

**Submission to the PJCIS:
New inquiry into the Australian Citizenship Amendment (Allegiance to Australia)
Bill 2015**

**Professor Kim Rubenstein,
Director of the Centre for International and Public Law, ANU College of Law, ANU
Monday 20 July 2015**

I am grateful to the Committee for the opportunity to make a submission on this Bill, and I would be grateful to also have the opportunity to appear before the Committee in person to expand upon it.

I am the author of *Australian Citizenship Law in Context* (2002, Law Book Co) and later this year (subject to the progress of this and the 2014 amendment Bill) a second edition of the book, appearing as *Australian Citizenship Law*, will be printed by Thomson Reuters.

In addition, as a practitioner on the roll of the High Court of Australia, I have been Counsel in three High Court matters concerning Australian citizenship and I have also appeared in a matter before the Full Federal Court regarding the interpretation of the Australian Citizenship Act (Cth) 2007 Act (the Citizenship Act), as well as in some AAT matters on interpretation issues under the Act.

Between November 2004 and 30 June 2007, I was a consultant to the Commonwealth of Australia, represented by the then Department of Immigration and Multicultural and Indigenous Affairs, now the Department of Immigration and Border Control (the Department) in relation to its review and restructure of the Australian Citizenship Act 1948 which resulted in the Australian Citizenship Act 2007 which came into force on 1 July 2007 and which this current Bill seeks to amend.

I would like to stress that I have *not* been a consultant to the Department and have not been involved in any way with this amendment Bill.

In 2008 I was a member of the Independent Committee established by the then Minister for Immigration and Citizenship, Chris Evans, reviewing the Australian Citizenship Test. I therefore assisted in the drafting of its report *Moving Forward: Improving pathways to Citizenship* <http://www.citizenship.gov.au/pdf/moving-forward-report.pdf>

Purpose of this Bill

In the Explanatory Memorandum circulated by the Minister for Immigration and Border Protection, the outline to this Bill refers back to the Prime Minister's National Security Statement of 23 February 2015 explaining the Government's multi-faceted approach to countering these threats to national security. This approach includes this amendment Act 'to broaden the powers relating to the cessation of Australian citizenship for those

persons engaging in terrorism and who are a serious threat to Australia and Australia's interests.'

I begin by setting out a foundational policy concern I have with the Bill. I support a multi-faceted approach to countering threats to national security but I firmly believe that the approach should **not** include amending the Citizenship Act.

This is because the status of citizenship in a democratic society should not be treated as a tool of punishment or protection from threats to society. Citizenship, in contrast to the concept of being a 'subject' - a status that Australians held solely until 1949 - reflects a move from being 'subject' to the power of the Executive towards being subject to the rule of law in the same way as members of the Executive are subject to the rule of law - ie it moves to a position of an equality of citizenship or membership in a democratic society.

These proposed changes to the Act alter that fundamental balance, moving us back to that of being subjects - which counters the inclusive and largely egalitarian trajectory that changes to the Australian Citizenship Act have represented mainly until this amendment Bill and the 2014 amendment Bill.

I also believe this policy move is counter-productive to the very reason for its stated introduction (countering threats to national security) and that it may influence further perceptions of alienation and 'otherness' from and towards dual citizens in Australia.

This is not consistent with the multicultural society that Australia represents. I have written about this in an Opinion Piece in *The Australian* on the 29 May 2015:
<http://www.theaustralian.com.au/opinion/abbotts-dual-citizenship-plan-is-bad-policy-even-in-fight-against-terror/story-e6frg6zo-1227373341586>

I also believe the terminology of 'allegiance' and the way that term is used in a singular sense in this Bill, is not a helpful way of conceiving of and understanding membership in Australian society today. It is also not reflective of the globalized world in which we live. I have written about this with my colleagues in the introduction to and in a chapter in a collection that I edited with Dr Fiona Jenkins and Dr Mark Nolan. The book *Allegiance and Identity in a Globalised World* (CUP, 2015) -
<http://www.cambridge.org/gb/academic/subjects/law/jurisprudence/allegiance-and-identity-globalised-world> may be a useful source for the Committee's work.

In the book, the contributors identify the ways in which concepts of allegiance and identity have changed and are contested. This Bill returns us to a singular notion of allegiance that is not reflective of a multicultural Australia in the 21st Century. I attach the proofs of the introduction to that book with my submission.

I do not agree with the sentiments underpinning the 'Purpose of the Act' as set out in section 4 of the Bill -

This Act is enacted because the Parliament recognises that Australian citizenship is a common bond, involving reciprocal rights and obligations, and that citizens may, through certain *conduct incompatible with the shared values of the Australian community*, demonstrate that they have severed that bond and *repudiated their allegiance to Australia. (my italics)*

I do not believe that the statement ‘conduct incompatible with the shared values of the Australian community’ is clear and that it necessarily leads to the next sentence of demonstrating that they have ‘repudiated their allegiance to Australia’ whatever that may actually mean. There are many actions of individuals that do not represent shared values in a western liberal democratic nation and they are generally criminalized – and the criminal law is brought in to manage that activity. Using citizenship, as the tool to manage that aspect of human behaviour is not wise, as set out above. Moreover, as suggested above, defining one’s allegiance to Australia is not a clear notion, and attempting to do so is open to abuse on many levels.

Having set out my overall objection to this amendment Bill, I now turn to the specific provisions that are arguably unconstitutional and may not survive a High Court challenge if relied upon to revoke a person’s Australian citizenship.

Mechanics of the Bill

The Bill introduces three new ways in which a person, who is a dual citizen, can cease to be an Australian citizen.

This is a major change to the current Citizenship Act, in that the current Act only has extremely limited ways in which a person can lose their citizenship. Save for section 35 (as explained next), they are either through the choice of the individual (renunciation, and even then that is very restrictive), or due to fraud in the *obtaining* of citizenship or through failing to fulfill special residence conditions associated with becoming a citizen (s 34A).

The very limited context in which a person can lose their citizenship other than those means is through section 35 – ‘Service in the Armed Forces of enemy country’. It is important to recognize that section 35 and its predecessor has never been relied upon by the Executive to determine someone has lost their citizenship, and indeed, the Department’s view has been that the section has never operated because Australia has not been formally ‘at war’.

I write about this in my 2002 book at pages 146-147, referring to the predecessor to section 35, the former s 19 of the 1948 version of the Act. When the Australian Citizenship Council reviewed s 19 in its report in February 2000 (*Australian citizenship for a new century* (February 2000)) after there were comments that a person who is not a dual citizen should also be subject to the provision, the Council felt that this was unduly harsh and recommended that s 19 remain unchanged (at p 67 of the report).

These amendments are therefore very harsh measures being introduced, and I shall make comments about them individually.

1. Renunciation by Conduct

Renunciation in the present Act is restricted – just because a person applies to renounce their citizenship does not mean that they can. The current section places limits on the Minister’s power to accept the application, including if the person seeks to renounce their Australian citizenship and the application is made during a war in which Australia is engaged (s 33 (5)).

This restriction seems at odds with the principles underpinning the new 33 AA Renunciation by Conduct, whereby the aim is to force upon someone renunciation if they are conducting activity, not unlike being at war with Australia.

Indeed there are many oddities in this section including the use of criminal law definitions without the protections of the criminal law framework in place. Another is the term ‘acts inconsistently with their allegiance to Australia’ – a term which is unclear (as set out above) - even if it is then specified in subsection (2).

Arguably activity in that list, in subsection (2) while abhorrent, does not necessarily mean a person no longer has a connection to Australia. A person may unknowingly finance a terrorist and that action does not necessarily represent they intended or sought to renounce their Australian citizenship.

The timing of loss of citizenship is also odd, in its practical application, and inconsistent with rule of law principles of being aware of the legal framework in which you live. A person could, as a matter of law as set out in the Act, lose their citizenship without knowing it and this goes against western liberal democratic principles and the rule of law.

2. Expanding section 35

As discussed above, it is unclear whether section 35 as it currently stands is in itself constitutional, let alone whether this amendment would also survive a constitutional challenge.

This section also uses the Criminal Code without the protections of the criminal law.

This section also enables a person to ostensibly lose their citizenship without knowing it and this goes against western liberal democratic principles and the rule of law.

3. Conviction for terrorism offences and certain other offences

This third new way of revoking a person’s citizenship specifically links to the criminal law system and establishes that if a person is convicted of the offences included in s 35A (3) they then cease to be an Australian citizen on conviction.

As I have already written, I do not think that these convictions necessarily represent a change in one's commitment to Australia. The breadth of these provisions is illustrated starkly with (3) (e) - an offence under section 29 of the Crimes Act – destroying or damaging Commonwealth property. While I agree that the criminal law, on the whole, is an appropriate frame for dealing with the behavior in this list, I do not think that these are grounds for removing a person's citizenship.

Constitutional restrictions on revoking citizenship

All these amendments give rise to serious questions about the limits on the Executive and the Parliament to take away a person's citizenship. The Constitutional power to make laws regarding citizenship is drawn from various sections under section 51 of the Constitution and the breadth of these section may be in issue with these amendments. Moreover, there are also constitutional restrictions on how governments make laws within those parameters. Both aspects will give rise to issues that a High Court will need to grapple with if the proposed legislation is passed.

Analogies with the former s 17 – loss of citizenship on becoming a citizen of another country.

Under the 1948 there had been one other way a person could lose their citizenship – under the former s 17 of the 1948, discussed in my book at pages 136-144. In that discussion I include at page 141:

‘Section 17 operated in law, so that as soon as people satisfied s 17, they were no longer Australian citizens. Section 17 was repealed by the *Australian Citizenship Legislation Amendment Act 2002*, which commenced on 4 April 2002. When the amendment legislation was debated in the Senate on 14 March 2002, Senator Bolkus tabled a memorandum of advice, dated 27 June 1995, prepared by the late A R Castan QC, (See Australia, Senate, *Parliamentary Debates* (14 March 2002), proof version, pp 552-557)’

‘In that advice it was argued that s 17 fell beyond the limit of constitutional power because it 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 out dual citizenship. Some of Castan QC's reasoning relied upon the constitutional concept of “equality” under the law. While this concept has not been well-developed by the High Court since the date of that advice, the decision of the High Court in *Re Patterson; Ex parte Taylor* (2001) 75 ALJR 1430 lends support to some of the concepts raised by Castan QC in his memorandum.’

I am happy to expand further in person about my concerns about the constitutional strength of these provisions and their impact on a conception of the rule of law in a democratic society.

The Vulnerability of Dual Citizenship

Finally, I would like to raise the point that this bill reinforces the vulnerability of dual citizenship, if passed. In the article I wrote with Niamh Lenagh Maguire, which I am also attaching to this submission, we argue that the trend to move to strip dual nationals of their citizenship effectively make dual citizens more vulnerable – and gives them a second class citizenship that is always suspect – always insecure.

I do not think this is consistent with the democratic principles of a multicultural country where most members have links to other nation-states.

In addition, I do not think that making all individuals vulnerable to loss of citizenship, ie including the idea that a sole citizen, with an entitlement to apply for another citizenship, would be appropriate. This would not be consistent with our multicultural make up (given the majority of people in the country, save for the Indigenous population) have some links in their family history to another country. Moreover, making someone vulnerable to statelessness in international law is not appropriate for a democratic state that is proud of its commitment to the rule of law, both nationally and internationally.

I look forward to elaborating upon this submission in person.

Kim Rubenstein
20 July 2015

Professor Kim Rubenstein

Attachments:

1. Fiona Jenkins, Mark Nolan and Kim Rubenstein, 'Introduction' in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds) *Allegiance and Identity in a Globalised World* (CUP, 2014)
2. Niamh Lenagh Maguire and Kim Rubenstein, 'More or Less Secure? Nationality questions, deportation and dual nationality' in Alice Edwards and Laura van Waas (eds) *Nationality and Statelessness under International Law* (CUP, 2014).

Introduction: Allegiance and Identity in a Globalised World

Fiona Jenkins, Mark Nolan and Kim Rubenstein

1. Introduction

Interrogating the concepts of allegiance and identity in a globalised world involves challenging long-standing attempts to describe, recognise and regulate membership, connection and participation within and beyond the nation-state. On the one hand, concepts of allegiance and identity can be used quite simplistically to define a singular national identity and common connection to a nation-state. Yet, on the other hand, allegiance and identity are notions that can help us understand the capacity for nation-states, and members of nation-states, to maintain diversity, and to build allegiance with others outside of the border. For example, in forging transnational entities that share norms, values, laws, and social practices transcending singular national concerns, the sphere of national identity and allegiance becomes far more complex than traditional figures of commitment and belonging can encompass. Indeed, understanding how allegiance and identity are being reconfigured helps us understand diversity and social (dis)harmony within and beyond nation-states.

Controversies surrounding allegiance and identity are both similar and different for domestic public lawyers and international lawyers. While each of these legal perspectives, the domestic and the international, involve viewing the nation-state as fundamental to concepts of allegiance and identity, they also see the world slightly differently, depending upon the frame of public law or international law. Indeed, scholars contributing to this volume, in

addition to thinking from both the public law and international law vantage, have used multiple disciplinary perspectives to examine allegiance and identity in a range of socio-legal contexts. Some have examined the tensions created by the legal description, recognition, and regulation of national (public law) citizenship or nationality, regional identity, and constitutional identity. A central set of questions here is the extent to which law can and should help constitute identity as a basis for engendering a form of allegiance to the polity that includes an identity. Other contributors have sought to understand indigenous identity and customary law in contrast to the identity and laws of a dominant public law culture co-existing with the indigenous peoples. Moving to the international framing, others expose the contemporary realities and emerging challenges of temporary or permanent, forced or voluntary migration, including asylum seeking. The intersection between security concerns, principally counter-terrorism law, and migration and citizenship claims is also investigated within this volume and as explained further below is an interesting site for the intersection of public and international law. Further, important questions of allegiance and identity can also be examined by asking questions about the nature of the resultant social inclusion or exclusion facilitated by legal regimes and national, regional, or international policy making. Finally, the international law and transnational law dimensions highlight the impact of globalisation on an individual's sense of membership beyond the nation-state that illuminates further the intersections between the public and international.

Indeed, this book is the fourth in a series connecting public and international law.¹ As a volume in this series, it continues to

¹ The first three volumes are Jeremy Farrall and Kim Rubenstein (eds), *Sanctions, Accountability and Governance in a Globalised World* (Cambridge University Press, Cambridge, 2009), Thomas Pogge, Matthew Rimmer and Kim Rubenstein (eds), *Access to Essential Medicines: Public Health and International Law* (Cambridge University Press, Cambridge, 2010), and Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in International and Public Law* (Cambridge University Press, Cambridge, 2012).

highlight how domestic public law and international law intersect; together with suggesting how disciplines other than law are relevant for the public or international lawyer who seeks an understanding of allegiance and identity in a globalised world. The intersection is particularly rich within this theme because of the capacity to reflect on the place of the individual within and beyond the nation-state. This happens in a domestic public law sense by thinking about how the state regulates the formal status of individuals and their membership within the nation state, and indeed beyond it extra-territorially. Further, within international law, we see the multiple ways international law has dealt and engaged with the national in an international framework, shedding further light on the tensions (highlighted in the first three volumes) of the clashes that can occur when these disciplines within law collide.

2. Allegiance and Identity

Allegiance and identity are related concepts and some may suggest that all allegiance is a simple consequence of embracing a single, valued identity. However true that may be, much definitional and conceptual complexity surrounds each concept so we begin by discussing how these concepts are understood before highlighting the particular ways in which both allegiance and identity are discussed by contributors to this volume who have utilized a range of disciplines to provide conceptual clarity.

For many politicians, policy-makers, and social commentators, the goal of social inclusion, harmony, security, and national or international peace and well-being may well be thought to flow simply from encouraging the “right” form of identification, from which the “right” form of allegiance and related behaviour flows. Perhaps the “right” form of both identity and allegiance is thought to be that which encourages majoritarian and democratic legal processes in pursuit of uniformity of identity and allegiance.

However, diverse and globalised nations, states or regions, with histories that include both conflict and peace, or political stability and (revolutionary) regime change, should rarely be analysed in such simplistic ways. As Chryssochoou clearly comments in the European context: “cultural homogeneity within national borders is no longer the reality for many European nations and ceases to constitute the basis of the national project of ‘living together.’”² In this vein scholars of politics, international relations, law, philosophy, and social psychology should be affronted by a simplistic model suggesting that one true allegiance to complex entities flows from one central identity persisting over time. A more nuanced model of the relationship between allegiance and identity could conceive of both identity and allegiance in a number of ways. Some of the possibilities are sketched out further below.

2.1 Identity

One might consider that the least problematic, pure, and non-coerced of identifications would be an identity which is freely-chosen, and correlates with a psychologically-internalised self-description. Further, one might say that ideally the relevant socio-legal context would allow it to be politically possible to live the identity you wish, however complex an identity that may be, as it best suits your psychological or other needs. This may apply both to a personal identity (as “me”), or a social identity (as one of “us”). However, for many of the people entangled in the domestic and international legal regimes discussed in this volume, a true self-identification of this type is elusive if not impossible. This may be the case because a desired identity is constituted socially as a devalued, minority group status, the identification with which causes considerable tension if not personal and collective danger

² X. Chryssochoou, ‘Development, (Re)Construction, and Expression of Collective Identities’ in A.E. Azzi, X. Chryssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 5.

within the dominant political culture. Often in such circumstances, the legal and/or social identity actually described, recognised, and regulated by law or politics is better thought of as an ascribed identity of some sort. In this case, a person or member of a social group has found it advantageous to adopt and live according to some form of socially-scripted identity which is bestowed upon them rather than being chosen enthusiastically by them for the purposes of self-definition.

The next set of conceptual problems worth noting relates to understandings of how identity and identification works over time and in response to complex situational demands, threats, and social circumstances. Here we could ask the question: do we all possess just one identity or many? Does one identity remain the sole, complete, relevant and optimal way of describing our personal or social self over time? Is there anything wrong with admitting that in some situations our self-definition should emphasise only one or some of our identities or one or some aspects of our identity over others? Should a discussion of allegiance and identity in a globalised world and within domestic, regional and international legal regimes, admit that psychological, political, ethical, social or legal reasons may demand such selective emphasis in order to satisfy psychological need and the reality of self-expression under the demands of intergroup relations?

Many theorists, from social constructivists through to political psychologists, would see no problem with an assertion that there must be selective “salience” or relevance of one or a few of our multiple and possible identities (and/or combinations of those identities) depending on context. This is a challenge to the idea that personal (“me”) or social (“us”) identities are unitary, of equal strength and relevance across time (“chronically-salient identities”), and are robust to threats and situational demands. However, identity theorists who prefer to think we construct our identities in response to historical and contemporary needs and demands do use models of identity salience which can explain the self-selection of different relevant identities from multiple possible

identities according to social context,³ rather than suggesting that behaviour is forever dictated by a very small number of chronically-salient identities.

Asking questions about the identity-based causes of allegiance in the context of diverse societies and entities (members of national states, regional political groupings, and international organisations) seems to imply more complex and context-dependent understandings of personal and social identity. In order to understand the rich examples studied in this volume, a simpler model of identity and identification is unlikely to satisfy the analytical demands posed. Perhaps most importantly, in constitutional or legal disputes over memberships such as citizenship and residence, we should note that legal recognition of identity in a new land creates complex or hybrid forms of identification constituted by two or more social level identities.⁴ True examples of biculturalism are becoming a reality for the many generations who draw their sense of self from post-migration experience.⁵ Sometimes referred to as dual or hybrid identities, these salient and contextually-relevant combinations of identities may remain psychologically important for a migrant granted citizenship, even when allegiance that is of a form indistinguishable from that of a citizen born in the shared country of residence is on display.

Many of the chapters in this volume could be said to be posing conceptual questions about how the simultaneous salience or importance of many identities (national, ethnic, religious, occupational etc), and the inter-relationship between those social

³ P.J. Oakes, 'The Salience of Social Categories' in J.C. Turner, M.A. Hogg, P.J. Oakes, S. Reicher, and M. Wetherell (eds), *Rediscovering the Social Group* (Oxford: Basil Blackwell, 1987) 117-141 .

⁴ M.A. Nolan and K. Rubenstein, 'Citizenship and Identity in Diverse Societies' (2009) XV(1) *Humanities Research* 29-44.

⁵ S. Wiley and K. Deaux, 'The Bicultural Identity Performance of Immigrants' in A.E. Azzi, X. Chyssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 49-68.

identities, contributes to expressions of allegiance, perceptions of belonging, reactions to social exclusion, and feelings of injustice. For example, what are the simultaneously salient identities (or otherwise) of a citizen of Hong Kong or the EU when the superordinate polity (China or the EU) decides policy with a direct, and perhaps negative implication for the local identity (as a Hong Kong resident or, say, as a French national)? How does the nature of the identity or identities relevant in that context, in turn, shape resultant allegiance to one or more political groupings? Other identity controversies studied in this volume include how a second (perhaps simultaneously-salient) identity or ethnic heritage is the source of potential suspicion if not exclusion from a country of birth or citizenship. Some chapters in this volume describe apparent denials of protection of citizens via effective consular support or the expected civil and political rights enjoyed by fellow citizens within a criminal justice system due to the shadow cast by additional identities and their consequent apparent allegiances. In this way, some authors contributing to this volume ask how identity-based status, religious or ideological relationships other than a particular citizenship or residence status, arouses suspicion in the context of national security and counter-terrorism law including at the level of administrative decision-making relevant to character test assessments for visa determinations.

Perhaps it would be simpler if everyone were to put into practice⁶ only one chronically-salient (national) identity in a simplistic world of homogenous nation states. However, the range of identities and identity relationships actively lived by citizens, dual or multiple citizens, temporary and permanent migrants, refugees and asylum seekers, and indigenous peoples alike are much more complex than that. The reality of life with two or more passports, with relevant multiple, self-chosen and/or ascribed social identities, requires a more subtle analysis by the authors

⁶ S.D. Reicher, 'Putting Identity Into Practice' (2005) 3 *New Review of Social Psychology* 47-54.

contributing to this volume. The concept of identity and identification, and the meta-theory demanded for analysis of such complex domestic and international legal controversies, require detailed attention in the contemporary world.

A survey of the chapters collected together in this volume highlights the various ways in which identity is conceptualised and discussed by the contributing authors. This also enables us to list the ways in which identity has been described and analysed in this volume. For example, identity has been invoked, described and analysed as *national identity* by many contributors. Balint discusses national identity in comparison with national cultural identity and military identity; Bessell does so alongside discussions of citizenship, alien identity, and family identity; Jenkins invites us to consider the nature of “thick” and “thin” national identities in contrast to ethnic identities; Kneebone, as well as Ottonelli and Torresi, ask whether migrant workers need to share national identity; Platow, Grace and Smithson investigate contemporary perceptions of the prototypical Australian; and Thwaites examines the exclusory effects of identifying enemies of a purported national identity that is figured as a shared identification with liberal democracy.

Identities above the level of the nation state (eg. *regional and transnational identities*) are discussed in separate contributions from Breda and Jiménez (the EU⁷), as well as from Marsden (the self-autonomous region of Hong Kong). A discussion of *racial, ethnic or cultural identities* is had by authors such as Lester, Kneebone and Zagor. This volume also includes analysis of *indigenous identities* within a conquering or colonising nation state (Monson and Hoa’au as well as Wood and Weinman), with Wood

⁷ See also, related work by Koopmans and P. Statham, ‘Winners and Losers in the Europeanization of Public Policy Debates’ in in A.E. Azzi, X. Chyssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 93-113.

and Weinman doubting the utility of the historic use of an undifferentiated “pan-indigenous” identity. An identity which fits in this group, conceptually, could be a “*diasporan identity*” discussed by Neoh, Rothwell and Rubenstein.

A discussion of *legal notions of identity* in this volume spans both the use of domestic and international law to determine the content of recognised identities. For example, at the domestic level, this discussion includes an examination of ascribed constitutional identities including the identities of internal or external territorians within Australia (Arcioni) and of aliens (Jenkins; Bessell; Arcioni). The legal concept of a child’s right to identity is described by Bessell. Breda questions the utility of constitutional demands to communal rights based on collective identity. Wood and Weinman highlight controversies surrounding legal proof of continuing identification in the context of native title disputes in a way similar to the history of identification relevant in claims made by child migrants (Bessell). Customary law notions of identity derived from land, place, and cohabitation (Monson and Hoa’au; Wood and Weinman) are also discussed, as are identities recognised by legal regimes of issuing identity cards (Kneebone). Zagor is fascinated by whether domestic refugee status determination proceedings give self-narration autonomy to refugee applicants wishing to express their relevant identities.

At the international level, nationality as an identity determined by international legal principles is studied by Neoh, Rothwell and Rubenstein. How international law shapes identity is further examined by Shahbuddin who questions the international treaty law and practice helping to define identity as a minority group. Similarly, Spiro investigates how international law relating to nationality helps shape the accepted national identity of Olympic athletes in a context of much doubt surrounding rather instrumental grants of citizenship to elite athletes. Gulati is also concerned about the limits of and distinct character of the international law notion of nationality, especially in comparison with the domestic legal notion of citizenship; and in more difficult cases of independent political

communities and modern, globalised, technological relationships within cyberspace. Finally, Hofmann analyses decisions of the International Criminal Tribunal for the Former Yugoslavia in order to expose how international humanitarian law and international criminal law has been using the concept of nationality to assist determinations of who is a protected person in the context of an ethnic conflict where ethnicity and nationality are not always completely separate identities.

The nature of identity-formation and its maintenance has also been described by authors in the following ways: as self-constructed and recreated identities versus imposed or ascribed or essentialised identities (eg. Bessell; Wood and Weinman; Jenkins; Lester; Platow, Grace and Smithson); as denied identities (Wood and Weinman); in terms of a process of enacting or performing identity (Jenkins) or as a political role played out within the nation state (including for groups advocating use of political violence: Golder and Michaelson).

Finally, the consequences of identification are variously described as social inclusion, social exclusion (eg. citizenship-stripping provisions in the counter-terrorism context: Thwaites; Harris-Rimmer), or the curious blend of these, being strangers inside (Jenkins) or suffering from marginalizing racism (Platow, Grace and Smithson). At the international law level, citizenship identity is examined in terms of the diplomatic protection that may or may not be extended to Australian citizens who have other citizenships or identities which have complicated, quite controversially, decisions relating to consular assistance (eg. Neoh, Rothwell, and Rubenstein).

2.2 Allegiance

Contributors to this volume have used concepts of allegiance in a variety of senses. What unites discussion of allegiance, though, is that it is a social and political concept deriving from identity and sometimes doubted or qualified in an *ad hoc* or other fashion with implications for how identity is then viewed and tolerated.

First, allegiance can be thought to derive from a legally-constructed and ascribed national identity creating an *obligation*, usually a duty of obedience in exchange for protection. This is the way in which Arcioni describes a rather inconsistent constitutional history of recognition (or not) of the membership and allegiance of members of external Australian territories. Her analysis of how the courts have failed to acknowledge membership and allegiance to the Australian sovereign owed by Papua New Guineans contrasts starkly to other legal decisions confirming that allegiance is owed to the Australian sovereign by Norfolk Islanders as members of another external Australian territory. The flip side of allegiance as obligation of the citizen is the expectation by the citizen that prior citizenship and allegiance entitles citizens to consular protection (Neoh, Rothwell, and Rubenstein).

Arcioni also highlights how perceptions of allegiance possible from dual citizens, reaches back to further qualify ascribed legal identity and membership resulting in social exclusion and limits on the political expression of allegiance and identity. Here, dual identity raises doubts about trustworthiness as members and the genuine nature of the allegiance expressed, resulting in the exclusion of those dual citizens who may wish to demonstrate their allegiance via being elected to public office. In Australia, the perceived allegiance of dual citizens prevents them from participating in Australian political life, as Australian constitutional law does not allow dual citizens to be elected to Federal Parliament.⁸ This link between concerns over possibly ambiguous or divided loyalty and allegiance for dual citizens and ascribed legal identities as members with full constitutional rights of democratic participation, raises the empirical question of exactly how dual identity can relate to voluntary expressions of allegiance. This is not only important to study in the case of two simultaneously salient national identities (as in the case of dual citizenship) but perhaps also in the case of national identities

⁸ Section 44(i) of the Australian Constitution.

existing alongside religious identities in complex blended identities (eg. Muslim Australians).⁹

A similar form of (legal) suspicion surrounding multiple allegiance, perhaps derived from the existence of a complex multiple identity, can be seen in the chapters relating to security and counter-terrorism concerns (eg. Golder and Michaelson; Harris-Rimmer; Thwaites; see also the issue of multiple allegiances as natural as in Neoh, Rothwell and Rubenstein with the concept of humans as *zoon politikon* with natural unitary allegiances). What is interesting in these chapters is how legal tests have invited doubts over allegiance by raising suspicions about complex identities. Golder and Michaelson utilize Foucauldian theory and concepts of true citizens versus “enemies within” who break the original social contract, to suggest how quickly the link between positive perceptions about allegiance and citizenship status can be severed in the face of potential, though often indeterminate, fears about future terrorism threats beyond and within the nation-state.

Other examples of legally-defined notions of allegiance owed to sovereigns or states included in this volume are the allegiance concepts inherent in the Basic Law defining the relationship between the special autonomous region of Hong Kong and the sovereignty of mainland China (Marsden). Here the relevant concern is how realistic this legal specification of multiple allegiances may be in addition to legal or constitutional specification of an ascribed local identity.

Balint suggests that allegiance can flow from a shared cultural identity but may also exist as a form of institutional belonging allowing, in turn, adequate access to the goods of a

⁹ M.A. Nolan and K. Rubenstein, 'Citizenship and Identity in Diverse Societies' (2009) XV(1) *Humanities Research* 29-44; M. Verkuyten, 'Religious Identity and Socio-Political Participation: Muslim Minorities in Western Europe' in A.E. Azzi, X. Chyssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 32-48.

political community.¹⁰ Other contributors describe allegiance as an emotional and psychological “tie” to a nation state or group (eg. Bessell; Ottonelli and Torresi) which is often of legal relevance in legal tests of ascribed legal identities. Some contributors describe such ties between (ethnic) identity and group as being regarded as “primordial” in some sense (eg. Shahabuddin).

Jenkins examines the relevance of and symbolic importance of citizenship pledges as an indicator of allegiance that is derived from granted or ascribed legal identities. However, she also highlights the controversy surrounding ways in which identity is enacted in order to satisfy societal demands (social scripts) for credibly demonstrating allegiance to that society. Her chapter suggests how attempts to enact identity may be judged as insufficient in the eyes of some fellow members, resulting in social exclusion or the creation of “strangers inside” who are of doubtful allegiance or obedience or obligation despite being granted (legal) identity such as citizenship. Part of Jenkins’ inquiry concerns whether allegiance to principles and values, or to something else is most appropriate; a question also asked in the chapters considering identity and allegiance to transnational regional entities such as the EU (Jiménez; Breda).

In terms of how allegiance is formed, maintained and changed, there are numerous examples in this volume pointing towards both the maintenance of multiple allegiances (eg. Marsden; Neoh, Rothwell and Rubenstein; Kneebone; Ottonelli and Torresi) as well as of allegiances which change and cease to be expressed by those holding new (national) identities (Bessell). In the context of temporary labour migrants in particular (Kneebone; Ottonelli and Torresi), exclusive and unequivocal allegiance is most naturally questioned. The very fact that nations tolerate long-term

¹⁰ See also J.R.H. Wakefield, N. Hopkins, C. Cockburn, K.M. Shek, A. Muirhead, S.D. Reicher, and W. van Rijswijk, ‘The Impact of Adopting Ethnic or Civic Conceptions of National Belonging for Others Treatment’ (2011) 37 *Personality and Social Psychology Bulletin* 1599-1610.

labour migrants who do not take out citizenship endorses a more complex understanding of identity-based allegiance. The real question in this context of temporary labour migration is whether an identity more in line with a form of membership or residence, and an identity falling short of full legal citizenship, should be a source of perceived allegiance entitling broad rights akin to citizenship, for the period of the temporary migration. After all, international labour hire agreements and work visas smack of the legal notion of contract often similar to the liberal democratic notion of “social contract” thought to be at the heart of one’s allegiance to a group or nation.¹¹ Chapters considering indigenous or tribal peoples and concepts of allegiance owed and earned demonstrate the important historical dimensions to the way in which the concept of allegiance is discussed, for instance the invocation of ancestral histories of origins and earlier migrations utilize a fluid concept of allegiance yet one which is clearly derived from geographically-determined identities over time (Monson and Hoa’au; Wood and Weinman).

2.3 Examples of Disciplines Invoked to Understand Identity and Allegiance

In this volume, a range of different disciplines help authors to describe both identity and allegiance in the subtle ways required. Examples of the disciplines drawn on to assist contributing authors can be given to highlight the diverse conceptual perspectives from which allegiance and identity can be understood. Together with the overview of chapters below, we can list the disciplines invoked in this volume as follows: international relations, literary theory, philosophy, politics, political philosophy, public policy, psychology, sociology, anthropology, as well as the range of public lawyers (administrative law, citizenship law, constitutional law, migration law) and international lawyers (including international development law, international humanitarian law and refugee law).

¹¹ Peter H. Schuck, and Rogers M. Smith, *Citizenship without consent : illegal aliens in the American polity* (1985, Yale)

3. Structure of the Volume

The chapters in this volume have been grouped under seven sections in an attempt to present perspectives on allegiance and identity side-by-side in ways that reflect the book's place in a series linking public law and international law. Starting from a public law frame in thinking inwardly into the nation-state, we first group those chapters speaking to foundational constitutional legal underpinnings to allegiance and identity. The next group then reflects back on those western underpinnings to assess how they speak to indigenous and customary law understandings. This is followed by an assessment of the impact of these public law frameworks on social inclusion and exclusion. Indeed the state has identified national security concerns and counter-terrorism as ways of justifying the development of law that also impact on and are influenced by both public law and international law concepts. We then move into the international sphere by placing those chapters that look at forced and voluntary migration of refugees and children together before turning to those contributions that assess temporary or permanent labour migration. Each of those two sections impact on questions of international movement and the push and pull factors that draw and send people to become members of new nations. Finally, the collection presents several chapters that highlight the varied transnational and international legal perspectives on allegiance and identity. An overview of these grouped themes, and, a taste of the main questions posed by authors of the chapters in these groups, provides a further aspect to this introduction, and draws from the insights into the disciplinary and theoretical perspectives used by the authors below.

3.1 Constitutional Legal Foundations

Public law traditionally begins with an assessment of the legal foundation to the nation-state, typically represented by a Constitution. These four chapters interrogate how constitutional law foundations and constitutional concepts impact on identity in

varying ways. Starting with Australia, Arcioni chooses to look at the concept of ‘the people’ not only because it is the people to whom identity and allegiance apply when thinking about membership, but also because it is the actual terminology used in Australia’s constitution over ‘citizenship’ when looking for constitutional expressions of membership. She also looks to the constitutional margins to interrogate constitutional identity, as these ‘provide the sharpest examples of how lines of membership are drawn’¹². Indeed, the jurisprudence involving Australia’s territories illuminates the relationship in Australia between allegiance and race. Drawing on international law concepts in the exercise of sovereignty over different territories, her chapter shows the many ways in which Australia has exercised fluidity in its determination of membership of those people in the various territories – those deemed in, and those deemed outside of Australia’s membership. Moreover, the foundational international law case of *Nottebohm* is also shown to be of relevance with its interrogation of ‘real and effective nationality’ when Arcioni reviews the most recent High Court of Australia case on the territories involving the identity of Papuans who were born as members and citizens, but were later deprived of it – for theirs was not deemed a “full” or “true” Australian citizenship. Why was this so? Arcioni is able to answer by looking at “culture as an indicator of membership.” The territories were made up of people from different cultures, different races, and the High Court has clearly distinguished them from the Australian constitutional people.

Breda’s chapter examines constitutional claims proposed by national identities both at the national and international levels. In looking at those claims for ‘constitutional recognition’ Breda clarifies the ‘distinctive status of identity-based constitutional demands in modern and pluralist constitutional theory’ by showing that objections to national identity claims are unfounded. Divided into two, his chapter first addresses the normative case against

¹² Arcioni – after around footnote 11 in her text.

assessing identity-based constitutional claims and he argues that more can be drawn from inserting normative arguments into the debates over procedural requirements of modern constitutions. Breda argues that identity-based constitutional claims could be ‘considered a helpful expression of democratic dissent.’ He then examines the interplay between the evolution of the modern republican tradition and national identity. Breda’s paper reminds us that procedural aspects of modern constitutional democracies and multinational states like the UK and international organisations like the EU are worth focusing on when considering the place and value of democratic expressions of national identity in modern democracy.

Questions about the identity of a territory within a state as much as the people within the territory are the concern of Marsden’s chapter examining the relationship between China and Hong Kong. Indeed, he argues that the ‘physical movement of people is not a prerequisite for a change to, or confirmation of allegiance and identity; a change in territorial sovereignty alone can do that.’ However, Marsden is able to show that allegiance and identity for the people of Hong Kong is a complex mix of connections within the Hong Kong Special Administrative Regime (HKSAR) and between the HKSAR and the People’s Republic of China (PRC), both supported and sometimes frustrated by the constitutional structure of the *Basic Law* and its interpretation. Drawing on international law and public law, which were both foundational to the arrangements for the relationship between the Hong Kong Special Administrative Regime and the People’s Republic of China, we see the international status of HKSAR through ‘some 200 multilateral treaties’ applying to the HKSAR – including those in place before the handover and continuing, those in force following Chinese ratification and another group which the PRC authorised the HKSAR to apply to the Region.. The public law foundations to the HKSAR are in the *Basic Law* enacted in accordance with the *Constitution of the PRC*. Marsden’s chapter reflects on the impact of the interpretations and decisions on the

Basic law as well as the key events sharing the autonomy and sovereignty debate in Hong Kong which have focussed on national security and democracy including the demonstration of freedom of expression such as the civil right of protest. In Marsden's view, key events in these areas are significant for illustrations of allegiance and identity for the people of Hong Kong, who have demonstrated their interest in the application of their constitution, their desire to shape their own future and their wish to be actively involved in the governance arrangements and desire to preserve an identity separate from China.

Finally in this first section, Jiminez's chapter takes us to Europe, also considered earlier by Breda in his theoretical analysis, but here in a direct examination of the concept of allegiance to 'Europe.' As Jiminez argues, 'the legal figure of European citizenship presents a most interesting case in the study of the interactions between international and public law, between domestic and transnational identities and between allegiance to nation and to a community of nations.' Drawing on the ideals of the 'European project' in its foundations to current problems facing the project, Jiminez argues for a more explicit allegiance from European citizens and a revival of foundational ideals applied to new challenges. Drawing on Joseph Weiler's important work on Europe Jiminez examines the problems Europe is experiencing in what he identifies as a 'midlife crisis' through social integration issues, economic fragmentation issues and the weakening of political integration and an absence of a clear cultural consensus. Using Weiler's 'Principle of Constitutional Tolerance' Jiminez argues for a European polity based on an analogical unity that respects the autonomy of the parts and enables a real 'unity in diversity'. It also demands an inclusive public sphere as the benchmark for a common political culture, which Jiminez argues will be the way forward for a Europe 'worth fighting for'. While drawing on both international law and public law concepts, it is this public law ending of an inclusive public sphere that reminds us that whether it be in national or supranational contexts like Europe,

basic public law principles inform and impact upon allegiance and identity in a globalised world.

3.2 Indigenous and Customary Law

A flaw in thinking about Constitutions as if they were the starting point of public law is that this fails to address the tensions arising from the colonial foundations to most Western constitutional underpinnings. Where the Constitutions and constitutional arrangements discussed above have been imposed, often on indigenous peoples, the inherent tensions in the law constituting membership and participation are exposed. Moreover, the plurality of national identities within the nation also complicate matters, and raise questions that are developed further in this section.

Monson & Hoa'au take us to the Solomon Islands to engage with this framework and in particular illustrate a process of contestation over the multiple constructions of identity and allegiance within a plural legal system that suffered a period of social upheaval and civil conflict that is popularly known in the Solomon Islands Pijin as 'the Tension'. Their chapter focuses on two sets of questions; how the different kinds of law in the Solomon Islands construct identities and allegiance and how this relates to the construction of space, and secondly, the way in which place, identity and allegiance affect a person's ability to make claims. As they powerfully ask: 'How does one's 'belonging' to a 'place' affect the ways in which we speak or write about these issues?' Indeed the authors make these points even more forcefully by identifying their own separate voices and making transparent that Rebecca Monson has written Part I, informed by her experience as a white Australian woman, while Part II is written by George Hoa'au who 'writes as an 'Are'are man from the place of the same name. Hoa'au 'draws on his knowledge as the eldest son of *Ulutoro* who was the eldest daughter of the 14th hereditary chief, the late Robert Auwehiona' – a tribe who historically provided refuge for runaways from tribal wars. Monson reflects on some of the difference in which *kastom* and state law construct identity, allegiance and belonging and how

the tensions between the *kastom* and liberal law raise important questions about her own identity and place in these jurisprudential discussions, and are critical to decolonising law.

Wood and Weinman's paper takes us to Australian jurisprudence in order to question whether domestic law is capable of adequately recognising Indigenous identity. They explain that the place 'law occupies in Indigenous Australian societies is not analogous to the role the Australian legal system plays for non-Indigenous society. Indigenous law, in the Indigenous context, can inform one's position in a network among kin and regulates behaviours, duties and obligations in relation to one's own group and country as well as towards other Indigenous and non-Indigenous peoples.' Their paper begins by exploring the theoretical legal constructions of Indigenous identity as contextualised by historical events and government policies, aimed at eradication, via assimilation. They then turn to consider the constructions of collective indigeneity in relation to Indigenous societies by examining case law within a more general critique of native title jurisprudence, with the aim of questioning how the legal dimensions of Indigenous Australian allegiance and identity can better accord with Indigenous peoples' right to determine their own identity or communal membership in accordance with their customs and traditions.¹³ Their paper though, echoing a similar theme developed in earlier volumes of this series, recognises that although law can play a significant part, there are limits to the capacity of legal systems alone to repair complex rents in the social fabric, such as that evidenced in the experience of Indigenous peoples. The path to the destruction of Indigenous identities, communities, cultures and civilisations had its genesis in the anti-Aboriginal views of the original settler populace; and the likely genesis of 'true' reconciliation will also lie in the will of the people as expressed through *truly* beneficial government policies. The

¹³ *United Nations Declaration on the Rights of Indigenous Peoples* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007), art 33.

Constitution and law will only change when the people's will changes.

3.3 Social Inclusion and Exclusion

Domestic public law framing of identity and membership further highlights the inherent tension of membership as a category of inclusion and exclusion. As soon as a liberal state places limits on those who can come in, and on the distribution of resources within the nation-state, there are immediate forms of discrimination involving those who are included and those who are excluded.

Indeed as Jenkins starts her chapter “allegiance arises as a visible issue most obviously where there is conflict, such that one identity...seems to preclude holding other identities...” This insight informs her analysis of ‘citizenship testing’ regimes which have been used increasingly often in Western nations as ways of establishing entry to citizenship. Drawing on Bonnie Honig’s *Democracy and the Foreigner*¹⁴ and her treatment of the biblical figure Ruth as a powerful paradigm for the ambiguities that attach to the immigrant who chooses between loyalties, Jenkins explains how Honig identifies xenophilia and xenophobia as closely paired, and mutually generating around issues of allegiance, arguing that ‘wherever allegiance must be *demonstrated* within a social text, the demonstration is liable to backfire.’ Through several analytical steps Jenkins shows how ‘the question of allegiance is closely related to a problem autonomy is designed to resolve, namely how the external character of law (its violence) may be resolved into something internal, a choice, that accedes to the law, perhaps through rational acknowledgment, perhaps through love’. Jenkins turns from this to the Australian citizenship pledge which has become the centrepiece of Australian citizenship testing (the test was first introduced in 2007 and linked to the pledge in 2008). The testing regime married to a pledge of allegiance highlights the inherent ambiguities that attend the very notion of allegiance, and

¹⁴ (Princeton University Press, 2001)

which, as Jenkins illustrates, may be construed ‘as an act of decision or will, or as an act that requires at some level the conversion of the heart and the richer nuance within this of a passionate commitment.’ Without fully rejecting the revival of the pledge, she argues that its political importance exceeds its alignment with the instruments of liberal citizenship; so that ‘we need to understand the peculiar nexus of citizenship with the capacity for undertaking an oath as working across an unstable range of registers and that there is little to be gained by stripping it back to its bare contours of liberal permissibility, for there are potentials here that belong to the democratic meanings of allegiance.’

Platow, Grace and Smithson pick up on the tensions inherent in the pledge, and charted in Jenkins’ treatment of ‘strangers inside’ democratic citizenship’ by using a new social-psychological framework for considering a form of racism they call ‘marginalizing racism’. This is a racism that promises inclusion with one hand while rejecting it on the other. Their analysis begins with concepts relevant to the processes underlying the expression of this racism – social identity and self-categorization theories – extending what has been referred to as the ‘social identity approach’. A key assumption of the analysis is that people’s self-concepts are ‘comprised of mental representations of themselves *categorized with others*.’ Moreover, these self-categorizations are ‘not only flexibly invoked but flexibly defined’; and the fluidity with which the rhetorical definitions of ‘us’ can occur is possibly precisely because of the psychological nature of group memberships. It is this fluidity that has allowed this form of racism to go unchecked. They argue this is an ‘important conceptual warning’ for those working in immigration and citizenship policy, as the ability to simultaneously include and exclude members of particular racial, ethnic (or any other social) grouping poses a serious threat to members of those groups.

Balint’s chapter concludes this section testing out inclusion and exclusion by engaging with the debate over whether too much

immigration and too high a degree of diversity threatens national identity and social cohesion in liberal democratic states. He does so by looking at two important social goals – welfare redistribution and national defence – two areas in which allegiance is relevant – and which speak to both progressive goals (welfare redistribution) and conservative goals (defence of the nation). These are two areas that also highlight public law (welfare distribution) and international law, in that defence of the nation is an attribute of sovereignty of the state in the international domain. Balint argues that national identity is neither a necessary nor a sufficient condition for the support of these projects and that even if a weak national identity is a threat for some types of national allegiance, it does not imply the failure of important social projects and may even help ensure their success. In other words, allegiance and identity are not the lynchpin for social cohesion, and help us reflect on the other dimensions at play when diversity and high levels of immigration are attacked for these reasons.

3.4 National Security Concerns and Counter-terrorism Law

Those other dimensions become clearer when turning to national security concerns and counter-terrorism law. Indeed, an important legal attribute of sovereignty, both in an international law context, but also in a domestic public law scenario, is of the sovereign's right to 'protect' its citizens. National security concerns often operate in a domestic public law context, looking for the terrorist within as well as keeping out the terrorists from outside. Here we see the boundary being blurred between public law and international law, but ultimately these chapters show how the state uses its public law to regulate its membership.

Thwaites' chapter takes us to the United Kingdom where legislation came into force in 2006 enabling British citizens to be stripped of their citizenship if this can be deemed "conducive to the public good", and provided statelessness is not a consequence. Thwaites uses this development to interrogate the legal theorist John Finnis's claim that in a liberal democratic state citizenship

functions as a form of shared identity which incorporates a common allegiance to liberal democratic values. Thwaites' argument is that the deprivation provisions show how Finnis's citizenship project is likely to undermine its own objectives, introducing divisions and distrust when its ultimate objective is to promote solidarity within the polity. Thwaites' chapter takes us through the context for the UK provisions, weaving in the story of David Hicks who was subject to the provisions, and the terrorist threats that pressed citizenship into service. He shows us why there are problems with Finnis's account of citizenship because, amongst other concerns, it clothes the exercise of an arbitrary power with a measure of respectability.

Golder and Michelsen continue the theme of state control over its citizenry and the state's sovereign power over political criminals and terrorists by looking at the theoretical work of Foucault and exploring how his theory informs a critique of Australian law in the context of counter-terrorism. Here they show how criminal law and criminal justice policy can 'play a crucial role in determining the identity and delimiting or questioning the allegiance of certain individuals within the nation state.' They argue that 'the allegiance of citizens can be put into question, or suspended, by the extraordinary operations of the criminal law' so that we need to think about criminal law alongside those areas like refugee law, migration law, citizenship law and constitutional law that are more often thought of as mechanisms "for determining inclusion and for re-constituting the shifting limits of a political community." By drawing together the case law and legislation in Australia since September 11, 2001 Golder and Michelsen illustrate how the 'new forms of extra criminal punishment...do not simply sanction certain forms of behaviour but that they, and the discourses within which they are embedded, are more importantly a key mechanism used by the state to delimit and define identity and membership of the Australian state.'

Harris-Rimmer provides one further example of the state's power over non-citizens with a case study of the treatment of Dr

Mohamed Haneef in 2007 in Australia. In this she looks directly at migration law and the wide reach of the counter-terrorism laws that led to breaches of natural justice, and the law becoming a servant of the executive, rather than the executive being bound by law. Of even more concern to the would-be migrant is her claim that it is ‘difficult for a migrant to demonstrate loyalty in the fever of a terrorism investigation, let alone innocence of a particular charge.’ In other words, will the migrant remain for ever an alien? And will the state be deserving of allegiance?

3.5 Forced and Voluntary Migration of Refugees and Children

In a transnational context, many of the security and international law issues touched on in the previous section lead to specific issues arising for the next point of our focus, those engaged in forced or voluntary migration. Refugees are the most identifiable group suffering from forced migration and children are also a vulnerable group, whether as refugees or in other contexts as described further below.

Zagor examines this vulnerability specifically in considering the narrative identities that refugees are required to create and the necessary allegiances forged when making their legal claims for refugee status. His chapter uses a mix of tools to discuss theories of legal personhood and identity and the place of autonomy in refugee law discourse. Zagor illustrates how the ‘production and reception of the refugee law narrative is a complex phenomenon involving several narrators with sometimes conflicting stories and objectives.’ Law is not well equipped to accept this ‘multiplicity of recognitions’ and ultimately the refugee is forced to satisfy a legal identity that provides protection and security that can never truly reflect the fluidity of any person’s identity. This returns to a recurring theme throughout the series, of the limitations and collisions that can occur when law, whether public or international, is part of the greater picture.

Lester continues this theme of law’s problematic place by asking “How can law clothe in legitimacy measures with such

dehumanising consequences?” Her chapter ‘explores how the dynamics of race and political economy have influenced the way in which law-makers construct, treat and understand the figure of the foreigner and the idea of sovereignty in the context of migration.’ Her analysis uncovers law as a vehicle for the manifestation of complex, deeply-held fears about ‘the loss of white power and identity and related hegemonic desires.’ She illustrates how Courts conceived myths of the sovereign right in international and public law to exclude even friendly aliens, by misunderstanding and misapplying the important legal writer Vattel, and its continuing legacy into 21st century jurisprudence. Consequently, she concludes that lawmakers ‘have constructed, treated and understood the (changing) allegiance and identity of the figure of the foreigner and the idea of sovereignty as a ‘control technology’ and she calls on current law and policy makers to re-think and re-imagine the relationship between migration and community as one that is more vital and an opportunity for exchange.

A different sense of forced migration that can be experienced by refugees is identified in Bessell’s chapter, which examines the experiences of British child migrants to Australia during the 20th century. These children were a different migration ‘beast’ because they were unaccompanied and did not fit into the normal framework of being identified through their parents. Their citizenship status and membership was not clear and many effectively became aliens, not formally taking up Australian citizenship. Bessell’s chapter highlights this conundrum and uses the international law framework of Convention on the Rights of the Child to look at whether citizenship and childhood are compatible and whether children should merely be seen as citizens in waiting. By using the British child migrant case study she advocates promoting respect of children’s self-constructed identity rather than privileging identities chosen for them by others.

3.6 Temporary or Permanent Labour Migration

A more positive form of migration would seem to be that of temporary or permanent labour, given an element of ‘choice’ seems involved in that form of movement. Choice however can be contestable as a descriptor given the life experiences of those who take advantage of immigration receiving nations, and given these nations’ approach to limiting membership for those living in a temporary or even permanent forms of migration.

Ottonelli and Torresi engage and interrogate how liberalism is troubled by the place of the migrant, and how in reaction it tends to condemn the migrant’s otherness in terms of defects of allegiance, or projects forms of identity viewed as dangerous for the liberal ethos and public culture of the political community. They challenge this pattern as reflecting an ‘unexamined empirical and normative assumption of permanent migration as the only model.’ Their paper argues that migrants often *choose* temporary migration and a special set of rights should be devised for those engaged in these temporary projects. They use the term ‘temporary migration projects’ to refer to people who determine, when going to the country of migration, that they only intend to live in that country for a variable period of time, but not permanently. This is because they are intending to benefit family (or other specific projects) back at home given the economic opportunities presented by the host country. It is not that permanent migration fails to present itself to them, but simply that they have a different agenda when living in the host country, and this different agenda can be a positive reason for not identifying or forming an allegiance to the host country. However, Ottonelli and Torresi do see the liberal state being responsible for creating differential rights targeted at these migrants that would ‘accommodate and facilitate their life plans, offer special protections while they are in the receiving country and make their return feasible and successful.’ There would not then be an expectation of allegiance and the sharing of culture and identity, but their presence should be seen as mutually beneficial and

therefore entitling rights and support for their ‘temporary migration project’ objectives.

Their case is supported by the following chapter which takes us to South-East Asia, in particular Singapore and Malaysia, where Kneebone examines the situation of low-skilled and unskilled labour migrants’ experience. Theirs is often one of exploitation, giving further substance to Ottonelli and Torresi’s call for certain rights protections. Kneebone looks to see if transnational and regional protective measures might be more effective than relying on the nation-state itself. Kneebone weaves through her analysis the distinctions between citizenship rights, labour rights and associated international law frameworks, mounting ‘an historical and normative argument for transnational justice based upon the notion of work and labour rights as social and economic rights’ and calling for a ‘normative framework which adequately addresses the rights of labour migrants without reference to citizenship or sovereignty.’ The temporary migrant’s place in the international framework, is therefore a good focus for transition to the next section, which examines transnational and international legal perspectives more closely.

3.7 Transnational and International Legal Perspectives

This last grouping concludes the public and international law theme by bringing together the chapters highlighting the tensions inherent in membership in a globalised world and the complexity involved in identifying legally determinative markers of identity and membership.

Issues of dual citizenship and multiple allegiances infuse Neoh, Rothwell and Rubenstein’s chapter which addresses some of the legal issues arising from the case study of Stern Hu, one of over 20 Australians currently serving sentences in Chinese prisons. The chapter highlights questions about Hu’s allegiance to his country of birth (China), country of nationality (Australia), his family in China and his employer. Neoh, Rothwell and Rubenstein argue that their chapter highlights the centrality of nationality when defining the

status of individuals in international law and what this may mean for understanding the meaning of allegiance and identity in a globalised world. Drawing on James Scott's work¹⁵ they argue that allegiances are unwieldy and bureaucratically incomprehensible in their raw form and so states have imposed some sort of legal order on the diverse allegiances that individuals may hold. Yet, no legal system can truly represent those allegiances except through a process of simplification. They further highlight how individuals with multiple nationalities and allegiances, when outside their country of nationality, are at greater risk. This is because of the fragility of the concept of diplomatic protection and the inability of States to assert their consular rights even when, as in this case, there was a Consular Agreement between Australia and China. They conclude their chapter highlighting how the traditional understanding of a diasporan identity has a modern flavour worthy of further attention by law that could influence a more fluid approach to reflecting multiple social and political allegiances that individuals possess.

Spiro's chapter takes us from the previous case study in China, to the terrain of international sport as another context to explore meanings of loyalty and identity, through the Olympic framework. His chapter explains how the regime of Olympic nationality has three components – the Olympic Charter, the rules of international sporting federations and the underlying state citizenship laws. This detail is fascinating in how the federation rules mirror the public law and international law frameworks and the approach to the international recognition of nationality reflects material from the *Nottebohm* decision already discussed throughout this volume. Indeed Spiro examines the International Court of Justice decision closely in the chapter when looking at questions of genuine links to Olympic country status. Further, he examines Ayelet Shachar's arguments that citizenship becomes a commodity

¹⁵ James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition have Failed* (Yale University Press, 1998) 11 at 22

rather than a social good if players can choose any country to compete with. While sympathetic to her concerns, Spiro puts the case that an end to Olympic nationality, and allowing athletes to compete for any national team where teams would still be geographically affiliated but player eligibility would not be contingent on geographic origins or attachment, would better reflect the fact that national affiliation supplies only a slice of individual identity composites. He concludes that the trajectory of Olympic nationality bolsters the post-national proposition that citizenship is generally in decline.

Spiro's conclusions may be controversial, as is the role of nationality in another international domain, that of international humanitarian law. Hoffman's chapter on the jurisprudence of nationality in the International Criminal Tribunal for the Former Yugoslavia raises concerns about the moves this section of the book identifies as a more fluid and expanding membership framework for a globalised world. The chapter concentrates on the Geneva Convention IV that uses the terminology of 'protected persons' –defining a protected person as someone *other than* a national of the Party to the conflict or Occupying power. The scenario in Bosnia and Herzegovina was complex in interpreting the provisions because the conflict was fundamentally along ethnic lines, not nationality. Once again *Nottebohm* becomes an important thread to the discussion; but in a string of cases, Hoffman shows how the Tribunal was looking at the substance of the relations between the individual and the state of nationality rather than the formal legal characterisation. While this was largely supported in academic writing, Hoffman's chapter aims to raise concerns about this approach and even argues that it may not always have beneficial consequences from a humanitarian perspective. Hoffman drills down on the legal aspects of allegiance, including highlighting, amongst other examples, how the annexure to the Hague Convention IV forbids compelling the population of an occupied territory to swear allegiance to the hostile power, concerned that such a step could lead to forced conscription.

Hoffman also moves to look beyond the legal textual arguments to the policy considerations of an expansive interpretation of article 4 of Geneva Convention IV, concerned that they could also lead to a denial of rights of ethnic groups instead of their protection.

Shahabuddin is also concerned with ethnic groups, looking at the role of ethnicity in contemporary international law, as expressed in its perception of 'minority'. His argument is that the current frameworks of liberal international law conceive of the minority as an ethnic notion, with overtones of a backward 'other' with primordial characteristics. Shahabuddin examines the complex role of ethnicity as a category in the identity formation of minorities within the dominant liberal architecture of international law. The frame of his argument draws upon the work of anthropologist Clifford Geertz who conceives of ethnicity as a socially and historically constructed primordial tie, in that individual's inclusion in a particular ethnic group is not because of merely 'personal affection, practical necessity, common interest, or incurred obligation, but at least in great part by virtue of some unaccountable absolute import attributed to the very tie itself.' Shahabuddin traces the notion of 'otherness' in ethnicity through etymological analysis, as the word derives from the Greek word *ethnos* which was used in a descriptive sense for the 'others', and moves on to New Testament Greek where *ethnos* appears as a religious indicator to refer to the non-Christian and non-Jewish, where it was nearly synonymous with barbarous. Biological features later became relevant with the emergence of social Darwinism and arguments being posited that different races of mankind represented distinct species distinguished by different mental capabilities. Shahabuddin argues that this biological underpinning can be traced to the present day use of the term 'ethnic' and that ethnicity came to replace the notion of race after WWII in the drafting of the Convention on Prevention of Discrimination and Protection of Minorities. Later in the drafting of the *International Covenant on Civil and Political Rights*, use of the term 'ethnic minorities' covers both race and national minorities.

This material is then used as a foundation to his analysis of the use of ethnic ‘otherness’ in the perception of the minority in contemporary international law, with an examination of case law, Convention development, Declarations, and European instruments. ‘Taken together’ Shahabuddin argues ‘what is common in all these definitions and understanding of the term ‘minority’ is the image of a group in a subordinate position, which has at its core certain primordial features that the members of the group not only share but also intend to preserve as an insignia of their identity.’ Shahabuddin then goes on to explain what this means for minority protection in contemporary international law.

The final chapter in this section - and indeed the collection - by Gulati, takes us directly to the core international legal concept of nationality, for his chapter studies the concept of ‘belonging to a country’ in terms of the formal legal relationship that exists between the individual and the political unit. Using his own personal experience of being born in the UK, growing up in India and Australia and spending an extended period of time in the Netherlands, while living in an age where he can stay connected to his parents in New Delhi, update his friends and associates in places all around the world, and despite a continued presence on the territory of Australia, maintain a ‘social fact of attachment’ (here using the key words of *Nottebohm*) with people and causes not within Australia, Gulati examines the differences between nationality and citizenship. He argues that they are distinct legal concepts – highlighting the public law domestic elements of citizenship as being linked to rights, and nationality in contrast involving the formal link to the nation state in international law. Here again, as in other chapters in this final section, Gulati spends time examining the *Nottebohm* case and displays how this international law case ‘radiated throughout the law of nationality’ and how the central ideas from the case have been continually used in domestic public law contexts. While nationality continues to be relevant, Gulati argues that the globalised nature of the world has changed its significance, and he further argues that notion of

allegiance is outdated and no longer relevant. He returns to his own life experience as testament to the need for fluidity and flexibility when thinking about nationality as a legal concept in the 21st century.

4. Conclusion

In an interdisciplinary volume on a similar theme to this collection, investigating the relationship between identity and participation in diverse societies, editors Azzi, Chryssochoou, Klandermans, and Simon (2011) suggest that understanding the ongoing need for appropriate identity recognition in culturally-diverse societies is no mere research fad; instead, it remains the central goal for commentators seeking “a comprehensive understanding of the dynamics of identity and political integration in culturally diverse societies”.¹⁶ Those authors suggest, as we do, that issues of identity and allegiance come into sharp relief when national concerns about migrant groups focus on their radicalisation¹⁷ or the political-activism¹⁸ of some that create security fears for some. Similarly, grants of citizenship are often accompanied by national demands for integration and participation within the nation state.¹⁹

¹⁶ X. Chryssochoou, A.E. Azzi, B. Klandermans, and B. Simon, ‘Introduction’ in A.E. Azzi, X. Chryssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 1.

¹⁷ J. van Stekelenburg and B. Klandermans, ‘Radicalization’ in A.E. Azzi, X. Chryssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 181-194.

¹⁸ B. Simon, ‘Collective Identity and Political Engagement’ in A.E. Azzi, X. Chryssochoou, B. Klandermans, and B. Simon (eds), *Identity and Participation in Culturally Diverse Societies: A Multidisciplinary Perspective* (Chichester: Wiley-Blackwell, 2011) 137-157.

¹⁹ X. Chryssochoou, A.E. Azzi, B. Klandermans, and B. Simon, ‘Introduction’ in A.E. Azzi, X. Chryssochoou, B. Klandermans, and B. Simon (eds), *Identity*

In this volume we have extended the inquiry around allegiance and identity in diverse societies in light of globalisation by thinking critically from a public law and international law frame, infused by the interdisciplinary insights of its contributors. The seven sections, ranging from constitutional foundations to international parameters remind us that these issues can be illuminated in helpful ways. Moreover, creating these opportunities for reflection and intersection amplify the opportunities and constraints provided by law, and provides a launching pad from which further developments may create new possibilities for individuals, wherever situated, to view themselves as members in a world open to new ways of thinking.

More or less secure? Nationality questions, deportation and dual nationality

KIM RUBENSTEIN AND NIAMH LENAGH-MAGUIRE

11.1. Introduction

Recent trends in some countries suggest that dual nationality has made individuals more vulnerable to deportation than single nationals of a nation state. Is this appropriate and what does it mean for the meaning of nationality and statelessness under national and international law? In this chapter we argue that countries *should* commit to a broader notion of membership than nationality, drawing upon the UN Human Rights Committee's jurisprudence. By examining the meaning of one's 'own country' and the extent it protects against deportation we argue for a more secure membership for individuals with dual citizenship.

The structure of this chapter reflects the distinction between the concepts of 'nationality' in international law and the 'citizenship' created and regulated by domestic legal regimes. While both terms are used broadly to describe an individual's status as a member of a nation state, there is more than a semantic difference between the two ideas: 'Conceptually and linguistically ... the terms emphasise two different aspects of the same notion ... "Nationality" stresses the international, "citizenship" the national, municipal aspect.'¹ For the purposes of this chapter, we take 'nationality' to mean the legal relationship between an individual and a nation state that is recognized under international law, and 'citizenship' to mean the relationship created or recognized by the domestic laws of states.² We first

¹ P Weis, *Nationality and Statelessness in International Law*, 2 edn (Alphen aan den Rijn: Sijthoff & Noordhoff International Publishers B.V., 1979), 4–5. See also the contribution by Edwards at Chapter 1 of this volume.

² Also important are what Joseph Carens describes as the 'psychological' dimension of citizenship and Linda Bosniak's concept of citizenship as identity or solidarity, that is, 'the quality of belonging, the felt aspects of community membership' (L. Bosniak, 'Citizenship Denationalized (The State of Citizenship Symposium)', *Indiana Journal of Global Legal*

examine the concept of 'dual nationality' in terms of international law before analyzing the domestic citizenship laws of two countries – namely the United Kingdom and Australia³ – in order to highlight the tensions between the idea of 'effective nationality' and modern, multiple citizenships. Where dual nationals are concerned, neither 'nationality', as it is currently understood in international law, nor the domestic legal status of 'citizenship', are presently capable of providing citizens with fair protection against deprivation of citizenship and deportation.

11.2. Dual nationality and deportation under international law

Historically, exclusivity has been an essential characteristic of nationality. The concept of nationality in international law has its origins in the allegiance owed by subjects to a sovereign ruler.⁴ This was an exclusive and insoluble allegiance, representing a 'debt of gratitude'⁵ the subject could never discharge and which could not be renounced unilaterally.⁶ Allegiance was exclusive, in the sense that a person could only be a subject of one sovereign at a time. As the sovereign nation state assumed its central position in international relations and international law, nationality came to mean the transferable allegiance owed by a citizen to the state, rather than the enduring bond of fealty or loyalty to a sovereign.⁷ However, nationality was still, at least ideally, a monogamous relationship. As Peter Spiro has observed, individuals who had more than one national allegiance presented both practical and philosophical problems:

Dual nationals represented on the one hand a constant source of international tension where one state attempted to protect its citizen from mistreatment at the hands of another state claiming the same individual

Studies 7 (2000) 447, 479). Later in this chapter we consider how law can enhance or defeat these elements of citizenship.

³ We do not claim that these jurisdictions are necessarily representative of a broader trend, simply that there are parallels in the development of their respective citizenship laws.

⁴ Peter Spiro, 'Dual Nationality and the Meaning of Citizenship' *Emory Law Journal* 46 (1997) 1412, 1420–2.

⁵ William Blackstone, *Commentaries on the Laws of England* (3rd edn, Chicago, IL: Callaghan & Co., 1884) 117. See also Spiro, 'Dual Nationality and the Meaning of Citizenship', 1420.

⁶ *Rex v. Macdonald* 18 Geo. 2 St. Tr. 858, 859 (1747).

⁷ Kim Rubenstein and Daniel Adler, 'International Citizenship: The Future of Nationality in a Globalized World' *Indiana Journal of Global Legal Studies* 7 (2000) 519, 531; Spiro, 'Dual Nationality and the Meaning of Citizenship'.

as its own. On the other hand, the presumptively divided loyalties of dual nationals represented a serious potential threat from within the polity in times of international conflict.⁸

The British and Australian case studies discussed in this chapter demonstrate that the phenomenon of dual nationality continues to present the same challenges today.

In the absence of any international legal mechanism to regulate nationality in a comprehensive way, dual nationality attracted various legal responses in the international and domestic spheres. Kim Rubenstein and Daniel Adler identified several attempts in the early to mid-twentieth century to codify the international law on the topic, each of which was premised on the general undesirability of dual nationality while upholding the rights of states to determine for themselves who should hold their nationality.⁹ However, as Forcese notes, one of these instruments – the Hague Convention of 1930 – cemented the conditions for dual citizenship to arise by default, by allowing nationals of one country to obtain another nationality intentionally, but not to renounce their original nationality.¹⁰ The Hague Convention did not guarantee that dual nationals would always enjoy the same rights as their counterparts who held only one nationality; importantly, Article 4 of the Hague Convention provided that a ‘State may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses’.¹¹

11.2.1 *Dual nationality and deportation – problems with ‘effective nationality’*

The role of allegiance as the basis of nationality is echoed in the leading decision of the International Court of Justice (ICJ) on nationality in the context of diplomatic protection, the *Nottebohm* case.¹² The threshold question for the ICJ was whether, by voluntarily acquiring citizenship of Liechtenstein and thereby relinquishing his German citizenship, Friedrich Nottebohm had effectively changed his nationality for the purposes of

⁸ Spiro, ‘Dual Nationality and the Meaning of Citizenship’, 1414–15.

⁹ Rubenstein and Adler, ‘International Citizenship’, 532–3. See also Craig Forcese, ‘The Capacity to Protect: Diplomatic Protection of Dual Nationals in the “War on Terror”’, *The European Journal of International Law* 17 (2006) 369.

¹⁰ Forcese, ‘The Capacity to Protect’, 383–4.

¹¹ Convention on Certain Questions Relating to the Conflict of Nationality Law, The Hague, 13 April 1930, in force 1 July 1937, 179 LNTS 89.

¹² *Liechtenstein v. Guatemala (Nottebohm)* 1955 ICJ 4.

international law. Nottebohm had emigrated from his native Germany to Guatemala in 1905, aged 24, and continued to live there, working in a family business, until the outbreak of the Second World War.¹³ In 1939, shortly after the start of the war, Nottebohm travelled to Liechtenstein and sought citizenship there; when it was granted, he lost his German citizenship automatically, and returned to Guatemala.¹⁴ Despite allowing him to re-enter on a Liechtenstein passport, Guatemala persisted in treating Nottebohm as though he were a German citizen, deporting him to the United States and confiscating his property.¹⁵ After the war, Liechtenstein sought to challenge these actions on Nottebohm’s behalf.

A majority of the ICJ did not accept that the nationality Liechtenstein had conferred on Nottebohm could validly be invoked against Guatemala for the purpose of diplomatic protection. The question for the ICJ was whether Liechtenstein, by granting citizenship, had acquired a ‘sufficient title to the exercise of protection in respect of Nottebohm as against Guatemala’ and was therefore entitled to seize the court of a diplomatic protection claim on his behalf.¹⁶ The court examined the basis of Nottebohm’s nationality and held that nationality is a ‘legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’.¹⁷ The facts of Nottebohm’s case disclosed no ‘bond of attachment’ or ‘long-standing and close connection’ with Liechtenstein as a matter of social fact, but instead pointed towards Mr Nottebohm’s long-standing link with Guatemala. Nottebohm had, clearly, attempted to utilize the apparent leniency of the international rules of nationality in order to avoid the operation of the laws of war.¹⁸ In the court’s view neither Nottebohm nor Liechtenstein had acted unlawfully, but Liechtenstein had granted citizenship ‘without regard to the concept of nationality adopted in international relations’.¹⁹ While Liechtenstein was entitled to grant citizenship, Guatemala did not need to recognize that citizenship as effective nationality for the purposes of providing Nottebohm with diplomatic protection.²⁰

¹³ *Ibid.*, 13. ¹⁴ *Ibid.*, 15–16.

¹⁵ Cindy Buys has explored the political and, pointedly, economic context of the US detention programme, ‘Nottebohm’s Nightmare: Have We Exorcised the Ghosts of WWII Detention Programs or Do They Still Haunt Guantanamo?’ (*Chicago Kent Journal of International and Comparative Law* (2011) 11).

¹⁶ *Nottebohm* 1955 ICJ 4, 15–16, see also 246. ¹⁷ *Ibid.*, 23.

¹⁸ *Ibid.*, 26. See also Robert D. Sloane, ‘Breaking the Genuine Link: The Contemporary International Legal Regulation of Nationality’, *Harvard International Law Review* 50 (2009), 11.

¹⁹ *Nottebohm* 1955 ICJ 4, 26. ²⁰ *Ibid.*, 26.

While Mr Nottebohm was not a dual national, the concept of 'effective nationality' expounded in his case has since been applied to resolve questions about dual-nationals' standing to bring legal claims based on one or other of their citizenships. The Iran-US Claims Tribunal, established to, inter alia, decide the claims of 'nationals of the United States against Iran and claims of nationals of Iran against the United States',²¹ was asked where this placed dual Iranian-US nationals.²² A majority of the tribunal held that it had jurisdiction to hear the claims against Iran of US-Iranian citizens, provided that their 'dominant and effective nationality ... during the relevant period ... was that of the United States'.²³ As Robert Sloane has recently noted,²⁴ the provenance of 'dominant and effective' nationality is much older than *Nottebohm*, but the tribunal was at pains to emphasize that its decision was consistent with the *Nottebohm* decision and reasoning of the majority in that case.²⁵ Indeed, as Rubenstein and Adler note, the two decisions share an underlying conclusion that the legal concept of nationality is based on the existence of a genuine connection with a nation state, as a matter of social fact.²⁶ However, the majority of the tribunal departed from the ICJ's approach by seemingly accepting that a person could have more than one effective nationality, notwithstanding the need to identify one as 'dominant' for the purposes of standing.²⁷

Although dual nationality was not squarely in issue in *Nottebohm's* case,²⁸ the decision has two important implications for dual nationality, particularly in the context of attempts to deport a dual national from one of his or her countries of nationality. First, there are suggestions in the ICJ's decision that the basis of 'effective nationality', recognized under international law, is not simply social connectedness with a state but

²¹ 'Declaration of the Government of the Democratic and Political Republic of Algeria concerning the Settlement of Claims by the Government of the United States and the Government of the Islamic Republic of Iran', 20 ILM 230 (1981).

²² 'Decision in Case No A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality' (6 April 1984) 5 Iran-US Claims Tribunal Reports 251 (*Iran-US Claims Tribunal Case*).

²³ *Iran-US Claims Tribunal Case*, 5 Iran-US Claims Tribunal Reports 251, 253.

²⁴ Sloane argues that the tribunal's reasons 'conferred on the genuine link theory an unwarranted veneer of positive legal authority', and contributed to its overestimation in international law: Sloane, 'Breaking the Genuine Link', 28.

²⁵ *Ibid.*, 28.

²⁶ Rubenstein and Adler, 'International Citizenship', 537.

²⁷ *Iran-US Claims Tribunal Case*, 5 Iran-US Claims Tribunal Reports 251, 265-6.

²⁸ Mr Nottebohm was not, and did not claim to be, a citizen of any country other than Liechtenstein.

allegiance to the state, and that such allegiance is exclusive. Nationality is 'the juridical expression of the fact that the individual upon whom it is conferred ... is in fact more closely connected with the population of the State conferring nationality than with that of any other State'.²⁹ Prima facie this view of nationality seems incompatible with the proposition that one person may hold nationality of more than one state.³⁰

Second, the idea of an effective nationality or one based on a 'genuine link', may apply differently between naturalized citizens and citizens by birthright. *Nottebohm* suggests that naturalization can only be effective under international law if it is accompanied by a genuine link between the citizen and the naturalizing state, whereas no such principle has been held to apply in respect of birthright citizenship.³¹ In *Nottebohm*, the majority of the ICJ focused on the particular circumstances of Nottebohm's naturalization, and on the significance of naturalization as a legal process more generally, in explaining why a genuine link was shown between the naturalized citizen and the country whose nationality was claimed.

As Robert Sloane has argued, it is important to understand *Nottebohm* as a decision about diplomatic protection, rather than as articulating a universally applicable concept of nationality in international law. Sloane is critical of what he describes as 'an unwarranted reliance on Nottebohm's romantic dicta about nationality'.³² Sloane points out that the genuine link theory propounded in *Nottebohm* may have been 'descriptively questionable' even at the time the case was decided. In any event, it is certainly now at odds with attitudes to nationality in contemporary international law and, we would argue, the contemporary acceptance of dual nationality in domestic laws,³³ as discussed further below.

11.2.2 A broader view of 'one's own country'

Nationality in the *Nottebohm* sense recognizes that the existence of such status has an effective, social dimension. *Nottebohm* suggests that where formal legal nationality is present, but a genuine connection is lacking, the person is not to be treated as holding effective nationality (at least where

²⁹ *Nottebohm* 1955 ICJ 4, 23.

³⁰ Rubenstein and Adler, 'International Citizenship', 523. Cf Sloane, 'Breaking the Genuine Link'.

³¹ Robert Sloane argues that, if a 'genuine link' really is the touchstone of nationality, 'the ICJ would have been obliged to find Liechtenstein's case equally inadmissible' even if Nottebohm had been born in Liechtenstein, rather than Germany, but had no other connection with that state: Sloane, 'Breaking the Genuine Link', 17-18.

³² *Ibid.*, 4. ³³ *Ibid.*, 32.

the formal dimension of nationality was obtained via naturalization). However, *Nottebohm* does not provide a solution in the reverse where there is ample evidence of the social connection between an individual and a state, but formal citizenship is lacking as a matter of domestic law. That task falls most often to human rights law as invoked by individuals seeking some of the benefits of nationality from a nation state that either refuses to grant them legal status, or conversely labels them with a citizenship they do not want to retain.

Most relevantly for this chapter, the United Nations Human Rights Committee (HRC), constituted under the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR),³⁴ has received complaints from individuals who maintained long-term residence in states whose citizenship they did not hold, but who nonetheless sought to invoke the protection of Article 12, paragraph 4 of the ICCPR: 'No one shall be arbitrarily deprived of the right to enter his own country.' In the first of those cases considered here, *Stewart v. Canada*,³⁵ while the complaint was not ultimately upheld, it did give rise to several strong dissenting opinions, laying the foundation for a recent, successful, complaint in *Nystrom v. Australia*.³⁶ We consider *Stewart* briefly, and return to *Nystrom* in our discussion of dual nationality in Australia.

Stewart was a British citizen who had lived in Canada since he was seven years old. As an adult, he was convicted of over forty criminal offences.³⁷ The Canadian government sought to deport Stewart to the United Kingdom, whereupon he complained to the HRC that he had been arbitrarily deprived of the right to enter his 'own country'. A majority of the committee found the phrase 'own country' was not confined to formal nationality, but declined to extend it as far as people in the position of Stewart, who, it said, 'could be deemed to have opted to remain [an alien] in Canada', and who should bear the consequences.³⁸ In their dissenting opinion, however, Members Evatt and O'Keefe wrote:

³⁴ International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, in force 23 March 1976, 999 UNTS 302.

³⁵ *Stewart v. Canada* (1997) CCPR/C/58D/538/1993.

³⁶ *Nystrom v. Australia* CCPR/C/102/D/1557/2007.

³⁷ Human Rights Committee, *Stewart v. Canada* (1997) CCPR/C/58D/538/1993 [2.2].

³⁸ For the majority, a decision not to obtain nationality in a country where naturalization was offered could be a matter of active refusal, or could be evidenced by a course of action that led to the state's offer of naturalization being withdrawn, by, for example, committing criminal offences [12.8].

for the rights set forth in article 12, the existence of a formal link to the State is irrelevant; the Covenant is here concerned with the strong personal and emotional links an individual may have with the territory where he lives and with the social circumstances obtaining in it.³⁹

As we explain below, this approach of identifying a person's 'own country' was endorsed by a majority of the HRC in the later case of *Nystrom*. It represents a welcome expansion of the rather more limited notion of effective nationality employed in *Nottebohm*. It may also, we suggest, provide a useful way of thinking through the domestic citizenship cases of attempted deportation of dual nationals (such as the recent Australian and British cases considered in this chapter), by providing a way of determining whether, in a particular case, an individual's claim to nationality is so strong as to preclude their expulsion or exclusion from a country. It is to these citizenship cases that we now turn.

11.3. Precarious dual citizenship in the United Kingdom and Australia

We argue that possessing dual nationality can, and in some cases has, made citizenship less secure as a matter of domestic law. Drawing on the example of citizenship laws in the United Kingdom and Australia, we show how the law reflects an underlying tension in states' approaches to dual nationality between the desire to acknowledge the reality of some citizens' multiple allegiances, and to manage the risk that these multiple allegiances may be associated with undesirable behaviour. The approach adopted in the UK and Australia is a blunt one: citizens are allowed to maintain multiple nationalities, but if they do, their additional nationality weakens their grasp on their British or Australian citizenship, and makes them uniquely vulnerable to the revocation of their citizenship and to deportation. Since the UK and Australia can deprive a dual national of their British or Australian citizenship (as applicable) without violating international law by making the citizen stateless and offending the 1961 Convention on the Reduction of Statelessness, their Parliaments have expressly reserved the right to do so by conferring powers on the Executive to revoke citizenship, facilitating the deportation of former citizens.⁴⁰

³⁹ *Stewart v. Canada* (1997), para. 5.

⁴⁰ It should be noted that the idea of revoking citizenship as punishment is not unique to the two countries whose citizenship regimes are considered in this chapter. Similar

11.4. Dual nationality and loss of citizenship in the United Kingdom

11.4.1 *Evolving legal attitudes to dual citizenship*

Historically, British nationality law has tended to tolerate the possession of multiple nationalities by British citizens.⁴¹ Indeed, as the common law did not recognize any right to renounce British subject status,⁴² a British subject who acquired another citizenship had no option to be anything other than a dual national.⁴³ From 1870 to 1948, the previous attitude of tolerance towards dual nationality was abandoned in favour of a more restrictive set of rules.⁴⁴

In 1948, a coordinated programme of nationality law reform throughout the Commonwealth commenced. Following Canada's adoption of a statutory form of 'Canadian citizenship' in 1946,⁴⁵ representatives of the United Kingdom and Commonwealth governments met and agreed that the UK and the self-governing members of the Commonwealth (the Dominions) would each adopt separate citizenship schemes, with citizens of the Commonwealth countries retaining the status of 'British subject' in addition to their new national citizenships.⁴⁶ At least as far as British law was concerned, a British subject could be a dual national. Indeed, this was the essential premise of the common scheme agreed

proposals are, or have been, considered actively in the United States, Israel and France. See Matthew J. Gibney, 'Should Citizenship Be Conditional? Denationalization and Liberal Principles' RSC Working Paper Series No. 75 (2 August 2011); Shai Lavy, 'Punishment and the Revocation of Citizenship in the United Kingdom, the United States and Israel' *New Criminal Law Review* 13 (2010), 404.

⁴¹ For an overview of the history of dual nationality under British immigration law, see UK Home Office, 'Dual Nationality' (undated), available at www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/nationalityinstructions/nisec2gensec/dualnationality?view=Binary, last accessed 2 June 2014.

⁴² Spiro, 'Dual Nationality and the Meaning of Citizenship'.

⁴³ While it was eventually accepted, as a matter of British law, that King George III had waived the allegiance of the revolutionary inhabitants of the American colonies that did not mean that British migrants to the United States could unilaterally absolve themselves of their allegiance to the Crown. Peter Spiro describes some of the legal and practical consequences of the English doctrine of perpetual allegiance in this context: see Spiro, 'Dual Nationality and the Meaning of Citizenship', 1421–2.

⁴⁴ Naturalization Act 1870, 33 & 34 Vict.168, ss 4–6.

⁴⁵ Canadian Citizenship Act 1946. See further Randall Hansen, 'The Politics of Citizenship in 1940s Britain: The British Nationality Act', *Twentieth Century British History* 10 (1999) 67.

⁴⁶ Hansen, 'The Politics of Citizenship in 1940s Britain'.

by the Commonwealth nations in 1948, which allowed the creation of Dominion citizenship without jeopardizing the status of the inhabitants of the Commonwealth as British nationals. The committee of experts from Commonwealth countries who designed the scheme reported that '[t]he essential features of such a system are that each of the countries shall by its legislation determine who are its citizens [and] shall declare those citizens to be British subjects'.⁴⁷ For example, as we describe in more detail below, prior to the commencement of the Australian Citizenship Act 1948, Australians were British subjects. The Australian Citizenship Act made them Australian citizens, as well as British subjects.

The substantive content of citizenship of the United Kingdom and Colonies, and British subject status more generally, varied over the succeeding decades. For present purposes, it is sufficient to note that being a 'Citizen of the United Kingdom and Colonies' did not necessarily carry with it the right to actually live in Britain or indeed to carry a British passport,⁴⁸ so that there could be dual nationals who were formally British citizens but who in practice only had a right of abode in their other country of citizenship. This has implications for the status of their 'dual' nationality at international law; the fact that a person was a citizen of the United Kingdom but did not have the right to live there, and may in fact not have lived there, suggests that either on an application of the *Nottebohm* test or the principle of 'one's own country', the United Kingdom would not have been held to be the country of their nationality.

In 1981 the category of 'Citizen of the United Kingdom and Colonies' was abolished, and replaced by three new classes of citizenship: British Citizenship,⁴⁹ British Dependent Territory Citizenship⁵⁰ (later British Overseas Territories Citizenship⁵¹), and British Overseas Citizenship.⁵² Each of these could be held concurrently with citizenship of another Commonwealth nation, where such citizenship existed, or citizenship of a foreign (i.e. non-Commonwealth) country.⁵³ Since 1981 citizens of

⁴⁷ David Dutton, 'Citizenship in Australia: A Guide to Commonwealth Government Records' (Canberra: National Archives of Australia, 2000) 14.

⁴⁸ See Ann Dunnett, 'United Kingdom' in Rainer Baubock and Eva Ersbøll (eds.), *Acquisition and Loss of Nationality: Policies and Trends in 15 European States. Volume 2: Country Analyses* (Amsterdam University Press, 2006) 551, 564–7.

⁴⁹ See British Nationality Act 1981, Part I.

⁵⁰ *Ibid.*, Part II.

⁵¹ British Overseas Territories Act 2002, s. 2.

⁵² See British Nationality Act 1981, Part III.

⁵³ This is more complicated where the other country does not permit dual citizenship. At the time of writing there is an unresolved question as to the status of several hundred

Dominion countries, such as Australia and Canada, have no longer been classed as 'British subjects' for the purposes of British nationality law; that classification is now reserved for those previously classified: 'British subjects without citizenship', certain alien women married to British subjects, and certain dual British and Irish citizens.⁵⁴

11.4.2 Deportation of dual citizens and deprivation of British citizenship

Since 1948, there has been a gradual expansion in the capacity of the Executive in Britain to revoke British citizenship. The full extent of these powers does not appear to have been explored until the last decade, when deprivation of citizenship has formed part of the British government's response to the threat of terrorism.

Under the 1948 Act, the Secretary of State had legislative discretion to deprive a person, who had acquired citizenship of the United Kingdom and Colonies by registration or naturalization, of that citizenship.⁵⁵ Such an order could be made if the Secretary of State was satisfied that the citizen's registration or naturalization was obtained by means of fraud, false representation or the concealment of any material fact.⁵⁶ Naturalized citizens who lived in a foreign country for seven years (other than those engaged in government service) were required to register annually their intention to retain their citizenship, or could have it revoked.⁵⁷ However, these discretions were constrained by an overarching requirement that the Secretary of State should not deprive a person of citizenship 'unless ... satisfied that it is not conducive to the public good that that person should continue to be a citizen of the United Kingdom and Colonies'.⁵⁸

The 1981 Act broadened the grounds for depriving individuals of British citizenship, as well as effectively ensuring that the only British citizens who could be deprived of their citizenship were those who possessed

people who arrived in the UK from Malaysia (which does not permit dual citizenship), who acquired British Overseas Citizen status under the British Nationality Act 1981, and renounced their Malaysian citizenship on the understanding that they would be eligible for British citizenship. In many cases these people are ineligible for British citizenship and cannot regain their Malaysian citizenship. See Emily Dugan, 'Immigration rules leave stateless Malaysians in limbo', *The Independent*, 13 March 2011.

⁵⁴ British Nationality Act 1981, ss 30–1. As we explain later in this chapter, British subject status continued to have significance in Australian law, well after Britain had ceased ascribing Australians that status.

⁵⁵ British Nationality Act 1948, s. 20. ⁵⁶ *Ibid.*, s. 20(2).

⁵⁷ *Ibid.*, s. 20(4). ⁵⁸ *Ibid.*, s. 20(5).

another nationality.⁵⁹ In addition to revoking citizenship obtained by fraudulent registration or naturalization, the Secretary of State now had the power to deprive a person of citizenship if the citizen:⁶⁰

- (a) has shown himself by act or speech to be disloyal or disaffected towards Her Majesty; or
- (b) has, during any war in which Her Majesty was engaged, unlawfully traded or communicated with an enemy or been engaged in or associated with any business that was to his knowledge carried on in such a manner as to assist an enemy in that war; or
- (c) has, within the period of five years from the relevant date, been sentenced in any country to imprisonment for a term of not less than twelve months.

The Secretary of State could not exercise this power on the latter ground (that a citizen had been sentenced to imprisonment for more than twelve months) if it appeared that the person deprived of citizenship would become stateless.⁶¹ Paradoxically, the clear inference of this stipulation was that citizens could, at least in theory, be stripped of nationality on one of the other grounds even if that would result in their statelessness.

In 2002 the deprivation provisions were broadened further, to allow the Secretary of State to deprive a person of their citizenship status (including citizenship by birth⁶²) if satisfied that the person had done anything seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory.⁶³ The Secretary of State may not do this if he or she is satisfied the order would make a person stateless.⁶⁴ However, no such restriction applies to deprivation of citizenship obtained by fraud, misrepresentation or concealment of material facts.⁶⁵ The 2002 amendments provided for a right of appeal against a decision to deprive a person of

⁵⁹ *Ibid.*, s. 40. ⁶⁰ *Ibid.*, s. 40(3).

⁶¹ *Ibid.*, s. 40(5)(b).

⁶² As Matthew Gibney has shown, the expansion of the denaturalization power to cover citizens by birth was justified by the British government on egalitarian grounds. For as long as naturalized citizens were more vulnerable than their native-born counterparts, the former class were said to enjoy a second-class citizenship: Gibney, 'Should Citizenship Be Conditional?', 15. See also UNHCR/Asylum Aid, 'Mapping Statelessness in the United Kingdom' (November 2011) 144–6.

⁶³ Nationality, Immigration and Asylum Act 2002, s. 4, repealing and substituting s. 40 of the British Nationality Act 1981.

⁶⁴ British Nationality Act 1981, s. 40(4) as amended.

⁶⁵ *Ibid.*, s. 40(3), (4) as amended. See also UNHCR/Asylum Aid, Mapping Statelessness in the United Kingdom (November 2011) 144–6.

nationality, except in cases where the Secretary of State certifies that the decision:⁶⁶

was taken wholly or partly in reliance on information which in his opinion should not be made public –

- (a) in the interests of national security,
- (b) in the interests of the relationship between the United Kingdom and another country, or
- (c) otherwise in the public interest.

Finally, the 2006 amendments to the 1981 Act expand even further the Secretary of State's general discretion to deprive a person of citizenship where there has been no fraud or misrepresentation.⁶⁷ The Secretary of State need only be satisfied that 'deprivation is conducive to the public good' (and must be satisfied that deprivation would not make the person stateless).⁶⁸ Importantly, this language echoes the provisions of the Immigration Act 1971, which give the Home Secretary the power to make an order depriving a person of their right of abode in Britain.⁶⁹ While appeal rights remain, the provision that previously prevented a deprivation order taking effect until appeals had been exhausted has also been repealed.⁷⁰ Writing in *The Times* after the 2006 amendments were passed, Nicholas Blake QC, observed:

Citizenship has long been a guarantee that a person is not subject to the battery of intrusive and repressive measures available under the immigration legislation, notably deportation. However, the legislative barrage of the last five years, linking immigration, asylum and terrorism, has broadened the basis for deprivation of citizenship ...

This increasing power for the Home Secretary to make decisions that override an individual's fundamental rights, which are protected by national or international law, for the good of the State, is alarming – particularly so if no criminal conviction or objective finding that a person has engaged in terrorist acts is required. The term 'conducive to the public good' is very broad. Not only are the criteria for stripping someone of citizenship obscure, but the means by which these criteria are established is unlikely to be fair. In cases of alleged undesirable associations brought to his attention by the security forces, the Home Secretary is likely to want

⁶⁶ British Nationality Act 1981, s. 40A(2) as amended.

⁶⁷ Immigration, Asylum and Nationality Act 2006, s. 56(1), repealing and substituting s. 40(2) of the British Nationality Act 1981.

⁶⁸ British Nationality Act 1981, s. 40(2), (4) (as amended).

⁶⁹ Immigration Act 1971, s. 2A.

⁷⁰ Asylum and Immigration Act 2004, Sch. 2, repealing s. 40A(6) of the British Nationality Act 1981.

to use the procedures of the Special Immigration Appeals Commission, where the person will probably not know the real case against him or her. The right of silence, trial by jury, freedom from executive detention: the ancient edifice of our unwritten constitution is being demolished brick by brick.⁷¹

These sentiments reflect the insecurity developing around dual citizenship.

11.4.3 Loss of British citizenship – recent cases

In recent years there have been a number of appeals from attempted revocations of British citizenship, including several high-profile cases, bringing the issue of loss of citizenship into the public domain. We examine two of these below, focusing on the difference that possessing dual nationality made for the outcome in each case.

11.4.3.1 Abu Hamza

Sheik Abu Hamza was a member of North London's Muslim community who had gained some notoriety after the 11 September 2001 terrorist attacks with his vocal praise of Osama bin Laden.⁷² Hamza was born in Alexandria and acquired Egyptian citizenship at birth.⁷³ He moved to the United Kingdom and acquired British citizenship in 1986.⁷⁴

In April 2003, the then Home Secretary used his expanded powers under the amended Nationality Act 1981 to inform Hamza of his intention to make an order depriving him of his British citizenship,⁷⁵ on the grounds that the Home Secretary was satisfied Hamza had acted in a manner 'seriously prejudicial to the vital interests of the United Kingdom or a British overseas territory'.⁷⁶ Hamza appealed to the Special Immigration Appeals Commission (SIAC), and before the appeal could be determined, Hamza was convicted of criminal offences, including

⁷¹ Nicholas Blake QC, 'Why is there no song and dance about this Act?' *The Times*, 25 April 2006.

⁷² Simon Jeffery and James Sturcke 'Profile: Abu Hamza', *The Guardian*, 15 November 2007; BBC News, 'Profile: Abu Hamza', 5 November 2010, available at www.bbc.co.uk/news/uk-11701269, last accessed 2 June 2014.

⁷³ *Abu Hamza v. Secretary of State for the Home Department* (2010) Appeal No. SC/23/2003 (5 November 2010) (Hamza) 2.

⁷⁴ *Hamza* (2010) Appeal No. SC/23/2003 (5 November 2010), 2.

⁷⁵ *Ibid.*

⁷⁶ British Nationality Act 1981, s. 40(2); *Hamza* (2010) Appeal No. SC/23/2003 (5 November 2010), 2.

soliciting murder and inciting racial hatred, and imprisoned.⁷⁷ An order was also issued for his extradition to face charges in the United States, he remained in prison pending extradition while he exhausted all avenues of appeal under domestic and European law.⁷⁸ As a result, the appeal against the deprivation of his citizenship did not come before the SIAC until 2010, and while the appeal was pending, the deprivation order could not be made.⁷⁹

These procedural issues are significant because central to Hamza's case was the fact that between the Home Secretary's announcing his intention to deprive Hamza of his citizenship in April 2003, and his appeal being considered by the SIAC, he had been stripped of Egyptian citizenship by the Egyptian government.⁸⁰ The SIAC held that Parliament's intention in enacting section 40(4) of the Nationality Act 1981 was to prevent the Home Secretary from making a deprivation order if its effect would be to make the individual 'a person who is not considered as a national by any state under operation of its law'.⁸¹ After taking evidence from a high-ranking legal officer in the Egyptian government, the SIAC was satisfied that an order had been made (though perhaps not published) depriving Hamza of Egyptian citizenship.⁸² The Home Secretary therefore had no power to deprive Hamza of his British citizenship because that order would render him stateless.⁸³

11.4.3.2 David Hicks

David Hicks is an Australian citizen who was captured in Afghanistan in late 2001 and accused of having provided support to Al-Qaeda and the Taliban.⁸⁴ Hicks was detained at Guantanamo Bay, and ultimately convicted by the United States' Guantanamo Military Commission for providing material support to terrorism.⁸⁵

⁷⁷ *Hamza* (2010) Appeal No. SC/23/2003 (5 November 2010), 2.

⁷⁸ The European Court of Human Rights decided that Hamza cannot be extradited to the United States because he faces a sentence of execution there: *Babar Ahmad and Others v. the United Kingdom* (ECHR Application Nos 24027/07, 11949/08 and 36742/08) 6 July 2010.

⁷⁹ See British Nationality Act 1981, s. 40A(6) as in force before the commencement of the Asylum and Immigration Act 2004, Sch 2.

⁸⁰ *Hamza* (2010) Appeal No. SC/23/2006 (5 November 2010), 5–11.

⁸¹ *Ibid.*, 3. ⁸² *Ibid.*, 11–12. ⁸³ *Ibid.*, 12.

⁸⁴ *R (Hicks) v. Secretary of State for the Home Department* [2005] EWHC 2818 (Admin) [1].

⁸⁵ The records of the Military Commission proceedings are available at: www.mc.mil/CASES/MilitaryCommissions.aspx, last accessed 2 June 2014.

While awaiting trial, Hicks applied to be registered as a British citizen, claiming entitlement to citizenship by descent.⁸⁶ He argued he should be registered as a British citizen and entitled to claim consular assistance from Britain.⁸⁷ This was particularly significant as a number of British detainees at Guantanamo Bay had been released into the custody of the British government and allowed to return to Britain.⁸⁸ The British government had demonstrated a willingness to intercede on behalf of its citizens detained on suspicion of terrorist activities, whereas the Australian government had not made strong representations on Hicks' behalf while he was imprisoned, and had indicated that Australia's position was that a military commission should try Hicks.⁸⁹

The British Home Secretary accepted that Hicks was *prima facie* entitled to be registered as a British citizen but at first asserted a discretion to refuse to register him on the grounds of public policy.⁹⁰ Later, the Home Secretary accepted Hicks' entitlement to be registered but claimed that while Hicks could be registered as a British citizen he could, in parallel, be deprived of his citizenship, in effect giving him no opportunity to claim any of the benefit of British citizenship before it was taken away.⁹¹ Speed was desirable in part because there was a concern that Hicks might, upon being granted British citizenship, seek to renounce his Australian citizenship immediately as a way of ensuring that he could not in future be deprived of his British citizenship (as to do so would render him stateless).⁹²

In December 2005 the High Court of England and Wales upheld David Hicks' entitlement to be registered as a British citizen and ordered that he be registered.⁹³ In reaching this view, the court considered that the grounds on which citizenship could at that time be revoked did not apply in Hicks' case, so that the Home Secretary could not simultaneously give him citizenship and take it away.⁹⁴ The Act provided for deprivation of citizenship on the grounds of certain conduct – for example, showing oneself to be disloyal or disaffected towards Her Majesty. However, the High Court held that these criteria were essentially forward-looking, that is, they applied to

⁸⁶ *R (Hicks) v. Secretary of State for the Home Department* [2005] EWHC 2818 (Admin) [1] at 4.

⁸⁷ *Ibid.* at 2.

⁸⁸ *Home Secretary v. Hicks* [2006] EWCA Civ 400, [6].

⁸⁹ *R (Hicks) v. Secretary of State for the Home Department* [2005] EWHC 2818 (Admin), 7.

⁹⁰ *Ibid.*, 14.

⁹¹ *Ibid.*, 6. See also *Home Secretary v. Hicks* [2006] EWCA Civ 400, [3].

⁹² *R (Hicks) v. Secretary of State for the Home Department* [2005] EWHC 2818 (Admin), 22.

⁹³ *Ibid.*, 1. ⁹⁴ *Ibid.*, 22.

a person's behaviour once the person had become a citizen. As such, whatever Hicks had done before he applied for citizenship was not relevant to the question of whether he could then be deprived of citizenship once it was granted.⁹⁵ Had Hicks subsequently been sentenced to imprisonment for more than twelve months, even on the basis of prior conduct, that could have provided the basis for deprivation of citizenship.⁹⁶ The Home Secretary's appeal was dismissed by the Court of Appeal. Lord Justice Pill (with whom Hopper LJ agreed), did not accept the Home Secretary's submission that 'conduct of an Australian in Afghanistan in 2000 and 2001 is capable of constituting disloyalty or disaffection towards the United Kingdom, a state of which he was not a citizen, to which he owed no duty and upon which he made no claims.'⁹⁷ After the Court of Appeal's decision, but before Hicks was granted citizenship, the Nationality Act of 1981 was amended so as to allow the Secretary of State to deprive a person of citizenship if satisfied that it would be conducive to the public good to do so.⁹⁸ The day after Hicks was granted British citizenship, the Home Secretary exercised this expanded discretion.⁹⁹

The *Hicks* case is significant not only because it demonstrates the privilege dual citizenship can provide, and how strenuously countries may resist affording that privilege to particular individuals, but also because it gives an insight into the different circumstances and experiences of dual citizens. Before the High Court, counsel for David Hicks argued that, once registered as a British citizen, he ought to be treated in the same way as the other British prisoners at Guantanamo, some of whom were also dual nationals.¹⁰⁰ The British government had negotiated for several prisoners to be returned to Britain, where they had not been charged with criminal offences and no effort had been made to deprive them of their nationality. Mr Justice Collins accepted the weight of a Home Office official's explanation that the differential treatment afforded Mr Hicks was justified on the basis that the other prisoners:

all had close links with the United Kingdom, having lived here for most of their lives whereas the claimant had no such links and was seeking to

⁹⁵ *Ibid.*, 17. ⁹⁶ *Ibid.*, 18.

⁹⁷ *Home Secretary v. Hicks* [2006] EWCA Civ 400, 37.

⁹⁸ Immigration, Asylum and Nationality Act 2006, s. 56(1), repealing and substituting s. 40(2) of the British Nationality Act 1981 (with effect from 16 June 2006).

⁹⁹ Annabel Crabb, 'Law strips Hicks of UK citizenship in hours', *Sydney Morning Herald*, 20 August 2006.

¹⁰⁰ *R (Hicks) v. Secretary of State for the Home Department* [2005] EWHC 2818 (Admin), 26.

use his adventitious entitlement to registration to obtain an advantage which the country in which he had been born and brought up would not provide.¹⁰¹

An analogy can be drawn here with the principles applied in the *Nottebohm* case, where the ICJ looked beyond *de jure* citizenship to the social facts of membership in order to determine the applicant's effective nationality. Put another way, given his lack of connection with the United Kingdom, it could not be said to be Hicks' 'own country'.

11.5. Dual nationality and deprivation of citizenship in Australia

11.5.1 Dual nationality in Australia

Australia is unlike some other countries with written constitutions, as the Australian Constitution does not deal directly with the concept of Australian citizenship. Until the Federal Parliament exercised its power under section 51(xix) of the Constitution to enact the Australian Citizenship Act 1948 (as part of the cooperative reform of citizenship law undertaken by Commonwealth countries and the United Kingdom, described above), Australians' nationality status was that of 'British subject'. In 1948 Australians retained the status of British subject and gained the status of 'Australian citizen'. Dutton has argued that this duality of status, which persisted until 1987 when Australians ceased to be 'British subjects', meant that 'the nationalist expectation of the coincidence of citizenship and nationality – of membership and identity – was not fully realised'.¹⁰² Rubenstein has elsewhere suggested a different interpretation, in which dual status reflected Australians' level of comfort with dual identities as both members of the Australian community and of 'the supranational concept of Empire'.¹⁰³

Australian citizenship law and policy has, until relatively recently, reflected a somewhat fragmented approach to the issue of dual citizenship. For almost the first ninety years of federation Australians benefited from a form of dual nationality recognized under the law of the United Kingdom. However, Australia's policy preference was that Australian citizens did not

¹⁰¹ *Ibid.*, 18.

¹⁰² Dutton, 'Citizenship in Australia: A Guide to Commonwealth Government Records', 19.

¹⁰³ Kim Rubenstein, 'From Supranational to Dual to Alien Citizen: Australia's Ambivalent Journey' in Kim Rubenstein and Simon Bronitt (eds.), *Citizenship in a Post-National World: Australia and Europe Compared* (Sydney: Federation Press, 2008), 40.

hold any additional citizenships. To the extent possible, this was reflected in the Australian Citizenship Act 1948, which until 2002 provided that Australians who obtained another nationality lost their Australian citizenship.¹⁰⁴ Between 1966 and 1986, the Citizenship Act prescribed an oath or affirmation, taken as a precondition for becoming an Australian citizen, in which a person swore, 'renouncing all other allegiance'¹⁰⁵ to be 'faithful and bear true allegiance to Her Majesty Elizabeth the Second, Queen of Australia, Her heirs and successors according to law'.¹⁰⁶ However, although a person who took the oath in that form 'may well believe that, ... he or she has effectively renounced any foreign nationality',¹⁰⁷ in *Sykes v. Cleary* (No 2) the Australian High Court held that an oath administered in Australia under Australian law could not amount to renunciation of a foreign citizenship.¹⁰⁸ A person taking the oath of allegiance remains a citizen of a foreign country until that country's laws concerning renunciation of citizenship are complied with.¹⁰⁹ The pledge was altered in 1986, and since then new citizens have not been required to formally or notionally forsake allegiance to their other countries of citizenship.¹¹⁰

As Rubenstein observes, this disjointed approach to the acquisition and loss of Australian citizenship gave rise to a 'basic inequality in the former system'¹¹¹ – only Australian citizens who had another citizenship *before* becoming Australians were entitled to dual citizenship.¹¹² From 4 April 2002, Australians who take out additional citizenship are no longer stripped automatically of their Australian citizenship,¹¹³ and may hold both concurrently (provided that dual citizenship is permissible under the law of the other state in question). There is now provision in the Citizenship Act 2007 for the resumption of citizenship lost before 2002, where a person can show that they did not realize that they

¹⁰⁴ Australian Citizenship Act 1948 (Cth) s. 17.

¹⁰⁵ *Ibid.* Schedule 2 (amended by Australian Citizenship Amendment Act 1986 (Cth)).

¹⁰⁶ *Ibid.* ¹⁰⁷ *Sykes v. Cleary* (No 2) (1992) 176 CLR 77, 108. ¹⁰⁸ *Ibid.*

¹⁰⁹ There is an important distinction between citizenship under the laws of foreign states and foreign citizenship for Australian constitutional purposes. The High Court has recognized that, under s. 44 of the Constitution, a person can be considered to have renounced their former citizenship by doing everything reasonable to that effect in 'the circumstances of the particular case' even if those steps were not sufficient to satisfy foreign processes. *Ibid.*, 108 (per Mason CJ, Toohey and McHugh JJ); 114 (per Brennan J); 128–9 (per Deane J); 138–9 (per Gaudron J).

¹¹⁰ Australian Citizenship Act 1948 (Cth) Schedule 2.

¹¹¹ Kim Rubenstein, *Australian Citizenship Law in Context* (Sydney: Law Book Company, 2002) 142.

¹¹² *Ibid.*

¹¹³ Australian Citizenship Legislation Amendment Act 2002 (Cth), Sch 1.

would lose their Australian citizenship by acquiring another citizenship, or that they would have suffered 'significant hardship or detriment' had they not done so.¹¹⁴

11.5.2 Deprivation of citizenship

Australia has always retained the option of depriving naturalized Australians of their citizenship under certain circumstances.¹¹⁵ Before it was replaced in 2007, the Citizenship Act 1948 provided for deprivation of Australian citizenship under limited and precisely defined circumstances.¹¹⁶ The deprivation of citizenship provisions (in section 21 of the Act) applied to naturalized citizens,¹¹⁷ who could be deprived of their citizenship at the discretion of the Minister if convicted of making a false representation or concealment when applying for citizenship,¹¹⁸ or they were convicted of an offence against an Australian or foreign law and sentenced to death, life imprisonment or imprisonment for more than twelve months, where the conviction occurred after they applied for citizenship but the offence in question was committed *before* citizenship was granted,¹¹⁹ or their citizenship was granted as a result of migration-related fraud.¹²⁰ The Minister was required to be satisfied that it would be contrary to the public interest for such a person to remain an Australian citizen.¹²¹ These provisions were substantially re-enacted in the Australian Citizenship Act 2007, with minor modifications.¹²²

Whether or not an Australian citizen is vulnerable to loss of their citizenship status depends, primarily, on the basis on which they obtained their citizenship and the basis on which it is to be revoked. Citizens by descent or adoption can only have their citizenship revoked if it was obtained by fraud or misrepresentation and the Minister is satisfied that it is not in the public interest that they remain an Australian citizen.¹²³ At least as a matter of statutory language it is open to the Minister to make

¹¹⁴ Australian Citizenship Act 1948 (Cth) s. 23AA.

¹¹⁵ See Naturalization Act 1903 (Cth) s. 11.

¹¹⁶ Australian Citizenship Act 1948 (Cth) s. 21.

¹¹⁷ *Ibid.*, s. 21(1)(a). ¹¹⁸ *Ibid.*, ss. 21(1)(a)(i), 50.

¹¹⁹ *Ibid.*, s. 21(1)(a)(ii). ¹²⁰ *Ibid.*, s. 21(1)(a)(iii). ¹²¹ *Ibid.*, s. 21(1)(b).

¹²² Australian Citizenship Act 2007 (Cth), s. 34. A person who has obtained their citizenship by descent or adoption can no longer be denaturalized on the basis of a conviction for criminal conduct committed before they obtained citizenship; citizenship may now be revoked where it was obtained as a result of third-party fraud.

¹²³ *Ibid.*, s. 34(1).

such an order even where the former Australian citizen would become stateless as a result; therefore, dual nationality does not necessarily figure in the calculation. The same is true for naturalized Australian citizens who lose their citizenship because it was obtained by misrepresentation or fraud.¹²⁴ However, naturalized citizens can also lose their citizenship if, after applying for citizenship, they are convicted of serious criminal offences within the meaning of the relevant provisions and the Minister is satisfied that the public interest is served by their citizenship being revoked.¹²⁵ The Minister cannot do this if the result would be that the former Australian citizen becomes stateless.¹²⁶ Dual citizens are therefore more at risk of losing their citizenship under this provision than those who, having been granted Australian citizenship, are no longer a citizen of any other country.

11.5.3 Deportation of dual citizens

Non-citizens require a visa in order to enter and remain in Australia.¹²⁷ Citizens do not.¹²⁸ Subject to the tightly-controlled exceptions under extradition law,¹²⁹ Australian citizens, whether or not they are dual nationals, may not be removed from Australia against their will or prevented from returning to Australia.

Constitutionally, it is less clear whether an Australian citizen with dual nationality has an absolute right to remain in Australia. While the status of 'Australian citizen' is 'entirely statutory',¹³⁰ there is a constitutional dimension to citizenship in Australia. The High Court has developed a constitutional concept of 'membership' of the Australian community based on presumptive Australian allegiance, which has influenced its decisions in cases involving citizenship rights, and which may have particular application to dual citizens. If a person does not possess 'full membership' of the Australian community, the court has held that their

¹²⁴ *Ibid.*, s. 34(2), (3).

¹²⁵ *Ibid.*, s. 34(2). ¹²⁶ *Ibid.*, s. 34(3).

¹²⁷ Migration Act 1958 (Cth), ss. 13–14, 29.

¹²⁸ Citizens may not be required to pay a fee in order to enter Australia: *Air Caledonie International v. Commonwealth* (1988) 165 CLR 462, 469. As to whether Australian citizens have a right of abode in Australia, see Helen Irving, 'Still Call Australia Home? The Constitution and the Citizen's Right of Abode', *Sydney Law Review* 30 (2008) 133.

¹²⁹ Extradition Act 1988 (Cth).

¹³⁰ *Chu Kheng Lim v. Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 54.

statutory labelling as a 'citizen' does not necessarily prevent them from being constitutionally 'alien', and subject to the legislative and executive powers of the Commonwealth under s 51(xix) of the Constitution (the power to make laws with respect to naturalization and aliens).¹³¹ This is a more generally applicable taxonomy than the case-by-case assessment of the 'social fact' of an individual's nationality status that occurs under international law.

The independent nation of Papua New Guinea (PNG) was created in 1975 from Territory of Papua and the Territory of New Guinea, which had both previously been administered by Australia. The people of Papua had previously been Australian citizens, but lost that status upon the commencement of the PNG Constitution.¹³² This wholesale expatriation of a whole class of Australian citizens was upheld by the High Court of Australia in *Re Minister for Immigration, Multicultural and Indigenous Affairs; Ex parte Ame*¹³³ on the basis that Papuans' 'membership' of the Australian polity was of a lesser quality than that of citizens resident in the Australian States and internal Territories and they had always, constitutionally, been 'aliens' despite possessing statutory Australian citizenship. Papuans' Australian citizenship had always been 'nominal', the court decided: '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'.¹³⁴ In reaching this view, the court had regard to the fact that the Constitution of PNG prevents PNG citizens from holding dual citizenship. As Kirby J noted, the relevant provisions should be understood in light of their intended purpose:

to cure the indignity of a largely nominal Australian citizenship; to abolish the differentiation between the nationality status of Papuans and New Guineans; and to fulfil the national aspirations of that new nation.¹³⁵

As well as being a potentially life-changing decision for Australia's former Papuan citizens,¹³⁶ *Ame* has implications for the legal character

¹³¹ See *Re MIMIA; Ex Parte Ame* (2005) 222 CLR 439 (*Ame*) and *Singh v. Commonwealth* (2004) 222 CLR 322, both discussed further below.

¹³² See Papua New Guinea Independence (Australian Citizenship) Regulations 1975 (Cth), r. 4.

¹³³ *Ame* (2005) 222 CLR 439. ¹³⁴ *Ibid.*, 471.

¹³⁵ *Ibid.*, 470.

¹³⁶ As to which see Kim Rubenstein, 'Advancing Citizenship: The Legal Armory and Its Limits', *Theoretical Inquiries in Law* 8 (2007) 509, and the case described in that piece,

of Australian citizenship more broadly and in particular for Australians with dual citizenship. *Ame* suggests that it is possible for a person to hold statutory citizenship but to be, constitutionally, an alien, and thus subject to deportation and exclusion from Australian territory. The High Court went to some length to emphasize the special nature of the Papuans' position, both in terms of the effective quality of the Australian citizenship they had once enjoyed, and their role in the post-colonial formation of an independent Papua New Guinea, in order to confine the precedent being set in upholding the wholesale deprivation of their citizenship. The judgments in *Ame* suggest that there might be a constitutional impediment to revoking the citizenship of people who were members of 'the people of the Commonwealth' referred to throughout the Constitution.¹³⁷ While that idea may well afford protection to some Australian citizens, for the reasons that follow it is not clear that it shields all dual citizens from loss of their statutory citizenship, or from being treated as constitutional aliens. As we explain below, possessing dual citizenship may mean that a person is not part of 'the people of the Commonwealth'.

The category of 'the people of the Commonwealth' (that is, the cohort of federal electors who are responsible for choosing the members of the House of Representatives under section 24 of the Constitution) may exclude people who owe an allegiance to a sovereign power other than the Queen in right of Australia. In *Singh v. Commonwealth*,¹³⁸ three of the five majority judges held that the 'central characteristic' of a constitutional alien is the owing of 'obligations (allegiance) to a sovereign power other than the sovereign power in question'.¹³⁹ This definition has subsequently been reiterated by a clear majority in *Ame*.¹⁴⁰ *Singh* complicated the distinction then only recently drawn by the High Court between citizens and aliens. The definition of 'alien' proposed in *Singh* and adopted in *Ame* leaves the status of Australian citizens who have another nationality in some doubt. Their Australian citizen status suggests that they are non-aliens,¹⁴¹ yet their allegiance to a foreign sovereign power is indicative of alienage.¹⁴² While the proposition remains untested, it is at least arguable that Parliament is entitled to treat as a

Minister for Immigration and Multicultural and Indigenous Affairs v. Walsh (2002) 125 FCR 31.

¹³⁷ See *Ame* (2005) 222 CLR 439, 457 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ), 79 (Kirby J).

¹³⁸ *Ame* (2005) 222 CLR 439. ¹³⁹ *Ibid.*, 395.

¹⁴⁰ *Ibid.*, 439, 458. See also *Koroitamana* (2006) 227 CLR 31.

¹⁴¹ *Shaw* (2003) 218 CLR 28, 35. ¹⁴² *Ibid.*, 395.

constitutional alien a person who owes allegiance to a foreign power, notwithstanding that they may hold the statutory status of citizen. In the event that dual citizens are capable of being considered aliens, they are at least in theory liable to lose their Australian citizenship pursuant to a law enacted under section 51(xix). At the extreme, Michelle Foster suggests,

it would presumably be open to Parliament to legislate for the automatic removal of Australian citizenship of all persons who have or acquire a foreign nationality, regardless of the circumstances in which the foreign citizenship was acquired, and ... the individual's ability to divest himself or herself of that foreign nationality.¹⁴³

Although the Australian Citizenship Act 2007 no longer requires a person who acquires Australian citizenship to renounce their other citizenships, in constitutional terms there is no indication in the case law that acquiring Australian citizenship automatically neutralizes the effect of allegiance to a foreign power.¹⁴⁴ Most dual nationals could potentially fit the *Singh* definition of an alien, unless it can be shown that a person's status as an Australian citizen effectively trumps other allegiances that the person might owe.

11.5.4 The difference that dual nationality makes: losing one's 'own country'

As we have explained above, when an Australian citizen is a dual national, particularly if they are an Australian citizen by naturalization, they are vulnerable, both as a matter of statute and constitutionally, to being deprived of their Australian citizenship in order to facilitate their removal from Australia. However, it is important to note that not holding Australian citizenship at all places a person in a much more immediately vulnerable state, irrespective of the nature and duration of their connections with the Australian community. As a country known to encourage immigration (albeit selectively), Australia has a population of long-term resident non-citizens, who have made lives in Australia but have not acquired Australian citizenship. The case described below shows

¹⁴³ Michelle Foster, 'Membership in the Australian Community: *Singh v. The Commonwealth* and its Consequences for Australian Citizenship Law' *Federal Law Review* 34 (2006) 161, 179.

¹⁴⁴ At least for the purposes of s. 44 of the Constitution, *Sykes v. Cleary* (1992) 176 CLR 77 demonstrates clearly that it does not.

how being a dual national in all but name has not been a sufficient basis on which to claim a right to remain in Australia, even in circumstances where Australia is arguably 'one's own country'.

Successive Australian governments have deported non-citizens who have committed serious criminal offences, even where the individuals concerned have virtually no connection with any country other than Australia, and can demonstrate that their social and family lives are enmeshed in the Australian community.¹⁴⁵ In one such case, *Minister for Immigration and Multicultural and Indigenous Affairs v. Nystrom*,¹⁴⁶ Stefan Nystrom was born in Sweden where his Australian-resident mother was on holiday, and he arrived in Australia aged less than a month old.¹⁴⁷ Nystrom lived in Australia without obtaining citizenship until he was deported to Sweden at the end of 2006, his visa having been cancelled on character grounds after he was convicted of a number of serious offences. While the Federal Court held that Nystrom had been absorbed into the Australian community and had no meaningful ties with Sweden,¹⁴⁸ the fact of his absorption only entitled him to an 'absorbed person visa', which the High Court subsequently confirmed could be cancelled on character grounds.¹⁴⁹

Nystrom complained to the HRC, arguing, among other things, that his deportation violated Article 12(4) of the ICCPR.¹⁵⁰ Nystrom relied on the dissenting opinions in *Stewart*, discussed above, claiming that his strong social and family links with Australia, coupled with the fact that he had no such links in Sweden, meant that his 'own country' was Australia, notwithstanding his lack of formal citizenship.¹⁵¹ In its response, Australia argued that Nystrom's 'own country' was Sweden, and that it was a matter for the state to determine the circumstances in which a non-citizen may remain in Australia.¹⁵²

¹⁴⁵ *Jovicic v. Minister for Immigration and Multicultural Affairs* [2006] FCA 1758; *Minister for Immigration and Multicultural and Indigenous Affairs v. Nystrom* (2006) 228 CLR 566 (Nystrom).

¹⁴⁶ *Nystrom* (2006) 228 CLR 566. ¹⁴⁷ *Ibid.*, 566, 567.

¹⁴⁸ *Nystrom v. Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121.

¹⁴⁹ *Nystrom* (2006) 228 CLR 566, 571 (Gleeson CJ), 584 (Gummow and Hayne JJ); 606–7 (Heydon and Crennan JJ).

¹⁵⁰ *Nystrom* (2006) 228 CLR 566.

¹⁵¹ Nystrom claimed that he had assumed that he was an Australian citizen (at 2.6). The Committee attached some weight to the fact that, while Nystrom was a ward of the state during his teenage years, no attempt was made on his behalf to obtain citizenship for him. *Ibid.*, 7.5.

¹⁵² *Ibid.*, 4.6–4.7.

In September 2011 the HRC found that by deporting Nystrom, Australia had violated his rights under the ICCPR, including under Article 12.¹⁵³ Nystrom's case is significant as it marks the Committee's endorsement of a broader concept of a person's 'own country', one not limited to formal nationality. This concept, the Committee found,

embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien ... there are factors other than nationality which may establish close and enduring connections between a person and a country, connections which may be stronger than those of nationality. The words 'his own country' invite consideration of such matters as long standing residence, close personal and family ties and intentions to remain, as well as to the absence of such ties elsewhere.¹⁵⁴

The HRC went on to observe that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.'¹⁵⁵

In their dissent, Neuman and Iwasawa held that in Nystrom's case, it might have been concluded that he should be treated as an Australian national because authorities of the state party had not obtained citizenship for him while he was a ward of the state.¹⁵⁶ However, they preferred the approach of the majority opinion in *Stewart*, in particular the weight given in the state party's offer of citizenship and the complainant's constructive failure to take it up. This approach, in Neuman and Iwasawa's view,

avoided making the right depend entirely on the state's formal ascription of nationality, but it preserved a relationship between the right and the concept of nationality, a fundamental institution of international law whose importance is also recognized in article 24, paragraph 3, of the Covenant.¹⁵⁷

The Committee's opinion highlights the different ways in which a person can 'belong' in more than one country. For Stefan Nystrom, like others in his position, his legal status did not correspond to his social membership in Australia. The Committee declined, for the purpose of identifying Nystrom's 'own country', to privilege his legal status over the social fact of

¹⁵³ UN Human Rights Committee, *Nystrom v. Australia* CCPR/C/102/D/1557/2007.

¹⁵⁴ *Ibid.*, 7.4. ¹⁵⁵ *Ibid.*, 7.6. ¹⁵⁶ *Ibid.*, 3.6. ¹⁵⁷ *Ibid.*, 3.1.

his status as a member of the Australian community. However, Nystrom remains a Swedish citizen, and thus is a member of two national communities in different ways. His formal legal citizenship does not correspond with his lived experience and social allegiances as a long-standing member of the Australian community. The Committee's decision recognizes that this kind of formal and informal dual 'nationality' is possible and that, at least in some cases, the formal elements of nationality will not be allowed to defeat its substantive dimension.

11.6. Conclusion

Under British and Australian law, in order to deport a citizen (other than by way of extradition) it is generally necessary to first revoke their citizenship. The prospect that a citizen will become stateless if deprived of their citizenship is generally (though not universally) enough to preclude any attempt to do so. Logically, this means that if a person is only a citizen of Australia or the United Kingdom, and has no claim to another nationality, there is little prospect of their being stripped of their citizenship. Statelessness is less of a risk for most dual nationals, who, even if deprived of one of their nationalities, will have another on which to fall back. In theory, this makes dual nationals easier to denaturalize and deport. As recent British cases have demonstrated, this is more than a theoretical possibility; considerable efforts have been made to deprive British citizens of their citizenship in order to deport them or, as in Hicks' case, to ensure that they have no opportunity to claim the rights associated with citizenship in the first place.

The rightness or otherwise of punishing people by removing their citizenship has been discussed extensively elsewhere.¹⁵⁸ Here, we are concerned with whether it is right to make dual nationals *more* vulnerable to denaturalization than their single-national counterparts; that is, whether there is something about a person's status as a dual national that should make their claim on each of their citizenships less secure. It appears counter-intuitive that having more than one citizenship means that one can have less, or a less secure single citizenship, as a result. Indeed, in an age of globalization where the incidence of dual citizenship is rising and is being

¹⁵⁸ Gibney, 'Should Citizenship Be Conditional?'; Shai Lavy, 'Punishment and the Revocation of Citizenship in the United Kingdom, the United States and Israel', *New Criminal Law Review* 13 (2010), 404; J. M. Spectar, 'To ban or not to ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System' *California Western Law Review* 39 (2003), 507.

claimed as a human right,¹⁵⁹ it is anomalous that this vulnerability for dual citizens reflects a return to the mindset of an earlier period in dual citizenship history where that makes him or her more vulnerable.¹⁶⁰

Questions to guide discussion

1. With the rise of an acceptance of multiple citizenships by states around the globe, what implications does this phenomenon have for our understanding of nationality and statelessness?
2. Is the single national more exposed to expulsion from the state and deprivation of nationality than the dual national, or vice versa? Should this be the case?
3. How should the relationship between the citizen and the state be understood, given that it can no longer be assumed to be 'monogamous'? Does dual nationality necessarily entail a division of loyalty?
4. Does the current state of law in the UK and Australia respectively privilege the legal over the social bonds of citizenship? What has been the position of the UN Human Rights Committee? Is there a distinction between an understanding of citizenship/nationality at municipal and international levels? Can (or how can) they be reconciled?

¹⁵⁹ Peter Spiro, 'Dual Citizenship as Human Right', *International Journal of Constitutional Law* 8 (2010), 111.

¹⁶⁰ Since this article was written, there have been several further developments in Australia and the UK in this area. In Australia, the Government responded formally to the Nystrom decision and can be viewed at: www.ag.gov.au/RightsAndProtections/HumanRights/DisabilityStandards/Documents/NystrometalvAustralia-AustralianGovernmentResponse.pdf. In addition, the UK High Court allowed Abu Hamza to be extradited in 2012. The decision is *Hamza & Ors v Secretary of State for the Home Department* [2012] EWHC 2736: www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Judgments/abu-hamza-others-judgment-05102012.pdf. And finally, changes to the UK law were made through the Immigration Act 2014, adopted on 14 May 2014, the relevant section of which (and full text of the immigration act) can be found at www.legislation.gov.uk/ukpga/2014/22/section/66/enacted. All websites last accessed 21 July 2014.