CITIZENSHIP IN AUSTRALIA: UNSCRAMBLING ITS MEANING

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[In this article the author highlights the differences between citizenship as a legal concept, and citizenship in the broader sense, as membership of the Australian community. It begins by identifying the present legal consequences of citizenship in Australia. In looking at the consequences collectively, it raises questions about their logic and consistency. The article proceeds to evaluate the importance of the legal status for the broader concept of membership of the community. By doing so, it challenges the significance of the legal status of citizenship as it presently stands in determining the broader, more fundamental question of who we regard as members of the Australian community.]

INTRODUCTION

The 1990s in Australia have seen a renewed interest in national identity. The decade preceding the centenary of Federation offers an opportunity to assess issues of fundamental national importance: the relationship between the individual and the state, between Australia and the United Kingdom,[1] between indigenous and non-indigenous Australians,[2] and between individuals in a multicultural society. In all of these contexts, sharp questions about Australian citizenship have been raised. An intensity has been added to these issues by the parallel movements abroad, as other countries confront their own identity.[3]

However, the Australian discussion has been confused, unclear and lacking focus. In reconsidering the meaning and consequences of citizenship, entirely different concepts of citizenship are often discussed. For some the discussion is about citizenship as a legal status:[4] who is recognised as a citizen by the state? Others view the notion of citizenship as participation and membership[5] within a democratic community. This may be broader than citizenship as a legal status. In

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1 See the report of the Republic Advisory Committee, *An Australian Republic: The Options* (1993) vols 1 and 2.

2 The Constitutional Centenary Foundation was established in 1991 to foster public discussion associated with the Constitution. This includes, amongst other things, the guarantee of rights, and the place of Aboriginal people in the Constitution.

3 The move to European Union has prompted European countries to evaluate questions of national identity. So too has the establishment of trade agreements which affect national sovereignty. For instance, the Commission on Citizenship of the Speaker of the House of Commons of the Parliament of the United Kingdom issued a report, *Encouraging Citizenship* (1990), cited in Robert Blackburn (ed), *Rights of Citizenship* (1993) 11, n 33; the Government of the United States established a Centre for Civic Education to develop new national standards in 1991, and in June 1994, the Canadian House of Commons' Standing Committee on Citizenship and Migration issued a report, *Canadian Citizenship: A Sense of Belonging* (1994), both cited in Civic Experts Group, *Civics and Citizenship Education: Report of the Civics Expert Group* (1994) 18.

4 See Roberto Alejandro, *Hermeneutics, Citizenship and the Public Sphere* (1993) 14, where this is referred to as 'citizenship as universality and as a legal construction'.

5 Ibid 21. Alejandro refers to this as 'Citizenship as communality and participation'.

addition, Kymlicka and Norman identify another concept, which is citizenship as 'desirable-activity'.[6] That is, looking at what we want our citizens to be like, what I have called the 'civic virtues' concept of citizenship.[7] Despite the different meanings of citizenship, most of the public discussion speaks of citizenship as a singular concept, oblivious to its shadings of meaning.

In Australia, all three concepts of citizenship are under scrutiny. In 1993, the Joint Standing Committee on Migration of the Australian Parliament was given a reference on the Australian Citizenship Act 1948 (Cth), and in 1994 it produced a report: *Australians All: Enhancing Australian Citizenship*.[8] It is concerned with citizenship as 'legal status'. In December 1993, the Senate Standing Committee on Legal and Constitutional Affairs of the Australian Parliament was asked to inquire into the possibility of a system of *National Citizenship Indicators*. It is inquiring into the social indicators which will enable measurement of the condition of legal, social and cultural rights of citizenship.[9] This is concerned with citizenship as 'membership of the community'. At the end of 1994, a Civic Experts group was established to provide the Government with a strategic plan for a non-partisan program of public education and information on Australian citizenship, among other things.[10] It is concerned with citizenship as 'civic virtue'. The fact that there have been different references reflects, to an extent, the differences of approach to citizenship.[11] A desire to distinguish between the different nature of the government inquiries is found, 18 months after they began, in the discussion paper of the National Citizenship indicators inquiry.[12]

This article seeks to highlight the differences between citizenship as a legal concept, and citizenship in the broader sense, as membership of the Australian community. First, the article attempts to identify the present legal consequences of citizenship in Australia. By looking at the consequences collectively, questions are raised about their logic and consistency. The article proceeds to evaluate the significance of the legal status of citizenship for the broader concept of membership of the community. By doing so, it challenges the significance of the legal status of citizenship as it presently stands in determining the broader, more fundamental question of who we regard as members of the Australian community.

6 Will Kymlicka and Wayne Norman, 'Return of the Citizen: A Survey of Recent Work on Citizenship Theory' (1994) 104 *Ethics* 352, 353.

7 Alejandro, above n 4, also refers to other models, such as 'Citizenship as amelioration of class conflicts' at 26, 'Citizenship as self sufficiency' at 28, and finally, his thesis of 'Citizenship as a hermeneutic endeavour' at 33 ff.

8 Joint Standing Committee on Migration, *Australians All: Enhancing Australian Citizenship* (1994) ('*Australians All*').

9 This body has become the Senate Legal and Constitutional References Committee. A Discussion Paper was published in May 1995, see below n 12.

10 See *Report of the Civics Expert Group*, above n 3.

11 It also reflects different political influences motivating government action.

12 Senate Legal and Constitutional References Committee, *Discussion Paper on A System of National Citizenship Indicators* (1995) 1.

CITIZENSHIP AS A LEGAL CONCEPT

The Australian Constitution

The Australian Constitution, as the foundation of our entire legal and governmental system, provides a logical starting point for the inquiry into citizenship as a legal concept. Curiously, citizenship of Australia is not mentioned in the Australian Constitution, although citizenship of a foreign power is mentioned in s 44(i) as a disqualification for membership of the Australian Parliament.[13] Section 34 is the first section to raise a concept of membership of the community in that it prescribes that the qualification of a member of the House of Representatives be 'a subject of the Queen'. Section 117 is the other section which raises the concept of membership, in that it prescribes that '[a] Subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.' The status of people in Australia centred around being 'British subjects' or 'Subjects of the Queen'. Those who were not British subjects were aliens. At Federation, Australia was still not independent of the United Kingdom.

Even so, Australian citizenship was discussed during the drafting of the Constitution. John Quick, a member of the Convention, who with Robert Garran later published the first commentary on the Constitution,[14] had sought the insertion in the Constitution of a power over Commonwealth citizenship. When this was not successful, he suggested that a new clause be inserted to confer citizenship on all persons resident within the Commonwealth, being natural born or naturalised subjects of the Queen, and not under any disability by the Parliament. Quick's concern was to create a national citizenship above State citizenship, and he was also concerned with the treatment of residents of one State in relation to another State and the wording of s 117 of the Constitution.[15] The proposed conferral of citizenship was similarly rejected.

This means that citizenship in Australia is not a constitutional concept. Furthermore, in failing to create or discuss Australian citizenship, the Commonwealth's power to legislate and define citizenship is uncertain. It is assumed that the Commonwealth has power to naturalise aliens under s 51(xix), but does this necessarily cover the citizenship of natural born members of the community?[16] Whether or not natural born Australians are covered by the aliens head of power, it could be argued that there is an inherent national power to legislate in this area.[17] This has never been conclusively determined, as it has not been called

[13] This is discussed further below under the section Working Rights at nn 144-56.

[14] John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth* (1901).

[15] See *Official Record of the Debates of the Australasian Federal Convention* (Sydney, 1891) vol I, 93, 546-7; (Sydney, 1897) vol II, 101; (Melbourne, 1898) vol IV, 664-91; (Melbourne, 1898) vol V, 1750-68, 1780-802, 2397-8; Cheryl Saunders, 'Citizenship under the Commonwealth Constitution' (1994) 3(3) *Constitutional Centenary Foundation Newsletter* 6.

[16] See the discussion in Michael Pryles, *Australian Citizenship Law* (1981) ch 1. In particular, the discussion at 10 of the Privy Council decision of *Cunningham v Tomey Homma* [1903] AC 151.

[17] See *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397-8; *Davis v Commonwealth* (1988) 166 CLR 79, 93.

into question in any case before the High Court. Thus, when the Constitutional Commission examined the question of citizenship in 1988, it recommended that s 51 of the Constitution be altered to give the Federal Parliament an express power to make laws with respect to nationality and citizenship.[18] It suggested that alteration be made to s 51(xix) so that it would become: (xix) nationality, citizenship, naturalisation, and aliens. This change was proposed so that the assumed validity of the Federal Government's power in the area would be made certain. However, this proposal did not go to referendum.

The Rights Committee of the Constitutional Commission proposed that the Constitution be amended to include a definition of Citizenship. The Committee suggested a section that stated:

> All persons who are (i) born in Australia; (ii) natural-born or adopted children of an Australian citizen; (iii) naturalised as Australians are citizens of Australia and shall not be deprived of citizenship except in accordance with a procedure prescribed by law which complies with the principles of fairness and natural justice.[19]

But the section, and the sentiment behind it, was not endorsed by the Commission in its final report. There were too many difficulties associated with placing this definition of citizenship in the Constitution itself, the Commission concluded.[20]

In the legal sense, therefore, citizenship in Australia is a statutory rather than a constitutional concept. It is thus to the Australian Citizenship Act 1948 (Cth) that we must first turn to understand citizenship as a legal concept.

Australian Citizenship Act 1948 (Cth)

The result, though, is profoundly disappointing. For what the Australian Citizenship Act offers is a definition stripped bare. The Act tells us nothing about the legal consequences of citizenship.[21]

Although the definition of an Australian citizen has changed since its inception in 1948,[22] causing confusion over the years,[23] the present formulation is reasonably clear. An Australian citizen is someone who falls within one of the following categories:

18 Constitutional Commission, *Final Report of the Constitutional Commission* (1988) vol 1, paras 4.177-4.198.

19 Ibid para 4.191.

20 Ibid para 4.195. For instance, the proposal would have effected changes in Australian citizenship law without a case being made to show why those changes should be made; and the changes would have increased the number of people with dual citizenship, which was seen as problematic. Overall, the Commission felt that the 'short constitutional provision' was not suitable.

21 This was one of the reasons for the reference to the Joint Standing Committee on Migration. See *Australians All*, above n 8, paras 1.8-1.18.

22 For a review of the changes until 1981 see Pryles, above n 16, 40-128. For a summary of the changes see *Australians All*, above n 8, paras 2.32-2.45. Sir Ninian Stephen surveyed the developments in 'Issues in Citizenship' on the occasion of The Deakin Lecture at the University of Melbourne, 26 August 1993.

23 As pointed out most persuasively in Sir Ninian Stephen's address, above n 22.

1. *by birth* if at the time of the person's birth in Australia, at least one parent is an Australian citizen or an Australian permanent resident;[24]
2. *by adoption* if adopted by an Australian citizen;[25]
3. *by descent* if a parent is an Australian citizen and registers the child's name at an Australian consulate within 18 years of the birth;[26] or
4. *by grant* of citizenship.[27]

Although transparent, two significant issues arise from the definition as it presently stands. The previous nationality by birthplace rule was changed on 20 August 1986. The nationality by birthplace-*jus soli* principle was abandoned for a specific reason. The new rule limited citizenship to those born in Australia to a parent who was an Australian citizen or permanent resident. The change highlighted the notion of citizenship representing a connection to the country, rather than mere birth on Australian territory. The immediate catalyst was the case *Kioa v West*,[28] where it had been argued that the child of the parents who were subject to a deportation order was an Australian citizen, and was therefore entitled to natural justice. Whilst this view was not adopted by the court, it was enough to encourage a change in the legislation.[29] Citizenship was not to be abused to obtain an immigration advantage.[30]

The grant of citizenship is within the Minister's discretion and is based upon a variety of factors that the Minister for Immigration must take into account. The applicant must be a permanent resident, over 18, and able to understand the nature of the application. In addition, the person has to have lived in Australia for a period of two years in the five years preceding the application, and this includes a period of 12 months in the two years before the application.[31] Also, the person has to be of good character, have a basic knowledge of English and an adequate knowledge of the responsibilities and privileges of Australian citizenship. Moreover, the applicant must be likely to reside or continue to reside in Australia, or maintain a close and continuing association with Australia.[32] Each of these factors tells us something about citizenship as a legal status representing a form of membership of the community.[33]

The necessity for adequate knowledge of the responsibilities and privileges of

24 Australian Citizenship Act 1948 (Cth) s 10.

25 Ibid s 10A (emphasis added).

26 Ibid s 10B (emphasis added).

27 Ibid s 13 (emphasis added).

28 (1985) 159 CLR 550.

29 The report on enhancing Australian citizenship proposed that this section remain unchanged. See *Australians All*, above n 8, paras 4.63-4.70. The decision of *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 ('*Teoh*') further supports the importance of citizenship in setting up a legitimate expectation leading to natural justice. See further discussion of *Teoh* below, nn 105-7.

30 See support for this in *Australians All*, above n 8, xxvi and paras 4.63-4.70.

31 Section 13(3) also provides a lesser period if the applicant has 'completed not less than three months' relevant defence service or has been discharged from relevant defence service before completing three months of that service as medically unfit by reason of the person's relevant defence service'.

32 Australian Citizenship Act 1948 (Cth) s 13.

33 The Standing Committee on Migration suggested that a review of the core criteria for the grant of citizenship be conducted in the lead up to the 50th anniversary of Australian citizenship, which occurs in 1999. See *Australians All*, above n 8, para 4.152.

Australian citizenship indicates that there are, in fact, legal consequences. What they are precisely is unexplained. In 1993, however, the preamble to the Act was changed, stating:

> 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, whilst respecting their diversity; and
>
> Persons granted Australian citizenship enjoy those 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.[34]

The preamble assists, no doubt, in determining in principle some of the consequences of citizenship, but there is no further explanation within the Australian Citizenship Act itself to tell the reader what they are. The preamble has little legal consequence. In essence, preambles are only of legal value when the words in a statute are unclear, as applied to the subject matter of the Act, or capable of more than one meaning. In those cases the preamble may assist in the interpretation of the statute. Moreover, the recital of facts in a preamble does not mean that the recitals are conclusive evidence of those facts — they are *prima facie* evidence only.[35]

As the Australian Citizenship Act does not provide us with much more than a bare definition of Australian citizenship, we must look to other pieces of legislation to discover the legal consequences of the status of citizenship.

Legislative Consequences of the Legal Status of Citizenship

The formal distinction between citizen and non-citizen is not extensive in Australian legislation. The two major pieces of Commonwealth legislation that distinguish citizens from non-citizens are the Electoral Act 1918 (Cth) and the Migration Act 1958 (Cth). In addition, each State's legislation on electoral rolls affirms the requirement of citizenship and each State's legislation prescribing jury service relies on the electoral rolls,[36] thereby linking it back to citizenship. The Public Service Act 1922 (Cth) distinguishes citizens and non-citizens when it comes to permanent employment,[37] and only Australian citizens can obtain an Australian passport under the Passports Act 1938 (Cth).[38] Interestingly, there is no distinction between citizen and non-citizen in the Defence Act 1903 (Cth).[39]

1 *Voting*

Part VII of the Electoral Act 1918 (Cth) outlines the 'Qualifications and Dis-

34 Introduced by Australian Citizenship Amendment Act 1993 (Cth) s 3.

35 *Dawson v Commonwealth* (1946) 73 CLR 157, cited in Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (3rd ed, 1988) para 4.33.

36 See below, nn 59-66.

37 See below nn 90-1.

38 See below nn 73-8.

39 See below nn 129-35.

qualifications for Enrolment and Voting'.[40] Those with Australian citizenship are entitled to be enrolled, as are British subjects who were enrolled immediately before 26 January 1984.[41] Those who are specifically not entitled to enrolment include non-citizens,[42] persons of unsound mind,[43] and persons who have been convicted and are under sentence for an offence punishable under the law of a State or Territory for five years or longer, or who have been convicted of treason or treachery and have not been pardoned.[44] The Victorian Constitution prescribes that Australian citizens or British subjects who were on the roll before 1984 are entitled to vote.[45] This mirrors the Commonwealth Electoral Act.[46]

Political participation in democratic systems highlights a significant legal consequence of citizenship. In Australia, of course, this is mandated. Not only are citizens entitled to vote, they are obliged to do so. Citizenship, in terms of voting, therefore confers both a legal right and a legal duty. However, not all citizens have the legal right to vote.[47] Non-citizens are placed alongside persons of unsound mind, and criminals,[48] when it comes to the *right* to participate in the political process. Prisoners, apparently, suffer a civil death when they commit crimes. Their conviction results in 'the annihilation of [their] legal existence and the consequent removal of all corresponding legal rights'.[49] This suggests that prisoners forfeit their citizenship rights when they are imprisoned, even though they are still citizens. Therefore, Parliament has the power to decide which citizens have the right to vote.

Some extra constitutional limitations may affect Parliament's power to curtail the right to vote. Article 25 of the International Covenant on Civil and Political Rights (ICCPR) provides:

> Every citizen shall have the right and the opportunity ... and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage.[50]

Australia has ratified this Covenant and, even though it has not been adopted in domestic legislation, it may have some influence over the Government's approach to voting rights. Moreover, the High Court has emphasised the funda-

40 Electoral Act 1918 (Cth) ss 93-7.

41 This relates to the history of the Australian Citizenship Act where the term British subject existed in Australia after it no longer did in the UK. This term was subsequently abolished in 1984. See Stephen, above n 22.

42 Electoral Act 1918 (Cth) s 93(7).

43 Ibid 93(8)(a).

44 Ibid 93(8)(b) and (c).

45 Constitution Act 1975 (Vic) s 48.

46 Constitution Act Amendment Act 1958 (Vic) s 103 provides for enrolment of electors for the Legislative Council and Legislative Assembly according to residence, or to the corresponding subdivision to the Commonwealth electorate.

47 Electoral Act 1918 (Cth) s 93.

48 Ibid s 93(8).

49 Jennifer Fitzgerald and George Zdenkowski, 'Voting Rights of Convicted Persons' (1987) 11 *Criminal Law Journal* 11.

50 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171; 6 ILM 368 (entered into force 1976).

mental nature of representative democracy in our Constitution[51] which may extend to an implied constitutional protection of the right to vote.[52] Whether the right to vote is clarified or not in constitutional contexts, the duty to vote, as prescribed in the Commonwealth Electoral Act, is clearly premised on one's citizenship.

The situation at the local government level is different from the Commonwealth and the States' legislation. For instance, the Local Government Act 1989 (Vic) entitles property owners[53] of any rateable land in a ward who are over 18 to be enrolled on the voter's roll, even if they are not on the electoral roll for the Legislative Assembly, and even if they do not reside in the ward.[54] So too occupiers[55] of any rateable land in the area who are over 18, and who do not reside in the ward in which that land is located, are entitled to be on the voter's roll. Corporations who are property owners or occupiers are entitled to appoint a person to represent the corporation or corporations and as such be placed on the roll.[56] Similar provisions exist in South Australia[57] and Tasmania.[58] As local government is the closest form of government to the people, and is concerned with the delivery of important services such as water, garbage collection, libraries, and other amenities, it is a significant part of the community. Therefore, voting rights *do* exist for some non-citizens in State local jurisdictions.

2 *Jury Service*

The notion of corresponding rights and duties leads to the discussion of jury service. The Constitution provides '[t]he Trial on indictment of any offence against any law of the Commonwealth shall be by jury'.[59] The Federal system relies on State laws to determine the composition of juries,[60] although the Jury Exemption Act 1965 (Cth) sets out who is *not* liable and shall *not* be summoned

51 See *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 149-52.

52 The High Court heard a challenge involving questions of the right to vote in September 1995 — *McGinty v The State of Western Australia* (No P44 of 1993). This reviews the case of *Attorney-General (Cth); ex rel McKinley v Commonwealth* (1975) 135 CLR 1 which does not confirm a right to vote in the Constitution.

53 Local Government Act 1989 (Vic) s 11(2) makes no distinction between property solely or jointly owned.

54 Ibid s 11(2).

55 Ibid s 13(4) states that 'a reference ... to the owner or occupier of any rateable land is, if work (as defined in s 4(1) of the Mineral Resources Development Act 1990) is being done on the land under a mining licence granted under Part 2 of that Act, a reference to the holder of the mining licence.'

56 Ibid s 13.

57 Local Government Amendment Act (No 3) 1984 (SA) s 91.

58 Local Government Act 1993 (Tas) s 254(2).

59 There is no clear definition of this term. It is just an offence which is so serious that it requires a jury. See discussion in Peter Hanks, *Constitutional Law in Australia* (1991) 409-11.

60 Section 68 of the Judiciary Act 1903 (Cth) provides for State procedural laws to apply in the trials and conviction on indictment of persons charged with Commonwealth offences. For High Court matters, s 77D requires that the laws that apply for the purpose of the trial of civil proceedings in the Supreme Court of the State or Territory apply in civil matters in which a trial is had with a jury in the High Court in that State or Territory. The right to seek an order that a trial of fact be heard by judge and jury exists in the federal context in Order 31 of the Federal Court Rules.

to serve as a juror in a federal court, a court of a State or a court of a Territory.[61]

Thus, the legal consequences flowing from citizenship, which logically should be consistent, are not. Each State has its own laws determining who should serve on a jury. Whilst the States determine liability for jury service primarily by electoral rolls,[62] each has disqualification provisions,[63] and all provide for exemption from jury service.[64] These disqualifications and exemptions mean that many citizens are not responsible for jury service. There are many differences in the Acts. One example of an inconsistency is within the category of persons 'entitled as of right to be excused from serving as a juror'. In NSW, a person who resides more than 56 km from the place at which the person is required to serve is entitled to claim an exemption,[65] whereas in Victoria, persons who reside more than 32 km from the court house at which they would be required to serve are entitled as of right to be excused.[66]

So the Commonwealth (to whom citizens are bound) abrogates to the States, in this case, the legal consequence of citizenship.

3 *Mobility Rights*

A further legal consequence of citizenship in Australia, presently distinguishing citizens from non-citizens, is the ability to enter and remain in Australia. The Migration Act 1958 (Cth) governs the 'entry into and presence in Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.'[67] This Act is specifically directed to regulating non-citizens, as opposed to conferring rights or duties upon citizens. When the Act was reformed in 1994, an objects clause was included. It now states that the 'Act is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'.[68]

All non-citizens have to obtain a visa in order to travel to Australia.[69] The entitlement to a visa is set out in the Act and Regulations. Therefore, whenever non-citizens, even permanent residents, leave the country, they do not have an absolute right of re-entry. Permanent residents need a Return (Residence) (Class

61 Jury Exemption Act 1965 (Cth) s 4. This includes, amongst others, the Governor General, Members of the Federal Executive Council and Members of both Houses of Parliament.

62 Juries Act 1967 (Vic) s 4; Jury Act 1977 (NSW) s 5; Jury Act 1899 (Tas) s 4; Jury Act 1929 (Qld) s 6; Juries Act 1957 (WA) s 4; Juries Act 1927 (SA) s 11; Juries Ordinance 1967 (ACT) s 9; Juries Act 1980 (NT) s 9.

63 Juries Act 1967 (Vic) ss 4(2), 4(3), and 5; Jury Act 1977 (NSW) s 6; Jury Act 1899 (Tas) ss 6 and 7; Jury Act 1929 (Qld) s 7; Juries Act 1957 (WA) s 5; Juries Act 1927 (SA) s 12; Juries Ordinance 1967 (ACT) s 10; Juries Act 1980 (NT) s 10.

64 Juries Act 1967 (Vic) s 4(4), Schedule 4; Jury Act 1977 (NSW) s 7, Schedule 3; Jury Act 1899 (Tas) s 7A, Schedule 1; Jury Act 1929 (Qld) s 8; Juries Act 1957 (WA) s 5(c), Schedule 2; Juries Act 1927 (SA) s 13, Schedule 3 (ineligibility); Juries Ordinance 1967 (ACT) s 11; and Juries Act 1980 (NT) s 11, Schedule 7.

65 Jury Act 1977 (NSW) s 7, Schedule 3.

66 Juries Act 1967 (Vic) s 4(4), Schedule 4.

67 See the opening words of the Act.

68 Migration Act 1958 (Cth) s 4(1). The authority to regulate non-citizens comes from the Commonwealth's power to legislate with respect to aliens and naturalisation in section 51(xix) of the Constitution.

69 Migration Act 1958 (Cth) s 42.

BB) visa if their visa does not entitle them to re-enter Australia after their departure. Even with that Return (Residence) visa, there are grounds upon which the Minister can deny re-entry of those persons.[70]

But does this mean that a consequence of citizenship is that Australian citizens have an absolute right of re-entry? The High Court has stated that '[t]he right of an Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive.'[71] Does this necessarily mean that the Australian Government cannot introduce a law that would require an Australian citizen to gain some form of clearance in order to enter? The Migration Reform Act 1992 (Cth) introduced into the Migration Act 1958 (Cth) the requirement of all persons to be 'immigration cleared' in order to enter Australia. If a person is a citizen, they need to show a clearance officer their Australian passport or prescribed other evidence.[72] This may imply that once a person's citizenship is established then they have a right of entry.

But what happens if the person does not have an Australian passport? Or if that passport has been cancelled? The Passport Act 1938 (Cth) regulates the issuance of passports. For practical purposes, in order to travel outside and return to Australia, Australians need a passport.[73] A passport is the official document issued by the state to its own citizens to enable them to travel abroad.[74] While non-citizens clearly do not have the right to a passport,[75] the right to a passport to travel in and out of Australia, for citizens, is not absolute. The Minister may refuse the issuance in certain circumstances.[76] These presently include where the applicant would be likely to engage in conduct prejudicial to the security of Australia or of a foreign country pursuant to the issuance.[77] The case of Wilfred Burchett is one famous example. Burchett, a controversial journalist, was denied a passport after he had left Australia in the 1950s. A Committee was set up to lobby the Government to grant Burchett a passport, relying on the Universal Declaration of Human Rights. This was to no avail, and an attempt to enter Australia in 1970 was not successful, despite having proof of

70 Subdivision D 'Visas may be cancelled on certain grounds' of Division 3 'Visas for Non-citizens'. Note, however, that there are certain procedures which must be followed, as set out in Subdivision E 'Procedure for cancelling visas under Subdivision D in or outside of Australia'.

71 *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 469.

72 Migration Act 1958 (Cth) s 166. The regulations have not prescribed other evidence pursuant to s 166(1)(a)(i).

73 Theoretically this is not a legal requirement under Australian law, but is generally required for overseas travel. See Robert Lancy, 'The Evolution of Australian Passport Law' (1982) 13 *MULR* 428. Note also that Australians who have dual citizenship are entitled to travel on their other country's passport, however, when they return to Australia they must have proof of Australian citizenship to return without a visa: Migration Act 1958 (Cth) s 166. Otherwise, they will have to pay for the cost of requiring the department to ascertain whether they are Australian citizens: Migration Act 1958 (Cth) s 171.

74 For a history of Australian passport law see Lancy, above n 73. Note the wording on the inside of the passport, which is a statement of the Governor-General requesting free passage, protection and assistance to the bearer.

75 Passport Act 1938 (Cth) s 7 provides for Australian citizens to be issued with Australian passports.

76 In common law, the right to issue passports is part of the prerogative of the Crown and no one is entitled as of right to demand a passport. See Lancy, above n 73, 432.

77 Passport Act 1938 (Cth) s 7E(1)(i). Also, if there is a warrant for the arrest of a person, or a condition of bail that the person remain in Australia: s 7B.

Australian citizenship.[78] This issue is not so clear under the present legislation. First, the Migration Act 1958 (Cth) now states that if a person cannot show evidence of their Australian citizenship, then they can request the Department of Immigration and Ethnic Affairs to assist that person, for a fee.[79] Moreover, Australia has ratified the ICCPR, Article 12 para (4) of which states: 'No one shall be arbitrarily deprived of the right to enter his [sic] own country.' There is no right in the Constitution which protects a citizen's right of entry to Australia, nor has the ICCPR been incorporated into Australian domestic law.[80] Therefore, it is not entirely clear that Australian citizens have an absolute right of entry into Australia.

A parallel issue to that of entry into Australia is the ability to stay in Australia. Temporary residents are only entitled to stay in the country for the length of time set out in their visa, and permanent residents may be deported in certain circumstances.[81] But do citizens have an absolute right to remain in Australia? The Extradition Act 1988 (Cth) provides for proceedings to determine whether a *person* is to be extradited, without determining the guilt or innocence of that person.[82] An extraditable person is defined in section 6, and again it is in terms of a *person*. This clearly includes citizens of Australia. But beyond the Extradition Act does the Australian Government have the ability to deport citizens? Under present legislation it does not appear so.[83] Recent debate about the presence of alleged Nazi war criminals, who settled in Australia in the aftermath of World War II and allegedly concealed their true identities, highlights the limits of deportation of Australian citizens. These people became Australian citizens. Under present laws, they cannot be deported. This provides an ironic contrast to the case of Burchett, an Australian citizen, who was kept out of Australia because of his political affiliations overseas. These alleged war criminals are protected because of their Australian citizenship.

A further issue relating to mobility is that non-citizens can be placed in administrative detention, as prescribed under the Migration Act 1958 (Cth).[84] The ability of the Government to do this was confirmed by the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.[85]

78 See Wilfred Burchett, *At the Barricades* (1981). There is not much case law on the discretion associated with the issue and denial of passports. See the discussion in Lancy, above n 73, 436, referring to *R v Holt; ex parte Glover* (unreported); and *In Marriage of H and H* (1985) FLC 80, 164.

79 Migration Act 1958 (Cth) s 171.

80 Note, however, the decision of the High Court in *Teoh* (1995) 128 ALR 353 which states that the Convention on the Rights of the Child provides a legitimate expectation for people that the government will take the treaty into account in exercising discretions which affect these rights.

81 Migration Act 1958 (Cth) ss 200-6.

82 Section 3(a).

83 In Canada, the case of *Re Federal Republic of Germany and Rauca* (1983) 41 OR (2d) 225 (CA) upheld the right to extradite a Canadian citizen, despite the Charter Right in s 6(1) of citizens to enter, remain and leave Canada. The Court held that the Extradition Act was justified under section 1 of the Charter, which allows for 'reasonable limits ... in a free and democratic society'.

84 Section 189 states that if an officer knows or reasonably suspects that a person in the migration zone is an unlawful non-citizen, the officer must detain the person.

85 (1992) 176 CLR 1 ('*Lim*').

The court upheld the power of the Executive under the Migration Act[86] to detain an alien held in custody for the purposes of expulsion or deportation. Such authority constituted an incident of executive power.[87] This was not entirely surprising, as it had been long upheld by the Australian courts as a necessary consequence of the power to deport. An earlier decision referred to in *Lim* was *Koo Wing Lau v Calwell*,[88] a Wartime Refugees Removal Act 1949 (Cth) case, dealing with the deportation of prescribed persons.[89]

This discussion of mobility rights shows that even though the law may be clear about non-citizens' rights, there is no corresponding clarity about citizens' rights, and therefore the legal consequences are not always easy to identify.

4 *Working Rights in the Public Service*

The Public Service Act 1922 (Cth) distinguishes between citizens and non-citizens when it comes to permanent employment. Permanent residents may be appointed on a probationary term, upon undertaking that they will seek Australian citizenship. Australian citizens receive automatic confirmation after two years on probation.[90] However there is no consistency across the States. For example, in Victoria citizenship is not a requirement for work in the public service.[91] Thus the Federal system complicates the consistency of the legal consequences of citizenship. As in the case of jury service, where there were inconsistent requirements, so too in public service employment there is a difference in the legal consequences of citizenship.

Each of the examples in this section of the article relates to the legislative consequences of the status of citizenship. They are concerned with duties to the state, such as voting and jury service and public service. In addition, the power to decide who enters Australia's territory revolves around the status of citizenship. Is there a common theme or logic for these legislative consequences? There is no uniformity or consistency between the States when the States' legislation is brought into play for jury service or public service; and while voting rights are consistent between the Commonwealth and the States for their own Parliaments, they are not the same at local government level. Finally, there is no clarity of legal consequence for citizenship as a result of the Migration Act 1958 (Cth).

The legal consequences of citizenship, however, are not confined to legislation. Beyond the legislation, we must also look to some of the decisions of the High Court, in order to determine common law principles that speak of legal consequences that flow from the legal status of citizenship.

86 Sections 54L and 54N as they then were.

87 *Lim* (1992) 176 CLR 1, 10 (Mason CJ), 32 (Brennan, Deane and Dawson JJ), 47 (Toohey J), 58 (Gaudron J) and 64 (McHugh J).

88 (1949) 80 CLR 533.

89 See discussion of Brennan, Deane and Dawson JJ in *Lim* (1992) 176 CLR 1, 31. For a critique of this approach see Mary Crock, 'Climbing Jacob's Ladder: The High Court and the Administrative Detention of Asylum Seekers in Australia' (1993) 15 *Sydney Law Review* 338, 349.

90 Section 47.

91 Permanent residents may be eligible for appointment. See Public Sector Management Act 1992 (Vic) s 36.

Non-Legislative Consequences of the Legal Status of Citizenship

1 *Rights of Citizenship*

The absence of an explicit constitutional statement of citizenship duties in the Constitution is parallelled by the lack of an explicit statement about the rights of citizens. There has been renewed discussion in the community about the question of a Bill of Rights in the Constitution, but not much attention has been paid to whose rights they would represent. Would they be rights of citizens, or of Australian residents? The matter was raised in *obiter* discussion in *Cunliffe v Commonwealth*[92] and provides further insight into the legal consequences flowing from citizenship.

This question arose in a migration law case. The Migration Act 1958 (Cth) was amended[93] to include a section imposing restrictions on the giving of 'immigration assistance'.[94] Only registered agents could legally provide immigration assistance,[95] with harsh penalties applying for breach of that section.[96] Cunliffe, a solicitor, challenged the Act. The relevant challenge involved the question of free speech.[97] In the discussion about implied rights, some of the judges addressed the question of whether an implied freedom, such as the one claimed, could be claimed by non-citizens.

Chief Justice Mason was the only judge to embrace the idea that non-citizens in Australia were entitled to the protection afforded by the Constitution and the laws of Australia.[98] Relying on *Re Bolton; ex parte Beane*,[99] he said that non-citizens within Australia were entitled to invoke the implied freedom of communication, 'particularly when they are exercising that freedom for the purpose, or in the course, of establishing their status as entrants and refugees or asserting a claim against government or seeking the protection of the government.'[100]

However, Justices Brennan (as he then was) and Deane sought to distinguish a non-citizen's right to the protection of the law, from the right to invoke the Constitutional protection of free speech. This distinction means that there are different legal consequences flowing from citizenship. Justice Brennan grounded this distinction in the notion of representative democracy. Aliens 'have no constitutional right to participate in or to be consulted on matters of government in this country' and the 'Constitution contains no implications that the freedom is available to aliens who are applying for or who have applied for visas ... Nor

92 (1994) 182 CLR 272.

93 Migration Amendment Act (No 3) 1992 (Cth).

94 Section 114B of the Act as numbered at that time. Now s 276.

95 Barristers and solicitors are exempt under s 277, in relation to court proceedings only.

96 Monetary sum of $5000: s 280. Also note the risk of imprisonment of 10 years for charging or receiving fees without being registered: s 282.

97 The other challenges were that there was no constitutional head of power for the Commonwealth to legislate and that it infringed s 92 of the Constitution because it impinged freedom of intercourse between the states.

98 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 299.

99 (1987) 162 CLR 514, 521-2.

100 *Cunliffe* (1994) 182 CLR 272, 299.

is there any basis for implying that aliens have a constitutional right'.[101] More specifically he stated: 'if the Constitution implies a right of access to government or to the repositories of statutory power ... it would be a citizen's right.'[102] The crucial point here is that the centrality of citizenship is the right to participate in, or to be consulted in government. If you do not have the right to vote, then you do not have the right to rely on the Constitutional protection of free speech in trying to invalidate a law.

Deane J accepted part of Mason CJ's argument, that non-citizens could rely on the ordinary law, and included in this some of the Constitution's guarantees, directives and prohibitions,[103] but declared that a non-citizen

> stands outside the people of the Commonwealth whose freedom of political communication and discussion is a necessary incident of the Constitution's doctrine of representative democracy. That being so the incident does not operate to directly confer rights or immunities upon an alien. Any benefit to an alien must be indirect in the sense that it flows from the freedom or immunity of those who are citizens.[104]

Deane J noted that the effect of his distinction might be of no practical consequence. However, the significance is extreme in determining the rights that flow from citizenship.

2 *Common Law Rights of Citizenship*

The decision of Gaudron J in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh*[105] adds a further dimension to the legal consequences of the status of citizen. With neither authority nor precedent to support her approach, her Honour relied on common law rights of citizenship. In deciding whether an executive decision-maker in a migration matter should have taken into account the interests of the children of a man who was about to be deported, Justice Gaudron relied on the children's Australian citizenship. She argued:

> [C]itizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's welfare, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case.[106]

With respect, her argument would have been strengthened if she had explained what it was about citizenship that led to this right. For instance, the right of citizens to remain in their country could have been expanded, so that, in order for the children to remain in Australia, and have the benefit of their father's protection, he should not be deported. Instead, her Honour only referred to the

101 Ibid 328.
102 Ibid.
103 Sections 80, 92, 116.
104 *Cunliffe* (1994) 182 CLR 272, 336.
105 (1995) 128 ALR 353, 374-6.
106 Ibid 375.

obligations that a state has to its citizens in a 'civilised democratic society'.[107] It is not clear upon which theories of citizenship her Honour was relying. However, questions of mobility and the right to remain in one's country are important consequences which have been addressed above.

The discussion so far has identified the legal consequences of the legal status of citizenship. This has not been done by looking at the Australian Constitution, nor has it been accomplished by looking at the Australian Citizenship Act. Rather, it has required searching through disparate pieces of legislation and separate pronouncements by the High Court of Australia. And the consequences are not always clear nor logically consistent. This gives us some indication of why the meaning of Australian citizenship is not altogether clear. The other reason is that the discussions about citizenship in the Australian context are broader, in that they are looking at questions of identity and membership within the Australian community. The next section will examine the significance of these legal consequences of citizenship as a legal status, for the broader question of membership in the community.

CITIZENSHIP AS MEMBERSHIP OF THE COMMUNITY

The word 'citizen' in contrast to the word 'subject' indicates something about citizenship. 'To be a subject is to be subjected to authority — subjected to particular rules, laws and obligations imposed by the state.'[108] In contrast, there is a more democratic foundation to the concept of citizenship — the individual no longer has to be subject to the state; sovereignty lies with the people. Notions of equality and ideas of participation infuse this difference.[109]

Citizenship is a political concept as much as it is legal, for it is concerned with the interaction and relationship between individuals, and between the state and individuals. In this sense, citizenship is discussed as membership of the community. Indeed, history is strewn with instances where citizenship and membership of the community are integrally linked. Fifth century Athens is a starting point where Pericles' Citizenship Law of 451-50 BCE required both parents to be citizens and to have a 'share in the city'.[110] Previously, Athenian citizenship could be obtained for sons provided that the father had been a citizen.[111] Thereafter, though, citizens were described by Aristotle as 'all who share in the civic life of ruling and being ruled in turn'.[112] Montesquieu viewed the citizen as a legal construction aimed at order; Kant saw citizens as those who obeyed law,

107 Ibid 375.

108 Laksiri Jayasuriya, 'Citizens' in Richard Nile (ed), *Australian Civilisation* (1994) 93, 94. See also discussions of difference by Paul Craig, 'Public Law, Sovereignty and Citizenship' in Robert Blackburn (ed), *Rights of Citizenship* (1993) 307; David Wishart, 'Allegiance and Citizenship as Concepts in Constitutional Law' (1986) 15 *MULR* 662.

109 See Julian Thomas, 'Citizenship and Historical Sensibility' (1993) 25 *Australian Historical Studies* 383; Anne Phillips, 'Citizenship Theory and Feminist Theory' in G Andrews (ed), *Citizenship* (1991) 76.

110 Cynthia Patterson, *Pericles' Citizenship Law of 451-50 BC* (1981) 1.

111 Ibid 8.

112 Aristotle, *Politics* (ed Sir Ernest Barker, 1946) 134, cited in *Australians All*, above n 8, para 2.5.

and Rousseau was concerned with active participation.[113] Paul Craig discusses the modern theorists concerned with citizenship: Rawls, Dworkin and Sandel with their differing views of community and the relationship between the individual and the state.[114] Each of their discussions were concerned with public participation as a representation of citizenship.

Yet, membership has been recognised as something more than this. One of the noted theorists on citizenship, T H Marshall, defined citizenship as a status bestowed on those who are *full members* of a community. In doing so he expanded citizenship to include social rights, as well as political and civil rights.[115] Thus, according to Marshall, social citizenship covers basic living standards, including health care and education.[116] This discussion of the broader notion of citizenship has influenced the separate government inquiries into citizenship.[117]

Many feminist theorists argue that citizenship is essentially a male construct. While the language of citizenship has often be seen as gender neutral, the theorists view it as 'perpetuat[ing] the invisibility of women' as citizens.[118] Carole Pateman, for example, sees liberal citizenship as essentially patriarchal, whereby it has revolved around a social contract giving rights to men. Civil rights are essentially public rights, which women have not been able to exercise to the same extent as men, because of their traditional roles in the private sphere.[119] Margaret Thornton looks at the civil status of women as citizens in the early years of the twentieth century to 'illustrate the peripheral civil status of women as citizens', and therefore questions the full membership consequences of citizenship.[120] Even Marshall's broader view of membership of the community, which includes social rights, has not been free of problems for women: the right to employment, one of the social rights, has traditionally been seen as the domain of men as bread winners.[121]

All of these issues raised in the debate about citizenship theory are therefore relevant to this article's attempt to unscramble Australian citizenship. For the issues raised in the public discussions about citizenship are not confined to the legal consequences of the status of citizen as discussed in the first part of this article. Rather, we need to look at the broader notions of membership in the community, such as participation and social membership, to assess who in fact are treated as members and how that relates to the legal consequences identified.

113 See the discussion by Alejandro, above n 4, 13.

114 See Craig, above n 108.

115 My emphasis. See T H Marshall, *Citizenship and Social Class* (1950) and discussions about Marshall's work in Ursula Vogel and Michael Moran (eds), *The Frontiers of Citizenship* (1991).

116 See also T H Marshall, *Sociology at the Crossroads & Other Essays* (1963).

117 *Australians All*, above n 8. National Citizenship Indicators discussion paper, above n 12. The philosophy underlying *Report of the Civics Expert Group*, above n 3 is to give all people access to the political process through education.

118 Louise Ackers, 'Women, Citizenship and European Community Law : The Gender Implications of the Free Movement Provisions' (1994) 4 *Journal of Social Welfare and Family Law* 391, 392.

119 See generally Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (1989); Carole Pateman, *The Sexual Contract* (1991).

120 Margaret Thornton, 'Embodying the Citizen' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995) 198.

121 Phillips, above n 109, 78.

Political Membership

1 *Voting*

The consequences of not being able to vote are striking. Non-citizens cannot participate in a defining moment of democratic life in a community. Most dramatically, permanent residents who view Australia as their home are not entitled to vote even though they may participate in the community in other ways.

An inability to vote reflects an inability to exercise any real power within the community. Moreover, in a country which makes voting compulsory, it is clear who is a member of the community and who is not. Historically, this point has been made most poignantly with regard to the Aboriginal community. In 1902, the Commonwealth Electoral Act denied Aboriginal people the right to vote. Extraordinarily, and anomalously, the Aborigines who had been voting in their own states, were stripped of that right. Aborigines waited 60 years for the passage of amending legislation, and in the Federal election of 1963 they were entitled to vote.[122] This was a significant step towards Aboriginal membership in the community.

But does the right to vote mean that a person is a full member of the community? In the Aboriginal context, the need to pay attention to matters such as land rights as well as access to social rights such as health, education and employment (still widely recognised as deficient) illustrates that a right to vote does not mean one is a full member of the community. This equally applies to other socially and economically disadvantaged groups within the community. Non-Aboriginal women have had the vote in Australia since 1902, however this has not translated to equal representation in Parliament, which is arguably a deficiency in relation to the notions of representative democracy.[123] Thus, one legal consequence of citizenship — voting — does not necessarily lead to full membership in the community.

Further, there is an inconsistency about voting rights and how they relate to the legal status of citizenship, in that citizens are not the only persons entitled to vote in all jurisdictions in Australia. Local government elections in some States[124] show us this is not the case, as was discussed in the first part of this article. Local government often reflects the grass roots level of participation in the community, in that it deals with every day services that are significant in the sense of membership and identity within a particular area.

Even with the misgivings about the extent to which voting rights make a person a full member of the community, consideration should be given to whether voting rights at the Commonwealth and State levels should be restricted to citizens. Should they be extended to permanent residents, who we regard as members of the community in other contexts? The present situation in New

122 For further discussion on the voting rights of Aborigines, see Pat Stretton and Christine Finnimore, 'Black Fellow Citizens: Aborigines and the Commonwealth Franchise' (1993) 25 *Australian Historical Studies* 521.

123 See Deborah Cass and Kim Rubenstein, 'Representation/s of Women in the Australian Constitutional System' (1995) 17 *Adelaide Law Review* 3.

124 WA and NSW require that electors be on the Commonwealth or State electoral roles.

Zealand is instructive. The Electoral Act 1993 (NZ) entitles permanent residents of New Zealand to be registered as electors.[125] A permanent resident is someone who resides in New Zealand.[126] New Zealand citizens and permanent residents must have resided continuously in New Zealand for a period of not less than one year in order to be registered.[127]

If people are living in Australia in a way which they perceive to be permanent, and they are legally entitled to live in Australia permanently and participate in the community in other ways,[128] why should they not be entitled to vote?

2 *Jury Service*

While jury service is a duty which citizens can perform, it is *not* performed uniformly by all citizens, so the consequences for non-citizens are less dramatic. They are not obviously singled out as non-members of the community. Whilst performance of that duty represents one's commitment to the legal process, and to the democratic notions of justice in being judged by one's community, it is not a key event in all citizen's lives. Non-citizens and ineligible citizens are equal when it comes to jury service as members of a community; there is no distinction between them. Therefore, whilst citizenship may be an important element of the duty to perform jury service, it is not as important an element in defining membership of the community in the sense of identity and belonging.

The same question, however, arises about the logic of excluding permanent residents from serving on juries. If they reside permanently as part of the community, surely they reflect part of the community whom the jury are meant to represent, as peers judging their fellow members?

3 *Military service*

Perhaps an underlying reason for not allowing permanent residents the right to vote or serve on a jury is that they may be loyal to another country, and that loyalty precludes them from being a full members of the country in which they are permanently residing? If this were so, one would think it would translate into the defence of the nation. If one cannot rely on people who owe allegiance to another country to vote or to form a jury then logically they should not be entitled to serve in the defence of the nation. But the distinction of citizen is not present for the purpose of serving in the military defence of the country. That is why is did not figure in the first part of this article.

The Defence Act 1903 (Cth) does not exclude non-citizens from voluntarily joining the forces,[129] nor is there a distinction for the purpose of compulsory conscription. Section 59 outlines who is presently liable to serve in the Defence Force in time of war, and all persons (except those who are exempt from the section or to whom it does not apply) who have *resided in Australia* for not less

125 Section 74.

126 And is not someone to whom s 7 of the Immigration Act 1987 (NZ) applies, nor is obliged to leave New Zealand pursuant to the Immigration Act 1987 (NZ).

127 Section 74(b).

128 See discussion below on social and economic membership rights at nn 142-3.

129 Section 34.

than six months and who are over 18 and under 60, are liable. Exemptions are on the basis of mental or physical disability. It does not apply to persons whose presence in Australia is solely related to employment in service of a government outside Australia, or to a prescribed official of an international organisation, or to a member of the Defence Force.[130]

Historically, Australia has called upon non-citizens to form part of the defence force.[131] The question of whether this was legal was considered by the High Court in *Polites v The Commonwealth*.[132] The National Security Act 1939-1943 (Cth) gave the Governor-General power to make regulations requiring '*persons* to place themselves, their services and their property at the disposal of the Commonwealth.'[133] Polites, a Greek national, challenged the validity of the regulations requiring service of resident aliens.[134]

The power of the Governor-General to make regulations for *all persons* posed the chief interpretive problem for the court. The principles of international law prevented the imposition upon resident aliens of an obligation to serve in the armed forces of the country in which they resided, unless the state to which they belonged consented to waive the ordinarily recognised exemption. Having accepted this, the question for the court was: should they interpret s 13A in light of international law or could Parliament legislate in a manner that was inconsistent with it? The court held that Parliament had been clear in its intention to include aliens, and according to the principles of national sovereignty, had the power according to its own Constitutional framework to impose such a requirement. Unfortunately, the analysis of the court was confined to this question, and the breadth of the Executive power. There was little, if any, comment on what the requirement meant for the status of the Greek national, Polites, as a resident in Australia. Chief Justice Latham, however, stated:

> It is for the Government of the Commonwealth to consider the political significance, taking into account the obvious risk of the Commonwealth having no ground of objection if Australians who happen to be in foreign countries are conscripted for military service there.[135]

As such, service as a soldier need not, and has not been, the exclusive duty of Australian citizens.

Ultimately, it is a political question for the government of the day to decide whether national service is necessary and, if so, whether to require it exclusively of citizens. As the situation stands at present, the Government can call upon non-citizens who reside in Australia to serve in the defence force. The political decision translates into a legal requirement. In looking at citizenship as the broader concept of membership of the community, the requirement to serve

130 Section 61C.

131 For a more detailed discussion of the historical developments see Ann-Mari Jordens, *Redefining Australians: Immigration, Citizenship and National Identity* (1995) ch 8.

132 (1945) 70 CLR 60.

133 Section 13A.

134 National Security (Aliens Service) Regulations 1942 (Cth).

135 *Polites v The Commonwealth* (1945) 70 CLR 60, 73.

one's community as a soldier is one factor identifying those who are members. In this example of service as a soldier, many non-citizens were brought within this concept of citizenship as membership, and have the potential to be so within current legislation. This brings into sharp focus the difference between citizenship as a legal construct and citizenship in terms of the broader notion of membership of the community. Moreover, the significance is brought into even sharper focus in that those non-citizens who were forced to fight for Australia were not entitled to vote in Commonwealth elections, nor would they be now, if called upon to defend the country. Further, while on active service abroad, they did not have a right of re-entry. This therefore calls into question the principle of confining voting rights to citizens, and the consistency of some of the mobility principles discussed below.

4 *Mobility Rights*

The discussion in the first section of this article distinguishing citizens' rights of mobility from those of non-citizens is a clear example of the concept of membership of the community underlying the legal status of citizen in the legislation. It is in order to decide who we *want* as members of our community that the Parliament decides to exclude people's entry, decides when they must leave, and even places non-citizens in administrative detention. The notion of sovereignty, and the right of a country to decide who it lets in to its border, is premised on a belief in that country's right to determine its own membership. The relevance of this notion of sovereignty is arguably outdated. As Mary Crock writes in the *Sydney Law Review*: 'The question remains whether such a ruling can be sustained in a world where isolationist philosophies are fast giving way to the internationalism of the "New World Order."'[136] There is a renewed world-wide interest in the consequences of citizenship, largely because of an acceptance that, through globalisation, the authority of countries to stand alone from other world developments is declining. This has translated to mobility rights not being restricted throughout Europe for members of the European Community, and may translate further throughout the world as trade agreements translate into movement of people.

In summary, each of the legislative consequences discussed in the first part of the article only translates into political consequences of citizenship and they do not encapsulate full membership as outlined by Marshall.[137] From a feminist perspective, they also only deal with public rights and duties, and do not enter into the private/domestic realms, therefore affecting the level of membership of women in the community. In themselves, the consequences also raise anomalies and inconsistencies when considering the broader question of membership. Why should permanent residents be liable to serve in the defence of the nation, when they are not entitled to vote or form part of a jury, and may not even have a right of re-entry into Australia?

136 Mary Crock, above n 89, 346, discussing the High Court decision of *Lim*.

137 See above nn 115-6.

5 *Fundamental Rights and Membership of the Community*

The differences drawn by the judges in the High Court decision of *Cunliffe*, discussed in the first section of this article,[138] also provide some commentary on the different views of the Court on membership in the community and the way it relates to the legal status of the citizen. Deane and Brennan JJ suggest that the key concept underlying citizenship is voting, and the right to participate in government. Therefore, according to this analysis, certain prisoners cannot rely on those constitutional rights associated with representative democracy; nor can permanent residents who have been living here for many years.

In making a distinction between (i) the laws that flow from the Constitution, (ii) the guarantees explicitly within the Constitution, and (iii) the guarantees that flow from the fundamental principles underlying the Constitution, the judges create different levels of membership. According to the philosophy expounded by Deane and Brennan JJ, as non-citizens do not vote and participate, they cannot claim the benefit of the laws that gain their authority from our representative system encapsulated in the Constitution. Yet Deane and Brennan JJ accepted the decision in *Re Bolton*[139] in saying that anyone present in the country is entitled to protection of Australian law. They agree that those who are subject to the law are entitled to the protection of it. However, their judgments essentially reject the broader proposition: that a non-citizen who is subject to the Constitution should be entitled to the protection of it.

Mason CJ's approach is broader, in accepting that the legal status of citizenship represents more than voting rights. Residents of the community are entitled to the protection of the Constitution and the law of the country. This is consistent with the approach that has been taken in Canada in relation to the Charter of Rights and Freedoms. The right to invoke Charter rights has been conferred upon 'everyone',[140] and this has included human beings who are physically present in Canada, and by virtue of such presence are amenable to Canadian law.[141] This view looks at membership as something fundamentally larger than the present legal status of citizenship. Mason CJ affirms a broader understanding of membership within the community which gives greater legal protection to all residents.

Social and Economic 'Membership' Rights

The discussion about theories of citizenship showed that the term citizenship means more than political rights. Membership of the community must also involve other forms of participation. T H Marshall raised social and economic rights as fundamental elements of citizenship. Factors which may be considered as representing social membership of a community are working rights, social

138 See discussion above nn 92-104.

139 *Re Bolton; ex parte Beane* (1987) 162 CLR 514.

140 Section 7.

141 *Singh v Minister of Employment and Immigration* [1985] SCR 177, 202.

security rights, and the duty to pay tax.[142]

Entitlements to social and economic rights are not exclusive to Australian citizens. The other legal status which recognises membership of the community in this social sense is lawful non-citizens on permanent visas. Those who are on temporary visas, or who are unlawful non-citizens are often excluded from this membership.[143]

1 *Working Rights*

There is nothing in the Constitution which prevents non-citizens from working generally in Australia. However, being elected as a parliamentary representative is another matter. Pursuant to s 34 of the Constitution, Parliament has prescribed that the person be at least 18 and an Australian citizen.[144] Moreover, being a citizen of another country disqualifies persons from being members of Parliament.[145] Dual citizenship in Australia raises anomalous issues, with some citizens being treated differently to others.[146] Australian citizens who have not done all that is reasonable on their part to denounce their former citizenship are not entitled to be members of Parliament.[147]

The question of membership of the community and allegiance to one country only in order to serve the country raises some interesting questions that have been underpinning questions of membership as expressed through voting, jury service and military service. Does membership of the community require allegiance to one country only? Is this a realistic requirement, and a necessary requirement in a period of globalisation? The disability of non-citizens working in government must be explained in the same terms as the distinctions drawn for voting rights, and for membership of Parliament. However, this is not consistent throughout Australia.

Other working rights, however, are determined by the Migration Act 1958 (Cth), and the terms and conditions of the visas of those who enter the country as lawful non-citizens.[148] There are many visa conditions in Schedule 8 of the Migration Act which are concerned with working rights. Schedule 2 of the Act outlines the specific conditions for different types of visas including the blanket

142 The discussion paper of the National Citizenship Indicators Inquiry lists as range of possible matters which involve rights and duties of citizenship in this broader sense, above n 12, 61-7.

143 Membership rights of non-citizens has recently been an issue in the United States. Proposition 187 of California, which threatened to deny illegal aliens health care and social security benefits, is an extreme example. More broadly, following on from their 'Contract with America', House Republicans drafted legislation to bar most legal migrants from 60 Federal programs, prohibiting them from receiving free childhood immunisations, housing assistance, Medicaid, subsidised school lunches and many other federal benefits. A retreat from this plan did occur, when Republicans said they did not want to enact policy that could be seen as hostile to immigrants who live in the US lawfully. See *Washington Post* (Washington), National Weekly Editions, 2-8 January 1995, 16, 18-19, and 20-6 February 1995, 25.

144 Electoral Act 1918 (Cth) s 163.

145 Section 44(i).

146 This was examined in *Australians All*, above n 8.

147 See *Sykes v Cleary [No 2]* (1992) 176 CLR 77, and Michael Pryles, 'Nationality Qualifications for members of Parliament' (1982) 8 *Monash University Law Review* 163.

148 Migration Act 1958 (Cth) s 41(2)(b) states that the regulations may provide for the imposition of a condition upon the kind of work that may be done in Australia.

denial of working rights which applies to the short-stay (visitor) visa.[149] However, beyond the short stay, the majority of temporary visas permit work of some sort, depending on the class of visa. Some student visas entitle the person to work up to 20 hours a week while in Australia.[150] Other conditions vary, from engaging in work relevant to the conduct of the business or performance of the task specified in the visa application,[151] to being entitled to work only for the person who has sponsored one's visa, unless permission is given.[152]

Given that many temporary residents and most permanent residents do have the ability to work, then in practical terms citizens and non-citizens exercise the same level of membership, in the social sense of citizenship. And with unemployment figures, this also may mean the same level of unemployment.[153] Ultimately, however, the Government has the ability to determine the working rights a non-citizen will have on entering the country through the allocation of certain types of visas.[154] In contrast, Australian citizens have a basic right to work, although this is not articulated in any specific document.

Working rights are protected in the International Covenant on Economic, Social and Cultural Rights.[155] If such a right was explicitly stated in the Australian Constitution it could stop the Government from restricting citizens from working. But that right does not exist, and the Government could restrict citizens from working in a way similar to restrictions exercised over non-citizens.[156] This further confirms that membership of the community in social terms is not confined to legal citizens.

2 *Social Security and Taxation*

Another significant reflection of one's membership of a community is the state's approach to social services support. The present Keating Government has a commitment to social justice. Its stated purpose is to expand choices and opportunities to enable people to *fully participate in economic, social and political life.*[157] This reflects a desire to create a fair and prosperous society. It also accords with Marshall's expanded view of citizenship. In order to participate in the community, one needs the means to do so.[158] The various Acts of Parliament designating entitlements to benefits displays the breadth of the present program. Medical services fall under the Health Insurance Act 1973 (Cth), and the Social Security Act 1991 (Cth) sets out a range of benefits which include age pensions,

149 There are six sub-classes in the visitor visa category which provide for the no-work Condition 8101.

150 See Conditions 8104 and 8105 which apply to various temporary classes of visas.

151 Condition 8106.

152 Condition 8107.

153 For those people, predominantly women, who choose to 'work' in the private sphere, the use of work as a factor in identifying membership in the community affects their membership.

154 Breach of a condition will affect a person's right to extend that visa, and may be a ground for cancellation of the visa, ss 116-18.

155 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3; (1967) 6 ILM 360, art 6.

156 Of course, the Government is involved with the regulation of work. The regime of industrial laws, setting minimum rates of pay and work conditions is one example.

157 See Department of Social Security, *Annual Report (1992-93)* 41 (emphasis added).

158 See the discussion of theories of citizenship, above at nn 1-12.

disability support pensions, wife pension, carer pension, sole parent pensions, widowed person allowances, job search allowances, newstart allowance, employment entry payments, education entry payments, sickness allowances, special benefits, special needs pensions, family payments, and child disability allowance.[159] The Austudy program provides assistance for certain students under the Student Assistance Act 1973 (Cth).

Significantly, these services are not directed solely to Australian citizens. Australian residents are included. The Social Security Act defines an Australian resident as a person who *resides* in Australia and is an Australian citizen or a person who is the holder of a valid permanent visa.[160] In deciding whether a person resides in Australia, the accommodation used by the person in Australia, the nature and extent of the family relationships the person has in Australia, employment, business or financial ties, assets in Australia, frequency and duration of travel outside of Australia, and any other matters relevant to determine whether the person intends to remain permanently in Australia, are all taken into account.[161] These are all factors that are essentially identified as contributing to one's membership of a community. Similarly, the Austudy scheme is presently available to Australian citizens and permanent residents.[162]

The Health Insurance Act 1973 (Cth) is even broader. It provides benefits for 'eligible person[s]' who are Australian residents or eligible overseas representatives.[163] The definition of Australian residents is also broader. Persons who reside in Australia and are Australian citizens, the holders of permanent visas, New Zealand citizens, and holders of temporary visas who have applied for permanent visa, are all caught in the definition.[164]

This expression of membership in the community is an inclusive one, and is certainly to be commended in terms of justice and equality within the community. It shows that the legal status of citizenship is not essential for membership of the community.

Similarly, Australian citizens are not the only persons liable to pay taxes. Residents of Australia also pay taxes to the Government.[165] Tax duties are related to working rights, and this further emphasises the equality of membership of citizens and non-citizens who work. This has not translated into a requirement for democratic representation of workers. The slogan from the American Revolution of no taxation without representation has not been adopted.

In the examples of social citizenship that have been identified in this part of the article, the legal status of citizenship is not a significant factor.

159 See Social Security Act 1991 (Cth) ch 2.

160 Ibid s 7(2).

161 Ibid s 7(3).

162 See Student Assistance Act 1973 (Cth) s 7(1). Note that the government has proposed in its 1995 Budget that non-citizens be disqualified from receipt of Austudy. This has raised community discussion and protest from students. See 'Citizens-only rule risks our futures: students', *Australian* (Sydney), 12 June 1995.

163 Eligible overseas representatives include the head of diplomatic missions and their staff and families: Health Insurance Act 1973 (Cth) s 3.

164 Ibid. See s 3 definition.

165 Income Tax Assessment Act 1936 (Cth) ss 6, 25.

CONCLUSION

Citizenship is clearly not a singular concept. How then, does this article 'unscramble' the meaning of Australian citizenship? The clarification of the difference between the 'legal status' of citizenship, and the concept of 'membership of the community' highlights why the debate so far has been confused, unclear and lacking focus. First of all, in order to discover the legal consequences of citizenship, we need to look at many pieces of disparate legislation and identify common law rights applied by the High Court. There is no singular statement in the Constitution, nor in the Australian Citizenship Act. This in itself does not encourage community understanding of clear and identifiable consequences of citizenship. A singular statement of the legal consequences of the legal status in the Citizenship Act 1948 (Cth) could clarify the consequences in an accessible manner.

Furthermore, the examination of the different legal consequences of citizenship has raised some questions. Citizenship does not provide consistent rights and obligations throughout Australia, and there does not appear to be any thought or clarity regarding why the lack of citizenship denies certain rights and duties and not others. Theories of citizenship have not properly informed our legal consequences.

Beyond legal status, citizenship as membership of the community is a network of complex relations, rights and obligations which circumscribe and protect all individuals among us, even those members of the community who are not defined legally as 'citizens'. Membership of the community in the full sense includes social citizenship and this is not confined to legal citizens. This has added further confusion to the public discussion so far. However, it is a positive attribute of a community that it is prepared to treat those who reside in Australia as members. Thus, we must take extreme care that if we invest citizenship with legal consequences in the Citizenship Act 1948 (Cth), we do not disinvest non-citizens of rights and status they are entitled to, not as Australian citizens, but as citizens in the common cause of humanity.