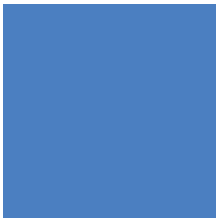
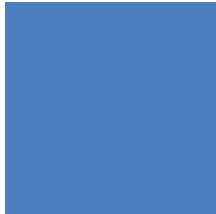




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MAY 2017

REPORT ON CITIZENSHIP LAW: AUSTRALIA



AUTHORED BY

RAYNER
THWAITES



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Report on Citizenship Law

Australia

*Rayner Thwaites*¹

1. Introduction

The law on the legal status of Australian citizenship and earlier (and co-existing) legal statuses is complex. Australia's citizenship law emerged from a historical matrix of common law, British Imperial, and colonial statute law. It is now defined by Australian statute, and governed by the constitutional grant of powers to the Australian (Commonwealth) parliament, without reference to Britain or British law. In addition, international law and administrative law and practice play, and have played, important roles in the citizenship regime. I address issues of substantive inclusion and belonging bound up with the legal status, but the central thread of this report is the change, development and operation of the relevant legal statuses.²

The report follows the GLOBALCIT format in falling into three substantive parts, on historical background, the current citizenship regime, and current issues (Parts 2, 3 and 4 respectively).³ My account is weighted toward the historical background in Part 2, addressing a gap in the current literature in the form of a historical overview of developments in, and the transformation of, Australian citizenship. I give particular attention to legislative developments and their relationship to the relevant constitutional concepts, following the relevant legal status(es) as they changed over time. Federation, the creation of the Commonwealth of Australia from six former British colonies in 1901, is my starting point.⁴

The discussion of the current citizenship regime in Part 3 delineates the main features of the governing legislation, the Australian Citizenship Act 2007. Readers of Part 3 can now supplement its seven pages with a much more detailed account of the

¹ My thanks to Lucy Cameron for her excellent research assistance and to Helen Irving and Joanne Kinslor for comments.

² My focus on the legal status of citizenship leaves unaddressed issues going to the realities of 'citizenship without rights'. See for example Chesterman and Galligan 1997.

³ This report is written as a stand-alone account, but benefits from the format of the EUDO-citizenship website which allows readers to readily access most of the historical legislation and case law referred to.

⁴ As such, it does not cover the issue of citizenship in relation to the Australasian Convention Debates of the 1890s in which the Australian Constitution was drafted. For an introduction to the literature on that topic see Rubenstein 2017: 35-62.

Act's operation, in the context of case law and policy, released only a few months before this report: the fourth chapter of the 2nd edition of *Australian Citizenship Law*, by Kim Rubenstein and Jacqueline Field (Rubenstein 2017: 91-289).

Two 'current issues' are selected for discussion in Part 4. The first issue is the expanded citizenship deprivation powers enacted in December 2015, the first usage of which was publicised in February 2017. My account of the deprivation measures focuses on their implications for the constitutional concepts that shape Australian citizenship legislation. The second issue is the rise in the proportion of the Australian resident population on long-term temporary visas with work rights. This has implications for the pathway to citizenship, if any, for those on such visas, and so for the incidence of citizenship in the wider Australian population.

The term 'citizenship' poses difficulties for an Australian historical account. Our story starts with the Commonwealth of Australia coming into existence with the operation of the Australian Constitution in 1901, but Australian *citizenship*, as such, did not exist until introduced by statute in 1948, coming into effect in 1949. Until 1949 the relevant status of the Australian national was that of British subject, but that status did not capture the status conferring a right to enter and remain in Australia. As explained below, the status answering to that description was a subset of the category of British subject which could be defined in constitutional terms as a 'non-immigrant' British subject. These complexities were not resolved by the advent of statutory Australian citizenship in 1949. Australian citizen and British subject co-existed as legal statuses until 1987, and the relationship between those statuses and the relevant Australian constitutional concepts was a matter of some uncertainty, only settled by case law of the High Court of Australia in the decades following 1987. In the Australian context the relevant membership status, namely the legal status that confers an immunity from immigration powers of exclusion and removal, only exists in 'pure' form as a constitutional status. As explained below, that constitutional status is negative, that of *non-immigrant* and *non-alien*, since the Australian parliament lacks constitutional powers directly over the subject of citizenship. Statutory citizenship can be said to have been brought into alignment with this constitutional concept in 1987.

2. Historical Background

2.1 Introduction

The history and constitutional framework of Australian citizenship law is bound up with the slow transformation of Australia from several self-governing colonies within the Empire, to a federated Dominion, to an independent sovereign state whose population is now defined by Australian statutory citizenship. As a legislative matter, it can be said to have taken until 1987 for Australia to arrive at its current position, whereby there is a binary of non-citizen and citizen, which clearly aligns with who is, and who is not, subject to immigration powers. It took High Court decisions in later decades to endorse a constitutional position that aligned with the post-1987 legislative reality. The assumption that immigration powers do not apply to those holding the relevant nationality status, and do apply to those without it, may be treated as the

default assumption internationally. But in the Australian context it marked the endpoint of a prolonged historical transformation.

The Commonwealth of Australia came into being on 1 January 1901. But Australian citizenship, a statutory legal status, was not introduced until 1949. At Federation, Australia did not see the need for a distinct ‘citizenship’ law. To quote from a later High Court judgment ‘the concept of nationality within Australia was substantially subsumed, so far as the law was concerned, in that generally operating throughout the British Empire. Australians were identified as having the status of “British subject”.’⁵

It was only in the 1980s that the concept of ‘British nationality’ ceased to do work in defining the scope and constitutional basis of Australian citizenship and immigration legislation. Statutory changes in the 1980s inaugurated a binary understanding of legal status, whereby Australian immigration law applied to non-citizens, but not (statutory) Australian citizens. In a series of decisions on the acquisition of citizenship, the High Court of Australia has ultimately endorsed this new binary as a matter of constitutional law. All non-citizens are subject to immigration law; Australian citizens are not. This slow emergence of a distinct national citizenship as first a determinative, and then an exclusive, basis for any ‘right to remain’ in Australia is a central strand of my account.

Accompanying Australia’s growing independence from the United Kingdom has been a massive demographic shift. Australia’s population has more than tripled since the Second World War, from about seven million in October 1945 to 24 million in February 2016 (Department of Immigration and Border Protection 2014; Australian Bureau of Statistics 2016a). As at 30 June 2015, 28.2 per cent of Australia’s estimated resident population (6.7 million people) was born overseas (Australian Bureau of Statistics 2016b), a very high percentage as compared with most other countries within the Organisation for Economic Co-operation and Development (Phillips & Simon-Davies 2017; OECD 2016). According to the current Secretary of the Department of Immigration and Border Protection, more than 7 million people have migrated permanently to Australia since 1945 and almost 5 million of them have become Australian citizens via naturalisation since the legal status of citizen was introduced in 1949 (Pezzullo 2014).⁶ (Naturalisation as a British subject under colonial and then Australian legislation had previously been available from the mid-19th century).

This large-scale migration has seen expansive growth not only in numbers, but in the diversity of the national origins of the Australian population and citizenry. In the period since the Second World War, the Australian population has shifted from being predominantly of British origin, to being one of the most diverse in the world.⁷

⁵ *Singh v Commonwealth* [2004] HCA 43, (2004) 222 CLR 322, [214] per Kirby J.

⁶ For a comparison of net overseas migration compared with natural increase as components of population growth in the period 1980-2015 see Phillips & Simon-Davies 2017, Table 4.

⁷ By way of contrast, at the 1933 census, 70.2 per cent of the Australian overseas born population (itself only 13.2 per cent of the total Australian population) was born in the United Kingdom. At the 2006 census, 23.5 per cent of the Australian overseas born population (with the overseas born population then 22.2 per cent of the total population) was born in the United Kingdom, with the top ten countries of birth being the United Kingdom, New Zealand, China, Italy, Vietnam, India, Philippines, Greece, Germany and South Africa, in that order: see Phillips, Klapdor & Simon-Davies 2010: Table 7. It is

This shift is linked with the long, slow demise of the so-called ‘White Australia’ policy. In place at Federation, the White Australia policy (exemplified in the first Immigration Restriction Act 1901 (Cth)) was not formally declared ‘dead and buried’ until 1973, though as discussed below, steps dismantling the policy were taken earlier. The demise of the White Australia policy has led to Australia as it exists today, a country that combines a contemporary multicultural reality, including racial diversity, with the historical legacy of White Australia. In recent decades, this multicultural reality and continuing widespread acceptance of relatively high levels of immigration from diverse source countries has co-existed with harsh policies towards unauthorised asylum seekers. The starting point for an inquiry into the co-existence of these elements lies in party political decisions over the period.⁸

Australian citizenship law can usefully be thought of as passing through a number of successive eras, each marking a further point on the trajectory away from the centrality of membership in the British Empire and towards a more distinct and self-sufficient national citizenship.⁹ The transition between these eras involves shifts in the roles played by Imperial (constitutional) law, international law, common law, statute, Australian constitutional law and administrative law and practice in determining membership of the Australian community.

2.2 Era 1: The Colonial Period 1901-1920

Australia came into existence as a legal entity on 1 January 1901, formed through the federation of six British colonies under the Commonwealth of Australia Constitution Act 1900, an Act of the British parliament, giving legal effect to the Constitution Bill that had been drafted in Australia in the 1890s, and endorsed in referendums of the Australian electors. On Federation the colonies: Tasmania, Victoria, New South Wales, Queensland, South and Western Australia, were transformed into states under a federal constitution, and a federal government, on the Westminster ‘responsible government’ model, was constituted. The new government was sovereign in domestic matters, but in terms of its foreign relations, Australia, in common with the other Dominions, was conceived of as a self-governing colony, a unit of the British Empire.

The relevant ‘citizenship’ status ascribed to the Australian population, for both domestic and international purposes, remained that that had applied in the colonies before Federation, that of ‘British subject’. The status of ‘British subject’ was, subject to qualifications in respect of ‘local’ naturalisation noted below, shared throughout the British Empire. The law relating to acquisition and loss of British subject status was, with the exception of legislation on naturalisation and naturalised citizens, discussed below in this section, a matter of common law until 1920.¹⁰ In that year Australian legislation was introduced to adopt the British Empire’s ‘common code’, the model

emphasised that these statistics are only for that portion of the population that was overseas born. For more recent statistics on naturalisation see Table 1 in the text at section 3.2.2.

⁸ For an introductory account of the politics which set the trajectory for the current harsh regime for unauthorised asylum seekers see Jupp 2002.

⁹ The division into eras employed in this Part is indebted to Brazil 1984.

¹⁰ There is a complication in that there is a question of whether the British Nationality and Status of Aliens Act 1914 (Imp) applied in the Dominions, affecting the date for change from common law to statute.

for which was contained in the British Parliament's British Nationality and Status of Aliens Act, 1914.

Notwithstanding the existence of a 'common status' of British subject, Australia distinguished for practical purposes between British subjects in general and British subjects whom it regarded as being a member of its own community. The relevant legal questions for those challenging the application of immigration laws to them was not whether or not they were British subjects, but whether or not they were returning home,¹¹ or had made their permanent homes in Australia and hence had become part of the Australian community.¹²

The existence of immigration restrictions that cut across the possession of British subject status was a necessary component of the racially discriminatory 'White Australia' policy that shaped immigration policy at Federation and for many years afterward, its unequivocal rejection only coming, as noted, in 1973 (Tavan 2005). British subject status was held by many across the Empire who did not meet the racially discriminatory strictures of the Australian policy, and accordingly were denied entry.¹³ In its pursuit of a 'White Australia', the country exemplified Clive Parry's observation that the shared legal status concealed 'very great discrimination between British subjects by means of immigration regulations' (Parry 1957: xv-xvi).

The immigration restrictions constituted what has aptly been termed a 'de facto administrative Australian citizenship' which distinguished between those British subjects who could be denied entry and deported, and those who could not (Dutton 1999: 13). The main mechanism of this de facto administrative citizenship was the dictation test.¹⁴ The test, set out in the Immigration Restriction Act of 1901, provided that persons would be prohibited from landing, or deported, if they failed, when asked by an immigration officer, to write out a passage of 50 words in a European language as dictated by the officer.¹⁵ A concise account of the dictation test was offered by the High Court in 1936: 'It was merely a convenient and polite device...for the purpose of enabling the Executive Government of Australia to prevent the immigration of persons deemed unsuitable because of their Asiatic or non-European race'.¹⁶

The only Australian legislation on 'citizenship' status in this period concerned naturalisation. As with immigration regulations, naturalisation in the early, post-Federation landscape sits awkwardly with the idea of a 'common status' across the

¹¹ *Potter v Minahan* [1908] HCA 63, (1908) 7 CLR 277.

¹² *Ex Parte Walsh and Johnson; In re Yates* [1925] HCA 53, (1925) 37 CLR 36.

¹³ The right to enter Australia could also be denied to British subjects for other reasons, for example requirements as to 'character'.

¹⁴ The dictation test was abolished by the Migration Act 1958. The White Australia policy continued to be implemented in the absence of this particular statutory mechanism, and was only unequivocally abolished in the early 1970s. See discussion in the text at section 2.5.2. and more generally Tavan 2005.

¹⁵ Immigration Restriction Act 1901 (Cth), ss 3(a), 7 and 14.

¹⁶ *R v Davey, ex parte Freer* [1936] HCA 58, (1936) 56 CLR 381 per Evatt J for the Court. In addition to its use as a tool of racial exclusion, the test was also applied to persons considered politically undesirable. A Czech dissent, Egon Kisch, to whom the dictation test was applied proved to be fluent in so many European languages that the officer tried the expedient of a test in Scottish Gaelic. The High Court held the resulting decision to deport him unlawful on the grounds that Scottish Gaelic was not a 'European language' within the meaning of the Act: *R v Wilson, ex parte Kisch* [1934] HCA 50, (1934) 52 CLR 234.

British Empire. Under a 1903 statute naturalisation became a matter exclusively for the federal government (with reciprocal recognition of earlier colonial/state grants of naturalisation secured across Australia).¹⁷ But an Australian certificate of naturalisation was initially only ‘local’ in effect. It conferred the status of British subject on the recipient within Australia but, contrary to Imperial (ie British) naturalisation (adopted in 1914), was generally regarded as ineffective elsewhere in the Empire.¹⁸ A person naturalised as a British subject in Australia (or other colony or Dominion) held a ‘limping status: they were subjects in the territory in which they were naturalised and while abroad, but not elsewhere in British territory’ (Parry 1957: 6).¹⁹

In contrast with the ‘convenient and polite device’ of the dictation test, which allowed for implementation of racially discriminatory immigration policy in a way that was ‘facially neutral’, the racial discrimination in the Naturalization Act 1903 was express, limiting an application for naturalisation to a resident who was not ‘an aboriginal native of Asia, Africa or the Islands of the Pacific, excepting New Zealand.’²⁰

2.3 Era 2: The ‘common code’ 1920-1949

In 1914, the British Parliament enacted the British Nationality and Status of Aliens Act 1914. The 1914 Act set out to codify the rules relating to acquisition and loss of British nationality, previously a matter of common law. It was intended to preserve throughout the British Empire a common status of nationality based on a common code.

The existence of the ‘common code’ was compatible with the autonomy of the different Dominions that were to adopt it. This was manifest in the manner of the code’s implementation. The promoters of the code relied not on the sovereign authority of the Imperial (British) Parliament, but on parallel action by the different Dominions. Australia adopted the common code in its Nationality Act of 1920. The 1920 Act constituted the first Australian general legislation on nationality, as opposed to on specific matters of local naturalisation.

The 1920 Act addressed a prominent concern of the time by providing, in Australian domestic law, for reciprocal recognition of naturalisation certificates issued by the United Kingdom and Australia and the other Dominions. In contrast with the 1903 Act, the 1920 Act did not expressly deny persons the ability to apply for naturalisation on grounds of race. In its place it conferred ‘absolute discretion’ on the Governor-General to give or withhold a naturalisation certificate without providing a reason, giving the government scope to apply any policy on naturalisation of non-Europeans it thought fit. Only 45 persons characterized by the government as being of an Asian nationality were naturalised between 1904 and 1953 (Dutton 2002: 43).

¹⁷ Naturalization Act 1903 (Cth), ss 13 and 4 respectively.

¹⁸ See for example *Markwald v Attorney-General* [1920] 1 Ch 348, referenced more recently in *Re Patterson; ex parte Taylor* [2001] HCA 51, (2001) 207 CLR 391, [293] per Kirby J.

¹⁹ See further Parry 1957, 80-81 and 445-449.

²⁰ Naturalization Act 1903 (Cth), s 5. On the parliamentary history leading to an expressly discriminatory naturalisation provision see Palfreeman 1967: 104-105.

The 1920 Act, following the British template, contained statements stressing that the status of naturalised British subject was ‘to all intents and purposes the status of a natural-born British subject.’²¹ A large hole in this claim was constituted by the provisions relating to loss of British subject status. The 1920 legislation made extensive provision for revocation of British subject status acquired through naturalisation.²² Under the 1920 Act, a certificate of naturalisation could be revoked where the person granted the certificate had: shown him or herself ‘by act or speech to be disaffected or disloyal to His Majesty’; been sentenced to a term of imprisonment of not less than a year, or received of a fine of not less than £100, within five years of the grant of the certificate; ‘was not of good character’ at the date of the grant; or had been ordinarily resident ‘out of his Majesty’s dominions’ for more than seven years (other than in certain circumstances), among other measures.²³ British subject status acquired through naturalisation was accordingly a much more conditional and vulnerable status than birthright citizenship (acquired by *ius soli*, as well as by conditional descent), although, under the 1920 Act, a woman who was an Australian-born British subject automatically lost her British nationality upon marriage to an alien man (a practice that was also followed in Britain, as in most of the world).²⁴ These grounds for revocation were continued, with minor variation, under the 1948 Act that introduced the statutory status of Australian citizenship, discussed in section 2.5 below, until they were finally repealed, with one exception, in 1958.

2.4 The Constitutional Framework²⁵

The Australian parliament’s legislation on matters of immigration and membership (including British subject status), raises the question of the parliament’s constitutional competence.

As noted above, Australia came into existence as a political and legal entity through the federation of six self-governing British colonies under the Australian Constitution. The text of the Constitution was, with small exceptions, settled in a series of constitutional conventions in the 1890s attended by mostly-elected delegates of the various colonies that went on to become states, and was adopted by voters in those colonies in referendums held in the period 1898-1900. It was enacted as an Act of British Parliament in 1900, coming into force on New Year’s Day 1901.

There was debate in the constitutional conventions as to whether ‘Australian citizenship’ should be included in the Constitution.²⁶ In the result, the concept of

²¹ Nationality Act 1920 (Cth), s 11, in the terms of the British Nationality and Status of Aliens Act 1914, s 3(1).

²² The 1920 Act was not the point at which an expansive discretion to revoke the citizenship of naturalised citizens, unrelated to fraud, was introduced into the statute book. Amendments made to the 1903 Act in 1917 conferred a sweeping discretion on the Governor-General to revoke the citizenship of a naturalised citizen.

²³ Nationality Act 1920, s 12, adopting the terms of the British Nationality and Status of Aliens Act 1914, s 7.

²⁴ On the history of marital denaturalisation see Irving 2016.

²⁵ This section draws on earlier work in Thwaites 2014, 39-44.

Australian citizenship did not appear in the constitutional text.²⁷ This was, in part, a reflection of the ‘political realities of that time’, namely Australian reliance on the supranational concept of British nationality.²⁸

The Constitution divides legislative powers between the federal Parliament and Australian state legislatures. This division is achieved by enumerating the subject matters on which the federal Parliament can legislate. Federal legislation is only valid to the extent it is ‘with respect to’ one of the enumerated heads of power. In the absence of explicit authority to enact citizenship legislation, we have to look elsewhere for authority to legislate. The heads of federal legislative power most relevant to the current account are sections 51(xix) and (xxvii): ‘The Parliament shall, subject to this Constitution, have powers to make laws for the peace, order and good government of the Commonwealth with respect to:...(xix) Naturalization and aliens’ and ‘(xxvii) Immigration and emigration’.²⁹ In common usage these powers are referred to as the ‘aliens power’ and ‘immigration power’ respectively.

To express matters to this point in constitutional terms, for the first 86 years of Australia’s history, its immigration and citizenship legislation was primarily reliant on the immigration power in s 51(xxvii). The reason for this was the lack of alignment between the status of British subject and the desired constitution, in the sense of membership, of the Australian community. To put it in exclusionary terms, those whom the government wished to exclude or remove under immigration law included both aliens *and* British subjects. For as long as ‘British subject’ was the antonym of alien, and the Australian government desired to exclude some British subjects, the aliens power could not be relied on for authority over immigration. As put by Isaacs J of the High Court, grounding legal authority in the aliens power would leave a ‘huge gap’,³⁰ preventing the exclusion or deportation of those from elsewhere in the British Empire travelling on British passports.

Under the immigration power, it was the highest national appellate court, the High Court of Australia, that came to define who could freely enter and remain (in determining whether an immigration law was constitutionally valid), and who could be excluded and removed. In the early decades of the Commonwealth of Australia, the High Court addressed the question of who was subject to the immigration power with reference to the concept of ‘community’: ‘the ultimate fact to be reached as a test whether a person is an immigrant or not is whether he is or is not at that time a member of the Australian community.’³¹ The concept of ‘membership of the Australian community’ lacked the legal specificity of connecting factors such as

²⁶ Rubenstein 2017, chapter 2, 35-62 is a good starting point for surveying the relevant literature on citizenship in the Australian constitutional debates, to which she is a leading contributor. See also Irving 1999, chapter 9, 156-170.

²⁷ *Re Patterson*, above note 18, [267] per Kirby J.

²⁸ *Re Patterson*, above note 18, [267] per Kirby J.

²⁹ This is not to say these are the only legislative powers that may be relevant. See for example the suggestion by members of the High Court that the external affairs power could be engaged by a treaty dealing with the subject of dual nationality: *Singh*, above note 5, [194] per Gummow, Hayne and Heydon JJ.

³⁰ *R v MacFarlane* [1923] HCA 39, (1923) 32 CLR 518, 556 per Isaacs J.

³¹ *Potter v Minahan*, above note 11, 308 per Isaacs J. While Isaacs J was in dissent on the issue of what constituted membership of the community, he was at one with the majority in holding that the limits of the immigration power were determined by who was, and who was not, a member of the community.

domicile, residence, personal presence, or citizenship,³² though it drew on these concepts, with the balance between them shifting over time. This lack of specificity was, as a matter of history, part of the reason the concept of ‘membership of the Australian community’ was relied on. For its intelligibility, the concept of ‘community’ relied on certain widespread assumptions concerning the habits and mores, and particularly the ethnic composition, of the Australian population.

An aspect of jurisprudence on the immigration power in s 51(xxvii) qualifying its use was the ‘absorption’ doctrine. The doctrine held that a person could cease to be an ‘immigrant’ subject to regulation by the immigration power, by virtue of the duration of her or his stay and strength of her or his connections with Australia. A person who was an immigrant when they arrived in Australia could (while the doctrine operated) become ‘absorbed’ into the Australian community, passing beyond the scope of the immigration power without the need for any positive act by the government.³³

2.5 Era 3: 1949-1987 The introduction of statutory Australian citizenship and the continuance of British subject status

2.5.1 The co-existence of the statuses of Australian citizen and British subject in Australian law

The statutory status of Australian citizenship was brought into existence by the Nationality and Citizenship Act 1948 (renamed the Australian Citizenship Act 1948 in 1973), entering into force in 1949.

Through the 1948 Act, Australia implemented an arrangement devised at a conference of legal experts from the Commonwealth on nationality, the Commonwealth Citizenship Scheme. The impetus for the replacement of the ‘common code’ with the Commonwealth citizenship scheme was Canada’s creation of a distinct ‘Canadian citizenship’ in 1946 (Parry 1957: 89, Jones 1956: 91-95). The Australian form of the ‘common clause’, the central tenet of the new scheme, was contained in s 7 of the 1948 Act which provided: ‘A person who, under this Act, is an Australian citizen...shall, by virtue of that citizenship be a British subject.’³⁴ This formula inverted the logic of the preceding ‘common code’ on British nationality, with the acquisition of national citizenship becoming primary and British nationality becoming a derivative status.

British nationals who were not Australian citizens (by birth, descent or naturalisation) were still not aliens; indeed the statute defined ‘alien’ as a person who was not a British subject.³⁵ In effect, a tripartite regime was established composed of: (i) Australian citizens (who were simultaneously British subjects); (ii) British subjects who were not Australian citizens and (iii) aliens. Among the non-citizens, those who

³² *Re Woolley, ex parte Applicants M276/2003* [2004] HCA 49, (2004) 225 CLR 1, [135]-[148] per Gummow J.

³³ *Re Patterson*, above note 18, [105] per McHugh J and authorities referred to there.

³⁴ Nationality and Citizenship Act 1948 (Cth), s 7.

³⁵ In full the definition read; “‘alien’ means a person who is not a British subject, an Irish citizen or a protected person’: *ibid*, s 5.

were British subjects enjoyed, in a number of respects, preferential treatment compared to those who were not (and so were defined as aliens).

The new status of Australian citizenship was predominantly acquired by birth in Australia. Citizenship by descent was available where born outside Australia to an Australian father.³⁶ The other avenues for acquisition of Australian citizenship distinguished between British subjects and aliens. British subjects who were not Australian citizens could become Australian citizens by registration,³⁷ a process distinct from the naturalisation process available to non-British subjects (aliens). While the qualifications for registration largely tracked those for naturalisation, registration eased or omitted a number of the naturalisation requirements. Registration, as contrasted with naturalisation, did not require any declaration of an intention to apply, required a shorter period of residence and did not require an oath of allegiance.³⁸

The continuing salience of the distinction between the two classes of non-citizen, British subjects and aliens, following the introduction of Australian statutory citizenship was also registered in the provisions for deportation under the Migration Act 1958. An ‘alien’ could be deported for an offence of violence to the person or extortion to which he or she had been sentenced to imprisonment for one year or longer.³⁹ No time limit was provided on an alien’s vulnerability to deportation. To reiterate, the category of aliens did not include non-citizen British subjects. By way of contrast, an ‘immigrant’ could only be deported for such an offence *within five years of arrival*. The category of immigrant, as opposed to alien, extended to British subjects.⁴⁰ A similar contrast existed between the position of ‘aliens’ and ‘immigrants’ with respect to the responsible Minister’s power to deport a non-citizen for conduct.⁴¹

The preferential treatment of the category of non-citizens who were British subjects, in the form of a registration process distinct from the naturalisation process for other non-citizens, came to an end in 1973.⁴² From that point onwards, there was no distinction with regards to acquisition of citizenship between non-citizen British subjects and other non-citizens within Australian citizenship law.

2.5.2 Naturalisation and the demise of the White Australia policy

As mentioned, since the Naturalization Act 1920, the White Australia policy, in matters of citizenship, had been implemented through the use of administrative discretion. The established policy was that non-Europeans should not be granted the right of permanent residence (which was a prerequisite for naturalisation). In 1957

³⁶ ‘or, in the case of a person born out of wedlock, his mother was an Australian citizen...’: Nationality and Citizenship Act 1948 (Cth), s 11.

³⁷ The registration process was limited to countries specified in the legislation, namely: ‘the United Kingdom and Colonies, Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon’ (s 7) or Irish citizen (ss 8 and 12).

³⁸ Nationality and Citizenship Act 1948 (Cth), ss 12-13 (registration) cf ss 14-16 (naturalisation).

³⁹ Migration Act 1958 (Cth), s 12

⁴⁰ *Ibid*, s 13.

⁴¹ *Ibid*, s 14 (1) cf 14(2).

⁴² See Australian Citizenship Act 1973 (Cth).

there was a change in Cabinet policy, making non-Europeans eligible for naturalisation if they had lived in Australia for 15 years after being lawfully admitted (Tavan 2005: 97-103). In 1966, the time period after which a non-European could apply for resident status and Australian citizenship was dropped to five years (Tavan 2005: 156-166). Remaining distinctions between Europeans and non-Europeans with respect to visas and naturalisation, and other ‘final overt vestiges of discrimination against non-Europeans’ were formally abolished under the Labor Party government of Prime Minister Gough Whitlam, which won the 1972 Federal election (Tavan 2005: 199).

2.5.3 *Lessening distinctions between naturalised and birthright citizens*

As enacted, the 1948 Act maintained a marked distinction between those who had acquired their membership status by birth on the one hand and those who had acquired it by naturalisation or registration on the other. Extensive grounds for revocation and deprivation of citizenship, confined to those who had acquired Australian citizenship by naturalisation (and, post-1949, registration), were carried over from the 1920 Act. This distinction between those who had acquired citizenship by naturalisation or registration, and other Australian citizens, did not last more than a decade into the new era.

All the grounds of revocation confined to naturalised or registered citizens, with the exception of fraud in the naturalisation or registration process, were repealed in 1958. On introducing the amending legislation to Parliament the responsible Minister stated that it had as one of its ‘principal objectives... eras[ing] from the Nationality and Citizenship Act every discrimination, except one [the fraud ground], between naturalised Australians and people born in Australia.’⁴³ In commending the repeal of the deprivation powers to Parliament, the Minister stated that ‘the government in a desire to welcome our new citizens with speed, sincerity and warmth into our national life asks the House [of Representatives] to delete it from the statute book.’⁴⁴

2.5.4 *Papua New Guinea*

The former possession of British New Guinea was placed under the authority of the Commonwealth of Australia in 1902, and accepted by the Commonwealth, as the Territory of Papua, by s 5 of the Papua Act 1905.⁴⁵ In the wake of the First World War, the other component of what was to become the independent state of Papua New Guinea; the former German possession of New Guinea, was placed under Australian administration by Mandate of the League of Nations in 1920. After 1945, the two Territories were administered jointly under Australian legislation.

⁴³ Commonwealth, Parliamentary Debates, House of Representatives, 26 August 1958, 711 (Mr Alexander Downer, Minister for Immigration).

⁴⁴ *Ibid.*

⁴⁵ *Re Minister for Immigration and Multicultural and Indigenous Affairs v Ame* [2005] HCA 36, (2005) 222 CLR 439, [5].

The 1948 Act introducing Australian statutory citizenship defined ‘Australia’ as including ‘the Territory of Papua’.⁴⁶ This had the effect of conferring Australian citizenship on those born in Papua (section 10 providing ‘a person born in Australia after the commencement of this Act shall be a citizen by birth’). Notwithstanding the formal possession of Australian citizenship, those born in Papua, ‘had no right to enter or remain in Australia, or even to leave their own country’ (Goldring 1978: 204). There were ‘[t]ight rules govern[ing] the “Removal of Native People from the Territory”’ (Denoon 2012: 9).⁴⁷

These ‘tight rules’ manifested racial exclusion. The constitutional basis for this exclusion of Australian citizens (born in Papua) from Australia was the immigration power. As with the exclusion of (non-white or otherwise undesirable) British subjects under White Australia, it was the ‘immigration power’ that was relied on. In a 1959 letter, the Australian Minister for Immigration wrote:

The Migration Act permits the exclusion from Australia of any ‘immigrant’. [Decisions and observations by the High Court have suggested] that any person may be regarded as an immigrant who is not a constituent member of the Australian community – whatever his national status may be.

On this basis, legal power exists to prevent the entry to Australia of either natives of Papua, whose national status is that of Australian citizens, or natives of the Trust Territory of New Guinea, who are Australian protected persons (Nationality and Citizenship Act and Citizenship Regulations).⁴⁸

Papua New Guinea formally became an independent state on 16 September 1975. On that date, Australian citizenship was removed from persons who became citizens of Papua New Guinea on its creation.⁴⁹

There have been legal challenges to this removal of Australian citizenship from citizens of the newly independent Papua New Guinea, with the case of *Ame* reaching the High Court.⁵⁰ Mr Ame was born an Australian citizen in the then Australian Territory of Papua in 1967. He had entered mainland Australia (defined by the High Court as ‘any of the States or internal Territories of Australia’) in 1999 under a visa which expired in 2000. In response to the issuance of a deportation order against him, he argued that because he was an Australian citizen at birth, he could not be removed under Australian immigration law. The High Court held that the form of Australian citizenship held by Papuans did not confer a right to permanent residence in mainland Australia. They held that s 122 of the Australian Constitution, the Territories power, entitled the Australian parliament to confer and withdraw sovereign rights from external territories, where this included treating the inhabitants of Papua New Guinea as aliens and withdrawing their Australian citizenship. The citizenship

⁴⁶ Nationality and Citizenship Act 1948 (Cth), s 5. The relevant portion reads “‘Australia’ includes Norfolk Island and the Territory of Papua’.

⁴⁷ Denoon’s quote references a phrase from Australian Archives, Department of Territories, A 452/1, file 60/8329, Administrator to Department, September 8, 1958.

⁴⁸ Denoon 2012: 9 quoting from Australian Archives, Department of Territories, A 452/1, file 60/8329, Minister A.R. Downer to W.C. Wentworth MP, October 27, 1959. The paraphrase in square brackets is that offered by Denoon.

⁴⁹ Under the Papua New Guinea Independence (Australian Citizenship) Regulations 1975, authorised by the Papua New Guinea Independence Act 1975 (Cth).

⁵⁰ *Ame*, above note 45.

law of Papua New Guinea did not recognise dual citizenship, and operated to strip Mr Ame of his Australian citizenship on independence.⁵¹ The High Court's reasoning in *Ame* is confined to circumstances in which the Territories power in s 122 of the Australian constitution is validly invoked. It does not constitute a general statement on the legality of changing a person's status from non-alien to alien outside the s 122 context.

The Australian Citizenship Act 2007 makes special provision for naturalisation of a person born in Papua before 16 September 1975 to an Australian citizen parent who was born in Australia.⁵²

2.6 Era 4: 1987-the present. A binary conception of membership in the Australian community

2.6.1 *The departure of British subject status from Australian law and constitutional re-alignments*

Writing in 1982 in the case of *Pochi v McPhee*, Chief Justice Gibbs of the High Court stated that the assumption that 'a person who is a British subject under the law of the United Kingdom cannot be an alien within s 51(xix) [The aliens power]' is false.⁵³ In support of this statement Gibbs referenced changes indicating the independence of Australia and the severing of imperial ties.⁵⁴ Gibbs held that it was no longer tenable for the scope of the aliens power to depend on any English as opposed to Australian law. A consequence of this conclusion was that there was no longer any need to rely on the immigration power in addition to the aliens power in order to regulate the admission and removal of non-citizen British subjects from Australia.

In the 1980s reference to 'British subject' and equivalent terms were removed from the Migration Act 1958 and the Australian Citizenship Act 1948, the primary pieces of Australian legislation regulating immigration and citizenship respectively. Statutory expungement of the status was both symptomatic and a manifestation of wider shifts in Australian law at the time that consolidated and finalised the formal independence of Australian law from the United Kingdom.

These 1980s amendments defined 'alienage' in terms of the presence or absence of Australian (statutory) citizenship. This approach appeared to organise Australian immigration and citizenship law in terms of a binary distinction between aliens and citizens. Whether this binary distinction in statute corresponded to an underlying constitutional binary was the subject of a series of subsequent cases in the High Court of Australia. These decisions related to the status of British subject – the best candidate to qualify an aligned, and exhaustive, binary division between statutory

⁵¹ *Ame*, above note 45, [9]-[14].

⁵² Australian Citizenship Act 2007 (Cth), ss 21(7) and 24. Where 'Australia' is understood to have the meaning it has at the time of the application for Australian citizenship.

⁵³ *Pochi v McPhee* [1982] HCA 60, (1982) 151 CLR 101, [9].

⁵⁴ The points raised by Gibbs J were that allegiance was now owed to the Queen of Australia, not the British crown, marking a breakdown of the doctrinal underpinning of shared British subject status, namely shared allegiance to the British Crown. Further, British legislation soon to enter into force, the British Nationality Act 1981, would have the consequence that every Commonwealth citizen would no longer be a British subject.

citizen (and so constitutional non-alien) and non-citizen (who, as a consequence of non-citizenship, was an alien). The common contention of the applicant in the cases was that a British subject in Australia over the relevant period could simultaneously be a (statutory) non-citizen, and a (constitutional) non-alien. It was argued that the Migration Act 1958 was constitutionally invalid in its application to the applicants, non-citizen British subjects, for lack of a head of legislative power.

The cases: *Nolan* (1988), *Patterson* (2001) and *Shaw* (2003) all concerned challenges to deportation orders against non-citizen British subjects.⁵⁵ Each of the litigants had made their life in Australia for decades after arriving as British subjects. They resisted deportation on the basis that the legislation relied on was not constitutionally valid in its application to them. They argued that as British subjects in the relevant period they were not aliens. The argument was that at the relevant time of their entry into, and life in Australia, there was a category of non-citizen, non-alien, British subjects, of which they were a member. The High Court's response to an argument of this form fluctuated: a majority rejected the argument in *Nolan* (1988), but accepted it in *Re Patterson; Ex parte Taylor* (2001), before ultimately rejecting it in *Shaw* (2003). To reiterate, the dispute between the majority and minority in these cases related to a particular period of time, now ended. Even those judges who affirmed the existence of an intermediate category of non-citizen non-alien British subject that included the applicant accepted that by 1986 this category had been 'terminated'.⁵⁶

The final case in this trilogy, *Shaw* (2003) affirmed as a matter of constitutional law a binary whereby the statutory status of non-citizen aligned with the constitutional status of alien and conversely, statutory citizen aligned with constitutional non-alien. This alignment of statutory and constitutional divisions is not to say that the statutory and constitutional concepts are identical. More particularly, lack of statutory citizenship does not conclusively determine constitutional alienage. The High Court of Australia has repeatedly reiterated the existence of limits on the Parliament's ability to define the constitutional concept of alienage.⁵⁷ But, with the exception of *Patterson's* case, now overruled, there was no ruling that a person who did not validly acquire Australian statutory citizenship was nonetheless not a constitutional alien

Among other implications, the above trilogy of cases emphasises that acquisition of statutory citizenship, not residence, is the key to acquisition of the relevant constitutional status of non-alien. *Nolan* had arrived in Australia at age 9, and the deportation order against him was issued some 18 years later. *Taylor* had been in Australia 33 years (and the ruling in the case invalidated his removal order). *Shaw* had entered Australia at age 2, some 29 years before the date of judgment and had never left, but was nonetheless an alien. The length of their lawful residence in Australia was constitutionally irrelevant.

⁵⁵ *Nolan v Minister for Immigration & Ethnic Affairs* [1988] HCA 45, (1988) 165 CLR 178; *Re Patterson*, above note 18; *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72, (2003) 218 CLR 28.

⁵⁶ *Singh*, above note 5, [265] per Kirby J.

⁵⁷ *Pochi*, above note 53, [9] per Gibbs J; *Re Patterson*, above note 18, [43], [47] per Gaudron J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* [2002] HCA 48, (2002) 212 CLR 162, [31] per Gleeson CJ; *Singh*, above note 5, [151]-[153] per Gummow, Hayne and Heydon JJ.

2.6.2 Modification of *ius soli*

From Federation, initially under common law, and from 1920 by statute, the predominant means of acquiring membership in the Australian community was through the *ius soli* principle ie by birth in Australian territory. A person born in Australia was a British subject and, from 1949, an Australian citizen.⁵⁸ Amendments introduced in 1986 qualified the *ius soli* principle. A person born in Australia after the commencement of the 1986 amendments was only an Australian citizen by birth if:⁵⁹

- (a) A parent of the person was, at the time of the person's birth, an Australian citizen or permanent resident; or
- (b) The person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.

The 'problem' which the 1986 amendments to *ius soli* was intended to address, as set out in the responsible Minister's Second Reading speech to the parliament, was that the 'generosity' contained in Australian law in the form of automatic birthright citizenship 'can be exploited by visitors and illegal migrants and illegal immigrants who have children born here in order to seek to achieve residence in Australia'.⁶⁰ The background to the amendments included:⁶¹ media attention to the issue, reports by parliamentary bodies and statutory agencies recommending or sanctioning such a change to *ius soli* (House of Representatives Standing Committee on Expenditure 1985; Human Rights Commission 1985a & 1985b),⁶² and High Court jurisprudence, some judgments of which had held that the effect of parental deportation on a child who was an Australian citizen was a relevant consideration for a decision-maker.⁶³

⁵⁸ This is not to say that it was always the case that a person born in Australia had a right to return if he or she travelled overseas. There were cases of persons born in Australia, and so British subjects, denied entry after a time overseas on the grounds that they were best characterized as an 'immigrant': for example *Donohue v Wong Sau* [1925] HCA 6, (1925) 36 CLR 404.

⁵⁹ Australian Citizenship Act 1948 (Cth), s 10 as amended by the Australian Citizenship Amendment Act 1986 (Cth), s 4.

⁶⁰ Commonwealth, Parliamentary Debates, House of Representatives, 19 February 1986, 868-869 (Mr Hurford, Minister for Immigration and Ethnic Affairs) ('2nd Reading Speech'). See also Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1986, 1353 (Mr Hurford, Minister for Immigration and Ethnic Affairs). This theme was taken up by many other speakers in the Parliamentary debates.

⁶¹ On the general background see for example Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1986, 1278 (Dr Charlesworth, Member for Perth). See also Prince 2003: Part One.

⁶² For the point taken from the Human Rights Commission reports see the 2nd Reading speech, above note 60.

⁶³ The most referenced decision in this regard was *Kioa v West* [1985] HCA 81, (1985) 159 CLR 551. Mr Kioa successfully challenged his deportation order. The grounds on which he succeeded were that he had not been accorded procedural fairness, and did *not* relate to his daughter's Australian citizenship. In Parliamentary debate the decision was presented as a prominent example of 'appeals which, in effect, have assisted attempts of illegal immigrants to stay in this country because of the present provision': see Commonwealth, Parliamentary Debates, House of Representatives, 13 March 1986, 1278 (Dr Charlesworth, Member for Perth).

2.6.3 *The ability of Australian citizens to acquire another citizenship*

From the introduction of Australian statutory citizenship in 1949 until 2003, statute provided that an Australian who acquired the citizenship of another country (other than through marriage) automatically ceased to be an Australian citizen.⁶⁴ The denial of an Australian's ability to acquire additional citizenship(s) without loss of Australian citizenship, contained in s 17 of the Australian Citizenship Act 1948, did not amount to an outright prohibition on dual citizenship. The bar to dual citizenship only went 'one way'. It did not preclude a person becoming a dual citizen by acquiring Australian citizenship by naturalisation, while retaining her or his original nationality.

Amendments in 2002, entering into force the following year, repealed s 17, so allowing an Australian to acquire another citizenship without losing her or his Australian citizenship.⁶⁵ The repeal of s 17 had been recommended in 1994 by the parliamentary Joint Standing Committee on Migration ('JSCM').⁶⁶ In making the recommendation, the JSCM stated:

The Committee rejects the argument that one cannot owe allegiance or commitment to more than one country. It is estimated that three million Australians currently possess dual citizenship. There is no evidence to suggest that these persons are disloyal or lack a commitment to Australia simply because they have chosen not to relinquish their former ties and heritage.⁶⁷

In its conclusions, the JSCM further stated that allowing Australians to acquire another citizenship was 'in keeping with Australia's non-discriminatory and inclusive approach to citizenship', was in line with 'international trends in citizenship law' and would relieve administrative burdens on Australian embassies and consulates.⁶⁸ In anticipation of the fiftieth anniversary of Australian Citizenship on 26 January 1999, an Australian Citizenship Council was formed to prepare and present a report to the Minister on 'Australian citizenship matters' (Australian Citizenship Council 2000: 3). The Australian Citizenship Council endorsed and reinforced the recommendations of the 1994 JSCM study, finding 'itself in complete agreement with the JSCM in relation to the repeal of section 17' (Australian Citizenship Council 2000: 65). The 2002 legislation repealing s 17 was responsive to the Australian Citizenship Council's report.⁶⁹

As suggested above, section 17 was of marginal significance to the prevalence of dual citizenship among the Australian population. Even with the s 17 prohibitions in place, dual citizenship in Australia was already 'a fait accompli' (Millbank 2000: i). The 2000 report of the Australian Citizenship Council characterized s 17 as a

major anomaly in that some Australian Citizens, estimated to be around 4.4 million, are able to lawfully possess more than one Citizenship, while those

⁶⁴ Nationality and Citizenship Act 1948 (Cth), s 17, as amended by Australian Citizenship Amendment Act 1984 (Cth).

⁶⁵ Australian Citizenship Legislation Amendment Act 2002 (Cth).

⁶⁶ See Joint Standing Committee on Migration 1994, recommendation 55.

⁶⁷ Joint Standing Committee on Migration 1994, para 6.92.

⁶⁸ Joint Standing Committee on Migration 1994, para 6.91 and 6.93, para 6.94 and para 6.95 respectively.

⁶⁹ Explanatory Memorandum to the Australian Citizenship Legislation Amendment Bill 2002, para 1.

who start from the base of having Australian Citizenship and acquire another Citizenship lose their Australian Citizenship.⁷⁰

The issue was not whether Australia should allow plural citizenship; already widespread, but whether an Australian citizen should be able to retain Australian citizenship on acquiring the citizenship of another country.

In 2007, for the first time since Australian statutory citizenship was introduced in 1949, the governing statute was completely restructured, with the Australian Citizenship Act 2007 replacing the Australian Citizenship Act 1948.⁷¹ While the statute was significantly reorganised, the substantive changes made in the transition from the 1948 Act to the 2007 Act were limited.⁷²

Statutory amendments providing for the introduction of a citizenship test for citizenship acquired by naturalisation were also made in 2007, though contained in amending legislation that followed the enactment of the 2007 Act.⁷³ Under the amendments, eligibility to become an Australian citizen by conferral rested on, among other matters, sitting and successfully completing a citizenship test.

3. Current citizenship regime⁷⁴

3.1 Modes of acquisition – Automatic acquisition of citizenship

The Australian Citizenship Act 2007 (Cth) is the primary legislation for the current Australian citizenship regime. The categorisation of modes of acquisition and loss in this Part follows the structure of the Act.

3.1.1 Citizenship by birth

As noted in section 2.6.2, the preceding *ius soli* regime was modified in 1986 such that a person born in Australia after the commencement of the amendments is only an Australian citizen by birth if:⁷⁵

- (a) A parent of the person was, at the time of the person's birth, an Australian citizen or permanent resident; or

⁷⁰ Australian Citizenship Council 2000, 60-61.

⁷¹ The Australian Citizenship Act 1948 was enacted as the Nationality and Citizenship Act 1948, but had its name changed by statutory amendment in 1973.

⁷² For a concise summary of the more notable changes see Rubenstein 2017, 2, fn 3.

⁷³ Australian Citizenship Amendment (Citizenship Testing) Act 2007 (Cth).

⁷⁴ For a recent and detailed description of the Australian Citizenship Act 2007 (Cth) in the context of relevant case law and administrative practice see Kim Rubenstein and Jacqueline Field 'Ch 4: Australian Citizenship Act 2007 (Cth) in Rubenstein 2017, 91-289.

⁷⁵ Australian Citizenship Act 1948 (Cth), s 10 as amended by the Australian Citizenship Amendment Act 1986 (Cth), s 4.

- (b) The person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.

The statutory modification of *ius soli* effected in 1986, making the legal status of a parent at the time of birth a prerequisite for the acquisition of birthright citizenship,⁷⁶ was upheld as a matter of constitutional law in the High Court's decision in *Singh* (2004). The *Singh* litigation was responsive to a deportation order against a child, Tania Singh, born in Australia in 1998 to parents who held neither Australian citizenship nor permanent resident status. The child plaintiff argued that, by virtue of her birth in Australia she could not be a constitutional 'alien', subject to immigration and citizenship laws enacted pursuant to the aliens power in s 51(xix). A majority of five judges of the High Court rejected this contention, holding that the constitutional concept of alien did not, as a matter of definition, exclude those born in Australia.⁷⁷ It was open to Parliament to condition the acquisition of birthright citizenship on the legal status of a parent, and it had done so in 1986. Further implications of the reasoning in *Singh* for constitutional understandings of non-alienage are discussed in section 3.4.

The Australian Citizenship Act 2007 does enable a person born in Australia, other than the child of citizen or permanent resident, to acquire Australian citizenship by birth. What is required is that the child be 'ordinarily resident' in Australia for 10 years from the date of her or his birth.⁷⁸ Australian courts have held that, as a matter of Australian administrative law, this 'ordinarily resident' requirement is a 'jurisdictional fact'.⁷⁹ The practical consequence of this ruling is that it licenses extensive factual inquiries by the courts as to the history of the applicant's residency. These judicial inquiries have, on occasion, led the courts to find, contrary to the Ministerial decision under review, that an applicant is an Australian citizen by birth.⁸⁰

A Bill introduced into the Australian Parliament by the government in October 2014 sought to further restrict the acquisition of citizenship by birth by this second route; being 'ordinarily resident' in Australia for ten years from birth.⁸¹ The proposed restrictions took the form of status qualifications on the application of the provision, among them that a person could not acquire citizenship by being 'ordinarily resident' in Australia for ten years from birth if at any time in that ten year period she or he had been present in Australia as an unlawful non-citizen. This proposal has not become law. The Bill lapsed when Parliament was prorogued for the 2016 federal election and, at the time of writing, no equivalent amendment has been introduced into the Parliament.

Other forms of acquisition characterised as automatic acquisition of citizenship under the Act include citizenship by adoption (under Australian law, by a person who is both an Australian citizen and present in Australia as a permanent resident at the time

⁷⁶ See now Australian Citizenship Act 2007(Cth), s 12(a).

⁷⁷ *Singh*, above n 5. Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ in the majority; McHugh and Callinan JJ dissenting.

⁷⁸ See Australian Citizenship Act 2007 (Cth), s 12(b).

⁷⁹ *Lee v Minister for Immigration and Citizenship* [2011] FCA 1458.

⁸⁰ See for example *Kim v Minister for Immigration and Border Protection* [2016] FCA 959. The workings of Australian judicial review of administrative action mean that it then falls to the Minister to do all things reasonable and necessary to give effect to that finding.

⁸¹ Australian Citizenship and Other Legislation Amendment Bill 2014.

of adoption),⁸² citizenship for children abandoned in Australia and citizenship by incorporation of territory.⁸³

3.2 Modes of acquisition – Citizenship by application

3.2.1 *Citizenship by descent*

A person born outside of Australia can acquire Australian citizenship by descent. If one of the person's parents was an Australian citizen at the time of the person's birth, then she or he will be eligible for citizenship by descent.⁸⁴ If the applicant is 18 years or over at the time of the application, she or he must also pass a character test.⁸⁵ In a departure from the pre-2007 position, the 2007 Act does not contain any requirement that the name of an applicant for citizenship by descent be registered with an Australian consulate within a certain period after his or her birth in order to claim citizenship by descent.

Citizenship by descent differs from the other categories of citizenship by application in that the Minister has no discretion to refuse an application by an eligible person. Subject to being satisfied: of the person's identity; that exceptions related to national security are not relevant; and that the person had not ceased to be an Australian citizen in the last 12 months (so that the application is effectively one for resumption of citizenship), 'the Minister must approve the person becoming an Australian citizen' if he or she is eligible for Australian citizenship by descent.⁸⁶

3.2.2 *Citizenship by conferral ie naturalisation*

Australia is a country of migration, and naturalisation has played, and continues to play, a significant demographic role in increasing the numbers of those holding Australian citizenship. As noted in the introduction, in a speech in late 2014, the Secretary of the relevant government department stated that 'almost 5 million' migrants had become Australian citizens since the status was introduced in 1949 (Pezzullo 2014).

A media release by the Australian Bureau of Statistics in 2016 recorded that 'The proportion of Australians who were born overseas has hit its highest point in over 120 years, with 28 per cent of Australia's population born overseas' (2016b). It went on to record that the number of Australian residents born in India had tripled over the previous decade, with the number of Australian residents born in China doubling over that period. The top ten countries of birth, excluding Australia, were, from largest to

⁸² Australian Citizenship Act 2007 (Cth), s 13. The automaticity of citizenship in such cases is to be contrasted with citizenship by adoption outside Australia under the Hague Convention on Intercountry Adoption or bilateral agreement, which is by application: see Australian Citizenship Act 2007 (Cth), subdiv AA.

⁸³ Australian Citizenship Act 2007 (Cth), ss 14 and 15 respectively.

⁸⁴ *Ibid*, ss 16 and 17.

⁸⁵ *Ibid*, s 16(2)(c).

⁸⁶ *Ibid*, s 17.

smallest: United Kingdom, New Zealand, China, India, Philippines, Vietnam, Italy, South Africa, Malaysia and Germany. These figures are for Australian residents, not Australian citizens, and so include Australian citizens, permanent residents and long-term temporary residents. These statistics are to be interpreted in the light of the significant expansion in those admitted to Australia on long-term temporary visas over the same period, rendering their pathway to citizenship conditional and contingent, a phenomenon discussed under ‘current issues’ in Part 4.

In terms of conferrals of citizenship, a 2010 paper by the Department of Immigration and Citizenship (Smith, Wykes, Jayarajah & Fabijanac 2010) recorded conferrals of Australian citizenship by nationality as follows:

Table 1

Previous Nationality	Citizenship Conferrals 2000-01 to 2009-10
United Kingdom	197,869
New Zealand	94,479
People’s Republic of China	80,072
India	72,818
South Africa	47,255
Philippines	35,251
Sri Lanka	21,712
Vietnam	20,411
Malaysia	19,317
Republic of Korea	14,760
Indonesia	12,204
Other countries	368,811
Total	984,959

The 2010 paper noted that there has been considerable movement among these nationalities over the ten year period, with New Zealand dropping to the sixth largest source by the end of the period, in 2009-10,⁸⁷ and India becoming the second largest source of new citizens by the end of the period.

Turning to the eligibility requirements for naturalisation, a current applicant for citizenship by naturalisation (or as currently termed under the statute ‘conferral’) must satisfy the Minister that she or he:⁸⁸

- is over 18 at the time of the application;

⁸⁷ There is a discussion of the legal barriers to New Zealanders seeking to acquire Australian citizenship under ‘current issues’ in the text below, section 4.2.2.

⁸⁸ See Australian Citizenship Act 2007 (Cth), s 21.

- is a permanent resident (both at the time of the application and of a decision on that application);
- satisfies the general residence requirement;
- is likely to continue to reside in, or maintain a close and continuing association with, Australia if the application is approved;
- is of good character; and
- understands the nature of the application; possesses a basic knowledge of English and ‘has an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship’, where satisfaction of the matters listed in this point requires sitting a citizenship test.

A key requirement for naturalisation, the general residence requirement, has fluctuated in the period since the introduction of statutory citizenship in 1949. As enacted in 1948, a person needed to have resided in Australia or New Guinea for a continuous period of one year immediately prior to making the application, and to have resided in those places for periods ‘amounting in the aggregate’ to four years in the eight years immediately preceding the date of application.⁸⁹ In 1973 this second component was dropped to two years in the eight years preceding.⁹⁰ In 1984 the residence requirement was changed to a cumulative requirement of being present in Australia as a permanent resident for one year in the aggregate in the two years prior to making the application, and for a period of two years in the aggregate in the five years preceding.⁹¹

In 2007 the general trajectory of shortening the residence requirements was reversed and the residence requirement increased to four years, largely taking its current form.⁹² The general residence requirement currently has three elements: that the applicant has been in Australia for the four years immediately prior to making the application of citizenship; that she or he not have held the status of unlawful non-citizen in that four year period and; that she or he have held the status of permanent resident for the last 12 months of that four year period. As a generalisation, the contraction and expansion of the general residence requirement has reflected shifts in government emphasis between actively encouraging, or selectively filtering, applicants for Australian citizenship. In late April 2017, the government announced that citizenship applicants ‘will be required to demonstrate a minimum of four years in Australia as a permanent resident immediately prior to applying for citizenship, with a maximum of 12 months outside Australia in this period’.⁹³

In addition to the ‘general residence’ requirement there are a variety of alternative, and shortened, ‘special residence’ requirements available to some categories of applicants for naturalisation, including ‘persons engaging in activities

⁸⁹ Nationality and Citizenship Act 1948 (Cth), s 15.

⁹⁰ Australian Citizenship Act 1948 (Cth), s 14 as amended by Australian Citizenship Act 1973, s 8.

⁹¹ Australian Citizenship Act 1948 (Cth), s 13 as amended by the Australian Citizenship Amendment Act 1984 (Cth), s11.

⁹² The one exception is that since 2007 the allowable absences from Australia in the final year before making the application have reduced to 90 days.

⁹³ Australian Government, *Strengthening the Test for Australian Citizenship*, April 2017, 9, <http://www.border.gov.au/ReportsandPublications/Documents/discussion-papers/citizenship-paper.pdf>

that are of benefit to Australia’, ‘persons engaged in particular kinds of work requiring regular travel outside Australia’, and those engaged in defence service.⁹⁴

The general residence requirement makes territorial presence in Australia necessary for naturalisation. Insofar as naturalisation is generally available to all long-term residents, the general residence requirement speaks to residence as a proxy for membership in the community, as will be recognised by the grant of citizenship status. The most common qualification to this understanding in Australian citizenship law is the requirement that an applicant for citizenship hold permanent resident status. The number and proportion of the Australian resident population denied permanent residence by the terms of their visa has grown in the last decade or so, contributing to a relative decline in the proportion of citizens against the wider resident population. This issue is discussed under ‘current issues’ in Part 4.

Other forms of citizenship by application include citizenship by adoption overseas in accordance with The Hague Convention on Intercountry Adoption or a bilateral agreement, and applications for resumption of citizenship.⁹⁵ As regards resumption of citizenship, particular provision is made for those who renounced their Australian citizenship in order to acquire the citizenship of another country, or who lost their Australian citizenship due to the old s 17 which, as discussed in section 2.6.3 above, operated until 2003 to revoke a person’s Australian citizenship where she or he acquired the citizenship of another country. Where a person resumes Australian citizenship, she or he acquires the same type of citizenship that she or he had previously (for example, a citizen who had acquired Australian citizenship by descent, then lost citizenship, would on resumption be treated as a citizen by descent).⁹⁶

3.3 Modes of loss

3.3.1 *Deprivation for fraud*

As discussed in section 2.5.3, until 1958 there was an extensive list of grounds on which a person naturalised as an Australian citizen could be deprived of that status. Amendments in 1958 removed all of the grounds of deprivation particular to naturalised citizens, save for deprivation on the basis of a conviction of fraud in relation to the citizenship application.⁹⁷ Prosecution had to be commenced within 10 years of the commission of the relevant fraud offence.⁹⁸

The last two decades have seen the rise and rise of the types and range of fraud caught by the fraud grounds. In 1997, the scope of fraud leading to deprivation of citizenship was expanded to include ‘migration-related fraud’, a conviction for fraud connected with a person’s entry into Australia or the grant to a person of a visa or

⁹⁴ Australian Citizenship Act 2007 (Cth), ss 22A, 22B and 23 respectively.

⁹⁵ Australian Citizenship Act 2007 (Cth), subdiv AA and subdiv C respectively. As noted above, children adopted in Australia under Australian law automatically become Australian citizens.

⁹⁶ Australian Citizenship Act 2007(Cth), ss 32(2), (3).

⁹⁷ Nationality and Citizenship Act 1948 (Cth), s 21 as amended by the Nationality and Citizenship: An Act to amend the Nationality and Citizenship Act 1948-1955, 1958 (Cth).

⁹⁸ Nationality and Citizenship Act 1948(Cth), s 50 as amended by the Nationality and Citizenship: An Act to amend the Nationality and Citizenship Act 1948-1955, 1958 (Cth).

permission to enter and remain in Australia.⁹⁹ Also in that year, the requirement that prosecution for fraud commence within 10 years of commission of the offence was removed.¹⁰⁰ Then in 2007, the fraud ground was expanded to encompass third party fraud; that is, where a person other than the applicant had been convicted of a fraud offence connected with the responsible Minister's approval of the applicant becoming an Australian citizen.¹⁰¹

The current provision for deprivation of citizenship on grounds of fraud applies to the various grounds of citizenship by application: citizenship by descent, citizenship by intercountry adoption and citizenship by conferral.¹⁰²

3.3.2 Other forms of loss

An Australian may apply to the responsible Minister for renunciation of his or her Australian citizenship.¹⁰³ The Minister has a discretion as to whether or not to approve an application for renunciation.

Ever since the introduction of Australian statutory citizenship in 1949, there has existed a provision that automatically revokes the Australian citizenship of a person who is citizen of another country and serves in the armed forces of a country at war with Australia.¹⁰⁴

The children of those who cease to be Australian citizens can also be deprived of citizenship.¹⁰⁵ This deprivation power does not apply if the child has another responsible parent who is an Australian citizen, or if the child would be rendered stateless as a consequence of deprivation.

In December 2015 a suite of mechanisms was enacted to deprive an Australian dual citizen of her or his Australian citizenship on security grounds. These are discussed under 'current issues' in Part 4. The public was informed through the media in February 2017 of the first person to be stripped of his Australian citizenship under the new powers.¹⁰⁶

⁹⁹ Australian Citizenship Act 1948 (Cth), s 21 as amended by the Migration Legislation Amendment Act (No. 1) 1997 (Cth), Sch 4.

¹⁰⁰ Australian Citizenship Act 1948 (Cth), s 50 as amended by the Migration Legislation Amendment Act (No. 1) 1997 (Cth), Sch 4.

¹⁰¹ Australian Citizenship Act 2007 (Cth), s 34.

¹⁰² Australian Citizenship Act 2007 (Cth), s 34.

¹⁰³ Australian Citizenship Act 2007 (Cth), s 33.

¹⁰⁴ Nationality and Citizenship Act 1948 (Cth), s 19. Currently Australian Citizenship Act 2007 (Cth), s 35 (1)(b)(i). On the background to the inclusion of the provision in the 1948 Act see Karlsen 2015.

¹⁰⁵ Australian Citizenship Act 2007 (Cth), s 36.

¹⁰⁶ Paul Maley, 'Khaled Sharrouf stripped of citizenship under anti-terror laws', *The Australian*, 11 February 2017, <http://www.theaustralian.com.au/national-affairs/immigration/khaled-sharrouf-stripped-of-citizenship-under-antiterror-laws/news-story/c82f008e768ae74f7798af983c4d2051>.

3.4 The constitutional concept of alien

There are repeated statements in Australian High Court judgments on the scope of the constitutional aliens power to the effect that statutory citizenship cannot define the scope of the power.¹⁰⁷ The basic objection is that to allow this would be to allow the parliament to determine the scope of its own legislative power, contrary to the principle that it is for the courts to determine the bounds of constitutional validity.¹⁰⁸ This then raises the question of how the scope of the aliens power might be defined independently of statutory citizenship. As noted in section 3.1.1, in *Singh* the proposition that birth in Australia was a constitutional constant, taking those born in Australia outside the scope of the aliens power, was rejected. *Singh* was concluded on the basis that the applicant was an Indian citizen, by *ius sanguinis*.¹⁰⁹ In *Singh*, a number of judges advanced the proposition that ‘a central characteristic of the status of “alien” is, and always has been, owing obligations to a sovereign power other than the sovereign power in question’.¹¹⁰ At points in the judgments, the identification of what had remained constant with respect to alienage was framed as extending to the stateless, in addition to those who owed allegiance to a foreign power.¹¹¹ A question raised, and not answered, by the decision is where this linkage of alienage with allegiance to a foreign power leaves Australian dual citizens, who have ties of allegiance to both Australia and a foreign power.

The subsequent decision of *Koroitamana* was, as with *Singh*, generated by the qualifications introduced to birthright citizenship in 1986.¹¹² The two children plaintiffs had been born in Australia to parents who were neither Australian citizens nor permanent residents, and neither child had spent 10 years ‘ordinarily resident’ in Australia from the date of birth. Accordingly, under the statutory terms in place since 1986, neither was an Australian citizen. The circumstances in *Koroitamana* were distinct from those in *Singh* as the case was argued on the basis that the applicants did not hold the ‘central characteristic’ of alienage referred to in *Singh*, namely ‘owing obligations’ to a foreign power. Under the Fijian constitution the children were entitled to obtain the citizenship of Fiji by registration, but neither child had been so registered. In other words, the applicants were not, at the time of hearing and judgment, citizens of any other country. The applicants further argued that they were not stateless, this argument motivated by statements in *Singh* that it was open to Parliament to treat a stateless person as an alien. The applicants argued that they were ‘constitutional citizens’ of Australia, neither stateless nor citizen of any other country. The Court unanimously held that the children were, in constitutional terms, aliens. It was held that the children were aliens even in the absence of any allegiance to a

¹⁰⁷ See authorities collected at note 57 above.

¹⁰⁸ See for example *Singh*, above note 5, [153] per Gummow, Hayne and Heydon JJ.

¹⁰⁹ See *Singh* above note 5, [2] per Gleeson CJ; [142] per Gummow, Hayne and Heydon JJ cf Kirby J at [210] ‘The case was argued on the basis that the plaintiff was, and is, a citizen of India. However, this is far from clear.’

¹¹⁰ *Singh*, above note 5, [190], [200] and [205] per Gummow, Hayne and Heydon JJ.

¹¹¹ *Singh*, above note 5, [190] ‘what did remain unaltered was that “aliens” included those who owed allegiance to another sovereign power, or who, having no nationality, owed no allegiance to any sovereign power’. See also Kirby J who decided the applicant was an alien notwithstanding that she was not necessarily entitled to another citizenship: *ibid*, [211].

¹¹² *Koroitamana v Commonwealth* [2006] HCA 28, (2006) 227 CLR 31.

foreign power, the constitutional status of alienage being held to encompass persons who do not possess any foreign nationality or allegiance.

Koroitamana is the most recent pronouncement of the High Court of Australia on the constitutional dimension of Australian citizenship, and more particularly the concepts of allegiance and (non-) alienage through which this constitutional understanding is expressed. The understanding of allegiance that *Koroitamana* supports is a formal one. The possession of statutory citizenship determines allegiance. Constitutional alienage effectively reduces to a lack of statutory Australian citizenship. This correspondence between lack of statutory citizenship and the status of constitutional alien does not mean the statuses are identical. As stated at the start of this section, the basic objection to an identity between statutory citizenship and constitutional non-alienage is that the Commonwealth Parliament cannot, through legislation, define a constitutional concept that controls its own legislative authority. Nonetheless, on current case law the nature and location of the constitutional boundaries on alienage that might invalidate citizenship legislation remain uncertain and speculative.

In December 2015 expansive new powers of deprivation on national security grounds were enacted. In explaining the legal context and justification for the new deprivation powers, the Australian government relied on *Koroitamana* as authority for the centrality of allegiance to citizenship,¹¹³ arguing that deprivation was a consequence of disallegiant conduct by the person concerned. For reasons discussed below, the formal conception of allegiance endorsed in *Koroitamana* needs supplementation if it is to support the 2015 amendments. Litigation on the new deprivation powers (whose first use was reported in February 2017), may prove a vehicle for further development of constitutional case law on the scope of the aliens power.

4. Current issues

4.1 New powers with respect to deprivation of citizenship¹¹⁴

In December 2015 amendments to the Australian Citizenship Act 2007 were enacted that significantly expand government powers to deprive a person of Australian citizenship status.¹¹⁵ In early 2017 reports emerged of the first publicly known use of the new powers.¹¹⁶

¹¹³ Explanatory Memorandum, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), Notes on Individual Clauses, [9] and [10]. This refers to the first Explanatory Memorandum of 24 June 2015. There was also a Supplementary Explanatory Memorandum of 30 November 2015 and a Revised Explanatory Memorandum of 1 December 2015. The same points were made in the ‘Outline’ to the two later Explanatory Memoranda.

¹¹⁴ This section draws on Irving & Thwaites 2015.

¹¹⁵ Australian Citizenship Act 2007 (Cth), as amended by the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth).

¹¹⁶ Maley, above note 106.

The amendments introduced three new mechanisms to deprive an Australian citizen of that status in the absence of any formal renunciation or fraud. The first mechanism is presented as automatically stripping a person of citizenship when she or he engages in conduct that is inconsistent with their allegiance to Australia.¹¹⁷ The conduct triggering deprivation is identified by reference to terrorism offences contained in the criminal code (though there is no requirement under this mechanism of conviction for the referenced offences).¹¹⁸ The mechanism only applies to conduct engaged in outside Australia, or in circumstances where the person has left Australia after engaging in the relevant conduct.¹¹⁹ To develop the reference to the ‘automaticity’ of the provision’s operation, the provision is currently framed in accordance with the legal fiction that there is no decision-maker. A person is deemed to have renounced her or his own citizenship by engaging in the relevant conduct.¹²⁰ That conduct triggers the relevant statutory provisions.¹²¹

The second mechanism is also framed as automatically stripping a person of citizenship when she or he engages in certain conduct. The conduct triggering revocation here is serving in the armed forces of a country at war with Australia, or fighting for, or being the service of, a declared terrorist organisation.¹²² The category of being in the ‘service’ of a declared terrorist organisation does not extend to action that is ‘unintentional’, the result of ‘duress or force’, or constitutes ‘neutral and independent humanitarian assistance’.¹²³ The power to declare a ‘declared terrorist organisation’ lies with the Minister.¹²⁴ As with the first mechanism, it is limited to conduct that occurs outside Australia.

The third mechanism, unlike the first two, applies to conduct engaged in in Australia. The precondition for its use is the person’s *conviction* for any of a number of listed terrorism offences, for which the person has been sentenced to a period of imprisonment of six years, or periods of imprisonment which total six years.¹²⁵ The Minister has a discretion as to whether to deprive a person of citizenship using this mechanism, where that discretion is regulated by statutory requirements.¹²⁶

All three of above deprivation mechanisms apply only to persons who are ‘a national or citizen of a country other than Australia’; that is to say, to dual citizens.¹²⁷

For their constitutional support, the deprivation provisions introduced in December 2015 rely on a concept of alienage that goes beyond that contained in current Australian constitutional jurisprudence.¹²⁸ The concept of allegiance is central

¹¹⁷ Australian Citizenship Act 2007 (Cth), s 33AA

¹¹⁸ Ibid, s 33AA(2)-(6).

¹¹⁹ Ibid, s 33AA (7).

¹²⁰ Ibid, s 33AA (1).

¹²¹ Ibid, s 33AA (9).

¹²² Ibid, s 35(1)&(2).

¹²³ Ibid, s 35(4).

¹²⁴ Ibid, s 35AA. The first declaration made under this section was the Australian Citizenship (Declared Terrorist Organisation – Islamic State) Declaration 2016, coming into effect on 6 May 2016.

¹²⁵ Australian Citizenship Act 2007 (Cth), s 35A.

¹²⁶ Ibid, s 35A(1).

¹²⁷ Ibid, s 33AA(1), s35(1), s35A(1).

¹²⁸ The next three paragraphs draw on Irving & Thwaites 2015, 145-147.

to the distinction between alien and citizen. As discussed in section 3.4 above, the 2006 case of *Koroitamana* confirmed a formal, statutory concept: ‘[A]n alien is a person who does not owe allegiance to Australia’,¹²⁹ meaning simply that an alien is not a citizen, as defined under the Australian Citizenship Act 2007. A citizen’s allegiance is signified by their acquisition of citizenship under the Act.

This formal conception of allegiance is not sufficient to support the mechanisms introduced by the amendments. The amendments rely on a substantive, multidimensional notion of *disallegiance*. Certain forms of conduct are defined under the amendments as ‘inconsistent with allegiance to Australia’ and therefore triggering deprivation. This is to transform the determination of whether a person is a citizen into a two part test: first, is the person eligible for citizenship under the formal rules found in the current legislation and secondly, if formally eligible, is she or he otherwise disqualified for having committed prescribed conduct?

The existing case law concerns persons who argued that they were not aliens, but who were found to be not eligible for citizenship under the relevant Australian legislation. With the exception of *Patterson’s* case, reversed in *Shaw*, such persons were held to be aliens because of their ineligibility for statutory citizenship. No further inquiry was made into their degree of connection to Australia. The conclusion that a person was other than a statutory citizen was decisive in ascribing alienage to them. The constitutional issues raised by any legal challenge to the 2015 deprivation measures will be different. The deprivation measures seek to redefine citizens as aliens where their formal citizenship eligibility is not in doubt.

4.2 Restricted pathways to citizenship for long-term residents

4.2.1 *Restricted pathways to citizenship for long-term residents – the rise of temporary visas with work rights*

Over the last decade or so there has been a marked increase in the number of long-term residents in Australia who, owing to the conditions of their entry visa, are excluded from a pathway to Australian citizenship unless they can make the transition to permanent resident status. Permanent residence is one of the eligibility requirements for naturalisation. The number of temporary visa holders present in Australia more than doubled in the seven years from 2006 to 2013, from around 350,000 to over 800,000 (Mares 2016: 56). These figures exclude the category of New Zealanders discussed in the next section.¹³⁰ There is little sign of a slowing or reversal of this growth in the number of long-term temporary migrants with work rights. The existence of a growing pool of long-term residents with restricted pathways to citizenship has given rise to concerns about creation of a class of long-term residents who are denied full inclusion and participation in the Australian community through citizenship (Mares 2016: 11-29; Askola 2016).

The number of those who can be granted permanent resident status is currently capped, while the number of temporary long-term visa holders with work rights is not

¹²⁹ Explanatory Memorandum, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015* (Cth), Notes on Individual Clauses, [10], referencing *Koroitamana*, above note 112.

¹³⁰ These figures include those on Bridging visas, a category not discussed in this report.

(Phillips & Spinks: 5). This has led to pressure on temporary visas to meet skill shortages, and an increasing disparity between the number of long-term residents and the number of available permanent resident visas. While not all long-term residents in Australia on temporary visas wish to settle in Australia permanently, there are strong indications of an ‘increasing mismatch between the aspirations of temporary migrants to become permanent residents and their capacity to realise that goal’ (Mares 2016: 60). This raises the prospect of a steadily growing pool of long-term Australian residents excluded from the broader community by the denial of a pathway to citizenship.

The three largest of these temporary schemes are the temporary skilled worker scheme (the 457 visa),¹³¹ that relating to international students (with work rights during and after study) and that relating to ‘working-holidaymakers’. The number of visas issued in these three categories has tripled between 1998-1999 and 2014-2015, from around 200,000 to more than 600,000 a year (Mares 2016: 55).¹³² While the number of long-term residents on work visas has expanded, the ability to access permanent resident status is increasingly conditioned on possessing the desired characteristics. In 2009, in order to address a backlog, the processing of skilled migration applications for permanent residency shifted from being dealt with in the order in which they were lodged to a ‘priority processing’ model (Phillips & Spinks 2012: 2). The practical implication of this shift in processing has been that a person relegated to the lowest priority group, group 5, is now treated as ‘indefinitely temporary’ as she or he waits for their application for permanent residence to be processed (Mares 2016: 96-127). The transition from the long-term temporary resident population to permanent residence is selectively filtered, with clear priority being given to those deemed economically self-sufficient, young, with good English and the particular skills nominated as in demand.

Increasingly, those applying for Australian citizenship have transitioned to permanent resident status (an eligibility requirement for naturalisation) from some form of temporary long-term visa with work rights.¹³³ The contemporary Australian approach to migration, settlement and citizenship increasingly involves two steps, with those characterised as “‘new” settlers’ having already spent a considerable period of time in Australia as temporary migrants (Mares 2016: 7; Phillips & Spinks 2012: 4). As put by Peter Mares in his book on this development, ‘permanent settlement continues, but it is now part of a hybrid system, intricately and intimately entwined with a much larger program of temporary entry, which serves as the primary gateway to establishing a life in Australia’ (Mares 2016: 36). Temporary migration has become a central mechanism by which future Australian citizens are selected.

¹³¹ On 18 April 2017 the government announced it will abolish the 457 visa subclass and replace it with new temporary work visa, see Department of Immigration and Border Protection, ‘Abolition and replacement of the 457 visa – Government reforms to employer sponsored skilled migration visas’, <https://www.border.gov.au/Trav/Work/457-abolition-replacement> .

¹³² Mares draws on Department of Immigration and Border Protection publications on the long term temporary visa programs under discussion. See also Phillips & Spinks 2012, Tables 3 and 4.

¹³³ ‘In 2013-14, around half of all permanent visa grants went to people already in Australia on a temporary visa’: Productivity Commission 2016, 4.

4.2.2 *Restricted pathways to citizenship for long-term residents - New Zealanders*

The above statistics do not incorporate the largest single category of long-term residents denied the status of permanent resident; New Zealanders who have entered Australia since 26 February 2001. Citizens of New Zealand have a unique position in Australia's immigration policy. The Trans-Tasman Travel Arrangement between the two countries, dating from 1973, allows for free movement between Australia and New Zealand.¹³⁴ Since 1 September 1994 Australia has had a universal visa system. Every non-citizen requires some form of visa to lawfully enter, and stay, for any length of time, in Australia. New Zealanders were accommodated under the universal visa system through the introduction of a Special Category Visa (SCV). There is no need to apply for a SCV prior to entering Australia. The visa is granted by immigration officials on presenting a New Zealand passport and incoming passenger card.

Historically, many more people have migrated from New Zealand to Australia than in the other direction, with net migration from New Zealand to Australia averaging 17,000 a year over the 38 years from 1979 to 2016, although there have been years in which New Zealand has made a net gain from population movements between the two countries, including most recently in the year ended June 2016 (Statistics New Zealand 2016). There are estimated to be over 600,000 Australian residents born in New Zealand, constituting 2.6 per cent of the Australian resident population (Australian Bureau of Statistics 2016b).

The current position of New Zealand citizens who are long-term residents of Australia, with respect to their pathway to Australian citizenship, is shaped by Australian legislative amendments that took effect on 26 February 2001.¹³⁵ Prior to the 2001 changes, 'as holders of SCVs New Zealand citizens were considered permanent residents for the purposes of the Australian Citizenship Act 1948 and were eligible to apply directly for Australian citizenship without first having to become permanent residents' (Australian and New Zealand Productivity Commissions 2012: 20). Those New Zealanders who arrived in Australia prior to 26 February 2001 (known as Protected SCV holders) were able to apply for Australian citizenship without first having to apply for permanent residency.

However, New Zealanders who arrived after that date (known as non-Protected SCV holders) are required to apply for permanent residence in Australia as a precondition for eligibility for Australian citizenship. If she or he is a non-Protected SCV holder, a New Zealander does not gain residency rights, regardless of the length of her or his stay. A New Zealander who applies for permanent residence in Australia goes into the pool with all other skilled migrants from across the world, to be assessed on the same criteria of health, age, skills and education. Accordingly, New Zealanders settling in Australia since 26 February 2001 benefit from open immigration criteria at the same time as they come under restrictive criteria for permanent residence. As a result they are left with a highly contingent pathway to citizenship, the conditions for which they may never fulfil, irrespective of how long they have been living and

¹³⁴ There is an earlier history of free movement between the two countries. The Trans-Tasman Travel Arrangement was the first formal recognition of reciprocal free movement. The Arrangement is not a bilateral agreement, but reflected in the immigration policies of both countries: see Australia and New Zealand Productivity Commissions 2012, 1-2.

¹³⁵ See Family and Community Services Legislation Amendment (New Zealand Citizens) Act 2001 (Cth).

working in Australia. As noted in section 4.2.1, the points system for permanent residence prioritises those who are young, economically self-sufficient and with skills nominated as in demand.

In a development that provides options for some non-Protected SCV holders, at the same time as it underscores the conditionality of current approaches to naturalisation and citizenship, on 19 February 2016 the Australian Prime Minister announced the creation of a new pathway to permanent residence, and beyond that, citizenship, for New Zealanders who arrived in Australia within the 15 year period from 26 February 2001 to the date of the announcement, and had been resident in Australia for the five years immediately prior to their application for permanent residence. The Australian government estimates that 140,000 New Zealanders fall into the category so defined. An additional condition of eligibility is a salary threshold, currently set at \$53,900 per annum.¹³⁶ The Australian government has estimated that the salary threshold means that only between 60,000 and 70,000 of the 140,000 post-2001 Special Category Visa holders will be eligible for the scheme (Department of Immigration and Border Protection 2016).

5. Conclusion

In a speech in December 2014, the Secretary of the Department of Immigration and Border Protection (the government department responsible for citizenship policy), stated that on the 70th anniversary of the creation of an Australian Department of Immigration, that would fall in June 2015, the Department should be able to declare ‘the original mission of 1945 – to build the population base – to have been accomplished’. In an age of ‘globalised travel, investment and labour mobility’, the focus on permanent residence was displaced by the need for ‘a strategy and plan for attracting those in the ready-made global pool of travellers, students, skilled workers and business-people, the latter with money to invest and ideas of commercialise’ (Pezullo 2014; see also Productivity Commission 2016: 3-4). Little was said about citizenship policy, settlement or integration and how these might fit with the transactional approach outlined in the speech.

Both of the current issues selected for discussion in this report speak to a more conditional understanding of citizenship. In the case of the rise of temporary long-term residents, the selective and fraught process of transitioning to permanent status and then citizenship undermines an assumption that forms part of Australia’s self-understanding, namely that those who have settled in Australia, long-term residents, can expect to become citizens. The transition to permanent resident status is now contingent on holding the requisite desirable characteristics, centred on the notion of the economically self-sufficient contributor. Turning from acquisition to loss, the expanded powers of deprivation introduced in 2015, even if little used in numerical

¹³⁶ This sum is the current Temporary Skilled Migration Income Threshold, a salary threshold used by the 457 program (discussed in text at section 4.2.1) as ‘an indicator that an occupation is skilled’ and that an applicant will be economically self-sufficient: see Department of Immigration and Border Protection 2016.

terms, render a person's enjoyment of citizenship (if she or he is a dual citizen) conditional on not being deemed to have engaged in disallegiant conduct.

These changes are framed as responses to a bold new world of globalisation, of commerce and threat. As introduced in this report, the last 116 years have seen marked shifts in the legal concepts and categories that determine the nature of citizenship status, reflecting shifts in Australia's understanding of its place in the world and of the meaning of citizenship. This process of change continues. The fragile hope is that these changes reinforce rather than undermine the basic securities that citizenship status can provide both to the person who holds it and the polity of which she or he is a part: a country a person can call home and a long-term resident population that holds, or is eligible for, citizenship.

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