



Mate! Citizens, aliens and ‘real Australians’—the High Court and the case of Amos Ame

In *Ame’s Case* the High Court said that a Papuan man who was an Australian citizen by birth was not a ‘real Australian’ and could be treated as an ‘alien’ under the Australian Constitution, including for the purpose of taking his citizenship away. The case indicates that citizenship in itself does not confer full membership of the Australian community, raising questions about the legal position of the many dual nationals in this country.

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Introduction

This research brief is the latest in a series of papers on Australian nationality and the 'aliens power' in the Constitution.¹ With no power over 'citizenship' in the Constitution, it is the concept of 'alien' and 'non-alien' that determines full legal membership of the Australian community. In recent landmark cases, the High Court has expanded the meaning of 'alien' to include long-term British settlers with full voting and other rights in Australia, and people born in this country to foreign parents. In *Ame's Case*² the High Court has taken a further step, declaring that someone who is technically an Australian citizen can also be treated as an 'alien'. As the High Court has emphasised, under Australian law anyone classed as an 'alien' can be subject to extensive federal lawmaking and executive power.

Ame's Case

In August 2005 the High Court handed down its decision in the case of Mr Amos Bode Ame, born in 1967 in the then Australian Territory of Papua. *Ame's Case* has significant implications for the Commonwealth's power over Australians, especially the many people in this country who are 'dual nationals'.

Facing deportation from Australia for overstaying his visa, Mr Ame argued that he was an Australian citizen by birth and had never lost this status. As a citizen he had a legal right to live in this country and could not be removed against his will. However the High Court declared that people born in Papua were never 'full' or 'real' Australian citizens, and that their inferior form of Australian nationality disappeared when Papua and New Guinea became one independent nation in 1975. The Court said such people had no right to freely enter Australia—nor any of the other rights of 'real Australians'—and could be removed from the country under the *Migration Act 1958* if found here without a current visa.

The outcome of *Ame's Case* avoids a significant problem for Australia's relations with Papua New Guinea (PNG). If Mr Ame had won, a 'large segment of the population of PNG' would have been Australian nationals and not PNG citizens.³ As Justice Kirby pointed out, such a result 'would dismember and wound ... the independent state of Papua New Guinea'.⁴

Ame's Case demonstrates that being a 'citizen' does not guarantee full membership of the Australian community, including the right to live in this country. As Mr Ame discovered, under Australian law some 'citizens' are more equal than others. The case suggests that Australian citizenship can be taken away unilaterally, without being initiated by or even without the knowledge of the holder. And it shows that fundamental aspects of Australia's existence as an independent state have not been fully resolved more than a century after Federation, including the geographic extent of the nation and exactly who belongs to the 'people of the Commonwealth.'

Two conclusions of the High Court are of particular significance for the Australian community. The High Court indicated that under the Commonwealth's power to make laws for the government of 'territories', internal and external territories could be treated

differently. Inhabitants of external Australian territories such as Papua before 1975 were not part of the 'people of the Commonwealth' referred to in the Constitution and could have their citizenship taken away using the 'territories power'. This has implications for residents of Australia's existing external territories.

The most dramatic finding of the High Court, however, was that under Australian law a *statutory* 'citizen' can be treated as a *constitutional* 'alien'. There is no guarantee of citizenship in the Australian Constitution as there is, for example, in the United States Constitution. Citizenship in Australia is entirely the creation of legislation. Nevertheless it had been assumed that citizenship was the 'passport'—in both a legal and practical sense—to full legal membership of the Australian community. Recent High Court authority suggested that the words 'citizen' and 'alien' described an opposite legal status. But in *Ame's Case* the High Court appears to have abandoned this notion, allowing a person who was in formal terms an Australian citizen to be fully subject to legislation based on the 'aliens' power in the Constitution. As other recent High Court cases have shown, this power is extensive. The High Court said that in the case of Mr Ame, the 'aliens' power authorised the removal of his citizenship, i.e. the very thing that supposedly qualified him to be a member of the Australian community. The case poses the question: if citizenship is not enough, what exactly is the legal test for full membership of the Australian nation? In particular, what is the legal position of the many dual nationals in Australia? Despite their formal status as 'citizens', are they at the same time 'aliens' and potentially subject to Commonwealth laws under this source of legislative power?

The High Court implied that in contrast to Mr Ame, it might not be possible to deprive members of the 'people of the Commonwealth' of their Australian citizenship since this would also remove their right, enshrined in the Constitution, to elect the federal government.⁵ Legal advice prepared in 1995 and tabled by a former Immigration Minister in 2002 said the citizenship of such people could only be removed by laws which were 'reasonably appropriate and adapted' for a legitimate purpose.⁶ However it is hard to believe that those classed as 'aliens' could benefit from protection against loss of citizenship for 'people of the Commonwealth'. And the High Court itself has undermined any security based on this status. In *Shaw* (2003)⁷ it said that long-term British migrants who had full voting and other rights, i.e. who were to all intents and purposes part of the 'people of the Commonwealth', could be deported from this country as 'aliens' if they broke Australian law.

A joint judgment was produced by six of the judges in *Ame's Case*. While agreeing with the conclusions of his colleagues, Justice Kirby appeared concerned about the potential ramifications of the case, writing a more detailed and fully explained judgment.

Background

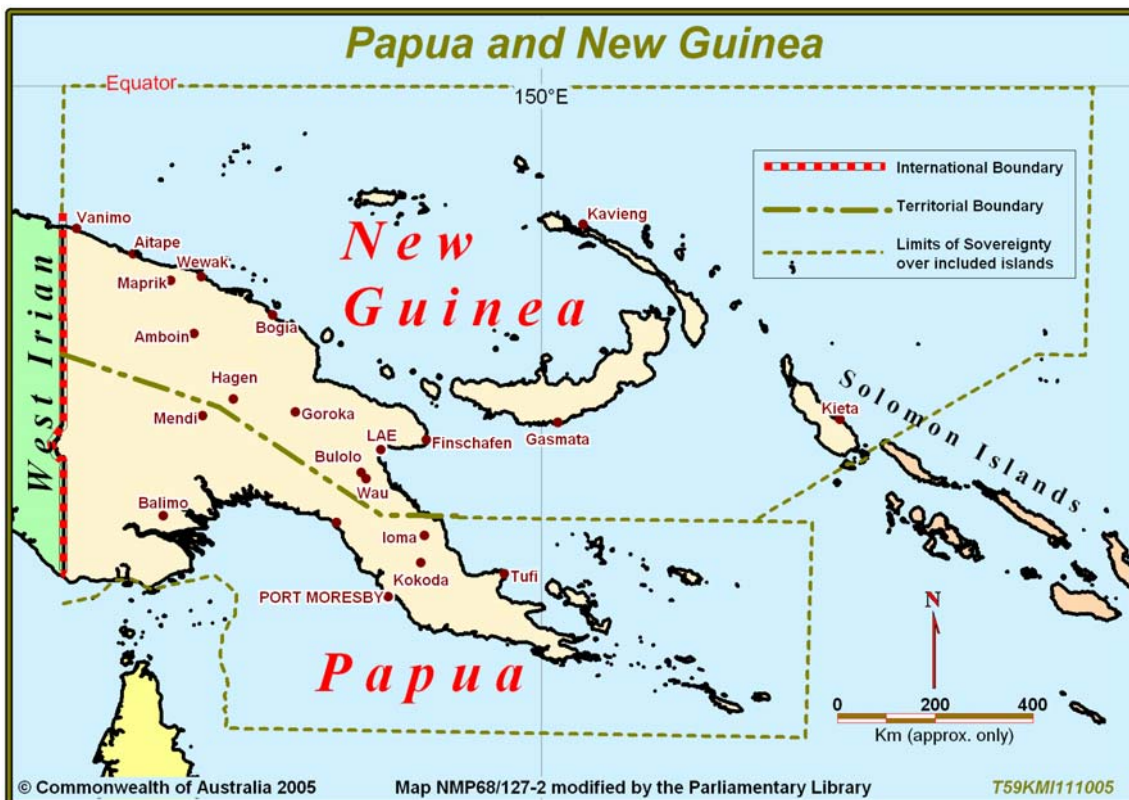
The origins of *Ame's Case* lie in the rivalry between imperial powers in the late nineteenth century. By the 1880s German commercial activity in New Guinea had alarmed the Australian colonies, which pushed for annexation by Great Britain. After British attempts to

claim nearly all of eastern New Guinea were rebuffed by Germany, the two European nations agreed to share control of the region. In 1884 a German protectorate was proclaimed over the north coast, and a British protectorate over the south.

In 1906 possession of British New Guinea was transferred to the new Commonwealth of Australia. The Territory's name was changed to 'Papua' and an extra star was added to the Australian flag.⁸ As for the rest of the Commonwealth of Australia, the nationality of people born in Papua was 'British subject'.⁹

Under the Versailles Treaty at the end of World War One, German New Guinea was transferred to the newly formed League of Nations, which gave Australia a mandate to administer the former German colony. While Papua and the Territory of New Guinea were jointly administered by Australia, they maintained their separate legal identities. Papua remained a 'possession of the Crown', while New Guinea became, from 1946, a United Nations 'trust territory' under Australian control.¹⁰

The *Nationality and Citizenship Act 1948*¹¹ which created the status of Australian 'citizen' defined 'Australia' as including 'Norfolk Island and the Territory of Papua'. So people born in Papua between 1948 and 1975 became Australian citizens by birth.¹² In contrast, people born in New Guinea did not acquire this status. Despite being Australian citizens, however, people born in Papua required an entry permit under the Migration Act before they could travel to the Australian mainland.¹³



Are Papuans 'real' Australians?

The key issue for Mr Ame was whether he remained an Australian citizen after PNG became independent in 1975. If he was still a citizen, he could not be involuntarily removed or deported from Australia under the current Migration Act.¹⁴

In the lead up to independence, the Constitutional Planning Committee for PNG reported that dual citizenship would be incompatible with a full commitment to the new state. As the Committee was told, 'no man, it is said, can stand in more than one canoe'.¹⁵ Reflecting this view, Australian legislation in 1975 removed Australian citizenship from anyone who became a PNG citizen on independence day.¹⁶ Under the new *Constitution of Papua New Guinea*, people born in Papua would not become PNG citizens at independence if they were 'real foreign citizens', including 'real' Australians—defined as those who had been 'granted a right ... to permanent residence in Australia'.¹⁷ Lawyers for Mr Ame argued that as a citizen of Australia by birth, he had a right to live anywhere in the country. Since he was already in 'Australia' when he was born, he could not be treated like an 'immigrant' under the Migration Act and be prevented from travelling to the Australian mainland.¹⁸ He was therefore a 'real Australian' and did not become a PNG citizen in 1975.

The High Court disagreed. It did not dispute that Mr Ame had been born in 'Australia' for the purpose of the Citizenship Act. But as the Court pointed out the meaning of 'Australia' for the purpose of the Migration Act was different, *excluding* Papua and other external territories.¹⁹ (These different definitions of 'Australia' continue today²⁰). This meant that people born in offshore territories such as Papua could be prevented from entering mainland Australia without an entry permit. The High Court noted that the drafters of the PNG Constitution were 'acutely aware' of this fact. It was this that led them to describe Papuans without an entry permit as not being '*real Australian citizens*'.²¹ As Justice Kirby said:

... whilst Papuans in the Territory of Papua before Independence Day enjoyed, by Australian law, a *form* of Australian citizenship it was not, in fact or law, *full* or *real* citizenship. Indeed, it was no more than nominal citizenship, applicable for limited purposes, such as securing a passport for overseas travel. It conferred few rights and specifically no rights freely to enter the States and internal territories of Australia, as other Australian citizens might do. Nor did it permit its holders to enjoy permanent residence in the States and internal territories of the Commonwealth.²²

As the High Court noted, the second class status of Australian 'citizens' in external territories such as Papua is a reminder of the prejudiced attitudes of Australia's past, including the White Australia policy. When the Minister for Immigration, Arthur Calwell, introduced the Citizenship Act in 1948, he was asked whether a 'native of Papua' would be entitled to come to Australia and enjoy the right to vote. Mr Calwell replied:

We do not even give them the right to come to Australia. An Englishman who came to this country and complied with our electoral laws could exercise restricted rights as a British

subject, whereas a native of Papua would be an Australian citizen but would not be capable of exercising rights of citizenship.²³

As the High Court observed, the Minister's statement and 'repeated references to ethnicity and race in the parliamentary debates' reflected a concern:

... to preserve to the Commonwealth the power to exclude from entry into the Australian mainland foreign nationals and even British subjects who were 'ethnologically of Asiatic origin' or other 'pigmentation or ethnic origin'.²⁴

Ame's Case shows that the racial attitudes of Australian lawmakers in previous generations can still influence whether a person is a full member of the Australian community today. The High Court held that Mr Ame was not a 'real Australian' in 1975 because of a long-standing policy controlling entry into Australia of people with his ethnic background. So he automatically lost his Australian citizenship when he became a PNG citizen on independence day. And as a non-Australian citizen he was not legally a member of the Australian community in 2005 and could be removed or deported from this country under the Migration Act.

Constitutional issues

Apart from whether Mr Ame came within the terms of the 1975 legislation depriving Papuans of Australian citizenship, the High Court also considered whether the legislation itself was valid under the Australian Constitution.

The Constitution and citizenship

The Australian Constitution does not guarantee citizenship to anyone, including people born on Australian territory. In contrast the fourteenth amendment to the US Constitution declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside'.²⁵ There is no similar provision in the Australian Constitution that Mr Ame and other Papuans might have benefited from as people 'born in Australia' before PNG independence.

Equally, however, there is no specific power in the Constitution allowing the Commonwealth to make laws on 'citizenship'. Indeed the concept of Australian citizenship is not mentioned at all. This was a deliberate decision of the framers of the Constitution. There was no 'citizenship power' included in the document because of a fear that the new federal government might deprive State residents of such status. As South Australian delegate to the 1898 Constitutional Convention Josiah Symon said:

... the Commonwealth shall have no right to withdraw, qualify, or restrict those rights of citizenship, except with regard to one particular set of people who are subject to disabilities, as aliens, and so on. Subject to that limitation, we ought not, under this Constitution, to hand over our birth right as citizens to anybody, Federal Parliament or anyone else ...²⁶

This does not mean that the Commonwealth cannot pass laws on citizenship. However such laws must be validly based on some other source of legislative power in the Constitution. There is still debate about which constitutional powers the legislation creating Australian citizenship—the *Nationality and Citizenship Act 1948*, now the Australian Citizenship Act—is based on.²⁷ As Australia's leading expert on citizenship law, Professor Kim Rubenstein, states:

... citizenship in Australia is not a constitutional concept. Furthermore, in failing to create or discuss Australian citizenship, the Commonwealth's power to legislate and define citizenship is uncertain ... This has never been conclusively determined, as it has not been called into question in any case before the High Court.²⁸

In *Ame's Case* the High Court said that the legislation stripping Papuans such as Mr Ame of Australian citizenship was authorised by the Constitution, with the main basis being the Commonwealth's power in s. 122 to legislate for Australian territories. The Court said that inherent in the power to make laws for a territory acquired by the Commonwealth (such as Papua) was a power to provide for its independence and for consequential changes to the nationality of people living there.²⁹ In itself this conclusion was unremarkable. However in its discussion of the 'territories power' the Court highlighted the greater power of the Commonwealth over residents of *external* as against *internal* Australian territories.

More contentiously, the High Court also said the 1975 legislation was authorised by the Commonwealth's power in s. 51(19) of the Constitution to make laws with respect to 'naturalization and aliens'. It said people such as Mr Ame who were technically Australian citizens but were about to become foreign nationals could be treated as 'aliens', including for the purpose of taking their citizenship away. This finding of the High Court—unnecessary since it had already justified the legislation under the territories power—has significant implications. In particular it suggests that any Australian who is also a foreign citizen may be subject to the Commonwealth's broad-ranging 'aliens' power. This in turn indicates that citizenship in itself does not confer full legal membership of the Australian community.

The territories power

The 'territories power' in s. 122 of the Constitution allows Parliament to make laws 'for the government' of any territory, including those 'surrendered by any State' (such as the ACT and the Northern Territory) or 'placed by the Queen under the authority of and accepted by the Commonwealth', such as Papua. The wording of s. 122 gives the Commonwealth extensive power in relation to internal and external territories, although its exact scope remains uncertain. In the early days of Federation, it was argued that s. 122 allowed the Commonwealth to legislate for territories as if it were 'standing in the place of a State parliament', i.e. without the constraints set out in the rest of the federal Constitution.³⁰ A later contrary view, however, was that s. 122 must be read in the context of the rest of the Constitution. In *Ame's Case* Justice Kirby said he favoured the latter approach, citing Justice Kitto's statement in *Lamshed* (1959) that there needed to be an interpretation of s. 122:

... which will treat the Constitution as one coherent instrument for the government of a federation, and not as two constitutions, one for the federation and the other for its territories.³¹

External territories can be treated differently

Ame's Case shows the importance of constraining s. 122 by reading it in the context of the rest of the Constitution. Mr Ame's lawyers argued that if the territories power allowed the Commonwealth to cancel his citizenship (by way of executive regulation), Australians born in internal territories could lose their nationality in the same way:

If removal could so easily occur in his case, it could, by inference, happen to ... other citizens born in a territory of the Commonwealth ... including internal territories (such as the Australian Capital Territory and the Northern Territory of Australia) in which live significant numbers of Australian citizens who would not normally regard themselves as vulnerable to so significant a change of status by such a simple legal device.³²

The joint judgment said that s. 122 allowed Parliament to regulate the legal status of people in Papua and other external territories. When the Citizenship Act in 1948 'treated the inhabitants of Papua and New Guinea [sic] as citizens ... it represented a legislative choice'.³³ Further, as the joint judgment explained:

... the powers under which it may legislate to *confer such citizenship* when a territory is acquired enable Parliament to legislate to *withdraw such citizenship* when rights of sovereignty or rights of administration in respect of such territory come to an end.³⁴

As Justice Kirby noted, if citizenship is no more than a statutory status, 'what the Parliament has provided to a person ... in terms of the Citizenship Act, it can also take away'.³⁵

However the High Court said its discussion of the use of s. 122 to remove citizenship should only be understood in relation to people in *external* Australian territories. The joint judgment said that inhabitants of such territories, including Papua before 1975, were not part of the 'people of the Commonwealth' referred to in the Constitution.³⁶ It was only residents of the former colonies which united in the new federation in 1901—and which were now the States and internal territories of Australia—who had this constitutional status. The joint judgment implied that being a member of the 'people of the Commonwealth' might protect people in internal territories against deprivation of citizenship, at least under the territories power:

The relations that may exist between Australia and the inhabitants of external territories are not necessarily identical with those that apply to the people united in a Federal Commonwealth pursuant to covering cl 3 of the Constitution, the people of the Commonwealth referred to in covering cl 5, or the people referred to in s 24. For example, the Constitution does not require that the inhabitants of an external territory should have the right to vote at federal elections. The references in the Constitution to 'the people of [particular States]' or 'the people of the Commonwealth' serve a significant purpose in their various contexts, but they do not have the effect of binding Australia to any particular form of relationship with all inhabitants of all external territories ...³⁷

Justice Kirby stated more explicitly that 'the spectre of the potential misuse of the same power in relation to an internal territory can be put aside',³⁸ suggesting that as 'people of the Commonwealth' residents of internal territories were within 'fundamental notions of nationality' protected by the Constitution.³⁹ There was a difference under s. 122 between territories 'surrendered by any State', such as the ACT and the Northern Territory, and territories 'placed by the Queen under the authority of' or 'otherwise acquired by the Commonwealth' such as Papua. The way they could be governed was different. Only the first kind were part of the Australasian colonies whose people had assented 'to the creation of the united federal Commonwealth'.⁴⁰ And it was only their inhabitants who had the right to vote in Australian elections. As Justice Kirby said:

The participation in the Commonwealth of Australians resident [in internal territories] is recognised in the language of the Constitution. The divestment from the Commonwealth of such territories, and the deprivation of nationality ("citizenship") status of people of the Commonwealth and electors, by reference to their connection with such territories, would present distinct questions that need not be decided in this case.⁴¹

While reassuring for residents of the ACT and the Northern Territory, this finding of the High Court has implications for those living in the existing Australian external territories.⁴² *Ame's Case* suggests that the Federal Government could use the territories power to regulate the status of the inhabitants of any territory 'placed by the Queen' under the authority of, or 'otherwise acquired' by the Commonwealth. An examination of the history of Australia's external territories indicates that this applies to the Cocos (Keeling) Islands,⁴³ Christmas Island⁴⁴ and notably also to Norfolk Island.⁴⁵

Whether citizenship could be taken away from residents of external territories only with a change in status for the territory itself (such as independence for Papua) is unclear. But in this regard it might be noted that Christmas Island and the Cocos (Keeling) Islands were recently excised from Australia's migration zone,⁴⁶ and that Norfolk Island is already outside 'Australia' for the purpose of the Migration Act.⁴⁷

The 'aliens power'

Citizens and aliens

The High Court said that the legislation depriving Mr Ame of his Australian citizenship was not only valid under the 'territories power' but was also authorised by the Commonwealth's power to make laws with respect to 'naturalization and aliens'.⁴⁸ The Court said that notwithstanding his formal status as an Australian citizen by birth, Mr Ame could be 'treated as an alien', including for the purpose of taking his citizenship away.⁴⁹

This has significant implications for the Australian community, not least because of the breadth of the 'aliens' power. This is the basis for important Commonwealth legislation, including much of the Citizenship Act and the entire Migration Act, and gives the Federal Government some exceptional powers over individuals who come within this term. For

example, any 'alien' unlawfully in Australia must be detained—potentially indefinitely and without first appearing before a court—before being removed or deported from the country as soon as 'reasonably practicable'.⁵⁰

A position had been reached prior to *Ame's Case* where it was assumed that 'alien' and 'citizen' described an opposite legal status, i.e. if people became Australian citizens, they were no longer 'aliens' under our law, and had full legal membership of the country with all of the rights and protections this entitled them to. As (then) Minister for Citizenship and Multicultural Affairs Gary Hardgrave said in July 2004:

Australian Citizenship is the cornerstone of our society and the bond which unites us as a nation. Australian Citizenship is the unity ticket – the passport to membership of the Australian family.⁵¹

A previous view of the High Court was that some people might not be 'aliens' under Australian law even if they had not become citizens in a formal sense. In *Re Patterson* (2001),⁵² the High Court decided by 4:3 that long term British migrants—who had full voting and other rights in Australia and who shared allegiance to the same monarch as the people of this country—had Australian 'nationality' under the Constitution even if they had not taken out citizenship. The Court said they were part of a special class of 'non-alien non-citizens'.

However with the retirement of Justice Gaudron in 2003, the High Court reversed its view.⁵³ In *Shaw* (2003) the High Court declared that all British settlers who arrived in Australia after 1949 were 'aliens' unless they had become Australian citizens. The majority of the Court adopted a:

... dichotomous approach to alienage and Australian citizenship. If a person is not an Australian citizen, by birth or subsequent naturalisation, such a person is an 'alien' for the purposes of the Constitution. He or she may be dealt with as such. *Cadit quaestio*. End of contest.⁵⁴

As the majority judges stated, 'citizenship may be seen as the obverse of the status of alienage'.⁵⁵ In *Singh* (2004)—involving a young girl born in Australia but who did not qualify for citizenship⁵⁶—Chief Justice Gleeson endorsed the statement of Justices Brennan, Deane and Dawson in *Lim* (1992) that:

... the effect of Australia's emergence as a fully independent sovereign nation with its own distinct citizenship was that alien in Hs 51(xix) of the Constitution *has become synonymous with non-citizen*.⁵⁷

Based on such High Court authority, Australian courts have used a citizen/alien dichotomy as their guiding principle. In August 2005, for example, the Full Federal Court in *Doumit* dismissed a claim by children born in Australia to foreign parents that they were not 'aliens' and could not be removed under the Migration Act. According to the Full Court:

... once this synonymity [between 'aliens' and 'non-citizens'] is recognised, it is immediately apparent that existing – and binding – authority determines the outcome of these proceedings.⁵⁸

Under the Citizenship Act the children were not born as citizens.⁵⁹ According to the Federal Court they were therefore 'aliens' and fully subject to the Migration Act based on the 'aliens' power in the Constitution.

Rejecting the citizen/alien dichotomy

But by its own decision in *Ame's Case* the High Court has demonstrated that under Australian law 'citizenship' is not merely the obverse or 'mirror image' of 'alienage'. It was the unanimous view of the High Court that despite being an Australian citizen by birth, Mr Ame could be treated as an 'alien' for the purpose of the 1975 legislation which deprived him of citizenship.

The joint judgment confirmed that the defining characteristic of an 'alien' under Australian law was the 'owing of allegiance to a foreign sovereign power'. It said that changes in the 'national and international context', such as PNG independence, can affect who is an 'alien' from the Australian perspective.⁶⁰ Knowing that the new PNG Constitution would give Papuans automatic citizenship of Papua New Guinea, it was within the power of the Australian Parliament to treat such people as 'aliens' and withdraw their Australian citizenship.⁶¹

Justice Kirby agreed that because Mr Ame acquired a new nationality at PNG independence he came within the 'aliens' power in the Constitution. But, he said, Mr Ame was an alien 'from his birth'.⁶² He could not live in (mainland) Australia without permission, had no right to vote and could not perform jury or other civic service in Australia. As Justice Kirby said, 'to all intents he was treated as a foreigner'.⁶³ His nominal status of Australian citizen 'fell far short of constitutional nationality.'⁶⁴

On either view the High Court has endorsed the use of the 'aliens' power on a person who was, in formal terms at least, an Australian citizen. On the High Court's interpretation, for some length of time Mr Ame was both an Australian citizen and an 'alien'. This may have been from his birth until PNG independence, as Justice Kirby says, or merely for the (momentary) period, as the joint judgment implies, after he became a PNG national and before he lost his Australian citizenship. The key point, however, is that the High Court has said that in some circumstances a person who qualifies as a 'citizen of Australia' under the relevant legislation can at the same time be treated as a constitutional 'alien', and, moreover, that the 'aliens' power in the Constitution can be used to take his or her citizenship away.

Aliens and dual nationals

Ame's Case has particular implications for people who are 'dual nationals', i.e. citizens both of Australia and some other country. When announcing a new regime of anti-terrorism laws

in September 2005, Australian Prime Minister John Howard indicated that some dual citizens might risk being deprived of their Australian citizenship.⁶⁵ The High Court's declaration in *Singh* (2004) that an 'alien' under Australian law was someone 'owing obligations (allegiance) to a sovereign power other than the sovereign power in question (here Australia)'⁶⁶ left the legal status of dual nationals in this country unclear. Such people may be citizens of this country but they also have 'obligations to a sovereign power other than Australia'. With its finding that the formal status of Australian citizen does not prevent a person being treated as an 'alien', *Ame's Case* has added to uncertainty about the constitutional status of 'dual nationals'.

It can be argued that Mr Ame's situation is readily distinguishable from that of Australians who are dual nationals. These people have 'real' Australian citizenship with the right to freely enter the country, vote in elections and work in the public service etc. Arguably they receive protection against deprivation of citizenship by their membership of the 'people of the Commonwealth' referred to in the Constitution. The joint judgment strongly implied, and Justice Kirby said explicitly, that Australian citizenship could not be taken away from inhabitants who fell within this phrase.

But as Justice Kirby was careful to state, the suggestion from the High Court in *Ame's Case* that there may be a bar on taking citizenship away from 'people of the Commonwealth and electors' referred to use of the *territories* power.⁶⁷ It is far from clear that any such bar would extend to use of the *aliens* power. If there is some constitutional protection against loss of citizenship for 'people of the Commonwealth', can this benefit people classed as 'aliens' under the Constitution?

In addition, there is a question about how much protection membership of the 'people of the Commonwealth' provides. As Justice Kirby himself pointed out, in *Shaw* (2003) the High Court decided that long-term British settlers with full legal rights in this country, including the right to vote in federal and state elections—i.e. who were, in his words, 'apparently assimilated as part of the "people" and "electors" of the Commonwealth'⁶⁸—had no protection from removal from this country as 'aliens' under the Constitution:

... the decision in *Shaw* ... exposes to expulsion and seriously unfair treatment subjects of the Queen who have *lived in mainland Australia for years, voted in elections and referenda, performed jury service and other civic duties and fought in the Australian Defence Forces*. To me this is an offensive doctrine affecting hundreds of thousands of persons in a residual class of effective Australian nationals. I hope that it will be reversed as its offensiveness to constitutional concepts of nationality and allegiance becomes obvious, and before more wrongs are done under it.⁶⁹

Of course, the *Shaw* case arose because the applicant in that matter had not become an Australian citizen.⁷⁰ It might be argued that if a person has formally become an Australian citizen as well as being 'fully absorbed' into the Australian community, they could not legally be regarded as an 'alien' under the Constitution. This is common sense. However, for

the High Court to support formal citizenship as the key factor in determining who is not an 'alien' would be contrary to its position in *Ame's Case*.

Current Australian law as laid down by the High Court in *Shaw, Singh* and *Ame's Case* therefore leaves open the possibility that Australian citizens who are also foreign nationals could be treated as 'aliens', despite in practice being long accepted as full members of the Australian community. Moreover, under the definition of 'alien' laid down by the High Court, this applies as much to Australian-born citizens who adopt foreign nationality as to foreign nationals who have become Australian citizens.

Extent of 'aliens' power

It is important to note that apart from expanding the number of people deemed to be 'aliens' under the Constitution, recent High Court cases have endorsed the extensive power of the Commonwealth over such people. The High Court has emphasised that the Commonwealth's power over 'aliens' is a 'plenary' or 'full' power. Any Commonwealth law affecting 'aliens' will be valid, provided it does not transgress some other part of the Constitution. As Justice McHugh explained in *Re Patterson* (2001):

... as long as a person falls within the description of 'aliens', the power of the parliament to make laws affecting that person is unlimited unless the Constitution otherwise prohibits the making of the law.⁷¹

A law about 'aliens' does not have to be 'proportionate', 'appropriate and adapted' or 'reasonably necessary'. Provided the law is for a legitimate government purpose relevant to the 'aliens' power and does not impose 'punishment',⁷² it will be valid. In *Al-Kateb* (2004),⁷³ for example, the High Court declared that a failed asylum seeker (i.e. an 'alien') can be kept in immigration detention indefinitely 'regardless of personal circumstances, regardless of whether he or she is a danger to the community, and regardless of whether he or she might abscond'.⁷⁴ The Court rejected the idea that immigration detention laws were limited to what was 'reasonably capable of being seen as necessary'.⁷⁵ As long as the laws were for a purpose related to the 'aliens' or immigration powers in the Constitution, it did not matter whether they were 'unjust or contrary to basic human rights' (Justice McHugh),⁷⁶ contravened the International Covenant on Civil and Political Rights (Justice Hayne)⁷⁷ or infringed the common law's 'fundamental and ancient' protection of personal liberty (Justice Callinan).⁷⁸

If the many thousands of Australian citizens who are also nationals of another country can be treated as constitutional 'aliens', they can also be subject to the Commonwealth's full legislative authority under this head of power in the Constitution.

Other issues

Citizenship can be taken away unilaterally

As Justice Kirby noted, nobody asked Mr Ame if he wanted to give up his Australian citizenship. Under Australian law he lost this automatically on PNG independence:

... without the specific knowledge or consent of the applicant, without renunciation or wrongdoing on his part, notice to him, due process or judicial or other proceedings, he was purportedly deprived of his Australian citizenship.⁷⁹

Mr Ame's lawyers claimed that a person could not lose their membership of the Australian community without their consent or some indication that they no longer wanted to belong to it.⁸⁰ Similarly the late eminent human rights lawyer Ron Castan QC argued that:

Once it is acknowledged that there is a constitutional concept of 'the people of the Commonwealth', then in my view those who form part of that body of people cannot be deprived of that status by the Parliament unless they intend to relinquish that citizenship, or have acted in ways which are inconsistent with their continued membership of that group of people.⁸¹

In *Nolan* (1988) Justice Gaudron said that the Commonwealth's power to revoke citizenship 'was not at large'. She said that a foreign national who becomes an Australian cannot have citizenship taken away without some further action indicating an abandonment of allegiance to Australia:

Parliament [cannot] expand the ['aliens'] power by constituting a non-alien an alien if there has not been some relevant change in the relationship between that person and the community constituting the body politic of Australia, including, e.g., the abandonment of membership of the community, or the acquisition of membership of some other nation community.⁸²

However, as the joint judgment in *Ame's Case* pointed out, the High Court in *Singh* (2004):⁸³

... rejected the view that concepts of alienage and citizenship describe a bilateral relationship which is a status, alteration of which requires an act on the part of the person whose status is in issue.⁸⁴

The joint judgment said there was no limitation inherent in the Australian Constitution preventing a person's nationality or citizenship being taken away unilaterally.⁸⁵

Citizenship can be removed by executive regulation

The Australian citizenship of Papuans such as Mr Ame was removed by a regulation made under the *Papua New Guinea Independence Act 1975* (Cwlth). Mr Ame's lawyers argued that a fundamental right such as citizenship could not be taken away by 'rule-making by the Executive', i.e. without specific prior consideration by Parliament.⁸⁶ The High Court said,

however, that the 1975 Act was passed by Federal Parliament knowing that the new PNG Constitution would not allow dual nationality. So the Act ‘must have contemplated regulations dealing with citizenship’.⁸⁷

Some Australian citizens can be kept out of Australia.

In *Air Caledonie* (1988) the High Court said that the right of a citizen to enter Australia ‘is not qualified by any law imposing a need to obtain a licence or “clearance” from the Executive.’⁸⁸ But in *Ame’s Case* the Court said this did not give Papuans who were Australian citizens any right to enter mainland Australia, which was validly restricted by the Migration Act. Section 122 of the Constitution (the ‘territories power’) allowed the Commonwealth to restrict entry by such people.⁸⁹ Despite being Australian citizens, inhabitants of external territories could also be treated as ‘immigrants’ for the purpose of the migration power in the Constitution.⁹⁰ As the joint judgment said:

The Constitution does not require that all inhabitants of all external territories acquired by Australia should have an unfettered right of entry into, and residence in, mainland Australia. There is no reason why Parliament cannot treat such an inhabitant as an immigrant.⁹¹

In a forerunner to *Ame’s Case*, the full Federal Court in *Walsh* (2002)⁹² also found that a woman born in Papua before 1975 had no right to permanent residence in Australia and lost her Australian citizenship when PNG became independent. The Federal Court held that while she had been an Australian citizen, she had not been absorbed into the Australian community (never having lived here), so she remained an ‘immigrant’ under Australian law with no automatic right of entry onto the mainland.

As constitutional law expert Genevieve Ebbeck points out, arguably it follows from the Federal Court’s decision in *Walsh*—and the High Court’s decision in *Ame’s Case*—that:

... an Australian citizen has no constitutionally guaranteed right, deriving from his/her citizenship, to enter Australia ... If it is correct to say that an Australian citizen possesses no right to enter and remain within Australia, the fundamental worth of his or her citizenship becomes questionable.⁹³

Legal membership of the Australian community

Ame’s Case raises some fundamental questions about exactly who gets to be a full member of the Australian community and what the legal criteria for this are. What is the test for full legal membership of the Australian nation?

In advice prepared for then Minister for Immigration Nick Bolkus in 1995 and later tabled in Parliament, the late eminent lawyer Ron Castan QC argued that becoming a citizen was enough to make someone a member of the ‘people of the Commonwealth’ and that this in turn constrained the ability of the Commonwealth to take a person’s citizenship away. Castan suggested that:

Whether it is dealing with persons who have become part of the 'the Australian people' by naturalisation, or with those who have always been and only ever been part of the Australian people by reason of their birth and residence in Australia, the parliament's capacity to pass laws depriving individuals of the privileges and benefits of being part of that 'people' has clear limits.⁹⁴

Ame's Case undermines Castan's argument. Being born an Australian citizen was not enough for Mr Ame to gain membership of the 'people of the Commonwealth' or stop him being treated as an 'alien'. He may have been a citizen but he was not a 'real Australian'. His formal citizenship gave him no right to travel to the mainland, let alone vote in federal or state elections or enjoy the other rights of 'real Australians'.

Moreover, as Justice Kirby lamented, the High Court's decision in *Shaw* shows that if a person is to all intents and purposes one of the 'people and electors of the Commonwealth'—with a right of free entry into the country, full voting rights and eligibility to work in the public service and fight for the nation—even this does not guarantee full legal membership of the Australian community. The High Court declared that British settlers who for over 50 years had been treated as 'real Australians' with all of the above rights, had actually been 'aliens' under the Constitution ever since they arrived and could be subject to 'reverse transportation' if, for example, convicted of a serious crime.

As *Shaw* indicates, the High Court cannot even agree that the 'people of the Commonwealth'—with their fundamental role in Australia's representative democracy as described in the Constitution—are not 'aliens'. On the one hand, as Justice McHugh in *Singh* (2004) said of the Australian-born girl facing deportation:

... birth in Australia made her a member of the Australian community and one of 'the people of the Commonwealth' to whom the Constitution refers. The Minister has no power to deport Ms Singh. She is not an alien.⁹⁵

Similarly Justice Kirby said in *Re Patterson* (2001) that the applicant:

... never was an 'alien' for the purposes of the Constitution ... when the attempt was made to treat him as an 'alien' (if that was the purpose of the Migration Act) he had been absorbed into the people of the Commonwealth.⁹⁶

However the majority of the High Court in *Singh* took a contrary view:

... to adopt either the expression 'people of the Commonwealth' or the expression 'a subject of the Queen' as an antonym of alien necessarily forecloses the exploration of some questions about the proper construction of s 51(xix) [the 'aliens power' in the Constitution].⁹⁷

If the legal test for full membership of the Australian community is not 'citizenship' or membership of the 'people of the Commonwealth' but simply that a person is beyond the Commonwealth's power to legislate with respect to 'aliens', then the obvious requirement is to satisfy the High Court's test for a 'non-alien'. In this respect it could be argued that it is

misleading for the High Court to state that 'alien in the Constitution has become synonymous with non-citizen.' This does not cover all categories of 'non-citizens'.⁹⁸ And it is far from saying that a citizen is necessarily a 'non-alien'.

For many years the guiding principle for deciding who came within the 'aliens' power was the statement of Chief Justice Gibbs in *Pochi* (1982) that:

Parliament can ... treat as an alien any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian.⁹⁹

More recently, however, it was suggested that Chief Justice Gibbs did not mean this phrase to be an exhaustive statement of the extent of the aliens power.¹⁰⁰ In *Singh* (2004), for example, the majority judgment said 'it would be wrong ... to take what was said by Gibbs CJ as necessarily treating a person born in Australia as beyond the reach of the aliens power'.¹⁰¹ In *Singh* itself and now in *Ame's Case*, the High Court has held that people born within 'Australia' (as defined for the purposes of citizenship) can be treated as 'aliens' under the Constitution. Moreover in *Ame's Case* a person who met the criteria for citizenship by birth was held to come within the aliens power. Using the High Court's logic there is no reason that a naturalized Australian with a foreign nationality could not also be regarded as an 'alien'.

On the basis of the principles laid down in *Singh* and *Ame's Case*, the only people who are definitely 'non-aliens' under Australian law, and therefore full legal members of the Australian community, are those who do not 'owe obligations to a sovereign power other than Australia'.¹⁰² Only those who are solely Australian citizens are plainly within this definition. Anyone who is both an Australian citizen and a citizen of another country 'owes obligations to' some other sovereign power as well as Australia. According to the High Court's reasoning to date, such people may be 'aliens' under the Australian Constitution, notwithstanding their citizenship of this country. At the very least *Ame's Case* leaves open this possibility.

If given an opportunity to consider this issue directly, the High Court would need to examine another statement of Chief Justice Gibbs in *Pochi*, namely that:

... the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51 (19) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word.¹⁰³

People who become Australian citizens through naturalization formally pledge their 'loyalty to Australia and its people' and agree to uphold and obey its laws.¹⁰⁴ In ordinary understanding, people who are or who become citizens of Australia could not possibly 'answer the description of aliens'. Based on *Singh* and *Ame's Case*, however, such people may need to abandon any foreign citizenship to be beyond the 'aliens' power. In 1986 the formal oath or pledge of Australian citizenship was changed to remove the requirement to 'renounce all other allegiance'.¹⁰⁵ While retaining foreign nationality does not stop a person

becoming an Australian citizen, it may still prevent them—at least on the current state of the law as declared by the High Court—moving beyond ‘alien’ status to full legal membership of the Australian nation.

Depriving other Australians of citizenship

Since there is no guarantee of citizenship in the Australian Constitution, there is no explicit constitutional obstacle to depriving other Australians of this status. Justice Kirby, however, was adamant that *Ame's Case* sets no precedent:

The change in the applicant's status as a citizen, as an incident to the achievement of the independence and national sovereignty of a former territory of the Commonwealth, *affords no precedent for any deprivation of constitutional nationality of other Australian citizens whose claim on such nationality is stronger in law and fact than that of the applicant.*¹⁰⁶

Justice Kirby said there was ‘no risk that later laws might purport to divest Australian nationals of their status as such, based on the decision in this case’.¹⁰⁷ He argued that ‘fundamental constitutional questions’ would arise if Federal Parliament ever attempted to ‘extend the deprivation of Australian nationality (including statutory citizenship) beyond the strictly limited categories of cases provided by the present law’.¹⁰⁸ In contrast the joint judgment provided no such explicit reassurance.¹⁰⁹

According to Castan, it is inherent in the constitutional concept of the ‘people of the Commonwealth’ that ‘Parliament can make laws which are *reasonably appropriate and adapted* to the purpose of determining who falls within and who falls beyond that category’.¹¹⁰ In his view, provisions in the Citizenship Act allowing citizenship to be removed where a person serves in the armed forces of a nation at war with Australia¹¹¹ or where someone specifically renounces their Australian citizenship¹¹² were ‘reasonably appropriate and adapted’ to such a purpose. On the other hand, a provision (now repealed)¹¹³ requiring automatic loss of citizenship when an Australian acquired foreign nationality—in effect a ban on dual nationality for Australian-born citizens—was not, in Castan’s view, ‘reasonably appropriate and adapted’ and was beyond the limit of constitutional power.¹¹⁴

Ame's Case shows that if there is an implied protection in the Constitution against unreasonable deprivation of citizenship for the ‘people of the Commonwealth’, it will not be a general protection, i.e. it will not apply across the Constitution to all laws the federal government can pass. The joint judgment and Justice Kirby said the inhabitants of external Australian territories—despite their Australian passports—were not ‘people of the Commonwealth’. So to the extent that there is any such protection in the Constitution, it cannot restrict the regulation of the legal status of inhabitants of Australia’s external territories. There is no need, on Castan’s reasoning, for federal laws to be ‘reasonably appropriate and adapted’ in relation to them.

Moreover, if there are others in Mr Ame’s legal position—i.e. people who are formally ‘citizens’ but who can be treated as ‘aliens’—will they be part of the ‘people of the

Commonwealth' because of their citizenship or outside this term because they are aliens? As discussed above, dual nationals potentially fall within this category. It might be argued that as a constitutional term the fact that a person is an 'alien' would take precedence over their statutory description of 'citizen' when determining if they were part of the 'Australian people' for the purpose of Castan's implied protection. Moreover, simply as a matter of definition, if a person comes within the term 'alien' it seems doubtful that they could also be a member of the 'people of the Commonwealth' under the Constitution.

In addition, the High Court has specifically said that laws about 'aliens' do not need to be 'reasonably appropriate and adapted'. If, as *Ame's Case* suggests, it is possible to treat an Australian citizen who is a national of another country as an 'alien', it is unlikely on current High Court authority that deprivation of their citizenship must be limited to what is 'reasonably appropriate and adapted'.

In any case it is not clear that the current High Court would agree that there is an inherent requirement in the Constitution—based on the concept of the 'people of the Commonwealth'—that laws depriving Australians of citizenship must be 'reasonably appropriate and adapted' to a legitimate constitutional purpose. Castan's view was clearly influenced by the fact that at the time he prepared his advice the High Court (under former Chief Justice Mason) had only recently implied a 'freedom of political communication' from the system of representative democracy established by the Constitution. The Mason Court said that to fulfil their function of electing the government, the 'people of the Commonwealth' referred to in key sections of the Constitution must be able to communicate about political and other matters that could influence their choice. Only laws which were 'reasonably appropriate and adapted' to serve a legitimate end compatible with representative government could validly restrict such communication.¹¹⁵

As the Australian National University's Dr Adrienne Stone has pointed out, however, 'the implication of a freedom of political communication was controversial' and 'still remains the subject of some judicial opposition'.¹¹⁶ Moreover, the current High Court under Chief Justice Gleeson is less willing than its forerunner to imply rights and protections from the text and structure of the Constitution. As Professor Greg Craven of Curtin University says, 'today's High Court is a far less athletic body than it was: where the Mason Court leapt, the Gleeson Court barely twitches'.¹¹⁷ In 2004, for example, the High Court declined to find in the Constitution any prohibition against the indefinite detention of people who had arrived in Australia without a visa but had committed no crime¹¹⁸ or any protection against the detention of children.¹¹⁹

Castan's implied protection against unreasonable deprivation of citizenship is at least partly derived from the role that the Constitution gives to the 'people of the States' and the 'people of the Commonwealth' in electing the federal government.¹²⁰ In *Ame's Case* both the joint judgment and Justice Kirby emphasised the voting rights of the inhabitants of internal Australian territories. Eligibility for voting in Commonwealth elections is largely determined by citizenship.¹²¹ Deprivation of citizenship would also deprive members of the 'people of the Commonwealth' of their electoral function under the Constitution.

As noted, however, the fact that the appellant in *Shaw* had the right to vote in Australian elections did not prevent the High Court deciding he had no Australian nationality and deporting him as an 'alien'. More generally, there is no absolute right to vote in the Constitution. The most that the High Court has been prepared to say is that if there were restrictions on universal adult suffrage, 'at some point choice by electors could cease to be able to be described as a choice by the people of the Commonwealth. It is a question of degree.'¹²² As Professor David Wiseman notes, such cases indicate that 'a minimum franchise ... is now guaranteed in the Constitution'.¹²³

Perhaps deprivation of citizenship might be treated in the same way: if enough Australians lost their citizenship and therefore the right to elect the federal government the relevant legislation might be invalid. As suggested, however, such arguments might have been more attractive to the Mason Court than the current High Court. And this would still leave open the loss of citizenship and disenfranchisement for lesser numbers without running into any such problem.

Conclusion

Ame's Case has received little publicity. But it is a perplexing decision with some significant implications for the Australian community. The case could have been decided entirely on the basis of the territories power in the Constitution. It is a surprise to no-one that the Australian government, as part of its power in the Constitution to make laws for the government of any territory, could provide both for the independence of Papua and the legal status of its inhabitants. Unremarkably, the federal government decided in 1975 that they should not retain Australian nationality but become citizens of the new state of Papua New Guinea. As Justice Kirby noted, this was consistent with:

... the common state practice evident in the devolution of territorial sovereignty to independent nations created out of the territories formerly governed by a colonial or like power.¹²⁴

But the High Court went beyond this, when it did not need to.¹²⁵ It raised the spectre of the 'aliens' power and set a potentially disturbing precedent, saying Mr Ame could be treated as an 'alien' when he was formally a citizen. This was unnecessary and disquieting; it raises questions for dual nationals, whose constitutional status was already unclear after the High Court's decision in 2004 in *Singh*. *Ame's Case* takes this uncertainty to a new level: it tells dual nationals that the 'passport' of citizenship may not bring legal protection as a full member of the Australian community.

Justice Kirby was clearly concerned to allay any alarm about the implications of *Ame's Case* for other Australians, stressing that it could not be used as a precedent. In contrast, the combined judgment of the other six High Court justices did not go to the same lengths. Both Justice Kirby and the joint judgment indicated that deprivation of citizenship under the territories power could not happen in the same way to residents of internal Australian territories. However this leaves inhabitants of Australia's existing external territories,

including Norfolk Island, Christmas Island and the Cocos (Keeling) Islands, in a potentially vulnerable position. *Ame's Case* suggests the federal government has full constitutional power to change their legal status, although this may require a change in the relationship between such territories and Australia. At a minimum *Ame's Case* shows that the federal government could—if it had some reason to do so—treat the residents of existing external territories as 'immigrants' requiring entry permits to travel to the Australian mainland.

The major point from *Ame's Case*, however, is what it says about who can be treated as an 'alien' under the Australian Constitution. The issue of depriving dual nationals of their Australian citizenship has been raised in the context of the terrorism threat to this country.¹²⁶ Is there a difference between the constitutional position of dual nationals and the situation of Mr Ame? If Papuans such as Mr Ame could be both regarded as formal citizens and treated as 'aliens', why does this not also apply to dual nationals? Based on the High Court's reasoning to date, the constitutional difference between the two situations is not self-evident. The High Court might say that in contrast to Mr Ame, dual nationals have become 'real Australians' with free right of entry and full voting and other rights in this country. But in *Shaw* the High Court rejected such an approach, saying that the applicant's 'personal history' in Australia made no difference to whether he was an 'alien'.¹²⁷ *Shaw* demonstrates that being 'fully absorbed' into the Australian community, with permanent residency and equivalent rights and obligations to 'real' Australians, does not stop a person being treated as an 'alien' under Australian law.¹²⁸ Alternatively, the High Court might say that dual nationals, while also foreign citizens, 'owe allegiance' to Australia in their capacity as citizens of this country. But so did Mr Ame. Australia was the sovereign power in Papua before 1975 and inhabitants such as Mr Ame owed allegiance to Australia as that power. If there is a basis for distinguishing the situation of dual nationals from that of Papuans such as Mr Ame for the purpose of deciding whether they come under the 'aliens' power, it is not evident from the High Court case law to date.

The current state of the law, as decided by *Singh* and *Ame's Case* is that an 'alien' under the Australian Constitution is simply a person who owes obligations (allegiance) to 'a sovereign power other than Australia'. If this is the extent of the definition, then dual nationals are 'aliens'. In fact, probably more so than Mr Ame, since he lost his Australian citizenship under a law which merely anticipated that Papuans in his position *would become* 'aliens' as citizens of the new PNG nation.¹²⁹

If given the opportunity it will be important for the High Court to resolve the status of dual nationals in Australia, particularly because of its own recent judgments emphasising the sweeping nature of the Commonwealth's power to make laws with respect to 'aliens'. The High Court has rejected any notion that the capacity of the federal government to make laws under this power is limited to what is 'proportionate' or 'reasonably necessary'. With this background, the current High Court is unlikely to accept that taking citizenship away under the 'aliens' power would be limited by Castan's theory of an implied protection for members of the 'people of the Commonwealth'. The High Court has made it clear that inhabitants of Australia's external territories are not 'people of the Commonwealth', so any protection from

Castan's theory, i.e. that laws taking citizenship away must be 'reasonably appropriate and adapted' to a legitimate purpose, will not apply to them. And if dual nationals are 'aliens', they are unlikely to receive any protection from the Castan theory either, even if the High Court did accept this theory. Their constitutional status as 'aliens' would logically take precedence over their statutory status as citizens. While the High Court has been somewhat equivocal, it is hard to see how an 'alien' under the Australian Constitution could also be a member of the 'people of the Commonwealth' for the purpose of the same document.

Finally, *Ame's Case* indicates the true nature of Australian citizenship. With no guarantee of Australian citizenship in the Constitution, Parliament can decide who receives citizenship, and who is deprived of this status, provided there is a source of legislative power. *Ame's Case* shows that citizenship can be taken from certain people unilaterally, even if they have no wish to give up their nationality, and perhaps even without their knowledge.

By controlling citizenship, Parliament also controls a pre-requisite for membership of the Australian nation. But *Ame's Case* shows citizenship is not enough for full legal membership of the Australian community. Under Australian law, some citizens can be kept out of the country they formally belong to. As Genevieve Ebbeck says, this raises questions about 'the fundamental worth' of Australian citizenship.

Instead, the real test for full legal membership of the Australian community appears to be whether a person is a 'non-alien' and therefore beyond regulation under the Commonwealth's extensive 'aliens power'. Despite the view of the majority in *Singh*, it is not the case that citizenship is merely 'the obverse of the status of alienage'. Under current High Court authority it is not clear whether anyone besides Australian citizens with no other nationality qualify as 'non-aliens'. The High Court has not even decided whether members of the 'people of the Commonwealth'—the basic term along with 'subjects of the Queen' used in the Constitution to describe Australians—are necessarily 'non-aliens'. On this basis, the full range of people who are 'non-aliens' and therefore 'real Australians' needs to await a further and more comprehensive High Court decision.

Endnotes

1. See also Peter Prince, '[The High Court and Deportation under the Australian Constitution](#)', *Current Issues Brief*, no. 26, Department of the Parliamentary Library, Canberra, 2002—03; '[We are Australian—The Constitution and Deportation of Australian-born Children](#)', *Research Paper*, no.3, Department of the Parliamentary Library, Canberra, 2003—04; '[Deporting British Settlers](#)', *Research Note* no. 33, Department of the Parliamentary Library, Canberra, 2003—04; '[The High Court and indefinite detention: towards a national bill of rights?](#)', *Research Brief*, no.1, Parliamentary Library, Canberra, 2004—05; and '[The detention of Cornelia Rau: legal issues](#)', *Research Brief*, no. 14, Parliamentary Library, Canberra, 2004—05.
2. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36.

3. *Minister for Immigration, Ex parte Amos Bode Ame*, [2005] HCA Trans 066, 3 March 2005, p. 22.
4. *ibid.*, p. 26.
5. *Commonwealth Constitution*, s. 24.
6. Senate, *Debates*, 14 March 2002, p. 787. See also Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co., Sydney, 2002, p. 8, fn 62.
7. (2003) 203 ALR 143.
8. Department of Administrative Services, *Australian Flags*, AGPS, Canberra, 1995, cited in Applicant’s submissions, *Ame’s Case*, p. 15.
9. [2005] HCA 36 at [63].
10. Respondent’s Submissions, *Ame’s Case*, p. 1.
11. Later renamed the *Australian Citizenship Act 1948*.
12. Australian Citizenship Act, s. 10(1).
13. [2005] HCA 36 at [22], and *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31 at 35–36.
14. The key provisions apply only to ‘non-citizens’: for example, see s. 4, 198, 200.
15. [2005] HCA 36 at [10].
16. *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cwlth), Regulation 4.
17. *Constitution of Papua New Guinea*, s. 64.
18. Mr Ame’s lawyers said that the Full Federal Court erred in *Minister for Immigration and Multicultural Affairs v Walsh* [2002] FCAFC 205 at [16]-[17] when it held that a person born as an Australian citizen in Papua in 1970 had not been absorbed into the Australian community (never having lived here) and remained an ‘immigrant’ under Australian law with no automatic right of entry onto the mainland. Applicant’s submissions, *Ame’s Case*, p. 7.
19. *Acts Interpretation Act 1901* (Cwlth), s. 17.
20. Compare s. 5 Australian Citizenship Act (‘Australia ... includes the external territories’) with s. 17(a) *Acts Interpretation Act 1901*—the definition applying for the Migration and other Acts—‘Australia ... includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.’
21. [2005] HCA 36 at [22].
22. *ibid.*, at [76].
23. House of Representatives, *Debates*, 30 November 1948, p. 3660, cited in [2005] HCA 36 at [69].
24. [2005] HCA 36 at [70], citing House of Representatives, *Debates*, 30 November 1948, p. 3658.

25. The current US Immigration and Nationality Act reflects this constitutional provision, granting citizenship to all persons 'born in the United States, and subject to the jurisdiction thereof'.
26. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 2 March 1898, Vol. II, p. 1763.
27. The main possibilities are 'naturalization and aliens' (s. 51(19)), the implied nationhood power, external affairs (s. 51 (29)), 'immigration and emigration' (s. 51 (27)), and the defence power (s. 51(6)).
28. Rubenstein, *op.cit.*, p. 8.
29. [2005] HCA 36 at [104–5] (Justice Kirby); and [38] (joint judgment).
30. K. Booker, A. Glass, R. Watt, *Federal Constitutional Law: An Introduction*, 2nd ed, Butterworths, Sydney, 1998, p. 313.
31. (1958) 99 CLR 132 at 154, see [2005] HCA 36 at [98].
32. [2005] HCA 36 at [47].
33. *ibid.*, at [33]. The inhabitants of New Guinea, as a UN Trust Territory, were 'protected persons' not 'citizens': see [2005] HCA 36 at [66] (Justice Kirby).
34. *ibid.*, at [33] (emphasis added).
35. *ibid.*, at [93].
36. Covering clauses 3 and 5, and s. 24.
37. [2005] HCA 36 at [30].
38. *ibid.*, at [106].
39. *ibid.*, at [120].
40. *ibid.*, at [101].
41. *ibid.*, at [106].
42. These territories are Norfolk Island, Cocos (Keeling) Islands, Christmas Island, Coral Sea Islands Territory, Territory of Ashmore Reef and Cartier Island, Territory of Heard and McDonald Islands, Australian Antarctic Territory. Not all are inhabited.
43. The Cocos (Keeling) Islands became a territory of Australia in 1955 and voted to integrate with the Australian community through a United Nations supervised Act of Self Determination (ASD) in 1984. See Department of the Environment and Heritage, *History of the Island Group Cocos (Keeling) Islands*, <http://www.deh.gov.au/parks/cocos/ishistory.html>, accessed on 5 September 2005.
44. On 1 January 1958, Christmas Island, which had been administered as part of the Colony of Singapore, became a separate colony. On 1 October 1958, sovereignty was transferred to Australia. See Department of the Environment and Heritage, *Christmas Island History*, <http://www.deh.gov.au/parks/christmas/islehistory.html>, accessed on 5 September 2005.
45. In *Newberry v The Queen*, [1965] 7 FLR 34, the Supreme Court of Norfolk Island explained that 'prior to 1855, Norfolk Island, having originally formed part of the penal settlement

established in New South Wales, was administered by the Governor of Van Dieman’s Land as part of that colony.’ Under the *Australian Waste Lands Act 1855* (Imp.), Queen Victoria issued an Order in Council in 1856 separating Norfolk Island from Van Dieman’s Land (by then renamed Tasmania), and ordering that the Governor of New South Wales also be the Governor of Norfolk Island. A further Order in Council in 1897 allowed the Governor of New South Wales to legislate in that capacity for Norfolk Island. In March 1914 King George V made an Order in Council placing Norfolk Island under the authority of the Commonwealth of Australia in accordance with the *Norfolk Island Act 1913* (Cwlth), which declared that the island was ‘accepted by the Commonwealth as a Territory’. As Justice Eggleston stated (at 39):

... the Crown regarded the power given by the *Australian Waste Lands Act, 1855* (Imp.) as wide enough to enable the Crown to *place Norfolk Island under the authority of the Commonwealth within the meaning of s. 122 of the Australian Constitution, with whatever consequential effects might be involved.* (emphasis added)

This analysis of Norfolk Island’s legal history was approved by Justice Mason of the High Court of Australia in *Berwick Ltd v Gray* [1975—1976] 133 CLR 603 at 608.

46. See Moira Coombs, ‘[Excising Australia: Are we really shrinking?](#)’, *Research Note*, no. 5, Parliamentary Library, Canberra, 2005—06, at <http://www.aph.gov.au/library/pubs/rn/2005-06/06rn05.htm>.
47. Acts Interpretation Act, s. 17(a)
48. *Commonwealth Constitution*, s. 51(19).
49. [2005] HCA 36 at [37].
50. Migration Act, s. 189 (detention), s. 198 (removal), s. 200 ff (deportation). And see preamble which states that it is ‘An Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons’.
51. Hon. Gary Hardgrave, *Australian Citizenship, Then and Now*, Speech to the Sydney Institute, 7 July 2004, p. 3.
52. (2001) 182 ALR 657.
53. See Peter Prince, ‘[Deporting British Settlers](#)’, op.cit.
54. 203 ALR 143 at 159 (Justice Kirby, dissenting).
55. *ibid.*, at 144.
56. Under s. 10 of the Citizenship Act, someone born in Australia is only a citizen if at least one parent is themselves a citizen or permanent resident. Tania Singh’s parents were asylum seekers from India without citizenship or permanent residency status in Australia.
57. *Singh v Commonwealth* (2004) 209 ALR 355 at 357; citing *Chu Keng Lim v Minister for Immigration* (1992) 176 CLR 1 at 25 (emphasis added).
58. *Doumit v Commonwealth* [2005] FCAFC 166 (19 August 2005) at [9].
59. Australian Citizenship Act s10(2).
60. [2005] HCA 36 at [35].

61. *ibid.*, at [37].
62. *ibid.*, at [119].
63. *ibid.*, at [111].
64. *ibid.*, at [119].
65. John Kerin, 'Stronger power to deport radicals', Lexis Nexis, *Australian Legal Developments*, 9.9.05; Prime Minister of Australia, *News Room*, 'Transcript of the Prime Minister The Hon John Howard MP Joint Press Conference with Attorney-General, Parliament House, Canberra', 8 September 2005, at <http://www.pm.gov.au/news/interviews/Interview1553.html>; see also Hon. Peter Costello MP, *Media Transcripts*, 'Interview with Ray Martin, A Current Affair', 23 August 2005, at <http://www.treasurer.gov.au/tsr/content/transcripts/2005/124.asp>.
For on-line links to the Federal Government's proposals for new counter-terrorism laws and reactions to these, see Susan Harris-Rimmer and Nigel Brew, '[Proposals to further strengthen Australia's counter-terrorism laws—2005](#)', *E-brief*, Parliamentary Library, Canberra, 6 October 2005, at <http://www.aph.gov.au/library/intguide/LAW/TerrorismLaws.htm>.
66. [2005] HCA 36, at [35]. *Singh* (2004) 209 ALR 355 at 414.
67. [2005] HCA 36 at [106].
68. *ibid.*, at [111] (emphasis added). British permanent residents can still vote if enrolled before 26 January 1984.
69. *ibid.*, at [110] (emphasis added).
70. The relevant provisions of the Migration Act allowing detention, removal and deportation (ss 189, 198,) only apply to 'non-citizens'.
71. (2001) 182 ALR 657 at 680.
72. Under Chapter III of the Australian Constitution, 'punishment' can only be imposed by the courts after determining guilt for a particular crime.
73. (2004) 208 ALR 124.
74. *ibid.*, at 130–31 (Gleeson CJ, dissenting).
75. *ibid.*, at 188.
76. *ibid.*, at 145.
77. *ibid.*, at 183.
78. *Al Khafaji* (2004) 208 ALR 201 at 211. On the issue of the 'aliens' power and immigration detention, see Peter Prince, '[The High Court and indefinite detention: towards a national bill of rights?](#)', *op.cit.*
79. [2005] HCA 36 at [44].
80. Applicant's submissions, *Ame's Case*, at [86–87].
81. Advice prepared in 1995 for former Minister for Immigration Senator Bolkus, tabled in Parliament in 2002, see Senate, *Debates*, 14 March 2002, p. 787.

82. (1988) 165 CLR 178 at 192.
83. 209 ALR 355.
84. [2005] HCA 36 at [36].
85. *ibid.*, at [34].
86. *ibid.*, at [82].
87. *ibid.*, at [25].
88. (1988) 165 CLR 462 at 469, cited in [2005] HCA 36 at [61].
89. [2005] HCA 36 at [22] and [61].
90. S. 51(27).
91. [2005] HCA 36 at [32].
92. [2002] FCAFC 205.
93. G. Ebbeck, ‘A constitutional concept of Australian citizenship’, (2004) 25 *Adelaide Law Review* 137, at 159–60; see also discussion of *Walsh* in Ebbeck, ‘Australian Citizenship and Aliens’, *Constitutional Law Forum 2002*, pp.11–13.
94. Senate, *Debates*, 14 March 2002, p. 787. See also Rubenstein, *op.cit.*, p. 8, fn 62.
95. (2004) 209 ALR 355 at 368.
96. 182 ALR 657 at 734.
97. (2004) 209 ALR 355 at 401.
98. For example, under the High Court’s current definition of ‘alien’ the constitutional position of ‘stateless’ people in Australia remains unclear. As the Commonwealth Solicitor-General said in discussion before the court in *Singh*:

In relation to statelessness, if one were today to define the core concept of ‘alien’ by reference to ‘allegiance to another’, one would have problems with dual nationality ... and one would have problems with stateless people. Every stateless person would be a non-alien, even though the person had never had any connection with Australia. That cannot be what the Constitution means. (No S441 of 2003; [2004] HCA Trans 006.)

Cf Federal Court’s decision in *Koroitamana* [2005] FCAFC 98 (27 May 2005).
99. (1982) 151 CLR 101 at 109–110. Cited with approval in *Nolan* (1988) 165 CLR 178 (at 185) by Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; and in *Te and Dang* by Gleeson CJ (2002) 193 ALR 37 (at 40); and Gummow J (2002) 193 ALR 37 (at 60).
100. *Re Patterson* (2001) 207 CLR 391 at 470, per Gummow and Hayne JJ.
101. 209 ALR 355 at 416.
102. The Commonwealth Solicitor-General has argued that the ‘aliens power’ is ‘a power to deal with people who do not have by law, whatever the law is from time to time, the necessary relationship with the polity to be members of it’. (No S441 of 2003; [2004] HCA Trans 006.) However this does not seem to provide a guiding principle for determining who is not an ‘alien’

under the Australian Constitution. Instead, it merely poses a question, i.e. what is the necessary relationship with the 'polity' for non-alien status? In addition, if the federal government through its legislation can control who is an 'alien' under the Constitution this would contravene the 'stream cannot rise above its source' doctrine: see Peter Prince, '[We are Australian—The Constitution and Deportation of Australian-born Children](#)', op. cit.

Nevertheless this argument was accepted by the Full Federal Court in *Koroitamana* [2005] FCAFC 98, which went beyond existing High Court authority to find that 'stateless' children born in Australia were 'aliens'. The Full Court said:

We do not, however, see anything in the joint judgment in *Singh*, when read with the judgment of the Chief Justice, as contrary to the proposition put forward by the Solicitor General in the present case that a stateless person, that is, someone owing no allegiance to any power, is an alien. This is so simply because, like a citizen of a foreign country, a stateless person lacks any constitutionally significant relationship with Australia. (at [6], emphasis added).

The Full Federal Court's reasoning in *Koroitamana*, however, appears merely to be a restatement of the assumption that if a person is not a citizen, they must be an alien. It is hard to see what might amount to a 'constitutionally significant relationship' between an individual and Australia besides citizenship. Indeed the Commonwealth argued in *Ame's Case* that citizenship is 'the exclusive criterion for "non-alien" status under the Constitution'. (Respondent's submissions p. 12.) Yet having a formal status as an Australian citizen was not enough for Mr Ame to gain 'non-alien' status and full legal membership of the Australian community.

103. (1982) 151 CLR 101 at 109.
104. Department of Immigration & Multicultural & Indigenous Affairs, 'Australian Citizenship', *Fact Sheet no. 2*, at http://www.citizenship.gov.au/pdf/fact_2004_2.pdf, and see Deirdre McKeown, '[Changes in the Australian Oath of Citizenship](#)', *Research Note*, no. 20, Department of the Parliamentary Library, Canberra, 2002–03.
105. McKeown, op. cit.
106. [2005] HCA 36 at [117] (emphasis added).
107. *ibid.*
108. *ibid.*, at [118], referring to current provisions of the Citizenship Act, which allow for deprivation of citizenship where a person:
 - has renounced Australian citizenship and acquired another nationality (s. 18)
 - is a national of another country and serves in the armed forces of a nation at war with Australia (s.19) and
 - is guilty of a criminal offence or migration fraud before being granted citizenship (s. 21).
109. Saying merely that the Court was presently concerned only with whether there was a limitation in the Constitution preventing unilateral deprivation of citizenship in relation to inhabitants of external territories. See [2005] HCA 36 at [34].
110. Senate, *Debates*, 14 March 2002, p. 787.
111. S. 19.

112. S. 18.

113. Former s. 17, repealed in 2002.

114. Senate, Debates, 14 March 2002, p. 787. Castan said that former s. 17 sought:

... to exclude from 'the people of the Commonwealth', in its Constitutional sense, persons who in truth have not ceased to be such people but who nevertheless wish to take on dual citizenship.

Castan said his view was particularly influenced by the fact that foreign nationals who had also become naturalised Australians, while forbidden from standing for Parliament, were not disqualified from voting and were accepted by the Constitution as 'people of the Commonwealth'. It was discriminatory to 'prohibit those who are not already dual citizens from attaining a status which is constitutionally permitted, and which millions of their fellow Australians already hold'.

115. Three High Court cases in the 1990s – *Australian Capital Television* (1992) 177 CLR 206, *Nationwide News* (1992) 177 CLR 1 and *Lange* (1997) 189 CLR 520 established an implied constitutional right of political communication. The cases established that:

- Limits on the Commonwealth's law making powers may be implied in and from the text of the Constitution
- The key principle of the Constitution is representative democracy—expressed and constitutionally entrenched in s. 7 and 24
- A necessary condition of representative democracy is the freedom to discuss and communicate information regarding political and economic matters
- This freedom extends beyond election periods to all political discussions generally
- The freedom of political communication is not absolute. It needs to be balanced with other principles, values and elements of Australia's constitutional system. In addition, it does not act as a personal defence, but as a limitation on the Government's legislative powers.

A law cannot restrict freedom of political communication unless:

- it is enacted to fulfil a legitimate purpose (of Australia's constitutional system); and
- the restriction is appropriate and adapted to fulfilment of that purpose.

116. A. Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement', (2005) 27 *Sydney Law Review* 29 at 42—43, noting Justice Callinan's opposition in *Lenah Game Meats* (2001) 208 CLR 199 at 331. Dr Stone notes that after its unanimous endorsement in *Lange* (1997) the implied freedom is 'probably beyond challenge for the moment'. However, 'the controversy surrounding the doctrine and its insecure textual and historical foundations may have ongoing effects' (at 43).

117. G. Craven, *Conversations with the Constitution: not just a piece of paper*, UNSW Press, Sydney, 2004, p. 150.

118. *Al-Kateb* (2004) 208 ALR 124.

119. *Re Woolley* (2004) 210 ALR 369.

120. Sections 7 and 24.
121. *Commonwealth Electoral Act 1918*, s. 93. Non-citizen British subjects enrolled before 1984 also continue to have the right to vote.
122. *McKinley* (1975) 135 CLR 1 at 36.
123. D. Wiseman, 'Implied political rights and freedoms', in S. Joseph and M. Castan, *Federal Constitutional Law*, Lawbook Co., Sydney, 2001, p. 345.
124. [2005] HCA 36 at [127].
125. The High Court said it was not necessary to consider other heads of legislative power, such as the implied nationhood power, the immigration power (s. 51(27)) or the external affairs power (s. 51 (29)). [2005] HCA 36 at [120]. The Commonwealth argued that international law supported the stripping of Mr Ame's Australian citizenship, noting 1999 draft articles by the International Law Commission which state that 'the predecessor State (here, Australia) shall withdraw its nationality from persons who are qualified to acquire the nationality of the successor State...'. Respondent's submissions, p.15.
126. See endnote 65.
127. 203 ALR 143 at 151.
128. Using a person's rights under legislation (e.g. right of entry, right to vote, etc) to determine who is an 'alien' under the Constitution would also contravene the 'stream cannot rise above its source' doctrine: see Peter Prince, *We are Australian*, op.cit., pp. 27—29. On absorption and 'alien' status, see also *Re Patterson* and *Te and Dang*, where the majority (Justices Kirby and Callinan dissenting) stated that while absorption into the Australian community meant a person was no longer an 'immigrant', alien status could only be lost through the formal process of becoming an Australian citizen. Absorption into the community made no difference. 'Resident aliens may be absorbed into the community, but they are still aliens', said Chief Justice Gleeson [(2002) 193 ALR 37 at 45]. See also *Nystrom* [2005] FCAFC 121. This case involved a 31 year old man who had lived all except the first month of his life in Australia but had not been registered as an Australian citizen by his parents. He committed serious crimes, and as a 'non-citizen' it appeared he could be deported under the Migration Act. The full Federal Court said that he had been 'absorbed' into the Australian community and was no longer an immigrant. He was the holder of an 'absorbed persons visa' under the Act. Such visas could not be cancelled on character grounds so he could not be deported to his birthplace of Sweden. None of this, however, affected his constitutional status as an 'alien'. The Full Court (reluctantly) agreed that he was still an 'alien' under current Australian law as interpreted by the High Court, even if this was by '*the barest of technicalities. It is the chance result of an accident of birth, the inaction of the appellant's parents and some contestable High Court decisions*' [at 29].
129. Although as noted in the text, Justice Kirby said Mr Ame was an alien 'since his birth'. In one sense, this is odd: what sovereign power other than Australia did Mr Ame owe allegiance to at the time of his birth? But it can be explained by Justice Kirby's support for the 'absorption' doctrine, i.e. that whether a person is an 'alien' under the Constitution is determined by the extent to which they have been integrated in practice as part of the Australian community, with a right to freely enter Australia, vote in federal and state elections and work in the public service etc. *Re Patterson* (2001) 182 ALR 657 at 734.

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