

THE RIGHTS AND RESPONSIBILITIES OF AUSTRALIAN CITIZENSHIP: A LEGISLATIVE ANALYSIS

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The Preamble to the Australian Citizenship Act 2007 (Cth) makes three broad claims about Australian statutory citizenship: that it signifies 'full and formal membership of the Australian community'; that it is characterised by the possession of 'reciprocal rights and obligations'; and that it is a 'bond' that 'unites all Australians'. This article examines the extent to which these claims accurately describe the legal implications of citizenship in Australia. In doing so, it looks in detail at the degree to which holding Australian statutory citizenship impacts upon the rights a person possesses in four broad categories that are intrinsically connected with citizenship: status protection rights, rights to entry and abode, rights to protection, and political rights.

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I INTRODUCTION

The Parliament recognises that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a bond, involving reciprocal rights and obligations, uniting all Australians while respecting their diversity.

The Parliament recognises that persons conferred Australian citizenship enjoy these rights and undertake to accept these obligations:

- (a) by pledging loyalty to Australia and its people; and
- (b) by sharing their democratic beliefs; and
- (c) by respecting their rights and liberties; and
- (d) by upholding and obeying the laws of Australia.

— Preamble, *Australian Citizenship Act 2007* (Cth)

Unpacking the legal implications of citizenship in Australia requires an inquiry on at least two levels. First, the statutory citizenship regime set up by the *Australian Citizenship Act 2007* (Cth) ('*ACA 2007*') and associated legislation must be understood. Secondly, this legislative regime must be situated within the parameters of the broader framework established by the *Australian Constitution*.

The constitutional framework for Australian citizenship has received significant attention in a number of recent scholarly papers.¹ Accordingly, this

¹ See, eg, Genevieve Ebbeck, 'A Constitutional Concept of Australian Citizenship' (2004) 25 *Adelaide Law Review* 137; Kim Rubenstein, 'The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize' (2004) 22(2) *Law in Context* 45; Helen Irving 'Still Call Australia Home: The *Constitution* and the Citizen's Right of Abode' (2008) 30 *Sydney Law Review* 133; Christopher Tran, 'New Perspec-

article directs its focus towards the first limb of inquiry: the question of what legal consequences flow from the possession of statutory citizenship in Australia. This is an issue which has escaped substantial consideration for over 10 years, despite the fact that during this time the *ACA 2007* was introduced to replace the previous citizenship legislation, the *Australian Citizenship Act 1948* (Cth) (*ACA 1948*).

In particular, this article seeks to test claims about the legal significance of possessing Australian citizenship against the legal reality. The above Preamble serves as a useful source of such claims. The Preamble was first introduced, albeit with slightly different wording, into the *ACA 1948* by amendment in 1993.² In the second reading speech for the amending legislation, Senator John Faulkner stated that the Preamble would ‘defin[e] the meaning which the Parliament and the people of Australia accord to citizenship’.³

The Preamble suggests that three broad implications flow from the possession of statutory citizenship in Australia.⁴ First, it claims that, unlike non-citizens, citizens under the Act are ‘full and formal members’ of the Australian community. Secondly, it suggests that citizenship is characterised by the possession of ‘reciprocal rights and obligations’ that are not held by non-citizens. Finally, the Preamble describes statutory citizenship as a ‘bond’ that ‘unite[s] all Australians while respecting their diversity’, suggesting that citizenship is underpinned by principles of equality.⁵

tives on Australian Constitutional Citizenship and Constitutional Identity’ (2012) 33 *Adelaide Law Review* 199; Sangeetha Pillai, ‘Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited’ (2013) 39 *Monash University Law Review* 568.

² *Australian Citizenship Amendment Act 1993* (Cth) s 3.

³ Commonwealth, *Parliamentary Debates*, Senate, 6 May 1993, 208 (John Faulkner).

⁴ The extent to which the words in a statutory preamble breathe meaning into the statute remains a matter of some debate. It is relatively well accepted that preambles do not have the direct force of positive law, however they form part of the statutes they precede, and may be drawn on as evidence of the object or purpose of these statutes. The circumstances in which it is appropriate to have recourse to a preamble are less clear-cut. While some maintain that this may only be done to resolve an ambiguity in a statutory provision, others suggest that a preamble is more generally relevant as context which sheds light on the objective intention of Parliament when drafting the statute: see, eg, Anne Twomey, ‘Constitutional Recognition of Indigenous Australians in a Preamble’ (Report No 2, Constitutional Reform Unit, Sydney Law School, 2011) 16–21.

⁵ This is underlined by recent publications by the Department of Immigration and Border Protection (formerly the Department of Immigration and Citizenship): see, eg, Department of Immigration and Border Protection, *Australian Citizenship Ceremonies Code* (2011) <http://www.citizenship.gov.au/_pdf/australian-citizenship-ceremonies-code.pdf> 3, 13, 54–5, 57; Department of Immigration and Citizenship, *Australian Citizenship — Our*

In *Roach v Electoral Commissioner* ('*Roach*'),⁶ Gleeson CJ drew directly on the 'reference to the reciprocity of rights and obligations' in the Preamble.⁷ His Honour stated that this notion of reciprocity is 'important in the context of membership of the community', and that breaching the obligations of membership (for example, through serious criminal activity) may warrant temporary suspension of legal rights associated with citizenship.⁸ Gleeson CJ's statement suggests that the citizenship rights and obligations referred to in the Preamble are not purely moral or social in nature; to at least some extent, they give rise to legal implications. This article analyses the extent of these implications via an examination of the most significant differences between the rights of citizens and non-citizens under Commonwealth legislation. This question has previously been considered by Kim Rubenstein in her 2002 text, *Australian Citizenship Law in Context*,⁹ which comprehensively surveys the extent to which Commonwealth legislation discriminates on the basis of statutory citizenship.

Rubenstein's study reached two broad conclusions: first, that statutes far more commonly discriminate on the basis of residence in Australia than on the basis of citizenship; and secondly, that where citizenship-based discrimination does exist in Commonwealth legislation, this discrimination lacks any 'consistent basis'.¹⁰ Though over a decade has elapsed, and the citizenship legislation in force in 2002 has been replaced, these conclusions remain broadly true today.¹¹ Accordingly, this article adopts a more targeted analysis.

Common Bond (2013) <http://www.citizenship.gov.au/learn/cit_test/test_resource/_pdf/our-common-bond-2013.pdf> 3, 17.

⁶ (2007) 233 CLR 162.

⁷ *Ibid* 177 [12].

⁸ *Ibid*. It is worth noting that the issue at hand in the case involved the question of the extent to which statutory voting rights could be denied to prisoners. Thus, Gleeson CJ's remarks were nested in this context. His Honour did not directly consider whether Parliament has the authority to deny other citizenship rights where 'civic responsibilities' are breached, though arguably there is some suggestion in the judgment that 'fundamental political right[s]' more generally might be subject to restriction: *ibid* 176–7 [12].

⁹ (Lawbook Co, 2002).

¹⁰ *Ibid* 184.

¹¹ Certain elements of the statutory regime have shifted somewhat over time. For example, certain statutes which, in 2002, still discriminated on the basis of British subjecthood rather than citizenship or residence have now been updated: see, eg, *Navigation Act 2012* (Cth). Section 128 of the *Navigation Act 1912* (Cth) is cited by Rubenstein as an example of a provision which refers to 'British subjects': see Rubenstein, *Australian Citizenship Law in Context*, above n 9, 184, 217. No such references remain in the 2012 Act. Other provisions that applied exclusively to citizens have now been expanded so that they also extend to residents: see, eg, *Nuclear Non-Proliferation (Safeguards) Act 1987* (Cth) s 38(3)(d). Nonetheless, Rubenstein's

Rather than cataloguing every legislative distinction that separates citizens and non-citizens, it looks in-depth at the extent to which holding statutory citizenship impacts upon the possession of rights in four broad categories: status protection rights, rights to entry and abode, rights to protection, and political rights.

These categories are intrinsically connected with citizenship. Each enshrines rights which were fundamental to very early configurations of the state–citizen relationship.¹² Moreover, they have not lost relevance over time; internationally, the codification of express citizenship rights in each of the four areas is very common, both constitutionally and in statute.¹³ To a certain extent, Australian legislation reflects this trend. In each category, possession of Australian citizenship materially affects the extent to which rights protection exists. This is in contrast to most rights in Australia, which are not predicated upon possession of citizenship. However, the extent to which citizens' rights protection in these areas is achieved through statutory codification varies somewhat. Moreover, legal protection is not always equal for all citizens, calling into question the notion of equality between citizens alluded to in the Preamble to the *ACA 2007*.

This article is divided into five parts. Part II contextualises the *ACA 2007*, providing an overview of its substance, and explaining its constitutional basis and evolution from historical citizenship legislation in Australia. Part III examines the question of what rights flow from the possession of statutory Australian citizenship in each of the categories outlined above. In doing so, it compares the rights that arise in Australia with those in overseas jurisdictions. Particular emphasis is placed on the citizenship rights that exist in the United Kingdom, Canada and New Zealand. These countries emerge as natural comparators for Australia for two reasons. First, all four countries share a historical connection, in the sense that their concepts of citizenship have roots in the common law concept of 'British subject' status. Secondly, like Australia but unlike a large number of countries worldwide, legal citizenship in the UK,

general assessment remains valid. For instance, in the case of statutes with extraterritorial application, certain provisions only affect citizens: see, eg, *Antarctic Marine Living Resources Conservation Act 1981* (Cth) ss 3 (definition of 'Australian national'), 5(2)(a); *Chemical Weapons (Prohibition) Act 1994* (Cth) s 5(1). However, others operate upon both citizens and residents: see, eg, *Air Navigation Act 1920* (Cth) s 27(2) (definition of 'Australian operator'); *Competition and Consumer Act 2010* (Cth) s 5(1). As Rubenstein suggested in 2002, there is no clearly apparent reason for why such statutes differ in application: Rubenstein, *Australian Citizenship Law in Context*, above n 9, 201.

¹² See further Part III(A) below, in particular nn 80–84 and accompanying text.

¹³ See further Part III below.

Canada and New Zealand is primarily developed through statute, rather than constitutionally.¹⁴ Part IV examines the question of which obligations, if any, can be said to arise reciprocally to the rights considered in Part III. Part V concludes by considering whether the Preamble's three claims about the nature of Australian citizenship are borne out by Australian law, based on the analysis in Parts III and IV.

II AUSTRALIAN CITIZENSHIP LEGISLATION IN CONTEXT

A *The Constitutional Basis for Australian Citizenship Legislation*

It has been well noted that the *Australian Constitution* makes no direct reference to a national citizenship.¹⁵ The *Constitution* does not define a class of people with an entitlement to hold the status of Australian citizenship, prescribe the rights that flow from holding such a status, or even confer a clear power upon Parliament to define citizenship through legislation.

Notwithstanding this, a statutory concept of Australian citizenship was introduced in 1949, with the entry into force of the *Nationality and Citizenship Act 1948* (Cth) ('*NCA 1948*') (later renamed, in 1973, the *Australian Citizenship Act 1948* (Cth)).¹⁶ Statutory citizenship has remained an Australian legal fixture ever since, though its parameters have expanded and contracted over time. Today, the legislative concept of Australian citizenship is enshrined in the *ACA 2007*.

The Commonwealth's constitutional power to define the concept of Australian citizenship through legislation has been affirmed on a number of occasions by members of the High Court.¹⁷ The basis for this power has been

¹⁴ Moreover, citizenship legislation in each of these countries substantially mirrors the form of the *ACA 2007*. The relevant statutes are the *British Nationality Act 1981* (UK) c 61; *Citizenship Act*, RSC 1985, c C-29; and *Citizenship Act 1977* (NZ). Like the *ACA 2007*, each of these Acts provides for the acquisition and loss of citizenship, but does not comprehensively codify the rights of citizenship. Further, the various ways in which citizenship may be acquired and lost are common between all four countries — though the specifics vary somewhat. This is discussed further in Part III(B) below.

¹⁵ See, eg, Irving, 'Still Call Australia Home', above n 1, 133.

¹⁶ In 1969, s 1(3) of the *Citizenship Act 1969* (Cth) amended the name of the *Nationality and Citizenship Act 1948* (Cth) to the *Citizenship Act 1948–1969* (Cth). In 1973, the Act was renamed again as the *Australian Citizenship Act 1948–1973* (Cth), via s 1(3) of the *Australian Citizenship Act 1973* (Cth). It is most commonly referred to as the *Australian Citizenship Act 1948* (Cth).

¹⁷ See, eg, *Nolan v Minister of State for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 190 (Gaudron J); *Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [31] (Gleeson CJ); *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4]

contemplated by individual judges, who have suggested a number of potential anchors.¹⁸ For instance, in *Singh v Commonwealth* ('*Singh*'),¹⁹ Gleeson CJ held that, pursuant to the naturalisation and aliens power under s 51(xix) and the immigration power under s 51(xxvii) of the *Australian Constitution*,

Parliament ... has the power to determine the legal basis by reference to which Australia deals with matters of nationality and immigration, to create and define the concept of Australian citizenship, to prescribe the conditions on which such citizenship may be acquired and lost, and to link citizenship with the right of abode.²⁰

The Commonwealth's power to pass citizenship legislation has only been challenged once. In *Hwang v Commonwealth* ('*Hwang*'),²¹ McHugh J, sitting alone, dismissed the claim, stating that 'it is hardly to be supposed that the national government of an independent sovereign state such as Australia does not have the power to declare to the world who are the citizens of Australia'.²² However, his Honour did not isolate the precise basis for the Commonwealth's power to regulate citizenship. While emphasising that this power is broad, and that a number of factors at least suffice to authorise citizenship legislation in its form at the time,²³ he expressly recognised that express and implied

(Gleeson CJ); *Hwang v Commonwealth* (2005) 222 ALR 83, 86 [9] (McHugh J). Discussion(s) of judicial statements to this effect are included in Rubenstein, *Australian Citizenship Law in Context*, above n 9, 71–4, though a number of relevant judgments were handed down after the publication of that text.

¹⁸ For a fuller discussion on this point, see Pillai, above n 1, 590, 593–4, 600.

¹⁹ (2004) 222 CLR 322.

²⁰ *Ibid* 329 [4]. See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 173 [31] (Gleeson CJ).

²¹ (2005) 222 ALR 83.

²² *Ibid* 86 [9].

²³ *Ibid*. In addition to the naturalisation and aliens and immigration powers, McHugh J suggested that, at least since the adoption of the *Statute of Westminster 1931*, 22 & 23 Geo 5, c 4 in 1942, Parliament has had the power to determine the citizenry, subject to any express or implied constitutional prohibitions. His Honour stated that this power arose from the Commonwealth's 'status and existence as a national polity': *ibid* 86 [9]. A number of previous High Court authorities have acknowledged the existence of an 'implied nationhood power' — which, amongst other things, creates legislative powers that 'arise from the national status of the Commonwealth as a sovereign body and a polity who speaks to the world on behalf of Australians': see, eg, *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237, 269 (Dixon J) ('*Pharmaceutical Benefits Case*'); *Victoria v Commonwealth* (1975) 134 CLR 338, 396–7 (Mason J) ('*AAP Case*'); *New South Wales v Commonwealth* (1975) 135 CLR 337, 373–4 (Barwick CJ), 389 (Gibbs J), 470 (Mason J), 505 (Murphy J) ('*Seas and Submerged Lands Case*'); *Davis v Commonwealth* (1988) 166 CLR 79, 94 (Mason CJ, Deane and Gaudron JJ). Moreo-

constitutional limitations form boundaries within which such legislation must be created. McHugh J suggested that such boundaries stem from the constitutional phrase 'the people of the Commonwealth', which points to a class of people who cannot be excluded from the citizenry.²⁴ In the view expressed by Gleeson CJ in *Singh*, limitations stem instead from the boundaries of the constitutional powers that authorise citizenship legislation: ss 51(xxvii) and 51(xix).²⁵

Ultimately, no High Court majority has ever reached agreement on either the basis for or the scope of the Commonwealth's power to enact citizenship legislation. It is clear that there must be some limit to Parliament's power to define the concept of citizenship through statute. However, until the basis and scope of the power are settled, where this limit lies will remain ill-defined. What is relatively well-established, however, is that a clear constitutional basis exists for citizenship legislation in its current form.²⁶

B *The Historical Development of Australian Citizenship Legislation*

The commencement of the *NCA 1948* signified the emergence of Australian statutory citizenship. However, this did not symbolise a radical shift in notions of formal membership of the Australian community, but rather a relatively gradual evolution from previous statutes which had shaped such notions without using the language of citizenship.

The legislative regulation of formal membership of the Australian community in the early years of Australian federation has been charted in detail by other scholars,²⁷ and a comprehensive review of this material is not the object of this article. For present purposes, it suffices to note that early statutes, such as the *Naturalization Act 1903* (Cth) and the *Nationality Act 1920* (Cth) conceived of 'natural-born British subject status' as the fullest formal indicator

ver, McHugh J held that Commonwealth powers to enact citizenship legislation and to define 'the people' who comprise the Australian community existed at Federation itself, although as a matter of practice the existence of UK legislation made it impossible to exercise these powers for a number of years: *ibid* 86–7 [10].

²⁴ *Hwang* (2005) 222 ALR 83, 89 [18].

²⁵ *Singh* (2004) 222 CLR 322, 329 [4].

²⁶ While the validity of the *ACA 2007* has never been challenged, the Act does not seem to differ in any constitutionally significant way from its previous iteration, the validity of which has been affirmed in *Singh*, *Hwang* and a number of other cases.

²⁷ See, eg, Rubenstein, *Australian Citizenship Law in Context*, above n 9; Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century* (Cambridge University Press, 1997).

of Australian community membership. Both of these statutes created a ministerial power to issue naturalisation certificates, the grant of which conferred upon recipients all the rights and privileges and obligations of a natural-born British subject.²⁸ Neither statute, however, specified what these rights, privileges and obligations were. Moreover, rights and duties were not necessarily equal between 'natural-born British subjects'. John Chesterman and Brian Galligan, for instance, point out that while Aboriginal Australians were formally regarded as British subjects by birth, they were nonetheless excluded from several rights associated with normative membership of the Australian community.²⁹ It has been noted that prior to 1948, non-Aboriginal people in Australia fell into three broad categories: 'natural-born British subjects' and 'naturalised persons' (who enjoyed substantive community membership including permanent residence), 'British subjects' (who had various substantive rights, including full political rights, but lacked permanent residence) and aliens.³⁰

In addition to its silence on the rights and obligations associated with naturalisation or 'natural-born British subject' status, the *Naturalization Act 1903* (Cth) did not define what a 'natural-born British subject' was, leaving this to be determined at common law. In the *Nationality Act 1920* (Cth), a definition was included, incorporating elements of both nationality by birth and nationality by descent.³¹ The structure of this definition was retained in the criteria for the possession of Australian citizenship by birth and descent in the *NCA 1948*. The *NCA 1948* also retained other features of the *Nationality Act 1920* (Cth) — for instance, the prescription of residence requirements that

²⁸ *Naturalization Act 1903* (Cth) s 8; *Nationality Act 1920* (Cth) s 11.

²⁹ John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997).

³⁰ Rubenstein, *Australian Citizenship Law in Context*, above n 9, 61–2, citing David Dutton, 'Citizenship in Australia: A Guide to Commonwealth Government Records' (Research Guide No 10, National Archives of Australia, 1999) 14. Understanding the substantive consequences of formal community membership in Australia has always hinged largely upon understanding the consequences of constitutional alienage, which, from the inception of Australian federation, was conceived of as the obverse of such membership: see David Dutton, 'Citizenship in Australia: A Guide to Commonwealth Government Records' (Research Guide No 10, National Archives of Australia, 2000) 59, quoted in Rubenstein, *Australian Citizenship Law in Context*, above n 9, 62. Early High Court cases read the aliens power extremely broadly, giving the Commonwealth 'almost complete control over laws relating to aliens': Rubenstein, *Australian Citizenship Law in Context*, above n 9, 58 (citations omitted). Formal community membership granted a degree of immunity from such Commonwealth control — though it is worth noting that in some cases considerable vulnerability to control under the similarly expansive immigration power remained: see, eg, Pillai, above n 1, 580–3.

³¹ *Nationality Act 1920* (Cth) s 6(1).

needed to be fulfilled before a person could be granted a naturalisation certificate.³² Further, though it created a distinct concept of Australian citizenship, the *NCA 1948* retained British subject status as the indicator of non-alienage, and as a measure of full formal membership of the Australian community.³³ Those who held Australian citizenship, thus, were both Australian citizens as well as British subjects.³⁴ Moreover, like the *Naturalization Act 1903* (Cth) and the *Nationality Act 1920* (Cth), the *NCA 1948* did not spell out the 'rights, powers and privileges' or 'obligations, duties and liabilities' that stemmed from full membership of the Australian community, leaving these to be determined under other laws.

The precise statutory requirements for Australian citizenship have shifted over time. The original *NCA 1948* conferred citizenship at birth upon any person born in Australia, provided their father was not a diplomat or an enemy alien.³⁵ In 1986, the relevant provision was changed to limit birthright citizenship to persons born in Australia where at least one parent held Australian citizenship or permanent residence.³⁶ In 1987, both the term 'British subject' and a definition of 'alienage' in opposition to it, were removed from the *NCA 1948*.³⁷

However, the basic approach of awarding statutory citizenship on the basis of a combination of birth and descent criteria, or via the naturalisation of aliens, has been retained to this day.

C *The Australian Citizenship Act 2007*

In 2007, the *ACA 1948* was replaced by the *ACA 2007*. This legislation remains the source of statutory citizenship in Australia today.

³² *Ibid* s 7.

³³ *NCA 1948* s 5(1) (definition of 'alien').

³⁴ While some British subjects gained Australian citizenship automatically when the Act commenced in 1948, such citizenship was not mandatory in order to be a full member of the Australian community in either formal or substantive terms. When the legislation was first introduced, Immigration Minister Arthur Calwell stressed that 'creation of an Australian citizenship under this bill will in no way lessen the advantages and privileges which British subjects who may not be Australian citizens enjoy in Australia': Commonwealth, *Parliamentary Debates*, House of Representatives, 30 September 1948, 1062.

³⁵ *NCA 1948* s 10(2).

³⁶ *Australian Citizenship Amendment Act 1986* (Cth) s 4(a).

³⁷ These changes were introduced via ss 4(2)(a) and 33 of the *Australian Citizenship Amendment Act 1984* (Cth). These provisions entered into force on 1 May 1987.

The *ACA 2007* retains the broad principles that underpinned the *ACA 1948*. Like the 1948 Act, it provides for Australian citizenship to be acquired 'as of right' based on a combination of birth and descent criteria,³⁸ and creates a ministerial discretion to grant citizenship to others who have satisfied particular criteria.³⁹ The Preamble was also retained substantially unchanged. Further, the 1993 amendment replaced the 'Oath of Allegiance' to Australia (that naturalised citizens were previously required to take) with a 'Pledge of Commitment' to Australia.⁴⁰ The Pledge is retained in sch 1 of the 2007 Act.

In the second reading speech for the *ACA 2007*, then Minister for Citizenship and Multicultural Affairs, John Cobb, emphasised that it was designed to 'deliver better structured, clearer, more accessible law, drafted in the language of the 21st century'.⁴¹ In doing so, the Act sought to give effect to a recommendation of the 1994 Joint Standing Committee on Migration, that the *ACA 1948* be redrafted using simple language and a modern drafting style.⁴²

The 2007 Act does, however, introduce a few significant modifications to Australia's citizenship framework. The most well-known is its establishment of a citizenship test.⁴³ With some exceptions, persons applying for 'citizenship by conferral'⁴⁴ must have passed the test, in addition to satisfying the general eligibility criteria inherited from the *ACA 1948*.⁴⁵ Another new feature of the

³⁸ See *ACA 2007* pt 2 div 1. Typically, both birth and descent requirements must be satisfied for a person to acquire citizenship automatically: s 12(1). However special provisions operate with respect to adopted and abandoned children: ss 13–14.

³⁹ *ACA 2007* pt 2 div 2. Where a person's claim to citizenship is based wholly on descent, the acquisition of citizenship requires an application to the Minister, though there is no discretion to deny citizenship where eligibility criteria have been met: ss 16–17. The statutory regime governing the acquisition of citizenship is discussed in detail below.

⁴⁰ *Australian Citizenship Amendment Act 1993* (Cth) s 8.

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 November 2005, 9.

⁴² Joint Standing Committee on Migration, Parliament of Australia, *Australians All — Enhancing Australian Citizenship* (1994). See also Michael Klappdor, Moira Coombs and Catherine Bohm, 'Australian Citizenship: A Chronology of Major Developments in Policy and Law' (Research Paper, Parliamentary Library, Parliament of Australia, 2009) 27–8.

⁴³ It is worth noting, however, that the citizenship test provisions did not appear in the original version of the *ACA 2007*, but were introduced via the *Australian Citizenship Amendment (Citizenship Testing) Act 2007* (Cth), which commenced on 1 October 2007.

⁴⁴ See *ACA 2007* pt 2 div 2 sub-div B, particularly s 21.

⁴⁵ It is, however, a statutory requirement that the citizenship test be related to the eligibility criteria in the *ACA 2007* ss 21(2)(d) ('understands the nature of an application [for citizenship]'), 21(2)(e) ('possesses a basic knowledge of the English language') and 21(2)(f) ('has an adequate knowledge of Australia and of the responsibilities and privileges of Australian

ACA 2007 is its express prohibition on the approval of citizenship applications made by persons assessed by the Australian Security Intelligence Organisation (ASIO) as being a direct or indirect risk to Australian society.⁴⁶

The ACA 2007 is divided into three Parts. Part 1 contains preliminary provisions that canvas the general scope of the Act, as well as a simplified outline of the whole statute, definitions of key terms including 'Australian citizen'⁴⁷ and 'permanent resident',⁴⁸ and clarification of the circumstances in which historical citizenship legislation requires reference.⁴⁹

Part 2 of the Act deals largely with the acquisition and loss of Australian citizenship. Division 1 provides for the 'automatic acquisition of Australian citizenship' in three circumstances: where a person is born in Australia to an Australian citizen or permanent resident;⁵⁰ where a child is adopted by an Australian citizen (provided the child was a permanent resident of Australia at the time of adoption);⁵¹ and where a child is found abandoned in Australia, unless and until citizenship of another country is proved.⁵² Section 15 further provides that where Australia acquires a territory, persons 'connected with that territory' may be made Australian citizens by a ministerial determination in a legislative instrument. Notably, as under later iterations of the ACA 1948, automatic acquisition of citizenship at birth does not extend to those born in Australia where neither parent holds Australian citizenship or permanent residency — and High Court authority confirms that a person born in such circumstances is an alien under the *Australian Constitution*.⁵³ However, where such a person remains 'ordinarily resident' in Australia until he or she is 10 years old, citizenship is acquired automatically.⁵⁴

citizenship'): see Note to s 23A(1). Moreover, the eligibility criteria in these subsections are taken to be satisfied by successful completion of the citizenship test: s 21(2A).

⁴⁶ Ibid ss 17(4), 19D(5), 24(4), 30(4). Limited exceptions apply to stateless persons born in Australia or to Australian citizen parents. The Minister is only precluded from approving the citizenship applications of such persons where they have been convicted of an offence in specified categories: see ss 17(4A)–(4B), 19(6)–(7), 24(4A)–(4B), 30(5)–(6).

⁴⁷ Ibid s 4(1).

⁴⁸ Ibid s 5(1).

⁴⁹ For instance, s 4(2) provides that where it is necessary to determine whether a person was an Australian citizen at any time prior to the commencement of the ACA 2007, the ACA 1948 as in force at the relevant time should be consulted.

⁵⁰ Ibid s 12.

⁵¹ Ibid s 13.

⁵² Ibid s 14.

⁵³ See *Singh* (2004) 222 CLR 322; *Koroitamana v Commonwealth* (2006) 227 CLR 31.

⁵⁴ ACA 2007 s 12(1)(b).

Division 2 of pt 2 deals with ‘Australian citizenship by application.’ For people connected with Australia by descent alone (persons born outside Australia where at least one parent held Australian citizenship at the time of birth), the acquisition of Australian citizenship is not automatic, and must be applied for.⁵⁵ However, approval of applications lodged on this basis is guaranteed,⁵⁶ except where the applicant’s identity cannot be established,⁵⁷ or where the applicant is subject to an adverse or qualified security assessment stipulating that he or she poses a security risk.⁵⁸ Similar criteria govern the eligibility for citizenship of persons adopted by Australian citizens outside of Australia. However in this circumstance, while an application for citizenship must not be approved if the identity of the applicant cannot be confirmed⁵⁹ or if they are deemed to pose a risk to security,⁶⁰ there is no general obligation to approve applications otherwise.

Where neither a birth nor descent connection with Australia exists, a person may nonetheless apply for ‘citizenship by conferral’, provided certain eligibility criteria have been satisfied. The general criteria, set out in s 21(2) of the Act, require applicants to be of ‘good character’; satisfy prescribed residency requirements and hold permanent resident status; be likely to maintain a residency in or a ‘close and continuing relationship with Australia’; understand the nature of their application for citizenship; possess a basic knowledge of English; and have an ‘adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship’. In order to satisfy the latter three requirements, a person must typically have passed the citizenship test provided for under s 23A.⁶¹ However, certain categories of people qualify for exemption from the test and relaxed eligibility criteria.⁶² Unlike those who acquire citizenship automatically, or those who make descent-based applications for citizenship, people who obtain Australian citizenship by conferral must typically make the Pledge of Commitment provided for in

⁵⁵ *Ibid* s 16.

⁵⁶ *Ibid* s 17(2).

⁵⁷ *Ibid* s 17(3).

⁵⁸ *Ibid* s 17(4).

⁵⁹ *Ibid* s 19D(4). Further, pt 2 div 5 of the Act deals in detail with the particulars of identifying information.

⁶⁰ *Ibid* s 19D(5).

⁶¹ Note to s 23A(1).

⁶² *Ibid* s 19G.

sch 1.⁶³ This involves pledging loyalty to Australia and its people, expressing commitment to Australia's democratic beliefs⁶⁴ and respect for its rights and liberties, and promising to 'uphold and obey' its laws.⁶⁵ As with applications for descent-based citizenship, fulfilling the criteria for 'citizenship by conferral' does not guarantee that citizenship will be granted. However, where the criteria are satisfied, the Minister is only expressly precluded from granting citizenship to applicants who have been assessed as a national security risk,⁶⁶ whose identity cannot be verified,⁶⁷ or who have been convicted of or charged with certain offences.⁶⁸

The final category of citizenship by application in pt 2 div 2 provides for the resumption of citizenship by persons who formerly held Australian citizenship. Eligibility criteria must be met,⁶⁹ but satisfying these criteria does not guarantee that a person's application for resumption will be approved.⁷⁰ Further, the Minister is precluded from approving the resumption of a person's citizenship where that person's identity cannot be established,⁷¹ or where they have been assessed by ASIO as a direct or indirect risk to Australia.⁷² A person who meets the eligibility criteria for citizenship by resumption is not precluded from applying for citizenship via any of the other means they are eligible for.⁷³

⁶³ See *ibid* s 26(1) for the circumstances in which a person need not make the Pledge of Commitment.

⁶⁴ The Department of Immigration and Border Protection website states that these democratic beliefs are: 'parliamentary democracy', 'the rule of law', 'living peacefully', 'respect for all individuals regardless of background' and 'compassion for those in need': Department of Immigration and Border Protection, *Australian Citizenship — Why Should I Become a Citizen?* (7 November 2013) <http://www.citizenship.gov.au/should_become/>.

⁶⁵ *ACA 2007* sch 1. The content of the Pledge mirrors the description of the undertakings of 'persons conferred Australian citizenship' in the Preamble to the *ACA 2007*.

⁶⁶ *Ibid* ss 24(4)–(4D).

⁶⁷ *Ibid* s 24(3).

⁶⁸ *Ibid* s 24(6).

⁶⁹ *Ibid* s 29.

⁷⁰ *Ibid* s 30(2).

⁷¹ *Ibid* s 30(3).

⁷² *Ibid* s 30(4). Once again, limited exceptions apply to stateless persons born within Australia or to Australian citizen parents. Such persons are precluded from resuming citizenship where they have been convicted of particular offences: ss 30(5)–(6). People in this category are not excepted from the requirement to refuse resumption of citizenship where identity cannot be established: s 30(3).

⁷³ *Ibid* Note 2 to s 29(2).

Division 3 of pt 2 establishes four ways in which Australian citizenship may be lost. First, a person may apply to renounce their Australian citizenship under s 33. Secondly, s 34 creates a ministerial power to revoke the citizenship of people who have obtained citizenship by descent or by conferral, in fairly limited circumstances. Thirdly, s 35 provides that any citizen who also holds citizenship of a foreign country automatically loses their Australian citizenship if they serve in the armed forces of a country at war with Australia. Finally, s 36 creates a ministerial discretion to revoke the citizenship of a child where their responsible parent has lost their Australian citizenship. These categories will be explored in more depth in Part III(B) of this article.

Part 3 of the Act sets out particulars that apply to the application process, and to the way in which the Minister must exercise any decision-making powers. Notification of any decisions made must be provided,⁷⁴ and where an adverse decision has been reached, reasons for the decision must be given.⁷⁵ Section 52 establishes a right to review in the Administrative Appeals Tribunal with respect to decisions made.

As discussed above, the Preamble to the Act describes citizenship as ‘a common bond, involving reciprocal rights and duties’. However, like the *ACA 1948*, the *ACA 2007* does not specify what the ‘rights and duties’ of citizenship are, leaving this to be determined by other pieces of legislation. Such legislation far more commonly makes rights contingent upon the lower threshold of permanent resident status than on possession of Australian citizenship itself.⁷⁶ Moreover, some rights that are reserved exclusively for citizens do not extend to all citizens, rendering the ‘rights of citizenship’ uncertain. Similar issues arise with respect to determining the duties of citizenship. The Pledge of Commitment in sch 1 of the 2007 Act could conceivably serve as a source of citizenship obligations. However, as not all citizens are required to take the Pledge this raises the question of the extent to which the duties of all citizens are equal.⁷⁷ Parts III and IV below will explore these issues in turn.

⁷⁴ *Ibid* s 47(1).

⁷⁵ *Ibid* s 47(3). However, a failure to comply with this requirement does not invalidate the decision: *ibid* s 47(5).

⁷⁶ See generally Rubenstein, *Australian Citizenship Law in Context*, above n 9, ch 5.

⁷⁷ Notably, a 2008 report by the Australian Citizenship Test Review Committee recommended that the citizenship test should assess the requirement of ‘adequate knowledge of ... the responsibilities and privileges of Australian citizenship’ in a manner linked to the information a person must understand in order to make the Pledge of Commitment: see Australian Citizenship Test Review Committee, ‘Moving Forward ... Improving Pathways to Citizenship’ (Report, August 2008) 25 [6.8]. In its response to the Committee’s report, the govern-

III RIGHTS THAT FLOW FROM STATUTORY CITIZENSHIP

A Overview

In the absence of any clear delineation of the consequences that flow from citizenship in the *ACA 2007*, it is necessary to look to other pieces of Commonwealth legislation to determine the nature of citizenship rights and obligations.

Rubenstein's 2002 work illustrates that a global look at citizenship-based discrimination in Commonwealth statutes does not generate a clear list of citizenship rights and obligations. Most statutory rights and obligations do not hinge upon citizenship status,⁷⁸ and where statutes do discriminate on the basis of citizenship there is no 'consistent basis' for this discrimination.⁷⁹ This Part builds upon this work, by examining in detail the extent to which statutory citizenship rights can be said to exist in four broad categories that are intrinsically connected with citizenship: status protection rights, rights to entry and abode, rights to protection, and political rights.

Rights in each of these categories have been associated with citizenship since its earliest days. The idea of citizenship as a value-laden legal status,⁸⁰ guaranteed to particular individuals who could not be divested of it,⁸¹ has its roots in the ancient Roman concept of citizenship, as does the notion of

ment accepted this recommendation, stating that it 'strongly supports having the Pledge as the centrepiece of Australian citizenship testing': see Australian Government, 'Moving Forward... Improving Pathways to Citizenship: Government Response to the Report by the Australian Citizenship Test Review Committee' (Report, November 2008) 2. The content of the Pledge mirrors the Preamble's description of the undertakings of 'persons conferred Australian citizenship': see above n 65.

⁷⁸ Where community membership is used as a basis for statutory discrimination, it is 'residence' (sometimes permanent residence) rather than citizenship that typically applies. On this basis, Rubenstein has concluded that 'residents are often included as "Australian[s] in all but law": Rubenstein, *Australian Citizenship Law in Context*, above n 9, 254, quoting Einfeld J in *Minister for Immigration, Local Government and Ethnic Affairs v Roberts* (1993) 41 FCR 82, 86. See generally at ch 5. This assessment extends not only to rights conferred through legislation, but also to obligations owed — the *Commonwealth Electoral Act 1918* (Cth) remains the only statute which places obligations upon citizens but not on residents: Rubenstein, *Australian Citizenship Law in Context*, above n 9, 209.

⁷⁹ Rubenstein, *Australian Citizenship Law in Context*, above n 9, 184.

⁸⁰ For a description of some of the rights of Roman citizenship, see Derek Heater, *A Brief History of Citizenship* (Edinburgh University Press, 2004), 31–2; Sean A Adams, 'Paul the Roman Citizen: Roman Citizenship in the Ancient World and its Importance for Understanding Acts 22:22–29' in Stanley E Porter (ed), *Paul: Jew, Greek, Roman* (Brill, 2008), 313–14.

⁸¹ See Gordon P Kelly, *A History of Exile in the Roman Republic* (Cambridge University Press, 2012) 33.

citizenship as a source of inclusion and protection.⁸² The connection between citizenship and political rights dates back even further, to Aristotelian notions of citizenship and their practical manifestation in the *agoras* of the Greek city states.⁸³ The connection between citizenship and entry and abode rights stems from the marriage between modern citizenship and the unit of the nation-state, with its relatively fixed territorial boundaries.⁸⁴

The relationship between citizenship and these rights is more than merely historical: the codification of rights in these four categories remains very common globally.⁸⁵ In Australia, as this Part will demonstrate, a person's citizenship status is of great practical importance when determining the extent of their rights in these areas. However, this is rarely the result of the clear codification of citizenship rights in statute. Moreover, rights in the four domains considered here do not always extend equally to all citizens. To an extent, this differs from the treatment that rights in these categories are afforded internationally.

B Status Protection Rights

The notion of status protection rights for citizens more commonly arises in a constitutional context than in a statutory one. Protection of the status of citizens is provided for in several foreign constitutions, via a number of mechanisms. Some constitutions include definitions of citizenship, which specify people who are entitled to hold the status, and serve as guarantees that it will not be stripped from people within this class.⁸⁶ Other countries empower Parliament to determine who will hold citizenship through statute,

⁸² Gerard Delanty, *Citizenship in a Global Age: Society, Culture, Politics* (Open University Press, 2000) 11.

⁸³ See, eg, Davidson, above n 27, 15–16.

⁸⁴ See generally Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Basic Books, 1983).

⁸⁵ As noted in Part I above, such codification may occur constitutionally, in statute, or via a combination of the two.

⁸⁶ Countries with such provisions in their constitutions include Barbados, Brazil, Bulgaria, Colombia, Ecuador and the United States. See *Constitution of Barbados* ch II; *Constituição da República Federativa do Brasil* [Constitution of the Federative Republic of Brazil] art 12; *Конституция на Република България* [Constitution of the Republic of Bulgaria] art 25; *Constitución Política de Colombia* [Constitution of Colombia] art 96; *Constitución del Ecuador* [Constitution of the Republic of Ecuador] title 1 ch II; *United States Constitution* amend XIV. All translations are by the Comparative Constitutions Project.

but constitutionally protect against the deprivation of citizenship for some or all citizens.⁸⁷

The *Australian Constitution*, by contrast, is silent on Australian citizenship and, accordingly, does not provide any express status protection for Australian citizens. The acquisition and loss of Australian citizenship are dealt with entirely under the *ACA 2007*. As noted in Part II(C) above, pt 2 div 3 of this Act sets out four ways in which a person's citizenship may cease: via a successful application to renounce citizenship,⁸⁸ by ministerial revocation where certain criteria specified in s 34 of the Act are met, as a result of service in the armed forces of a country at war with Australia,⁸⁹ and via a general ministerial discretion to revoke the citizenship of a child where their responsible parent has lost his or her Australian citizenship.⁹⁰ Each of these four mechanisms is explored in more detail below, followed by a general analysis of citizenship protection in Australia relative to the UK, New Zealand and Canada.

1 *Renunciation of Citizenship*

The general capacity for renunciation of Australian citizenship is codified in s 33(1) of the Act. To renounce his or her citizenship, a person must make an application to the Minister.⁹¹ Cessation of citizenship is not guaranteed once such an application is made — it is contingent upon ministerial approval. As a general rule, such approval is required under s 33(3) where the applicant is over 18 and either holds foreign citizenship or is precluded by their Australian citizenship from obtaining citizenship of their country of birth or ordinary residence. However, the Minister may discretionally reject an application for renunciation where at the time of lodgement Australia is engaged in a war.⁹² Further, applications must not be approved where the Minister determines that this would not be in the interests of Australia.⁹³

⁸⁷ Countries with such constitutional provisions include Belarus, Croatia, Czech Republic, Estonia and Finland. See Канстытуцыя Рэспублікі Беларусь [Constitution of the Republic of Belarus] art 10; *Ustav Republike Hrvastke* [Constitution of the Republic of Croatia] art 9; *Ústava České Republiky* [Constitution of the Czech Republic] art 12; *Eesti Vabariigi Põhiseadused* [Constitution of Estonia] art 8; *Suomen Perustuslaki* [Constitution of Finland] s 5.

⁸⁸ *ACA 2007* (Cth) s 33.

⁸⁹ *Ibid* s 35.

⁹⁰ *Ibid* s 36.

⁹¹ *Ibid* s 33(1).

⁹² *Ibid* s 33(5).

⁹³ *Ibid* s 33(6).

2 Ministerial Revocation of Citizenship

Section 34 of the *ACA 2007* confers upon the Minister power to revoke the citizenship of persons who gained citizenship by descent⁹⁴ or conferral.⁹⁵ This revocation power may only be exercised where certain, relatively limited, criteria are satisfied.

Revocation of a person's citizenship is possible where the person has been convicted of a serious offence in relation to their application for citizenship, or when citizenship was obtained through fraud, irrespective of whether the person's citizenship was gained by descent or by conferral.⁹⁶ Citizens by conferral may additionally have their citizenship revoked under s 34(2)(b)(ii) where, after lodgement of a citizenship application, but prior to the conferral of citizenship, they were convicted of a serious offence of any nature. However, where this is the sole basis for the revocation of a person's citizenship, citizenship must not be revoked if it would render them stateless.⁹⁷ This effectively restricts the application of this element of the revocation power to persons who hold dual citizenship.

In all cases, the power to revoke citizenship is contingent upon the Minister being satisfied that it would be 'contrary to the public interest' for the person in question to remain an Australian citizen.⁹⁸ There is no express statutory power that enables the revocation of the citizenship of a person who acquired citizenship 'automatically', under pt 2 div 1 of the Act.

3 Service in the Armed Forces of an Enemy Country

A person ceases to be an Australian citizen under s 35 of the Act if they serve in the armed forces of a country at war with Australia. As with s 34(2), cessation of citizenship under s 35 only occurs where the citizen in question holds nationality or citizenship of a foreign country in addition to Australian citizenship.⁹⁹ Section 35 does not require that the person in question hold nationality or citizenship of the country in whose armed forces they serve — any dual citizenship suffices. It also seems that, unlike s 34, s 35 is not limited in its application to persons who gained citizenship by descent or by conferral — persons who gained citizenship 'automatically' remain vulnerable, provided

⁹⁴ *Ibid* s 34(1).

⁹⁵ *Ibid* s 34(2).

⁹⁶ *Ibid* ss 34(1)(b), (2)(b).

⁹⁷ *Ibid* s 34(3).

⁹⁸ *Ibid* ss 34(1)(c), (2)(c).

⁹⁹ *Ibid* s 35(1)(a).

they hold dual citizenship. Cessation of citizenship under s 35 occurs at the moment that service for the foreign country commences — ministerial revocation is not required.¹⁰⁰

4 Ministerial Discretion to Revoke a Child's Citizenship Where Their Parent Has Lost Citizenship

The final basis upon which citizenship may be lost under the Act applies to the dependent children of persons who have ceased to be Australian citizens under ss 33, 34 or 35. Where a child in this category is under 18 years of age, the Minister may, in his or her discretion, choose to revoke the child's citizenship. However, revocation must not occur where the child has another responsible parent who holds Australian citizenship,¹⁰¹ or where revocation would render the child stateless.¹⁰²

5 Analysis

Generally speaking, the provisions in pt 2 div 3 of the *ACA 2007* do not render the status of Australian citizens particularly vulnerable — citizenship may only be lost in clearly prescribed situations, ministerial discretions to revoke citizenship are not broad, and there are statutory protections in place to protect against a loss of citizenship where statelessness would ensue. Nonetheless, two factors limit the extent to which citizenship in Australia can be described as a 'protected' status.

First, while the *ACA 2007* prescribes relatively limited circumstances in which citizenship can be lost, the absence of any clear *constitutional* protection for the status of citizens is significant. The provisions of the *ACA 2007* — both those which confer citizenship upon people, and those which determine when it may be lost, are subject to appeal or amendment by Parliament. Thus, any status protection that flows from the narrow statutory criteria that govern the cessation of citizenship under pt 2 div 3 of the Act is itself insecure, as the circumstances in which a person may lose their citizenship could quite easily be expanded by statutory amendment. Indeed, the question of which people ought to be entitled to hold Australian citizenship is one which has been revisited on several occasions by Parliament.¹⁰³ Despite the fact that citizen-

¹⁰⁰ Ibid s 35(2).

¹⁰¹ Ibid s 36(2)(a).

¹⁰² Ibid s 36(3).

¹⁰³ For instance, when it was first enacted, s 10 of the *NCA 1948* automatically conferred statutory citizenship upon all persons born in Australia, provided their father was not a diplomat. In 1986, s 10(2) was amended to restrict citizenship by birth to persons born in

ship is acquired 'automatically' by a person who is born in Australia to an Australian parent, and that currently no ministerial revocation power exists under s 34 with respect to such a person, the statutory right to citizenship still falls far short of anything resembling constitutional status protection for natural-born citizens. In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* ('Ame'),¹⁰⁴ the High Court unanimously held that there is no conceptual barrier to a person having their citizenship status changed by Executive regulation, where the statutory framework in place provides for this.¹⁰⁵ In this sense, the 'status protection' rights that Australian citizens hold are weaker than those held by citizens in countries where citizenship is a constitutionally protected status.

Secondly, although statutory safeguards exist to protect citizens in all categories against the arbitrary deprivation of citizenship, not all Australian citizenships are equal. Citizens who have gained their citizenship by descent or by conferral, for instance, are less protected than people who have acquired their citizenship 'automatically', as people in the latter category are not susceptible to having their citizenship revoked under s 34.

In a similar vein, dual citizens are more vulnerable than citizens who hold Australian citizenship alone, who are protected by anti-statelessness provisions against losing their citizenship under ss 34(3)(b), 34A(2) or 36(3). However, this added vulnerability is mitigated by the fact that the revocation powers afforded to the Minister by s 34 are fairly narrow in comparison to those in other countries in which citizenship is regulated by statute.

In New Zealand, as in Australia, citizenship may be revoked where it has been acquired by fraud, false representation, wilful concealment of information or mistake.¹⁰⁶ In addition, the Minister of Internal Affairs may deprive a dual citizen of New Zealand citizenship where they have voluntarily exercised any the privileges or performed any of the duties of their foreign citizenship 'in a manner that is contrary to the interests of New Zealand'.¹⁰⁷

Australia where at least one parent held citizenship or permanent residence: *Australian Citizenship Amendment Act 1986* (Cth) s 4. The requirements for descent-based citizenship have also shifted over time, as has the entitlement to Australian citizenship of persons holding citizenship of other nations.

¹⁰⁴ (2005) 222 CLR 439.

¹⁰⁵ It is worth noting, however, that this case related to a relatively unique type of Australian citizenship: that held by people born in the former Australian territory of Papua. See further Rubenstein, 'The Lottery of Citizenship: The Changing Significance of Birthplace, Territory and Residence to the Australian Membership Prize', above n 1.

¹⁰⁶ *Citizenship Act 1977* (NZ) s 17; *ACA 2007* s 34.

¹⁰⁷ *Ibid* s 16(b).

This deprivation power extends to persons who have voluntarily and formally acquired the nationality or citizenship of a foreign country other than by marriage, and have subsequently acted in *any* manner contrary to the interests of New Zealand.¹⁰⁸

In the UK, 2006 amendments to the *British Nationality Act 1981* (UK) c 61 go significantly further than both Australia and New Zealand, conferring upon the Secretary of State a wide power to deprive a person of citizenship status where ‘the Secretary of State is satisfied that deprivation is conducive to the public good’.¹⁰⁹ As with the Australian and New Zealand revocation provisions, this power cannot be exercised where it would render a person stateless, and so in practice only applies to dual citizens.¹¹⁰

In Canada, the circumstances in which a person may currently lose citizenship under pt II of the *Citizenship Act*, RSC 1985, c C-29 are, at present, more constrained: citizenship may be lost only where it is renounced, or where it has been obtained by fraud or the concealment of material circumstances. However, a private members bill introduced into the House of Commons in May 2012 proposes an amendment to this Act that would deem any citizen that holds dual citizenship to have made an application for renunciation of their Canadian citizenship if they engage in an act of war

¹⁰⁸ Ibid s 16(a). Notably, however, where the Minister makes such a deprivation order, a notice of intention to make the order must be served on the citizen in question: s 19(1). Upon being served such a notice, a person may apply within 28 days to the High Court for a declaration that there are ‘insufficient grounds to justify the making of [a deprivation order]’: s 19(2). Where the Court makes such an order, the Minister is precluded from making another deprivation order without fresh cause: s 19(4).

¹⁰⁹ *Immigration, Asylum and Nationality Act 2006* (UK) c 13, s 56(1), amending *British Nationality Act 1981* (UK) c 61, s 40(2).

¹¹⁰ *British Nationality Act 1981* (UK) c 61, s 40(4). Proposed legislative changes which may expand the circumstances in which deprivation of UK citizenship may occur are currently under consideration by the UK Parliament. In January 2014, the House of Commons passed a proposed amendment in the Immigration Bill 2013–14, which would have allowed the Home Secretary to deprive a person who obtained UK citizenship by naturalisation of this citizenship, even if statelessness would ensue, where the person, while holding UK citizenship, had conducted himself or herself in a manner seriously prejudicial to the vital interests of the UK: see Immigration Bill 2013–14 (HL Bill 84) cl 60. In April 2014, the House of Lords, in its Report stage, rejected this broad power, and instead approved an amendment which would establish a committee comprised of members of both houses of Parliament to consider and report on whether the current citizenship deprivation provision should be expanded: see Immigration Bill 2013–14 (HL Bill 98) cl 66. The third reading of the Bill is scheduled to take place in the House of Lords on 6 May 2014: see United Kingdom Parliament, *Bills Before Parliament 2013–14: Public Bills: Immigration Bill 2013–14* (9 April 2014) <<http://services.parliament.uk/bills/2013-14/immigration.html>>.

against the Canadian Armed Forces.¹¹¹ Minister of Citizenship, Immigration and Multiculturalism, Jason Kenney, subsequently proposed that the Bill be expanded to provide for dual citizens to be deprived of Canadian citizenship where they engage in acts of terrorism.¹¹² If passed, Bill C-425 in its original form would bring the deprivation provisions in the Canadian *Citizenship Act* largely into line with those in the *ACA 2007*. However, Kenney's proposition would go significantly further.

The developments in New Zealand and the United Kingdom, and the proposals for legislative change in Canada, suggest potential lines along which the revocation provisions in pt 3 div 2 could be expanded in the future. While the commission of terrorist offences, treason or action 'contrary to the public interest' in Australia does not currently render an Australian citizen vulnerable to losing his or her citizenship, there are existing statutory provisions that could easily be drawn upon to include such situations amongst the circumstances in which citizenship may be lost. For instance, pt 5.1 of the *Criminal Code* (Cth) creates treason offences where (inter alia): a person causes death or harm to the Sovereign, Governor-General or Prime Minister;¹¹³ 'levies war, or does any act preparatory to levying war, against the Commonwealth';¹¹⁴ 'instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth';¹¹⁵ or, while Australia is at war with an enemy, intentionally assists the enemy to engage in war with the Commonwealth.¹¹⁶ Making the loss of citizenship a consequence of conviction for such offences would seem to be an obvious extension of the existing provision in s 35 of the *ACA 2007*, and one that is foreseeable in light of international developments.

C *Rights to Entry and Abode*

The broad category of 'entry and abode rights' encompasses two discrete types of rights: the right to come into Australian territory, and the right to remain in this territory. As this section will demonstrate, current statute law does not in

¹¹¹ Bill C-425, *An Act to Amend the Citizenship Act (Honouring the Canadian Armed Forces)*, 2012, cl 2.

¹¹² Evidence to House of Commons Standing Committee on Citizenship and Immigration, Parliament of Canada, Ottawa, 21 March 2013, 2–3 (Jason Kenney).

¹¹³ *Criminal Code* (Cth) ss 80.1(1)(a), (b), (c).

¹¹⁴ *Ibid* s 80.1(1)(d).

¹¹⁵ *Ibid* s 80.1(1)(g).

¹¹⁶ *Ibid* s 80.1AA(1).

either case grant clear, guaranteed rights to Australian citizens. Notwithstanding this, the category remains one of the few areas in which the question of whether a person holds Australian citizenship is often of critical importance when determining the level of protection that they enjoy. However, this has less to do with strong statutory rights protection for citizens, than with the existence of expansive statutes (passed under the wide ambit of the aliens and immigration powers) that apply exclusively to non-citizens.

The prime example of such a statute is the *Migration Act 1958* (Cth) (*'Migration Act'*). The object of the *Migration Act*, expressed in s 4(1), is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. To advance this object, the *Migration Act* establishes itself as 'the only source of the right of non-citizens to ... enter or remain [in Australia]',¹¹⁷ and 'provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by [the] Act'.¹¹⁸ Thus, with respect to both the right to enter Australia and the right to abode within the country, the *Migration Act* subjects non-citizens to a degree of regulation that citizens do not face.

1 *The Right to Enter Australia*

Section 42(1) of the *Migration Act* provides that, with some limited exceptions, any non-citizen who wishes to enter Australia must possess a visa that is 'in effect'. There are various classes of visas, many of which do not authorise re-entry into Australia. Thus, permanent residents of Australia are often required to obtain an additional 'Return (Residence) (Class BB) visa' if they wish to leave and then re-enter Australia.¹¹⁹ Even where a non-citizen possesses a visa that authorises their return to Australia, re-entry to the country is not guaranteed: pt 2 div 3 sub-div D of the *Migration Act* provides that in certain circumstances, the Minister may cancel a non-citizen's visa. This cancellation power is, however, limited by specified criteria.¹²⁰

Australian citizens, unlike non-citizens, do not need to obtain a visa under the *Migration Act* in order to re-enter Australia from overseas. However, this

¹¹⁷ *Migration Act* s 4(2).

¹¹⁸ *Ibid* s 4(4).

¹¹⁹ Section 42(1) of the *Migration Act* provides that, generally speaking, non-citizens may not travel to Australia without a visa that is in effect. There are two subclasses for the 'Return (Residence) (Class BB) visa': *Migration Regulations 1994* sch 1 pt 1 cl 1128. Subclass 155 authorises re-entry to Australia as a permanent resident for a five year period, while subclass 157 provides this authorisation for a three month period: see *Migration Regulations 1994* sch 2.

¹²⁰ See, eg, *Migration Act* s 116.

does not necessarily mean that Australian citizens have an ‘absolute right of re-entry’ into the country.¹²¹

Section 4(3) of the *Migration Act* provides that the Act requires citizens, as well as non-citizens, to identify themselves upon entering Australia — although the purpose of this is expressed as being furtherance of the *Migration Act*’s object of regulating the entry into and presence in Australia of non-citizens. The key provision to this end is s 166(1), which requires both citizens and non-citizens to present identification evidence for immigration clearance when entering Australia. For Australian citizens, this identification evidence typically consists of the person’s passport.¹²²

In order to be issued with an Australian passport, a person must be an Australian citizen. However, citizenship does not give rise to any absolute right to hold a passport.¹²³ While s 7 of the *Australian Passports Act 2005* (Cth) creates a general entitlement for a citizen to be issued with a passport upon application to the Minister for Foreign Affairs, this entitlement is subject to pt 2 div 2 of the Act, which sets out a number of situations in which the Minister may, in the exercise of executive discretion, refuse to issue a passport. These circumstances include where a child has applied for a passport in the absence of parental consent,¹²⁴ and where a ‘competent authority’ reasonably believes that reasons relating to Australian¹²⁵ or international¹²⁶ law enforcement arise, or reasonably suspects that if a particular person were issued with an Australian passport, he or she would be likely to engage in specified kinds of ‘harmful conduct’.¹²⁷ However, as Helen Irving has noted, some of the potential reasons for denial of a passport ‘include matters having no direct bearing on a person’s “character” as a citizen’.¹²⁸ Section 15, for instance, allows the Minister to refuse to issue a passport to a person where they have had two or more passports lost or stolen in the preceding five years.

Further, s 22(1) of the *Australian Passports Act 2005* (Cth) creates a general ministerial power to cancel a citizen’s passport. Section 22(2) provides a

¹²¹ Rubenstein, *Australian Citizenship Law in Context*, above n 9, 230.

¹²² *Migration Act* s 166(1)(a)(i). See also Rubenstein, *Australian Citizenship Law in Context*, above n 9, 230 n 207 for an overview of other identification evidence which may be prescribed under this section.

¹²³ Irving, ‘Still Call Australia Home’, above n 1, 140.

¹²⁴ *Australian Passports Act 2005* (Cth) s 11.

¹²⁵ *Ibid* s 12.

¹²⁶ *Ibid* s 13.

¹²⁷ *Ibid* s 14.

¹²⁸ Irving, ‘Still Call Australia Home’, above n 1, 140 n 57.

number of specific situations in which this power to cancel may be exercised, without limiting the scope of s 22(1). Included within the scope of sub-s (2) is a power to cancel a passport where a 'competent authority' has made a request for cancellation under s 14(1).¹²⁹ This power was invoked to cancel the passport of former Guantanamo Bay detainee Mamdouh Habib upon his return to Australia in 2005.¹³⁰

Refusal or cancellation of a citizen's passport deprives that citizen of the right to travel abroad. If a person's passport is cancelled while they are overseas, the cancellation would, in a practical sense, deprive them of the capacity to re-enter Australia. This suggests that while regulation of the entry rights of non-citizens might be more common as a matter of everyday practice, citizens are not immunised through legislation against exclusion from Australian territory.¹³¹

2 *The Right to Remain or Reside in Australia*

The other major vulnerability of non-citizens under the *Migration Act* relates to their susceptibility to expulsion from the country. Division 9 of pt 2 of the Act creates a number of deportation powers that operate with respect to certain non-citizens. Permanent residents are not excluded from the operation of these powers, and the threshold that must be passed to give rise to potential deportation is not always high. For instance, under s 201, a person may be rendered vulnerable to deportation if, within 10 years of attaining permanent residency, he or she committed an offence and was sentenced to at least one year's imprisonment. However, s 201 has largely fallen into disuse, on account of the insertion of the even broader s 501, which allows for the

¹²⁹ *Australian Passports Act 2005* (Cth) s 22(2)(d).

¹³⁰ See *Habib v Minister for Foreign Affairs and Trade* (2010) 192 FCR 148.

¹³¹ The question of whether it is legally permissible for the Commonwealth to prevent an Australian citizen from entering Australia on the grounds that they do not hold a valid passport has not been tested before the courts. Arguably, the *Australian Constitution* or the common law may provide a degree of protection for citizens in this circumstance. For instance, Irving has argued that citizens have a constitutionally protected right of abode in Australia: Irving, 'Still Call Australia Home', above n 1, 141. George Williams and David Hume have also suggested that, pursuant to *Potter v Minahan* (1908) 7 CLR 277, the common law principle of legality presumptively protects against abrogation of 'the freedom of individuals to re-enter their home country': George Williams and David Hume, *Human Rights Under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 42. However, the existence and extent of any such protection remains unresolved at present. It is also unclear whether, if such constitutional or common law protection were ultimately found to exist, the class of protected persons would map directly to the class of persons possessed of statutory citizenship.

revocation of a non-citizen's visa where the Minister is not satisfied that he or she passes the character test set out in s 501(6), irrespective of the number of years he or she has spent in Australia. Section 501(6)(a) provides that a person does not pass the character test where he or she has a 'substantial criminal record', which, pursuant to s 501(7)(c), is satisfied where a sentence of 12 months or more has been imposed. The other paras of s 501(7) outline additional circumstances in which the 'substantial criminal record' criterion is deemed to be satisfied for the purposes of the character test.¹³² Subsection 7(e), in particular, greatly expands the class of persons captured by s 501 beyond those who fall within s 201, by providing that a person will be taken to have a 'substantial criminal record' if they have been 'acquitted of an offence on the grounds of unsoundness of mind or insanity' and, as a result, have been 'detained in a facility or institution.' Cancellation of a visa under s 501 leads to detention — potentially indefinite detention — pending removal from Australia, and ultimately deportation and permanent exclusion from the country.¹³³ As Michelle Foster has noted, s 501 has been increasingly applied to cancel the visas of long-term residents of Australia, many of whom arrived in the country as children.¹³⁴

There is no power under current legislation that enables the deportation of Australian citizens. However, this does not mean that their right to reside in Australia is unqualified. For instance, the *Extradition Act 1988* (Cth) provides for the extradition of persons from Australia, and — unlike extradition law in a number of countries — does not exclude Australian citizens from its scope.¹³⁵ Additionally, certain types of citizens may once again be more vulnerable to exclusion than others, due to their potential capacity to qualify as constitutional aliens or immigrants. For example, in oral submissions in *Ame*, the Commonwealth suggested that citizens who had 'live[d] overseas for more than three years', or those who had been 'born overseas of Australian parents' and had gained citizenship by descent, could validly have their entry

¹³² A person is also deemed to have a 'substantial criminal record' if they have been sentenced to death (sub-s (7)(a)), life imprisonment (sub-s (7)(b)) or two or more terms of imprisonment — whether the sentencing occurs on one or more occasions — where the total term of sentence amounts to two years or more (sub-s (7)(d)). Subsection 7(e) is discussed above in the discursive text.

¹³³ See Michelle Foster, "An 'Alien' by the Barest of Threads" — The Legality of the Deportation of Long-Term Residents from Australia' (2009) 33 *Melbourne University Law Review* 483, 484.

¹³⁴ *Ibid* 485–6.

¹³⁵ See further Part III(D)(1) below.

to Australia regulated pursuant to the immigration power.¹³⁶ Such regulation does not presently exist,¹³⁷ and this interpretation of the immigration power is debatable as a matter of constitutional law.¹³⁸ However, the fact that scope for such arguments exists, combined with the lack of any express protection of entry and abode rights for Australian citizens, indicates that the security of such rights is not equal for all citizens. Other potentially vulnerable citizens include dual citizens, who, it has been argued, could conceivably qualify as constitutional aliens.¹³⁹

Although the entry and abode rights of Australian citizens are significantly stronger than those of non-citizens, the category is one of the areas in which citizenship rights in Australia fall short of those protected in a number of countries. The UK, for instance, extends a formal right of abode to all British citizens¹⁴⁰ — as well as to some non-citizens.¹⁴¹ The right of abode encompasses the freedom to both reside in the United Kingdom and to come and go from the territory without immigration control.¹⁴² In New Zealand, s 13 of the

¹³⁶ Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCATrans 66 (3 March 2005) 73 (D M J Bennett QC).

¹³⁷ While the *Migration Act* in its current form purports to regulate the entry to and presence in Australia of 'non-citizens', this was not always the reference point for determining its scope. Historical versions of the statute sought to regulate the entry into Australia of 'immigrants', under the ambit of the constitutional immigration power: see *Minister for Immigration and Multicultural and Indigenous Affairs v Walsh* (2002) 125 FCR 31, 35–6 [16]–[17] (Heerey, Mansfield and Hely JJ).

¹³⁸ In response to such suggestions Kirby J stated: 'We do not really have to resolve it in this case, but I really doubt that you could impose a duty on any Australian citizen to get a visa or something, some permission to get back into Australia because they are just not immigrants. They are not within the immigration power': Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCATrans 66 (3 March 2005) 73. Gummow J also stressed that the argument was not central to the case, but suggested it ventured into 'dangerous waters': Transcript of Proceedings, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCATrans 66 (3 March 2005) 74. This suggests that, should an appropriate case arise, the latent potential of the immigration power to extend to authorise laws of the kind suggested may be closed off by the Court. Both Gummow and Kirby JJ have, however, since retired from the High Court.

¹³⁹ See, eg, Kim Rubenstein, 'From Supranational to Dual to Alien Citizen: Australia's Ambivalent Journey' in Simon Bronitt and Kim Rubenstein (eds), *Citizenship in a Post-National World: Australia and Europe Compared* (Federation Press, 2008) 47.

¹⁴⁰ *Immigration Act 1971* (UK) c 77, s 2(1)(a). It is worth noting, however, that there are other types of British nationality provided for in the *British Nationality Act 1981* (UK) c 61 — for instance the statuses of 'British Dependent Territories Citizen' (pt II) and 'British Overseas Citizen' (pt III). Persons holding these statuses do not hold the same abode rights as those who hold 'British citizen' status (pt I).

¹⁴¹ *Immigration Act 1971* (UK) c 77, s 2(1)(b).

¹⁴² *Ibid* s 1(1).

Immigration Act 2009 (NZ) expressly confirms that New Zealand citizens, by virtue of their citizenship, have ‘the right to enter and be in New Zealand at any time’,¹⁴³ and that ‘no New Zealand citizen is liable to deportation under [the *Immigration Act*] in any circumstances’.¹⁴⁴ In Canada, citizens have a constitutionally protected right to ‘enter, remain in and leave Canada’, under s 6(1) of the *Canadian Charter of Rights and Freedoms* (‘*Canadian Charter*’).¹⁴⁵ The right is one of the few *Canadian Charter* rights that cannot be displaced by an express parliamentary declaration that a provision or piece of legislation shall operate ‘notwithstanding’ the *Canadian Charter* right affected.¹⁴⁶ It may, however, be limited by s 1, which guarantees the rights and freedoms set out in the *Canadian Charter* but provides that these rights and freedoms may be subject to ‘such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Thus, the extradition of Canadian citizens has often been upheld: although extradition falls foul of s 6, the need to combat illegal activity is a reasonable limit for the purposes of s 1.¹⁴⁷ In *Abdelrazik v Canada (Minister of Foreign Affairs)*,¹⁴⁸ s 6 was held to give rise to a positive obligation requiring the Canadian government to issue an emergency passport to a citizen to facilitate his re-entry to Canada.¹⁴⁹ In relation to the United States, it has been held that ‘the only absolute and unqualified right of citizenship is to residence within the territorial boundaries of the United

¹⁴³ *Immigration Act 2009* (NZ) s 13(1). Section 13(2), however, provides that in order to establish his or her right to enter New Zealand, a New Zealand citizen must prove his or her citizenship and establish his or her identity by complying with border requirements.

¹⁴⁴ *Ibid* s 13(3)(b).

¹⁴⁵ *Canada Act 1982* (UK) c 11, sch B pt I.

¹⁴⁶ The capacity for Parliament to issue such declarations is enshrined in s 33 of the *Canadian Charter*, and enables the circumvention of the rights codified in s 2 and ss 7–15. The provision, however, has rarely been relied upon.

¹⁴⁷ See, eg, *United States v Cotroni* [1989] 1 SCR 1469. The fairness of a particular extradition is not typically an issue under s 6, but where a particular extradition is not ‘in accordance with the principles of fundamental justice’, it may be held invalid under s 7 of the *Canadian Charter*: see, eg, *Canada v Schmidt* [1987] 1 SCR 500; *United States v Burns* [2001] 1 SCR 283.

¹⁴⁸ [2010] 1 FCR 267.

¹⁴⁹ While refusal to issue an emergency passport is *prima facie* a breach of s 6, the refusal will nonetheless be constitutionally permissible where the government can demonstrate that the refusal was in accordance with a ‘reasonable limit’, for the purposes of s 1 of the *Canadian Charter*. The refusal in *Abdelrazik* did not meet this threshold: *Abdelrazik v Canada (Minister of Foreign Affairs)* [2010] 1 FCR 267, 334–5 [156]–[157] (Zinn J).

States'.¹⁵⁰ Many countries also provide express constitutional recognition of entry or abode rights for citizens.¹⁵¹

The Australian statutory regime with respect to the entry and abode rights of citizens has the capacity to develop in two opposite directions. On the one hand, the existence of express citizenship rights in countries such as Canada, the United Kingdom and New Zealand, where the notion of citizenship shares similar roots, might suggest the eventual evolution of express rights in this area.¹⁵² On the other hand, the constitutional potential for the entry and abode of certain citizens to be regulated under the aliens or immigration powers may facilitate future legislative attempts to create express distinctions between the extent to which different classes of citizens enjoy rights in this category.

D *Rights to Protection*

The phrase 'rights to protection' refers broadly to state duties that may be invoked by citizens in need. There are two common ways in which such rights are recognised. The first comes in the form of protection — either absolute or qualified — against the extradition of citizens to foreign countries.¹⁵³ The second involves the existence of state obligations to extend consular assistance

¹⁵⁰ *United States v Valentine*, 288 F Supp 957, 980 (D PR, 1968) (Cancio J).

¹⁵¹ These countries include Albania, Bahrain, Democratic Republic of the Congo, Estonia and South Africa: see *Kushtetuta e Republikës së Shqipërisë* [Constitution of the Republic of Albania] art 38(1); *Constitution of the Kingdom of Bahrain* art 17(b); *Constitution de la République Démocratique du Congo* [Constitution of the Democratic Republic of the Congo] art 30; *Eesti Vabariigi Põhiseadused* [Constitution of the Republic of Estonia] s 36; *Constitution of the Republic of South Africa* s 21(3). The extent of constitutional protection varies between countries. Some countries, including Ethiopia and Finland, also grant constitutionally protected entry, abode or mobility rights to non-citizens, often of a lesser nature than the rights held by citizens: see, eg, *ሰገ መንግሥት* [Constitution of the Federal Democratic Republic of Ethiopia] art 32(1); *Suomen Perustuslaki* [Constitution of Finland] s 9.

¹⁵² Helen Irving has argued that there is scope for the development of a constitutional citizens' right of abode in Australia, in part on the basis that abode rights are 'conceptually inseparable from citizenship': Irving, 'Still Call Australia Home', above n 1, 141.

¹⁵³ Countries that have constitutionally codified such protections include Brazil, Czech Republic, Finland, Germany, Guinea-Bissau and Switzerland: see *Constituição da República Federativa do Brasil* [Constitution of the Federative Republic of Brazil] art 5(LI); *Listina Základních Práv a Svobod* [Czech Constitutional Charter of Fundamental Rights and Freedoms] art 14(4); *Suomen Perustuslaki* [Constitution of Finland] s 9; *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] art 16(2); *Constituição da República da Guiné-Bissau* [Constitution of the Republic of Guinea-Bissau] art 34; *Bundesverfassung der Schweizerischen Eidgenossenschaft* [Federal Constitution of the Swiss Confederation] art 25(1).

or diplomatic protection to citizens detained overseas.¹⁵⁴ In many cases, the codification of protective rights in both these categories is achieved through constitutional provision, though a number of countries supplement this through legislation.¹⁵⁵ In Australia, there are no clear statutory citizenship rights in either category.

1 Protection Against Extradition

Australian extradition law does not discriminate on the basis of citizenship, or even of residency. As noted above, the *Extradition Act 1988* (Cth) facilitates the extradition of both citizens and non-citizens, and the criteria that govern extradition do not change depending on whether or not the person whose extradition is sought holds citizenship. In *Vasiljkovic v Commonwealth*,¹⁵⁶ it was argued that the extradition of an Australian citizen was not permissible under Australian law. The High Court rejected this argument. Gleeson CJ stated that: '[t]here is nothing in the Act or Regulations that seeks to attach any legal significance to the fact that the plaintiff was at the relevant time a citizen of Australia.'¹⁵⁷

A number of foreign countries constitutionally protect against the extradition of citizens.¹⁵⁸ While in some cases, the prohibition on such extradition is

¹⁵⁴ Countries that have constitutionally codified such protections include Ecuador: see *Constitución del Ecuador* [Constitution of Ecuador] art 40(3). Other countries, including Afghanistan, Belarus, Bulgaria and Croatia, take a more general approach, and assert that the state will protect the rights of citizens abroad. See *Constitution of Afghanistan* art 39; *Канстытуцыя Рэспублікі Беларусь* [Constitution of the Republic of Belarus] art 59; *Конституция на Република България* [Constitution of Bulgaria] art 25(5); *Ustav Republike Hrvastke* [Constitution of the Republic of Croatia] art 10.

¹⁵⁵ In Canada, for instance, limited protection against extradition in certain circumstances is achieved through a combination of ss 1, 6 and 7 of the *Canadian Charter* and the *Extradition Act*, SC 1999, c 18. Similarly, in Costa Rica, limited protection against extradition is secured through the *Constitución Política de la República de Costa Rica* [Political Constitution of the Republic of Costa Rica] art 31 and the *Extradition Act 1971* (No 4795). Codified rights to diplomatic protection or assistance are more often found in constitutions than in statutes, and are often drafted in very general terms: see above n 154. However, some examples of legislative codification of protective rights can be found, for example, in the United States: see, eg, 22 USC § 1732 (2012). In Canada, once again, a hybrid model applies — rights to protection are secured through a combination of s 7 of the *Canadian Charter* and the *Foreign Missions and International Organizations Act*, SC 1991, c 41.

¹⁵⁶ (2006) 227 CLR 614.

¹⁵⁷ *Ibid* 619 [8].

¹⁵⁸ See above n 153.

absolute,¹⁵⁹ often it is more limited.¹⁶⁰ Many countries qualify constitutional prohibitions on extradition with provisions that extradition is possible where the rule of law, human rights or international treaties are complied with. For example, art 9 of the Constitution of Finland prohibits the extradition of citizens, but qualifies this by providing that extradition is possible in accordance with law to countries where ‘human rights and legal protection are guaranteed’.¹⁶¹

In Australia, the extradition process prescribed by the *Extradition Act 1988* (Cth) precludes the surrender of an otherwise eligible person for extradition where an ‘extradition objection’ arises under s 7 of the Act.¹⁶² Extradition objections arise where the person’s extradition has been sought for a political offence in relation to the extradition country,¹⁶³ or where, despite purporting to be for a legitimate extradition offence, the person’s surrender ‘is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, sex, sexual orientation, religion, nationality or political opinions or for a political offence in relation to the extradition country’.¹⁶⁴ An objection also arises where there is a risk that the person, if extradited, may face prejudice at trial, or punishment, detention or restriction in his or her personal liberty, by reason of ‘race, sex, sexual orientation, religion, nationality or political opinions’.¹⁶⁵ Extradition under the *Extradition Act 1988* (Cth) is also precluded where there are substantial grounds for believing that it would place the extradited person in danger of being subjected to torture,¹⁶⁶ or

¹⁵⁹ For example, *Конституция Российской Федерации* [Constitution of the Russian Federation] art 61(1) prohibits the deportation or extradition of Russian citizens. In a similar vein, *Bundesverfassung der Schweizerischen Eidgenossenschaft* [Federal Constitution of the Swiss Confederation] art 25 prohibits the expulsion of any Swiss citizen, or the extradition of any citizen to a foreign authority without the citizen’s consent.

¹⁶⁰ A number of countries, including Belarus and Bulgaria for instance, constitutionally prohibit the extradition of citizens except where the extradition is in accordance with a treaty to which the nation is a party: see, eg, *Канстытуцыя Рэспублікі Беларусь* [Constitution of the Republic of Belarus] art 10; *Конституция на Република България* [Constitution of Bulgaria] art 25(4). Other constitutions only permit the extradition of citizens to countries where the human rights and legal protection of the citizen are guaranteed: see, eg, *Suomen Perustuslaki* [Constitution of Finland] s 9.

¹⁶¹ *Suomen Perustuslaki* [Constitution of Finland].

¹⁶² See *Extradition Act 1988* (Cth) ss 19(2)(d), 22(3)(a).

¹⁶³ *Ibid* s 7(a).

¹⁶⁴ *Ibid* s 7(b).

¹⁶⁵ *Ibid* s 7(c). Additional grounds for extradition objections are provided for in ss 7(d)–(e).

¹⁶⁶ *Ibid* ss 15B(3)(a), 22(3)(b).

where there is a risk that they may be subjected to the death penalty.¹⁶⁷ Thus, the statute includes many of the protections that are constitutionally secured for citizens in foreign countries, but extends these protections to non-citizens as well.¹⁶⁸

Extradition statutes in the UK, New Zealand and Canada include protective provisions of a similar nature to those in the *Extradition Act 1988* (Cth).¹⁶⁹ In each of these countries, however, protection is augmented somewhat by the existence of a bill of rights. Section 3 of the *Human Rights Act 1998* (UK) c 42 provides that legislation, so far as possible, must be given effect in a way which is compatible with the rights guaranteed in the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*').¹⁷⁰ This provision was relied upon to deny the extradition to the United States of computer hacker Gary McKinnon.¹⁷¹ Similarly, s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) provides that '[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning'. In Canada, various sections of the *Canadian Charter* impact on the legal framework for extradition. The extradition of Canadian citizens has been held to infringe s 6(1) of the *Canadian Charter*, which protects the entry, abode and mobility rights of Canadian citizens. However, as the need to combat illegal activities gives rise to a reasonable limit for the purposes of s 1 of the *Canadian Charter*, the s 6(1) infringement posed by extradition is typically a permissible one.¹⁷² In practice, constitu-

¹⁶⁷ Ibid ss 15B(3)(b), 22(3)(c)(ii).

¹⁶⁸ It is worth noting that some countries that set constitutional limits on extradition also extend these protections to non-citizens. For instance, the Constitution of Greece expressly prohibits the extradition of 'aliens prosecuted for their actions as freedom-fighters': see Σύνταγμα [Constitution of Greece] art 5(2).

¹⁶⁹ See *Extradition Act 2003* (UK) c 41, ss 79–83, 87; *Extradition Act 1999* (NZ) ss 7–8; *Extradition Act*, SC 1999, c 18, ss 44–7.

¹⁷⁰ Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

¹⁷¹ See, eg, Alan Travis and Owen Bowcott, 'Gary McKinnon Will not Be Extradited to US, Theresa May Announces', *The Guardian* (online), 17 October 2012 <<http://www.guardian.co.uk/world/2012/oct/16/gary-mckinnon-not-extradited-may>>; Joshua Rozenberg, 'Gary McKinnon: Theresa May Had No Choice But to Use Human Rights Grounds', *The Guardian* (online), 17 October 2012 <<http://www.guardian.co.uk/law/2012/oct/16/gary-mckinnon-theresa-may-human-rights>>.

¹⁷² See *United States v Cotroni* [1989] 1 SCR 1469. Interference with the entry, abode and mobility rights protected under s 6(1) of the *Canadian Charter* has been held to be justifiable even where the persons with respect to whom extradition was sought faced the risk of the

tional limits are more likely to flow from s 7, which provides that '[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice'. Extradition may violate the 'principles of fundamental justice' if the nature of criminal procedures or potential penalties in the extradition country 'shock[] the conscience',¹⁷³ or if the surrender of the person would 'offend[] against the basic demands of justice'.¹⁷⁴ Extraditions where the extradited person may face the death penalty have been held to infringe s 7,¹⁷⁵ but the risk of a severe prison term has been held not to suffice.¹⁷⁶ Notably, unlike s 6, the protection that stems from s 7 does not only flow to Canadian citizens, but extends to all persons.

The absence of a bill of rights in Australia potentially means that protections against extradition on human rights grounds are more limited than in the United Kingdom, Canada and New Zealand. Nonetheless, a number of human rights protections are encoded in the *Extradition Act 1988* (Cth).¹⁷⁷ Moreover, as in Canada, the United Kingdom and New Zealand, there is no discrimination in the level of protection afforded to citizens and non-citizens, as citizenship is not made a precursor for basic human rights protection.

2 *Rights to Consular Assistance and Diplomatic Protection*

Part 2 of the *Australian Consular Operations Handbook* governs the provision of consular services to Australians overseas and contains guidelines with respect to services provided in relation to the welfare of Australians abroad.¹⁷⁸ Chapter 4 of this Part states that '[t]he Department aims to give humanitarian assistance to Australian citizens and permanent residents whose welfare is at

death penalty, on the grounds that the death penalty is 'only marginally a mobility rights issue': see *United States v Burns* [2001] 1 SCR 283, 317 [48]. However, in this case, the extradition was blocked anyway by virtue of s 7 of the *Canadian Charter*: at 353–60 [124]–[143] (McLachlin CJ, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ).

¹⁷³ *Canada v Schmidt* [1987] 1 SCR 500, 522 (La Forest J for Dickson CJ, Beetz, McIntyre, Le Dain and La Forest JJ).

¹⁷⁴ *Ibid* 523.

¹⁷⁵ *United States v Burns* [2001] 1 SCR 283.

¹⁷⁶ See, eg, *United States v Jamieson* [1996] 1 SCR 465; *United States v Whitley* [1996] 1 SCR 467; *United States v Ross* [1996] 1 SCR 469.

¹⁷⁷ See above nn 162–167 and accompanying text.

¹⁷⁸ Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook* (February 2013) <<http://www.dfat.gov.au/publications/consular-operations-handbook/>>.

risk abroad, while respecting their rights to privacy',¹⁷⁹ and generally provides guidance on the services that travellers and their families can expect with respect to matters such as missing persons,¹⁸⁰ health and medical issues¹⁸¹ and assault.¹⁸² Chapter 6 of pt 2 deals with consular services in relation to Australians arrested or detained overseas. Paragraph 6.1 states that:

Consular protection in the case of arrested, detained or imprisoned people means ensuring, as far as possible that:

- Australians arrested, detained or imprisoned overseas are able to see an Australian consular officer and receive consular assistance
- Australians overseas charged with offences against local law or otherwise punished have access to appropriate legal defence and receive a fair trial under local law
- Australians imprisoned overseas are treated no less favourably than local citizens confined for similar offences
- The basic needs of Australian prisoners are met and the prisoners enjoy humanitarian standards of prisoner welfare.

Chapter 6 generally contains a number of guidelines outlining how consular officers should proceed with respect to 'Australians arrested or detained overseas.' Whether these guidelines apply exclusively to matters concerning Australian citizens, or whether they extend to cover permanent residents (as the provisions in ch 4 do)¹⁸³ is not clarified. Chapter 6 states that consular officials should: attempt to visit arrested or detained Australians at the earliest opportunity;¹⁸⁴ show a continuing interest in the welfare of Australians imprisoned overseas, irrespective of the nature of the crimes they have allegedly committed;¹⁸⁵ provide additional assistance where the Australian in question is a minor;¹⁸⁶ inform a nominated next of kin of the situation if the prisoner wishes it;¹⁸⁷ attempt to attend court where an Australian citizen is

¹⁷⁹ Ibid [4.1].

¹⁸⁰ Ibid [4.6]-[4.7], [4.13].

¹⁸¹ Ibid [4.14]-[4.15].

¹⁸² Ibid [4.17]-[4.21].

¹⁸³ Ibid [4.1].

¹⁸⁴ Ibid [6.3], [6.7].

¹⁸⁵ Ibid [6.4].

¹⁸⁶ Ibid [6.12].

¹⁸⁷ Ibid [6.13].

charged with a criminal offence;¹⁸⁸ and in certain circumstances make informal and, occasionally, formal representations on behalf of prisoners.¹⁸⁹

Significantly, as the *Australian Consular Operations Handbook* expressly states, it is not a legal document, and is ‘not intended to create any legally binding duties or obligations on the Australian Government to provide any particular consular assistance or services’.¹⁹⁰ Australian legislation is silent on the question of what consular service duties, if any, the Australian government owes to citizens who encounter trouble overseas. Similarly, there is no statutory duty for the government to extend diplomatic protection to a citizen who is wronged by a foreign power. In *Hicks v Ruddock*,¹⁹¹ David Hicks who, at the time of litigation had been detained in Guantanamo Bay for in excess of five years, argued that the Australian government owed him a “‘diplomatic duty’ of protection’, which, though it could not be enforced ‘as of right’, precluded the government from taking into account considerations irrelevant to the duty to protect when exercising its discretion.¹⁹² However, this argument was made by reference to common law and constitutional principles, rather than by reference to any legislative duty.¹⁹³

It has been argued that as a matter of political reality, consular assistance and diplomatic protection are often necessarily conducted behind closed doors.¹⁹⁴ This suggests that there is a need for some flexibility and discretion

¹⁸⁸ Ibid [6.15].

¹⁸⁹ Ibid [6.22]–[6.24].

¹⁹⁰ Ibid Introduction.

¹⁹¹ (2007) 156 FCR 574 (*Hicks*).

¹⁹² Ibid 594 [66] (Tamberlin J).

¹⁹³ The plaintiff in *Hicks* drew on UK common law cases to argue for the existence of a protective duty owed by the Australian government to David Hicks, as a citizen. The duty, it was argued, was applicable in Australia through the executive power in s 61 of the *Constitution*. The plaintiff acknowledged that the duty was one of ‘imperfect obligation’, and accordingly that it did not oblige the government to extend protection to Hicks: ibid 593 [61]. However, it was contended that the duty compelled the government to consider Hicks’ request for protection, in a manner that was according to law, and that this had been breached. The government sought for the case to be summarily dismissed. Tamberlin J dismissed the action for summary judgment, holding that although ‘the case for Mr Hicks is in some respects difficult and novel ... it does not follow that it has no reasonable prospects of success’: ibid 600 [92]. However, as Hicks ultimately pleaded guilty to the charges brought against him by the US, proceedings did not progress further. Consequently, the status of the legal arguments raised remains uncertain.

¹⁹⁴ For a summary of such arguments, see Craig Forcese, ‘The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad’ (2007) 57 *University of New Brunswick Law Journal* 102, 108.

when providing such services. The *Australian Consular Operations Handbook* stresses this point. Paragraph 6.1 states:

The arrest or detention of Australians overseas is a complex issue in consular protection. People arrested or detained require sensitive and well-considered assistance, possibly over an extended period. Sound guidance and policy direction may be required in handling bilateral relations in these cases. The nature of the crime committed or the long-term nature of detention may attract media and parliamentary interest in Australia, calling for careful and considered responses by Government and the Department.

Nonetheless, the perception of inaction on the part of the Australian government, in a series of high profile cases involving allegations of serious mistreatment of Australian citizens at the hands of foreign states — for example, the detention and alleged torture of Hicks¹⁹⁵ and fellow Guantanamo Bay inmate Mamdouh Habib by the United States,¹⁹⁶ the cases of Stern Hu¹⁹⁷ and Julian Assange¹⁹⁸ and, most recently, of ‘Prisoner X’ Ben Zygier, who in 2010 hanged himself while imprisoned in a maximum security Israeli jail¹⁹⁹ — have on occasion given rise to suggestions that a minimum standard of care ought to be established under the law.²⁰⁰

¹⁹⁵ Robert McClelland, ‘Howard Lets US Military Commission Devalue Our Citizenship’ (Media Release, 9 July 2003), <<http://thejusticecampaign.org/wordpress/wp-content/uploads/2011/05/McClelland-Military-Commissions.pdf>>.

¹⁹⁶ Natalie O’Brien, ‘Australians Saw Habib Tortured, Says Officer’, *The Sydney Morning Herald* (online), 13 February 2011 <<http://www.smh.com.au/national/australians-saw-habib-tortured-says-officer-20110212-1aran.html>>.

¹⁹⁷ Matt O’Sullivan, “‘Thrown to the Wolves’: PM Accused of Ignoring Rio Man”, *The Sydney Morning Herald* (Sydney), 11 July 2009, 1.

¹⁹⁸ See, eg, Philip Dorling, ‘Assange Felt “Abandoned” by Australian Government after Letter from Roxon’, *The Sydney Morning Herald* (online), 20 June 2012 <<http://www.smh.com.au/opinion/political-news/assange-felt-abandoned-by-australian-government-after-letter-from-roxon-20120620-20npj.html>>; Dylan Welch, ‘WikiLeaks Founder “Abandoned” by Government’, *The Sydney Morning Herald* (online), November 8 2011 <<http://www.smh.com.au/national/wikileaks-founder-abandoned-by-government-20111107-1n3wj.html>>; WL Central, *Former PM Condemns Australia for Abandoning Assange and Abdicating Sovereignty* (1 December 2012) <<http://wlcentral.org/node/2784>>.

¹⁹⁹ Felix Patrikeeff, ‘Ben Zygier: The Silence Surrounding Prisoner X’, *The Conversation* (online), 22 February 2013 <<http://theconversation.com/ben-zygier-the-silence-surrounding-prisoner-x-12371>>.

²⁰⁰ See Donald Rothwell, ‘Diplomatic Protection of Australians Abroad’ (Speech delivered at the Vice-Chancellor’s Lecture Series, Australian National University, 14 November 2012) <<http://www.anu.edu.au/vision/videos/7031/>>.

In 2007, the Australian Democrats introduced the Repatriation of Citizens Bill 2007 (Cth) into Parliament. In the second reading speech for the Bill, Senator Lyn Allison stated that it had been motivated by 'the failure of current laws to protect the human and legal rights of Australian citizen, Mr David Hicks, following his capture by the United States authorities in Afghanistan in 2003'.²⁰¹ The Bill sought to require the Attorney-General to 'use all appropriate and available channels and opportunities' to request the release and surrender to Australia of an Australian citizen detained by a foreign power, in particular circumstances.²⁰² These circumstances were prescribed in cl 6, which required the Attorney-General to request repatriation where, after investigating the matter, he or she concluded that: (a) there was 'excessive delay in bringing the citizen to trial'; (b) the conditions of detention were 'cruel or inhumane'; (c) the citizen faced corporal punishment or the death penalty; (d) the pre-trial and trial process had not been fair by international standards; or (e) there would be an infringement of the citizen's human rights under any international human rights treaty or convention to which Australia was a party. Clause 6 also prescribed the procedure which the Attorney-General was required to adopt when investigating claims.

The Repatriation of Citizens Bill 2007 (Cth) ultimately lapsed in 2008. It has been suggested that, if passed, it would have been one of the first statutes of its kind in the world.²⁰³ Another example can be found in the Foreign Relations and Intercourse Title in the *United States Code*,²⁰⁴ which goes considerably further than the Repatriation of Citizens Bill 2007 (Cth). Section 1732 of this Title of the Code imposes upon the President a duty to, upon receiving knowledge that a US citizen has been deprived of liberty by a foreign government, demand the reasons for imprisonment. Where the imprisonment 'appears to be wrongful and in violation of the rights of American citizenship', the President must demand the citizen's release.²⁰⁵ If release is 'unreasonably delayed or refused', the President is required to use all legal means that he thinks necessary or proper to obtain or effectuate the release, short of acts of war.²⁰⁶

²⁰¹ Commonwealth, *Parliamentary Debates*, Senate, 29 March 2007, 8.

²⁰² Repatriation of Citizens Bill 2007 (Cth) cl 5.

²⁰³ Christopher Tran, 'Government Duties to Provide Diplomatic Protection in a Comparative Perspective' (2011) 85 *Australian Law Journal* 300, 303.

²⁰⁴ 22 USC (2012).

²⁰⁵ *Ibid* § 1732.

²⁰⁶ *Ibid*.

Recently, in a public lecture, Donald Rothwell argued that Australia ought to enact a Consular Services Act that expressly enshrines the ‘right of consular assistance’ in Australian law and establishes minimum standards that governments are required to meet when providing assistance to Australians overseas.²⁰⁷ Rothwell argued that such legislation should ‘make clear [both] the capacity of the Australian government to represent Australians overseas,’ as well as ‘the legal entitlement of citizens to [such] representations’.²⁰⁸ He also stressed that laws that guarantee legal protection for citizens in foreign countries exist in ‘countries as diverse as Brazil, Kazakhstan, Hungary, China, Estonia and Germany’.²⁰⁹

In Canada, s 3 of the *Foreign Missions and International Organizations Act*²¹⁰ gives force of Canadian law to several articles of the *Vienna Convention on Consular Relations*,²¹¹ including those that create state obligations to nationals.²¹² In the United Kingdom, the equivalent is achieved through the *Consular Relations Act 1968* (UK) c 18.²¹³ Both these countries also make a number of policy documents available online via government websites.²¹⁴ New Zealand mirrors Australia in that no statute governs the provision of consular services. In all four countries it is noted that while dual citizens are

²⁰⁷ Rothwell, above n 200, 39:20.

²⁰⁸ Ibid 39:37.

²⁰⁹ Ibid 37:21.

²¹⁰ SC 1991, c 41.

²¹¹ Opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).

²¹² *Foreign Missions and International Organizations Act*, SC 1991, c 41, s 3(1) states that:

Articles 1, 5, 15, 17, 31 to 33, 35, 39 and 40, paragraphs 1 and 2 of Article 41, Articles 43 to 45 and 48 to 54, paragraphs 2 and 3 of Article 55, paragraph 2 of Article 57, paragraphs 1 to 3 of Article 58, Articles 59 to 62, 64, 66 and 67, paragraphs 1, 2 and 4 of Article 70 and Article 71 of the *Vienna Convention on Consular Relations*, have the force of law in Canada in respect of all foreign states, regardless of whether those states are parties to those Conventions.

In particular, art 5 of the *Vienna Convention on Consular Relations* creates a number of obligations with respect to the protection of nationals.

²¹³ *Consular Relations Act 1968* (UK) c 18, s 1(1), sch 1.

²¹⁴ For the United Kingdom, see, eg, Foreign & Commonwealth Office, *Support for British Nationals Abroad: A Guide* (July 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193660/FCO_BritsAbroad_web_13.pdf>; Foreign & Commonwealth Office, *Consular Strategy 2013–2016: Consular Excellence* (April 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/191053/CONSSTRAT10.pdf>. For Canada, see, eg, Government of Canada, *A Guide for Canadians Imprisoned Abroad* (December 2013) <<http://travel.gc.ca/travelling/publications/guide-for-canadians-imprisoned-abroad#protection>>; Government of Canada, *Emergency Information* (January 2014) <<http://travel.gc.ca/assistance/emergency-info>>.

entitled to access consular assistance, their ability to do so may be limited in certain situations, due to international or foreign law constraints.²¹⁵ Of the four countries, Australia alone expressly states that consular assistance generally extends to permanent residents.²¹⁶

The simultaneous extension of certain protections to Australian permanent residents and the acknowledgement that full protection may not flow to Australian citizens who hold dual citizenship raises questions about the extent to which statutory citizenship can correctly be described as the gateway to protective rights in Australia, and the extent to which the rights held by citizens can be described as equal in nature. These questions are underlined by the fact that, at least with respect to consular assistance and diplomatic protection, no rights are expressly guaranteed to citizens, giving rise to the possibility that protection may be extended unequally to different citizens, or denied to some citizens altogether.

E *Political Rights*

The final category in which this article will consider the existence of citizens' rights in Australia is that of political membership. As Rubenstein has noted, 'membership of the political community is ... determined by citizenship status' — at least to the extent that the 'political community' is defined by

²¹⁵ Foreign & Commonwealth Office, *Support for British Nationals Abroad: A Guide*, above n 214; SafeTravel, New Zealand Ministry of Foreign Affairs and Trade, *Our Services* (6 December 2013) <<https://www.safetravel.govt.nz/our-services>>; Government of Canada, *Dual Citizenship: What You Need to Know* (18 December 2013) <<http://travel.gc.ca/travelling/publications/dual-citizenship>>; Department of Foreign Affairs and Trade, *Dual Nationals* <<http://www.smarttraveller.gov.au/tips/dual-nationals.html>>.

²¹⁶ Department of Foreign Affairs and Trade, *Australian Consular Operations Handbook*, above n 178, [4.1]. In the United Kingdom, citizens of certain European Union and Commonwealth countries may access assistance in limited circumstances, however, UK permanent residence alone is insufficient: Foreign & Commonwealth Office, *Support for British Nationals Abroad*, above n 214, 5. The websites of certain New Zealand embassies suggest that assistance may be available for permanent residents of New Zealand: see, eg, New Zealand Ministry of Foreign Affairs and Trade, *New Zealand Embassy Tehran, Iran: Embassy Services for New Zealanders* <<http://www.nzembassy.com/iran/new-zealanders-overseas/embassy-services-new-zealanders>>. However, the Ministry's 'SafeTravel' website states that '[c]onsular services are available to New Zealand citizens outside New Zealand', with no mention of permanent residents: see SafeTravel, New Zealand Ministry of Foreign Affairs and Trade, *Our Services*, above n 215. Canadian websites that describe the provision of consular services make no mention of permanent residents: see, eg, Government of Canada, *A Guide for Canadians Imprisoned Abroad*, above n 214.

reference to the class of people who may exercise the vote, and the people who sit in Parliament as representatives of the voters.²¹⁷

Eligibility to vote in Australian federal elections is governed by the *Commonwealth Electoral Act 1918* (Cth) (*'Commonwealth Electoral Act'*). Prior to 1984, eligibility was not restricted to Australian citizens — rather, any adult who held British subject status and had resided in Australia for at least six months could exercise the vote. In 1984, significant amendments were made to the Act, including the substantial restriction of voting rights to persons over the age of 18 who hold Australian citizenship.²¹⁸ However, as a transitory measure, British subjects who possessed voting rights at the time of this change were allowed to retain these rights.²¹⁹

Not all adult Australians are able to exercise voting rights. Sections 93(8) and 93(8AA) of the *Commonwealth Electoral Act* specify particular classes of excluded persons. A person is not entitled to be placed on the electoral roll or to vote if he or she is 'of unsound mind' and by virtue of this is 'incapable of understanding the nature and significance of enrolment and voting',²²⁰ or if he or she has been convicted of treason or treachery, and has not received a pardon.²²¹ Further, a person who is serving a sentence of imprisonment of three years or longer cannot vote at any Senate or House of Representatives election,²²² though they may remain on the electoral roll.²²³

In 2006, amendments to the *Commonwealth Electoral Act* expanded the disenfranchisement of prisoners to include all persons serving a sentence of imprisonment, irrespective of its duration.²²⁴ In *Roach v Electoral Commissioner* (*'Roach'*),²²⁵ the High Court held that these amendments were unconstitutional. While ss 8 and 30 of the *Australian Constitution* clearly stipulate the determination of qualifications for electors to be the ultimate decision of the Federal Parliament, the Court held that Parliament must exercise this power in a manner that is consistent with the constitutional requirement in

²¹⁷ Rubenstein, *Australian Citizenship Law in Context*, above n 9, 223.

²¹⁸ *Commonwealth Electoral Act* s 93(1)(b)(i), as amended by *Statute Law (Miscellaneous Amendments) Act 1981* (Cth) s 32.

²¹⁹ *Commonwealth Electoral Act* s 93(1)(b)(ii).

²²⁰ *Ibid* s 93(8)(a).

²²¹ *Ibid* s 93(8)(b).

²²² *Ibid* s 93(8AA).

²²³ *Ibid* s 96A.

²²⁴ *Ibid* s 93(8AA), as inserted by *Electoral and Referendum (Electoral Integrity and Other Measures) Act 2006* (Cth) sch 1 item 15.

²²⁵ (2007) 233 CLR 162.

ss 7 and 24 that Parliament be 'directly chosen by the people'.²²⁶ Essentially, this means that Parliament may only exclude people from exercising the franchise in a manner that is 'appropriate and adapted to serve an end consistent or compatible with the maintenance of the [constitutionally] prescribed system of representative government'.²²⁷ Making voting rights contingent upon the possession of statutory citizenship — which, as the Preamble to the *ACA 2007* states, represents 'full and formal membership of the community of the Commonwealth of Australia' — was held to satisfy this standard,²²⁸ however, a 'substantial reason' is needed for the disenfranchisement of any group of adult citizens.²²⁹ Gleeson CJ held that a potential basis for the exclusion of citizens might be found in 'conduct which manifests such a rejection of civic responsibility as to warrant temporary withdrawal of a civic right'.²³⁰ On this basis, the disenfranchisement of prisoners serving sentences in excess of three years was constitutionally permissible, but the blanket disenfranchisement of all prisoners was not.²³¹

Voting in Australia is both a right as well as a statutory obligation.²³² However, for Australian citizens who reside overseas, it is optional where the person intends to return to Australia within a six-year period.²³³ In order to retain voting rights while overseas, the citizen must register as an 'eligible overseas elector'.²³⁴ Where the citizen in question intends to live overseas for in excess of six years, he or she is precluded from exercising the vote.²³⁵

Citizenship is also relevant to the right to stand for political office at Commonwealth level. Eligibility criteria here are more restrictive. Section 44(i) of the *Australian Constitution* provides that

²²⁶ Ibid 173–4 [6]–[7] (Gleeson CJ), 204 [101] (Gummow, Kirby and Crennan JJ), 211 [130] (Hayne J).

²²⁷ *Roach* (2007) 233 CLR 162, 204 [101] (Gummow, Kirby and Crennan JJ).

²²⁸ Ibid 174 [7] (Gleeson CJ).

²²⁹ Ibid.

²³⁰ Ibid 175 [8].

²³¹ Section 93(8AA) of the *Commonwealth Electoral Act* was amended in 2011 to reflect this: *Electoral and Referendum Amendment (Enrolment and Prisoner Voting) Act 2011* (Cth) sch 2 item 2.

²³² See *Commonwealth Electoral Act* s 245(1).

²³³ Ibid s 94(1).

²³⁴ Ibid.

²³⁵ Ibid ss 94–94A. See further Bryan Mercurio and George Williams, 'The Australian Diaspora and the Right to Vote' (2004) 32 *University of Western Australia Law Review* 1.

[a]ny person who ... is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

While this provision does not, in its terms, demand that parliamentarians hold Australian citizenship, it effectively requires this in practice. Moreover, s 44(i) has been interpreted to exclude dual citizens from standing for Parliament, on the basis that they hold allegiance to or citizenship of a foreign power.²³⁶

Possession of Australian citizenship is not necessary for the exercise of all political rights. For example, the implied freedom of political communication that has been held to arise out of ss 7 and 24 of the *Australian Constitution* is not restricted to citizens, but rather extends to all persons in Australia. While members of the High Court have affirmed that aliens ‘have no constitutional right to participate in or to be consulted on matters of government’,²³⁷ the indirect conferral of the freedom of political communication upon aliens is necessary to maintain a ‘broad national environment in which the individual citizen exists and in which representative government must operate’.²³⁸

The category of political rights is perhaps the only significant area in which positive rights are conferred expressly and exclusively upon people who hold Australian citizenship, both at a statutory level as well as a constitutional level. The combination of these factors materially affects the capacity for citizenship rights to change in this area. While Parliament has a general power to determine, through electoral law, the qualifications of electors, *Roach* and the subsequent case of *Rowe v Electoral Commissioner* (*Rowe*)²³⁹ indicate that its capacity to exercise this power in a way that excludes Australian citizens from the franchise is relatively limited.²⁴⁰ Such exclusion cannot be legislated for

²³⁶ See, eg, Sarah O’Brien, ‘Dual Citizenship, Foreign Allegiance and s 44(i) of the Australian Constitution’ (Background Paper No 29, Parliamentary Library, Parliament of Australia, 1992); Rubenstein, *Australian Citizenship Law in Context*, above n 9, 258–9.

²³⁷ *Cunliffe v Commonwealth* (1994) 182 CLR 272, 328 (Brennan J), see also 336 (Deane J).

²³⁸ *Ibid* 336 (Deane J).

²³⁹ (2010) 243 CLR 1.

²⁴⁰ See, eg, Anne Twomey, ‘*Rowe v Electoral Commissioner* — Evolution or Creationism?’ (2012) 31 *University of Queensland Law Journal* 181, 183–4, 187; Graeme Orr, ‘The Voting Rights Ratchet: *Rowe v Electoral Commissioner*’ (2011) 22 *Public Law Review* 83, 84.

without a 'substantial reason' that is compatible with the constitutionally prescribed system of representative democracy.²⁴¹

Both the linkage of political rights with citizenship and the exclusion of certain citizens from such rights are common internationally.²⁴² The United Kingdom, Canada and New Zealand each sit at different points on the spectrum with respect to the political rights of citizens, with Australia adopting a 'middle ground' position comparatively. The United Kingdom, like Australia, determines voting rights and the right to stand for office through statute.²⁴³ In general, these rights are linked with British citizenship, though they also extend to certain non-citizens.²⁴⁴ All convicted prisoners serving

²⁴¹ See, eg, *Roach* (2007) 233 CLR 162, 204 [101] (Gummow, Kirby and Crennan JJ).

²⁴² Countries that codify rights of this nature include Afghanistan, Albania, Andorra, Angola, Argentina, Bahrain, Belarus, Belgium, Bolivia, Bulgaria, Croatia, Cuba and many more. See *Constitution of Afghanistan* art 33; *Kushtetuta e Republikës së Shqipërisë* [Constitution of the Republic of Albania] art 45; *Constitució del Principat d'Andorra* [Constitution of the Principality of Andorra] art 24; *Constituição da República de Angola* [Constitution of the Republic of Angola] art 54; *Constitución de la Nación Argentina* [Constitution of Argentina] s 37; *Constitution of the Kingdom of Bahrain* art 1(e); *Канстытуцыя Рэспублікі Беларусь* [Constitution of the Republic of Belarus] art 64; *De Belgische grondwet* [Constitution of Belgium] art 61; *Constitución Política del Estado Plurinacional de Bolivia* [Constitution of the Plurinational State of Bolivia] arts 26–8; *Конституция на Република България* [Constitution of Bulgaria] art 42; *Ustav Republike Hrvastke* [Constitution of the Republic of Croatia] art 45; *Constitución de la República de Cuba* [Constitution of the Republic of Cuba] art 132. Codification is often constitutional in nature, however some countries supplement a broad constitutional guarantee with more specific statutory provisions. For instance, in Argentina, the general guarantee of political rights in *Constitución de la Nación Argentina* [Constitution of Argentina] art 37 is supplemented by provisions in the *Código Electoral Nacional* [National Electoral Code], and other legislation.

²⁴³ However, unlike Australia, where political rights are determined by a handful of statutes and constitutional provisions, electoral law in the United Kingdom is a complex affair that spans across over 200 Acts, Regulations and Orders: see generally R A Watt, 'Reflections on a New Structure for the United Kingdom's Electoral Law' (Report, Electoral Commission, 2013) <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0010/155899/Reflections-on-a-New-Structure-for-the-UKs-Electoral-Law.pdf>.

²⁴⁴ Non-citizen residents who can exercise voting rights in the United Kingdom general elections include Irish citizens and qualifying Commonwealth or European Union citizens: *Representation of the People Act 1983* (UK) c 2, s 4(1)(c). Those residents who gain voting rights by virtue of a qualifying European Union citizenship (ie, those who are not Commonwealth citizens or citizens of the Republic of Ireland) cannot vote in general parliamentary elections, but can vote in European and local elections in the UK: s 2(1)(c). They may also vote in elections to the Scottish Parliament and Welsh and Northern Ireland Assemblies (if they live in those areas) and some referenda (based on the rules for the particular referendum): see The Electoral Commission, *Who Can Register to Vote?* (2008) About My Vote <http://www.aboutmyvote.co.uk/who_can_register_to_vote.aspx>. Residents who are Irish citizens or qualifying Commonwealth citizens have the additional right to vote in general parliamentary elections: *Representation of the People Act 1983* (UK) c 2, s 1(1)(c).

prison terms are currently denied the right to vote in United Kingdom general elections, though the European Court of Human Rights has ruled that this blanket ban on prisoner voting is incompatible with the *European Convention on Human Rights*.²⁴⁵ In New Zealand, voting rights are not limited to citizens: all citizens and permanent residents who have, at some time, resided continuously in New Zealand for a period of at least one year are eligible to vote.²⁴⁶ In Canada, a combination of statutory and constitutional provisions apply. The *Canada Elections Act*²⁴⁷ entitles all Canadian citizens over the age of 18 years to vote,²⁴⁸ but excludes any person who is 'imprisoned in a correctional institution serving a sentence of two years or more'.²⁴⁹ This legislation is subject to s 3 of the *Canadian Charter*, which constitutionally guarantees Canadian citizens the right to vote at federal or provincial elections, and to be eligible for membership of parliament. The right in s 3 cannot be displaced by Parliament,²⁵⁰ however, it is subject to reasonable limits prescribed by law.²⁵¹

Political rights in Australia come close to qualifying as rights inextricably connected with citizenship. Unlike entry and abode rights, rights to protection, or even status protection rights, express statutory rights in this area are granted on the basis of citizenship. Additionally, *Roach* and *Rowe* suggest that these statutory citizenship rights attract a degree of constitutional protection.

However, as Irving has argued, the capacity to describe voting rights as 'citizenship rights' is frustrated by the fact that such rights '[do] not apply to all citizens, and because [they] still [apply] to a class of non-citizens'.²⁵² Further, the constitutional exclusion of dual citizens from eligibility for Parliament reinforces that in the realm of political rights — as in other arenas — not all citizens are equal. Nonetheless, the category of political rights provides perhaps the strongest indication of the existence of reciprocal rights and obligations that flow from citizenship. This idea is further explored in Part IV.

²⁴⁵ See, eg, *Hirst v United Kingdom [No 2]* [2005] IX Eur Court HR 187.

²⁴⁶ *Electoral Act 1993* (NZ) s 74(1).

²⁴⁷ SC 2000, c 9.

²⁴⁸ *Ibid* s 3.

²⁴⁹ *Ibid* s 4(c).

²⁵⁰ *Canadian Charter* s 33.

²⁵¹ *Ibid* s 1.

²⁵² Irving, 'Still Call Australia Home', above n 1, 140.

IV THE 'RECIPROCAL OBLIGATIONS' OF CITIZENS

The Preamble to the *ACA 2007* describes Australian statutory citizenship as 'a common bond, involving reciprocal rights and responsibilities'. While this description does not, of itself, have legal force, it has attracted some judicial affirmation. For instance, in *Roach*, Gleeson CJ stated that the reciprocity of citizenship rights and obligations is 'important in the context of membership of the community'.²⁵³

The idea that the rights of citizenship have reciprocal obligations was central to Gleeson CJ's decision in *Roach*. His Honour upheld the disenfranchisement of prisoners serving sentences of three years or longer on the grounds that 'serious offending' amounts to a form of 'civic irresponsibility' that Parliament may appropriately couple with temporary 'exclusion from the political rights of citizenship'.²⁵⁴ Further, his Honour stated:

Emphasis upon civic responsibilities as the corollary of political rights and freedoms, and upon society's legitimate interest in promoting recognition of responsibilities as well as acknowledgment of rights, has been influential in contemporary legal explanation of exclusions from the franchise as consistent with the idea of universal adult suffrage.²⁵⁵

However, the notion of reciprocity between citizenship rights and obligations in Australia gives rise to a number of uncertainties. First, identifying either rights or obligations that are unique to Australian citizens is challenging. This is underlined by the sheer paucity of either judicial commentary or scholarly consideration of the obligations of Australian citizenship. The thinness of material to draw upon makes the analysis in this Part necessarily brief.

Commonwealth statutes that discriminate on the basis of community membership do not consistently make rights contingent upon citizenship; instead, they also base rights upon the lower threshold of residence.²⁵⁶ Further, as Part III of this article demonstrates, even in the areas in which possession of Australian citizenship makes a significant practical difference to the treatment a person receives, this is often achieved in the absence of any express codification of citizenship rights. Where rights are both codified and strongly linked with citizenship, as with voting rights, non-citizens are

²⁵³ *Roach* (2007) 233 CLR 162, 177 [12].

²⁵⁴ *Ibid* 176 [11]–[12].

²⁵⁵ *Ibid* 177 [12].

²⁵⁶ See Rubenstein, *Australian Citizenship Law in Context*, above n 9, 184.

nonetheless not excluded in their entirety, and rights are, in some cases, denied to citizens even when no obligations have been breached.²⁵⁷

Ascertaining obligations that are unique to citizens is similarly difficult. The Department of Immigration and Border Protection webpage states that the responsibilities of citizenship are to ‘obey the law’, ‘defend Australia should the need arise’, ‘vote in federal and state or territory elections, and in [referenda]’ and ‘serve on a jury if called to do so’.²⁵⁸ However, the first three of these obligations are not uniquely held by citizens. All persons within Australia are bound to obey Australian law, and a lack of citizenship (or even of permanent residency) does not protect a person against being conscripted into defending the nation ‘should the need arise.’ In a time of war, any person between the ages of 18 and 60 years who has resided in Australia for six months or more can be called upon by proclamation of the Governor-General to serve in the Defence Force for the duration of the war.²⁵⁹ Further, as mentioned in Part III(E), some British subjects retain exercisable voting rights in Australia.²⁶⁰ It is difficult to conceive of rights and obligations as truly reciprocal where the obligations are imposed in the absence of guaranteed rights, and where fulfilment of obligations does not in practice give rise to corresponding rights in all cases.²⁶¹

Secondly, the legal position of all Australian citizens is not equal. Some Australians are more susceptible to losing their citizenship,²⁶² or to exclusion from the country,²⁶³ than others. This raises the question of whether any ‘obligations’ that arise reciprocally to these rights are more onerous for these

²⁵⁷ An example of this is the denial of voting rights to citizens who intend to reside overseas for in excess of six years: *Commonwealth Electoral Act* ss 94–94A.

²⁵⁸ Department of Immigration and Border Protection, above n 64.

²⁵⁹ *Defence Act 1903* (Cth) ss 59–60. The constitutionality of requiring resident aliens to perform military service was challenged, and upheld, in the 1945 case of *Polites v Commonwealth* (1945) 70 CLR 60.

²⁶⁰ *Commonwealth Electoral Act* s 93(1)(b)(ii).

²⁶¹ Along similar lines, Irving has noted that making legal citizenship rights contingent upon the performance of legal duties incumbent upon all persons regardless of citizenship status may generate a system in which citizens are more onerously penalised than non-citizens for breaching such duties. While non-citizens would only suffer the penalty for failing to perform the duty, citizens would be subject both to this penalty as well as the loss of whatever citizenship rights are reciprocally linked to the duty: see Helen Irving, ‘Rights and Citizenship in Law and Public Discourse’ in Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate, 2006) 161, 170.

²⁶² See Part III(B)(5) above.

²⁶³ See Part III(C)(2) above.

more vulnerable citizens than for other Australians. In a similar vein, the formal undertakings of all citizens are not equal. People who obtain citizenship by conferral are required to pledge loyalty to Australia and its people, to express commitment to Australia's democratic beliefs and respect for its rights and liberties, and to promise to 'uphold and obey' its laws, via the Pledge of Commitment. Those who gain citizenship automatically at birth or by descent, however, are not required to make any such undertakings. This raises the question of whether the Pledge itself could amount to a source of citizenship obligations and, if so, whether these obligations operate differently upon different classes of citizen. The language of the Preamble also points to the possibility that citizenship obligations may vary depending on how a person obtained citizenship. After describing Australian citizenship as 'a common bond, involving reciprocal rights and obligations', the Preamble states that:

The Parliament recognises that persons *conferred* Australian citizenship enjoy these rights and undertake to accept these obligations:

- (a) by pledging loyalty to Australia and its people; and
- (b) by sharing their democratic beliefs; and
- (c) by respecting their rights and liberties; and
- (d) by upholding and obeying the laws of Australia.²⁶⁴

These four undertakings correspond to the undertakings in the Pledge of Commitment. The Preamble's reference to persons 'conferred' Australian citizenship arguably supports the view that these commitments only apply to persons who have obtained citizenship by conferral, and do not extend to those who hold citizenship by birth or descent. This, however, seems at odds with the idea, also expressed in the Preamble, that Australian citizenship is a 'common bond' that 'unites all Australians'.

V CONCLUSION

In the introduction to this article, I suggested that the Preamble to the *ACA 2007* makes three claims about the nature of Australian statutory citizenship: that holding citizenship grants a person a 'full and formal membership of the Australian community' that non-citizens do not hold; that such membership is characterised by the possession of 'reciprocal rights and obligations'; and that citizenship is a bond that unites those who hold it, suggesting that it is underpinned by principles of equality.

²⁶⁴ Emphasis added.

Gleeson CJ's comments in *Roach* suggest that the Preamble's claims are not entirely normative: to at least some degree they indicate legal implications that flow from Australian citizenship. Parts III and IV of this article tested the extent to which the Preamble's claims are reflected in the legal rights and duties of Australian citizens in four key domains that have long been regarded as deeply connected with citizenship.

The analysis in these Parts gives rise to mixed conclusions. While, as Rubenstein has established, most rights in Australia are not made contingent upon citizenship, in each of the categories examined in this article, the rights of citizens are materially different from those of non-citizens. In three of the four categories — status protection rights, rights to entry and abode, and political rights — this distinction is legal in nature.²⁶⁵ Arguably, this lends some credence to the claim that citizenship is an essential element of 'full and formal' community membership.

The claim that statutory citizenship is characterised by 'reciprocal rights and obligations' is more contestable. Part III demonstrates that where a person's legal position is affected by their citizenship status, this is not always achieved through the express codification of citizenship rights. In the case of entry and abode rights, for instance, the privilege of Australian citizens stems instead from the express denial of certain rights to non-citizens.²⁶⁶ The lack of expressly recognised, guaranteed citizens' rights makes the argument that such rights arise in exchange for the fulfilment of citizenship obligations a tenuous one. Moreover, many of the obligations conceived of as 'citizenship responsibilities' apply equally to some non-citizens, who do not become entitled to the rights of citizenship in exchange for performance.²⁶⁷ This, again, suggests that any rights and obligations held by citizens are not, in fact, reciprocal in nature.

Finally, the idea that Australian citizens are united by legal equality is dubious. The *ACA 2007* establishes different classes of citizenship, some of which are better protected against revocation than others. The fact that only certain classes of citizens are obliged to take the Pledge of Commitment raises

²⁶⁵ In the case of rights to protection, Australian citizens do appear to enjoy greater rights to diplomatic assistance than non-citizens. However, as no rights in this area are codified, this distinction between citizens and non-citizens cannot be classified as a legal one, and the degree of distinction is difficult to measure.

²⁶⁶ This is at odds with the legal framework in Canada, the United Kingdom and New Zealand, all of which confer express rights to enter and reside in their respective territories upon their citizens.

²⁶⁷ See Part IV above.

questions about whether different citizens have different legal obligations. Moreover, statutory citizenship must be situated within the parameters of a constitutional framework which does not necessarily conceive of all citizens equally: there is a danger, for instance, that certain citizens might fall within the ambit of the expansive immigration and aliens powers. These factors suggest that the image painted by the Preamble, of Australian citizenship as a gateway to full and equal community membership, may well be illusory, at least in legal terms.