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We are Australian—The Constitution and Deportation of Australian-born Children

Does birth in Australia protect a child against deportation? Is a child born in this country an 'Australian national' even if legislation says he or she is not a 'citizen'? Can children be denied citizenship because their parents are 'illegal' immigrants or temporary visa holders? The High Court must decide these questions in a forthcoming case in which a five year old girl born in Sydney—whose Sikh refugee parents face expulsion from Australia—will challenge 1986 laws restricting the automatic right to citzenship at birth.

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Executive Summary

We are Australian

Aren't all children born in Australia, 'Australian'? Not necessarily.

This used to be the case. Until 1986 every child born in this country automatically became an Australian citizen at birth—no matter who the parents were. Only children of foreign diplomats and 'enemy aliens' did not become Australian citizens.

The High Court is shortly to hear the case of *Plaintiff S441/2003*, in which a five year old girl born in Sydney will challenge 1986 laws that restricted the automatic right to citzenship at birth. The girl's parents fled anti-Sikh persecution in India in 1997. She 'speaks with an Australian accent and thinks Brett Lee is the best cricketer in the world'.[1] But if her parents are denied refugee status they will be deported. And as a 'non-citizen', their daughter—despite her birth in Australia—will also have to leave.

Plaintiff S441/2003 involves fundamental issues about Australian identity that the High Court has never had to confront before. Most important is whether there is an Australian 'nationality' protected by the Constitution—separate from 'citizenship' under the *Australian Citizenship Act 1948*—which confers rights and freedoms that Parliament cannot touch.

The Citizenship Act was amended in 1986 to remove automatic citizenship at birth from children of 'illegal' immigrants and temporary visa holders, including visitors and refugees. Now such children only become citizens if they are 'ordinarily resident' in Australia for the first ten years of their lives.[2]

The High Court has been asked to declare the 1986 amendment unconstitutional. The outcome is not straightforward.

At the time of the 1986 amendment, there was anxiety in the media about the number of illegal immigrants in Australia.[3] There was also concern about 'contemptible queue jumping' by parents who used the citizenship status of their Australian-born infants to gain permanent residency and avoid deportation. [4]

In *Kioa* (1985), the High Court noted that 'the mere fact that prohibited immigrants have a child born to them in Australia' did not entitle them to permanent residence.[5] It also rejected the idea that the citizenship of Australian-born children gave them a right to a separate hearing before their parents could be deported. But 'the possibility that such an argument might one day be successful was enough to encourage precautionary legislative change'.[6]

Also in 1985 the (then) Human Rights Commission condemned the practice of expelling 'prohibited non-citizens' who had *Australian-born* and therefore, under the law then in force, *Australian citizen* children. This amounted to the 'de facto deportation' of such

children who were denied the 'human right' available to other Australian citizens of growing up in the country of their birth.

The Commission said these concerns could be dealt with by removing citizenship from such children.[7]

The Australian President of the International Commission of Jurists and former leader of the New South Wales Liberal Opposition, John Dowd, disagreed:

> If you're born in a country, it's surely a natural human right that you be allowed to remain here … They ought to realise that you can't talk about human rights at the same time as you take them away from children.[8]

Despite this, the Federal Government accepted the approach of the Human Rights Commission in the 1986 amendment.[9]

In *Plaintiff S441/2003* the High Court will have to decide:

- Whether the 1986 amendment to the Citizenship Act was authorised by the Australian Constitution, and
- Even if the 1986 change was valid, whether 'non-citizen' children born in this country have Australian 'nationality', meaning they cannot be forcibly detained and deported under the Migration Act.

Possible Sources of Authority

The Australian Constitution authorises the Federal Parliament to make laws with respect to various matters. Commonwealth laws are only valid if they relate to one of these matters.

The Constitution gives the Federal Parliament power to make laws about 'immigration and emigration'.[10] But Australian-born children are unlikely to be 'immigrants' in the ordinary meaning of that word. They have not 'migrated' to Australia, having 'arrived' *from within* this country rather than entering *from outside*. So it is doubtful that the 'immigration and emigration' power can authorise laws about children born in this country.

Parliament can make laws about 'naturalization',[11] or the process of becoming a citizen. However, denying citizenship to Australian-born children goes beyond the process of naturalization, or even 'de-naturalization'.

The High Court has held that there is a 'nationhood power' implied in the Constitution allowing the Commonwealth to legislate for matters which are 'inherently national'.[12] It is unclear whether this would authorise the 1986 amendment. On one view it is not an inherent function of a national government to deny citizenship to those born within its territory who would otherwise qualify as members of the national community. On the

other hand, it would be plausible for the High Court to decide that an ability to withhold citizenship from locally-born children of foreign nationals is a necessary part of a general 'nationhood' power.

The central question in *Plaintiff S441/2003*, however, is likely to be whether Australian-born children of illegal immigrants and temporary visa holders can be 'aliens' in the sense used in section 51(19) of the Constitution. If children born in this country cannot be 'aliens' there will be no specific provision in the Constitution on which the 1986 law can be based. The validity of the 1986 change to the Citizenship Act would then depend on the untested and uncertain scope of the 'implied nationhood' power. Moreover, if such children are not 'aliens' (or 'immigrants'), the Commonwealth will have no authority to forcibly remove them from Australia under the Migration Act.

1898 Constitutional Convention

The record of the 1898 Constitutional Convention reveals that the drafters of the Australian Constitution deliberately omitted any authority for Federal Parliament to deny the 'birthright' of State residents to membership of the new Commonwealth. A proposal to include a general power over 'citizenship' in the Constitution—providing a valid basis for Parliament to grant or deny this status to whomsoever it pleased—was specifically rejected. Federal Parliament was only to have the power to prevent immigrants or 'aliens' '*from the outside world*' becoming Australian nationals.[13]

There was no mention of any such issue in the debate over the 1986 amendment to the Citizenship Act.

In *Cole v Whitfield* (1988), the High Court said that records of the Convention debates could be used in interpreting the Constitution. But the 'subjective intention' of the 'founding fathers' could not replace the 'ordinary and natural' meaning of constitutional terms such as 'aliens'.

The difficulty in the case of *Plaintiff S441/2003* is that the 'ordinary and natural' meaning of the word 'aliens' in the Constitution is far from clear.

Are Australian-born Children 'Aliens'?

The word 'alien' is not defined either in the Constitution or in legislation. Under a former definition in the Citizenship Act, it used to mean anyone who was 'not a British subject, an Irish citizen or a protected person'. But this definition became out of date for an independent Australian nation and was removed in 1987—without being replaced.

Plaintiff S441/2003 gives the High Court its first opportunity to consider whether 'non-citizen' children born in Australia are 'aliens' in the sense used in the Constitution. Until recently the accepted description of an 'alien' under Australian law was that of Chief Justice Gibbs in *Pochi* (1982):

> Parliament can … treat as an alien any person who was *born outside* Australia, whose parents were not Australians, and who has not been naturalized as an Australian. (emphasis added).[14]

In *Taylor* (2001) and *Te and Dang* (2002), three members of the current High Court (Chief Justice Gleeson and Justices Gummow and Hayne) said that Chief Justice Gibbs' statement in *Pochi* remains good law for Australia.[15] However, Chief Justice Gibbs' description of who Parliament can treat as an 'alien' plainly did not cover and left uncertain the status of non-citizens *born within* Australia.

In *Te and Dang* (2002), Justice McHugh argued that Chief Justice Gibbs' statement in *Pochi* (1982) meant that 'an alien is any person who is a non-citizen'.[16] Similarly, in *Lim* (1992), Justices Brennan, Deane and Dawson suggested that 'the word "alien" in s. 51(19) of the Constitution had become synonymous with "non-citizen"'.[17]

But in Australian constitutional law 'the stream cannot rise above its source', [18] i.e. the Commonwealth Parliament cannot control the limits of its own power. Its 'source' of power is the Constitution. 'Alien' cannot simply mean 'non-citizen' because this would allow Parliament through citizenship legislation to determine the scope and extent of the 'aliens' power in s. 51(19) of the Constitution. As Justice Gaudron said in *Lim* (1992), 'Citizenship … is a concept which is entirely statutory … (therefore) it cannot control the meaning of "alien" in s. 51(19) of the Constitution.'[19]

It was not until the recent decisions in *Taylor* and *Te and Dang* that a majority of the High Court tackled the false 'citizen/alien' dichotomy head on. In *Taylor* (2001) four judges on the High Court (Justices Gaudron, McHugh, Kirby and Callinan) found that a citizen of the United Kingdom who migrated to this country in the 1960s shared allegiance with Australians to a common monarch. Despite never having become a citizen, Mr Taylor was a subject of the Queen of Australia and could not be an 'alien' for the purpose of this country's deportation laws. Instead he belonged to a new class of Australian resident, the 'non-alien non-citizen' (or *'non-removable* non-citizen').[20]

Central to the High Court's interpretation of the 'aliens' power in the Constitution is the distinction between 'aliens' on the one hand, and 'natural-born' or naturalized 'subjects' on the other. The authors of the Australian Constitution deliberately gave Federal Parliament a lesser power over 'naturalization and aliens' instead of a broader authority over 'citizenship'—because, as South Australian delegate to the 1898 Convention Charles Kingston said, 'it is impossible to contemplate the exclusion of *natural-born subjects*' from membership of the new Federation.[21]

In *Pochi* (1982), Chief Justice Gibbs referred to the long-standing common law rule that:

> Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it.[22]

As Justice Kirby said in *Te and Dang* (2002), a key issue arising from *Taylor* (2001) is:

> Who constitute the class of persons who are not citizens, but … are 'natural-born subjects' of the Crown in Australia, like Mr Taylor, who are not 'aliens' within the decision in that case?[23]

Based on ancient common law principles, provided a child is born on Australian territory at a time when its parents are within Australia's jurisdiction, it will be a 'natural-born subject' of Australia. In *Calvin's Case* (1608),[24] Lord Coke said that for a child to be a 'natural-born subject' at common law rule required:

> 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion.[25]

Any person in Australia on some form of temporary visa is—as the conferral of the visa itself indicates—within Australia's jurisdiction, i.e. under the 'actual obedience' of the Commonwealth. Any child of such a person born on Australian territory will therefore be a 'natural born subject' of Australia.

The same applies in the case of people in Australia without a visa. Such people are within Australia's jurisdiction and owe 'temporary or local allegiance' to the sovereign authority of Australia, whether or not they acknowledge this. This applies not only to unlawful non-citizens in detention but to any person living illegally in this country. The only exception in practice will be diplomatic and other visa holders with immunity from Australian law.[26] In all other cases, the parents will be under Australian jurisdiction while in this country. Any children born here will therefore be 'natural-born subjects' and outside the common law and constitutional meaning of 'alien'.

Other ways of defining 'non-aliens' for the purpose of Australian constitutional law could be considered besides referring to ancient common law. However it is doubtful whether it is open to the High Court to abandon the common law distinction between 'aliens' and 'natural-born subjects'. As the Court has itself emphasised, while the practical application of constitutional terms such as 'aliens' can vary from time to time, the 'abstract meaning' or *'fixed connotation'*[27] of such words must remain the same. If this were otherwise, there would be little point having a Constitution whose terms are protected against alteration by Parliament and which can only be changed through a referendum of the people.

The 1898 Constitutional Convention and recent High Court cases suggest that a distinction with 'natural-born' or 'Australian-born' subjects is part of the 'fixed connotation' of the word 'alien' in its constitutional context.

In *Mabo v Queensland (No 2)* (1992) Justice Brennan emphasised the difficulty of moving away from common law concepts:

> Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, *it cannot do so where the departure would fracture what I have called the skeleton of principle*.[28] (emphasis added).

Ignoring the distinction with 'natural-born' subjects would 'fracture the skeleton of principle' inherent in the meaning of the word 'aliens' in section 51(19) of the Australian Constitution.

As in Australia, United States constitutional law on the issue of citizenship and nationality incorporates and protects the English common law on 'alienage'. The Fourteenth Amendment to the United States Constitution—introduced after the US Civil War—guarantees citizenship to anyone 'born in the United States, and *subject to the jurisdiction thereof*'. As the US Supreme Court explained, this wording ensures that US constitutional law on citizenship corresponds with common law notions of 'aliens' and 'natural-born subjects'.[29] Only those beyond US jurisdiction, i.e. 'children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State,'[30] are denied automatic citizenship on birth in the United States.

A 1997 proposal put to the United States Congress to limit citizenship by birth to children of citizens or permanent residents—almost identical to Australia's 1986 amendment—lapsed because of its inconsistency with the common law concepts enshrined in the US Constitution.[31]

Unlike the United States Constitution, the Australian Constitution contains no guarantee of citizenship for those born in this country. But by including a power over 'aliens' the Australian Constitution—as in the United States—specifically incorporates and protects common law concepts inherent in this term.

In the United Kingdom, in contrast to the United States and Australia, there is no Constitution protecting key principles from amendment by legislation. This has allowed the British Parliament to override the common law right of any 'natural-born subject' of the United Kingdom to British nationality. The *British Nationality Act 1981* is similar to, and indeed appears to have been the model for, the 1986 amendments to Australia's Citizenship Act, conferring citizenship on children born in the United Kingdom only if one of their parents is a citizen or permanent resident, or if they live in the United Kingdom for the first ten years of their lives.[32]

Under Canada's Constitution the national parliament of that country possesses the same power to make laws concerning 'naturalization and aliens'[33] as conferred on the Australian Parliament in section 51(19) of our Constitution. It is relevant to Australia that cases on this power in the early 1900s held that persons born within Canada to foreign parents were 'natural-born subjects' of the Crown and not 'aliens' under Canadian constitutional law.

Practical Significance of 'Non-Alien' Status

If locally-born children such as the applicant in *Plaintiff S441/2003* are not 'aliens', there will be some important consequences. Most significantly the purpose of the 1986 amendment to the Citizenship Act will largely be negated. It may be that the amendment itself is held to be invalid, returning citizenship to children born in Australia since that date to temporary visa holders and other non-permanent residents. But even if the High Court decides that removal of citizenship from 'non-alien' children was constitutionally valid, they will remain 'non-aliens'. Except in the very limited cases acknowledged by the common law, it appears to be beyond the power of Parliament and the Commonwealth to treat locally-born children as 'aliens' without an alteration to the Constitution.

If Australian-born children of 'illegal' arrivals or temporary visa holders are neither 'aliens' nor 'immigrants' in the sense used in the Constitution, they cannot validly be subject to the forcible detention and removal provisions in the Migration Act.[34] The 'voluntary' detention and deportation of the children (at the request of their parents) seems constitutionally valid. But if parents facing deportation do not want their Australian-born children in immigration detention, or if they are willing and able to leave them behind in this country, the Commonwealth will be unable under the Migration Act to detain or deport the children.

Forcible detention by the Commonwealth of children who are not 'aliens' or 'immigrants' would also contravene the 'separation of powers' doctrine. A power of imprisonment is conferred exclusively on Australian courts under Chapter III of the Constitution. So any detention not authorised by deportation provisions applying to 'aliens' and 'immigrants' can occur only as a result of a court order. Such detention could not validly occur because of an administrative order from an immigration official or the Minister.

'Non-alien' status would also assist the parents of Australian-born children. As Justice Gaudron observed in *Teoh* (1995):

> it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare …[35]

Current High Court authority accepts that in terms of the common law, 'natural-born subjects' are, like citizens, members of the Australian body politic.[36] It follows that if locally-born children of non-permanent residents are 'natural-born subjects', they share the common law (as against statutory) rights of citizens. This includes the right to have their best interests taken into account as a primary consideration in any administrative decision (i.e. by immigration officials, tribunal or the Minister) concerning the fate of the families to which they belong.

The Australian Government's official instructions on deportation of parents reflect Justice Gaudron's view that the best interests of Australian citizen children must be considered. The various instructions direct immigration officials to take into account the Australian citizen status of children when considering the deportation of non-citizen parents.[37] If the High Court decides that locally-born children are 'Australian-born subjects' (or Australian 'nationals'), this should be reflected in the official instructions regarding deportation of parents. Alongside citizenship and permanent residency, immigration officials should be directed to have regard to a child's constitutional nationality in deciding the fate of parents. This should also be the case with the Minister's discretionary power to intervene in deportation cases.[38]

Many decisions under the Migration Act are deemed to be 'privative clause' decisions which are 'final and conclusive' and cannot be challenged in any court.[39] However 'privative clauses' banning further appeals are ineffective where a tribunal or similar body has committed a 'jurisdictional error'[40] or has exceeded 'constitutional limits'.[41] So the Migration Act could not be used to prevent parents appealing to the Federal or High Courts if the constitutional status of a child had been ignored by a decision-maker.

The Way Ahead

Having a third national status to consider alongside citizenship and permanent residency might be regarded as unwieldy.

If the High Court decides in *Plaintiff S441/2003* that children born locally to non-permanent residents are citizens or, if not citizens, 'natural-born subjects' and therefore Australian 'nationals', there seems little point retaining the current legislation. Such a decision by the High Court would mean that there is a form of Australian nationality derived from the common law on 'alienage' and protected by the Constitution that cannot be removed without approval by the people in a referendum. The failure to discuss constitutional issues in 1986 might provide Parliament with a reason to reconsider this issue.

A decision on whether Parliament should re-consider the legal status of children born in Australia would be assisted by accurate information on the 'migration consequences' of a child's citizen status. As Justice Brennan and John Dowd pointed out at the time of the 1986 amendment, having a child born in Australia never entitled the parents to permanent residency or enabled them (without more) to avoid deportation. Information on the number of people directly affected would also assist any re-consideration. After the 1986 amendment came into force, the Human Rights Commission, despite having recommended such a change, queried whether it was really necessary to take citizenship away from Australian-born children:

> it is of the view that the risk can be over-stated. It considers the suggestion that 'the floodgates' might be opened is without foundation … Allowing all of these persons to stay … would hardly constitute a trickle, let alone a flood.[42]

Table 1: Who is an Australian Citizen?

Australian Citizenship Act 1948 (as amended)

• Born in Australia – with at least one parent who is a citizen or permanent resident	Citizen
• Born in Australia – without a parent who is a citizen or permanent resident	Non-citizen (unless live in Australia till age ten)
• Adopted by Australian citizen – under law in force in State or Territory – when in Australia as permanent resident	Citizen
• Born overseas – with a parent who is a citizen[43] – if register child before turns 18	Citizen
• Receive citizenship by grant (naturalisation) if – permanent resident – over 18[44]	Citizen

Table 2: Basic Terms

• Australian 'citizen'	See Table 1.
• Australian 'national'	Includes any 'citizen' and (arguably) any 'non-alien non-citizen'.
Australian 'subject'	A person who resides under the rule, control and jurisdiction of the Australian government. Involves 'allegiance' to the Queen of Australia (or 'the Crown in right of Australia'). Includes all 'citizens' and 'nationals'.
• Allegiance	Obligation of faithfulness, loyalty, and obedience to a state and its government.
• Alien	A person with no relationship with the state.

Part One—The Constitution and Australian-born Children

The High Court has been asked to decide whether children born in Australia have a constitutional right to remain in this country. Not all such children are Australian citizens. Children of temporary visa holders, refugees and others without permanent residency do not receive citizenship at birth and can be forcibly deported from Australia. In September 2003 Justice Kirby referred the case of *Plaintiff S441/2003*—involving a five-year-old girl born in Australia to asylum seeker parents—to the full High Court. Justice Kirby explained that the central issue is:

> whether there is a constitutional status of nationality quite apart from the statutory status of citizenship and whether implied in that constitutional notion of nationality being a subject of the Queen of Australia are certain irreducible minimum protections.[45]

Deporting Australian-born Children

In late 2002 a group of East Timorese families who had lived in Australia for up to a decade were told they were to be deported.[46] The group included over 200 children born in Australia since the families arrived in the early to mid-1990s.[47] Deportation orders were applied to the children without considering their status under Australian constitutional law.

East Timor's new President Xanana Gusmao queried why, unlike East Timor, birth in Australia conferred no legal right to remain in this country:

> We have this law as a new nation … If an Indonesian that was born in East Timor wanted to come back into the country, I cannot deny him access. It's a basic human right.[48]

Legislative changes in 1986 removed the automatic right of anyone born in Australia to live here. Amendments to the *Australian Citizenship Act 1948* ('the Citizenship Act') meant citizenship was henceforth conferred only on children born in Australia to citizens or permanent residents.

The 1986 Amendment

The amendment to the Citizenship Act in 1986 was specifically targeted at people without permanent residency seeking a foothold in Australia through the birth of a child in this country. It had two main aims: to prevent infant children 'sponsoring' their parents for permanent residency and to stop parents using the fact that their citizen children could not be expelled to prevent their own deportation.

The Minister for Immigration and Ethnic Affairs in the then Labor Government, the Hon. Chris Hurford MP, explained that:

> Australia is one of the few remaining countries which confers citizenship automatically upon a child born here, unless one of its parents was at the time of its birth a diplomat or a consular representative of a foreign country or an enemy alien. This generosity in our law can be exploited by visitors and illegal immigrants who have children born here in order to seek to achieve residence in Australia.[49]

Under the amended Citizenship Act, children born in Australia to someone who is not a citizen or permanent resident are not regarded as citizens at birth and only become Australian nationals if 'ordinarily resident' in this country for the first ten years of their lives.[50] As 'non-citizens' such children can be forcibly detained and deported under the *Migration Act 1958*.[51]

Background: The High Court and the 'Army of Illegals'

The 1986 amendment was preceded by anxiety about the cost to the community of the 'growing army of illegal immigrants' in Australia.[52] Prominent newspaper reports in 1985 referred to estimates of 50-60 000 'prohibited non-citizens' in this country.[53]

In the same context the media highlighted a High Court case involving two-year old Australian-born Elvina Kioa whose Tongan parents had overstayed their temporary entry permits and faced deportation. The *Sydney Morning Herald* said that a 'crucial element [was] 'the weight that should be given to their daughter, who was born here and is an Australian citizen'.[54] The Kioas' lawyers argued that as a citizen Elvina had a right to be heard on the matter of her parents' deportation and to have her own interests taken into account.[55]

The High Court in *Kioa* did not confer any additional rights on Australian-born children. Elvina's status as a citizen did not entitle her to a special hearing beyond the representations made on behalf of her parents.[56] The child's citizenship was 'a relevant consideration militating against the making of deportation orders'[57] but, as (then) Justice Brennan pointed out, 'it is not suggested … that the mere fact that prohibited immigrants have a child born to them in Australia entitles them to permanent residence in Australia'.[58]

Nevertheless, while the High Court rejected the idea that the citizenship of Australian-born children entitled them to a separate hearing before their parents could be deported, 'the possibility that such an argument might one day be successful was enough to encourage precautionary legislative change'.[59]

Human Rights and the 1986 Amendment

Strong criticism of the Federal Government's deportation policies by the Human Rights Commission also contributed to the 1986 amendment.

In a series of reports in 1985,[60] the Commission condemned the practice of expelling prohibited non-citizens who had Australian-born and therefore, under the law then in

force, *Australian citizen* children. This amounted to the 'de facto deportation' of such children 'who were forced in one way or another' to go with their parents.[61]

The Commission said this contravened both the International Covenant on Civil and Political Rights ('ICCPR') and the United Nations Declaration of the Rights of the Child. The 'effective deportation of the family' deprived Australian-born children 'of one of the principal rights associated with [their] Australian nationality, namely, the right to be brought up in the country of [their] birth'.[62]

The Commission said that only 'in extreme circumstances' should an established family be 'broken by deportation of one of its members, especially where there is an Australian born citizen member child in the family.'[63] The Commission noted, however, that 'nothing in the ICCPR or the Declaration of the Rights of the Child requires the children of prohibited non-citizens to become Australian citizens merely because they are born in Australia'. To avoid treating Australian-born children 'as if, in effect, they were not citizens, with the result that their human rights are denied', the Commission said that 'it may be fairer … to change the rule that birth in Australia automatically results in Australian citizenship for the children of prohibited non-citizens.'[64]

The Federal Government adopted the Commission's recommendation when introducing the 1986 amendment.[65] But the Government's legislation went further, not only catching children of 'prohibited non-citizens' but any child without a citizen or permanent resident for a parent, whether or not the parents were legally in Australia at the time of their child's birth.[66]

Reaction to the 1986 Amendment

The 1986 amendment was enthusiastically endorsed by the non-Government parties. According to the Opposition Spokesman for Immigration and Ethnic Affairs, Liberal Alan Cadman:

> The Bill seeks to remove automatic citizenship for children born in Australia of visitors, temporary entrants and prohibited non-citizens, thus closing the loophole which has allowed infants to sponsor their own parents … There are instances of pregnant women coming from overseas, having their child in Australia and of that child then sponsoring the parent as a permanent resident … [P]arents who were illegal immigrants would … resist deportation on the grounds that the child who had automatically gained Australian citizenship, needed the parents' constant attention.[67]

Democrats leader, Senator Don Chipp, also supported the change:

> The conferring of citizenship by birth under the present Australian Citizenship Act has been mercilessly exploited by illegal immigrants and visitors who have deliberately had a child in Australia so that those children may become permanent residents and the parents can therefore become automatic citizens of this country.[68] This loophole in our law—and this is what it is—allows contemptible queue jumping to the detriment of not

> only those who are waiting all over the world to be processed for entry into Australia but also the hundreds of thousands of people living in Australia who are desperately seeking to bring their loved ones to this country.[69]

The Australian President of the International Commission of Jurists and former leader of the New South Wales Liberal Opposition, John Dowd, was more critical. He queried whether the change was necessary from a legal perspective, noting that 'having a child born here is not a basis for staying here as a matter of law'. Instead it was merely an argument that parents facing deportation could put to immigration officials.[70]

As for the suggestion that human rights concerns could be ameliorated by changing a child's legal status, he said:

> If you're born in a country, it's surely a natural human right that you be allowed to remain here. The fact that your parents may have immigration problems … ought not to make the child the victim of the dispute between the parents and the government … they ought to realise that you can't talk about human rights at the same time as you take them away from children.[71]

The Constitution and the 1986 Amendment

Senator Chipp's hope that with the 1986 amendment 'the string of claims from parents that they cannot be deported because their children … were born here and therefore they cannot be deported will cease'[72] did not take into account the children's constitutional position.

The Migration Act and the Constitution

The *Migration Act 1958* 'provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by this Act'.[73] On the face of it, therefore, a child who is born in Australia but is not a citizen or permanent resident can be detained and deported under the Migration Act.

However the Migration Act—like the Citizenship Act and other Commonwealth legislation—must be linked to a source of power in the Australian Constitution. The Migration Act relies on the 'aliens' and 'immigration' powers in the Constitution.[74] It follows that the Act cannot validly apply to a person who is not an 'alien' or an 'immigrant'. In other words, a person needs to be both a 'non-citizen' *and* either an 'alien' or an 'immigrant' in a constitutional sense before they can be validly subject to the detention and deportation provisions in the Migration Act.[75]

The debate in Parliament about the 1986 amendment to the Citizenship Act made no reference to any such constitutional issue. The Parliament appeared to assume that deeming certain Australian-born children to be 'non-citizens' in itself enabled them to be

deported, and that this was sufficient to remove a key basis for appeals by the children's parents against deportation.

The 1898 Constitutional Convention and the Citizenship Act

Parliament's failure to discuss constitutional issues when removing citizenship from some Australian-born children is all the more surprising because the authors of the Australian Constitution specifically intended that the Federal Government should not have the power to pass any such law.

At the 1898 Constitutional Convention, Dr John Quick (responsible with Robert Garran for the authoritative *Annotated Constitution of the Australian Commonwealth*)[76] proposed that:

> We ought either to place in the forefront of this Constitution an express definition of citizenship of the Commonwealth, or empower the Federal Parliament to determine how federal citizenship shall be acquired, what shall be its qualifications, its rights, and its privileges, and how the status may hereafter be lost … [77]

Other delegates to the 1898 Convention were concerned, however, that the new Federal Government could use a power over 'citizenship' to deprive 'British subjects' from other parts of the Empire or residents of particular Australian States of this status.

South Australian delegate Josiah Symon was adamant that Federal Parliament should not be given such a power, stating that this issue 'goes to the very foundation of the Constitution which we are framing.' As he explained:

> At the very root of the proposed Union is the invitation to the citizens of the states to join the Federation, and to obtain, as their reward, citizenship of the Commonwealth … what this Convention is asked to do is to hand over to the Federal Parliament the power … of taking away from us that citizenship in the Commonwealth which we acquire by joining the Union.[78]

Symon said that if the Federal Government was given such a power, 'then I should feel that it was a very serious blot on the Constitution, and a very strong reason why it should not be accepted.'[79]

Richard O'Connor from New South Wales said the proposed powers over 'immigration and emigration' and 'naturalization and aliens' provided more than sufficient control over membership of the new Australian federation:

> you have power to prevent any person from entering any part of the Commonwealth, [so] you have also the power to prevent any person from becoming a member of the Commonwealth community … It appears to me quite clear, as regards the right of any person from the outside to become a member of the Commonwealth, that the power to

> regulate immigration and emigration, and the power to deal with aliens, give the right to define who shall be citizens, as coming from the outside world...[80]

Similarly, Edmund Barton said that in giving the Federal Parliament power over 'naturalization and aliens', 'we give them power to make persons subjects of the British Empire. Have we not done enough? We allow them to naturalize aliens.'[81]

Dr Quick's proposal was defeated. No power to make laws in relation to 'citizenship' was included in the Constitution approved by the Australian people in a series of referendums over 1898 and 1899. Indeed the Constitution contains no reference at all to the concept of Australian citizenship.[82]

The Convention Debates and Constitutional Interpretation

The outcome of the 1898 Convention debate on 'citizenship' is of more than historical interest.

In *Cole v Whitfield* (1988), the High Court declared that the Convention debates could assist in constitutional interpretation:

> Reference to the [Convention debates] may be made, not for the purpose of substituting for the meaning of the words used [in the Constitution] the scope and effect—if such could be established—which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.[83]

As the statements of Symon and O'Connor at the 1898 Convention indicate, a not unimportant element in the movement of the Australian states towards federation was a guarantee of citizenship in the new Commonwealth. The new federal government was not to have the power to deprive State residents of such status. Under the immigration and 'naturalization and aliens' powers, Federal Parliament could regulate the rights of aliens 'coming from the outside world'—including whether such people could be 'members of the Commonwealth community' or citizens/subjects of the new state. But the Commonwealth Parliament was denied a broader power in relation to 'citizenship' generally. As Symon said:

> the Commonwealth shall have no right to withdraw, qualify, or restrict those rights of citizenship, except with regard to one particular set of people who are subject to disabilities, as aliens, and so on. Subject to that limitation, we ought not, under this Constitution, to hand over our birth right as citizens to anybody, Federal Parliament or any one else ...[84]

The possible sources of constitutional authority for the 1986 legislation which deprived certain Australian-born children of citizenship need to be considered in this context.

Sources of Constitutional Authority

Section 51(19): Naturalization

In relation to membership of the new Federation, the Commonwealth was left with an express power in the Constitution over 'naturalization'.

Consistent with the principle in *Cole v Whitfield*, the Convention debates indicate the subject matter to which the naturalization power was directed.

The debate at the 1898 Convention shows that the contemporary meaning of 'naturalization' was the same as it is now, i.e. the 'process of becoming a citizen'. The Citizenship Act is clearly valid to the extent that it deals with this process. Moreover, as Justice Gaudron pointed out in *Nolan* (1988), 'the power to legislate with respect to naturalization … seems necessarily to carry with it a power to revoke the grant of naturalization'.[85] So the Citizenship Act can provide validly for 'de-naturalization', i.e. the removal of citizenship from naturalized Australians.[86]

However, denying citizenship to Australian-born children seems to go beyond 'naturalization' or 'de-naturalization'. It appears to involve exactly the kind of 'taking away' of citizenship from those otherwise entitled by birth to this status that the framers of the Constitution wished to avoid in restricting Parliament to the 'naturalization' power.

It seems unlikely therefore that the 1986 amendment to the Citizenship Act could be validly based on the 'naturalization' power in section 51(19) of the Australian Constitution.

Nationhood Power

The authors of the two leading texts on Australian citizenship law, Michael Pryles and Kim Rubenstein, both refer to an 'implied nationhood power'[87] in the Constitution that may give the Commonwealth authority to go beyond naturalization to determine other aspects of citizenship, including who has Australian nationality. As Pryles said:

> it may be that the Commonwealth Parliament possesses an inherent power to create an Australian national status (Australian citizenship) and to determine who may hold that status … Australia has emerged from a federal colony to a sovereign nation State at international law. It is arguable that there exists as an inherent attribute of that position which Australia now enjoys a power to create and define a national status for its citizens.[88]

Rubenstein notes that while it is 'not clear from judicial authority' that the Commonwealth can use such a power to make laws about nationality and citizenship, the High Court has endorsed the ability of the Commonwealth to legislate for other matters which are 'inherently national'.[89]

It would seem to be inherent in the powers of a national government to decree that people born within the nation are formally to be considered 'citizens'. It would also seem inherent in the functions of a national government to decree that foreign nationals are not 'citizens' and can only become citizens through a certain process. But it is doubtful whether the inherent functions of a national government in relation to citizenship are unlimited. It could be queried, for example, whether the Australian Government *inherently* has the power to exclude persons *born within its territory* and who would otherwise qualify as members of the national community from formal membership of the nation.

Section 51(27): Immigration and Emigration

Using its power under the Constitution to make laws in relation to 'immigration and emigration',[90] the Commonwealth can validly prevent people who are still 'immigrants' (i.e. who have arrived in Australia but have not fully settled in or been absorbed into the Australian community) from becoming citizens.

Can Australian-born children be 'immigrants' in the sense used in the Constitution?

The High Court has said that words in the Constitution are to be given their 'ordinary and natural' meaning.[91] The 'ordinary and natural' meaning of 'immigration' is the process of 'entering a country for temporary or permanent purposes'.[92] Therefore only people who have 'entered' Australia can be 'immigrants' in a constitutional sense.

The Migration Act states that a child who was a non-citizen when born in this country 'shall be taken to have entered Australia when he or she was born'.[93] This appears to bring non-citizen children born in this country within the constitutional definition of 'immigrants'. However, using the Migration Act to legislate that a person has 'entered' Australia through childbirth is a legal fiction inconsistent with the 'ordinary and natural' meaning of the word. 'Entering' connotes coming *from outside*, whereas a child born in Australia has 'arrived' *from within* the country. So such a child cannot have 'entered' Australia and cannot be an 'immigrant' in the normal sense of that word.

Consistent with *Cole v Whitfield*, it is also relevant that the framers of the Constitution saw the subject to which the 'immigration' power was directed as those 'coming from the outside world' and that people born in Australia would necessarily be beyond this power.

It is unlikely therefore that the 1986 amendment could be validly based on the 'immigration and emigration' power in the Constitution.

Section 51(19): Aliens

The Constitution also gives the Commonwealth a specific power to legislate in relation to 'aliens'.[94]

Those who carried the day at the 1898 Constitutional Convention plainly intended that Federal Parliament should only have the power to prevent 'aliens *from the outside world*' becoming Australian nationals. But the rule in *Cole v Whitfield* states that the 'subjective intention' of the 'founding fathers' cannot be substituted for the 'ordinary and natural' meaning of words in the Constitution such as 'aliens'.

In the case of the 'naturalization' and 'immigration' powers, this is not an issue. The ordinary meaning of those terms is clear. Reference to the Convention debates merely confirms the subjects to which they were directed, in turn indicating the boundaries within which those powers operate.

However the meaning of 'aliens' in Australian constitutional law is far from plain. In recent cases the High Court has been unable to agree on who comes within this term.[95] If the ordinary meaning of 'aliens' can include Australian-born children, the 1986 amendment will be constitutionally valid, notwithstanding the clear intention of the authors of the Constitution that Parliament should have no authority to pass such legislation. If, on the other hand, children born in this country are not 'aliens' there will be no specific provision in the Constitution on which the 1986 law can be based. The validity of the 1986 change to the Citizenship Act would then depend on the untested and uncertain scope of the 'implied nationhood power'.

Whether Australian-born children can be classed as 'aliens' within the meaning of that term in the Constitution is therefore a critical factor both for the constitutional validity of action under the Migration Act affecting such children and for the legality of the 1986 amendment itself. The next section looks more closely at this issue.

Part Two—Are Australian-born Children 'Aliens'?

The term 'alien' in section 51(19) of the Constitution is not defined either in the Constitution itself or in legislation. A definition of 'alien' was originally included in the Citizenship Act when it commenced in 1948, but was removed in 1987.[96]

The case of *Plaintiff S441/2003* gives the High Court its first opportunity to directly consider whether 'non-citizen' children born in Australia are 'aliens' in the sense used in the Constitution. The various 'aliens' cases the Court has decided to date have all involved people born overseas arguing that they were nevertheless not 'aliens' under Australian constitutional law.

'Aliens' and 'Natural-born Subjects'

Inherent in the High Court's understanding of the 'aliens' power in the Australian Constitution is the ancient distinction between 'aliens' and 'natural-born subjects'. In *Pochi* (1982), Chief Justice Gibbs referred to the long-standing common law rule that:

> Natural-born subjects are such as are born within the dominions of the crown of England; that is, within the ligeance, or as it is generally called, the allegiance of the king; and aliens, such as are born out of it.[97]

In *Te and Dang* (2002) Justice Gummow cited as 'significant' the statement by Lord Jowitt LC in *Joyce* (1946) that 'the natural-born subject owes allegiance from his birth, the naturalized subject from his naturalization, the alien from the day when he comes within the realm.' [98] Justice Callinan explained in *Te and Dang* that it was not citizenship but allegiance to the sovereign—as owed by a 'natural-born' or 'naturalized' subject—that was the key to membership of the Australian nation:

> Although citizenship is a sufficient condition for membership of the Australian body politic, it is not a necessary condition. Judged from a constitutional—rather than a statutory—perspective, the fundamental criterion of membership is allegiance to the Queen of Australia.[99]

Justice McHugh in *Taylor* (2001) stated a direct link between allegiance as a subject of the Queen of Australia and non-alien status:

> Once it is accepted that a person is the subject of the Queen for the purpose of the Constitution, that person cannot be an alien for the purpose of the Constitution. It is not a matter of Australian citizenship—a term that the Constitution does not use—but of the distinction that the Constitution draws between a subject of the Queen and one who is not, that is to say, an alien.[100]

Relevance of Ancient Common Law

Using the language of the current High Court, if non-citizen children born in this country are 'natural-born' (or 'Australian-born') subjects of the Queen of Australia they cannot be 'aliens' in the sense used in the Constitution. At first glance the use of ancient common law concepts such as 'allegiance to the sovereign' and 'natural-born subjects' to decide whether someone is an 'alien' or a member of the national community seems out of place in 21st century Australia. Yet as the above quotes show these concepts have been at the core of recent High Court cases on the 'aliens' question. Perhaps this is only because cases such as *Taylor* centred on the legal status of long-standing British migrants who settled in Australia before a certain date.[101] But having endorsed such concepts in recent cases—including in *Te and Dang* to conclude that two *non-British* applicants were 'aliens' under Australian law—it seems difficult for the High Court to deny their relevance in considering the constitutional status of Australian-born children. As Justice Kirby said in *Te and Dang*, a key issue arising out of *Taylor* is:

> Who constitute the class of persons who are not citizens, but … are 'natural-born subjects' of the Crown in Australia, like Mr Taylor, who are not 'aliens' within the decision in that case?[102]

The 'Citizen/Alien' Dichotomy

It might be argued that the proper distinction is not between 'aliens' and 'subjects of the Queen' (whether 'natural-born' or 'naturalized') but between 'aliens' and 'citizens'.

In *Te and Dang*, Justice McHugh argued that the High Court in *Pochi* (1982) and *Nolan* (1988) 'held that an alien is any person who is a non-citizen'.[103] And in *Lim* (1992), Justices Brennan, Deane and Dawson suggested that 'the word "alien" in s. 51(19) of the Constitution had become synonymous with "non-citizen".'[104] What the High Court said in *Nolan*, however, was that the practical meaning of the word 'alien' had altered with the emergence of Australia as an independent nation:

> so that, while its abstract meaning remained constant, it encompassed persons who were not citizens of this country even though they might be British subjects or subjects of the Queen by reasons of their citizenship of some other nation.[105]

Recognition that 'aliens' in modern Australia could include British subjects who had not become citizens was not the same, however, as saying that the term automatically applied to anyone who was not a citizen.

Similarly, what the High Court actually said in *Pochi* (per Chief Justice Gibbs) was that:

> Parliament can … treat as an alien any person who was *born outside* Australia, whose parents were not Australians, and who has not been naturalized as an Australian.[106] (emphasis added).

This principle was endorsed by the High Court in *Nolan*, which noted:

> That definition should be expanded to include a person who has ceased to be a citizen by an act or process of denaturalization and restricted to exclude a person who, while born abroad, is a citizen by reason of parentage.[107]

In *Taylor* (2001) and *Te and Dang* (2002), three members of the current High Court (Chief Justice Gleeson and Justices Gummow and Hayne) said that Chief Justice Gibbs' statement in *Pochi* remained good law for Australia.[108]

Chief Justice Gibbs' statement about who Parliament can treat as an alien—as modified by the *Nolan* court—encompasses most non-citizens. But this is far from establishing that in Australian law the words 'alien' and 'non-citizen' are synonymous. The *Pochi/Nolan* principle plainly does not cover and leaves uncertain the status of non-citizens *born within* Australia.

'The Stream Cannot Rise Above its Source'

Moreover, as Justice Gaudron said in *Lim* (1992), 'Citizenship … is a concept which is entirely statutory … (therefore) it cannot control the meaning of "alien" in s. 51(19) of the Constitution.'[109]

As Zines notes:

> The power of the Commonwealth to confer authority on members of the executive or administration is restricted by the Constitution in two major respects—first, by the principle of the separation of powers, and, secondly, by the doctrine that no law can give power to any person (other than a court) to determine conclusively any issue upon which the constitutional validity of the law depends. The second doctrine is sometimes metaphorically summed up in the maxim 'the stream cannot rise above its source' …[110]

Blackshield and Williams specifically link this doctrine to the scope of the 'aliens' power in the Constitution. They explain that:

> the Commonwealth Parliament cannot control the limits of its own power. Its 'source' of power is the Constitution. Whether an enactment falls within an area of power granted to the Parliament by the Constitution must ultimately be determined not by the Parliament but by the High Court. This explains the reservations expressed by Gaudron J … as to how far the Parliament could use its power in respect of 'aliens' … to determine the legal definition of 'aliens'.[111]

In other words, in Australian constitutional law 'alien' cannot simply mean 'non-citizen' because this would contravene the 'stream and its source' doctrine, i.e. it would allow Parliament through citizenship legislation to determine the scope and extent of the 'aliens' power in s. 51(19) of the Constitution.

Aliens and the 'Skeleton of Principle'

In addition, a discussion of the constitutional scope of the word 'alien' cannot ignore its origins in English common law as adapted for the modern Australia context. As (then) Justice Brennan said in *Mabo v Queensland (No 2)* (1992):

> Australian law is not only the historical successor of, but is an organic development from, the law of England … Although this Court is free to depart from English precedent which was earlier followed as stating the common law of this country, *it cannot do so where the departure would fracture what I have called the skeleton of principle*.[112] (emphasis added).

Ignoring the distinction with 'natural-born' subjects would 'fracture the skeleton of principle' inherent in the meaning of the word 'aliens' in section 51(19) of the Australian Constitution. This is not to say that anyone who would have been a 'natural-born subject' when the Constitution was drafted is a 'non-alien' in 2003. Clearly the reference point for 'subject' has changed since Federation from the sovereign of the British Empire to the sovereign authority of Australia, i.e. the 'Crown in right of Australia'. So a 'natural-born' subject in current Australian constitutional law might more correctly be referred to as an 'Australian-born' subject.

Connotation and Denotation

The practical application of constitutional terms such as 'alien' may vary depending on the circumstances of the time. So, for example, British nationals can now be classed as 'aliens' under Australian constitutional law even though this was not the case at Federation. But the fundamental concepts or attributes inherent in the meaning of words in the Constitution do not change. As Justice Dawson said in *Street* (1989):

> the words [in the Constitution] have a fixed connotation but their denotation may differ from time to time. That is to say, the attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them.[113]

The 1898 Constitutional Convention and recent High Court cases suggest that a distinction with 'natural-born' or 'Australian-born' subjects is part of the 'fixed connotation' or an essential 'attribute' of the word 'alien' in its constitutional context.[114]

Aliens and 'Australian-born Subjects'

Not all children born in Australia will have 'natural-born subject' status.

In *Taylor* Justices Gummow and Hayne stated that:

> The common law rule in England was that 'all persons born on English soil, *no matter what their parentage*, owed allegiance to, and were therefore subjects of the king' (emphasis added).[115]

But this quotation, from Holdsworth's 'A History of English Law',[116] is an inaccurate summary. It was not the case that children born in England were necessarily 'natural-born subjects'. The legal status of the parents made a difference. As Pryles states:

> the common law accepted as the general basis of allegiance that of the *jus soli* (the place of birth) rather than the *jus sanguinis* (the allegiance of the parents). Of course there were some exceptions. Thus, for example, children of foreign ambassadors born within the King's dominions were not subjects while children of British ambassadors born within foreign states were subjects. Likewise children of members of an invading army or of enemy aliens born within the King's dominions were not considered to owe allegiance and were therefore not subjects.[117]

In *Calvin's Case* (1608)[118] Lord Coke set out the classic common law rule regarding 'natural-born subjects':

> There be regularly … three incidents to a subject born. 1. That the parents be under the actual obedience of the King. 2. That the place of his birth be within the King's dominion. And, 3. The time of his birth is chiefly to be considered; for he cannot be a subject born of one kingdom that was born under the ligeance of a King of another kingdom …
>
> … any place within the King's dominions without obedience can never produce a natural subject. And therefore … if enemies should come into any of the King's dominions, and surprise any castle or fort, and possess the same by hostility, and have issue there, that issue is no subject to the King, though he be born within his dominions, for that he was not born under the King's ligeance or obedience.[119]

Local Allegiance of the Parents

Lord Coke's statement indicates that the status of the *parents* was critical in determining whether *children* born within the territory of the sovereign were 'natural-born subjects'. The parents had to be both within the territory and under the 'actual obedience' of the King at the time of the birth of their child. In modern terms, the parents had to 'owe allegiance to' or be 'within the jurisdiction of' the sovereign authority of the nation for their children to acquire 'natural-born subject' status. Since invaders owed no obedience or allegiance to the King, any of their children born within the King's territory could not be natural born subjects.

What Lord Coke referred to as 'actual obedience' of the parents is today known as 'local allegiance.' In *Te and Dang* (2002), Justice Callinan referred to 'the difference between natural allegiance due from birth of a person born within the king's dominion, and local allegiance … such as may be owed by an alien whose true allegiance lies elsewhere'.[120]

Justice Kirby explained that 'local allegiance is nothing more than the duty of anyone in Australia to comply with the Constitution and laws of this country'.[121]

Chief Justice Gleeson noted in *Te and Dang* that:

> an alien resident in Australia may become subject to … 'local allegiance' … local allegiance is not incompatible with the status of alienage. Allegiance and alienage are not mutually exclusive.[122]

His Honour cited with approval the words of Viscount Cave in *Johnstone* (1921):

> No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given … and having landed, he may be deported, at least if a statute authorises his expulsion … But so long as he remains in this country with the permission of the sovereign, express or implied, he is subject by local allegiance with a subject's rights and obligations.[123]

The fact that parents owe 'local allegiance' to, or are within the jurisdiction of, the governing authority of the nation does not alter their (*i.e. the parents'*) national status. As Justice Callinan explained in *Te and Dang*:

> An obligation to obey the laws of Australia extends to anyone within the territorial reach of Australian law, no matter to whom the persons affected by them owe allegiance and does not give rise to any national status.[124]

However 'local allegiance' *on the part of the parent(s)* is sufficient to confer the status of 'natural-born subject' on *locally-born children*. In *Wong Kim Ark* (1898) the United States Supreme Court explained—in a passage cited by Justice Gummow in *Te and Dang*—that:

> Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States. His allegiance to the United States is direct and immediate, and, although but local and temporary, continuing only so long as he remains within our territory, is yet, in the words of Lord Coke, in Calvin's Case *'strong enough to make a natural subject, for if he hath issue here, that issue is a natural-born subject'*. (emphasis added).[125]

Current examples of 'Australian-born subjects'

Applying the common law concepts cited by the High Court in cases such as *Pochi* (1982), *Taylor* (2001) and *Te and Dang* (2002), the following children would be examples of 'natural-born' or 'Australian-born' subjects under the Constitution.

East Timorese children

The East Timorese refugees living in Australia have 'local allegiance' to 'the sovereign authority of Australia'.[126] On their arrival here they became subject to the jurisdiction and laws of this country. They were granted bridging visas—in itself evidence that they had

come within Australia's jurisdiction. In Lord Coke's words, they have 'actual obedience' to the Crown in right of Australia. They are not in the position of invaders, 'enemy aliens' or diplomatic representatives of foreign countries who are not subject to the control of Australian legal authorities.

As Justice Callinan pointed out in *Te and Dang*, unless and until they become naturalized the East Timorese refugees who arrived in Australia in the 1990s—notwithstanding their obligation to obey the laws of Australia—are and will remain 'aliens' in a constitutional sense. But according to the principles laid down in *Calvin's Case*—inherent in the meaning of 'alien' under Australian constitutional law—any children born in Australia to the East Timorese refugees are 'Australian-born subjects' and not 'aliens' within the meaning of that term in section 51(19) of the Constitution.

Children of other temporary visa holders

The same applies to other children born in Australia to any person granted a temporary visa. Whatever the particular type of visa, the fact of its conferral appears to be sufficient indication that a person who has entered Australia is within Australia's jurisdiction and subject to the laws of this country. This applies even for those temporary visas that are not regarded as 'substantive' under the Migration Act.[127] The only exception appears to be diplomatic and other visa holders with immunity from Australian law.[128] In all other cases, the holder of the visa owes 'actual obedience' to the laws of Australia while in this country. Any children born here to such people are therefore 'natural born subjects' of Australia and outside the constitutional meaning of 'alien'.

Children of 'unlawful non-citizens'

Under the Migration Act, any non-citizen in Australia without a visa is an 'unlawful non-citizen'[129] who must be detained by immigration officials[130] and removed from the country 'as soon as reasonably practicable'.[131] But lacking a visa and being an 'unlawful' resident who must be detained and deported does not indicate that a person is outside Australia's jurisdiction. Indeed it indicates the opposite. Australian authorities would reject absolutely the notion that someone without a valid visa is not subject to the laws of this country. As the Immigration Advice and Rights Centre notes:

> Unlawful non-citizens are subject to Australian law while they are in Australia. If they break the law they can be charged and if found guilty, fined or sentenced to jail. [Moreover] Generally speaking, unlawful non-citizens are protected by the law in the same way as Australian citizens or permanent residents.[132]

Such people are within Australia's jurisdiction and owe 'temporary or local allegiance' to the sovereign authority of Australia, whether or not they acknowledge this. This applies not only to unlawful non-citizens in detention but to any person living illegally in Australia. Unlike enemy invaders who would govern themselves within territory taken

from Australia, unlawful non-citizens living in this country are liable to the control of Australian legal authorities, i.e. they are 'subject to the jurisdiction of' the Commonwealth.

Again, it follows that any children born in Australia to such people satisfy the common law requirements for 'natural-born subjects' and therefore cannot be 'aliens' under Australian constitutional law. This applies even to those parts of Australian territory excised from Australia's 'Migration Zone' in 2001, including Christmas and Cocos Islands and other small atolls and reefs off the coast of northern Australia.[133] Whether or not they have access to the Migration Act with its various appeal procedures, people who reach Australian territory come under the Commonwealth's jurisdiction. Any children born on such territory are therefore 'Australian-born subjects' in a constitutional sense.

All Too Much?

A conclusion that children born in Australia to refugees, temporary visa holders and unlawful non-citizens are 'non-aliens'—and so beyond the scope of the 'aliens' power in the Constitution—is consistent with and follows logically from:

- the deliberate inclusion by the framers of the Constitution of the lesser power over 'naturalization and aliens' instead of a broader authority over 'citizenship'—for the very reason, as South Australian delegate to the 1898 Convention Charles Kingston said, that 'it is impossible to contemplate the exclusion of natural-born subjects' from membership of the new Federation[134]

- the apparent acceptance by the current High Court that an essential attribute or 'connotation' of the constitutional term 'aliens' is the distinction with the common law concept of 'natural-born subjects'

- the notion that allowing 'natural-born' or 'Australian-born' subjects to be included within the meaning of 'aliens' would fracture the 'skeleton of principle' inherent in the common law meaning of that term as incorporated in the Australian Constitution

- the doctrine that 'the stream cannot rise above its source' which indicates that Parliament cannot use citizenship or any other legislation to control the interpretation of 'aliens', and

- the fact that, as explained consistently by English and Australian courts from the time of *Calvin's Case* (1608) through to *Taylor* (2001) and *Te and Dang* (2002), temporary visa holders and other non-permanent residents have 'local allegiance' to Australia as soon as they come within Australian jurisdiction, which is sufficient for any children born on Australian territory to be 'natural-born subjects' and therefore 'non-aliens' under the Constitution.

Nevertheless it may be difficult to accept that because of ancient common law notions children of temporary visa holders and illegal immigrants must be classed as 'non-aliens'

under modern Australian constitutional law. On this basis any non-citizen child born on Australian territory to a parent within reach of the laws of this country—however temporary that may prove to be—will be a 'non-alien'. Barring the unlikely event of a foreign military invasion, the only exceptions in practice will be the locally-born children of foreign diplomats resident in Australia.

According 'non-alien' status to more or less any child born in Australia plays to the type of fear expressed to a 1994 citizenship inquiry by the Victorian Immigration Advice and Rights Centre in opposing a return to pre-1986 laws:

> people would come through on a transit visa, pop into the airport, deliver a child and then move on. The child can acquire citizenship and it also gives the parents certain rights and entitlements.[135]

Alternatives

In dismissing the claim of the applicants in *Te and Dang* (2002) to be beyond the 'aliens' power, Chief Justice Gleeson identified alternative ways of determining 'non-alien' status.

Membership of the Australian Community

Chief Justice Gleeson noted the claim of the applicants in *Te and Dang* that they were 'members of the community constituting the body politic of Australia' and therefore not 'aliens' under the Constitution.[136] Using 'membership of the Australian community' as the yardstick for determining 'alien' or 'non-alien' status would allow differentiation between various classes of non-citizen children born in Australia. The various levels of 'Australian membership' are described by Rubenstein[137] and Dauvergne[138] and can be broken down into the following broad categories:

- those subject to Australia's jurisdiction and entitled to the protection of its laws. This includes nearly everyone who steps foot in Australia, with foreign diplomats being the only real exception[139]

- members of the social community: often but not always linked to permanent residency, involving assurance of basic living standards, including access to health care and education, and

- political members: entitled to vote and stand for election to Parliament and with full rights to enter and leave the country at will. This category is largely reserved for Australian citizens.[140]

Children born in Australia to 'unlawful' migrants and to most short-term visa holders would qualify only for the first category; the children of the East Timorese refugees resident in Australia for up to a decade might be members of the second; and only children who are born as Australian citizens (i.e. with at least one parent who is a citizen or permanent resident) would be members of the third category.

However an 'alien/member of the Australian community' distinction would contravene 'the stream cannot rise above its source' doctrine.

Membership of the Australian community at a practical level is determined by a variety of Commonwealth laws. The Migration Act with its control over entry into and residency status in Australia 'is the principal legal framework determining who will be admitted to the community and who will be excluded.'[141] A range of other legislation, including the Citizenship Act, the *Social Security Act 1991* and the *Commonwealth Electoral Act 1918*, decides who qualifies within that community as 'ordinary members, 'social members' and 'political members'.[142]

In other words, contrary to the 'stream and its source' doctrine, Parliament could control the scope of the constitutional term 'alien' through legislation determining the various categories of membership in the Australian community.

While 'membership of the community' is a useful template for describing the different levels of access that residents of Australia have to social and political benefits, it does not provide particular assistance in the constitutional interpretation of the term 'alien'. As Chief Justice Gleeson said in *Te and Dang*, 'I find it difficult to understand what this contention [that Mr Te was a member of the Australian body politic] adds.' If Mr Te was not already outside

> the constitutional category of a person whom parliament is entitled to treat as an alien, then it does not advance the matter to construct an antonym for 'alien' and assert that it covers the prosecutor.[143]

Absorption and Alien Status

Chief Justice Gleeson noted that in *Taylor* (2001) Justice Kirby (with some support from Justice Callinan):

> explicitly referred to the absorption into the Australian community of a class of persons (British subjects) as a reason for treating them as beyond the aliens power as well as beyond the immigration power.[144]

Justice Kirby argued that allowing absorption to transform 'aliens' into members of the Australian community was important to prevent deportation in 'extreme cases', such as 'the position of a person, long resident in Australia, purportedly excluded from citizenship as a result of discriminatory or restrictive laws enacted by the Parliament.'[145]

Use of the 'absorption' concept to determine 'alien' or 'non-alien' status would also permit differentiation between the various classes of non-citizen children born in Australia. Children of 'unlawful' non-citizens and most temporary visa holders would not qualify as 'non-aliens'. Almost by definition, the families of such children would not be regarded as 'absorbed' into the Australian community.

The circumstances of the East Timorese children, on the other hand, may amount to the type of 'extreme' case justifying use of Justice Kirby's 'absorption' doctrine. The children faced deportation only because the Commonwealth delayed processing their families' refugee claims through lengthy and unsuccessful litigation,[146] and because of previous changes to legislation denying them citizenship at birth and removing the option of an 'absorbed person's visa'.[147] Moreover, in the case of at least some of the children, a further short period in Australia would automatically mean citizenship and protection against deportation.[148]

But the majority in *Taylor* and *Te and Dang* rejected Justice Kirby's absorption doctrine, stating that alien status could only be lost through the formal process of becoming an Australian citizen and that absorption made no difference. 'Resident aliens may be absorbed into the community, but they are still aliens', said Chief Justice Gleeson.[149] Justice Gaudron explained that:

> an alien born person may acquire membership of the Australian body politic and, thereby, cease to be an alien only in the circumstances and in accordance with the procedures [i.e. naturalization] specified by the [Citizenship] Act.[150]

Difficulty with Alternatives

A fundamental obstacle to an alternative way of defining 'non-aliens', whether by 'membership of the community' or 'absorption'—or through an absolute 'citizen/alien' dichotomy—is the need to abandon the common law distinction between 'aliens' and 'natural-born subjects'. Under any of these alternative approaches, some 'Australian born subjects' will miss out on being 'non-aliens'. Only if ancient common law notions inherent in the drafting of section 51(19) of the Constitution are discarded could children born in this country as 'Australian-born subjects' be classed as 'aliens'.

It might be queried whether it is open to the High Court to do this. Indications from the Court itself that a 'fixed connotation' of the word 'alien' is the distinction with a 'natural-born subject', plus Justice Brennan's injunction in *Mabo v Queensland (No 2)* (1992) against fracturing the 'skeleton of principle' underlying Australian law, suggest that it is not.

Aliens and Citizens: Overseas examples

United States

As in Australia, United States constitutional law on the issue of citizenship and nationality incorporates the English common law on 'alienage'.

The constitutional right of people born within United States territory to citizenship is an issue at the heart of that country's history. The decision of the United States Supreme Court in *Dred Scott* (1857) that no person of African descent could be a citizen was an

important part of the background to the American Civil War. After the Civil War the United States Congress and the States adopted the Fourteenth Amendment to the United States Constitution guaranteeing that 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside'. The current US Immigration and Nationality Act reflects this constitutional provision, granting citizenship to all persons 'born in the United States, and subject to the jurisdiction thereof'.[151]

During the debates on the 1866 Civil Rights Act—which incorporated the provisions on citizenship in the Fourteenth Amendment—the Chair of the Congressional Judiciary Committee said the Act was 'merely declaratory of what the [common] law now is', observing that:

> Every person born within the United States, its Territories and districts, whether the parents are citizens or aliens, is a natural-born citizen in the sense of the Constitution, and entitled to the rights and privileges appertaining to that capacity.[152]

As the United States Department of Justice noted in evidence to a Congressional Committee in 1997, the US Supreme Court in *Wong Kim Ark* (1898) established that 'the language of the Constitution, as it relates to citizenship, must be interpreted in light of the common law.'[153] The Fourteenth Amendment had been worded specifically to ensure that US constitutional law on citizenship corresponded with common law notions of 'aliens' and 'natural-born subjects'. As the Supreme Court said:

> The real object … in qualifying the words 'all persons born in the United States', by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words, (besides children of members of the Indian tribes, standing in a peculiar relation to the National Government, unknown to the common law,) the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which … by the law of England, and by our own law … had been recognized exceptions to the fundamental rule of citizenship by birth within the country.[154]

Under the Fourteenth Amendment, only those who were 'aliens' under the common law were excluded from automatic citizenship at birth, 'with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes'.[155]

Even this exception followed the logic of the common law. In 1866, when the Fourteenth Amendment came into force, 'it was perceived that Indians owed their allegiance to their tribe, not the U.S., (therefore) they were … not under the obedience of the U.S.'[156] In accordance with the common law on 'alienage', children of people who were not under the 'actual obedience' of the United States could not be 'natural-born subjects' of that country.

Incorporation into the US Constitution of common law principles concerning 'aliens' and 'natural-born subjects' means those principles still restrict legislative attempts to alter rights to citizenship and membership of the US body politic. A 1997 proposal to limit

citizenship by birth to children of citizens or permanent residents—almost identical to Australia's 1986 amendment—lapsed because of its inconsistency with common law concepts enshrined in the US Constitution:

> This proposed legislation is unquestionably unconstitutional … The unmistakeable purpose of [the Fourteenth Amendment] was to constitutionalize the Anglo-American common law rule of jus soli or citizenship by place of birth … By excluding certain native-born persons from U.S. citizenship, the proposed legislation impermissibly rescinds citizenship rights that are guaranteed to those persons by the … Fourteenth Amendment. Such a rescission of constitutionally protected rights is beyond Congress's authority.[157]

Unlike the United States Constitution, the Australian Constitution contains no guarantee of citizenship for those born in this country. But as noted above a power to make laws about 'citizenship' was deliberately left out of the Australian Constitution because of a fear that 'natural-born subjects' might be denied their 'birthright' to full membership of the new nation. The Australian Parliament was only to be given authority to determine the rights of 'aliens coming from the outside world'. And by including a power over 'aliens' the drafters of the Australian Constitution—as in the United States—specifically incorporated and protected common law concepts inherent in this term.

United Kingdom

Under the *British Nationality Act 1981*, children born in the United Kingdom from 1983 onwards are British citizens only if one of their parents is a citizen or permanent resident. Other children born in Britain become British citizens if they have lived in the United Kingdom for the first ten years of their lives.[158] The 1986 amendments to Australia's Citizenship Act appear to have been based on the 1981 British legislation.

Unlike other common law countries, there is no Constitution in the United Kingdom limiting the meaning of key terms in legislation. Therefore the ability to deport people or to deprive them of nationality is not restricted to those who come within specific heads of power in a constitutional document.

In other words, whatever the common law may say about the status of people born in the United Kingdom, this is to no avail if legislation defines such people as non-citizens and permits them to be deported. So there would be little point in arguing that children born in Britain but deemed to be non-citizens under the British Nationality Act cannot be deported because they are 'natural-born subjects' under the common law.[159]

Canadian and New Zealand Citizenship Acts

Under current Canadian and New Zealand law, there is no issue regarding the legal status of children born locally to temporary visa holders or 'unlawful non-citizens'. In both countries such children are automatically citizens.[160] In Canada and New Zealand only children outside the common law definition of 'natural-born subjects' are excluded from

citizenship 'by virtue of birth'. For example, the New Zealand *Citizenship Act 1977* states that a person shall not be a citizen by birth if:

> His mother or father was a person upon whom any immunity from jurisdiction was conferred by … the Diplomatic Privileges and Immunities Act … or in any other way, and neither of his parents was a New Zealand citizen; or
>
> His father and mother were enemy aliens and the birth occurred in a place then under occupation by the enemy.[161]

Such exceptions seem archaic without an awareness of the basis at common law for distinguishing between 'natural-born subjects' and 'aliens'. The origin of citizenship legislation in the common law on 'alienage' explains why legislation in New Zealand (and in Australia) still denies citizenship to people born within the country to parents who are 'enemy aliens'.[162]

Until 1986 Australia's approach was similar to the current position in Canada and New Zealand. Someone born in Australia as a 'natural-born subject' had full rights to citizenship. The only people treated as 'non-citizens' were those regarded under the common law as 'aliens'.

Canadian 'Aliens' Cases

Under Canada's Constitution the national parliament of that country possesses the same power to make laws concerning 'naturalization and aliens'[163] as conferred on the Australian Parliament in section 51(19) of our Constitution.

Cases on the Canadian 'aliens' power are relevant to the current consideration of the constitutional status of Australian-born children in *Plaintiff S441/2003*.

In the early 1900s Canadian provinces passed laws restricting the legal rights of non-Europeans, arguing that such people did not come within the exclusive 'aliens' power of the Dominion Government in Ottawa. Cases challenging these laws demonstrate that persons born within Canada to foreign parents were regarded under Canadian constitutional law as 'natural-born subjects' of the Crown.

In *Cunningham* (1903), the Privy Council upheld a law of British Columbia stipulating that 'no Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election'. The Earl of Halsbury commented that:

> The first observation which arises is that the enactment, supposed to be *ultra vires* and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. *A child of Japanese parentage born in Vancouver City is a natural-born subject of the King,* and would be equally excluded from the franchise. (emphasis added)[164]

As 'natural-born subjects', the locally-born children of foreigners resident in Canada were outside the scope of a federal legislative power identical to that in the Australian Constitution. In *Quong-Wing* (1914) the Canadian Supreme Court noted in relation to a law passed by the Province of Saskatchewan that:

> if the enactment in question had been confined to Orientals who are native-born British subjects it would have been impossible to argue that there was any sort of invasion of the Dominion jurisdiction under [the 'aliens' power in the Canadian Constitution].[165]

Part Three—Practical Significance of 'Non-alien' Status

Legal Status

Are the Children Citizens?

If the High Court decides that Australian-born children are not 'aliens' the constitutional basis for the 1986 legislation depriving them of citizenship will be shaky at best. Since the 'immigration' power is unlikely to provide a source of authority, there would then be no specific head of power in the Constitution validating the 1986 amendment. The Commonwealth would instead have to rely on the 'implied nationhood' power to justify the current law. This could go either way. On one view it is not an inherent function of a national government to deny citizenship to those born within the national territory. On the other hand, it would be plausible for the High Court to decide that an ability to withhold citizenship from locally-born children of foreign nationals is 'necessary to give effect to the Commonwealth as a national government'[166] and that it is therefore within the Commonwealth's power to make laws for this purpose.[167]

'Non-alien non-citizens'?

If the High Court decides that the 1986 amendment validly removed citizenship from Australian-born children, it will still need to determine whether the children are entitled to constitutional protection as '*non-alien* non-citizens'.

In *Taylor* (2001) four judges on the High Court (Justices Gaudron, McHugh, Kirby and Callinan) found that a citizen of the United Kingdom who migrated to this country in the 1960s shared allegiance with Australians to a common monarch. Despite never having become a citizen, Mr Taylor was a subject of the Queen of Australia and could not be an 'alien' for the purpose of this country's deportation laws. Instead he belonged to a new class of Australian resident, the 'non-alien non-citizen' (or *'non-removable* non-citizen').[168]

Apart from British nationals who settled in Australia before a certain date, Justice Gaudron and her colleagues were unsure who else might be included in this new category.

If the High Court finds that the common law distinction with a 'natural-born subject' remains inherent in the meaning of the word 'alien' in the Constitution, it must follow that locally-born children of temporary visa holders and other non-permanent residents are part of the new category.

Can the Commonwealth Turn the Children Into 'Aliens'?

If the High Court decides that such children are 'Australian-born subjects' and not 'aliens', the Commonwealth might consider a legislative response.

However, as Justice Gaudron pointed out in *Nolan* (1988), there are strict limits on how the Commonwealth can transform a person's status from 'non-alien' to 'alien':

> Parliament [cannot] expand the ['aliens'] power by constituting a non-alien an alien if there has not been some relevant change in the relationship between that person and the community constituting the body politic of Australia, including, e.g., the abandonment of membership of the community, or the acquisition of membership of some other nation community.[169]

As her Honour emphasised in *Taylor*:

> Absent any such change, the law could not be classified as a law with respect to naturalisation or aliens, for that power is wholly concerned with the relationship of individuals to the Australian community.[170]

In other words, since Parliament has no power to subject a person who is a 'non-alien' to a law about ‘aliens’, there needs to be a change in the relationship of such a person with Australia before the 'aliens' power can be used to impose such a status on them.

Renouncing allegiance

One way that relationship could change is through a statement of allegiance to a foreign power. As Justice Gaudron said (in relation to whether 'non-alien' British subjects who settled in Australia before a certain date could be treated as 'aliens'):

> Parliament might, for example, legislate to define 'alien' to include persons who, although not aliens prior to 1987, have since taken action to acknowledge their allegiance to the United Kingdom or to assert their rights and privileges as one of its citizens.[171]

As Rubenstein says, this statement:

> suggests that a positive act expressing allegiance to another country may be a constitutionally acceptable basis upon which to deprive a person of his or her non-alien constitutional status.[172]

Most children born in Australia to foreign citizens will be entitled to the same nationality as their parents. For example, children born in Australia to East Timorese refugees are accorded East Timorese nationality under the law of that country.[173] But this does not appear sufficient in itself for the Australian Parliament to treat such children as 'aliens'. As Justice Gaudron said in *Taylor*, 'a person is not necessarily excluded from membership of the Australian community by reason of his or her being a citizen of a foreign power'.[174] Even if they have foreign nationality, locally-born children would still need to make a *statement of allegiance* to another country or a *declaration of alienage* from Australia before they could be treated as 'aliens' under Australian constitutional law.

The children as 'minors' lack the legal capacity to make any such statement or declaration. As Justice Kirby said in *Te and Dang*, children are 'unable … to formulate the will to renounce allegiance to one country and to declare it for another'.[175] In addition, as Justice Gummow pointed out in *Kenny* (1993), 'the "stern rule" of the common law was that a natural born subject could not divest himself of that status by his own unilateral act'.[176] Combining these two points, Justice Kirby noted that:

> Change of allegiance … could not, at least ordinarily, be left to the subjective inclination of the individual, still less of a minor in the care of his or her parent. A change of allegiance … normally involves reciprocal conduct by a formal and public act, signifying the solemn change … [177]

The Citizenship Act allows the Minister to accept a declaration renouncing Australian citizenship by persons over 18.[178] But the status of 'non-alien non-citizen' or 'natural-born subject' is not recognised in Australian legislation. So even if an affirmation or declaration renouncing Australian subject status by or on behalf of the children were legally effective, there is no provision for a reciprocal process acknowledging this under current Australian citizenship laws.

Changing the Constitution

Except in the very limited cases acknowledged by the common law, it seems that it is beyond the power of Parliament and the Commonwealth to treat locally-born children as 'aliens' without an alteration to the Constitution. The only way to bring such children within the Migration Act and other Commonwealth legislation appears to be to include a specific power in the Constitution giving the Federal Government authority to make laws in relation to 'citizenship'.[179] It would then be beyond question that laws depriving 'Australian-born subjects' of citizenship and providing for the deportation of any 'non-citizen' would be constitutionally valid.

Detention and Deportation

In *Lim* (1992) Justices Brennan, Deane and Dawson noted that the 'aliens' power in the Constitution not only authorised:

> laws providing for the expulsion or deportation of aliens by the Executive but extends to authorizing the Executive to restrain an alien in custody to the extent necessary to make the deportation effective.[180]

If Australian-born children of 'illegal' arrivals or temporary visa holders are neither 'aliens' nor 'immigrants' in the sense used in the Constitution, they cannot validly be subject to laws such as the Migration Act based on these heads of power. In other words, the forcible detention and removal provisions in the Migration Act[181] cannot be used against 'non-alien' 'non-immigrant' children even if the High Court decides that they are not Australian 'citizens'.[182]

Forcible detention of 'non-alien' children would also breach the 'separation of powers' doctrine in the Constitution. A power of imprisonment is conferred exclusively on Australian courts under Chapter III of the Constitution. Any detention not authorised by deportation provisions applying to 'aliens' and 'immigrants' can therefore only occur as a result of a court order. Detention by the Commonwealth of children who are citizens or 'non-alien non-immigrants' would contravene the separation of powers doctrine and be constitutionally invalid. As the High Court stated in *Lim*:

> the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.[183]

On the other hand, the 'voluntary' detention and deportation of 'non-alien' children seems constitutionally valid. The Migration Act allows the Minister or an immigration official to deport dependent children at the request of a deportee or their spouse.[184] Use of this power to detain and deport Australian-born children might be regarded as 'reasonably incidental' to the deportation of 'alien' parents, therefore coming within the constitutional authority of the Commonwealth.[185]

Assisting the Family

If the outcome of *Plaintiff S441/2003* is that Australian-born children are either 'citizens' or 'non-alien non-citizens', the most important question is whether this helps their family contest deportation from Australia.

United Nations Convention on the Rights of the Child

A link between the position of the children and grounds of appeal for the parents against deportation is provided by the *United Nations Convention on the Rights of the Child*. Article 3(1) of the Convention states:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Australian cases on the *Rights of the Child Convention*, however, have not produced clear legal authority. The Convention was ratified by the Australian Government in 1991 but has yet to be enacted as domestic law.[186] Nevertheless, in *Teoh* (1995), where a Malaysian citizen with three Australian-born children appealed against deportation, the High Court said that the mere ratification of the Convention:

> results in an expectation that those making administrative decisions in actions concerning children will take into account as a primary consideration the best interests of the children and that, if they intend not to do so, they will give the persons affected an opportunity to argue against such a course.[187]

More recently, however, the present High Court has strongly criticised the decision in *Teoh*, focussing on the lack of domestic legislation implementing the *Rights of the Child Convention*. *Lam* (2003) involved the expulsion of a Vietnamese national with two locally-born children. The High Court held that a failure by immigration officials to contact the carer of the children in order to assess their best interests in accordance with the Convention did not invalidate the deportation order.[188] Justices McHugh and Gummow criticised the *Teoh* Court for holding that 'un-enacted international obligations' could impose 'mandatory relevant considerations' on decision-makers, describing this as a 'curiosity' that could only be sustained by 'erratic' reasoning.[189]

After *Lam*, it would be dangerous for parents to rely on the *Rights of the Child Convention* to argue that the best interests of their children (Australian-born or otherwise) should be given priority in decisions on their own deportation.[190]

Australian-Born Subjects and Best Interests of the Child

However the status of locally-born children as citizens or 'Australian-born subjects' may require their 'best interests' to be taken into account, notwithstanding rejection by the High Court of the relevance of the *Rights of the Child Convention*.

As Justice Gaudron observed in *Teoh*:

> I consider that the Convention is only of subsidiary significance in this case. What is significant is the status of the children as Australian citizens. Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability … In my view, *it is arguable that citizenship carries with it a common law right on the part of children and their parents to have a child's best interests taken into account*, at least as a primary consideration, in all discretionary decisions by governments and government agencies which directly affect that child's individual welfare, particularly decisions which affect children as dramatically and as fundamentally as those involved in this case (emphasis added).[191]

Since citizenship is an 'entirely statutory' concept,[192] any common law right to have a child's best interests taken into account must arise, as Justice Gaudron indicates, from the nature of the citizen as a 'member of the body politic' of Australia. Current High Court authority accepts that in terms of the common law, 'natural-born subjects' are necessarily members of the Australian body politic.[193] It follows that if locally-born children of the East Timorese refugees and the children of other non-permanent residents are natural-born subjects, they share the common law (as against statutory) rights of citizens. This includes the right to have their best interests taken into account as a primary consideration in any administrative decision (i.e. by immigration officials, tribunal or the Minister) concerning the fate of the families to which they belong.

Minister's Directions and National Status of the Child

The Australian Government's official instructions on deportation of parents reflect Justice Gaudron's view that the best interests of Australian citizen children must be considered. Directives issued by the Minister for Immigration require immigration officials to balance the 'best interests of the child' against a range of other factors in deportation cases.[194] The directives are structured so the 'best interests of the child' are not automatically put ahead of other considerations when a parent faces expulsion from Australia.[195]

One factor immigration officials are directed to take into account is a child's national status. *General Direction No 9* (concerning 'criminal deportation') states that in considering the best interests of the child 'regard should be had to … whether the child is an *Australian citizen* or *permanent resident*.'[196] Similarly, the guidelines for use of the Minister's discretionary power to intervene in deportation cases state that the Minister must take into account circumstances indicating 'irreparable harm and continuing hardship to an *Australian family unit* (where at least one member of the family is an *Australian citizen* or *Australian permanent resident*).'[197]

A finding by the High Court that locally-born children are not citizens but are 'Australian-born subjects' should be reflected in Ministerial directives regarding deportation of parents. Alongside citizenship and permanent residency, immigration officials should be directed to 'have regard to' a child's natural-born subject status in deciding the fate of parents.

This should also be the case with the Minister's discretionary power to intervene in deportation cases. If families with children who are 'alien' permanent residents can be regarded as 'Australian family units', the same should apply to families with 'non-alien' children who are 'Australian-born subjects'.

Avoiding Privative Clauses

Failure by an immigration official or tribunal[198] to take into account the status of locally-born children as citizens or 'Australian-born subjects' may allow parents to seek judicial review both at common law and under statute.[199] While the Ministerial directives do not currently refer to 'Australian-born subjects', it would be difficult to argue that having a child with constitutional protection against deportation is irrelevant to the fate of a parent under the Migration Act.

A recent amendment to the Migration Act[200] provides that 'privative clause' decisions under the Act are 'final and conclusive' and cannot be challenged in any court. On this basis, if submissions from parents arguing against deportation are rejected by the Refugee Review Tribunal or the Migration Review Tribunal, the matter could not be taken any further.

However 'privative clauses' banning further appeals are ineffective where a tribunal or similar body has committed a 'jurisdictional error'[201] or has exceeded 'constitutional limits'.[202] So the Migration Act could not be used to prevent parents appealing to the Federal or High Courts if the constitutional status of a child had been ignored by a decision-maker.

No appeal appears possible, however, if the Minister fails to consider a child's constitutional status when refusing to allow families to remain in Australia. In *Ex Parte S134* (2003), the High Court said the Minister's refusal to use his discretionary power under section 417 of the Migration Act was not reviewable:

> s 417(7) states in terms that the Minister does not have a duty to consider whether to exercise the power conferred by s. 417(1). That gives rise to a fatal conundrum. In the express absence of a duty, mandamus would not issue without an order that the earlier decision of the Minister be set aside. Further, in that regard, there would be no utility in granting relief to set aside that earlier decision where mandamus could not then issue.[203]

In practice this means deportees can only appeal against the decision of the relevant tribunal, not that of the Minister. As the High Court said:

> Given that there is no duty on the Minister to consider an application that he substitute a more favourable decision under s. 417(1) of the Act … the prosecutors' only right is to have their visa applications determined by the Tribunal in accordance with law, which right is secured by the relief with respect to the Tribunal's decision.[204]

Conclusion

The case of *Plaintiff S441/2003* is about Australian identity—about which children born in this country should formally be regarded as 'Australian'. It seems strange that more than one hundred years after Federation the legal position of Australian-born children will only now be fully addressed. But until 1986 this was not an issue, since citizenship or formal membership of the Australian community was bestowed on everyone who was an 'Australian-born subject' under the common law. Only those classed as 'aliens' under ancient common law rules were deprived of citizenship at birth.

The issue remained hidden after the 1986 amendment to the Citizenship Act because it was assumed—including by members of the High Court—that 'non-citizens' were necessarily 'aliens'. This was not the case. But it was not until the recent decisions in *Taylor* (2001) and *Te and Dang* (2002) that a majority of the High Court tackled the false 'citizen/alien' dichotomy head on. However these cases did not deal directly with the constitutional position of people born in Australia.

While the future of the East Timorese children facing deportation in 2002 has largely been resolved, the current prominence of migration and refugee issues made it inevitable that other deportation matters involving families with 'Australian-born subject' children would arise. *Plaintiff S441/2003* requires the High Court to decide exactly who is an 'alien' under

Australian constitutional law. There is no direct precedent for the High Court to determine the constitutional status of Australian-born children. But it seems doubtful that the Court could abandon the common law distinction between an 'alien' and a 'natural-born' subject. To do so would fracture 'the skeleton of principle' behind use of the term 'alien' in the Constitution, divesting the word of an inherent common law connotation.

If locally-born children such as the applicant in *Plaintiff S441/2003* are 'non-aliens', there will be some important consequences. Most significantly the purpose of the 1986 amendment to the Citizenship Act will largely be negated. It may be that the amendment itself is held to be invalid, returning citizenship to children born in Australia since that date to temporary visa holders and other non-permanent residents. But even if the High Court decides that removal of citizenship from 'non-alien' children was constitutionally valid, they will remain 'non-aliens'. Having authority to deny citizenship to such children does not mean the Commonwealth can deem them to be 'aliens'. The 'stream and its source' doctrine prevents the Commonwealth being the arbiter of who is or is not an 'alien' for the purpose of the Constitution. Children who are 'Australian-born subjects' will be part of the newly identified class of 'non-alien non-citizens'. The Commonwealth will be unable to alter this status without amending the Constitution itself.

Recognition by the High Court of an 'Australian-born subject' status equivalent in constitutional, if not statutory, terms to citizenship would mean that locally-born children have to be treated differently. Australian subject status would protect children from forcible detention and deportation under the Migration Act. It would also assist their families' attempts to stay in Australia. In considering parents' appeals against deportation, immigration officials would need to take account of any children with such status. Courts would inevitably regard the Australian 'nationality' of children as relevant to decisions about the fate of parents.

Having a third national status to consider alongside citizenship and permanent residency, however, might be regarded as unwieldy. Parliament could therefore consider returning to the pre-1986 position where all children born in Australia—with the practical exception of foreign diplomats and consular officials—automatically become citizens. The failure to discuss constitutional issues in 1986 might provide Parliament with a reason to reconsider this issue.

A decision on whether Parliament should re-consider the legal status of children born in Australia would be assisted by information about the number of people directly affected. According to the barrister representing *Plaintiff S441/2003*:

> There are thousands of children born to parents who are in detention or applying for refugee status, who have grown up here as Australians, but face being sent away.[205]

In contrast, after the 1986 amendment had been passed by Parliament, the Human Rights Commission, despite having recommended such a change, queried whether it was really necessary to take citizenship away from Australian-born children:

> it is of the view that the risk can be over-stated. It considers the suggestion that 'the floodgates' might be opened is without foundation. Over the past five years, the Commission has received only twenty-seven complaints (and two inquiries) relating to Australian-born children whose parents are under threat of deportation or have been deported … Allowing all of these persons to stay … would hardly constitute a trickle, let alone a flood.[206]

Accurate information on the 'migration consequences' of a child's citizen status would also assist any re-consideration. As Justice Brennan in *Kioa* and John Dowd from the International Commission of Jurists both pointed out at the time of the 1986 amendment, having a child born in Australia was merely an argument that parents threatened with expulsion could put to immigration officials. A citizen child never entitled the parents to permanent residency or enabled them (without more) to avoid deportation.[207] In addition, to the extent that there was a real problem under the pre-1986 law with—as Senator Chipp put it—'contemptible queue jumping' by illegal immigrants who 'mercilessly' gave birth in Australia so their infant children, as Australian citizens, could sponsor them for permanent residency, this appears to have been addressed by requiring sponsors to be a certain age[208] and by new legislation tightening sponsorship requirements.[209]

Endnotes

1. *Sunday Telegraph* (Sydney), 31 August 2003, p. 11.
2. Citizenship Act section 10.
3. 'The hidden dilemma of Australia's non-persons', *The Australian*, 26 January 1985, p. 1; 'Illegal visitors find gap in law', *Sydney Morning Herald*, 7 May 1985, p. 3; 'Backdoor appeal shut to illegal immigrants', *Sydney Morning Herald*, 18 October 1985, p. 2.
4. Australia, Senate 1986, *Debates*, vol. S 115, p. 3562 (Senator Don Chipp).
5. *Kioa* (1985) 159 CLR 550 at 604 (per Brennan J).
6. Kim Rubenstein, *Australian Citizenship Law in Context*, pp. 11 and 93.
7. Human Rights Commission, Report No 10, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs R.C. Au Yeung*, January 1985; Report No 13, *Human Rights and the Migration Act 1958*, April 1985; Report No 15, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs M. Yilmaz*, August 1985; see also Report No 18, *The Human Rights of Australian-born Children whose Parents are Deported*, August 1986.
8. Transcript of interview with John Dowd, 'Amendments to Citizenship Legislation should be opposed because they affect the citizenship of children born in Australia of illegal immigrants', *P.M.*, ABC Radio, 18 March 1996.

9 Australia, House of Representatives 1986, *Debates*, vol. HR 146, p. 868 (Minister for Immigration and Ethnic Affairs, The Hon C.J. Hurford MP).

10 Section 51(27).

11 Section 51(19).

12. Kim Rubenstein, op. cit., n. 6, pp. 71–2 and n. 35, citing *Victoria v The Commonwealth* (1975) 134 CLR 338 and *Davis v The Commonwealth* (1988) 166 CLR 79.

13. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 2 March 1898, vol. II, pp. 1753, 1754.

14. (1982) 151 CLR 101 at 109–110.

15. See *Te and Dang* (2002) 193 ALR 37 at 40 (Gleeson CJ); at 60 (Gummow J); and at 81 (Hayne J).

16. *Te and Dang* (2002) 193 ALR 37 at 54.

17. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25.

18. Leslie Zines, *The High Court and the Constitution*, 4th edition, p. 219, citing *Heiner v Scott* (1914) 19 CLR 381 at 393 per Griffith CJ.

19. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54.

20. See Mary Crock, review of Rubenstein, *Australian Citizenship Law in Context* in *The Sydney Law Review*, vol. 25(1), March 2003, p. 126.

21. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 2 March 1898, vol. II, p. 1760. Emphasis added.

22. (1982) 151 CLR 101 at 107–108.

23. *Te and Dang* (2002) 193 ALR 37 at 74.

24. Cited by the High Court in *Nolan* (1988) 165 CLR 178 at 189 (Gaudron J); *Taylor* (2001) 207 CLR 391 at 429 (McHugh J) and 482 footnote 320 (Kirby J); and *Te and Dang* (2002) 193 ALR 37 at 49 (Gaudron J) and 62–63 (Gummow J).

25. 7 Co. Rep 18a, 18b; 77 ER 399. Lord Coke's exposition of the common law on 'aliens' and 'natural-born subjects' was referred to by Quick and Garran in their *Annotated Constitution of the Australian Commonwealth* (1901) (at p. 599) when explaining the 'aliens' power in section 51(19) of the new Australian Constitution.

26. *Diplomatic Privileges and Immunities Act 1967*, section 7.

27. Or, to use Professor Zines language, such a distinction is part of the 'essence' of the term 'alien' as used in the Australian Constitution: see Leslie Zines, *The High Court and the Constitution*, 4th edition, p. 17.

28. 175 CLR 1 at 29–30.

29. *United States v Wong Kim Ark* 169 US 649 at 682, cited in Dawn E Johnsen, Acting Assistant Attorney General Office of Legal Counsel, United States Department of Justice, *Testimony Before the SubCommittee on Immigration and Claims of the United States House of Representatives Committee on the Judiciary, on Proposed Legislation to Deny Citizenship at Birth to Certain Children Born in the United States*, 25 June 1997.

30. *United States v Wong Kim Ark* 169 US 649 at 682, cited in Johnsen, *Testimony Before the SubCommittee on Immigration and Claims*, op. cit., n. 29.

31. Johnsen, *Testimony Before the SubCommittee on Immigration and Claims*, op. cit., n. 29.

32. *British Nationality Act* 1981, section 1.

33. *Constitution Act 1867 (British North America Act)* section 91 (25).

34. Migration Act sections 189 and 198.

35. (1995) 183 CLR 273 at 304.

36. See e.g. Justice McHugh in *Taylor* (2001) 207 CLR 391 at 435; Justice Callinan in *Te and Dang* (2002) 193 ALR 37 at 88.

37. General Direction Under Section 499 *Criminal deportation under section 200 of the Migration Act* 1958, issued 21/12/98; Direction No. 21 (23/08/01)—*Visa Refusal and Cancellation under Section 501*, issued 23/8/01, replacing Direction No 17 (issued 1999). MSI no. 254 *The Character Requirement: Visa Refusal And Cancellation Under Section* 501, issued: 20/9/99. *Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, Issued 4 May 1999. Under section 499 of the Migration Act, a person or body having functions or powers under the Act must comply with written directions from the Minister about how those functions and powers are to be carried out.

38. Minister for Immigration and Multicultural and Indigenous Affairs, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, clauses 4.1, 4.2.3, 4.2.4 and 4.2.8. Emphasis added.

39. Section 474, which came into effect in October 2001.

40. *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24.

41. *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598 at 614–5 (per Dixon CJ).

42. Human Rights Commission, Report No 18, *The Human Rights of Australian-born Children whose Parents are Deported*, August 1986, p. 3.

43. In the case of a parent who obtained Australian citizenship by descent (i.e. because one or both of his or her parents was a citizen), the parent must have been present legally in Australia for at least 2 years at any time before the registration of the child. (Citizenship Act section 10B).

44. Section 13 of the Citizenship Act sets out the criteria to be eligible for a grant of citizenship. The standard requirement is that the person must be a permanent resident, over the age of 18 and have resided in Australia for a period of 2 years in the 5 years preceding the application, including a period of one year in the 12 months before applying for citizenship.

45. *Plaintiff s441/2003 and Minister for Immigration and Multicultural and Indigenous Affairs*, Transcript, 4 August 2003; see also Transcript, 1 September 2003.

46. Between 1992 and 1994 around 1650 East Timorese fleeing persecution under Indonesian rule arrived in Australia. They applied for political asylum and were granted temporary bridging visas pending determination of their claims. A long delay followed while the Commonwealth Government sought to persuade the Federal Court and the Administrative Appeals Tribunal that Portugal—the former colonial ruler of East Timor—should be the country of asylum rather than Australia.

    It was not until 2002, after rejection of the Government's legal arguments, that Australian immigration officials considered the first of the asylum applications. By then East Timor had become the world's 191st independent nation. (The former Indonesian province gained independence in May 2003, after its people voted for independence in a United Nations sponsored ballot in 1999).

    Since asylum claims are assessed against current political conditions in the country of origin, the East Timorese no longer met the necessary criteria. Despite having been settled in Australia for many years, the refugees now faced deportation to East Timor. Most had no future to return to, and the East Timorese Government indicated that it could do without the additional burden. As President Xanana Gusmao said, the new nation was 'the poorest in Asia and among the 10 poorest in the world'. (*Herald Sun*, 5 April 2003, p. 18.)

    After months of extensive lobbying, including directly from President Gusmao (*Herald Sun*, 5 April 2003, p. 18), Australia's Minister for Immigration indicated in June 2003 that he would use his discretion under the *Migration Act 1958* to allow nearly all of the East Timorese to remain in Australia. (See Megan Shaw, '10-year fight ends in joy for asylum seekers', *The Age*, 4 June 2003, p. 1.)

    The Shadow Minister for Population and Immigration, Julia Gillard MP, said however that 'While the granting of these visas is a relief for 397 East Timorese people, the fate of more than 1,000 other East Timorese applicants remains unknown. These people continue to live in fear and uncertainty, not knowing if they will be required to leave Australia'. (See 'Minister Ruddock bends under pressure but needs to bend further', Media Release, 10 June 2003).

    For further background see Kerry Carrington, Stephen Sherlock and Nathan Hancock, 'The East Timorese Asylum Seekers: Legal Issues and Policy Implications Ten Years On', *Current Issues Brief*, no. 17, Department of the Parliamentary Library, 18 March 2003, (at http://www.aph.gov.au/library/pubs/CIB/2002–03/03cib17.htm).

47. Source: Department of Immigration and Multicultural and Ethnic Affairs ('DIMIA').

48. *Herald Sun*, 5 April 2003, p. 18.

49. Australia, House of Representatives 1986, *Debates*, vol. HR 146, p. 868.

50. Citizenship Act section 10.

51. Migration Act Section 4(4).

52. *Sydney Morning Herald*, 7 May 1985, p. 3; *The Australian*, *26* January 1985, p. 1.

53. 'The hidden dilemma of Australia's non-persons', *The Australian*, 26 January 1985, p. 1; 'Illegal visitors find gap in law', *Sydney Morning Herald*, 7 May 1985, p. 3; 'Backdoor

appeal shut to illegal immigrants', *Sydney Morning Herald*, 18 October 1985, p. 2. It might be noted that current figures are remarkably similar. The Department of Immigration & Multicultural and Indigenous Affairs estimated 'visa overstayers' at 60,000 as at 30 June 2002 (*Fact Sheet No. 86: Overstayers and People in Breach of Visa Conditions* at http://www.immi.gov.au/facts/86overstayers.htm). As the fact sheet notes, this figure 'does not include unauthorised arrivals by air or boat'. The Migration Act requires such people to be detained until granted a visa or deported. As at 9 January 2003 there were 1,176 people in immigration detention (Fact Sheet No. 82: Immigration Detention at http://www.immi.gov.au/facts/82detention.htm#3).

54. 'Illegal Visitors Find Gap in Law', *The Sydney Morning Herald*, 7 May 1985, p. 3.

55. 'Two year old triggers review of deportation laws, *Sydney Morning Herald*, 17 November 1984. See also *Kioa v West* (1985) 159 CLR 550, e.g. at 629 (per Brennan J.)

56. *Kioa* (1985) 159 CLR 550 at 629–30 (per Brennan J).

57. *Kioa* (1985) 159 CLR 550 at 634 (per Deane J).

58. *Kioa* (1985) 159 CLR 550 at 604 (per Brennan J).

59. Kim Rubenstein, op. cit., n. 6, pp. 11 and 93.

60. Human Rights Commission, Report No 10, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs R.C. Au Yeung*, January 1985; Report No 13, *Human Rights and the Migration Act 1958*, April 1985; Report No 15, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs M. Yilmaz*, August 1985; see also Report No 18, *The Human Rights of Australian-born Children whose Parents are Deported*, August 1986.

61. Human Rights Commission, Report No 10, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs R.C. Au Yeung*, January 1985, p.4.

62. Human Rights Commission, Report No 10, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs R.C. Au Yeung*, January 1985, p. 4.

63. Human Rights Commission, Report No 13, *Human Rights and the Migration Act 1958*, April 1985, p. 18.

64. Human Rights Commission, Report No 15, *The Human Rights of Australian-born Children: A Report on the Complaint of Mr and Mrs M. Yilmaz*, August 1985, p. 5.

65. Australia, House of Representatives 1986, *Debates*, vol. HR 146, p. 868 (Minister for Immigration and Ethnic Affairs, The Hon C.J. Hurford MP.

66. ibid.

67. Australia, House of Representatives 1986, *Debates*, vol. HR 147, p. 1267.

68. What Senator Chipp may have meant to say was that 'those children become automatic citizens of this country and the parents can therefore become permanent residents'.

69. Australia, Senate 1986, *Debates*, vol. S 115, p. 3562.

70. Transcript of interview with John Dowd, 'Amendments to Citizenship Legislation should be opposed because they affect the citizenship of children born in Australia of illegal immigrants', *P.M.*, ABC Radio, 18 March 1996.

71. ibid.

72. Australia, Senate 1986, *Debates*, vol. S 115, p. 3562.

73. Section 4(4).

74. Constitution section 51(27). There is also an argument that deportation provisions in the Migration Act can be validly characterised as laws with respect to 'external affairs' (section 51(29)): see Gummow and Hayne JJ in *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 at 474–5. In the same case, however, Kirby J forcefully rejected any such argument as 'unpersuasive' and 'untenable' (at 496–7). And McHugh J said the external affairs power 'could not … support legislation that would result in the deportation of a person who was not an alien' (at 425).

75. The only exception is if deportation of a 'non-alien' or 'non-immigrant' is 'sufficiently connected' to use of the Migration Act against a person who is within its scope. Every power in section 51 of the Constitution contains an implied 'incidental' power (*D'Emden v Pedder* 1904 1 CLR 91). Section 51(39) of the Constitution also confers an express power to legislate in relation to any matter incidental to execution of any power vested by the Constitution in the Parliament. This means that use of the Migration Act in relation to 'non-aliens' or 'non-immigrants' can be valid if it is a reasonable means for achieving an objective within the 'aliens' or 'immigration' powers.

76. Angus and Robertson 1901.

77. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 2 March 1898, vol. II, p. 1752.

78. ibid., p. 1768.

79. ibid. He added passionately that:

    'It is not a lawyers' question; it is a question of whether any one of British blood who is entitled to become a citizen of the Commonwealth is to run the risk—it may be a small risk—of having that taken away or diminished by the Federal Parliament! When we declare—'Trust the Parliament,' I am willing to do it in everything which concerns the working out of this Constitution, but I am not prepared to trust the Federal Parliament or anybody to take away that which is a leading inducement for joining the Union.'

80. ibid., pp. 1753, 1754.

81. ibid., p. 1765.

82. Instead the Constitution uses the terms 'subjects of the Queen' (sections 34, 117), 'people of the Commonwealth' (e.g. section 24) and 'people of a State' (e.g. section 7). In their *Annotated Constitution of the Australian Commonwealth* (1901), Quick and Garran explained that 'In view of the historical associations and the peculiar significance of the terms "citizens" and "subjects", one being used to express the membership of a republican community, and the other that of a community acknowledging an allegiance to a personal

sovereign, it was obvious that there might have been an impropriety in discarding the time-honoured word "subject" and in adopting a nomenclature unobjectionable in itself but associated with a different system of political government.' (at p. 957).

83. *Cole v Whitfield* (1988) 165 CLR 360 at 385.

84. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 2 March 1898, vol. II, p. 1763.

85. *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 178 at 192.

86. Citizenship Act section 21.

87. According to then Justice Mason in *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 at 397:

    … in my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51 (xxxix) [the incidental power] and 61 [the executive power] a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.

88. Michael Pryles, *Australian Citizenship Law*, p. 12.

89. Kim Rubenstein, op. cit., n. 6., pp. 71–2 and n. 35, citing *Victoria v The Commonwealth* (1975) 134 CLR 338 and *Davis v The Commonwealth* (1988) 166 CLR 79.

90. Section 51(27).

91. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129.

92. *Butterworths Australian Legal Dictionary*.

93. Section 10.

94. Section 51(19).

95. See Peter Prince, 'The High Court and Deportation Under The Australian Constitution', *Current Issues Brief*, no. 26, Department of the Parliamentary Library, 15 April 2003 (at http://www.aph.gov.au/library/pubs/CIB/2002–03/03cib26.htm).

96. When the Citizenship Act commenced in 1948, an 'alien' was defined as 'a person who [was] not a British subject, an Irish citizen or a protected person'. The *Australian Citizenship Amendment Act* 1984 removed this definition, with effect from 1987. This was part of a series of measures to remove formal discrimination in favour of people with a British background (see Rubenstein, op. cit., n. 6, p. 86). The *Aliens Act* 1947 was itself repealed in 1984. The Aliens Act required the registration of all 'aliens' in Australia. Since the Act was linked to the definition of 'aliens' in the Citizenship Act, non-citizen British subjects were exempt from this requirement. The Explanatory Memorandum for the Aliens Act Repeal Bill 1984 said that the Bill would 'remove discrimination between aliens and other non-Australian citizens thereby placing all non-Australian citizens on an equal footing'.

97. (1982) 151 CLR 101 at 107–108.

98. (2002) 193 ALR 37 at 64 citing Joyce [1946] AC 347 at 366.

99. *Te and Dang* (2002) 193 ALR 37 at 88.

100. *Taylor* (2001) 207 CLR 391 at 435.

101. In *Taylor*, a majority of the court accepted that such people 'shared allegiance' with Australians to a 'common sovereign' and so were outside the scope of the 'aliens' power.

102. *Te and Dang* (2002) 193 ALR 37 at 74.

103. *Te and Dang* (2002) 193 ALR 37 at 54.

104. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 25.

105. (1988) 165 CLR 178, at 186 (per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

106. (1982) 151 CLR 101 at 109–110.

107. (1988) 165 CLR 178 at 183 (per Mason CJ, Wilson, Brennan, Deane, Dawson and Toohey JJ).

108. See *Te and Dang* (2002) 193 ALR 37 at 40 (Gleeson CJ); at 60 (Gummow J); and at 81 (Hayne J).

109. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54.

110. Leslie Zines, op. cit., n. 27, p. 219, citing *Heiner v Scott* (1914) 19 CLR 381 at 393 per Griffith CJ.

111. Tony Blackshield and George Williams, *Australian Constitutional Law and Theory*, 3rd edition, p. 758, citing Justice Fullager's reference in the *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 to the maxim that 'a stream cannot rise above its source'.

112. 175 CLR 1 at 29–30.

113. (1989) 168 CLR 461 at 537.

114. Or, to use Professor Zines language, such a distinction is part of the 'essence' of the term 'alien' as used in the Australian Constitution: see Zines, op. cit., n. 27, p. 17.

115. *Taylor* (2001) 207 CLR 391 at 440.

116. Volume 9, p. 75.

117. Michael Pryles, op. cit., n. 88, p. 14.

118. Cited by the High Court in *Nolan* (1988) 165 CLR 178 at 189 (Gaudron J); *Taylor* (2001) 207 CLR 391 at 429 (McHugh J) and 482 footnote 320 (Kirby J); and *Te and Dang* (2002) 193 ALR 37 at 49 (Gaudron J) and 62–63 (Gummow J).

119. 7 Co. Rep 18a, 18b; 77 ER 399. Lord Coke's exposition of the common law on 'aliens' and 'natural-born subjects' was referred to by Quick and Garran in their *Annotated Constitution*

of the Australian Commonwealth (1901) (at p. 599) when explaining the 'aliens' power in section 51(19) of the new Australian Constitution.

120. *Te and Dang* (2002) 193 ALR 37 at 87.

121. *Te and Dang* (2002) 193 ALR 37 at 78.

122. *Te and Dang* (2002) 193 ALR 37 at 43.

123. *Te and Dang* (2002) 193 ALR 37 at 43, citing [1921] 2 AC 262 at 276.

124. *Te and Dang* (2002) 193 ALR 37 at 87 (per Callinan J)..

125. (2002) 193 ALR 37 at 63, citing *United States v Wong Kim Ark* 169 US 649 at 693 (per Justice Gray).

126. *Te and Dang* (2002) 193 ALR 37 at 87 (per Callinan J).

127. Under section 5 of the Migration Act, a 'substantive' visa is any visa except a bridging visa, a criminal justice visa or an enforcement visa. A 'substantive' visa is generally required before applying for change of status to permanent residency or citizenship.

128. *Diplomatic Privileges and Immunities Act* 1967, section 7.

129. Migration Act Sections 13 and 14.

130. Migration Act section 189.

131. Migration Act section 198.

132. Jennifer Burn and Anne Reich, The Immigration Advice and Rights Centre, *The Immigration Kit: A Practical Guide to Australia's Immigration Law*, 6th edition, p. 564.

133. See the definition of *'excised offshore place'* in section 5(1) of the Migration Act inserted by the *Migration Amendment (Excision from Migration Zone) Act 2001*.

134. *Official Record of the Debates of the Australasian Federal Convention*, Third Session, Melbourne, 2 March 1898, vol. II, p. 1760.

135. Joint Standing Committee on Migration, *Australians All—Enhancing Australian Citizenship*, September 1994, p. 101.

136. *Te and Dang* (2002) 193 ALR 37 at 45.

137 See Kim Rubenstein, op. cit., n.6, Chapter 5; Kim Rubenstein, 'Citizenship in a Borderless World', in Antony Anghie and Gary Sturgess, *Essays from Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry*, Kluwer Law International 1998, p. 183; Kim Rubenstein, 'Citizenship, Sovereignty and Migration: Australia's Exclusive Approach to Membership of the Community' in *Public Law Review* vol. 13(2), June 2002 p. 102.

138. Catherine Dauvergne, 'Challenges to Sovereignty: Migration laws for the 21st Century'; Paper presented to 13th Commonwealth Law Conference Melbourne, April 2003; Catherine Dauvergne, 'Citizenship, Migration Laws And Women: Gendering Permanent Residency Statistics', *Melbourne University Law Review*, vol. 24(2) 2000, p. 280.

139. While diplomats and consular officials are not subject to Australia's jurisdiction, they are, of course, protected by Australian law. Conversely, it might be argued that asylum seekers and others who get no further than territory excised from Australia's 'migration zone' come within Australian jurisdiction but are not fully entitled to the protection of Australian law, since they do not have access to the appeals processes under the Migration Act.

140. Although long-standing British migrants who have not been naturalized are partial members of this category because they have the right to vote (but cannot be elected to Parliament). *Commonwealth Electoral Act 1918*, Part VII.

141. Catherine Dauvergne, 'Citizenship, Migration Laws And Women: Gendering Permanent Residency Statistics', *Melbourne University Law Review*, vol. 24(2) 2000, p. 290.

142. See Kim Rubenstein, op. cit., n. 6, Chapter 5.

143. *Te and Dang* (2002) 193 ALR 37 at 45.

144. *Te and Dang* (2002) 193 ALR 37 at 45.

145. *Te and Dang* (2002) 193 ALR 37 at 80.

146. See Kerry Carrington, Stephen Sherlock and Nathan Hancock, op. cit., n. 46, p. 4.

147. Interview with Minister for Immigration & Multicultural & Indigenous Affairs, Hon. Philip Ruddock MP, *The Law Report*, ABC Radio National, 18 March 2003.

148. Some of the locally-born East Timorese children are now 8 or 9 years old. (Source: DIMIA.) As noted in the text, they automatically become citizens when they turn ten, provided they have been 'ordinarily resident' in Australia since their birth in this country (Citizenship Act, section 10).

149. Gleeson CJ (2002) 193 ALR 37 at 45; see also Gaudron J at 48–9, McHugh J at 56; Gummow J at 65.

150. *Te and Dang* (2002) 193 ALR 37 at 51.

151. Section 301(a) Immigration and Nationality Act, see Johnsen, op. cit., n. 29.

152. ibid.

153. ibid.

154. *United States v Wong Kim Ark* 169 US 649 at 682, cited in Johnsen, *Testimony Before the SubCommittee on Immigration and Claims*, op. cit., n. 29.

155. *United States v Wong Kim Ark* 169 US 649 at 693.

156. Testimony for Rep. Brian Bilbray Before the House Judiciary Subcommittee on Immigration and Claims, 25 June 1997.

157. Johnsen, *Testimony Before the SubCommittee on Immigration and Claims*, op. cit., n. 29.

158. *British Nationality Act 1981*, section 1.

159. A search of British legal data bases revealed no cases since the commencement of the British Nationality Act involving the definition of 'alien' under the common law.

160. *Citizenship Act 1985* (Canada) section 3; *Citizenship Act 1977* (New Zealand) section 6.

161. Section 6(2).

162. See Australian Citizenship Act section 10(3). For an explanation of 'enemy alien' versus 'alien-friend', see Michael Pryles, op. cit., n. 88, p. 65.

163. *Constitution Act 1867 (British North America Act)* section 91 (25).

164. *Cunningham and Attorney-General for British Columbia v Tomey Homma* [1903] A.C. 151. Provinces such as British Columbia successfully used their power over electoral laws to restrict participation of non-Europeans in commercial enterprises. As Head notes, 'Not surprisingly, inclusion on the voter's list became a prerequisite for all sorts of economic activity: for admission to a professional society; for obtaining hand logger's licences; for obtaining a beer licence.' Ivan Head, 'The Stranger in Our Midst: A Sketch of the Legal Status of the Alien in Canada', in *The Canadian Yearbook of International Law*, vol. II, 1964, p. 107 at 128.

165. *Quong-Wing v The King* (1914) 49 SCR 440, 18 DLR 121, 6 WWR 270. The law in question stated that 'No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a bona fide customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.'

166. Bede Harris, *Essential Constitutional Law*, pp. 74–75, citing *Victoria v Commonwealth and Hayden (AAP Case)* (1975) 134 CLR 338 per Mason J

167. It is clearly within the implied nationhood power for the Commonwealth to make laws determining who should be recognised as formal members of the Australian community. But it is unclear whether this extends to denying statutory recognition through the Citizenship Act to 'natural-born subjects' who have Australian 'nationality'. A 'proportionality' test appears appropriate in this case, as, for example, in *Davis v Commonwealth* (1988) 166 CLR 79, where legislation prohibiting the use of the expression '200 years' in connection with the 1988 bicentenary celebrations was held to be a 'grossly disproportionate' use of the Commonwealth's executive power. Cited in Zines, op. cit., n. 27, pp. 47–48.

168. See Mary Crock, review of Rubenstein, *Australian Citizenship Law in Context* in *The Sydney Law Review*, vol. 25(1), March 2003, p. 126.

169. *Nolan* (1988) 165 CLR 178 at 192.

170. *Taylor* (2001) 207 CLR 391 at 411.

171. *Taylor* (2001) 207 CLR 391 at 412.

172. Kim Rubenstein, op. cit., n. 6, p. 69.

173. Constitution of the Democratic Republic of East Timor 20 May 2002, Section 3(3); see also East Timor Nationality Act (No 9/2002 of 5 November 2002) Article 8(2).

174. *Taylor* (2001) 207 CLR 391 at 407.

175. *Te and Dang* (2002) 193 ALR 37 at 77 (per Kirby J).

176. *Kenny v Minister for Immigration and Ethnic Affairs* (1993) 42 FCR 330 at 339.

177. *Te and Dang* (2002) 193 ALR 37 at 77.

178. Section 18.

179. Such a provision could only be included by referendum in accordance with section 128 of the Constitution.

180. At 30–31 (per Brennan, Deane and Dawson JJ).

181. Migration Act sections 189 and 198.

182. It might be argued that if the implied nationhood power authorises withholding of citizenship from 'Australian-born subject' children (although see note 167 above), it could also authorise their forcible detention and deportation. However, while the High Court might conceivably find that the capacity to decide whether any resident is a citizen is 'necessary to give effect to the Commonwealth as a national government', it would seem to take the nationhood power to another level altogether to suggest that it authorises the forcible deportation of any person, whatever their constitutional status. Determining membership of the Australian community is an objective that is plainly within an implied nationhood power. But deportation of 'Australian-born subjects'—i.e. people who in constitutional terms are formal members of the community—simply because they are not statutory citizens does not appear to be an 'appropriate or proportionate' means of achieving that objective (see the discussion of proportionality in Zines, op. cit., n. 27, pp. 47–48).

183. *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at 28–29 (per Brennan, Deane and Dawson JJ).

184. Migration Act sections 199 and 205.

185. A valid exercise of legislative power (e.g. in respect of 'aliens') 'extends to matters which are necessary for the reasonable fulfilment of that power' (Dixon CJ in *Burton v Honan* (1952) 86 CLR 169 at 177).

186. Although elements of the Convention have been reflected in Commonwealth and State/Territory legislation. See 'Australia's Combined Second and Third Reports under the Convention on the Rights of the Child', March 2003, (http://www.ag.gov.au/www/agdHome.nsf/Alldocs/RWPB07DC89BDAD0B2BECA256DA400227F90?OpenDocument).

187. (1995) 183 CLR 273 at 302 (per Justice Callinan).

188. *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 195 ALR 502 at 5389 (Callinan J).

189. (2003) 195 ALR 502 at 527.

190. While *Lam* seems to have resolved the issue, some of the additional steps in Australian judicial consideration of the *Rights of the Child Convention* are worth setting out for the sake of completeness. In *Teoh*, Chief Justice Mason and Justice Deane noted that a 'legitimate expectation' that decision makers would treat the best interests of the children as a 'primary consideration' would not exist where the Commonwealth had made 'statutory or executive indications to the contrary'. (1995) 183 CLR 273 at 291.

Both the Keating Government (in May 1995) and the Howard Government (in February 1997) issued statements providing an 'executive indication' that international conventions and treaties should not give rise to such expectations. See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory*, 3rd edition, pp. 766–767.

In *Tien* (1998) the Federal Court held that these attempts by the Commonwealth to override the *Rights of the Child Convention* were ineffective. According to Justice Goldberg:

> Notwithstanding the publication of [the 1997] statement, I do not consider that the statement has the effect apparently intended. I consider that the reference to 'statutory or executive indications to the contrary' referred to by Mason CJ and Deane J in Teoh is a reference to indications made at or about the time the relevant treaty is ratified. *Tien and Others v Minister for Immigration and Multicultural Affairs* (1998) 159 ALR 405 at 427.

Justice Goldberg referred to *Ram* (1996) where the Federal Court said (in relation to the 1995 statement) that:

> I doubt their Honours contemplated a case where at the time of ratification, Australia had expressed to the world and to its people its intention to be bound by a treaty protecting the rights of children, but subsequently, one or more ministers made statements suggesting that they at least had decided otherwise. *Department of Immigration and Ethnic Affairs v Ram* (1996) 69 FCR 431 at 437–8, cited in *Tien* (1998) 159 ALR 405 at 428

In *Tien* Justice Goldberg set aside the deportation of a parent with an Australian-born child because the immigration official who cancelled Mr Tien's visa 'did not grapple with the obligation under the Convention to make the best interests of [the child] a primary consideration.' (at 429).

His Honour emphasised that Australia's ratification of the Convention created procedural not substantive rights. This meant that if the immigration official 'decided not to make the best interests of the child a primary consideration she was bound to draw this decision to the attention of Mr Tien and give him an opportunity to respond to it.' (at 428–9).

However, according to the Federal Court in *Baldini* (2000), Ministerial directives issued under the Migration Act (see text and note 1940 provide the 'statutory or executive indication' needed to oust any 'legitimate expectation' based on *Teoh* that complying with the Convention should be the primary issue in deportation matters. In *Baldini*, Justice Drummond stated that:

> The Direction read with s. 499 of the [Migration] Act is, in my opinion, a successful attempt by the Legislature and the Executive to overcome the difficulties referred to in cases such as *Tien*…that the Government of the day encountered in seeking to displace the *Teoh* principle by Executive action such as the issue of the Ministerial statements of 10 May 1995 and 25 February 1997... In my opinion...the Direction contain(s) such an elaborate regime with which the Tribunal must, by force of s. 499 of the Act, comply in a case in which it is required to consider the interests of a potential deportee's child that there is no room for finding in Australia's ratification of the Convention a basis for any legitimate expectation on the part of a potential deportee that the interests of his child

will be, in terms of the Convention, 'a primary consideration'. *Baldini v Minister for Immigration & Multicultural Affairs* [2000] 115 A Crim R 307 at [30].

191. (1995) 183 CLR 273 at 304.

192. *Lim* (1992) 176 CLR 1 at 54 (per Gaudron J).

193. See e.g. Justice McHugh in *Taylor* (2001) 207 CLR 391 at 435; Justice Callinan in *Te and Dang* (2002) 193 ALR 37 at 88.

194. *General Direction Under Section 499 Criminal deportation under section 200 of the Migration Act 1958*, issued 21/12/98; *Direction No. 21 (23/08/01)—Visa Refusal and Cancellation under Section 501*, issued 23/8/01, replacing *Direction No 17* (issued 1999). MSI no. 254 *The Character Requirement: Visa Refusal And Cancellation Under Section 501*, issued: 20/9/99. *Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, Issued 4 May 1999. Under section 499 of the Migration Act, a person or body having functions or powers under the Act must comply with written directions from the Minister about how those functions and powers are to be carried out.

195. These directives date from shortly after the Federal Court's decision in Tien (1998). See note 190.

196. General Direction No 9 paragraph 19. Emphasis added. Direction No 21 ('deportation on character grounds') also instructs immigration officials to consider 'whether the child is an Australian citizen or permanent resident' (at paragraph 2.16).

197. Minister for Immigration and Multicultural and Indigenous Affairs, *Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under s345/351/391/417/454 of the Migration Act 1958*, clauses 4.1, 4.2.3, 4.2.4 and 4.2.8. Emphasis added.

198 The particular tribunal would depend on the nature of the application and the grounds of appeal against deportation in individual cases. The East Timorese families refused refugee status by the Immigration Department appealed to the Refugee Review Tribunal. However in some cases reviews can be sought from the Administrative Appeals Tribunal or the Migration Review Tribunal. Once the relevant tribunal has made a decision, the applicants may be able to appeal to the Federal or in some cases the High Court. Alternatively, they can request the Minister to use the discretionary power under various sections of the Migration Act (sections 351, 391, 417 and 454) to 'substitute a more favourable decision' for the tribunal's decision.

199. For judicial review based on failure by a decision maker to take into account a relevant matter see *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24; and *Administrative Decisions (Judicial Review) Act 1977* section 5(2)(b).

200. Section 474, which came into effect in October 2001.

201. *Plaintiff S157/2002 v Commonwealth* (2003) 195 ALR 24.

202. *R v Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598 at 614–5 (per Dixon CJ).

203. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 193 ALR 1 at 12 (per Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

204. *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134/2002* (2003) 193 ALR 1 at 22–3 (per Gaudron and Kirby JJ).

205. *Sunday Telegraph* 31 August 2003, p. 11.

206. Human Rights Commission, Report No 18, *The Human Rights of Australian-born Children whose Parents are Deported*, August 1986, p. 3.

207 This remains the situation today, as shown by the recent case of a Russian mother facing deportation despite the fact that expulsion would separate her from her young Australian citizen son. See *Nevsky and Scott* [2002] FamCA 860; see also *Daily Telegraph*, 11 August 2003, p. 7.

208. See Migration Series Instruction (MSI) 353 Form 4— Sponsors And Sponsorship, paras 3.2.1–3.2.2. In limited circumstances, a child under 18 can have another person act as a sponsor on their behalf. But this other person must themselves be over 18 and an Australian citizen, permanent resident or eligible New Zealand citizen. Alternatively, a 'community organization' may sponsor a parent on behalf of a child (para 5.1.4).

209. See *Migration Legislation Amendment (Sponsorship Measures) Act 2003*, assented to on 14 October 2003, which amends the Migration Act to provide a framework for the Migration Regulations to prescribe requirements relating to sponsorship.