

## AUSTRALIAN CITIZENSHIP AND THE INDEPENDENCE OF PAPUA NEW GUINEA

PETER M MCDERMOTT\*

If Papua and New Guinea attain independence as one entity it is likely that the legal consequences of their separate existence for so many years will also take some time to unravel. Such matters as ... the national status of the inhabitants of the two areas could also raise problems to be resolved by reference back to the prior separate existence of Papua and New Guinea.<sup>1</sup>

[T]he Papuans who were Australian citizens were not allowed to leave the airport until they had given a guarantee of one hundred pounds, that they would leave in a certain time. That is, our own citizens had to get permission to visit our country. Those things had a bit of an impression on me.<sup>2</sup>

### I INTRODUCTION

The *Papua New Guinea Independence Act 1975* (Cth) ('*PNG Independence Act*') provided for the Independent State of Papua New Guinea to become an independent sovereign nation on Independence Day, on 16 September 1975. This new Independent State was constituted by the former Australian Territories of Papua and New Guinea. Until World War II, these Territories had been separately administered by Australia. The *Papua and New Guinea Act 1949* (Cth) ('*PNG Act*') had provided for the unified administration of the territories of Papua and New Guinea. Prior to Independence Day, Papua was an external territory of Australia and New Guinea was a trust territory of the United Nations. Before Independence Day, those who were born in Papua would generally have Australian citizenship derived from the *Nationality and Citizenship Act 1948* ('*NCA*') (later renamed the *Australian Citizenship Act 1948* (Cth) ('*ACA*')).<sup>3</sup> Upon Independence Day, most indigenous persons who lived in Papua New Guinea automatically became citizens of the new Independent State. This was achieved by the operation of section 65 of the *Constitution of the Independent*

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\* Associate Professor and Reader in Law, The University of Queensland; Senior Member, Administrative Appeals Tribunal.

1 Alex Castles, 'International Law and Australia's Overseas Territories' in Daniel O'Connell (ed), *International Law in Australia* (1965) 292, 331–2.

2 Edward Gough Whitlam, 'The Transfer of Administrative Power in Papua New Guinea' (Speech delivered at University House, Canberra, 3 November 2002).

3 For a comprehensive analysis of the *ACA*, see Kim Rubenstein, *Australian Citizenship Law in Context* (2002) ch 4, 65.

*State of Papua New Guinea*. At the same time, those who until then had Australian citizenship had their citizenship withdrawn from them.

## II PAPUA

Following an ‘abortive attempt’<sup>4</sup> by Queensland to annex Eastern New Guinea in 1884 to resist German expansion, the south-eastern part of New Guinea formally became part of Her Majesty’s Dominions in 1888.<sup>5</sup> British New Guinea then became a Crown colony under an administrator who was subject to the control of the Governor of Queensland. In *Strachan v Commonwealth*,<sup>6</sup> Griffith CJ remarked that ‘under contemporaneous arrangement (recorded in the Statutes of Queensland) the Governor was instructed to consult his Ministers with respect to directions given to the Administrator’.<sup>7</sup> An Order in Council made under the *British Settlements Act 1887* (Imp)<sup>8</sup> provided for an appeal from any court of the Possession of British New Guinea to lie to the Supreme Court of Queensland.

Prior to Federation, it was anticipated that British New Guinea would be administered by the Government of the Commonwealth of Australia. Quick and Garran have pointed out that section 122 of the *Australian Constitution* was drafted to enable British New Guinea (as well as the Northern Territory) to be transferred to the Commonwealth of Australia upon Federation.<sup>9</sup> Section 122 of the then new *Australian Constitution* enabled the Commonwealth Parliament to make laws for the government of ‘any territory placed by the Queen under the authority of and accepted by the Commonwealth’. In 1901, the Senate and the House of Representatives both passed resolutions that affirmed they would join in measures to authorise the acceptance of British New Guinea as a Territory of the Commonwealth if His Majesty the King was pleased to place it under federal control.<sup>10</sup>

The process of formally transferring authority over British New Guinea from Britain to the Commonwealth of Australia began in 1902 when Imperial Letters Patent<sup>11</sup> were issued to place British New Guinea under the authority of the Commonwealth of Australia.<sup>12</sup> The *Papua Act 1905* (Cth) (*‘Papua Act’*) provided for the Commonwealth to assume authority over that area of south-

4 Bruce McPherson, *The Reception of English Law Abroad* (2007) 314.

5 The Preamble to the *Papua Act 1905* (Cth) recites that the territory was annexed ‘on or about’ 4 September 1888.

6 (1906) 4 CLR 455.

7 Ibid 462. The relevant Queensland statute was the *British New Guinea (Constitution) Act 1887* (Qld). Sir Samuel Griffith would have been familiar with this legislation as he had served as the Lieutenant-Governor of Queensland for a lengthy period (21 June 1901 to 24 March 1902): *Queensland Parliamentary Handbook* (1979) 174.

8 *British Settlements Act 1887* (Imp) c 54.

9 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 972.

10 Preamble to the *Papua Act 1905* (Cth).

11 Letters Patent, 18 March 1902, S.R. and O. (Imperial), 1948, vol II, 1096.

12 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 446.

eastern New Guinea known as British New Guinea. Section 5 of the *Papua Act* provided that the ‘Possession of New Guinea is hereby declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth, by the name of the Territory of Papua’. This provision constituted the necessary acceptance of the Territory of Papua by the Commonwealth to satisfy the requirements of section 122 of the *Australian Constitution*.<sup>13</sup> In *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame*,<sup>14</sup> Kirby J recognised that Papua fell within the category of a territory that was ‘placed by the Queen under the authority of and accepted by the Commonwealth’.<sup>15</sup> The Commonwealth Parliament later reaffirmed ‘the identity and status of the Territory of Papua as a Possession of the Crown’ in section 8 of the *PNG Act*.

### III NEW GUINEA

New Guinea was a former German colony, which was captured by Australian forces soon after the outbreak of World War I. The *Treaty of Versailles* had provided for ‘His Britannic Majesty King George V’ to be granted a mandate under the League of Nations to administer New Guinea, which was formerly German New Guinea. The Treaty provided that the mandate was to be exercised on behalf of the King by the Government of the Commonwealth of Australia (article 22). This mandate was formally accepted by Britain under the *Treaty of Peace Act 1919* (Imp). The Commonwealth Parliament by the *New Guinea Act 1920* (Cth) provided for the Territory of New Guinea to be placed under the authority of and accepted by the Commonwealth. The High Court of Australia has recognised the authority of the Commonwealth of Australia to administer New Guinea. It held that section 122 of the *Australian Constitution* was the source of the authority for the legislation.<sup>16</sup>

After the creation of the United Nations, New Guinea then acquired the status of a trust territory under the United Nations. In accordance with Chapter XII of the *Charter of the United Nations*, the General Assembly of the United Nations on 13 December 1946 approved the terms of a Trusteeship Agreement submitted to it by the Australian Government. In 1949, the Commonwealth Parliament in the preamble to the *PNG Act* recognised that Chapter XI of the Charter of the United Nations was applicable to Australia’s administration of the territory of New Guinea. The *PNG Act* recognised ‘the identity and status of the Territory of New Guinea as a Trust Territory’.<sup>17</sup>

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13 *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 446–7.

14 (2005) 222 CLR 439 (‘Ame’).

15 *Ibid* 479.

16 *Frost v Stevenson* (1937) 58 CLR 528; *Fishwick v Clelland* (1960) 106 CLR 186, 197.

17 *PNG Act* s 8.

#### IV CITIZENSHIP OF INDIGENOUS INHABITANTS OF PAPUA NEW GUINEA

There is a statement in the joint reasons of the majority in *Ame* that the *ACA* ‘treated the inhabitants of Papua New Guinea as citizens’.<sup>18</sup> However, prior to Independence Day, there was a clear difference in the citizenship status of those who were born in Papua and those inhabitants who were born in New Guinea. Papua was treated as part of Australia for the purposes of the *NCA* (later renamed as the *ACA*). However, New Guinea was excluded from the definition of ‘Australia’ in that Act for citizenship purposes.<sup>19</sup>

##### A Papua

In 1905, when Papua was accepted as a Territory, there was then no such status as Australian citizenship. At that time, as Kirby J explained in *Ame*: ‘The nationality of all persons born in the Territory of Papua, as much as in the entire Commonwealth of Australia was that of British subject’.<sup>20</sup> Accordingly, those who were born in Papua before the passage of the *NCA* would, at birth, become British subjects.<sup>21</sup> This is because of the established principle,<sup>22</sup> which then applied throughout the British Empire, that ‘all persons born anywhere in the King’s dominions were British subjects’.<sup>23</sup>

The *NCA* first created the status of ‘an Australian citizen’. That Act was passed as a consequence of the passage in London of the *British Nationality Act 1948* (UK) c 56, which provided that the concept of British nationality would derive from the citizenship of a number of Commonwealth countries, including Australia. There had been the previous agreement of Commonwealth countries to pass local citizenship legislation in accordance with a Commonwealth citizenship scheme.<sup>24</sup> Those who were born in Papua before the passage of the *NCA*, and who survived the passage of that Act, would, by the combined effect of section 25(1)(a) and section 10(1) of that Act, acquire Australian citizenship.<sup>25</sup>

Prior to Independence Day, the indigenous inhabitants who were born in Papua after the passage of the *NCA* would generally acquire Australian citizenship by birth. Section 10(1) provided that a person who was born in

18 *Ame* (2005) 222 CLR 439, 458.

19 Michael Pryles, *Australian Citizenship Law* (1981) 45, cited in *Minister for Immigration and Multicultural Affairs v Walsh* (2002) 125 FCR 31, 34, [4]; Rubenstein, above n 3, 90 fn 139.

20 *Ame* (2005) 222 CLR 439, 467.

21 *Mahuru and Department of Immigration and Citizenship* [2008] AATA 464, [3] (Unreported, Deputy President McPherson, 3 June 2008); *Gaigo and Minister for Immigration and Citizenship* [2008] AATA 590, [2] (Unreported, Deputy President McPherson, 9 July 2008).

22 *Potter v Minahan* (1908) 7 CLR 277, 287, 293, 305. See also Albert V Dicey, *A Digest of England with Reference to the Conflict of Laws* (1896) 174; John Salmond, ‘Citizenship and Allegiance’ (1902) 18 *Law Quarterly Review* 49, 58.

23 *Mahuru and Department of Immigration and Citizenship* [2008] AATA 464, [3] (Unreported, Deputy President McPherson, 3 June 2008).

24 Patrick Brazil, ‘Australian Nationality and Immigration’ in Kevin Ryan (ed), *International Law in Australia* (1984) 210, 216–17.

25 *Gaigo and Minister for Immigration and Citizenship* [2008] AATA 590, [3] (Unreported, Deputy President McPherson, 9 July 2008).

‘Australia’ after the commencement of that Act became an Australian citizen by birth. This was subject to some limited exceptions stated in that section.<sup>26</sup> The definition of ‘Australia’ that originally appeared in section 5 of the *NCA* defined ‘Australia’ as including ‘the Territory of Papua’. The trust territories of New Guinea and Nauru were not included within this definition. That definition was later omitted by the *Nationality and Citizenship Act 1953* (Cth) (‘*NCA 1953*’), which inserted a new definition in the *NCA* that provided that ‘Australia’ includes the Territories of the Commonwealth that are not trust territories.<sup>27</sup> Papua would be included in that definition, as it was a certainly a territory of Australia and not a trust territory.

At the time of passage of the *NCA* which conferred Australian citizenship on Papuans, Arthur Calwell, the Minister for Immigration, informed the House of Representatives that Papuans required permission to enter the Australian mainland. He remarked:

We do not even give them the right to come to Australia. An Englishman who came to this country and complied with our electoral laws could exercise restricted rights as a British subject whereas a native of Papua would be an Australian citizen but would not be capable of exercising rights of citizenship.<sup>28</sup>

There was then an appreciation that the conferral of Australian citizenship upon Papuans did not necessarily give them the right to enter the Australian mainland.

## B New Guinea

A person who was born in New Guinea whilst it was a German colony would, under British law, be an alien, as that person would not have been within a dominion of the Crown.<sup>29</sup> A person who was born in New Guinea whilst it was a mandate under the League of Nations would not have acquired British citizenship by birth. In 1937, in *Frost v Stevenson*,<sup>30</sup> Evatt J explained that ‘the territory is not within the King’s dominions, so that birth within the territory does not create the status of British subject’.<sup>31</sup> The change of status of the territory from a mandate under the League of Nations to a trust territory under the United Nations did not make the territory a dominion of the Crown, so a person who was born in the trust territory would not have acquired British citizenship at birth.

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26 Section 10(2) of the *NCA* provided that a person should not be an Australian citizen under s 10(1) of the Act where the father of that person was not an Australian citizen and possessed the immunity to suit that was accorded to an accredited foreign envoy and where the father of that person was an enemy alien and the birth occurred in a place then under occupation by the enemy. These exceptions restated the common law exceptions to the position that a person who was born within the dominions of the British Crown owed permanent allegiance to that Crown: see Dicey, above n 22, 176–7.

27 *Minister for Immigration and Multicultural Affairs v Walsh* (2002) 125 FCR 31, 34, [4].

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 1948, 3658 (Arthur Calwell, Minister for Immigration).

29 *Wong Man On v Commonwealth* (1952) 86 CLR 125, 133. See also Michael Pryles, *Australian Citizenship Law* (1981) 50–2.

30 (1937) 58 CLR 528.

31 *Ibid* 588.

After the passage of the *NCA*, a person who was born in the Territory of New Guinea could not, under section 10(1) of the Act, become an Australian citizen by birth. This is because the successive definitions of ‘Australia’ that have been earlier mentioned did not include New Guinea within the definition of ‘Australia’. The *NCA 1953* inserted a new definition in section 5 of the principal Act, which provided that “‘Australia’ includes the Territories of the Commonwealth that are not trust territories”.<sup>32</sup> This definition made it clear that those born in a trust territory such as New Guinea or Nauru would not acquire Australian citizenship at their birth. A person who was born in New Guinea could only become an Australian citizen by descent if a parent of that person was an Australian citizen and if there was the satisfaction of other prescribed matters such as the registration of the birth of that person.

Those who were born in the Territory of New Guinea whilst it was a trust territory of the United Nations would have the status of ‘Australian Protected Persons’.<sup>33</sup> Those persons who were born in the Territory who could not claim Australian citizenship by descent would not have Australian citizenship.

## V PAPUA AND NEW GUINEA TREATED DIFFERENTLY FROM THE MAINLAND

In 2001, Deputy President Breen of the Administrative Appeals Tribunal remarked that Papua New Guinea ‘was not part of Australia for all purposes, like a state or the internal territories, and there was always the chance that it would eventually separate from Australia completely’.<sup>34</sup> Even before British New Guinea (later renamed as Papua) had been accepted as a territory by the Commonwealth, it was appreciated by the Attorney-General’s Department that when Papua was accepted as a territory by the passage of the Papua Bill (which was enacted as the *Papua Act*), it would not necessarily ‘be within the Australian tariff fence’.<sup>35</sup> Immigration considerations were also relevant having regard to then prevailing attitudes. Legislation which was passed by the Commonwealth Parliament that applied throughout Australia would not generally apply to the external territories. This is because, as at Independence Day, the external Territories were then excluded from the definition of ‘Australia’ in section 17(a) of the *Acts Interpretation Act 1901* (Cth) which was limited to the area comprising the States and internal Territories. The *Migration Act 1958* (Cth) (*‘Migration Act’*) as originally passed did not include a definition of Australia

32 *Minister for Immigration and Multicultural Affairs v Walsh* (2002) 125 FCR 31, 34, [4].

33 John Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (1978) 204, cited in *Ame* (2005) 222 CLR 439, 447. That an indigenous person who was born in the former Territory of New Guinea had the status of an ‘Australian Protected Person’ was recognised in s 64 of the *Constitution of the Independent State of Papua New Guinea*: see Brian Brunton and Duncan Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (1984) 224.

34 *Walsh and Minister for Immigration and Multicultural Affairs* [2001] AATA 378, [17] (Unreported, Deputy President Breen, 8 May 2001).

35 Bevan Mitchell (ed), *Opinions of Attorneys-General of the Commonwealth of Australia* (1981) vol 1, 268, Opinion No 225.

and so required a permit for any entry from the Territories to the mainland. It should also be mentioned that the citizens of Papua and New Guinea had never elected representatives to the Commonwealth Parliament even though the Commonwealth Parliament had authority under section 112 of the *Australian Constitution* to pass legislation to provide for such representation.

## VI MOVEMENT TOWARDS INDEPENDENCE

The *Papua and New Guinea Act 1963* (Cth) amended the *PNG Act* to provide for a House of Assembly for Papua New Guinea. The House of Assembly constituted 100 persons who were elected by electors of Papua New Guinea and 18 members had to possess prescribed educational qualifications.<sup>36</sup> On 9 July 1974, the House of Assembly resolved that Papua New Guinea should be made independent. On 18 June 1975, the House of Assembly resolved that 16 September 1975 would be the day on which Papua New Guinea would become an independent State. This day would be recognised as ‘Independence Day’.<sup>37</sup>

## VII CONSTITUTIONAL PLANNING COMMITTEE

On 13 August 1974 the Constitutional Planning Committee issued their report on the new constitution to the Chief Minister of Papua New Guinea, the Hon Michael Somare. That report contained some important recommendations in respect of the citizenship of the new independent Papua New Guinea. The Committee recommended:

Only Papua New Guinea citizens will have the right to vote at elections, or to stand, for local government bodies, provincial assemblies and the National Parliament. They will have the *right* to be appointed to posts in government and private enterprise to which they are otherwise qualified. They will be eligible for services and other benefits the government may provide – in health, education, and economic development. They will receive protection from the Papua New Guinea Government when they travel abroad on its passports. And, in turn, they will owe their country certain *obligations* – to pay taxes, to uphold its laws, and to serve it in peace and in war.<sup>38</sup>

The Constitutional Planning Committee also issued a recommendation that a person who has citizenship of Papua New Guinea should not be able to have the citizenship of another country. The Committee reported that the people ‘have frequently resorted to imagery: no man it is said can stand in more than one canoe’.<sup>39</sup> The Committee had made no express recommendation that citizens of an independent Papua New Guinea who held Australian citizenship should be

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36 *Papua and New Guinea Act 1963* (Cth) s 36.

37 *PNG Independence Act* s 3.

38 Constitutional Planning Committee, Parliament of Papua New Guinea, *Citizenship* (1974) ch 4, [2] (emphasis in original).

39 *Ibid* ch 4, [88].

divested of that citizenship, but this divestment of citizenship was a necessary consequence of their recommendation to prohibit dual citizenship.

The Constitutional Planning Committee pointed out that

the vast majority of the inhabitants of Papua New Guinea will become citizens of Papua New Guinea *as of right* when our recommendations come into force. They will *automatically* become Papua New Guineans. They will not have to do anything in order to become citizens. They will simply be *defined by law* as citizens.<sup>40</sup>

The Committee recommended that any person who was born in Papua New Guinea before the new citizenship law came into force shall be a citizen of Papua New Guinea if he or she was not a 'real' citizen of a foreign country, and he or she has at least two indigenous grandparents. For the purposes of this recommendation, the Committee reported that

persons who are Australian citizens by virtue of their birth in Papua, and persons who are Australian Protected Persons, are regarded as holding no real foreign citizenship, *provided that* they have not been granted the right to reside in Australia. They must be, in effect, people who have always been identified with the indigenous inhabitants of Papua New Guinea.<sup>41</sup>

## VIII RELINQUISHMENT OF SOVEREIGNTY BY AUSTRALIA

The recital to the *PNG Independence Act* outlined the important stages which led to the Independence of Papua New Guinea. The recital referred to the resolutions of the House of Assembly, which have been mentioned, as well as mentioning that the General Assembly of the United Nations resolved that the Trusteeship Agreement would cease to be in force.

The *PNG Independence Act* provided, in section 4, that on the expiration of the day preceding Independence Day,<sup>42</sup> Australia ceased to have 'any sovereignty, sovereign rights or rights of administration in respect of or appertaining to the whole or any part of Papua New Guinea'. The Act also, in section 5, repealed the various Acts that provided the basis for Australia to administer Papua New Guinea, including the *Papua New Guinea Act 1949–1975* (Cth).

In *Ame*, the High Court remarked that there was no challenge to the validity of section 4 of the *PNG Independence Act*, nevertheless the court was satisfied that the provision was within the power conferred by section 122 of the *Australian Constitution*. The majority in their joint reasons remarked:

The capacity to acquire and exercise sovereignty, sovereign rights, and rights of administration in respect of external territories necessarily includes the capacity to make provision for the bringing to end of those rights.<sup>43</sup>

40 Ibid ch 4, [20] (emphasis in original).

41 Ibid [22] (emphasis in original).

42 Section 3 of the *PNG Independence Act* defined 'Independence Day' as 16 September 1975.

43 *Ame* (2005) 222 CLR 439, 457.



This relinquishment of sovereignty had consequences for those who were born in Papua who held Australian citizenship. In *Ame*, David Bennett, the then Solicitor-General for the Commonwealth, submitted in argument:

Section 4 of the *Papua New Guinea Independence Act* effected a complete change in sovereignty. Once s 4 changed, the relationship between the Australian polity and most of the residents of Papua, the Commonwealth could treat these residents as ‘aliens’ within s 51(XX).<sup>44</sup>

In *Gaigo and Minister for Immigration and Citizenship*,<sup>45</sup> Deputy President McPherson remarked that ‘the effect of section 4 of the *Papua New Guinea Independence Act 1975* was that, upon independence, the people of Papua New Guinea ceased to be citizens of Australia’.<sup>46</sup> The Deputy President pointed out that in several decisions given after Great Britain recognised American independence in 1784, ‘it was held that a declaration relinquishing sovereignty and government over another territory constituted a surrender of authority over the inhabitants of that territory’.<sup>47</sup> One such case is *Doe d Thomas v Acklam*,<sup>48</sup> in which Abbott CJ of the King’s Bench remarked:

a relinquishment of the government of a Territory is a relinquishment of authority over the inhabitants of that territory; a declaration that a State shall be free, sovereign and independent is a declaration that the people composing that State shall no longer be considered as subjects of the Sovereign by whom such declaration is made.<sup>49</sup>

The Papuans were not advised about the impending loss of their Australian citizenship. However, it may not have been practicable to provide such advice in many instances. In any event, the failure to advise the Papuans of their impending loss of Australian citizenship could not prevent the withdrawal of Australian sovereignty over Papua New Guinea. In *Mahuru and Department of Immigration and Citizenship*,<sup>50</sup> Deputy President McPherson remarked:

It would be an extraordinary result if Australia were forever barred from giving effect to a withdrawal of its sovereignty over Papua New Guinea and its people by reason of an allegation of racial discrimination said to be involved in its failure to preserve the Australian citizenship of every local inhabitant born in Papua. It would mean that Australia would be permanently precluded from ever recognising the independence of Papua New Guinea for fear that it might deprive some one or more persons of their Australian citizenship without first consulting each one of them individually about it.<sup>51</sup>

What is noticeable about the *PNG Independence Act* is the lack of any reference to the new constitutional arrangements which would govern Papua New Guinea after the passage of that Act. This was quite deliberate in that the intention of the Commonwealth Government and Parliament was that the people of Papua New Guinea would themselves control their destiny and establish their

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44 Ibid 445.

45 [2008] AATA 590 (Unreported, Deputy President McPherson, 9 July 2008) (*‘Gaigo’*).

46 Ibid [13].

47 Ibid. See also McPherson, above n 4, 184 fn 78.

48 (1824) 2 B & C 779; 107 ER 572.

49 *Doe d Thomas v Acklam* (1824) 2 B & C 779, 796; 107 ER 572, 579.

50 [2008] AATA 464 (Unreported, Deputy President McPherson, 3 June 2008) (*‘Mahuru’*).

51 Ibid [17].

own constitutional arrangements. This is evident from the preamble of the *Constitution of the Independent State of Papua New Guinea* which recites: 'WE, THE PEOPLE, do now establish this sovereign nation and declare ourselves, under the guiding hand of God, to be the Independent State of Papua New Guinea'.<sup>52</sup>

## IX AUTOMATIC CITIZENSHIP OF PAPUA NEW GUINEA

The recommendations of the Constitutional Planning Committee on citizenship were reflected in the *Constitution of the Independent State of Papua New Guinea*. Section 65 of the *Constitution* prescribed the circumstances in which an indigenous person would gain automatic citizenship of Papua New Guinea on Independence Day. The section of the Constitution is headed 'Automatic Citizenship on Independence Day' and provides:.

### *Automatic Citizenship on Independence Day*

- (1) A person born in the country<sup>53</sup> before Independence Day who has two grand-parents who were born in the country or an adjacent area<sup>54</sup> is a citizen.
- (2) A person born outside the country before Independence Day who has two grand-parents born in the country is a citizen as from Independence Day if –
  - (a) within one year after Independence Day or such longer period as the Minister responsible for citizenship matters allows in a particular case, application is made by him or on his behalf for registration as a citizen;<sup>55</sup>
- ...
- (4) Subsections (1) and (2) do not apply to a person who –
  - (a) has a right (whether revocable or not to permanent residence in Australia; or
  - (b) is a naturalised Australian citizen; or
  - (c) is registered as an Australian citizen under Section 11 of the Australian Citizenship Act 1948–1975 of Australia; or
  - (d) is a citizen of a country other than Australia, unless that person renounces his right to residence in Australia or his status as a citizen of Australia or of another country in accordance with subsection (5).

52 Brunton and Colquhoun-Kerr, above n 33, 1.

53 The term 'country' is defined in sch 1.2 of the *Constitution of the Independent State of Papua New Guinea* to mean 'the area of Papua New Guinea'.

54 The term 'adjacent area' is defined in s 65(3) of the *Constitution of the Independent State of Papua New Guinea* to include the Solomon Islands, Irian Jaya, and the islands in the Torres Strait, which are part of Queensland.

55 Section 3 of the *Citizenship Act 1975* (Papua New Guinea) prescribes a form for an application under s 65(2)(a) of their Constitution.

- (5) A person to whom Subsection (4) applies may, within the period of two months after Independence Day and in such manner as may be prescribed by Act of Parliament, renounce his right to permanent residence in Australia or his status as an Australian citizen or as a citizen of another country and make the Declaration of Loyalty.
- (6) Where in his opinion it is just to do so, the Minister responsible for citizenship matters may in his deliberate judgment (but subject to Division 4 (Citizenship Advisory Committee), extend the period of two months referred to in Subsection (4), but unless the Minister is satisfied that the applicant –
  - (a) assumed in error that he was a citizen; or
  - (b) did not know that he was not a citizen; or
  - (c) had no reasonable opportunity or not enough time to determine his status, the period may not be extended beyond a further two months.<sup>56</sup>

Under section 65(1) of the *Constitution*, a person would gain automatic citizenship of Papua New Guinea if that person were born in the country (being defined as the area of Papua New Guinea) and had two grandparents who were born in the country or an adjacent area. The *Constitution* would operate to confer automatic citizenship on those indigenous inhabitants who were born in Papua and who had Australian citizenship at birth. The only indigenous citizens who would not gain citizenship of the new Independent State would be those persons who at independence had a further attachment to Australia or were citizens of a foreign country.

The process of automatic citizenship of the new State of Papua New Guinea did not apply to those persons mentioned in section 65(4) of the *Constitution*. This section refers to a person who has a right of permanent residence in Australia. That right would then have been a permit under the *Migration Act*. The section also refers to a person who was then a naturalised Australian citizen, a person who was registered as an Australian citizen under section 11 of the *ACA* from 1948 to 1975 or a citizen of another country other than Australia. A person who, in accordance with section 65(5) of the *Constitution*, renounced a right to residence in Australia or his status as an Australian citizen or of another country would not come within the terms of section 65(4) of the *Constitution*.

## X RIGHT OF PERMANENT RESIDENCE ON THE AUSTRALIAN MAINLAND

It was important to ascertain whether prior to Independence Day a Papuan who was an Australian citizen had a right of permanent residence on the Australian mainland. This is relevant for the purpose of examining whether such a person gained ‘automatic’ citizenship of the new Independent State of Papua New Guinea under section 65 of the *Constitution of the Independent State of Papua New Guinea*. The framers of that Constitution in section 65(4) of the Constitution referred to whether a citizen ‘has a right (whether revocable or not

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<sup>56</sup> Brunton and Colquhoun-Kerr, above n 33, 229.

to permanent residence in Australia)'. Where, on Independence Day, a citizen had a right of permanent residence on the Australian mainland, that person would not acquire automatic citizenship of the new Independent State of Papua New Guinea.

Prior to Independence Day, as a matter of practice, permission to enter Australia was readily granted and Papua New Guineans were issued with Australian passports.<sup>57</sup> However, the fact that an inhabitant of New Guinea, who had the status of an Australian Protected Person, had been issued with a passport would not of itself be evidence that the inhabitant had Australian citizenship. There is the famous precedent where a British passport was issued to somebody who was not a British subject.<sup>58</sup> As Dowsett J remarked in *Walsh v Minister for Immigration and Multicultural Affairs*,<sup>59</sup> 'a passport is an identity document issued to facilitate overseas travel'.<sup>60</sup>

The relevant *Australian Citizenship Instructions*<sup>61</sup> that were operative at the time of Independence outlined the circumstances in which a Papuan would be granted the right of permanent residence on the Australian mainland:

Right of permanent residence was automatic for children born in Papua of non-indigenous descent. Those of indigenous descent were required, as a matter of policy determined by Cabinet, to apply for the right of permanent residence in mainland Australia. Government policy gave the Minister the discretion to grant the right of permanent residence to such persons on application if they had been bought up in a European manner, had English as their principal language and were European in outlook.<sup>62</sup>

These *Australian Citizenship Instructions* were a statement of administrative policy or practice rather than the conferral of any entitlement under law.<sup>63</sup> This is because each application would be assessed on its merits.<sup>64</sup>

The anomalous position at the time of independence was that an indigenous resident of Papua would not have a right to reside on the mainland. This was even though that resident was an Australian citizen. An indigenous resident of Papua, who was an Australian citizen, would have required permission to enter Australia. Such permission could only be granted under the *Migration Act*. On Independence Day, section 6(1) of the *Migration Act* then provided: 'An immigrant who, not being the holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited migrant'. That regime applied from the

57 Goldring, above n 33, 204.

58 *Joyce v Director of Public Prosecutions* [1946] AC 347.

59 (2001) 116 FCR 524 ('*Walsh Federal Court*').

60 *Ibid* 528, [17].

61 Commonwealth Department of Immigration and Citizenship, *Australian Citizenship Instructions*.

62 *Walsh and Minister for Immigration and Multicultural Affairs* [2001] AATA 378, [14] (Unreported, Deputy President Breen, 8 May 2001).

63 The status of these instructions was discussed in *Minister for Immigration and Multicultural Affairs v Walsh* (2002) 125 FCR 31, 37, [24]: 'The 'Australian Citizenship Instructions' do not have the force of law. In any event, they do not rise above a statement as to the usual administrative practice in dealing with applications for permanent residence, rather than confirming or establishing any entitlement to permanent residence on the part of persons referred to in those Instructions'. See also *Re Dainty and Minister for Immigration and Ethnic Affairs* (1987) 6 AAR 259.

64 See, eg, *Re Aston and Secretary to the Department of Primary Industry* (1985) 4 AAR 65, 75.

passage of the *Migration Act* from 1958 until 1984.<sup>65</sup> In 1984, the *Migration Amendment Act 1983* (Cth) (*Migration Amendment Act*) commenced operation.

The *Migration Amendment Act* made what Dowsett J in *Walsh Federal Court* described as ‘a fundamental change’ to migration law.<sup>66</sup> This change, as Dowsett J explained, was that ‘[t]hereafter, the *Migration Act* purported to regulate entry by *non-citizens* rather than immigrants’. After the passage of the *Migration Amendment Act*, there was no longer any need for an Australian citizen to obtain a permit under the *Migration Act* to enter Australia. This is why the High Court in *Air Caledonie International v Commonwealth*<sup>67</sup> remarked: ‘The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or ‘clearance’ from the Executive’.<sup>68</sup> However, Independence Day occurred well before the passage of the *Migration Amendment Act*. In *Walsh Federal Court*, Dowsett J remarked that ‘it is clear that immediately prior to Independence Day the applicant’s status as an Australian citizen did not entitle her to permanent residence in Australia’.<sup>69</sup>

The High Court of Australia has ruled that an Australian citizen does not have a right of permanent residence in Australia that is derived from the *Australian Constitution*. In *Ame*, the majority of the High Court pointed out that the acquisition of Papua as an external territory did not give the residents of Papua any entitlement to enter the Australian mainland. The majority in their joint reasons remarked:

When Australia acquired Papua as an external Territory, it was not obliged constitutionally to give inhabitants of that external Territory an unfettered right of entry into mainland Australia. To the contrary, the broad power conferred by s 122 of the *Australian Constitution* supported laws restricting such entry into Australia.<sup>70</sup>

## XI PROHIBITION OF DUAL CITIZENSHIP

Section 64 of the *Constitution of the Independent State of Papua New Guinea* contains a prohibition on dual citizenship in accordance with the recommendations of the Constitutional Planning Committee. It provides:

### *Dual Citizenship*

- (1) Notwithstanding the succeeding provisions of this part but subject to Subsection (2), no person who has a real foreign citizenship may be or become a citizen, and the provisions of this Part shall be read subject to that prohibition.

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65 *Walsh Federal Court* (2001) 116 FCR 524, 527, [11].

66 *Ibid* 527. The nature of this fundamental change was recognised prior to the passage of the *Migration Amendment Act* by Patrick Brazil, then Secretary of the Commonwealth Attorney-General’s Department. He then commented ‘the question now arises, why, with the development of an Australian citizenship, the right of abode should not now be linked with citizenship’: Brazil, above n 24, 225.

67 (1988) 165 CLR 462.

68 *Ibid* 469.

69 *Walsh Federal Court* (2001) 116 FCR 524, 527.

70 *Ame* (2005) 222 CLR 439, 454–5.

- (2) Subsection (1) does not apply to a person who has not yet reached the age of 19 years provided that, before he reaches that age and in such manner as is prescribed by or under an Act of the Parliament, he renounces his other citizenship and makes the Declaration of Loyalty.
- (3) A citizen who has a real foreign citizenship and fails to comply with Subsection (2) ceases to be a citizen of Papua New Guinea when he reaches the age of 19 years.
- (4) For the purposes of this section, a person who –
  - (a) was, immediately before Independence Day, an Australian citizen or an Australian Protected Person by virtue of
    - (i) birth in the former Territory of Papua; or
    - (ii) birth in the former Territory of New Guinea and registration under Section 11 of the Australian Citizenship Act 1948–1975 of Australia; and
  - (b) was never granted a right (whether revocable or not) to permanent residence in Australia,
 has no real foreign citizenship.<sup>71</sup>

The Federal Court of Australia in *Minister for Immigration and Multicultural Affairs v Walsh*<sup>72</sup> examined section 64 of the *Constitution of the Independent State of Papua New Guinea*. The court regarded section 64 as prohibiting dual citizenship except in the case of infants until they attain the age of 19 years, at which time they must elect whether or not to retain their citizenship.<sup>73</sup>

Throughout section 64 of the *Constitution* are references to ‘real foreign citizenship’ in accordance with the recommendations of the Constitutional Planning Committee. Section 64(4) of the *Constitution* provides that a person who was born in Papua New Guinea before Independence Day and who had no permanent right to reside in Australia have no ‘real foreign citizenship’. This has the consequence that most of the indigenous inhabitants of Papua New Guinea, who would not have had a right of permanent residence in Australia, would on Independence Day have acquired automatic citizenship of Papua New Guinea under section 65 of the *Constitution*.

## XII WITHDRAWAL OF AUSTRALIAN CITIZENSHIP

Those indigenous inhabitants who were Australian citizens prior to Independence Day and who on that day acquired automatic citizenship of the new State of Papua New Guinea would, under Papua New Guinea law, be regarded as no longer having Australian citizenship. This is because of the general prohibition against dual citizenship, which is contained in section 64 of the *Constitution of the Independent State of Papua New Guinea*. The majority of the High Court of Australia in *Ame* remarked: ‘That *Constitution* was

<sup>71</sup> Brunton and Colquhoun-Kerr, above n 33, 224.

<sup>72</sup> (2002) 125 FCR 31 (*Walsh Full Federal Court*).

<sup>73</sup> *Ibid* 38.

antagonistic to dual citizenship'.<sup>74</sup> The only exception to that general prohibition was the person who was under 19 years on Independence Day and who held dual citizenship. When a person became a citizen of Papua New Guinea on Independence Day by the operation of section 65 of the *Constitution*, they no longer possessed Australian citizenship. This withdrawal of Australian citizenship from most Papuans occurred under the law of Papua New Guinea.<sup>75</sup>

The changes to Australian law at the time of Independence can be seen as fulfilling a need to align the law of Australia with that of Papua New Guinea. In *Mahuru and Department of Immigration and Citizenship*,<sup>76</sup> Deputy President McPherson emphasised in referring to section 65 that '[i]t was part of the law of Papua New Guinea. It was not part of the law of Australia, except to the extent that Australia gave effect to it'.<sup>77</sup> It was assumed by Deputy President Breen in *Walsh and Minister for Immigration and Multicultural Affairs*<sup>78</sup> that 'an executive decision was made at an international level which determined the rights of the people of Papua New Guinea with respect to citizenship'.<sup>79</sup> Justice Dowsett in *Walsh Federal Court* remarked that the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975 (Cth)* ('*PNGIACR*') 'regulate[s] an aspect of relations between Australia and New Guinea'.<sup>80</sup> It should be understood that there was some justifiable concern at the time that skilled people would leave Papua New Guinea for higher paid work in Australia.<sup>81</sup>

The *PNG Independence Act* did not expressly deprive the indigenous inhabitants of Papua New Guinea of Australian citizenship, although this would have been a necessary consequence of the relinquishment of sovereignty by Australia. Section 6 of the *PNG Independence Act*, however, contained a regulation-making provision that enabled regulations to be made, which made 'modifications or adaptations of any Act'.

The express withdrawal of Australian citizenship from those indigenous inhabitants who on Independence Day acquired automatic citizenship of the new Independent State occurred under the *PNGIACR*.<sup>82</sup> These Regulations, which were made on 10 September 1975, came into operation on Independence Day.<sup>83</sup>

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74 *Ame* (2005) 222 CLR 439, 455.

75 *Ibid* 474; *Mahuru and Department of Immigration and Citizenship* [2008] AATA 464, [15] (Unreported, Deputy President McPherson, 3 June 2008).

76 [2008] AATA 464 (Unreported, Deputy President McPherson, 3 June 2008) ('*Mahuru*').

77 *Ibid* [9].

78 [2001] AATA 378 (Unreported, Deputy President Breen, 8 May 2001) ('*Walsh Tribunal*').

79 *Ibid* [18].

80 *Walsh Federal Court* (2001) 116 FCR 524, 532, [32].

81 Sione Latukefu (ed), *Papua New Guinea: A Century of Colonial Impact 1884–1984* (1989) 167.

82 *Statutory Rules 1975* (Cth).

83 *PNGIACR* reg 2.

Regulation 4 of the *PNGIACR* provides:

4. A person who –
  - (a) immediately before Independence Day, was an Australian citizen within the meaning of the Act<sup>84</sup>; and
  - (b) on Independence Day becomes a citizen of the Independent State of Papua New Guinea by virtue of the provisions of the Constitution of the Independent State of Papua New Guinea,
 ceases on that day to be an Australian citizen.

The majority of the High Court of Australia in *Ame* considered that the withdrawal of Australian citizenship under regulation 4 ‘was consistent with the maintenance of proper relations with the new Independent State, and with the change that occurred in Australia’s relationship with that State’.<sup>85</sup>

The majority of the High Court of Australia in *Ame*<sup>86</sup> also recognised that regulation 4 appears to have been modelled upon legislation that was enacted by the United Kingdom Parliament in the 1960s and 1970s as well as orders which provided that a person who, before the day on which a former colony attained independence, was a United Kingdom citizen should, on independence, cease to be a United Kingdom citizen.<sup>87</sup> Justice Kirby<sup>88</sup> also cited other examples of such United Kingdom legislation.<sup>89</sup> In *Motala v Attorney-General*,<sup>90</sup> the House of Lords held that such legislation applied to children who were born in Northern Rhodesia not long before independence in 1964 and operated to deprive those children of their status as citizens of the United Kingdom and Colonies.

The validity of regulation 4 of the *PNGIACR* was upheld by the High Court of Australia in *Ame*. The High Court in *Ame* also held that the reference to ‘any Act’ in section 6 of the *PNG Independence Act 1975* would include a reference to the *ACA*. The High Court considered that it was intended that regulations could be made which enabled the modification of the *ACA*. The majority of the High Court in their joint reasons remarked:

Parliament enacted s 6 in the light of an understanding of the terms of the *Papua and New Guinea Constitution*, and its drafting history. The recitals to the *Papua New Guinea Independence Act* refer to those matters. Section 6 must have contemplated regulations dealing with citizenship.<sup>91</sup>

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84 *PNGIACR* reg 3 provided that this reference to ‘the Act’ was a reference to the then *Australian Citizenship Act 1948–1973* (Cth). See also *Walsh Federal Court* (2001) 116 FCR 524, 527.

85 *Ame* (2005) 222 CLR 439, 455.

86 *Ibid.*

87 See, eg, *Aden, Perim and Kuria Muria Islands Act 1967* (UK) s 1; *Bahamas Independence Act 1973* (UK) s 2; *Bahamas Independence Act 1973* (UK) s 2; *Botswana Independence Act 1966* (UK) s 3; *Fiji Independence Act 1970* (UK) s 2; *Guyana Independence Act 1966* (UK) s 2; *Jamaica Independence Act 1962* (UK) s 2; *Malaysia Act 1966* (UK) s 2; *Nigeria Independence Act 1960* (UK) s 2.

88 *Ame* (2005) 222 CLR 439, 486–7.

89 See, eg, *Cyprus Act 1960* (UK) s 4 and *British Nationality (Cyprus) Order 1960*; *Gambia Independence Act 1964* (UK) s 2; *Ghana Independence Act 1957* (UK) s 2; *Bahamas Independence Act 1973* (UK) s 2; *Zambia Independence Act 1964* (UK) s 2.

90 [1992] 1 AC 281 cited in *Mahuru* [2008] AATA 464, [20].

91 *Ame* (2005) 222 CLR 439, 456.



In *Walsh Federal Court*, Dowsett J remarked that ‘the current legislation cannot be understood without reference’<sup>92</sup> to the regulations.

It has been recognised that the operation of regulation 4 of the *PNGIACR* is dependent upon the operation of the law of Papua New Guinea. A former Secretary of the Commonwealth Attorney-General’s Department has remarked that the regulation had the effect that ‘a person who immediately before independence (16 September 1975) was an Australian citizen and who on independence became a citizen of Papua New Guinea ceased on that day to be an Australian citizen’.<sup>93</sup> In *Mahuru*, Deputy President McPherson remarked: ‘Regulation 4 simply gave effect to the provisions of section 65(1) and section 65 (4) of the Constitution’.<sup>94</sup> He added:

It is true that regulation 4(b) of the *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* gave legal effect in Australia to what happened in Papua New Guinea on Independence Day; but that was no more than local recognition of the existing juristic fact that was accomplished by the joint operation of s 65 of the *Constitution of the Independent State of Papua New Guinea* and s 4 of the *Papua New Guinea Independence Act 1975*.

Regulation 4 would not deprive an indigenous person of Australian citizenship where that indigenous person did not acquire automatic citizenship of the new State of Papua New. Such a person may not come within the terms of section 65(1) of the *Constitution of the Independent State of Papua New Guinea* by not having two grandparents who were born in the country or an adjacent area. Regulation 4 would also not deprive an indigenous person of Australian citizenship where that person had a right of permanent residence in Australia as was recognised by section 65(4) of the *Constitution of the Independent State of Papua New Guinea*.

The withdrawal of Australian citizenship from the Papuan people occurred in circumstances when they had no advance warning of the fact that their citizenship would be withdrawn. Prior to Independence Day, a person from either Papua or New Guinea could have made an application for the right of permanent residence on the mainland.<sup>95</sup> An applicant who had, before Independence Day, been granted permanent residence would come within the terms of section 65(4) of the *Constitution of the Independent State of Papua New Guinea* as having ‘has a right (whether revocable or not to permanent residence in Australia)’. That person would not, on that day, have automatically acquired citizenship of the new Independent State under section 65(1) of the *Constitution of the Independent State of Papua New Guinea*.

It is interesting to reflect that in 1898 the delegates to the Australasian Federal Convention rejected the proposal of Dr Quick to enshrine Australian citizenship in the *Australian Constitution* as in the United States. Instead the

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92 *Walsh Federal Court* (2001) 116 FCR 524, 532.

93 Brazil, above n 24, 221.

94 *Mahuru* [2008] AATA 464, [10].

95 In *Walsh Tribunal* [2001] AATA 378, [22], Deputy President Breen remarked:

In this case, the dis-affected person, the applicant, was a mere child. There is not a shred of evidence that anyone in authority made the slightest attempt to explain to her or her parents the complexities of her position or the steps to be taken to enable her to exercise her right to preserve her erstwhile status as an Australian citizen.

delegates preferred the terminology in section 117 of the Constitution of ‘subject of the Queen’, which was then consistent with the status of all subjects of the British Empire. However, one delegate, Josiah Symon,<sup>96</sup> who regarded citizenship as a ‘birthright’,<sup>97</sup> was concerned that if Parliament was granted a power over citizenship it could legislate to deprive a citizen of his or her citizenship.<sup>98</sup> This is what actually occurred when Papua and New Guinea attained Independence. However, such deprivation of citizenship occurred not directly by an Act of Parliament but indirectly by subordinate legislation that was authorised by the *PNG Independence Act*. This subordinate legislation had to be tabled before both Houses of Parliament.

### XIII RACIAL DISCRIMINATION ACT 1975

In *Mahuru*, the applicant was born at Port Moresby in the then territory of Papua in 1962. The applicant thereupon acquired Australian citizenship at birth. The applicant had two grandparents who were born in the country. On Independence Day the applicant became a citizen of the Independent State by virtue of the operation of section 65(1) of the *Constitution of the Independent State of Papua New Guinea* unless under section 65(1) of that *Constitution* he had a right to permanent residence in Australia. There was no evidence that he had such a right. The applicant contended that the deprivation of his Australian citizenship was contrary to section 10(1) of the *Racial Discrimination Act 1975* (Cth) (*Racial Discrimination Act*) as well as article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>99</sup> which appears as a schedule to the Act.

Section 10(1) of the *Racial Discrimination Act* provides:

If by reason of, or of a provision, of a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

An impediment to the operation of section 10 of the *Racial Discrimination Act* to Papua New Guinea was that section 4 of that Act provided: ‘This Act extends to every external Territory except Papua New Guinea’. The *Racial Discrimination Act* then also, in section 3(1), defined ‘Territory’ as not including Papua New Guinea. In *Mahuru*, Deputy President McPherson remarked:

Even if it was capable, within the meaning of the *Racial Discrimination Act 1975* of involving an element of racial or other discrimination against the applicant in

96 Later a Senator for South Australia.

97 The ‘colonial birthright’ doctrine is comprehensively analysed in McPherson, above n 4.

98 *Official Record of the Debates of the Australasian Federal Convention* (Melbourne, 3 March 1898) 1763–4. See also *Singh v Commonwealth* (2004) 222 CLR 322, 366–7.

99 *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

Papua New Guinea, it was one to which, by s 4 of that Act, the scheduled Convention did not extend.<sup>100</sup>

Another impediment to the operation of section 10 of the *Racial Discrimination Act* to the Independence of Papua New Guinea related to a matter of timing. The *PNGIACR*, which expressly divested indigenous inhabitants of Australian citizenship, came into operation on Independence Day, which was on 16 September 1975. Section 10 of the *Racial Discrimination Act* came into operation on 31 October 1975, which was the date fixed by Proclamation.<sup>101</sup> The operative provisions of the *Racial Discrimination Act* came into operation well after Independence Day when the withdrawal of Australian citizenship from the Papuans had already occurred.

#### XIV INTERNATIONAL HUMAN RIGHTS LAW

In *Ame*, Kirby J remarked that

laws depriving people of a former status as citizens, utilising criteria that might be portrayed as based on racial or ethnic considerations, are arguably suspect. They invite consideration of any applicable principles of international law to check the validity of conclusions reached within the paradigm of international law.<sup>102</sup>

There had been some consideration as to whether regulation 4 of the *PNGIACR* contravened international human rights law. It has been held that the regulations did not contravene either article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* or article 15 of the *Universal Declaration of Human Rights*.<sup>103</sup>

##### A International Convention on the Elimination of All Forms of Racial Discrimination

Article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination* provides:

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;

...

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100 *Mahuru* [2008] AATA 464, [22].

101 *Ibid* [13].

102 *Ame* (2005) 222 CLR 439, 484.

103 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183<sup>rd</sup> plen mtg, UN Doc A/RES/217A (III) (1948).

- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality

...

In *Mahuru*, the applicant claimed that the deprivation of his Australian citizenship had been in contravention of article 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Article 5 protects '[t]he right to nationality'. This claim was not upheld, as the applicant gained a new form of nationality. Deputy President McPherson remarked that '[t]he applicant *Ame* was not deprived of the right to nationality: it simply underwent a change from the nationality of Australia to the nationality of the new State of Papua New Guinea'.<sup>104</sup>

### B Universal Declaration of Human Rights

Article 15 of the *Universal Declaration of Human Rights* declares that 'everyone has the right to a nationality' and that 'no one shall be arbitrarily deprived of his nationality'. In *Ame*, the High Court did not regard regulation 4 as effecting an arbitrary deprivation of the right to nationality of the applicant. The majority of the justices in their joint reasons remarked:

That withdrawal was not arbitrary. It was consistent with the maintenance of proper relations with the new Independent State, and with the change that occurred in Australia's relationship with the inhabitants of the new Independent State.<sup>105</sup>

Justice Kirby also concluded that regulation 4 of the *PNGIACR* was not 'arbitrary', as it operated only in relation to a person who had already acquired citizenship of the new Independent State under the *Constitution of Papua New Guinea*. He emphasised that such an applicant 'was not rendered Stateless. His nationality status simply changed, by reason of the change of the sovereignty of the place of his birth, his long-term residence and residence of his forebears.'<sup>106</sup>

## XV POTENTIAL STATELESS PERSONS

The applicant in *Ame* was certainly not, on Independence Day, rendered stateless. However, there would be a class of persons in Papua New Guinea who would on that day been excluded from citizenship of the new Independent State. That class would have been those Australian-protected persons who were born in New Guinea, who did not have Australian citizenship by descent and who did have a right of permanent residence in Australia. Under the operation of section

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104 *Mahuru* [2008] AATA 464, [22].

105 *Ame* (2005) 222 CLR 439, 455.

106 *Ibid.*

65(4) of the *Constitution of the Independent State of Papua New Guinea*, the members of that class would not gain automatic citizenship of the new Independent State. This would have severe consequences for a resident as only citizens can vote in elections, hold elective office, or acquire freehold land.<sup>107</sup> Such a person would also not enjoy certain constitutional rights that are conferred upon citizens of Papua New Guinea such as the right to protection from unjust deprivation of property,<sup>108</sup> the right to freedom of information<sup>109</sup> or the right to freedom of movement.<sup>110</sup> Unless a member of that class renounced his or her right to permanent residence in Australia within the two month prescribed period or such period as has been extended by the Minister,<sup>111</sup> or has been naturalised,<sup>112</sup> that member would have no citizenship rights as well as no longer having the protection of Australia. The Federal Court of Australia has referred to the difficulties that stateless people experience such as discrimination and the denial of travel documents.<sup>113</sup>

## XVI PERSONS UNDER 19 YEARS ON INDEPENDENCE DAY

The *Papua New Guinea Independence (Australian Citizenship of Young Persons) Regulations 1980* ('PNGIACYPR')<sup>114</sup> was intended to remedy an anomaly of the operation of *the Constitution of the Independent State of Papua New Guinea*. That *Constitution* provided that a person under the age of 19 years could become a citizen of Papua New Guinea even if that person had a right of residence on the Australian mainland. Once that person became a citizen of Papua New Guinea then regulation 4 of *the PNGIACR* operated to deprive those persons of Australian citizenship.<sup>115</sup>

This anomaly was removed by regulation 2 of the *PNGIACYPR*, which provides:

2. A person who on Independence Day –
  - (a) was under 19 years of age;

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107 *Constitution of the Independent State of Papua New Guinea* s 56.

108 *Constitution of the Independent State of Papua New Guinea* ss 53, 68(4). See also *Minister for Lands v Frame* [1980] PNGLR 433.

109 *Constitution of the Independent State of Papua New Guinea* s 51.

110 *Constitution of the Independent State of Papua New Guinea* s 52.

111 *Constitution of the Independent State of Papua New Guinea* ss 65(4), 65(5).

112 *Constitution of the Independent State of Papua New Guinea* s 67.

113 *Savvin v Minister for Immigration and Ethnic Affairs* (1999) 166 ALR 348; *Diatlov v Minister for Immigration and Multicultural Affairs* (1999) 167 ALR 313, 321; cf *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150, art 28 (travel documents) (entered into force 22 April 1954); James Hathaway, *The Rights of Refugees under International Law* (2005) 237, 620–2, 626, 748.

114 *Statutory Rules 1980* (Cth).

115 *Walsh Full Federal Court* (2002) 125 FCR 31, 39, [32].

- (b) was not for the purposes of section 64 of the *Constitution of the Independent State of Papua New Guinea* a person who was never granted a right (whether revocable or not) to permanent residence in Australia; and
- (c) ceased to be an Australian citizen,

shall be deemed to have re-acquired his Australian citizenship on that day.

The operation of regulation 2 of the *PNGIACYPR* was retrospective in operation. This is because the regulation provides that the person ‘shall be deemed to have re-acquired his Australian citizenship on that day’ being Independence Day. Regulation 3 provides that a person subject to those regulations ceases to be an Australian citizen on renouncing the Australian citizenship and making the Declaration of Loyalty in accordance with the *Constitution of the Independent State of Papua New Guinea*.

## XVII RESUMPTION OF CITIZENSHIP

Indigenous applicants of Papua New Guinea whose Australian citizenship was divested under regulation 4 of the *PNGIACR* have sought the resumption of Australian citizenship under the *ACA*.<sup>116</sup>

Some indigenous applicants have made applications to acquire citizenship by descent. An application for citizenship by descent could have been made under section 11 (and after 1984, under sections 10B and 10C) of the *ACA*.<sup>117</sup> The difficulty in making such an application was that an applicant under those provisions had to have been born outside ‘Australia’. Such provisions could not be availed of by a person who was born in Papua before Independence Day. The Full Court of the Federal Court of Australia has held that such a person was ineligible to make an application for citizenship by descent under section 10C of the *ACA* as, on Independence Day, he or she would then have been born within ‘Australia’ for the purpose of the *ACA*.<sup>118</sup>

An application for citizenship could formally have been made under section 23AA of the *ACA*. This provision applied where an applicant had done a voluntary and formal act,<sup>119</sup> other than marriage, by virtue of which he or she had acquired the nationality or citizenship of a country other than Australia (section 23AA(1)(a)(i)) or done any act or thing to acquire the citizenship of another country (section 23AA(1)(a)(ii)). In most instances indigenous applicants had not done any such voluntary acts or formal things.

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116 See, eg, *Walsh Full Federal Court* (2002) 125 FCR 31; *Songoro and Minister for Immigration* [2005] AATA 774 (Unreported, Senior Member Constance, 4 August 2005).

117 Rubenstein, above n 3, 95–9.

118 *Walsh Full Federal Court* (2002) 125 FCR 31.

119 The Administrative Appeals Tribunal has ruled that merely remaining in Papua New Guinea after Independence does not constitute a ‘voluntary’ or ‘formal’ act within the meaning of s 24AA(1)(a) of the *ACA*: see *Songoro and Minister for Immigration* [2005] AATA 774, [21]–[23]. See also *Mahuru* [2008] AATA 464, [26].

Section 23AB of the *ACA* enabled a declaration for the resumption of citizenship to be made where a person had ceased to be an Australian citizenship under section 18. This latter provision applied where an adult person of the age of 21 years had made a declaration renouncing his Australian citizenship. This provision would also not have applied in the case of most applicants who did not make any such declaration, and who in any event would have been a minor on Independence Day.<sup>120</sup>

An application for citizenship could have been made under section 23B of the *ACA* where a person by reason of section 23 of that Act had ceased to be an Australian citizen. This latter provision applied where a responsible parent of a child had ceased to be an Australian citizen under sections 18 or 19 of that Act. Neither section 18, which refers to where an adult person of the age of 21 years, had made a declaration renouncing his Australian citizenship, or section 19, which refers to a loss of citizenship by service in the armed forces of an enemy country, had any application at all to most indigenous persons.

Any application for Australian citizenship is now dealt with under the *Australian Citizenship Act 2007* ('*ACA 2007*'). The *Australian Citizenship (Transitional and Consequential) Act 2007* (Cth) ('*Transitional and Consequential Act*') provides, in schedule 3, for certain declarations made under the *ACA* to be taken to be an application under the *ACA 2007*.<sup>121</sup> Any declaration that had been made under *ACA* can now only be dealt with under the *ACA 2007*, as the *ACA* has been repealed.<sup>122</sup>

An application for the resumption of citizenship is now ordinarily made under section 29 of the *ACA 2007*. That provision has been held not to extend where an indigenous person had lost citizenship on Independence Day by reason of the process of automatic citizenship under section 65 of the *Constitution of the Independent State of Papua New Guinea*.<sup>123</sup>

## **XVIII RESUMPTION OF CITIZENSHIP BY PAPUAN WITH AUSTRALIAN PARENT**

The *ACA 2007* contained an important reform to benefit those indigenous applicants who formerly held Australian citizenship by being born in Papua and who had an Australian parent. *Walsh Full Federal Court* concerned a woman who was born in Papua in 1970 when she would have acquired Australian citizenship by birth. Her father was born on the Australian mainland. Ms Walsh was held ineligible to apply for Australian citizenship by descent under section 10C of the *ACA*,<sup>124</sup> which prompted the reform. In giving the second reading speech on the Australian Citizenship Bill 2005, the Minister for Citizenship and Multicultural Affairs, John Cobb, remarked:

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120 *Mahuru* [2008] AATA 464, [24].

121 *Gaigo* [2008] AATA 590, [15].

122 *Transitional and Consequential Act* s 42 which came into effect on 1 July 2007. See also, *Mahuru* [2008] AATA 464, [28].

123 *Mahuru* [2008] AATA 464, [26]–[28]; *Gaigo* [2008] AATA 590, [15].

124 See also Rubenstein, above n 3, 95–9.

The Australian citizenship legislation drafted to complement the creation of an independent Papua New Guinea did not make allowance for people such as Susan Walsh, whose mother was Papuan and whose father was born in New South Wales. Registration as a citizen by descent is not possible in Ms Walsh's case because those provisions require that the person is born outside Australia. Papua, prior to PNG independence, was a part of Australia for the purposes of Australian citizenship law. While only a handful of people will benefit from this change, it upholds an important principle.<sup>125</sup>

Now section 21(7) of the *ACA 2007* provides for the acquisition of Australian citizenship for people born in Papua prior to Independence Day where they have a parent who was born in an Australian State or an internal Territory. Under section 21(7) of that Act, a person who was born in Papua before 16 September 1975 may now apply for the resumption of Australian citizenship. In order to qualify under that provision, a parent of the applicant had to be born in Australia as defined by the *ACA 2007*.<sup>126</sup> An applicant would ordinarily produce documentary evidence that a parent was born in Australia. There are other requirements in section 21(7) that need to be satisfied. One such requirement is that the parent was an Australian citizen at the time of an applicant's birth (section 21(7)(c)). Another such requirement is that an applicant is of good character at the time of the Minister's decision (section 21(7)(d)). It is usual practice for an applicant to provide a police clearance to satisfy such a requirement.

## XIX CONCLUSION

This millennium has brought a renewed interest about Australia's national identity and the nature of Australian citizenship.<sup>127</sup> The High Court of Australia has recognised that citizenship is a statutory concept.<sup>128</sup> As Dowsett J remarked in *Walsh Federal Court*, 'citizenship is purely the creature of statute'.<sup>129</sup> What can be conferred by Parliament can be withdrawn by Parliament.<sup>130</sup>

The circumstance of this wholesale withdrawal of citizenship from Australian citizens was certainly unique in Australian history. It was achieved by the operation of both New Guinea law and Australian law. Under Papua New Guinea law, there was a prohibition against dual citizenship in section 64 of the *Constitution of the Independent State of Papua New Guinea*. Under Australian law, the relinquishment of sovereignty under section 4 of the *PNG Independence Act* necessarily had the consequence that, upon independence, the people of Papua New Guinea ceased to be citizens of Australia. The wide regulation-

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125 Commonwealth, *Parliamentary Debates*, House of Representatives, 9 November 2005, 12–13.

126 *ACA 2007* s 21(7)(b); the explanatory memorandum contains the statement that the 'policy intention is to make clear that the meaning of 'Australia' in this subsection refers to the definition of Australia at the time that the applicant makes the application for citizenship and at no other time': Revised Explanatory Memorandum, Australian Citizenship Bill 2005 (Cth).

127 Rubenstein, above n 3, 1.

128 *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178, 184.

129 *Walsh Federal Court* (2001) 116 FCR 524, 527, [13].

130 Cf Human Rights Commission, *The Australian Citizenship Act 1948* (1982) 3, [3].



making power in section 6 of the *PNG Independence Act* also conferred authority upon the Executive to make a regulation to withdraw Australian citizenship from many of its citizens. There is much force in the observation of Kirby J during argument in *Ame* that '[i]f Parliament takes away important civic rights one expects that will be done expressly and by clear language, and not by a general provision such as section 6'.<sup>131</sup> However, the legislation did – and still does – enable regulations to be made to effect the 'modification'<sup>132</sup> of a statute such as the *ACA*. It would not now be in accordance with contemporary Parliamentary practice for an Act of Parliament to authorise the making of a regulation to amend an Act.<sup>133</sup> This is particularly so where the citizenship rights of a large number of persons may be affected.

The Australian citizenship that the Papuans had possessed before Independence Day was, as the Constitutional Planning Committee fully appreciated, not a 'real foreign citizenship'.<sup>134</sup> This is why the expression 'real foreign citizenship' is to be found in section 65 of the *Constitution of the Independent State of Papua New Guinea*. The nominal Australian citizenship possessed by Papuans would not enable them to enter the Australian mainland. In *Ame*, Kirby J emphasised that the Constitution of the new Independent State gave its citizens a 'real citizenship'.<sup>135</sup> Justice Kirby also pointed out that '[i]n place of a veneer of citizenship were substituted substantial and enforceable rights of citizenship of Papua New Guinea that conform to international law'.<sup>136</sup>

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131 *Ame* (2005) 222 CLR 439, 444.

132 *Walsh Federal Court* (2001) 116 FCR 524, 532, [32].

133 The Senate Regulations and Ordinances Committee would now scrutinise delegated legislation to ensure 'that it does not contain matter more appropriate for parliamentary enactment': see, Senate, Parliament of Australia, *Odgers' Australian Senate Practice* (2001) 376.

134 Constitutional Planning Committee, Parliament of Papua New Guinea, *Citizenship* (1974) ch 4, [20].

135 *Ame* (2005) 222 CLR 439, 474.

136 *Ibid.*