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The High Court and Deportation Under the Australian
Constitution

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Executive Summary

The High Court is divided about the status of many thousands of British nationals living in Australia who have not formally become citizens of this country.

At stake is the right of such people to freely remain in Australia. The Federal Government is currently attempting to deport a British migrant who has lived here since 1977. The issue is whether settlers from the United Kingdom (and perhaps other Commonwealth countries) who arrived in Australia by the 1970s or 1980s have constitutional protection against deportation, or whether like other foreign residents they are 'aliens' in a constitutional sense and can be expelled if, for example, convicted of serious crimes.

In June 2003 the High Court will again address this issue, with the newest addition to the bench, Justice Heydon, likely to have the casting vote.

In *Taylor* (2001)¹ and *Te and Dang* (2002),² three judges maintained that while at the time of Federation Britain was not a 'foreign power' and British subjects were not 'aliens' under Australian constitutional law, this position did not survive Australia's emergence as an independent sovereign nation. Other judges argued that British subjects who settled in Australia by the 1970s or 1980s shared allegiance with Australians to a common monarch, and so could not be 'aliens' under Australian law. Instead they were part of a new category of 'non-alien non-citizens' outside the scope of the detention and deportation provisions in the *Migration Act 1958* (Cwlth).

The aliens issue is central to membership of the Australian community. As recent cases show, the privileges accorded to various groups of citizens and non-citizens under Australian law vary, not necessarily in a logical or consistent way. In *Taylor* and *Te and Dang* a majority of the High Court gave greater rights to non-citizen British residents (even those convicted of serious crimes) than those enjoyed by some Australian citizens or some people born in this country.

Deportation and the Migration Act

According to recent media reports the Federal Government intends to deport a 42 year old British migrant – a resident of Perth since 1977 – because of her conviction and imprisonment on drugs charges.³ This action will only be valid if she is an 'immigrant' or an 'alien' under the Australian Constitution. Someone outside these categories cannot legally be deported under the *Migration Act 1958* (Cwlth).

The deportation provisions of the Migration Act rely on the Commonwealth's power to make laws with respect to 'naturalisation and aliens'⁴ and 'immigration and emigration'.⁵ People who have 'become absorbed into the Australian community' such as long-term residents have passed beyond the stage of being 'immigrants', and can be deported only if they remain 'aliens' under Australian constitutional law.⁶

The fate of the British migrant facing deportation could depend, therefore, on whether she is constitutionally an 'alien' under Australian law.

As Justice Kirby said in a recent judgment, the status of long-term British residents under the Australian Constitution has national significance:

this Court must deal with the aliens issue ... it is of considerable importance to the many thousands of people living in Australia who are non-citizen British subjects and who ... on the view of the Constitution propounded by [the Commonwealth] ... are all subject to present or future laws which could authorise, or require, their removal, individually or as a class, from Australia where they have not become Australian citizens.⁷

Te, Dang and Taylor

A judgment released late in 2002 in the combined case of *Ex parte Meng Kok Te* and *Ex parte Dung Chi Dang*⁸ revealed continuing disagreement on the 'aliens' issue between members of the High Court.

In 1980 Te (aged 13) and Dang (aged 12) fled with their families from Cambodia and Vietnam respectively. After a period in transit camps in third countries, each was given a permanent visa to enter Australia 'effectively as a refugee granted asylum'.⁹ Significantly, neither became an Australian citizen. By the late 1990s both had spent periods in prison for drug trafficking, as well as committing other offences, causing Australian authorities to commence deportation proceedings under the Migration Act.¹⁰

The decision in *Te and Dang* itself was unanimous. The High Court decided 7-0 that despite having resided in Australia for their entire adult lives, Te and Dang came within the 'aliens' power under section 51 (19) of the Constitution and could therefore validly be deported under the Migration Act.

The legal status of British subjects was not relevant to Te or Dang, both nationals of former French Indo-China colonies. But the High Court used their case to debate whether its 2001 decision in *Re Patterson; Ex parte Taylor*¹¹ – a deportation matter involving a British migrant who had lived in Australia since 1966 – had changed the law in relation to the aliens power in the Australian Constitution.

In *Taylor*, the High Court held that a citizen of the United Kingdom who – like Te and Dang – came to Australia as a child, did not become an Australian citizen and was convicted of serious offences, could **not** be deported.

In *Te and Dang*, the High Court agreed that the word 'alien' was a constitutional not a legislative concept, and that it was for the Court itself not Parliament to define its meaning – although Parliament could make laws prescribing who would come within this term.¹² There was also agreement on the basic dictionary meaning of 'alien', i.e. 'a foreigner' or 'one born in or belonging to another country who has not acquired citizenship by naturalisation and is not entitled to the privileges of a citizen'.¹³

From that point, opinions diverged sharply within the Court about the scope of the term 'aliens' in section 51 (19) of the Constitution.

Gleeson CJ, Gummow and Hayne JJ adhered to their view in *Taylor* that the law on this matter remained as stated by the High Court in *Pochi* (1982)¹⁴ and *Nolan* (1988).¹⁵ In contrast, Gaudron and Kirby JJ – with some support from McHugh J – argued that *Taylor* had created new law on the 'aliens' issue. Callinan J expressed no opinion on the effect of the *Taylor* decision.

Aliens and British Subjects

Gleeson CJ, Gummow and Hayne JJ maintained (in *Taylor* and in *Te and Dang*) that the practical operation of the term 'aliens' in section 51 (19) has evolved – in line with Australia's constitutional development – to encompass all non-citizens, including any British subject resident in this country who has not been naturalised and who is not otherwise entitled to the rights of Australian citizenship. This position is consistent with their joint judgment in *Sue v Hill* (1999),¹⁶ where – along with other members of the Court – they held that Britain was now a 'foreign power' for the purpose of section 44 (i) of the Constitution.¹⁷

The three judges contend that while at the time of Federation Britain was not a foreign power and British subjects were not 'aliens' under Australian constitutional law, this position did not survive Australia's emergence as an independent sovereign nation. A common allegiance to the 'Imperial Crown' in the early years of Federation, shared with the United Kingdom and other dominions of the British Empire, prevented a distinct international identity for Australia and its people. This changed perhaps as early as the 1926 Imperial Conference, which established 'equality of status ... from a constitutional

as distinct from a legal point of view ... between Great Britain and the self-governing Dominions'.¹⁸

As Gummow and Hayne noted in *Taylor*, legislation in both Australia and the United Kingdom after World War II 'recognised that the metaphysical indivisibility of the Imperial Crown no longer made constitutional or political sense'¹⁹ and that references in the Constitution to Australian residents as 'subjects of the Queen' referred to 'the Crown in its Australian politic capacity'.²⁰

In *Te and Dang*, Gleeson CJ reiterated²¹ his support for the conclusion of the Mason High Court in *Nolan*²² that, as a result of the emergence of Australia as an independent nation, the acceptance of the divisibility of the Crown and the creation of a distinct Australian citizenship in the *Nationality and Citizenship Act 1948* ('the Citizenship Act'):

the fact that a person who was born neither in Australia nor of Australian parents and who had not become a citizen of this country was a British subject or a subject of the Queen by reason of his birth in another country could no longer be seen as having the effect, so far as this country is concerned, of precluding his classification as an 'alien'.²³

In other words, while the concept of 'alienage' was once inconsistent with a person's status as a British subject, the constitutional position had changed over time. As Gleeson CJ, Gummow and Hayne JJ said in *Sue v Hill*:

Whilst the text of the Constitution has not changed, its operation has ... The Constitution speaks to the present and its interpretation takes account of and moves with these developments.²⁴

Perhaps more significantly, as Gummow and Hayne JJ observed in *Taylor*, this means that 'persons may acquire the status or character of alienage by reason of supervening constitutional and political events not involving any positive act or assent on the part of the person concerned'.²⁵

So for three of the current members of the High Court an 'alien' for constitutional purposes is now simply a 'non-citizen', i.e. 'any person who was born outside Australia, whose parents were not Australians, and who has not been naturalized as an Australian'.²⁶ All overseas settlers – whether from Britain or elsewhere, and regardless of the length of time spent in this country – are 'aliens' for the purpose of this country's deportation laws, unless they have formally become Australian citizens or are entitled to citizenship because they have Australian parents.²⁷

'Non-alien' British Residents

In contrast to their three colleagues, Gaudron, McHugh, Kirby and Callinan JJ held in *Taylor* that a British person long-term resident in Australia was a subject of the Queen of Australia and therefore not an 'alien' for the purpose of this country's deportation laws.²⁸

Their reasons for reaching such a conclusion differed.

Gaudron J noted that when the Citizenship Act commenced in 1948, an 'alien' was defined as 'a person who [was] not a British subject, an Irish citizen or a protected person'. It was not until 1987 that an amendment removing this definition came into effect. So Mr Taylor was not an alien under this legislation when he arrived with his British migrant parents in 1966.²⁹ Gaudron J agreed that the definition in the Act could not control the meaning of 'alien' in section 51 (19) of the Constitution, but 'it could, until its repeal in 1987, serve to identify those whom the Parliament had legislated to recognise as members of the Australian community'. The effect was to 'naturalise' Mr Taylor 'and all other British citizens in the same position'. In other words, 'Mr Taylor was not, for constitutional purposes, an alien at any time prior to 1987'.³⁰ Moreover, while Parliament could legislate under the naturalisation and aliens power to deprive British subjects who arrived before 1987 such as Mr Taylor of their membership of the Australian community, it had not done so. Therefore Mr Taylor remained a non-alien under the Australian Constitution.³¹

Kirby J also regarded the changes to the Citizenship Act that came into effect in 1987 as critical, arguing that 'non-citizen British subjects' who settled in Australia before then were 'absorbed into the community and are members of the people, and electors, of the Commonwealth'.³² Like Gaudron J, he said that while 'the privileged position' of British settlers was terminated from 1987 onwards, 'such termination did not ... operate retrospectively on the class of persons who arrived before that time'.³³

In contrast, McHugh J thought that the passing of the *Royal Style and Titles Act 1973* was the critical event. For McHugh J, the distinguishing feature of an 'alien' was that he or she did not owe allegiance to the monarch of the country. In the *Royal Style and Titles Act 1973* the Parliament had asserted that 'the Crown was no longer "one and indivisible throughout the Empire"'.³⁴ Until this time, Australian citizens and British settlers arriving in this country owed allegiance to the same sovereign. Furthermore:

British subjects ... living in Australia at the commencement of the *Royal Style and Titles Act 1973* became subjects of the Queen of Australia as well as subjects of the Queen of the United Kingdom. Accordingly, they were not and did not subsequently become aliens within the meaning of s 51(xix) of the Constitution.³⁵

Callinan J, in a short judgment, agreed with the reasoning of both McHugh J and Kirby J.³⁶

None of these judges perceived any inconsistency between their judgments and the High Court's decision in *Sue v Hill* that Britain was a 'foreign power' under the Constitution. According to McHugh J:

it is one thing to say that a person born in England is the subject of a foreign power and another thing to say that such a person is an alien for the purpose of the Constitution ... *Sue v Hill* holds that this dual allegiance prevents them from being members of the federal parliament. But nothing in the Constitution indicates that allegiance to the Queen

in two capacities makes a person born in the United Kingdom an alien for the purpose of the Constitution.³⁷

New 'Aliens' Law?

Gleeson CJ, Gummow, and Hayne JJ argued in *Te and Dang* that the divergent reasoning of the other four judges in *Taylor* meant that case had not established a precedent for a third category of Australian resident, namely a 'non-alien non-citizen'.³⁸

But other judges in *Te and Dang* were adamant that *Taylor* had created a new category of 'non-alien' resident in which long-term settlers from Britain were clearly included. Kirby J stated bluntly that:

to the extent that the Minister, or anyone else, still hankers for a return to the simple distinction between alienage and the status of citizenship under Australian legislation, that principle does not survive the decision in *Taylor*. It remains to identify exactly what the new principle is. But one thing is certain after *Taylor*. For Australian constitutional purposes, the word 'alien' in s 51 (xix) of the Constitution is *not* conclusively defined to be all other persons in the world who are not Australian citizens.³⁹

Gaudron J expressed a similar opinion, noting that *Taylor*

clearly held that provisions of the [Migration] Act permitting the detention and removal of non-citizens were invalid in their application to a person who had been born in the United Kingdom, had entered Australia before the coming into effect, in 1987, of the Australian Citizenship Amendment Act 1984 ... and had been absorbed into the Australian community but had not taken out Australian citizenship.⁴⁰

But as McHugh J said, 'the reasoning of none of the majority Justices had the support of four of the seven Justices'.⁴¹ Moreover, as Blackshield and Williams note, 'consideration of this issue [whether Taylor was an 'alien'] was not strictly necessary, since Taylor had succeeded' on other grounds in arguing that he could not legally be deported.⁴²

On this basis, contrary to the view expressed by Kirby and Gaudron JJ in *Te and Dang*, the judgments in *Taylor* do not alter the law regarding practical operation of the term 'aliens' in section 51(19) of the Constitution. However, if the constitutional status of long-term British settlers had been the central issue in *Taylor*, it seems likely that the clear cut 'citizen/alien' distinction set down in *Pochi* and *Nolan* would have been overturned. Four members of the High Court said specifically – in *Taylor* or in *Te and Dang* – that the decision in *Nolan* was flawed, should be disregarded or should be overruled.⁴³ As Gleeson CJ said in *Te and Dang*, 'that is the current, inconclusive, state of authority'.⁴⁴

My Grandmother is an Alien

The fate of the British migrant who has lived in Perth for the last 26 years will depend on the High Court's decision in several similar matters due to be heard in mid-2003.⁴⁵

These cases provide an opportunity to resolve the status of the many long-term British migrants in this country who for one reason or another have never formally become Australian citizens. It might be unsettling for such people, particularly the elderly, to discover they are 'aliens' under Australian law and the potential consequences of this legal status. In *Te and Dang*, Kirby J referred to the (theoretical) 'spectre of a ninety year old non-citizen, proposed for expulsion as an 'alien', although she had lived peacefully in Australia virtually all her life'.⁴⁶

The retirement of Gaudron J leaves the rest of the High Court evenly divided on the general issue of whether the *Pochi/Nolan* 'citizen vs alien' distinction remains the law, or whether a new category of 'non-alien, non-citizen' British migrant should now be formally recognised for the purpose of Australia's Constitution. It appears that the latest addition to the bench, Heydon J, may have the casting vote when this issue is again argued before the court.

The Empire Strikes Back

If the High Court decides in the forthcoming cases that British subjects who arrived before a certain date have special recognition under Australia's constitutional law,⁴⁷ two subsidiary issues should also be resolved.

The first issue is the particular cut-off date (1973 or 1987) for distinguishing 'non-alien' British migrants from 'alien' settlers. Two cases directly raise this issue.⁴⁸

The second issue is the class of people who could claim 'non-alien' status as a 'British subject'. In *Te and Dang*, Gaudron and McHugh JJ affirmed their view in *Taylor* that non-citizens 'born in the United Kingdom' who settled in Australia before the relevant date would qualify as 'non-aliens'.⁴⁹ But Kirby J also included anyone 'born in the dominions of the Crown other than Australia',⁵⁰ i.e. potentially the whole of the former British Empire. As his Honour observed in *Taylor*, at Federation:

and for decades afterwards, the view prevailed in the law that the Crown was one and indivisible throughout the British Empire. Allegiance to the Crown, and the monarch who was for the time being its visible and personal embodiment, was the common element of nationality shared by all British subjects, including those born in Australia.⁵¹

Kirby J's argument has logic. If allegiance to the indivisible Imperial Crown determined 'alien' versus 'non-alien' status in the days of the British Empire, then until a certain point in the twentieth century nobody born in a British colony or dominion was an 'alien' from the Australian constitutional perspective. Moreover, based on the judgments of Gaudron, McHugh, Kirby and Callinan JJ in *Taylor* and *Te and Dang*, provided such people settled in Australia before either this country or their place of birth became constitutionally separated from the British Crown, they would remain 'non-aliens' under Australian law.

As Gleeson CJ said in *Te and Dang*:

It was the historical relationship between Australia and the British Empire, and the status of British subjects, that gave rise to the issue in [*Taylor*]. If the [applicants] in this case [i.e. in *Te and Dang*] had been born in Hong Kong, or Canada, or Gibraltar, that relationship may have been relevant here'.⁵²

So it appears the sun may not have entirely set on the British Empire in Australian constitutional law. This might be welcomed by those suffering from Imperial nostalgia, but could seriously complicate Australia's deportation laws. Apart from a constitutional exemption for long term UK migrants, settlers from any former British colony who arrived in Australia before a certain date might be able to escape deportation under the Migration Act. The relevant date would vary depending on when the potential deportee's country of origin became an independent sovereign nation or established allegiance to the Crown in its own right. Immigration officials and the courts would face the unwieldy and impractical task of analysing the constitutional history of every former British dominion to determine exactly who could validly be deported from this country.⁵³

One solution would be for the High Court to reach a clear-cut decision on the exact scope of the 'aliens' power in section 51 (19) of the Constitution. An alternative, as Gaudron J suggested in *Taylor*,⁵⁴ would be for Parliament to legislate retrospectively to clarify the legal status of long-term migrants from the United Kingdom and other parts of the former British Empire. Whether the latter option would be politically feasible, however, is another matter.

Can the Deportation Occur?

It is unclear, therefore, whether Australia's immigration officials have the power under section 51 (19) of the Constitution to deport the British migrant who has lived here since 1977. Had this person become an Australian citizen at some stage she would not now face the prospect of being deported. Nevertheless, *Taylor* and *Te and Dang* give her some hope of overturning the deportation order on the basis that she is a 'non-alien non-citizen' British subject.

However, a strict application of the different judgments in *Taylor* and *Te and Dang* does not bode well for a challenge to the deportation order.

Counsel for the Commonwealth could point to the contention of Gleeson CJ, Gummow and Hayne JJ in *Taylor* and *Te and Dang* that an 'alien' under Australian constitutional law is simply a 'non-citizen'. Opposing counsel could note the rejection of this general proposition by the other four judges in these cases. But this may not be enough to prevent deportation. While Gaudron and Kirby JJ declared in *Taylor* and in *Te and Dang* that 1987 (with the commencement of the Citizenship Act amendments) was the critical date after which British subjects settling in Australia would be within the class of 'constitutional

aliens', McHugh J treated 1973 (and the passing of the *Royal Style and Titles Act*) as the proper demarcation point.

Since Callinan J agreed with both Kirby J and McHugh J, it is unclear which date he regarded as critical. However, if this particular British migrant arrived in Australia only in 1977, then – under a majority of the judgments in both *Taylor* and *Te and Dang* (i.e. those of Gleeson CJ, Gummow, Hayne and McHugh JJ) – she would be classed as an alien for the purpose of section 51 (19) of the Constitution, allowing her to be deported under the *Migration Act*.

Absorption, Crime and Deportation

In the event that the British migrant currently facing deportation is held to be a 'non-alien', this might not be the end of her worries. If a court found that despite her many years as an Australian resident she had not been 'absorbed' into the community and legally remained an 'immigrant', the Commonwealth could validly use its section 51 (27) 'immigration' power to deport her under the *Migration Act*.⁵⁵ *Te and Dang* suggests this is a possible outcome.

As Gummow J explained in *Te and Dang*:

Notions of 'membership of the Australian community', 'absorption into the Australian community' and 'becoming part of the people of Australia' have been employed in the decisions of the Court to indicate a state of affairs which marks the passage of an individual beyond the range of the immigration power'.⁵⁶

Kirby and Callinan JJ believed the 'substantial criminal records'⁵⁷ of *Te and Dang* were central to whether they had been 'absorbed' into the Australian community. According to Kirby J:

Far from showing allegiance or being absorbed into the Australian body politic, the repeated conduct of the applicants constitutes a public renunciation of the norms of the community.⁵⁸

Callinan J agreed, noting that:

more relevant, and conclusive, is the fact that their criminal activities are incompatible with absorption within the community ... To be absorbed, a person must fit into, live in the community, and seek to make himself a member of the community, and to participate in the lawful activities of it. Committing serious crimes against the community, and as a result, becoming liable to spend, and spending substantial periods in prison are the antithesis of these.'⁵⁹

In *Taylor*, notwithstanding Mr Taylor's conviction for serious child sex offences,⁶⁰ Callinan J held that 'the prosecutor has been absorbed into the community. He is beyond the reach of the immigration power conferred upon the Parliament by the Constitution'.⁶¹

Callinan J explained that in contrast to Te and Dang, Taylor had been in Australia 'a considerable time (15 years), sufficient for his absorption into the community, before the commission of the offences for which he was convicted'.⁶² Kirby J noted more broadly that relevant factors in Mr Taylor's 'absorption' into the Australian community were:

the thirty four years that had elapsed between the arrival of the prosecutor in Australia and the Assistant Minister's decision [to deport him], together with his upbringing in Australia, his familial and other connections with Australia and the fact that he had never left Australia following his arrival as a child.⁶³

While Kirby J said that the High Court 'has no power to review the merits of the Minister's decision'⁶⁴ (to deport Te and Dang), the comments above demonstrate that an assessment of 'absorption' necessarily involves examination of the merits of individual cases.

The case of the British migrant currently threatened with deportation falls somewhere between *Taylor* and *Te and Dang*. Like Te and Dang, she has been convicted on drugs and related charges. She has resided in Australia slightly longer than Te or Dang, but not nearly as long as Taylor. She has 'familial' connections with Australia (two children born here),⁶⁵ but so did Te and Dang (in the latter's case, a wife and baby son, as well as a large extended family).⁶⁶ It is unclear from media reports how long she had been in Australia before her initial conviction.

It is not self-evident why (as Callinan J said) criminal activities are 'incompatible with absorption into the community'. It is true, as Kirby J said, that such activities are a 'public renunciation of the norms of the community', but within every community there will be those who implicitly renounce the accepted values of a peaceful and ordered society by committing crimes. Society punishes them, but they are not outside the community or 'unabsorbed' simply because they commit such actions.

If crimes are relevant to the issue of absorption, to what extent is it sensible to distinguish between different offences and when they were committed? The applicant in *Taylor* 'pleaded guilty to serious offences involving sexual assaults upon children, for which he was sentenced to a minimum of three and a half years imprisonment',⁶⁷ yet the Commonwealth and the Court⁶⁸ accepted that 'Mr Taylor was completely absorbed into the Australian community'.⁶⁹ In contrast, the serious offences committed by the applicants in *Te and Dang* (in Dang's case involving a prison term of one year and eight months, *substantially less* than Taylor's sentence)⁷⁰ meant – according to Kirby and Callinan JJ – automatic exclusion from membership of the Australian community.

If the reason for this divergent treatment is not the different type of crime but the longer period Taylor spent in Australia before committing an offence, this seems inconsistent with the judges' argument that serious crime by its very nature amounts to a 'public renunciation' of community values and is 'incompatible' with membership of the Australian community.

Based on the above, there may be a role for Parliament in defining the relevance of criminal activities for the purpose of 'absorption' and deportation under the Migration Act.

Absorption and 'Alien' Status

In *Taylor* and *Te and Dang*, Kirby and Callinan JJ disagreed with the rest of the Court about whether absorption not only moved a person beyond 'immigrant' status but could also transform them into a 'non-alien'. The majority stated that alien status could only be lost through the formal process of becoming an Australian citizen and that absorption made no difference. 'Resident aliens may be absorbed into the community, but they are still aliens', said Gleeson CJ.⁷¹ Gaudron J explained that:

an alien born person may acquire membership of the Australian body politic and, thereby, cease to be an alien only in the circumstances and in accordance with the procedures specified by the [Citizenship] Act.⁷²

Kirby J warned against any such absolute rule, acknowledging the possibility of 'extreme' cases such as:

a person resident in Australia for sixty years, who had served in its Armed Forces or police who believed he had been naturalized but through some mistake or slip had not formally accomplished the change of status.⁷³

Callinan J seriously doubted whether absorption 'can put persons ... beyond the reach of the aliens power', but shared 'some of the concerns expressed by Kirby J with respect to very long term residents of Australia'.⁷⁴

Kirby J seemed to have a deeper fear, noting the argument that Australia could in theory reinstate discriminatory laws restricting who could become a citizen.⁷⁵ Such laws would then allow the arbitrary deportation of long-term Australian residents. As Kirby J said, 'similar laws have been given effect in other countries. The possibility is not therefore wholly theoretical'.⁷⁶

So Kirby and Callinan JJ left open the possibility that apart from existing citizens and British subjects who arrived before 1987, there may be others who could become 'non-alien' through 'absorption' into the Australian community over a long period of time. In *Te and Dang*, however, Kirby J noted that if in exceptional circumstances losing alien status by absorption was possible, 'the facts of the applicants' cases fall so far short of such instances that it is unnecessary to canvass them further'.⁷⁷

'Belonging to Another Place'

While Kirby and Callinan JJ recognised that an 'alien' might become a 'non-alien' other than by formal naturalisation as an Australian citizen, they did not look beyond the concept of 'absorption' for how this might work in practice.

In *Te and Dang*, Kirby J (along with McHugh J) also observed that 'the term "alien" connotes "belonging to another person or place".'⁷⁸ However, there was no application of this to the practical circumstances of Te or Dang. Having escaped as refugees from the turmoil of Cambodia and Vietnam in 1980 at the age of 12 or 13, arguably neither could be regarded in 2002 as 'belonging' to their countries of birth in any real way. Te had never returned to Cambodia, yet faced deportation to what by now would be a completely unfamiliar land. Dang had briefly returned twice to Vietnam, more than 12 years ago. Te and Dang's counsel put to the Court the length of time both had been in this country,⁷⁹ but oddly did not raise other aspects of whether either really 'belonged' anywhere besides Australia.

If – contrary to the views of the majority in *Taylor* and *Te and Dang* – a 'non-citizen' can become a 'non-alien' other than by formal naturalisation, the notion of where such a person actually 'belongs' seems just as relevant as the extent to which they may or may not have been 'absorbed' into the Australian community.

Conclusion: Aliens, Citizens and Membership of the Australian Community

The aliens issue is central to membership of the Australian community. Rubenstein notes that:

the regulation of immigration through [the 'naturalization and aliens'] power is the clearest expression of membership of the community since it practically determines who in fact is present within the country and maintains control over those people who do not take up Australian citizenship.⁸⁰

Moreover, as Gaudron J said in *Taylor*:

The power to legislate with respect to naturalisation and aliens clearly includes a power to legislate to deprive a person of his or her membership of the body politic that constitutes the Australian community.⁸¹

But the power of the Federal Government to regulate and control 'aliens' is only part of the intricate and involved question of who is entitled to full rights as a member of the Australian community.⁸²

Recent examples illustrate the complexity of this broader issue.

In *Minister for Immigration and Multicultural Affairs v Walsh*⁸³ (full Federal Court 2002), the Court had to decide whether a person born in the Australian external territory of Papua in 1970, and therefore an Australian citizen by birth, retained her citizenship after Papua New Guinea became independent in 1975. Under the new PNG Constitution and Australian legislation,⁸⁴ Ms Walsh would remain an Australian citizen only if she had a right to permanent residence in mainland Australia. The Federal Court held that while she

was an Australian citizen prior to PNG independence, she had not been absorbed into the Australian community (never having lived here), so she remained an 'immigrant' under Australian law with no automatic right of entry onto the mainland.

As Genevieve Ebbeck points out:

Arguably it follows from the ... decision in *Walsh* that an Australian citizen has no constitutionally guaranteed right, deriving from his/her citizenship, to enter Australia ... If it is correct to say that an Australian citizen possesses no right to enter and remain within Australia, the fundamental worth of his or her citizenship becomes questionable.⁸⁵

Walsh shows that distinguishing between 'citizens' on the one hand and 'aliens' on the other only partially determines membership of the Australian community. Ms Walsh was, at least until 1975, an Australian citizen and therefore not an 'alien', but clearly not a full member of the Australian community because she remained an 'immigrant'.

The Australian born children of temporary visa holders – such as the 1,650 East Timorese refugees who have lived in this country since the early 1990s and are currently trying to avoid deportation⁸⁶ – provide another example of the uncertainty about who receives full membership rights in the Australian community.

Most of the East Timorese refugees arrived in Australia between 1992 and 1994. Some now have children born in this country.⁸⁷ Despite being born here, the children are not Australian citizens.⁸⁸ However, under the Citizenship Act, they will become citizens on their tenth birthday if they continue to live in Australia.⁸⁹ According to the Commonwealth's official Citizenship Instructions, this provision applies 'regardless of the parent/s migration or citizenship status', and 'is an operation of law provision which does not require an application or decision'.⁹⁰

It is difficult to see why children born in Australia who have known no other country and who will automatically become Australian citizens when they turn ten are any more 'aliens' in a constitutional sense than overseas born 'non-citizens' who are entitled to citizenship because they have Australian parents.⁹¹ It is arguable that the Australian-born children of temporary visa holders such as the East Timorese refugees may also be part of a new constitutional category of 'non-alien non-citizens'. But similar to Australian citizens in the former territories of Papua and New Guinea prior to 1975, they will not be full members of the Australian community with the right to freely move in and out of the country.⁹²

It can be seen that the rights accorded to various groups of citizens and non-citizens as members of the Australian community vary, not necessarily in a logical or consistent way. In *Taylor* and *Te and Dang*, a majority of the High Court gave greater rights to non-citizen British residents – even those convicted of serious crimes such as the applicant in *Taylor* – than those enjoyed by some Australian citizens (e.g. Ms Walsh pre-1975) or people born in this country (children of temporary visa holders). In particular, British permanent

residents in Australia who arrived before a certain date have freedom of movement (including protection against deportation), something not available to these other groups.

Putting legal considerations to one side, it is unfortunate from the perspective of Australia's national development that some members of the High Court allow discrimination in favour of 'British subjects' (whatever the exact extent of that phrase) in relation to 'alien' status. Apart from not becoming Australian citizens, Te and Dang made the mistake of being born outside the realm of the former British Empire. It could be argued that such a distinction – based on what Gummow J described as 'medieval notions' of allegiance to the British Crown⁹³ – is out of place in present day Australia.

Endnotes

1. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.
2. *Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* and *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 193 ALR 37.
3. AAP News, 'WA: British Woman faces deportation over character breaches', Story No 2853, 14 February 2003; *West Australian*, 'Right to stay has law key', 15 February 2003, p. 54.
4. Constitution section 51 (19).
5. Constitution section 51 (27). There is also an argument that deportation provisions in the Migration Act can be validly characterised as laws with respect to 'external affairs' (section 51 (29)): see Gummow and Hayne JJ in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 474-5. In the same case, however, Kirby J forcefully rejected any such argument as 'unpersuasive' and 'untenable' (at 496-7). And McHugh J said the external affairs power 'could not ... support legislation that would result in the deportation of a person who was not an alien' (at 425).
6. Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* and *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 193 ALR 37 at 42.
7. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 477.
8. *Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* and *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 193 ALR 37; 7 November 2002.
9. Kirby J, (2002) 193 ALR 37 at 68.
10. See the background facts in the judgment of Callinan J, (2002) 193 ALR 37 at 82-85.
11. (2001) 207 CLR 391.
12. (2002) 193 ALR 37 at 42 (Gleeson CJ) and 70 (Kirby J).
13. (2002) 193 ALR 37 at 70 (Kirby J).
14. *Pochi v Macphee* (1982) 151 CLR 101.

15. *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178.
16. (1999) 199 CLR 462.
17. Section 44 (i) of the Constitution disqualifies anyone 'under any acknowledgment of allegiance ... to a foreign power' from being chosen as a member of Federal Parliament.
18. Report of the Royal Commission on the Constitution (1929), cited in *Sue v Hill* (1999) 199 CLR 462 at 496.
19. (2001) 207 CLR 391 at 466.
20. (2001) 207 CLR 391 at 467.
21. (2002) 193 ALR 37 at 39.
22. (1988) 165 CLR 178.
23. Gleeson CJ in *Taylor* (2001) 207 CLR 391 at 400, citing Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ in *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 184.
24. (1999) 199 CLR 462 at 496. In other words, while the 'connotation' – i.e. the essential meaning – of a constitution term remains the same, its 'denotation' – the things to which the terms refers – can change over time. See e.g. J Goldsworthy, 'Originalism in Constitutional Interpretation (1997) 25 *Federal Law Review* 1.
25. (2001) 207 CLR 391 at 468.
26. Gibbs CJ in *Pochi v Macphee* (1982) 151 CLR 101, at 109–110, cited by Gleeson CJ (2002) 193 ALR 37 at 40; Gummow J (2002) 193 ALR 37 at 60.
27. In *Nolan* (1988 165 CLR 178), the High Court (Mason, Wilson, Brennan, Deane, Dawson and Toohey; Gaudron dissenting) specifically contrasted the Australian situation from the position under US law. The court said (at p. 183):

'an 'alien' has been said to be, for the purposes of United States law, 'one born out of the United States, who has not since been naturalized ...' That definition should be expanded to include a person who has ceased to be a citizen by an act or process of denaturalization and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage'.
28. This explanation of the meaning of 'alien' under Australian law recognises that those born overseas can be registered as a citizen of this country, and hence lose 'alien' status, if they have Australian parents. However, a person is not automatically an Australian citizen simply by having Australian parents. As Rubenstein explains, Australia has imposed additional requirements for citizenship by descent that have varied from time to time. (See Kim Rubenstein, *Australian Citizenship Law in Context*, pp. 94–99. Therefore the phrase 'is a citizen by reason of parentage' appears to be shorthand for 'is entitled to citizenship by reason of parentage'.
28. Following the High Court's decision that he could not be detained and deported under the Migration Act, Mr Taylor successfully sued the Minister for Immigration for wrongful imprisonment. He was awarded damages of \$116 000 as compensation for time spent in

immigration detention and prison. See *Graham Ernest Taylor v Phillip Ruddock and Ors*, Matter No 662/02 District Court of New South Wales 18 December 2002.

29. (2001) 207 CLR 391 at 408.
30. (2001) 207 CLR 391 at 410.
31. (2001) 207 CLR 391 at 411–12.
32. (2001) 207 CLR 391 at 496.
33. (2001) 207 CLR 391 at 496.
34. (2001) 207 CLR 391 at 432.
35. (2001) 207 CLR 391 at 436.
36. (2001) 207 CLR 391 at 518.
37. See *Taylor* (2001) 207 CLR 391 at 432.
38. Gleeson CJ at [16]; Gummow J at [133].
39. (2002) 193 ALR 37 at 73.
40. (2002) 193 ALR 37 at 47.
41. (2002) 193 ALR 37 at 55.
42. Blackshield and Williams, *Australian Constitutional Law and Theory*, 3rd edition, p. 879. As Blackshield and Williams note, Gleeson CJ, Gaudron, Gummow and Hayne JJ (with McHugh J agreeing) found that the Parliamentary Secretary to the Minister had exercised her discretion under s. 501(2) of the Migration Act to cancel Taylor's permanent visa if she 'reasonably suspected' that he did not pass the character test on the erroneous basis that he would thereafter have an opportunity to make representations to her.
43. See Gaudron J in *Taylor* (2001) 207 CLR 391 at 409; McHugh J in *Te and Dang* at (2002) 193 ALR 37 at 54; Kirby J in *Te and Dang* at (2002) 193 ALR 37 at 73; Callinan J in *Taylor* (2001) 207 CLR 391 at 518.
44. (2002) 193 ALR 37 at 41.
45. The High Court has held preliminary hearings in the matters of *Cowgill* and *Shaw*, both involving citizens of the United Kingdom who migrated to Australia in the 1970s, and whose permanent residency visas have recently been cancelled on grounds of bad character. These matters are expected to be heard by the full High Court in June 2003. Two further matters involving British migrants, *Hollis* and *Burgess*, may also be heard by the full High Court around the same time. (See transcripts from *Shaw v Minister for Immigration and Multicultural Affairs* (B99/2002) 9 December 2002; and *Minister for Immigration and Multicultural Affairs ex parte Cowgill* (P100 of 2002) 11 March 2003 at [160] to [180]).
46. (2002) 193 ALR 37 at 80 (Kirby J).
47. The Commonwealth will argue against this proposition, submitting that the High Court should 'accept the minority decision' in *Taylor*, i.e. the position of Gleeson CJ, Gummow and Hayne

JJ (see transcript from *Minister for Immigration and Multicultural Affairs ex parte Cowgill* (P100 of 2002) 11 March 2003 at [185]).

48. The applicant in *Cowgill* is a United Kingdom citizen who arrived in Australia with his parents in 1976 aged one (see *West Australian*, 'Let me stay, pleads dad', 12 March 2003). *Shaw v Minister for Immigration and Multicultural Affairs* involves a British citizen who emigrated to Australia in 1974 aged two (see Genevieve Ebbeck, 'Australian Citizenship and Aliens', *Constitutional Law Forum 2002*, p. 8.) *Burgess* and *Hollis* involve the further intriguing question of 'people who arrive before 1973 but have gone back and ... whether, while outside Australia, they can rely on [*Taylor*] to demand re-entry' (see *Minister for Immigration and Multicultural Affairs ex parte Cowgill* (P100 of 2002) 11 March 2003 at [160]).
49. Gaudron J (2002) 193 ALR 37 at 47; McHugh J (2002) 193 ALR 37 at 55.
50. Kirby J at (2002) 193 ALR 37 at 74.
51. (2001) 207 CLR 391 at 483.
52. Gleeson CJ (2002) 193 ALR 37 at 43.
53. *Cowgill*, for example, involves a person who is a New Zealand citizen (by birth), as well as being a UK citizen (by parentage). As Gummow J has noted, a relevant issue when *Cowgill* is considered by the full High Court will therefore be 'the situation in New Zealand law as to Royal Style and Titles' when Mr Cowgill arrived in Australia. (See *Minister for Immigration and Multicultural Affairs ex parte Cowgill* (P100 of 2002) 11 March 2003 at [220–225]).
54. (2001) 207 CLR 391 at 412.
55. As Gummow and Hayne JJ noted in *Taylor*, the immigration power was a key instrument in maintaining the White Australia policy in the early years of Federation. All races in the British Empire were subjects of the British Imperial Crown and therefore not 'aliens' from the Australian constitutional perspective. But 'local legislation discriminated against some British subjects and interfered with the movement of British subjects within the Empire by excluding them from entry ... based upon the immigration power'. (2001) 207 CLR 391 at 439.

As Kim Rubenstein notes, Gaudron J has raised another option for use of the immigration power to deprive British migrants of the right to live in Australia. Her Honour stated in *Taylor* that settlers who had been 'integrated [i.e. absorbed] into the Australian community' could not be detained and compulsorily deported using the immigration power (since they had passed beyond the stage of being 'immigrants'). But this power could validly be used to grant permanent residency visas to arriving migrants, therefore there was no reason that it could not also be used to cancel such visas (see (2001) 207 CLR 391 at 413).

If the residency visa of a permanent settler was cancelled in the way Gaudron J suggests, they could not be forcibly deported (provided, of course, that they did not come within the class of constitutional aliens). But, as Rubenstein says, if such people 'voluntarily leave the country, they can be regulated on their return through a visa or have their visa cancelled, thus disallowing re-entry. This means they are free to continue to live in Australia but, in practice, not free to leave.' (See Kim Rubenstein, *Australian Citizenship Law in Context*, p. 71.)

56. (2002) 193 ALR 37 at 59.

57. See Kirby J (2002) 193 ALR 37 at 69.
58. (2002) 193 ALR 37 at 80.
59. (2002) 193 ALR 37 at 88.
60. See background in *Graham Ernest Taylor v Phillip Ruddock and Ors*, Matter No 662/02 District Court of New South Wales 18 December 2002.
61. Callinan J, (2001) 207 CLR 391 at 515.
62. (2002) 193 ALR 37 at 88.
63. (2001) 207 CLR 391 at 477.
64. (2002) 193 ALR 37 at 80.
65. AAP News, 'WA: British Woman faces deportation over character breaches', Story No 2853, 14 February 2003.
66. See (2002) 193 ALR 37 at 67 (Kirby J), and 85 (Callinan J).
67. (2001) 207 CLR 391 at 392.
68. (2001) 207 CLR 391 at 477 (Kirby J).
69. (2001) 207 CLR 391 at 407 (per Gaudron J).
70. (2002) 193 ALR 37 at 67–68. Kirby J also found it relevant to mention that Dang had spent '2 years and 2 months in prison on charges that did not result in convictions ... nearly 7 months in immigration detention; and the period since September 2001 on remand, awaiting the hearing of his present charges. In all, Mr Dang has therefore spent a total of about 5 ½ years of his time in Australia in custody of various kinds.'
71. Gleeson CJ (2002) 193 ALR 37 at 45; see also Gaudron J at 48–9, McHugh J at 56; Gummow J at 65.
72. *Te and Dang* (2002) 193 ALR 37 at 51.
73. (2002) 193 ALR 37 at 80.
74. Callinan J (2002) 193 ALR 37 at 89.
75. (2002) 193 ALR 37 at 80.
76. *Taylor* (2001) 207 CLR 391 at 496.
77. (2002) 193 ALR 37 at 80.
78. McHugh J at [81]; Kirby J at (2002) 193 ALR 37 at 70.
79. *Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* and *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, Transcript of Proceedings, 18 April 2002, p. 91, [4020] – [4060].
80. Kim Rubenstein, *Australian Citizenship Law in Context*, pp. 260–61.
81. (2001) 207 CLR 391 at 411.

82. See generally Kim Rubenstein, *Australian Citizenship Law in Context*, Chapter 5; and Dr Genevieve Ebbeck, 'A constitutional concept of Australian citizenship', paper presented at Lindell Conference, University of Melbourne 7 December 2002 (part of forthcoming publication by Melbourne University).
83. [2002] FCAFC 205.
84. *Papua New Guinea Independence (Australian Citizenship) Regulations*, Regulation 4.
85. Ebbeck, 'A constitutional concept of Australian citizenship', paper presented at Lindell Conference, University of Melbourne, 7 December 2002 (part of forthcoming publication by Melbourne University), pp. 13–15; see also discussion of *Walsh* in Ebbeck, 'Australian Citizenship and Aliens', *Constitutional Law Forum 2002*, pp. 11–13.
86. K. Carrington, S. Sherlock and N. Hancock, 'The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On', *Current Issues Brief no. 17*, Department of the Parliamentary Library, 18 March 2003, at <http://www.aph.gov.au/library/pubs/cib/2002-03/03cib17.htm>.
87. *Sydney Morning Herald*, 8 April 2003, p. 12.
88. Section 10(2) of the Citizenship Act states that someone born in Australia will be an Australian citizen 'if and only if (a) a parent of the person was, at the time of the person's birth, an Australian citizen or permanent resident'.
89. Australian Citizenship Act, section 10(2)(b).
90. Department of Immigration and Multicultural and Ethnic Affairs, *Australian Citizenship Instructions*, paras 2.3.9 and 2.3.11.
91. As cited above (see note 24), Gibbs CJ in *Pochi v Macphee* (1982) 151 CLR 101 at 109–110 stated that 'the Parliament can...treat as an alien any person who was *born outside Australia*, whose parents were not Australians, and who has not been naturalized as an Australian' (emphasis added). This phrase was cited with approval in *Nolan* (1988) 165 CLR 178 (at 185) by Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ; and in *Te and Dang* by Gleeson CJ (2002) 193 ALR 37 (at 40); and Gummow J (2002) 193 ALR 37 (at 60).

It may be, as Gummow and Hayne JJ suggested in *Taylor* ((2001) 207 CLR 391 at 470), that Gibbs CJ did not mean this phrase to be an exhaustive statement of the extent of the aliens power. But Gibbs CJ did indicate the outer limit of this power when he said in *Pochi* (at 109) that 'Clearly the Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51 (19) to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'. As the court in *Nolan* noted (at 183), 'as a matter of etymology, "alien"...means belonging to another person or place. Used as a descriptive word to describe a person's lack of relationship with a country, the word means, as a matter of ordinary language, "nothing more than a citizen or subject of a foreign state"'.

In ordinary language, there is no 'lack of relationship' between Australian born children and this country. Indeed, it is strongly arguable that children who were born in Australia and have lived nowhere else have an established relationship only with Australia.

While section 10(2)(b) of the Citizenship Act states that a child born in Australia whose parents were not Australian citizens or permanent residents only becomes a citizen on their tenth birthday, there is nothing in the Citizenship Act, the Australian Citizenship Regulations or the *Australian Citizenship Instructions* that deems such a child to have the citizenship or nationality of their parents. This would, of course, be a matter to be determined not according to Australian law but based on the law of the home country of the parent(s).

By virtue of the Migration Act (section 78), 'non-citizen' children born in Australia are taken to have the same visa status as their parents, so it could be said therefore that since their parents are foreign citizens, the children are 'citizens or subjects of a foreign state' and hence aliens. It could be queried, however, whether merely being given the same visa status as their parent(s) makes an Australian born child a citizen or subject of a foreign state. In any case, this argument is circular, since the Migration Act does not apply to the children unless they are constitutional 'aliens' (or 'immigrants') in the first place.

The concept of 'effective nationality' in international law might also be noted. In *Liechtenstein v Guatemala (Nottebohm Case)*, the International Court of Justice (ICJ) 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' (Judgment of 6 April 1955, ICJ Reports 1955 p. 23 cited in Rubenstein, 'Globalisation and the Laws of People', in C. Dauvergne (ed.) *Jurisprudence for an Interconnected Globe* (Ashgate 2003, forthcoming)). Children who have only lived in Australia plainly have 'a social fact of attachment' with this country.

Note 25 above observed that an overseas born person is not automatically an Australian citizen simply by having Australian parents. Section 10B of the Citizenship Act imposes a number of steps and requirements, including that an Australian citizen parent by descent must have lived in Australia for at least two years, that the application for registration as a citizen is made before the age of 25 and that applicants over the age of 18 pass a character test. According to the formulation of Gibbs CJ, such people appear to be regarded as 'non-aliens' in a constitutional sense even before they apply for registration as a citizen. In comparison, the process for Australian born children to become citizens on their tenth birthday is, as noted in the text, automatic. If overseas born non-citizens can be regarded as 'non-aliens' before they are registered as Australian citizens, the same arguably applies to Australian born non-citizens before they turn ten.

The argument that Australian born children who have lived only in this country are 'non-aliens' in a constitutional sense applies whether or not they are eligible for the same citizenship as their parents. There is an even stronger case, however, for those children born in this country who are not entitled to acquire citizenship of another country. Under section 23D of the Citizenship Act, the Commonwealth must register such children as Australian citizens if an application is made in the approved form. Before an application is made they are not formally Australian citizens, but neither could it be argued that they 'belong to another person or place' or are 'citizens or subjects of a foreign power'. Using Gibbs CJ's language, they 'could not possibly answer the description of 'aliens' in the ordinary understanding of the word'.

It would also be difficult to suggest that children born in Australia who have not lived elsewhere are within the section 51 (27) 'immigration and emigration' power. Butterworths

Australian Legal Dictionary defines 'immigration' as the process of 'entering a country for temporary or permanent purposes'. Children who have only lived in this country have never engaged in the process of 'immigration' in such a sense.

If the Australian born children of temporary visa holders such as the East Timorese refugees are neither 'aliens' nor 'immigrants' in the constitutional sense, they are not subject to the forcible detention and deportation provisions in the Migration Act. Whether they have any practical choice but to accompany their parents is, of course, another matter.

92. If such children are validly deemed by the Migration Act (section 78) to have the same visa status as their parents, they would face the same restrictions on movement that their parents are subject to under their temporary bridging visas. If Australian born children of such visa holders are not in fact subject to the Migration Act (as per note 91 above), they could not therefore be validly deemed under the Act to have visas allowing them to stay in Australia. But if not subject to the Act, neither would they be liable to detention or deportation. Hence they may be in a similar position to settlers who have their permanent residency visa removed, i.e. 'they are free to continue to live in Australia but, in practice, not free to leave.'(Kim Rubenstein, *Australian Citizenship Law in Context*, p. 71: see note 55 above).
93. *Re Minister for Immigration and Multicultural Affairs; Ex parte Dang* and *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*, Transcript of Proceedings, 18 April 2002, p. 13 [485].