Genevieve Ebbeck[*]

A CONSTITUTIONAL CONCEPT OF AUSTRALIAN CITIZENSHIP

ABSTRACT

It is argued in this paper that Australian citizenship may be a constitutional, and not merely statutory, concept. Australian citizenship has become a litigious matter, and there is currently a clear division within the High Court about the nature of Australian citizenship and the consequences flowing from possession of that citizenship. If Australian citizenship is a constitutional concept, an important question arising is whether there is a constitutional implication of citizenship and, if so, how it may limit legislative and executive powers. This paper also examines whether positive citizenship rights or obligations may be implied in the Constitution.

I INTRODUCTION

This paper considers the question of what is meant by 'citizenship' in the Australian legal context. Citizenship is clearly a statutory concept but, following the recent decisions of the High Court in *Re Patterson; Ex parte Taylor* ('*Patterson*'),[1] *Re Minister for Immigration and Multicultural Affairs; ex parte Te; Re Minister for Immigration and Multicultural Affairs; ex parte Dang* ('*Te and Dang*')[2] and *Shaw v Minister for Immigration and Multicultural Affairs* ('*Shaw*'),[3] it is suggested that it may also have constitutional connotations.

II SPLIT WITHIN THE HIGH COURT IN THIS LINE OF CASES

This paper examines the two opposing views in these cases; they can be identified as (a) the *Patterson/Te and Dang* majority view, which became the *Shaw* dissenting view, expressed by McHugh, Gaudron, Kirby and Callinan JJ (all of whom reached their conclusions by virtue of different reasons), and (b) the *Patterson* dissenting

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* BA, LLB (Hons), GDLP, LLM (International Law), PhD; Senior General Counsel, Australian Government Solicitor. The views expressed in this article are personal and are not the views of the Australian Government Solicitor.

1 *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

2 *Re Minister for Immigration and Multicultural Affairs; ex parte Te; Re Minister for Immigration and Multicultural Affairs; ex parte Dang* (2002) 212 CLR 162.

3 *Shaw v Minister for Immigration and Multicultural Affairs* (2004) 203 ALR 143.

view, maintained in *Te and Dang*, which became the *Shaw* majority view, proposed by Gleeson CJ, Gummow and Hayne JJ and then also by Heydon J.

In *Patterson*, the four judges forming the majority held that a man who did not possess statutory Australian citizenship was, nevertheless, not an alien. Arguably, their Honours' decision can be understood as recognition that, as a matter of constitutional law, the man in question was in substance a citizen. Whilst a change in the composition of the High Court saw the minority position in *Patterson*, which dissented from this proposition, become the majority holding in *Shaw*, there is clearly still a marked division in the High Court and scope for further exploration of these issues in subsequent cases.

III STATUTORY VS CONSTITUTIONAL CONCEPT OF AUSTRALIAN CITIZENSHIP

It is suggested that the distinction between a constitutional concept of Australian citizenship, and a statutory concept, still remains a fundamental distinction that should be explored in future litigation. To some extent Kirby J, who was one of the majority *Patterson/Te and Dang* judges and who subsequently formed part of the dissenting minority in *Shaw*, hinted at this distinction. In *Shaw*, Kirby J firmly rejected the argument that the statutory concept of Australian citizenship could 'in effect … change the Constitution',[4] and he distinguished between 'nationals of Australia' and 'statutory citizens'.[5] Perhaps His Honour considered that there exists a constitutional concept of Australian nationality.

If citizenship is a constitutional concept, an important question to be considered is whether there is a constitutional implication of citizenship and, if there is one, what attributes that implication possesses by way of limitations to legislative, executive and possibly judicial powers. Although not a proposition likely to find favour with the present High Court, it is also worth considering whether positive citizenship rights or obligations may be implied.

IV A CONSTITUTIONAL IMPLICATION OF AUSTRALIAN CITIZENSHIP

The Constitution exists for the Australian community. Our foundation level document is there to serve the needs of the Australian community. However, the Constitution does not deal expressly with the definition of the Australian community or membership of that community. Nor does it provide any explicit

4 Ibid 168 (Kirby J).
5 Ibid 167 (Kirby J).

indication of the meaning of the term 'the people of the Commonwealth'.[6] The Constitution does, however, deal with the question by negative connotation, by the constitutional concept of 'alien'.

Given its origin as the constitutive document of the 'subjects of the Queen' who were the people of the various Colonies, it is not surprising that the Constitution does not define what is meant by 'Australian citizen', nor does it contain any statement of the rights that are possessed by, and the duties that are imposed upon, the Australian citizen. The drafters of the Constitution adopted the term 'subject of the Queen' in preference to 'citizen' or 'Australian citizen', as it expressed the then constitutional relationship with the British Empire and avoided republican overtones.[7]

Nevertheless, despite the lack of express recognition of Australian citizenship in the Constitution, it is argued in this paper that there may be an implied constitutional concept of Australian citizenship.

A constitutional implication may be inherent in the text or the structure of the Constitution.[8] As Brennan CJ stated in *McGinty v Western Australia*,

> [i]mplications are not devised by the judiciary; they exist in the text and structure of the Constitution and are revealed or uncovered by judicial exegesis. No implication can be drawn from the Constitution which is not based on the actual terms of the Constitution, or its structure.[9]

For example, ss 7, 24, 64, 128 and related sections of the Constitution give effect to representative government, from which the High Court found an implication of freedom of political communication could be drawn.[10] This implication is based upon the text of the Constitution. By contrast, the '*Melbourne Corporation*'

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6 Section 24 of the Constitution; and see also the expression 'people of the State' in s 7, the references to the people of the various Colonies in the Preamble, uniting in 'one indissoluble Federal Commonwealth' so that, by cl.5, the Constitution is made binding on them as 'people of every State and of every part of the Commonwealth'.

7 At one point, a definition of 'citizen of the Commonwealth' was proposed by O'Connor at the 1989 Melbourne Convention: see the Official Record of the Debates of the Australasian Federal Conventions, Melbourne, 1898, 673. Another definition was later proposed by Dr Quick: Debates, 1898, 1752. However, proposals to use and define the term citizen were rejected. The term 'subject of the Queen' was preferred; Barton, for example, took the view that the term 'citizen' was inappropriate to be applied to subjects residing in the Commonwealth: Debates, 1898, 1764.

8 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 502, 567 (the Court).

9 *McGinty v Western Australia* (1996) 186 CLR 140, 168 (Brennan CJ).

10 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 502, 567 (the Court).

principle[11] is implicit in the federal nature of the Constitution, and protects 'the structural integrity of the State components of the federal framework'.[12]

Arguably, the Constitution should be interpreted in light of an implication of a constitutional concept of Australian citizenship. Textual support for this implication can be found in the Preamble (the people of the colonies agreeing to unite into the Federal Commonwealth and 'under the Constitution'), s128 (ultimately, 'the people' possess the power to alter a Constitution that is theirs) and perhaps also the provisions enshrining representative government referred to above.

It is possible to gain support for such an implication from the very existence of the Constitution, given that there must be a community for which a constitution exists. As McHugh J stated in *McGinty v Western Australia*, the Constitution 'is the instrument by which the Australian people have consented to be governed'.[13]

In *Nationwide News Pty Ltd v Wills*, Deane and Toohey JJ stated that 'all powers of government ultimately belong to, and are derived from, the governed'.[14] In *McGinty v Western Australia*, McHugh J explained this to mean that

> [s]ince the passing of the Australia Act (UK) in 1986, notwithstanding some considerable theoretical difficulties, the popular and legal sovereignty of Australia now resides in the people of Australia. But the only authority that the people have given to the parliaments of the nation is to enact laws in accordance with the terms of the Constitution.[15]

The question can be asked: is it a corollary of 'popular and legal sovereignty' that there be a constitutional concept of who, precisely, are 'the people' in whom that sovereignty resides, and a constitutional concept of their rights and obligations?

It is worth noting at this point that a statutory concept of Australian citizenship did not come into existence until nearly half a century after Federation, with the enactment of the *Nationality and Citizenship Act 1948* (Cth) (now titled the *Australian Citizenship Act 1948* (Cth)).

But this absence of a statutory definition of Australian citizenship did not prevent there being an Australian community for which the Constitution existed. It can be

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11 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 (also known as implied State immunities).

12 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 216 (Stephen J).

13 *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

14 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70 (Deane and Toohey JJ).

15 *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

argued that there existed, at that constitutional level, a concept of membership of the Australian community.

These statutory and constitutional concepts may now be identical insofar as they define who is and who is not an Australian citizen. However, that does not resolve the question of what flows from a constitutional concept of Australian citizenship, in other words the content of any constitutional implication.

V LACK OF STATUTORY GUIDANCE

The Parliament has also been slow to grapple with the issue of the nature and content of the statutory concept of Australian citizenship. As noted above, a statutory concept of Australian citizenship came into existence with the enactment of the *Nationality and Citizenship Act*. However, the difficult issues pertaining to the meaning of citizenship, and what flows from possession of the statutory concept of Australian citizenship, were not addressed by that Act when first enacted.

It was only in 1993 that consideration was given to what Australian citizenship means in a modern context and the traditional and hierarchical notion of allegiance to the Monarch was replaced. The Preamble to the *Australian Citizenship Act* (as it is now known) inserted in 1993 reads:

> Australian citizenship represents formal membership of the community of the Commonwealth of Australia; and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity; and
> Persons granted Australian citizenship enjoy these rights and undertake to accept these obligations
>
> by pledging loyalty to Australia and its people, and
> by sharing their democratic beliefs, and
> by respecting their rights and liberties, and
> by upholding and obeying the laws of Australia.

The pledge of commitment as a citizen of the Commonwealth of Australia now reflects the last four lines of this Preamble.

The *Australian Citizenship Act* defines Australian citizenship in terms of 'formal membership of the community of the Commonwealth of Australia', and it refers to 'reciprocal rights and obligations'. However, it leaves many questions unanswered about (a) what is meant by this formal membership, and (b) what exactly are citizenship rights and obligations (as opposed, for example, to 'human rights' such as the right to freedom from torture, or generally applicable obligations such as the obligation to pay tax).

Elevating the discussion of Australian citizenship to a consideration of it as a constitutional concept generates further questions, for example the extent to which there are any rights inherent in Australian citizenship that cannot be denied by the Commonwealth or a State or Territory Parliament.

VI THE NATURE OF AUSTRALIAN CITIZENSHIP

The nature of citizenship was considered by the High Court in a series of cases, beginning with *Patterson*, and continuing in the subsequent cases of *Te and Dang* and then *Shaw*. These cases raised the meaning of 'Australian citizen' in the context of 'alien'.

As is discussed in this paper, it was held by a majority of the High Court in *Patterson* that there was, in Australia, not just two distinct statuses, namely citizen and alien, but indeed there was a third category in between these two, arising because of Australia's past constitutional relationship with the UK. In this regard, the decision in *Patterson* has been overruled by *Shaw*, at least for the moment. On the current authority of *Shaw*, a person can only be either a citizen within the meaning of the Australian Citizenship Act, or an alien; there is no third category. The view of the majority judges in *Shaw* does not provide support for a constitutional concept of citizenship. However, it is unlikely that the arguments for a constitutional concept of citizenship will disappear post-*Shaw*, as the High Court remains split 4–3 on the *Patterson/Shaw* issue itself, and has not addressed these issues in any broader context (eg an analysis of any constitutionally guaranteed rights attaching to citizenship).

VII THE PATTERSON JUDGMENTS

Turning first to the *Patterson* decision: Mr Taylor was born in the UK, and entered Australia in 1966. He resided continually in Australia from that time, never leaving Australia. By virtue of certain amendments to the *Migration Act,* Mr Taylor held a transitional (permanent) visa, which permitted him to remain indefinitely in Australia. In 1996 he was convicted of a number of offences and sentenced to imprisonment; upon his release, the Minister cancelled his visa. Mr Taylor then instituted High Court proceedings, arguing amongst other things that he was not an 'alien' within the meaning of s 51(xix) of the Constitution and hence the relevant provisions of the *Migration Act* did not apply to him. (Note that the *Migration Act* is primarily based upon the aliens power.) It is important to note that, as a British subject who arrived in Australia in 1966, Mr Taylor was eligible to vote, and in fact he had enrolled to vote when he was 18 years old.

The *Patterson* majority of the High Court (McHugh, Gaudron, Kirby and Callinan JJ, writing separate judgments) held that Mr Taylor was not an alien within the meaning of s 51(xix) of the Constitution, and as a consequence the provisions of the *Migration Act* providing for the detention and removal of unlawful non-citizens were not valid in their application to him. That majority, while accepting that generally a non-citizen is an 'alien', held that there is a category of former British subjects who are 'non-citizens' but not 'aliens'. Gleeson CJ, Gummow and Hayne JJ dissented, all finding that Mr Taylor was an alien.

Arguably, the majority judgments in *Patterson* provide support for the view that there is a constitutional concept of Australian citizenship, and not merely a statutory concept. Conversely, the *Patterson* dissenting judges held that Mr Taylor was an alien. They focussed upon the statutory concept of Australian citizen, and did not accept that there could be another status that was, in substance, a constitutional concept of Australian citizen. Gleeson CJ (diss) noted that, as Mr Taylor had been born outside Australia, his parents were not Australians, and he had not been naturalised as an Australian, he was not an Australian citizen.[16] Nothing turned upon the fact that Mr Taylor had been included amongst the group of persons eligible to be electors.[17] In other words, on the reasoning of the *Patterson* dissenters, as Mr Taylor was not recognised as an Australian citizen by the *Australian Citizenship Act*, he could not be an Australian citizen. As Gummow and Hayne JJ (diss) noted, 'the prosecutor had not taken the steps which the [Australian] Citizenship Act afforded for the acquisition of Australian citizenship'.[18] The conclusion then followed: Mr Taylor must, then, be an alien.

Importantly, the *Patterson* majority judges acknowledged that a person could be a non-alien even if not recognised as an Australian citizen according to the statutory definition. This conclusion could also be understood as a conclusion that, as a matter of constitutional law (as opposed to statutory law), Mr Taylor was in substance an Australian citizen.

Justice Gaudron held that an alien was a person who was not a member of the body politic that constitutes the Australian community.[19] She held that, since 1 May 1987 (the date of commencement of the *Australian Citizenship Amendment Act 1984* (Cth)), Australian citizenship has been the sole criterion for new membership of the Australian body politic.[20] But before that date, citizenship was not the sole criterion for membership of the Australian body politic because until then British subjects continued to be treated as non-aliens under Australian law. A person who,

16 *Patterson* (2001) 207 CLR 391, 400–1 (Gleeson CJ).
17 Ibid 468–9 (Gummow and Hayne JJ).
18 Ibid 471 (Gummow and Hayne JJ).
19 Ibid 404, 410 (Gaudron J).
20 Ibid 410 (Gaudron J).

as a British subject, was a member of the body politic that constituted the Australian community before 1 May 1987, was not validly deprived of that status so as to become an alien after that date.[21]

Justice Gaudron thus focused upon membership of 'the body politic that constitutes the Australian community'. Arguably, on her Honour's reasoning, if a person was a member of the Australian body politic and was thus as a matter of substance an Australian citizen then the Parliament could not unilaterally remove that constitutional status of citizenship from an individual.

Justice McHugh conceptualised citizenship in terms of allegiance. His Honour held that an alien was a person who did not owe allegiance to the sovereign, other than local and temporary allegiance.[22] Adopting the criterion of allegiance, the critical date for him in his judgment in *Patterson* appeared to be the date on which there was first an Australian sovereign separate from the British sovereign. That date was set by the enactment of the *Royal Style and Titles Act 1973* (Cth) which, for Australian purposes, made the Queen the Queen of Australia.[23] A British subject born in the United Kingdom and living in Australia before that date owed allegiance to the Queen of the United Kingdom, and continued after that date to owe allegiance to the Queen of Australia as well.[24] As McHugh J reasoned, 'the evolutionary process that converted persons born in Australia into subjects of the Queen of Australia must also have converted British-born subjects living in Australia into subjects of the Queen of Australia'.[25] Such a person was not, and remains not, an alien.[26]

Arguably, adopting McHugh J's reasoning, where the bond of allegiance between an individual and his or her sovereign is the bond of citizenship, that individual is in a constitutional sense a citizen.

Also forming part of the majority in *Patterson* was Kirby J. There were similarities between his reasoning and that of Gaudron J.[27] Kirby J noted that persons such as Mr Taylor had been 'treated as full and equal members of the Australian community and nation', and 'they share rights and duties akin to those which,

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21 Ibid 411–12 (Gaudron J).

22 Ibid 428 (McHugh J).

23 Ibid 430, 437 (McHugh J). McHugh J shifts position on the issue of date in the subsequent case of *Shaw*, which is discussed later in this paper.

24 Ibid 431–2 (McHugh J).

25 Ibid 420–1 (McHugh J).

26 Ibid 421–2, 431, 437 (McHugh J).

27 Like Gaudron J, the critical date in Kirby J's view (in *Patterson*) was 1 May 1987; contrast with McHugh J, whose critical date (in *Patterson*) was in 1973 with the change to the Royal Style and Titles legislation.

following the introduction of the concept of citizenship in 1948, Australian citizens enjoyed as such'.[28] Of significance was the fact that such persons were 'full participants in the Australian political process'.[29] However, Kirby J also relied upon the concept of 'absorption into the Australian community' in his reasoning.[30] It has long been recognised that absorption into the Australian community removes a person from the reach of the immigration power;[31] however, Kirby J also drew on the concept in his analysis of the scope of the aliens power.

Justice Callinan was the fourth member of the majority. His Honour did not adopt one particular conceptualisation of citizenship; he stated that he agreed with the reasoning and conclusions of Kirby J,[32] but then also expressed agreement with the approach of McHugh J.[33]

Thus in *Patterson* there were a number of different approaches to the nature of Australian citizenship. Gaudron J looked to membership of the 'body politic of the Australian community'. Kirby J also focussed upon voting and political participation yet also drew upon the concept of 'absorption within the Australian community', whilst McHugh J looked to allegiance.

These differences in the reasoning of the majority judges led the *Patterson* dissenters in the subsequent cases of *Te and Dang* and then *Shaw* to conclude that *Patterson* had no ratio decidendi. However, as is discussed below, those judges forming part of the *Patterson* majority responded in two ways: (a) they defended *Patterson* as being correct, and as clearly overturning previous authority (*Nolan v Minister for Immigration and Ethnic Affairs*[34] ('*Nolan*')), and (b) they ensured that their reasoning converged in many ways in their *Shaw* judgments.

VIII THE DECISION IN *TE AND DANG*

A number of questions could be posed in the aftermath of *Patterson*. What did it mean, to be a member of the 'body politic'? Did it simply mean a person who was eligible to vote and who could thereby participate in the selection of the Parliament? What was the mechanism for demonstrating allegiance? Did it have to be via a formal process, as set out in legislation, or could it be a unilateral act? Could a person lose his or her status as an alien after living in the Australian

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28 Ibid 487 (Kirby J).
29 Ibid 491–2 (Kirby J).
30 See for example *Patterson* (2001) 207 CLR 391, 492 (Kirby J).
31 See for example *Ex parte Walsh and Johnson; In re Yates* (1925) 37 CLR 36.
32 *Patterson* (2001) 207 CLR 391, 519 (Callinan J).
33 Ibid.
34 (1988) 165 CLR 178.

community for many years, or did one always remain an alien without undergoing a process of naturalisation? Indeed, what was the difference between an alien and an immigrant (bearing in mind there are two separate constitutional powers, dealing with these matters)?

Some of these issues were considered by the High Court in the subsequent decision of *Te and Dang*, handed down on 7 November 2002 (a decision which also pre-dates the *Shaw* decision).

Mr Te was a Cambodian national born in 1967. He entered Australia in 1983 on a Cambodian Refugee Humanitarian visa. He was granted a permanent entry permit on arrival. His permanent entry permit continued in effect after 1 September 1994, as a transitional (permanent) visa pursuant to regulations. In 1992, Mr Te was convicted of trafficking in heroin, and sentenced to a term of imprisonment. At the time of committing the offence (the 'deportable offence'), Mr Te had lived in Australia for less than 10 years. In 1996, he was convicted on further counts of trafficking in heroin, and sentenced to a term of imprisonment. In 1998 a delegate of the Minister made a decision pursuant to s 200 of the *Migration Act* ordering his deportation; the deportation order was founded on the deportable offence. Mr Te challenged the deportation order in various forums, but ultimately instituted the High Court challenge.

Mr Dang was a Vietnamese national born in 1968. Having fled Vietnam with his family, he entered Australia in 1981 on a P30233 visa (then a refugee visa for accompanied persons). On entry, it became a permanent entry permit. His permanent entry permit continued in effect after 1 September 1994, as a transitional (permanent) visa pursuant to regulations. Over a course of years, Mr Dang was convicted of a number of offences including possession of heroin, possession of firearms, and drug trafficking. In 1999, a delegate of the Minister cancelled Mr Dang's visa. A judicial challenge was duly mounted, and a case stated to the High Court.

Both Mr Te and Mr Dang argued that they were not susceptible to laws enacted under either the aliens power (s 51(xix)) or the immigration power (s 51(xxvii)), because they had been absorbed into the Australian community. They submitted further in relation to s 51(xix) that they were not 'aliens' because (a) they owed allegiance to the Queen of Australia and no other power; and (b) they were both members of the community constituting the body politic of Australia. They argued that they had renounced any allegiance to their country of birth by fleeing as refugees, and they were subject to the laws of Australia.

It can be seen that Mr Te and Mr Dang drew, in their arguments, upon all three concepts of citizenship adopted by the various members of the High Court forming the *Patterson* majority. They argued that they met Gaudron J's test by being

members of the community constituting the body politic of Australia; they argued that they met Kirby J's test of non-aliens on the basis that they had been absorbed into the Australian community; and they argued that they met McHugh J's test of allegiance to Australia.

In separate judgments, all members of the High Court rejected the arguments put by Mr Te and Mr Dang.

IX REASONING IN *TE AND DANG* MIRRORED EARLIER SPLIT IN *PATTERSON*

Although all members of the High Court agreed that Mr Te and Mr Dang were both aliens, their reasoning split along the lines of the majority and dissenting judges in *Patterson*. Those judges who had dissented in *Patterson*, namely Gleeson CJ, Gummow and Hayne JJ, continued to rely upon pre-*Patterson* case law to base their conclusion that Mr Te and Mr Dang were clearly aliens.

Gleeson CJ stated that he remained of the dissenting view he took in *Patterson*,[35] and noted that there was no majority view expressed in *Patterson*.[36] Gleeson CJ stated that he preferred the view expressed by the High Court in the earlier case of *Nolan*, in which the High Court had held that an alien was a person who was not an Australian citizen.[37] Gummow J also expressly preferred the earlier *Nolan* definition of an alien,[38] stated that he considered the reasoning in *Patterson* was 'not soundly based',[39] and said that *Patterson* contained no ratio.[40] Hayne J simply cited *Nolan* for the relevant definition of 'alien'.[41]

The other four members of the Court, who had formed the majority judges in *Patterson*, accepted the correctness of that decision. Gaudron J indicated that, in her view, the holding in *Patterson* was 'clear'.[42] Kirby J mounted a strong defence of the case, rejecting the argument that *Patterson* contained no binding statement of constitutional principle.[43] Kirby J noted that the simple notion of a dichotomy between an Australian citizen and a constitutional alien could no longer be maintained[44] and that the majority in *Patterson* had overruled *Nolan* to the extent

35 *Te and Dang* (2002) 212 CLR 162, 168 (Gleeson CJ).
36 Ibid 170 (Gleeson CJ).
37 *Te and Dang* (2002) 212 CLR 162, 170 (Gleeson CJ).
38 Ibid 194 (Gummow J).
39 Ibid 199 (Gummow J).
40 Ibid 200 (Gummow J).
41 Ibid 219 and fn 224 (Hayne J).
42 Ibid 178 (Gaudron J).
43 Ibid 207-8 (Kirby J).
44 Ibid 209 (Kirby J).

that it purported to state this exclusive test of alienage,[45] stating that there could be 'no real doubt about the rule' for which *Patterson* stood.[46] Callinan J accepted the correctness of *Patterson*,[47] as did McHugh J.[48] McHugh J also noted that *Patterson* showed that the simple proposition in *Nolan* that an alien is any person who is a non-citizen could not be accepted.[49] However, McHugh J did agree with Gleeson CJ, Gummow and Hayne JJ in respect of the point whether *Patterson* contained a binding ratio; McHugh J stated that no ratio decidendi with respect to the aliens power could be extracted from the reasoning in *Patterson*.[50] Nevertheless, McHugh J went on to state that *Patterson* still had precedential authority in respect of circumstances that are not reasonably distinguishable from those which gave rise to the decision.[51]

Whilst Gaudron, McHugh, Kirby and Callinan JJ all accepted the correctness of *Patterson*, they also all held that, in respect of Mr Te and Mr Dang, the decision offered no assistance.[52] As Gaudron J pointed out, the circumstances in Patterson were in fact the 'obverse' of those in *Te and Dang*.[53] As Mr Taylor had been a British subject at the time of arrival in Australia in 1966, he had not been an alien when he entered Australia, and he could not subsequently be converted into one (see discussion of *Patterson* reasoning earlier in this paper). However, both Mr Te and Mr Dang had entered Australia as non-British subjects and were clearly aliens at the time of arrival.

X A CHANGE IN THE COMPOSITION OF THE COURT – THE SHAW DECISION

The applicant in *Shaw*, Mr Jason Shaw, had been born to British parents in the UK in 1972. He arrived in Australia on 17 July 1974, and had not left Australia since that date. Mr Shaw had not become an Australian citizen pursuant to the Australian Citizenship Act, nor was he eligible to vote in Australia.[54] Mr Shaw acquired a 'substantial criminal record' within the meaning of provisions of the Migration Act, and accordingly the Minister for Immigration and Multicultural Affairs cancelled his visa on the basis that he did not meet the 'character test'. Under that Act, Mr Shaw then became liable to the removal and deportation provisions. Proceeding by

45 Ibid.
46 Ibid 210 (Kirby J).
47 Ibid 228 (Callinan J).
48 Ibid 186-9 (McHugh J).
49 Ibid 186-7 (McHugh J).
50 Ibid 187 (McHugh J).
51 Ibid 186-9 (McHugh J).
52 Ibid 179 (Gaudron J), 188-9 (McHugh J), 215 (Kirby J), 228 (Callinan J).
53 Ibid 179 (Gaudron J).
54 *Shaw* (2004) 203 ALR 143, 144 (Gleeson CJ, Gummow and Hayne JJ).

way of Case Stated, Mr Shaw challenged that visa cancellation. The High Court's decision was handed down on 9 December 2003.

Mr Shaw argued that he fell within the '*Patterson* class' of non-citizen non-aliens, and hence was not liable to removal or deportation. However, the new member of the Court, Heydon J (who had replaced Gaudron J upon her retirement), adopted the position of the *Patterson* dissenters, thereby altering the balance of the Court on the issue. The new majority (Gleeson CJ, Gummow and Hayne JJ in a joint judgment, with whom Heydon J agreed) held that Mr Shaw entered Australia as an alien in the constitutional sense,[55] and remained an alien because he did not take out statutory Australian citizenship. Accordingly, his visa could be cancelled, and he could be removed or deported in accordance with the provisions of the *Migration Act*.

In *Shaw*, Gleeson CJ, Gummow and Hayne JJ stated, '[t]his case should be taken as determining that the aliens power has reached all those persons who entered this country after the commencement of the Citizenship Act on 26 January 1949 and who were born out of Australia of parents who were not Australian citizens and who had not been naturalised'.[56] Their Honours went on to state that the *Patterson* decision should henceforth be regarded as authority only in respect of the issues concerning s 64 of the Constitution and constructive failure in the exercise of jurisdiction.[57] By clear implication, their Honours took the view that *Patterson* should not be regarded as authority on the non-citizen non-alien issue.

McHugh, Kirby and Callinan JJ all dissented (writing separate judgments), holding that Mr Shaw was not an 'alien'. McHugh J stated that he remained of the view that *Patterson* was correctly decided, despite having no clear ratio decidendi.[58] Furthermore, all three judges pointed out that the majority in *Patterson* had clearly overruled *Nolan* on the meaning of 'alien'.[59]

In affirming the correctness of the majority position in *Patterson* and subsequently in *Te and Dang*, Kirby J criticised the 'spectacle of deliberate persistence in attempts to overrule recent constitutional decisions on identical questions on the basis of nothing more intellectually persuasive than the retirement of a member of a past majority and the replacement of that Justice by a new appointee who may hold a different view'.[60]

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55 Ibid 151 (Gleeson CJ, Gummow and Hayne JJ).
56 Ibid.
57 Ibid 152–3 (Gleeson CJ, Gummow and Hayne JJ).
58 Ibid 155 (McHugh J).
59 Ibid 154 (McHugh J), 160–1 (Kirby J), 182–3 (Callinan J).
60 Ibid 161–2 (Kirby J).

In *Shaw*, both McHugh J and Kirby J shifted position on the issue of relevant date. Both now agreed with Callinan J's view that the evolutionary process by which the Queen became Queen in right of Australia, and her subjects became subjects of the Queen in right of Australia, was not completed until the date of the coming into force of the *Australia Acts*, namely 3 March 1986.[61] Thus, all three members of the Court who now form the *Shaw* dissenters took the view that persons arriving in Australia as immigrant 'subjects of the Queen' on and before 3 March 1986 were not 'aliens'.[62]

XI FUTURE DECISIONS?

Lower courts are bound to follow the majority position in *Shaw*, at least where its facts cannot be distinguished. Thus, for the moment, Australian law accepts that there are only two classes of persons in Australia: statutory Australian citizens, and aliens. However, given the 4–3 split in the Court, and the fact that the dissenters in *Shaw* have moved to a common ground on certain issues, the possibility of the *Patterson* majority view again finding favour cannot be ruled out. In *Shaw*, Kirby J expressed his hope for this to occur, stating:

> One day, if a larger challenge comes than is presented by Mr Shaw's unhappy case, it may be hoped that a new majority in this Court will gather around the view of the Constitution favoured by the majority in *Re Patterson* and that that view will be restored.[63]

It is suggested that, even if the particular issue at stake in the *Patterson*, *Te and Dang* and *Shaw* line of cases, namely the status of British subjects who migrated to Australia before 3 March 1986, is not revisited, there still remains significant scope for exploring the issue of citizenship as a constitutional concept in other contexts, most obviously in the context of fundamental rights.

This paper goes on to examine the formulations of citizenship adopted by those judges forming the majority in *Patterson* and *Te and Dang*, and the dissenters in *Shaw*, before moving to examine citizenship in the context of fundamental rights and obligations. The formulations of Australian citizenship in terms of allegiance, absorption into the Australian community and membership of the body politic, are fundamental to any attempt to define a constitutional (not statutory) concept of citizenship.

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61 Ibid 155 (McHugh J), 170–1 (Kirby J).
62 Ibid 155 (McHugh J), 171 (Kirby J), 185 (Callinan J).
63 Ibid 175 (Kirby J).

XII ALLEGIANCE

As discussed above, one of the three formulations of citizenship in *Patterson* was couched in terms of 'allegiance'. In particular, McHugh J's reasoning in *Patterson* was based upon a transformation of allegiance. His analysis was referred to and adopted by Kirby J in *Shaw* — further indication of the extent to which the three dissenting judges in *Shaw* have taken steps to adopt a more uniform position.[64]

The issue of allegiance was particularly discussed in *Te and Dang*. In that case, the High Court rejected the argument that Mr Te and Mr Dang necessarily renounced their original nationality by fleeing their countries of origin because they had a well-founded fear of persecution and claimed refugee status. Neither man could establish any other form or manifestation of renunciation.[65] Indeed, as both Gleeson CJ and Kirby J pointed out in *Te and Dang*, the definition of 'refugee' in the *Convention Relating to the Status of Refugees* contemplates that a person seeking refugee status in these circumstances will retain his or her nationality: article 1A(2).[66]

Kirby J was the only member of the Court in *Te and Dang* to analyse the issue of unilateral actions in changing allegiance. His Honour noted that 'it is a matter of controversy as to whether it is open to a person unilaterally and privately to effect such a renunciation' [of nationality].[67] Kirby J stated that change of allegiance so as to terminate a person's status as an alien could not, at least ordinarily, be left to the subjective inclination of the individual, and still less of a minor in the care of his or her parents. Change of allegiance normally involves reciprocal conduct by a formal and public act.[68]

A number of judges of the High Court in *Te and Dang* reiterated that, in respect of an alien entering Australia as such, the process whereby he or she lost that status of alien was the statutory process of naturalisation.[69] Then, in *Shaw* in the context of

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64 Ibid 169–70 (Kirby J).

65 Whilst they remained aliens, Mr Te and Mr Dang only owed 'local allegiance', in other words they only owed the duty of anyone in Australia to comply with the Constitution and the laws of this country. Accordingly, Mr Te was born in Cambodia and in the absence of other evidence was therefore a citizen of Cambodia at the time of arrival in Australia; Mr Dang was born in Vietnam and in the absence of other evidence was a citizen of Vietnam at the time of arrival into Australia. There was no evidence before the Court that either applicant was not still a citizen of his country of birth. Neither applicant had made any formal act or taken any oath of allegiance to this country or its Queen.

66 *Te and Dang* (2002) 212 CLR 162, 174 (Gleeson CJ), 214 (Kirby J).

67 Ibid 214 (Kirby J).

68 Ibid 214-5 (Kirby J).

69 Ibid 170 (Gleeson CJ), 180 (Gaudron J), 188 (McHugh J), 194 (Gummow J).

membership of the Australian community, Kirby J stated that, '[a]pplied today and for future application, I would accept that such community and such loyalties are marked off by citizenship of birth and descent, and citizenship by naturalisation'.[70]

Thus, there seems to be no scope for any future class of aliens to acquire a constitutional status of citizen by any means other than by conforming to the relevant statutory procedure. In other words, leaving aside those persons falling into the *Patterson/Shaw* class of persons, acquisition of statutory Australian citizenship is accepted by the High Court as a prerequisite to acquisition of any form of Australian citizenship, including any non-statutory form.

Accordingly, in future litigation, the issue of acquisition of allegiance is not likely to be complex. Leaving aside the *Patterson/Shaw* category of persons, the allegiance of a naturalised Australian citizen will be demonstrated by the taking of an oath in accordance with the relevant statutory procedure. Far more difficult issues surrounding allegiance are likely to arise in the context of loss of citizenship, which is discussed later in this paper.

XIII ABSORPTION INTO THE AUSTRALIAN COMMUNITY

Another formulation of citizenship in *Patterson*, relied upon by Kirby J in that case, made reference to the concept of absorption into the Australian community. The applicants in *Te and Dang* argued that they had been absorbed into the Australian community and were thus beyond the reach of the aliens power. However, in mounting such an argument, the applicants in *Te and Dang* faced the hurdle of having to persuade the High Court to overrule previous authority that absorption into the Australian community does not deprive a person of his or her status as an alien.

In *Pochi v Macphee*, Gibbs CJ discussed the common law rules as to alienage, and noted 'there are strong reasons why the acquisition by an alien of Australian citizenship should be marked by a formal act, and by an acknowledgement of allegiance to the sovereign of Australia. The *Australian Citizenship Act* validly so provides'.[71] In *Cunliffe v The Commonwealth*, Mason CJ stated, 'an alien who has been absorbed into the Australian community ceases to be an immigrant, though remaining an alien'.[72]

The applicants in *Te and Dang* failed to persuade the Court to overrule such previous authority. First, in respect of the dissenters in *Patterson*, who continued

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70 *Shaw* (2004) 203 ALR 143, 166 (Kirby J).
71 *Pochi v Macphee* (1982) 151 CLR 101, 111 (Gibbs CJ).
72 *Cunliffe v The Commonwealth* (1994) 182 CLR 272, 295 (Mason CJ).

their line of reasoning in *Te and Dang*: Gleeson CJ, Gummow and Hayne JJ all held in *Te and Dang* that an alien cannot be absorbed into the Australian community and thereby lose his/her status as alien.[73] Turning then to those judges forming the *Patterson* majority and continuing their line of reasoning in *Te and Dang*, the issue of absorption into the Australian community was not dealt with by Gaudron or McHugh. Callinan J held that, even if he assumed that absorption did apply to aliens, neither Mr Te nor Mr Dang was absorbed.[74] Callinan J stated that committing serious crimes against the community and spending substantial periods in prison for them was the 'antithesis' of being absorbed into the community.[75] Kirby J agreed that neither Mr Te nor Mr Dang had, as a matter of fact, been absorbed into the Australian community.[76]

However, Kirby J did leave open the possibility of absorption applying in 'extreme cases' such as 'a ninety year old non-citizen, proposed for expulsion as an 'alien', although she had lived peacefully in Australia virtually all her life', or '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 that change or status', or 'the position of a person, long resident in Australia, purportedly excluded from citizenship as a result of discriminatory or restrictive laws enacted by the Parliament'.[77] Furthermore, Callinan J stated that he shared 'some of the concerns expressed by Kirby J with respect to very long term residents of Australia'.[78] Subsequently, in *Shaw*, Callinan J again couched his analysis in the language of absorption into the Australian community.[79]

The issue of absorption into the Australian community may arise in the future, particularly if this type of 'extreme case' comes before the High Court. Some members of the Court, and most obviously Kirby and Callinan JJ, may be loathe to find that the Parliament has power to expel or refuse re-entry to very long term residents of Australia, particularly if they have no significant criminal history indicating a severance of the relationship with the Australian community.

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73 *Te and Dang* (2002) 212 CLR 162, 172-3, 176 (Gleeson CJ), 194 (Gummow J), 219-220 (Hayne J).

74 Ibid 228 (Callinan J).

75 Ibid.

76 Ibid 217-8 (Kirby J).

77 Ibid.

78 Ibid 229 (Callinan J).

79 *Shaw* (2004) 203 ALR 143, 187 (Callinan J).

XIV MEMBERSHIP OF THE AUSTRALIAN BODY POLITIC

The most difficult issues pertaining to the nature of Australian citizenship arise in respect of the 'membership of the body politic' conceptualisation of citizenship. The majority in *Patterson* did not expand upon the meaning of being a member of the body politic of the Australian community. In *Te and Dang*, neither Mr Te nor Mr Dang was nor had been entitled to be enrolled as an elector (see s 93(1) of the *Commonwealth Electoral Act 1918* (Cth)). This was in contrast to Mr Taylor of the *Patterson* case, who was eligible to vote in Australia. Also in contrast to Mr Taylor was the applicant in *Shaw*, namely Mr Shaw, who had not enrolled as an elector on the national electoral rolls, nor was he eligible to vote.[80]

Three members of the Court in *Te and Dang* dealt with the issue of membership of the body politic. Gleeson CJ noted that the aliens power in the Constitution includes a power to decide who will be entitled to membership of the Australian body politic, and it extends to denying such membership to a person who arrived in this country as an alien and who has never taken up Australian citizenship.[81] Gleeson CJ also stated that, although it was not relevant in that case, a right to vote was not necessarily incompatible with the status of alienage. His Honour considered that it was within the power of the Parliament to extend the franchise to certain kinds of resident aliens, just as it was within the power of the Parliament to deny the vote to some citizens such as persons under a certain age.[82]

In McHugh J's words in *Te and Dang*, 'to say that an alien is a member of the body politic is a contradiction in terms'.[83] He did not, however, expand upon what it means to be a member of the body politic. The only other member of the Court in *Te and Dang* to consider the issue was Kirby J, and he left open the question of whether membership of the body politic of the nation involves an idea that is in anyway broader than, and different to, the notion of allegiance. On the facts, neither Mr Te nor Mr Dang was an elector, neither was qualified to participate in a referendum to alter the Constitution, and neither was liable to jury service and other like civic responsibilities and privileges in Australia.[84] To Kirby J, it was clear that neither man was a member of the Australian body politic.

Kirby J was then the only member of the Court in *Shaw* to examine again the notion of participation in the Australian community, in the context of being a non-alien. His Honour reiterated the importance of factors such as liability to perform jury

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80 Ibid 176 (Callinan J), and see also fn 214 in which Callinan J discusses s 93 of the *Commonwealth Electoral Act 1918* (Cth).

81 *Te and Dang* (2002) 212 CLR 162,175 (Gleeson CJ).

82 Ibid 173 (Gleeson CJ).

83 Ibid 189 (McHugh J).

84 Ibid 215-6 (Kirby J).

service, entitlement to public sector employment, obligation to perform national military service, and entitlement to enrol for participation in federal and State elections and in constitutional referenda.[85]

XV MEMBERSHIP OF THE BODY POLITIC AND THE RIGHT TO VOTE

A number of issues are raised by the concept of membership of the body politic. For example, does possession of the right to vote in Australia mean that a person is a member of the body politic and hence is an Australian citizen? Is it possible to be an Australian citizen and not be able to vote for a reason other than age or mental incapacity? Can a person be a member of the body politic of the Australian community and yet not be able to vote? As noted above, Gleeson CJ in *Te and Dang* did not consider the right to vote was confined to members of the Australian body politic, and was also of the opinion that it could be denied to citizens for reasons such as age.

If it is correct to say that there is a constitutional concept of Australian citizenship and not merely a statutory concept, are there any limitations upon the Commonwealth Parliament's power to lawfully restrict the right to vote? The answer to this last question depends upon whether the right to vote is a fundamental right possessed by all persons who are members of the Australian body politic, such that (for example) it could not lawfully be denied to a person by virtue of his or her gender, race, sexuality etc, as any such denial could not be said to be reasonably appropriate and adapted to a legitimate purpose.

It is interesting to note that the right to vote has been held *not* to be an essential right of US citizenship. In *United States v Valentine*,[86] the Puerto Rican defendants were indicted for refusing to submit to induction into the United States armed forces. The Selective Service Act made 'every male citizen of the United States' between the requisite ages liable for training and service in the US armed forces. The defendants argued that the Selective Service Act did not apply to them. In brief, Puerto Rico held and still holds the status of a self-governing Commonwealth in association with the United States; it is not a state of the United States. It has its own local House of Representatives and Senate. Whilst the people of Puerto Rico formally hold US citizenship, they lack voting representation in Congress and do not participate in the election of the President.[87] The court held:[88]

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85 *Shaw* (2004) 203 ALR 143, 167 *(*Kirby J).

86 *United States v Valentine* 288 F Supp 957 (1968).

87 Ibid 979.

88 Ibid 980.

> Defendants' error lies in assuming that the right to vote is an essential right of citizenship. The proposition is beguiling, but it will not stand analysis. The only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United States; a citizen cannot be either deported or denied re-entry.'

The court held that the right to vote is not made a right of US citizenship by the US Constitution, and then went on to find:[89]

> Since the franchise is not per se a right of citizenship, it follows that it is not a precondition to imposition of duties of citizenship.

Despite the position in relation to US citizenship, possession of the right to vote may be an essential indicia of membership of the Australian body politic.

Australian citizenship is, after all, a product of Australian history; contrast for example the approach taken in the US in respect of 'one vote one value', and the approach taken by the High Court in *McGinty v WA*. The High Court in *McGinty* recognised that historical context was a major factor in the development of the strict American doctrine pertaining to voting dilution, given the US history of racial gerrymandering. The applicability of the relevant US cases to the Australian context was clearly rejected in *McGinty*. The same may be said of the US position in respect of the right to vote. However, at the very least, the US position on whether the right to vote is an essential indicia of membership of the US body highlights the elusiveness of defining citizenship as membership of a body politic.

XVI OTHER RIGHTS AND DUTIES OF AUSTRALIAN CITIZENSHIP

Moving on from the initial question of who is an Australian citizen, and whether the right to vote is a citizenship right, interesting legal issues also arise in respect of the other rights and duties of an Australian citizen (ie *citizenship* rights and obligations, not human rights or generally applicable obligations on all persons living within Australia). Arguably, there are rights and duties attaching to a constitutional concept of Australian citizenship, and not merely statutory rights and duties.

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89 Ibid.

XVII WHETHER AUSTRALIAN CITIZENS HAVE A RIGHT OF ENTRY INTO AUSTRALIA

Most Australian citizens probably assume, without even consciously thinking about the issue, that they have a right to enter Australia, and that this right cannot be denied. However, this has now become a topic for litigation.

The issue arose in the matter of *Walsh v Minister for Immigration and Multicultural Affairs*.[90] Ms Walsh was born in Papua on 13 July 1970. Her father was an Australian citizen, having been born in New South Wales and her mother was an indigenous Papuan woman. They were not married at that time, but were subsequently married under the law of Papua New Guinea in 1980. At the time of his death, her father was still an Australian citizen. On 14 February 2000 Ms Walsh applied to be registered as an Australian citizen by descent. At that time she was living in PNG. Ms Walsh's application was made under s 10C of the *Australian Citizenship Act 1948*.

To obtain registration as an Australian citizen under s 10C, Ms Walsh had to establish:

(a) a natural parent was an Australian citizen at the time of her birth; and
(b) that parent
    (i) is an Australian citizen at the time an application under this section is made or
    (ii) is dead and at the time of his or her death was an Australian citizen;
(c) that she:
    (i) was born outside Australia on or after 26 January 1949;
    (ii) was aged 18 years or over on the day on which s10C commenced;
    (iii) failed for an acceptable reason to become registered as an Australian citizen under s10B or s11 as in force at any time before the commencement of s 10B; and
    (iv) the Minister is satisfied that she is of good character.

No issue arose about Ms Walsh's ability to satisfy elements (a), (b)(ii), c(ii), c(iii) and c(iv); however, Ms Walsh's application was refused by a delegate of the Minister on the ground that she did not meet element c(i). The delegate found that she was not 'born outside Australia' (Papua having been, at the time of her birth, a Territory of Australia) and hence did not satisfy s 10C(4)(c)(i) of the Australian Citizenship Act.

Ms Walsh also argued in the alternative that she had never lost her Australian citizenship. As to this issue:

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

(a) At the time of her birth in Papua, Ms Walsh was an Australian citizen by birth, because Papua was an external territory of Australia.
(b) Upon independence on 16 Sept 1975, Papua became part of the independent nation of Papua New Guinea, and ceased to be a territory of Australia: *Papua New Guinea Independence Act 1975* (Cth), s4.
(c) The Constitution of PNG dealt with the issue of citizenship of persons who had been Australian citizens prior to independence. In summary, Ms Walsh was a citizen of PNG unless she had a right to permanent residence in mainland Australia: see PNG Constitution, s 65(4)(a).[91]

The delegate found that Ms Walsh had lost her Australian citizenship because she held no right to permanent residence in mainland Australia at the relevant time.

The decision was challenged in the AAT and Ms Walsh lost. She appealed to the Federal Court, and won at first instance before Dowsett J. The Commonwealth then appealed to the Full Federal Court, and won; the Full Federal Court agreed that Ms Walsh was not entitled to Australian citizenship by virtue of descent. The Court then considered whether or not she had lost her Australian citizenship, ie whether or not she had a right of permanent residence in mainland Australia at the relevant time.

The Full Federal Court held that, although she was an Australian citizen prior to PNG's Independence Day, that did not mean that she had a right of permanent residence in mainland Australia. In summary, their Honours reasoned as follows. In 1975, the *Migration Act 1958* (Cth) imposed immigration controls on an 'immigrant' proposing to enter Australia, and was framed as a law with respect to immigration and emigration, enacted pursuant to s51(xxvii). An immigrant who entered Australia without an entry permit thereby became a prohibited immigrant and was liable to deportation: s 6(1) of the *Migration Act*. An immigrant could obtain a temporary or permanent entry permit. A person who was not an immigrant was not subject to that control, and therefore by implication had the right to enter and remain permanently in Australia.

In other words, the Full Federal Court found that, in 1975, the only persons who had a right of entry into Australia were non-immigrants. It was not until changes to the *Migration Act* in 1984 that the Act regulated entry by 'non-citizens' and became based on the aliens power, s 51(xix). In 1975, the right of entry for the purposes of the *Migration Act* was not possessed by Australian citizens but by persons who

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91 The Full Federal Court took the view that the reference to 'Australia' in s65 of the PNG Constitution could only sensible be read as referring to Australia excluding the former territories of Papua and New Guinea: see *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31, 35 (Heerey, Mansfield and Hely JJ).

were not immigrants. Thus, the Court said that, in determining whether Ms Walsh had a right to permanent residence in Australia, the question was not whether she was an Australian citizen but whether, had she sought to enter Australia, she would have been an immigrant.[92]

The Court held that Ms Walsh was an immigrant even though she was an Australian citizen. They said that

> possession of Australian citizenship may be an important factor in determining whether a person has become absorbed in the Australian community, and thus outside the immigration power, but it may not be decisive. An Australian national may, in some circumstances, enter Australia as an immigrant and regulation of such entry is within the constitutional competence of the Commonwealth Parliament.[93]

It must be recognised that Ms Walsh was in an unusual situation, having been born in an external Territory and never having permanently resided in a State or internal Territory of Australia prior to instituting these proceedings. The vast majority of Australian citizens are born within mainland Australia, and no question of them being immigrants ever arises.

Nevertheless, arguably it follows from the Full Federal Court's decision in *Walsh* that an Australian citizen has no constitutionally guaranteed right, deriving from his /her citizenship, to enter Australia.

In *Air Caledonie International v Commonwealth*,[94] a case in which the High Court held that an 'immigration clearance fee' was a tax insofar as it was imposed on Australian citizens, the Court stated that a citizen had 'the right to re-enter the country, without need of any Executive fiat or 'clearance', for so long as he retained his citizenship'. [95] It is not clear, however, whether the Court considered this to be a constitutionally guaranteed right of re-entry.

By way of comparison, as was noted by the court in *United States v Valentine*, a US citizen has an 'absolute and unqualified right' to residence within the territorial boundaries of the United States; a US citizen cannot be either deported or denied re-entry. In *Lopez v Franklin*,[96] the court stated, in relation to the US citizen child of non-citizen parents facing deportation, that the child 'is perfectly free to return to the United States whenever he has the desire and the means (either independently or

92 Ibid 35–6 (Heerey, Mansfield and Hely JJ).
93 Ibid 36 (Heerey, Mansfield and Hely JJ).
94 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462.
95 Ibid 470 (the Court).
96 *Lopez v Franklin* 427 F. Supp 345 (1977) 349.

through others) to do so. He faces no quotas or entry restrictions because he is not an alien but a native-born citizen of the United States'.

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. Arguably, as a right to residence within Australia is an inherent right possessed by Australian citizens, the terms of the *Migration Act* are irrelevant. Gaudron J in particular has suggested that there are rights that derive from citizenship: in *Kartinyeri v Commonwealth*,[97] her Honour stated 'rights deriving from citizenship inhere in the individual by reason of his or her membership of the Australian body politic and not by reason of any other consideration'.

The High Court subsequently refused Ms Walsh Special Leave to Appeal from the decision of the Full Federal Court.[98] The Court considered that there were insufficient prospects of success on any statutory construction argument, and also refused to grant Special Leave to Appeal in order to litigate the validity of the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) on the basis that the argument had not been raised in any lower court. The statutory construction argument had raised the constitutional issue about whether the applicant, as an Australian citizen, could have been an immigrant.

Nevertheless, despite the refusal of Special Leave to Appeal in *Walsh*, there may be scope for these constitutional issues to be considered in subsequent cases. Indeed, the plaintiff in High Court proceedings *S441/2003 v Minister for Immigration and Multicultural and Indigenous Affairs*,[99] currently proceeding by way of Case Stated, is arguing the existence of a constitutionally based right, held by a person born in Australia, to remain in Australia regardless of his or her statutory status (eg as an unlawful non-citizen for the purposes of the *Migration Act 1958* (Cth)).

XVIII A RE-EXAMINATION OF THE FREEDOM OF POLITICAL COMMUNICATION CASES

In *Lange v Commonwealth*, in a joint judgment, the High Court rejected the view that had previously been expressed by some members of the Court that the constitutionally guaranteed freedom of speech in relation to political matters amounted to an individual right and not merely a limitation upon power. The

97 *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 366 (Gaudron J).

98 See High Court Transcript in *Walsh v MIMA* B41/2002, 25 June 2003, available at http://www.austlii.edu.au/au/other/hca/transcripts/2002/B41/1.html. The Court was constituted by McHugh and Gummow JJ.

99 Transcript of hearing in Chambers before Kirby J on 1 September 2003 available at http://www.austlii.edu.au/au/other/HCATrans/2003/330.html

question had been left open by Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd*.[100] However, in *Lange v Commonwealth*, the Court stated that ss 7 and 24 and the related sections of the Constitution 'do not confer personal rights on individuals. Rather they preclude the curtailment of the protected freedom by the exercise of legislative or executive power'.[101]

One of the issues that the High Court had grappled with in these cases was the rationale for the implied freedom of speech in relation to political matters, namely the argument that the Constitution contained an implication of 'representative government' or 'representative democracy'. However, as discussed above, an alternative premise upon which to begin could be that the Constitution pre-supposes and is based upon the existence of a constitutional concept of Australian citizenship. Certain rights and obligations flow from that citizenship. If this is the premise upon which one begins, a different conclusion might be reached in *Lange*, namely the conclusion that the freedom of speech in relation to political matters is a personal right possessed by all Australian citizens and deriving from their membership of the Australian body politic.

XIX THE OBLIGATION OF ALLEGIANCE AND THE POSSIBILITY OF LOSS OF CITIZENSHIP

Obligations, as well as rights, are said to attach to the citizen. Traditionally it was said that the essence of the offence of treason lay in the violation of the allegiance that was owed to the Monarch.[102] In a modern statutory context, this is understood as loyalty to a country and its community. A new Australian citizen pledges 'loyalty to Australia and its people'. All Australian citizens are declared by the *Australian Citizenship Act* to share 'a common bond, involving reciprocal rights and obligations'.

In the post-September 11 climate,[103] the Commonwealth modernised and expanded the offence of treason: see s 80.1 of the *Criminal Code Act 1995* (Cth). Other legislative developments may take place post the Bali bombing incidents that occurred on October 12, 2002. For example, it is now treason to engage in conduct that assists by any means whatever, with intent to assist, another country or an organisation that is engaged in armed hostilities against the Australian Defence Force: see s 80.1(1)(f). This amendment should remove future difficulties such as those currently being experienced in respect of Mr David Hicks, an Australian

100 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 125 (Mason CJ, Toohey and Gaudron JJ).

101 *Lange* (1997) 189 CLR 502, 560 (the Court).

102 *Halsbury's Laws of England,* Vol 9 (1st ed, 1909) 450.

103 Post the attack on the World Trade Centre on September 11, 2001.

citizen who (at the time of writing this paper) is being held by the US in Guantanamo Bay after capture in Afghanistan, allegedly fighting for an organisation engaged in armed hostilities with the Australian Defence Force. Such conduct in the future will clearly be treasonous.

The penalty for treason is life imprisonment: see s 80.1 of the *Criminal Code Act*. However, will we also see attempts made by the Government to revoke Australian citizenship in instances of treason, or will the Commonwealth Parliament legislate on the issue? Section 21 of the *Australian Citizenship Act* makes provision for the loss of citizenship in certain circumstances, in the context of naturalisation. Broadly, citizenship may be lost because of citizenship fraud, offences committed before approval of the application for citizenship, or for migration-related fraud. However those circumstances do not include treasonous conduct post-naturalisation.

Leaving aside issues such as fraud or a failure to meet the prescribed requirements for naturalisation, in what circumstances (if any) can either a naturalised Australian citizen or an Australian citizen by birth be deprived of his or her citizenship? In *Afroyim v Rusk*,[104] the US Supreme Court considered whether Congress could enact a law stripping a Fourteenth Amendment US citizen of his or her citizenship when that citizenship had not been voluntarily renounced or given up. The Fourteenth Amendment to the US Constitution provides that 'all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside'. The US citizen in question had voted in a foreign political election. The Court rejected the argument that such a law could be enacted.

The Court in *Afroyim v Rusk* stated, 'In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.'[105] They went on to say, 'Once acquired, this Fourteenth Amendment citizenship … [is] not to be shifted, cancelled, or diluted at the will of the Federal Government, the States, or any other governmental unit.'[106] The Court held:[107]

> Citizenship is no light trifle to be jeopardized at any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without the protection of citizenship in any country in the world - as a man without a country. Citizenship in this Nation is a part of a co-operative affair. Its citizenry is the country and the country is the citizenry. The very nature of

104 *Afroyim v Rusk* 387 US 253 (1967).
105 Ibid 257.
106 Ibid 262.
107 Ibid 267–8.

> our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, colour or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.

This right is not possessed by non-Fourteenth Amendment US citizens. The US Congress may lawfully prescribe the circumstances in which a non-Fourteenth Amendment US citizen (eg a person born outside the United States to a US citizen parent) loses his or her US citizenship, for example by failing to meet certain residence requirements: see *Rogers v Bellei*.[108]

Without considering the issue in any detail in this paper, it can also be noted that there may be consequences, as a matter of international law, resulting from loss of citizenship. Article 8.1 of the Convention on the Reduction of Statelessness[109] provides that a Contracting State shall not deprive a person of its nationality if such deprivation would render him or her stateless. Articles 8.2 and 8.3 then contain exceptions to this prohibition. One such exception permitted to be retained by a Contracting State if in existence as a matter of national law at the time of signature, ratification or accession to that Convention is deprivation of citizenship on the basis that the person has, 'inconsistently with his duty of loyalty to the Contracting State … conducted himself in a manner seriously prejudicial to the vital interests of the State': Article 8.3(a)(ii). Some States which did have existing domestic laws on the issue, such as the United Kingdom, made declarations consistent with Article 8.3 at the time of signature, ratification or accession.

Difficult issues also arise about when a citizen can be said to have voluntarily relinquished his or her citizenship. The US courts have looked to evidence of intention to relinquish citizenship, whether expressed in words or as an inference from proved conduct. Intentional participation by an Australian citizen in military action on behalf of an 'enemy', against Australians, may in certain circumstances be sufficient to demonstrate a severing of the bond of allegiance between the individual and the Australian community. However, a very cautious approach must be taken. It was held in *Vance v Terrazas* that, 'in proving expatriation, an expatriating act, and an intent to relinquish citizenship must be proved by a preponderance of the evidence'.[110]

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108 *Rogers v Bellei* 401 US 815 (1970).

109 The Convention on the Reduction of Statelessness, New York, 30 August 1961, entered into force for Australia and generally on 13 December 1975.

110 *Vance v Terrazas* 444 US 252 (1979) 270.

XX CONCLUSION

Australian citizenship is now a litigious matter. The High Court and Federal Court are exploring the nature and consequences of Australian citizenship in an attempt to grapple with some of the issues left unanswered by the Constitution and the *Australian Citizenship Act*. There is currently a clear division within the members of the High Court on these issues. Future litigation may also generate argument about citizenship as a constitutional, and not merely statutory, concept.

The existence of a statutory concept of Australian citizenship should not be seen to preclude, automatically, a constitutional concept of Australian citizenship. Kirby J may have hinted at this in *Shaw*, when he distinguished between being a 'national of Australia' and a 'statutory citizen'.[111] The reference to being a 'national of Australia' could also be understood as a reference to being a constitutional citizen of Australia.

It will be interesting to see if members of the High Court have recourse to a constitutional concept of Australian citizenship when interpreting the Constitution, and indeed find that there is a constitutional implication of Australian citizenship. If such an implication exists, considerable debate will then be generated about the consequences flowing from such an implication.

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111 *Shaw v Minister for Immigration and Cultural Affairs* (2004) 203 ALR 143, 167 (Kirby J).