on the Laws Affecting Aliens, Together with the Minutes of Evidence and Index, Ordered by the House of Commons, 2 June 1843, (v).

¹⁸ Pryles, Australian Citizenship Law, 30.

¹⁹ Ibid., 18-19.

²⁰ Parry, Nationality & Citizenship Laws, 76.

²¹ An Act for the Naturalization of Aliens 1847 (Imp), s III. See also Parry, Nationality & Citizenship Laws, 76.

²² An Act for the Naturalization of Aliens 1847 (Imp), s I. See also Jones, British Nationality Law, 72.

²³ See Pryles, Australian Citizenship Law, 31-2; Parry, Nationality & Citizenship Laws, 524.

²⁴ Parry, Australian Citizenship Law, 526; Pryles, Nationality & Citizenship Laws, 32. See also An Act for the Naturalization of Aliens within the Colony of Western Australia 1871 (WA).
naturalisation were entitled ‘to all political and other rights, powers and privileges’ and were ‘subject to’ the same ‘obligations’, as natural-born British subjects provided they renounced their original citizenship, or subject status.\(^{25}\) Restrictions in terms of owning real and personal property were removed,\(^ {26}\) and British subjects were permitted to ‘divest’ themselves ‘of British nationality’.\(^ {27}\) Despite the Western Australian act, and the fact that New South Wales enacted a replica in 1875, the British act did not address the place of colonial naturalisation certificates.\(^ {28}\)

Colonial naturalisation policies were complicated. For example section 9 of *An Act to Consolidate the Law Relating to Aliens 1865* (Vic) allowed the Governor-in-Council to ‘at his discretion grant the letters of naturalization without requiring…any further residence in Victoria’, or the taking of ‘the oath prescribed by this Act’ if the applicant was naturalised ‘in any British colony on the continents of Australia Africa or America or in the colony of Tasmania or of New Zealand’.\(^ {29}\) In contrast the *Naturalisation Act 1870* (Imp) did not address the outer-territorial scope of naturalisations granted in the colonies: people naturalised in the colonies were British subjects only when they remained within the territorial boundaries of that particular colony, and they would not necessarily retain their subject status when visiting another colony or Great Britain itself.\(^ {30}\)

Another complicating factor was the emergence in local legislation of racial discrimination. Under s 6 of Queensland’s *Aliens Act 1867* (Qld) only Asian and African immigrants who were married, had been residents for at least three years and whose wives also resided within the colony could be naturalised.\(^ {31}\) In South Africa, Law 3 of 1885 passed in the Transvaal prevented ‘persons belonging to any of the native races of Asia’ from obtaining naturalisation and citizenship

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\(^ {25}\) Naturalization Act 1870 (Imp), s 7.

\(^ {26}\) Ibid., s 2.

\(^ {27}\) Ibid., ss 3 and 4.

\(^ {28}\) Pryles, Australian Citizenship Law, 32. Parry, Nationality & Citizenship Laws, 80. See also *An Act to Amend the Law relating to Aliens 1875* (NSW).

\(^ {29}\) An Act to Consolidate the Law relating to Aliens 1865 (Vic), s 9. See also Parry, Nationality & Citizenship Laws, 527-8.

\(^ {30}\) Pryles, Australian Citizenship Law, 33.

\(^ {31}\) An Act to Consolidate and Amend the Laws relating to Aliens 1867 (QLD), s 6. See also Parry, Nationality & Citizenship Laws, 525.
While s 18(1) of New Zealand’s proposed * Asiatic Immigration Act 1896* (NZ) stated that ‘[a]fter the coming into operation of this Act no letters or certificate of naturalisation shall on any ground whatever be issued to any Asiatic being a Chinese’. Newspaper articles emphasised how these issues affected the Australian colonies and the United States.34

Despite these sentiments, some colonies dismissed racist concerns and granted naturalisation certificates to Asian immigrants. These certificates, however, were worthless when travelling to or returning from overseas. The New South Wales case, *Ex parte Lau You Fat*35 provides an example. Lau You Fat was a ‘vegetable gardener residing at Nhill’, Victoria with his English wife and daughter.36 He arrived in the colony in the early 1860s and was naturalised in 1886. In 1887 he travelled to China for a ‘temporary visit’. On return the ship docked in New South Wales where Lau You Fat was ‘forcibly prevented from leaving the ship’ and ordered to pay the ten pound poll tax,37 required under the *Influx of Chinese into New South Wales Act of 1881* (NSW).38 According to James Powell, the Inspector of Customs, Lau You Fat was ‘not a British subject’ and did not fall under one of the Act’s exemptions. The Court found that the Victorian naturalisation certificate had ‘no extra-territorial validity’. Lau You Fat could not ‘land without payment of the poll-tax’.39 In the colony of New South Wales Lau You Fat was ‘not a British subject, but an alien’ despite his Victorian naturalisation.40

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33 Ng Bickleen Fong, *The Chinese in New Zealand: A Study in Assimilation* (Hong Kong: Hong Kong University Press, 1959), 25.
34 ‘The Chinese Question’, South Australian Register, 10 December 1878, 5.
35 (1888) 9 NSWR 269.
36 *Ex parte Lau You Fat* (1888) 9 NSWR 269, 270, Affidavit, Lau You Fat.
37 Ibid.
38 Ibid., 270-1, Affidavit, Powell, Inspector of Customs. See also *Influx of Chinese into New South Wales Act 1881* (NSW) ss 4 and 5.
39 *Ex parte Lau You Fat*, 269.
40 Ibid., 273, Chief Justice.
Issues surrounding the extra-territoriality of colonial naturalisation remained contentious until movement between the Australian colonies was no longer an issue. On 1 January 1901 the colonies of Australia united to become a ‘self-governing dominion within the British Empire’. According to Kim Rubenstein the ‘separate laws’ each colony introduced to exclude and control certain immigrant groups formed ‘a common cause and a motivating force behind Federation’. 41 This is apparent during the Australasian Federal Conventions of 1891, 1897, and 1898 where these prejudices were articulated. However the debates also reflect wider imperial realities. For example, people from Fiji, Hong Kong and India were also British subjects, but Convention delegates remained united for their exclusion. During the 1898 Melbourne Convention, Charles Cameron Kingston stated:

Hong Kong is undoubtedly a British possession, and a Hong Kong Chinaman is undoubtedly a native-born British subject. Thus, honorable members will see what difficulties might arise if the privileges of citizenship of the Commonwealth were extended to all British subjects. If that were done, we should be landed in a difficulty against which it is well to provide. I think the very best thing under all the circumstances is to do what is recommended by Dr. Quick, and give the Federal Parliament power to legislate on this subject as occasion arises.42

Dr John Quick had proposed that Federal Parliament be given the power to legislate in terms of a Commonwealth citizenship. 43 However Richard Edward O’Connor noted ‘[t]he word “citizen” is not used from beginning to end in this Constitution’, nor did the Constitution define, mention or discuss ‘citizenship’. 44 The compromise was section 51 (xix) of the Australian Constitution, which empowers Federal Parliament ‘to make laws...with respect to...naturalization and aliens’.45 In court this power has rarely been discussed, although it is generally accepted that it ‘extends to

41 Rubenstein, Australian Citizenship Law in Context, 36.
42 Record of the Debates of the Convention (Melbourne 1898) Vol 5, 1760.
43 Ibid., 1750.
44 Ibid., 1760-1.
45 Commonwealth of Australia Constitution Act 1901 (Imp), s 51(xix). See also Pryles, Australian Citizenship Law, 1.
prescribing the process by which aliens may become naturalized in the sense of the procedure to be followed’, including defining who can be naturalised and the conditions, responsibilities and privileges of naturalisation.\textsuperscript{46} Section 51 is not one of the powers exclusive to Federal Parliament; originally states could also legislate. This changed when the \textit{Naturalisation Act 1903} (Cth) was introduced.\textsuperscript{47}

\textbf{Racialised Naturalisation, the \textit{Naturalisation Act 1903} (Cth)}

We do not say … who shall or shall not be naturalized. We simply take to ourselves the power to confer Australian citizenship on such persons as we may think fit. It would therefore be useless for a coloured alien who may be in possession of a state certificate of naturalization, to apply for Commonwealth naturalization as it goes without saying that such new naturalization would be refused.\textsuperscript{48}

The \textit{Naturalisation Act 1903} (Cth) set out the Commonwealth’s naturalisation requirements. Despite Prime Minister Sir Edmund Barton’s above claim, section 4 allowed residents naturalised ‘in a State or in a colony which has become a State’ to retain their certificates.\textsuperscript{49} This created controversy in Federal Parliament. Anderson Dawson was ‘prepared to differentiate between the white alien and the coloured alien’ to prevent ‘coloured’ immigrants gaining citizenship privileges.\textsuperscript{50} Gregor McGregor, however, admitted that he ‘would rather see the few coloured aliens who are in Australia admitted to all the privileges of citizenship, than see the vast number of those who have proved themselves eligible citizens in different States deprived of their citizenship’.\textsuperscript{51}

Withholding Commonwealth naturalisation certificates from those already naturalised was baulked at; limiting naturalisation certificates only to people of European descent was not. Section 5 stipulated that ‘aboriginal native[s] of Asia, Africa, or the Islands of the Pacific,
excepting New Zealand’ could not be naturalised. Parliament deliberation was intense. William Higgs, the Senator who moved the amendment, stated that the intention was both ‘to prevent any of the 80,000 coloured aliens…from applying for Commonwealth naturalisation papers’, and ‘to block those natural-born British subjects who may be natives of India or other countries under British rule, from being able to secure naturalisation papers within the Commonwealth’. He wanted ‘a distinction’ made between ‘them and immigrants who come from Germany, Italy, and other countries in Europe’.

We want to preserve Australia for the white races. If our successors should see fit, owing to the advance of civilization and a higher standard of living in eastern countries, to make a fresh arrangement they can alter the terms of the law. But as far as we can see at the present time it is evidently desirable, in the interests of the Commonwealth, to pass this provision.

Some senators, such as Staniforth Smith, agreed, linking naturalisation with other elements of the White Australia Policy such as voting and immigration restriction. Meanwhile, others opposed. James Drake expressed his disappointment—Parliament had ‘departed from a principle which’ he considered ‘a sound one, that we should not put upon our statute-book any discrimination as to colour’. He was also concerned this amendment would take Australia out of line in terms of a reciprocal naturalisation scheme—if ‘[w]e want to have a Commonwealth naturalisation law that is wider than that of any other British country. It will be a fatal obstacle to that end, if we make distinctions on account of race or colour’. David Charleston questioned the restrictiveness of Australian legislation, noting that ‘[w]e have put a fence right round Australia,

52 Naturalization Act, 1903 (Cth), s 5.
53 Senate, (9 July 1903), 1933.
54 Ibid., 1935.
55 Ibid., 1933.
56 Ibid., 1939.
57 Ibid., 1934.
58 Ibid., 1933.
59 Ibid.
and have said that certain races shall not come in’. 60 He asked, ‘why should they not have the right of citizenship’, and then added:

I earnestly hope that in our legislation we shall not show such a bitter racial hatred, and a fear of contact with the people of any race. As regards the 80,000 aliens in this Commonwealth, many of whom perhaps have acquired property, if they apply for citizenship, why should it not be granted? I see no reason why it should not. It will be a very great injustice to deprive them of a right to which they have established a moral claim by living in our midst as worthy British subjects, obeying our laws, and helping us to build up this great Commonwealth.61

Charleston’s hope was not realised. Section 5 of the Naturalisation Act 1903 (Cth) is one of many examples of Anglo-Australia’s ‘bitter racial hatred’ towards Indigenous people from Australia, Asia, Africa and the Pacific Islands and the formalisation of this through legislation. However this amendment only just passed—eleven for, ten against—and Parliament was in no way unified in terms of the section’s racial prejudice, nor in agreement that it should be enacted.62

While section 5 was openly discriminatory, section 8 permitted alternative forms of discrimination in other legislation and areas of law. Under this section those granted certificates of naturalisation were ‘entitled to all political and other rights powers and privileges’ and expected to fulfil the same obligations as ‘natural-born British subject[s]’, although distinctions were permitted in terms of ‘the rights powers or privileges of natural-born British subjects and those of persons naturalized in the Commonwealth or in a State’.63 Section 13 ended the ability of the states to grant certificates of naturalisation.64

60 Ibid., 1937-8.
61 Ibid.
62 Ibid., 1943.
63 Naturalization Act, 1903 (Cth), s 8. See also Pryles, Australian Citizenship Law, 35.
64 Naturalization Act, 1903 (Cth), s 13. See also Rubenstein, Australian Citizenship Law in Context, 51.
The *Naturalisation Act 1903* (Cth) contained ‘no definition…of a natural-born British subject, so the common law prevailed’. It also had ‘limited territorial effect’ as the naturalisation certificates were valid in Australia only. According to Rubenstein this act not only retained, but institutionalised Australia’s long-standing ‘exclusionary sentiment’. Alongside the *Immigration Restriction Act 1901* (Cth), the *Naturalisation Act 1903* (Cth) formed the bedrock of the White Australia Policy. Gwenda Tavan explains that this policy arose from ‘the desire of Australia to build a strong and prosperous society founded upon the principle of racial and cultural homogeneity’. This meant that ‘[a] burgeoning sense of national identity was…interpreted through the prism of race’. Aziz Rana, in contrasting naturalisation policies for immigrants under the Crown in Great Britain with experiences in the United States, explains that in the United States ‘the European monarchical distinction between aliens and subjects became far less important than whether one possessed the right ethnic and cultural background to be assimilated into settler society’. This distinction is apparent in early naturalisation case law in Australia, such as *Ah Sheung v Lindberg*.

Ah Sheung was a naturalised British subject born in China, but residing in Victoria. Between 1883 and 1901 he took two trips to China and was ‘always…admitted without objection’. In 1901 he again travelled to China, where he remained for five years. On his return in 1906 he ‘failed to pass the dictation test’ required by s 3(a) of the *Immigration Restriction Act 1901* (Cth) and was accused of being a prohibited immigrant. His naturalisation papers, granted in

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65 Rubenstein, Australian Citizenship Law in Context, 51.
66 Pryles, Australian Citizenship Law, 35; Parry, Nationality & Citizenship Laws, 529.
67 Rubenstein, Australian Citizenship Law in Context, 52.
69 Ibid., 11.
70 Ibid., 12.
72 [1906] VLR 323.
73 Ibid., 329 (Cussen J).
74 Ibid., 324.
the colony of Victoria in 1883 were also on board the ship, however doubt was raised regarding his identity.75

The case went before the Supreme Court of Victoria. Cussen J found that Ah Sheung was not a prohibited immigrant: ‘from 1883 onwards, the applicant was a domiciled Victorian subject of the reigning sovereign, and...except during his visits to China, he was also resident’.76 Cussen J examined Ah Sheung’s rights during 1900 and early 1901, finding he could ‘vote at elections for and...be elected a member of either House of the Victorian Parliament and the Local Government Councils’, serve on a jury, ‘become a barrister or solicitor’, as well as ‘generally...exercise civil and political rights in Victoria, save that he was incapable of becoming a member of the Executive Council’.77

Cussen J referenced, distinguished, and utilised cases from Canada and the United States. Some cases, like United States v Jung Ah Lung78 resonated on their facts. Jung Ah Lung, a Chinese labourer living in the United States, was granted ‘a certificate of identification’ which he took with him on a trip to China. On return to San Francisco he was prevented from landing ‘for want of the certificate’ and detained on board the ship. A writ of habeas corpus noted ‘it appeared that he corresponded in all respects with the description contained in the registration books of the custom house of the person to whom the certificate was issued’. He was permitted to leave custody, with ‘the order of discharge’ later ‘affirmed by the circuit court’.79 For Cussen J this case revealed that states in the United States retained ‘the right...to inquire into the grounds upon which any person within their respective territorial limits is restrained of his liberty, and to discharge him if it be ascertained that such restraint is illegal’, even when detained by Federal Government.80

75 The Attorney General for the Commonwealth v Ah Sheung (1907) 4 CLR 949, 952.
76 Ah Sheung v Lindberg, 329 (Cussen J).
77 Ibid., 330-1.
80 Ah Sheung v Lindberg, 326.
In exploring subject status, domicile, and residency, Cussen J looked to Canada and the United States. He referenced *Union Colliery Company of British Columbia v Bryden*, a Canadian case concerning British Columbia’s ability to pass legislation prohibiting Chinese people from working in coal mines, quoting ‘[e]very alien when naturalized in Canada becomes, ipso facto, a Canadian subject of the Queen; and his children are not aliens, requiring to be naturalized, but are natural-born Canadians’. He also referenced *Cunningham v Tommy Homma*, a Canadian case dealing with voting rights, but which he utilised to explain that ‘in a case like the British Empire, domicile or residence must be the test governing the internal divisions of that nationality’. Later he noted that the United States case of *Lau Ow Bew v United States* is ‘an authority in favour of the view I have expressed’. In this case the Supreme Court found Lau Ow Bew was ‘unlawfully restrained of his liberty’ and should be discharged.

In his discussion on naturalisation Cussen J interpreted section 16 of the *Naturalisation Act 1870* (Imp), which gave Her Majesty the ‘power to confirm or disallow’ any naturalisation laws ‘made by the legislature of any British possession’. Cussen J looked to Canada, Great Britain and the United States finding that under section 16 ‘colonial naturalizations’ were not ‘only operative within the colony’ but in practice resulted in the issuing of ‘passports to the holders of colonial certificates of naturalization’ which ‘protect[ed] them in all foreign countries other than their country of origin’.

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81 Ibid., 330.
82 [1899] AC at 580.
83 Union Colliery Company of British Columbia v Bryden [1899] AC at 580, 586; Ah Sheung v Lindberg, 330.
84 [1903] AC at 155.
85 Cunningham v Tommy Homma [1903] AC 151.
86 Ah Sheung v Lindberg, 330.
87 [1892] 144 US 47.
88 Ah Sheung v Lindberg, 340.
89 Lau Ow Bew v United States [1892] 144 US 47.
90 Naturalization Act 1870 (Imp), s 16.
91 Ah Sheung v Lindberg, 335-6.
the colony of naturalisation did not deprive the holder of the ‘right to return as a naturalized subject’.  

When considering the ability of states to exclude certain groups, Cussen J referenced cases solely from the United States, noting that England basically had ‘no Acts dealing with exclusion’. In contrast, United States case law demonstrated that Congress had the power to ‘exclude aliens altogether,’ as well as being able to ‘prescribe the terms and conditions upon which’ foreigners could enter the country ‘and to have its declared policy…enforced through its executive officers, without judicial intervention,’ unless the ‘judicial department is authorized by treaty or Statute, or is required by the Constitution to intervene’. Congress had no power to exclude citizens. Cussen J believed this was ‘due to the restraining clauses of the United States Constitution, protecting the rights of citizens, which are not to be found’ in Australia.

In Victoria the case against Ah Sheung was dismissed. He was awarded all costs. Nevertheless, the Commonwealth Attorney General appealed to the High Court. Unlike Cussen J, Griffith CJ, who read the Court’s decision, did not reference international legal material. According to the High Court, Ah Sheung’s case actually rested on a determination of his identity. To ascertain this, a number

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94 Ibid., 342. Cussen J noted three exceptions: 'the Act 10 Geo IV, c 27 and 28-36, now obsolete, and the Extradition Acts, and the recent Aliens Act 1905, which contains a special definition of immigration.'
96 Ibid., 341.
97 Ibid., 341-2.
98 The Attorney General for the Commonwealth v Ah Sheung, 951.
of witnesses were called and Ah Sheung was questioned on the landscapes of Melbourne and Walhalla where he had resided. Ultimately it was the evidence of Constable James Don, regarded ‘as a careful and accurate observer’, who recognised Ah Sheung from his time working at the Chinese Store on Little Bourke St. Constable Don’s evidence ‘carried great weight’ in establishing the identity of Ah Sheung ‘the defendant, and Ah Sheung, a naturalized subject of the King in Victoria’.99 The appeal was dismissed.100

The Naturalisation Act 1903 (Cth) remained in force until 1921. Amendments were passed in 1917, although they did not nullify the exclusionary elements of section 5.101 During this time Australia was not alone in its exclusion of certain groups from naturalisation. The original act pertaining to naturalisation in the United States allowed only ‘free white person[s]’102 to be naturalised, although this was extended in 1870 to include ‘aliens of African nativity and… persons of African descent’.103 The removal of these racial restrictions was gradual, beginning in 1943, but not complete until 1952 when the An Act to Revise the Laws Relating to Immigration, Naturalization, and Nationality 1952 (US) came into force.104 In New Zealand the introduction of the Asiatic Restriction Act 1896 (NZ) was thwarted by a warning from the imperial government not to exclude British subjects from Asia.105 To counter this New Zealand introduced the Chinese Immigration Act Amendment Act 1896 (NZ).106 Twelve years later the Minister of Internal Affairs decided ‘not to naturalize any more Chinese’. This policy remained in place until 1952.107 At the beginning of the twentieth century in the self-governing colony of

99 Letter to Secretary, Department of External Affairs from Crown Solicitor Charles Powers, Melbourne, 6 October 1906, p 2, NAA, A1, 1908/1498, 61-2.
100 The Attorney General for the Commonwealth v Ah Sheung, 952.
101 Naturalisation Act 1917 (Cth).
102 An Act to Establish an Uniform Rule of Naturalization (26 March 1790) (US).
103 An Act to amend the Naturalization Laws and to punish Crimes against the same, and for other Purposes (14 July 1870) (US).
106 Chinese Immigrants Act Amendment Act 1896 (NZ).
107 Ibid. See also Fong, 25, 37-8, 53, 119.
Natal, later a province of South Africa, local naturalisation certificates were granted to European immigrants only.\textsuperscript{108}

Gorman explains that the ability to exclude was ‘prevalent throughout the nineteenth century, as colonial settlers sought to build British societies in foreign lands’.\textsuperscript{109} According to Lake and Reynolds this linked with ‘the spread of ‘whiteness’ as a transnational form of racial identification’.\textsuperscript{110} However, ‘whiteness’, when utilised as a form of exclusionary citizenship, clashed with the racial reality of an Empire which included Fiji, India, and Hong Kong. As the settler states sought greater autonomy, these tensions came to the fore.\textsuperscript{111} The resulting rifts between an inclusive Empire with exclusive dominions could, Gorman explains ‘on the surface…indicate a hardening of attitudes towards non-Europeans’. However he is cautious.

Upon closer inspection…it seems that this interpretation, usually taken as the norm, needs to be modified. Intra-imperial conflicts over immigration can perhaps be better understood in terms of citizenship, specifically the dichotomy between notions of “wider patriotism” and the growing power of and respect for state autonomy.\textsuperscript{112}

This overlap of issues in terms of immigration, citizenship, and naturalisation is apparent when analysing discussions between Great Britain and the Dominions at Colonial Conferences during the early twentieth century.

The Place of Race in Imperial Naturalisations
Overseeing the various forms of nationality which evolved throughout the empire had occupied Great Britain since the \textit{Aliens Act 1844} (Imp). In 1901 a report focusing on the \textit{Naturalisation Act}...

\textsuperscript{108} Minutes of Proceedings of the Colonial Conference, 1907 (London: Eyre and Spottiswoode, 1907), 536.
\textsuperscript{109} Gorman, ‘Wider and Wider Still?’, paragraph 20.
\textsuperscript{110} Lake, \textit{Drawing the Global Colour Line}, 3.
\textsuperscript{111} Gorman, ‘Wider and Wider Still?’, paragraph 1, 26.
\textsuperscript{112} Ibid., paragraph 27.
1870 (Imp) and the differing naturalisation laws brought issues relating to naturalisation to the fore.\(^{113}\)

Section 7 of the 1870 act, dealing with conditions, terms and granting of naturalisation certificates, was lambasted as ‘one of the principal defects’ and ‘so obscurely worded that it has been construed in different senses by different authorities’—adding to confusions of who were British subjects and where.\(^{114}\) The report also argued that ‘all differences between the status of a natural-born British subject and of a naturalized British subject should…be abolished’, as it was ‘especially desirable that a naturalized alien should, like a natural-born British subject, remain a British subject everywhere and for all purposes unless and until he divests himself of or loses his nationality in one of the ways provided by law’.\(^{115}\)

The report recommended streamlining the process and qualifications needed to become a naturalised British subject, allowing colonial governors to grant certificates of naturalisation only if the requirements in the colony were ‘substantially the same as those…under an Act of the United Kingdom’.\(^{116}\) The result would be a form of imperial naturalisation ‘recognised by British law everywhere, both within and without His Majesty’s Dominions’.\(^{117}\) Reaching agreement, however, proved difficult. At the Colonial Conference of 1902 Sir A H Hirne, the Premier of Natal, presented ‘[p]roposals to unify the naturalisation laws’.\(^{118}\) According to Sir Edmund Barton, then Australian Prime Minister, the question was discussed, although ultimately dropped as ‘[n]o specific resolution was submitted, it being ascertained that any proposal that

\(^{113}\) Report of the Inter-Departmental Committee appointed by the Secretary of State for the Home Department to Consider the Doubts and Difficulties which have Arisen in Connexion with the Interpretation and Administration of the Acts Relating to Naturalization, and to Advise what Amendment, if any, of the Law is Desirable (London: Eyre and Spottiswoode, 1901), 5, 8.

\(^{114}\) Ibid., 10-11. See also Naturalization Act 1870 (Imp), s 7.

\(^{115}\) Ibid., 11.

\(^{116}\) Ibid., 11-12.

\(^{117}\) Ibid., Recommendation 3, 18.

\(^{118}\) The Sydney Morning Herald, 1 May 1902, 6. See also Papers Relating to a Conference between the Secretary of State for the Colonies and the Prime Minister of Self-Governing Colonies, June to August 1902 (London: Eyre and Spottiswoode, 1902), 40.
naturalisation in one part of the Empire should include all other parts would in the present state of existing laws meet with serious objections'.\textsuperscript{119} Parry offers an alternate interpretation of Australia’s stance, noting that Australia ‘opposed the introduction of a certificate of naturalisation with Imperial validity since it would necessitate the invidious application of immigration restrictions against British subjects for the implementation of the “All-White Australia” policy’.\textsuperscript{120}

During the Imperial Conference of 1911 settler nations increasingly looked to each other to interpret and address questions relating to naturalisation, while the United Kingdom acknowledged the different issues and complications these nations faced. For example, Sir Wilfred Laurier, the Canadian Prime Minister, noted that the United Kingdom was ‘perhaps more easy on the colour question than we would be in Canada, South Africa, or New Zealand’ as it ‘would not have…a rush of such immigration as we would’. Therefore, while ‘[t]he men of the coloured races who would be naturalised in Great Britain would be of higher education and higher class’, they would nevertheless remain ‘a class of subject generally undesirable’.\textsuperscript{121}

Great Britain, unlike Australia, Canada, New Zealand, and South Africa, ‘faced no large influx of Asian immigrants, and thus could study the issue in terms of imperial unity, rather than national interest’.\textsuperscript{122} According to Gorman, while this valuing of ‘homogeneity’ was ‘undoubtedly based upon prejudice’, it is vital to ‘incorporate the notion of colonial nationalism as a framing element’ which ‘recasts anti-Asian prejudice as an inward-looking, rather than outward-looking, phenomenon’.\textsuperscript{123}

This development of more nuanced nationally derived responses is apparent at the 1911 conference. While the position of New Zealand’s Prime Minister Sir Joseph Ward remained

\textsuperscript{119} “Naturalisation”, The Sydney Morning Herald, 18 November 1902, 5.

\textsuperscript{120} Parry, Nationality & Citizenship Laws, 530.

\textsuperscript{121} Sir Wilfred Laurier, The Minutes of Proceedings, Imperial Conference 1911, (London: His Majesty's Stationery Office, 1911), 262.

\textsuperscript{122} Gorman, ‘Wider and Wider Still?’, paragraph 28.

\textsuperscript{123} Ibid.
emphatic—‘[i]n our country we would not naturalise Asiatics’—South African delegate F.S. Malan stated that ‘a British subject anywhere, British subject everywhere in the Empire’ would apply to Chinese immigrants, although South Africa would ‘not necessarily give him all the rights of a British subject’; for example voting would be restricted. South Africa sought not a blanket ban in terms of naturalisation, but a limitation of rights by a sort of open stealth, a practice also occurring in Australia. For certain groups—Aboriginal, African, Asian, Islander—if strict immigration controls could not prevent their entrance, then legislation would curtail their social, political and economic rights. ‘“British subject anywhere, British subject everywhere,” but subject to local laws’ was reiterated on numerous occasions by Malan who began to link the concept of a national citizenship with British subject status:

I am speaking now first about the point of citizenship. He is a British subject, but if he is not 21, for one thing, then he is not a registered voter; or if he does not satisfy the qualifications required by the country he is not a registered voter. In the Cape Province, for instance, there is a property qualification. In Natal it is the same. In the Transvaal and the Free State, where they have manhood suffrage, it is for Europeans only. So the coloured British subjects in the Transvaal and the Free State have not a right to go on to the register. In the Cape Colony they say he has to satisfy their local law as regards registration before he can become a registered voter.

Certificates of naturalisation became a single step on the citizenship path. For countries like Australia, New Zealand, and South Africa, this made an imperial naturalisation scheme more appealing. Granting an imperial naturalisation certificate would not be a giant leap allowing the recipient to gain all the privileges of citizenship, and the Legislature would still determine what rights and privileges were bestowed. In fact, Winston Churchill, the United Kingdom’s Home Secretary, noted, ‘[w]e have no desire at all that the Secretary of State for the Home Department should have the power to reach out, as it were, into the self-governing area of the South African Union or the

125 Ibid., F.S. Malan, 255.
126 Ibid., 256.
127 Ibid., 255.
Dominion of Canada and confer naturalisation’, nor would any local laws be hampered.¹²⁸

These discussions resulted in the *British Nationality and Status of Aliens Act 1914* (Imp) which set up a consistent set of laws on nationality applicable throughout the British Empire.¹²⁹ Part I defined ‘natural-born British subjects’. Part II outlined the process for the ‘Naturalization of Aliens’ in both the United Kingdom and the dominions.¹³⁰ Part III applied to numerous aspects of nationality law, ranging from the status of ‘Married Women and Infant Children’ to supplemental issues like the King’s ability to grant letters of denization.¹³¹ The diversity of opinions apparent at the conferences remained, resulting in two forms of naturalisation: ‘local’ naturalisations which ‘already existed in the Dominions and Colonies’ and ‘imperial’ naturalisations requiring five years residency anywhere in ‘the British Empire’.¹³²

Parry explains that under Part II the granting of naturalisation was ‘on much the same terms as…under the Act of 1870’.¹³³ The Secretary of State could grant certificates of naturalisation to aliens who had resided in the United Kingdom or one of the ‘dominions for a period of not less than five years’ or who had ‘been in the service of the Crown for not less than five years within the last eight years before the application’.¹³⁴ This solidified the imperial aims of the legislation as residence could be in the United Kingdom, or one of the Dominions.¹³⁵ The applicant was required to be ‘of good character’ and have ‘an adequate knowledge of the English

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¹²⁸ Ibid., Winston Churchill, 256.
¹²⁹ Pryles, Australian Citizenship Law, 20.
¹³⁰ British Nationality and Status of Aliens Act 1914 (UK), s 2(1).
¹³¹ Ibid., Part III: Women and Children, ss 10-12; Loss of British Nationality, ss 13-16; Status of Aliens, ss 17 and 18 (property rights, s 17); Procedures and Evidence: ss 19-24; Supplemental, ss 25-28 (ability of His Majesty to grant letters of denization, s 25).
¹³² Jones, British Nationality Law, 81.
¹³³ Parry, Nationality & Citizenship Laws, 83.
¹³⁴ British Nationality and Status of Aliens Act 1914 (UK), s 2(1)(a).
¹³⁵ Ibid., s 2(1)(a) and (2). See also Parry, Nationality & Citizenship Laws, 83.
language’. 136 British nationality was effective once the oath of allegiance was sworn. 137

Section 8(1) allowed naturalisations by governments in British possession (with the exception of British India) to be ‘exercised by the Governor or a person acting under his authority, but shall be subject…to the approval of the Secretary of State’. 138 Section 9 was applicable in Canada, Australia (including Papua and Norfolk Island), New Zealand, South Africa, and Newfoundland and permitted ‘the Government of the Dominion’ to have ‘the like powers to make regulations with respect to certificates of naturalization and to oaths of allegiance’ provided local legislation in the relevant dominion ‘adopted this Part of this Act’. 139 Persons naturalised through this Act were ‘entitled to all political and other rights, powers, and privileges, and…subject to all obligations, duties, and liabilities, to which a natural-born British subject is entitled or subject’, and importantly, ‘as from the date of his naturalization, have to all intents and purposes the status of a natural-born British subject’. 140

The intention of the British Nationality and Status of Aliens Act 1914 (Imp) was to facilitate naturalisations throughout the Empire by stipulating what ‘common pre-conditions’ were applicable. 141 The reality was that many dominions diverged from the Imperial Act as their own naturalisation laws evolved. 142 Canada, for example, maintained ‘a traditional curial element in naturalisation, derived rather from the law of the United States than from that of the United Kingdom’. 143 In South Africa ‘a distinct rule…respecting the effect of annexation on nationality’ developed, while ‘a woman British subject marrying an alien could be construed to remain a British subject under the law of New Zealand at a time when she was deemed everywhere else to be an alien’. 144 The dominions also adopted Part II

136 Ibid., s 2(1)(b).
137 Ibid., s 2(4).
138 Ibid., s 8(1). See also Parry, Nationality & Citizenship Laws, 83.
139 Ibid., s 9.
140 Ibid., s 3.
141 Pryles, Australian Citizenship Law, 20.
142 Jones, British Nationality Law, 81.
143 Parry, Nationality & Citizenship Laws, 84.
144 Ibid.
at different times. Canada enacted legislation ‘before it had in fact been enacted by the Imperial Parliament’. Australia legislated in 1920, South Africa in 1926, and New Zealand in 1928. Meanwhile in 1918 the British Parliament introduced amendments providing for ‘wider powers of revoking certificates of naturalization’.\footnote{Ibid.}

Although Great Britain was unable to completely ‘harmonize naturalization policies’, Gorman explains that this ‘failure to create a unified system of citizenship in general, perhaps paradoxically worked to sustain the empire, as it allowed the settlement colonies the leeway to pursue their individual goals, while keeping alive the desire for imperial unity’.\footnote{Gorman, ‘Wider and Wider Still?’, paragraph 44.} This process of imperial unification was, in a racial context, enhanced by the British Nationality and Status of Aliens Act 1914 (Imp) as the exclusionary sections of naturalisation law relating to Asian immigrants—repeatedly asserted by Australia, New Zealand, and South Africa—were annulled when those dominions enacted the imperial naturalisation scheme.

**Conclusion: Naturalised Subject to Naturalised Citizen**

On 17 May 1918 an application for a ‘notice of change of abode’ from an Ah Sheung residing at 15 Bennetts Lane, Melbourne to Canton, China was received.\footnote{“Sheung Ah: Nationality – Chinese: Date of Birth – 1873: Date of Arrival – 1898: First Registered at Little Bourke St Melbourne, NAA, MT268/1, VIC/CHINA/SHEUNG AH.} For the past two years, while World War I raged, Ah Sheung’s name had been on the aliens registration list. His photo was kept and sent to customs throughout Australia as he was required to apply for a certificate of exemption from the dictation test if travelling overseas.\footnote{“Form of Application for Registration”, NAA, B13, 1916/3136.}

Two years later the Nationality Act 1920 (Cth) introduced the British Nationality and Status of Aliens Act 1914 (Imp) to Australia.\footnote{Jones, British Nationality Law, 81. See also Pryles, Australian Citizenship Law, 36.} Like Canada, Australia baulked at adopting Part II of the British act in full, opting to re-enact the act on its own terms.\footnote{Parry, Nationality & Citizenship Laws, 532.} Despite this, the Nationality Act 1920 (Cth) was a strong endorsement of the British
imperial scheme. Pryles explains that ‘[b]y participating in the common code Australia adopted the same conditions for naturalization as were prescribed in Britain and other participating dominions’.\footnote{Pryles, Australian Citizenship Law, 36.} Section 15 ‘provided for the recognition of certificates of naturalization granted in Britain and in other British dominions’.\footnote{Ibid.} This was not limited solely to European immigrants as the racial discrimination contained in section 5 of the 1903 act was completely removed.\footnote{Ibid.} However Rubenstein cautions that this was replaced with ‘[d]ifferent forms of exclusion’ as section 10 prevented ‘any person under disability; from being granted a certificate of naturalisation’. ‘Disability’, she explains ‘was defined to mean “that status of being a married woman, a minor, lunatic or idiot”’.\footnote{Rubenstein, Australian Citizenship Law in Context, 55.}

Australia’s first naturalisation act formed part of a raft of legislation curtailing the political and social rights of certain groups, while also controlling immigration. These were some of the first acts passed by Federal Parliament, and included the \textit{Pacific Island Labourers Act 1901} (Cth), assented to six days before the \textit{Immigration Restriction Act 1901} (Cth), which prevented ‘Pacific Island labourers’ from entering Australia and permitted the Minister to order their deportation.\footnote{Pacific Island Labourers Act 1901 (Cth) ss 3, 4 and 8(2).} The notorious \textit{Immigration Restriction Act 1901} (Cth), enacting the infamous ‘dictation test’,\footnote{Immigration Restriction Act 1901 (Cth) s 3(a).} was amended in 1905 so the test could be given ‘in any prescribed language’.\footnote{Immigration Restriction Amendment Act 1905 (Cth), s 3.} Under the \textit{Commonwealth Franchise Act 1902} (Cth) the names of Indigenous people from Australia, Asia, Africa, and the Pacific Islands could not appear on the electoral roll.\footnote{Commonwealth Franchise Act 1902 (Cth) s 4.} A series of Sugar Bounty Acts from 1903 to 1910 provided a bounty to growers of sugar cane or beet who used only ‘white’ labour,\footnote{Sugar Bounty Act 1903 (Cth) s 2; Sugar Bounty Act 1905 (Cth) s 5; Sugar Bounty Act 1910 (Cth) s 9(1).} while section 16(1) of the \textit{Post and Telegraph Act 1901} (Cth) provided that ‘[n]o contract or arrangement for the carriage of mails shall be entered into on behalf of the Commonwealth unless it contains a condition that only white labour
shall be employed in such carriage’. 160 Sub-sections 16(1)(c) and 21(1)(b) of the Invalid and Old-age Pension Act 1908 (Cth) openly asserted that ‘Asiatics (except those born in Australia), or aboriginal natives of Australia, Africa, the Islands of the Pacific, or New Zealand’ were not ‘qualified to receive an old-age [or invalid] pension’. 161 The Maternity Allowance Act 1912 (Cth) and Widows Pension Act 1942 (Cth) contained similar provisions.162

In 1923 the High Court ruled that Jiro Muramats, a naturalised resident born in Japan, was not entitled to vote in federal or state elections.163 During the First and Second World Wars ‘people of enemy nations who were naturalised’ in addition to ‘Australian-born descendants of migrants born in enemy nations’ were interned. 164 Under the Nationality Act 1920 (Cth) a covert form of racial discrimination arose in naturalisation policies as the Governor-General refused to grant naturalisation certificates to people not from Europe. 165 In 1947 naturalisation applications still asked ‘Is the applicant of European (white) race or descent?’166

In 1948 Australia introduced the Nationality and Citizenship Act 1948 (Cth), later known as the Australian Citizenship Act 1948 (Cth), which implemented ‘a distinct Australian national status (Australian

160 Post and Telegraph Act 1901 (Cth), s 16.
161 Invalid and Old-age Pension Act 1908 (Cth), s 16(1)(c), s 21(1)(b).
162 Maternity Allowance Act 1912 (Cth), s 6(2); Widow’s Pension Act 1942 (Cth), ss 14(1)(f) and (g), 27(1)(d) and (e). For Aboriginal Australians see also Social Services Consolidation Act 1947 (Cth), ss 19(2), 47, 62(2), 76, 86(3), 91, 94(4), 97, 111.
163 Muramats v The Commonwealth Electoral Officer for the State of Western Australia [1923] 32 CLR 500, 504 (Higgins J).
citizenship). Nevertheless, the discretionary policy of refusing to naturalise immigrant residents not from Europe remained until the mid-twentieth century. In 1956 Harold Holt, the Minister for Immigration, announced that ‘non-European wives or husbands of Australian citizens’, as well as some non-European residents who had ‘been here for a long period of years’ would be eligible for naturalisation. Ten years later Hubert Opperman, the Minister for Immigration announced the implementation of ‘significant steps’ to ‘reduce differences regarding citizenship’ and allow ‘more non-Europeans’ to become Australian citizens. In Australia surreptitious ‘racial discrimination’ in naturalisation applications waned gradually, ending sixty-three years after it openly began.

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167 Pryles, Australian Citizenship Law, 8.
168 Australia, Representatives, Parliamentary Debates (18 October 1956) 1595.