

## 5. WHAT IS A “REAL” AUSTRALIAN CITIZEN?

INSIGHTS FROM PAPUA NEW GUINEA

AND MR. AMOS AME

KIM RUBENSTEIN WITH JACQUELINE FIELD

This chapter highlights the way citizenship can be thrown into question by territorial transformations and the vestiges of colonialism. Drawing upon the case of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439 (“Ame’s Case”) to respond to the question “What does it mean to be an authentic Australian citizen?” we examine how the High Court of Australia (“High Court”) was called upon to recognize citizenship as a result of changes in Australia’s territorial relationship with Papua New Guinea.

One of the authors of this chapter was pro bono counsel to Mr. Ame, an individual born an Australian citizen but stripped of that citizenship in 1975. Kim Rubenstein argued on his behalf that the deprivation of citizenship was unconstitutional. However, the High Court upheld the removal of Mr. Ame’s citizenship, finding that his Australian citizenship as it existed before 1975 was not “real.”

In Ame’s Case, the High Court determined that Papuan Australians who formally held the legal status of citizen under the Australian Citizenship Act of 1948 (Commonwealth of Australia [“Cth”], henceforth “Citizenship Act”), from the Citizenship Act’s inception until 1975, could have that status stripped from them by regulations. The court’s decision was based on the proposition that Mr. Ame’s Australian citizenship was a “technical” status, “largely nominal,” and “not in fact or law full or real citizenship.” The court also called Mr. Ame’s prior

status a “vener of Australian citizenship,” a “flawed citizenship” of a “fragile and strictly limited character,” and more like “shadows . . . appearances and mere titles” than an “enforceable reality.”<sup>1</sup>

As revealed throughout this collection, evidentiary challenges may bring into question not only an individual’s right to her citizenship but the very concept of citizenship itself. The borders of all countries create templates for citizenship, but the connection between these and citizenship at the level of the individual often seems abstract and vague. The details of how colonial borders become operationalized as the criteria for “real” or “authentic” Australian citizenship manifest in judicial decisions. Courts’ reliance on the government’s sovereign definitions of territories within territories can serve to materialize national fantasies, as opposed to passively reflecting empirical facts. The High Court in *Ame’s Case* devalued the citizenship of Papuans based on characterizations informed by colonial standards. The court found that Papuan Australian citizens “had no right (still less a duty) to vote in Australian elections and referenda”; “could perform no jury or other civic service in Australia”; and lacked the right to enter or reside in the mainland of Australia. Thus, the court concluded, Papuan Australian citizens were “treated as . . . foreigner[s].”<sup>2</sup> This effective disjuncture between rights and status, resulting primarily from tensions among concepts of race, Australian identity, and membership at the turn of the century, enabled the court to affirm that as a matter of law someone could hold the legal status of citizen absent an underlying right to that status.

Such a reading is a symptom of how contemporary prejudices freeze some old legal biases in place but not others. Imagine telling Australian women that since at one point they had been denied all the rights denied Papuan Australian men, their past diminished citizenship rights implied they too could have their rights violated by new laws. Mr. Ame’s plight reveals how past fantasies of empire and colonization effect a precarious if not effaced citizenship for Papuan Australians today. By doing so, the High Court judgment illuminates our understanding of the nature of authentic Australian citizenship. This is a story that resonates with other colonial experiences and will be developed further in this chapter. The susceptibility of Australian citizenship to legislative interventions, at least for some populations, suggests the potential for further unfair treatment, say of recent immigrants, dual citizens, or naturalized Australians. The time is ripe for clarification of the concept of Australian citizenship in the founding document of nationhood, to define Australian citizenship in a way that is not infused by its racial foundations and better protect those who possess it.<sup>3</sup>

### *Ame's Case*

Amos Bode Ame was born in Papua on May 20, 1967, a time when Australia administered Papua as a possession of the Crown. For the purposes of the Citizenship Act, Papua was part of Australia, and those born in Papua after the Citizenship Act came into force on January 26, 1949, automatically acquired the status of Australian citizen at birth. In 1975, Papua New Guinea gained independence.<sup>4</sup> Mr. Ame was then eight years old. At that time, the governor-general of Australia had promulgated regulations, pursuant to Section 6 of the Papua New Guinea Independence Act 1975 (Cth), which provided that persons who became citizens of the Independent State of Papua New Guinea on independence ceased to be Australian citizens.

Mr. Ame had not entered mainland Australia before 1975, nor did he apply to become an Australian citizen by naturalization or by registration. He entered mainland Australia in 1999 and remained several years beyond the term of his visa. In 2005 the Australian government sought to remove Mr. Ame from Australia pursuant to its powers under the Migration Act 1958 (Cth) ("Migration Act").

Mr. Ame challenged his detention and removal from Australia as an unlawful noncitizen. He argued to the High Court that the relevant provisions of the Migration Act did not apply to him. The cessation of Australia's sovereignty over Papua did not erase his own Australian citizenship, he claimed. Thus he was not an alien and not subject to Australia's immigration laws. The minister for immigration and multicultural and indigenous affairs argued that the intention of the drafters of the Papua New Guinea Constitution was that people with Papuan heritage and who were born there would become citizens exclusively of the new nation. Thus, the minister argued, Mr. Ame's Australian citizenship at birth did not give him a right to enter and reside in Australia. The Papua New Guinea Constitution, and the Australian regulations operationalizing it, meant that the Commonwealth could treat him as an "alien" and thus deport him under Australia's immigration laws.<sup>5</sup>

### *The Papua New Guinea Story*

#### COLONIAL HISTORY

Crucial to the High Court's affirmation of the minister's position in Ame's Case is Australian citizenship's historical context. Papua New Guinea's relationship with Australia is part of a colonial story that began well before Australia was a commonwealth. It is part of a broader colonial story within the British Empire, where citizenship was fluid, had several meanings, and conferred more rights

on some subjects than on others.<sup>6</sup> The schematic story of colonization told here illustrates how the arbitrary writing of country borders creates contrivances of modern citizenship that appear based on birth and family, and how these conventions come into question when liminal cases call attention to these boundaries.

In the 1860s, the Australian colony of Queensland, motivated largely by the desire to secure Melanesian labor for Queensland's sugar plantations, became interested in the southern coast of the island of New Guinea (Waiko 1993). At the same time, the German government sought sovereignty over the country's northeastern section. By 1884 the northeast had been declared a German protectorate, and the southeast section a British protectorate, originally named British New Guinea and, later, Papua. As John Waiko writes, "The fact that the people of present day Papua New Guinea became part of the British and German colonial empires . . . was an accident of European history over which they had no control" (1993, 26). Of course all boundaries are, for better or worse, accidents to those born inside them (infants do not choose their location of birth or their parents). This particular accident led to a legal framework of administratively and politically separate territories in the first period and, later, territories that were administered together, but which maintained their politically separate legal identities.

After the establishment of the Australian Federation in 1901, British New Guinea was "placed under the authority of the Commonwealth of Australia by Letters Patent dated March 16, 1902, and was accepted by the Commonwealth as the Territory of Papua by s 5 of the *Papua Act 1905* (Cth)" (Ame's Case, 446–47).<sup>7</sup> Papuans, under the legislative authority of Australia, automatically became British subjects and pledged allegiance to the Crown. Edward Wolfers writes that the story of the colony's administration from the time it became a formal territory of the Commonwealth of Australia until World War II was the "already familiar one of a continued Australian lack of interest and neglect. Policy was made . . . and supervised by a single man (Sir Hubert Murray) and throughout the period 'the Murray system' became known as Australian policy" (1975, 28). Wolfers characterizes the policies as those of "unilateral intervention in village affairs, the protection of the Papuans and the preservation of European interests, standards and society" (29). In sum, Papuans were British subjects and objects of European paternalism.

From 1942, owing to World War II, civil administration was suspended in Papua. For three years, until October 1945, the Australian army through the Australian New Guinea Administrative Unit was the effective government in Papua and that part of New Guinea not under Japanese control. Indeed, "by the end of 1944 when perhaps 55,000 Papuan New Guineans were serving the

Allied cause” (Wolfers 1975, 111), the burden of war was more heavily shouldered by the indigenous people of the territories than by other Australian citizens.

#### FROM SUBJECTHOOD TO CITIZENSHIP

When the Citizenship Act came into force in 1949, Papuan British subjects became Australian citizens. So too did indigenous Australians become Australian citizens at that date, as did all British subjects who satisfied certain legislative requirements.<sup>8</sup>

People who resided in the territory of New Guinea, however, did not. Instead, they became “protected persons” (see Rubenstein 2002, 82). A 1920 mandate of the League of Nations placed the former German possession of New Guinea under Australian administration as a separate territory of New Guinea, a mandate codified in Australia under the New Guinea Act 1920 (Cth). When Australian citizenship was created in 1949, only those in Papua were identified as Australian citizens.<sup>9</sup>

Crucial for this chapter is that between 1949 and Papua New Guinea’s independence in 1975, those born in Papua were Australian citizens by birth. However, that status had little value to Papuans—as will be discussed later in this chapter. Indeed, the most striking aspect of this story, which resonates with indigenous Australians’ experience (see Chesterman and Galligan 1997) and that of certain classes of British subjects throughout the empire (see Gorman 2006), is the disjuncture between citizenship “status” and the substantive “rights” that status instantiated.

#### PAPUAN AUSTRALIAN CITIZENSHIP AND “REAL” CITIZENSHIP

The disjuncture between status and rights for Papuan-born Australian citizens influenced the Papua New Guinea Constitution’s definitions of citizenship. Citizenship matters had become a matter of attention in the late 1950s, when Asians residing in the territory (only a small number had entered Papua) were allowed to apply for naturalization as Australian citizens (Wolfers 1975, 133). In 1962, people with mixed racial origins were allowed to apply for citizenship, although the government seemed reluctant to accede to their request.

By 1975, just before Papuan independence, Wolfers writes,

Papuans are Australian citizens although they cannot exercise their “right” to live in Australia (unless they are married to a white or mixed race Australian). Chinese and mixed race people who have been granted Australian citizenship can. . . . And to press home the point as to the difference between the white Australians and the non white almost-

Australian, till 1968 Papuans and New Guineans had to apply to a District Officer for a “Permit for a Native to Leave or to be Removed from a Territory” before they went abroad. In 1967 the Migration Ordinance was amended by the House of Assembly so that a female Papua New Guinean with an expatriate spouse could be spared the embarrassment of having to apply for permission to be “removed” by her husband and with the coming into force of the new ordinance in 1968, all indigenes had only to apply to any authorized officer for a “Permit to leave the Territory.” (1975, 134)

These exclusions and diminished rights affected the Papua New Guinea Constitution’s definition of citizenship. Mindful of being assigned a second-class form of citizenship in Australia, the Papua New Guinea Constitutional Committee wanted to be sure that Papua New Guinea citizenship was not a mere formality for those who had the “real” or full citizenship of some other country prior to independence. To that end, Section 64 of the Papua New Guinea Constitution was drafted to state: “No person who has a real foreign citizenship may be or become a citizen.”

“Real foreign citizenship” was defined as follows in Section 64(4):

For the purposes of this section, a person who:

- (a) was immediately before Independence Day, an Australian citizen or an Australian Protected Person by virtue of:
  - (i) birth in the former Territory of Papua, or
  - (ii) birth in the former Territory of New Guinea and registration under section 11 of the Australian Citizenship Act 1948–1975 of Australia; and
- (b) was never granted a right (whether revocable or not) to permanent residence in Australia, has no real foreign citizenship.

The *Final Report of the Constitutional Planning Committee* (Constitutional Planning Committee 1974) inserted the terminology of “real” foreign citizenship to exclude Australians from citizenship of Papua New Guinea. This terminology, created and inserted by Papua New Guinea itself, became the basis for the High Court to affirm that the Australian citizenship held by Papuans prior to 1975 was not “real” and to infer from this that Ame was not an Australian citizen (Ame’s Case, 449).

Although the High Court inferred from these past lower rights the complete absence of citizenship status for those born prior to Papua’s independence, the colonial legacy could be interpreted quite differently. According to

Graham Hassall, “Because status in the colonial era was defined by race and ethnicity, the articulation of laws of citizenship for the Independent State of Papua New Guinea was inevitably viewed by many as an opportunity to redress past imbalances” (2001, 255). Instead of reinforcing discriminatory policies, the Australian High Court might have followed the impulse to continue compensation for this. Concerned that those who already had wealth and power might overwhelm the emerging citizenry of Papua New Guinea, the drafters were attempting to protect the interests of indigenous Papua New Guineans while at the same time recognizing the historical relationship with its neighbors. The reference to “real” citizenship in the Papua New Guinea Constitution was a way of emphasizing that their status of citizenship *should* be of significance (Goldring 1978, 204), not to preclude from residence in Australia those who had been born citizens in the colonized territory.

*From Citizenship to Alienage*

Mr. Ame argued his citizenship was a right protected under the Australian Constitution, and thus that Australian regulations in 1975 could not strip him of this status. If citizenship were to have any legal significance or meaning (as it was a legal, statutory term), it could be argued he had a “right,” indeed a valid constitutional claim, to live in Australia back in the 1970s even if that had not been asserted at the time. While the Migration Act may have been formally in force, it was not constitutionally valid. Mr. Ame argued that because he was a citizen of Australia at birth, he had a right to live anywhere in the country and could not be removed pursuant to the Migration Act for overstaying his visa.<sup>10</sup>

Ame argued that he was a “real Australian” at birth and did not lose this status or become a citizen of Papua in 1975. The High Court disagreed, pointing out that, while Mr. Ame had been born in “Australia” for the purposes of the Citizenship Act, the definition in the Migration Act did not include external territories such as Papua: “Whilst Papuans in the Territory of Papua before Independence Day enjoyed, by Australian law, a form of Australian citizenship it was not, in fact or law, full or real citizenship” (Ame’s Case, 471). The form of citizenship held by Papuans did not confer a right to permanent residence in the states and internal territories of Australia. Justice Kirby referred to the intention of the lawmakers enacting the 1948 act:

The Minister responsible for the Citizenship Act was specifically asked in the Parliament whether a “native of Papua” was, under the legislation

entitled to come to Australia and enjoy the right to vote in Australia. He replied, accurately:

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

The Minister’s statement to the Federal Parliament, and the repeated references to ethnicity and race in the parliamentary debates, reflected a concern, very much alive at the time of the enactment of the Citizenship Act, to preserve to the Commonwealth the power to exclude from entry into the Australian mainland foreign nationals and even British subjects who were “ethnologically of Asiatic origin” or other “pigmentation or ethnic origin.” (Ame’s Case, 468, citations omitted)

The court concluded that the removal of Mr. Ame’s citizenship in 1975 was authorized by Section 51(xix) of the Australian Constitution because people like Mr. Ame who were legally “Australians” but who were about to become foreign nationals could be treated as “aliens,” including taking away their Australian citizenship.

The Australian Constitution references distinctions of status between “aliens” and “non-aliens” in Australia and authorizes the Parliament to make laws on “naturalisation and aliens.” It was on this basis that the Parliament first legislated the naturalization of British subjects in Australia and, since 1948, has passed legislation on Australian citizenship as well as immigration and deportation laws.<sup>11</sup>

In Ame’s Case, the High Court held that there is no limitation inherent in the “naturalisation and aliens” power that prevents using it to remove someone’s citizenship (Ame’s Case, 458): “The legal status of alienage has as its defining characteristic the owing of allegiance to a foreign sovereign power” (458). According to the court, “The view that concepts of alienage and citizenship describe a bilateral relationship which is a status, alteration of which requires an act on the part of the person whose status is in issue” (459), had in previous judgments been rejected.<sup>12</sup>

Thus, people born in the Australian territory of Papua between 1948 and 1975 were Australian citizens afforded limited rights. After September 16, 1975, these former citizens became “aliens” by operation of Australian legislation and the Papua New Guinea Constitution, and Mr. Ame could be deported.

*Finding the Heart of “Authentic” Australian Citizenship*

Ame’s Case makes it clear that possession of the legal status of “Australian citizen,” and even the holding of an Australian passport as evidence of this status, does not necessarily entitle the holder to “real” or constitutionally protected citizenship of Australia.<sup>13</sup> Moreover, the case emphasizes the contingency of borders and the recognition of certain populations or territories as themselves creations of a state’s identity. While in most of the cases in this book the documentary challenges are what counts as the integrity of an individual’s identity, here in Ame’s Case and as can also be seen in Sara Friedman’s chapter in this collection, what ultimately determines citizenship is a country’s sovereign determination of this status, often based on borders or other postcolonial jurisprudence.

Similar issues arise, for instance, in American Samoa, which has been a part of the United States for more than a century. Nonetheless, current federal law classifies persons born in American Samoa as “noncitizen nationals”—the only Americans so classified—thus denying American Samoans constitutional citizenship otherwise guaranteed by the citizenship clause of the Fourteenth Amendment of the U.S. Constitution.<sup>14</sup> How a country defines itself influences a court’s legal conception of membership.

For Mr. Ame, and those like him born in Australian territory, the legal status they received at birth, as Australian citizens, was significant and meant something to them. The fact that they were ultimately not identified as Australian by constitutional authorities meant their status had no legal impact on their rights of membership and they were powerless. As discussed earlier, before 1975 Papuan Australian citizens, although Australian citizens, had to apply for a permit to enter or remain in mainland Australia. Holding the legal status of “Australian citizen” did not represent “authentic” citizenship for Papuans. The legal status was a device for international relations—Papuans could use an Australian passport to travel *outside* of Papua but not as a claim or right to travel to Australia, their country of citizenship.

Australia never created a uniform Australian citizen.<sup>15</sup> Citizens held different rights depending on the legal route through which that citizenship was obtained. The Papuan Australian citizens felt the legacy of that profoundly—so much so that, in creating a new Papua New Guinea state, there was an overt desire to distinguish itself from Australia to ensure a full and equal Papua New Guinean status of citizen. After the experience of the shallow, formal status of the statutory version of their Australian citizenship, the framers saw a need to bestow upon the Papua New Guinea citizenship a status of constitutional

value. There was a commitment to give citizenship “real” meaning. Connected with this, in Papua New Guinea, was a belief that citizenship had to be singular. If a person was a Papua New Guinean citizen then he or she could not also be an Australian citizen—dual citizenship was constitutionally prohibited. Thus, those holding “real citizenship” of a foreign country were excluded from citizenship of Papua New Guinea at independence.

The creation of the legal term of art “real citizenship” in the Papua New Guinea Constitution became one of the key reasons for the High Court to deny Mr. Ame and those like him constitutional protections of their rights to and from citizenship. Under the Papua New Guinea Constitution, “real citizenship” of Australia was evidenced by a right to permanent residence in Australia. The High Court found that Mr. Ame “had no real foreign citizenship . . . unless he was a person who had been granted a right to permanent residence in Australia. No such right was ever granted to [Mr. Ame]” (Ame’s Case, 451). The court went on to conclude that Mr. Ame became a citizen of Papua New Guinea upon independence and that an Australian regulation to deprive individuals who became citizens of Papua New Guinea of their Australian citizenship validly applied to him.

Nonetheless, Justice Kirby stated Ame’s case set no precedent for the deprivation of citizenship from “other Australians”:

The change in the applicant’s status as a citizen, as an incident to the achievement of the independence and national sovereignty of a former Territory of the Commonwealth, affords no precedent for any deprivation of constitutional nationality of other Australian citizens whose claim on such nationality is stronger in law and fact than that of the applicant. . . . having regard to the particular historical circumstances of this case and the fragile and strictly limited character of the “citizenship” of Australia which the applicant previously enjoyed, no requirement was implicit in the Australian Constitution that afforded the applicant rights of due process that might arise in another case in other circumstances of local nationality having firmer foundations. (Ame’s Case, 483)

The fact that the Australian Parliament denied Papuans the political rights normally linked to citizenship—such as voting, jury service, and freedom of movement in and out of the mainland—meant that the High Court could determine they did not hold a “real citizenship.”

For Mr. Ame and those like him, any sense of connection to Australia from birth in Australian territory and an identity from growing up in Australian territory were constitutionally irrelevant. As discussed in the introduction

to this book, citizenship is a matter of matching one's own records with the records the government deems necessary, even when the conditions and list of documents change post hoc. Those Papuans born in Australian territory, with Australian birth certificates, had a feeling of citizenship that was not fully recognized by the state. This was so even though the state had put out legal markers such as legal status and other attributes of citizenship, including the provision of a passport to those traveling internationally, to assist in creating that feeling and sense of connection. Ultimately, the state's sovereign power to determine nationality enabled Mr. Ame's legal status to be tied to racist laws that would not be tolerated in any other context in contemporary Australia. The result reveals a country's commitment to an oddly crafted, backward-looking view of citizenship status.

*"The Global Color Line" and "Authentic" Citizenship*

As Marilyn Lake and Henry Reynolds have written in their groundbreaking book, "The imagined community of white men was transnational in its reach, but nationalist in its outcome" (2008, 4). Australia's experience mirrored the experience throughout the empire: "In dividing the world into white and not-white it helped render the imperial non-racial status of British subjects increasingly irrelevant and provided a direct challenge to the imperial assertion that the Empire recognized no distinction on the basis of color or race, that all subjects were alike subjects of the Crown" (5). This racialized distinction played out well into the 1970s, persisting through the status shift from British subject to Australian citizen. By creating a subcategory of Australians, who did not have a right to enter and reside in the mainland country of their citizenship, to vote, or to carry out jury service, the Australian government was able to create a class of Papuan Australian citizens whose diminished citizenship could be removed by the executive making a regulation.

This domestic or national example mirrored the practice throughout empires and also the practice in the United States. Indeed, Justice Kirby, in his separate judgment in Ame's Case, supporting the decision, drew comfort from the international practice around these issues, identifying the "countless instances in legislation designed to terminate colonial and like status, including in territories formerly part of the dominions of the Crown, involved laws of the United Kingdom Parliament relevantly similar to those made in Australia in the present instance" (Ame's Case, 486). Together with this statement he lists twenty-eight acts that followed a similar practice.<sup>16</sup>

The terms by which Mr. Ame and others acquired and also lost citizenship provide evidence of citizenship's malleability: citizens may be distinguished and citizenship denied on the basis of rights conferred by a changing Parliament, by changing boundaries, and subject to shifting policy contexts and political motivations.<sup>17</sup> Moreover, this chapter affirms the point made throughout the collection. Classifications of individuals and groups follow from close readings of laws and legal status, not experiences or civil rights, much less a feeling of political membership. Like Sara Friedman's chapter, together with chapters by Kamal Sadiq, Rachel Rosenbloom, and Beatrice McKenzie, Ame's Case strengthens the argument that these moments of friction and failure offer valuable insights into how both citizenship and sovereignty are produced and struggled over in diverse arenas around the globe. From the inception of the Australian Citizenship Act of 1948 (Cth), to the regulations allowing Mr. Ame to be stripped of his citizenship up to the current formulation (from 2007), citizenship's status and rights in Australia remain precarious and thus raise questions about whether citizenship is the bedrock of other rights or a quicksand on whose uncertain ground we notice other contingencies of rights as well.<sup>18</sup>

### *Conclusion*

Before Papua New Guinea became independent in 1975, race was essential to Australia's creation of and understanding of "authentic" citizenship. Papuan Australian citizens had no claims to citizenship "rights" such as voting or residence within Australia. Such overt discrimination influenced the drafters of the Papua New Guinea Constitution to commit to a more sincere citizenship and to imbue the legal status in Papua New Guinea with authenticity.

This discrimination, and the drafting of the Papua New Guinea Constitution, contributed to the High Court's decision in Ame's Case that Papuan Australian citizens' citizenship was not "real" and could be unilaterally removed from them. The decision highlights the contested nature of Australian citizenship as a legal status; citizens could be denied rights, and their citizenship, at the discretion of the state. Thus, similar to other findings in this collection, documents may be used to question citizenship, even those that had at one point conferred it. Australian citizenship is not, we know after Ame's Case, evidenced by the possession of a passport or a legal status. The invocation of lesser substantive rights from the colonial era is not a logical truism about the nature of Australian citizenship's dependence on political rights from a previous era as much as it is an elevation of sovereign determinism over the values of the rule of law for Australian citizens.

The High Court did not consider factors such as the civic value of a persistent citizenship status, or the individual and his or her identity and community, nor did it question the need for postcolonial reckoning with past discrimination. Ultimately, in Australia and elsewhere, the sovereign determines its citizens by scripts of the state's own design. The nature and security of Australian citizenship is left floating, adrift on the waves of political persuasion and, in cases like Mr. Ame's, the tides of prejudice.

#### NOTES

Kim Rubenstein presented the original version of this chapter at the Boston College Center for Human Rights and International Justice workshop that was held April 19–21, 2011. Jacqueline Field worked with Rubenstein to develop the chapter for this book.

1. See Ame's Case 449 (per Gleeson CJ, McHugh, Gummow, Hayne, Callinan, Heydon JJ); 470, 471, 474, 483 (per Kirby J).
2. See Ame's Case 449, 470, 481.
3. Since the writing of this chapter, the Citizenship Act has been amended to provide for three new avenues for stripping dual citizens of their Australian citizenship, in light of the government's stated commitment to respond to threats of terrorism by Australian citizens. See Sections 35, 35AA, and 35A, introduced by the Australian Citizenship Amendment (Allegiance to Australia) Act 2015 (Cth). This is the most recent example of the susceptibility of Australian citizenship to legislative interventions, and an enduring conceptualization of different classes of Australian citizen.
4. The former Possession of British New Guinea was placed under the authority of the Commonwealth of Australia by letters patent dated March 18, 1902, and was accepted by the Commonwealth, as the Territory of Papua, by Section 5 of the Papua Act 1905 (Cth). The former German possession of New Guinea was placed under Australian administration by a mandate of the League of Nations in 1920. After 1945, Papua and New Guinea were administered jointly under legislation of the Commonwealth, both keeping their separate identities. Papua remained "a possession of the Crown." New Guinea was a "trust territory" administered by Australia under an agreement approved by the United Nations. People born in Papua were Australian citizens by birth under the Australian Citizenship Act 1948 (Cth) and also were British subjects; people born in New Guinea were "protected persons."
5. Mr. Ame has not been alone in seeking to claim Australian citizenship. For example, a series of appeals have been made to the Administrative Appeals Tribunal by Papuans seeking to resume the Australian citizenship they lost at Papuan independence under Sections 23A, 23AA, 23AB, and 23B of the Australian Citizenship Act 1948 (Cth) and its successor, Section 29 of the Citizenship Act. The tribunal has consistently confirmed that those Papuans were not Australian permanent residents and are not eligible to resume their Australian citizenship under these provisions; see, for example, *Re Gaigo and Minister for Immigration and Citizenship* [2008] AATA 590; *Re Brian and Minister for Immigration and Citizenship* (2008) 105 ALD 213; *Yamuna v. Minister for Immigration and*

*Citizenship* [2012] AATA 383. Section 21(7) of the Citizenship Act does provide a limited avenue for Papuans with parents who were Australian citizens born in mainland Australia to apply for citizenship. However, these statutory avenues were not relevant to Mr. Ame's claim to constitutional citizenship.

6. Daniel Gorman (2006, 20) discusses the conceptualization of citizenship in Britain's empire. He points out the stark divide in citizenship status between British subjects in the United Kingdom and white-settlement colonies, on the one hand, and the dependent empire, on the other, with those subjects born in the dependencies having fewer rights.

7. Indeed, the queen of England is also the queen of Australia, and there are still steps to be taken for Australia to become a republic and fully independent from the United Kingdom.

8. Like all Australian citizens at the time, Papuans also retained the status of British subject and indeed were both British subjects and Australian citizens until 1975. Other Australian citizens maintained the status of British subject with their Australian citizen status until 1987. See Rubenstein 2002, 88.

9. Papua New Guinea Provisional Administration Act 1945 (Cth), Papua and New Guinea Act 1949 (Cth), and Papua and New Guinea Act 1963 (Cth).

10. See *Re MIMLA; Ex parte Ame* [2005] HCATrans 66 (March 3, 2005).

11. The High Court also found that the removal of Papuans' Australian citizenship was supported by the Commonwealth's power to make laws with respect to its territories in Section 122 of the Australian Constitution. See Naturalisation Act 1903 (Cth); Nationality Act 1920 (Cth); Australian Citizenship Act 1948 (Cth); Australian Citizenship Act 2007 (Cth).

12. See *Singh v. The Commonwealth* (2004) 222 CLR 322. The Australian Parliament's power over citizenship legislation is consistent with a similar scope of authority recognized by the U.S. Supreme Court regarding Congress's power over immigration and citizenship. That said, the Fourteenth Amendment guarantees against potential legislative or executive actions citizenship rights to those born in the United States. The U.S. Supreme Court also has created more parity of rights for naturalized and natural-born U.S. citizens and generally, as a matter of statutory law, either relies on the law in place at the date of birth for assigning citizenship or provides citizenship at birth retroactively as an operation of law. See, for instance, 8 USC 1402 through 8 USC 1409, for statutes providing retroactive citizenship to those in U.S. territories or Puerto Rico; for recent immigration court decisions on this question, see Stevens 2015b.

13. This point links to the key theme that emerges from this collection of the problematic nature of relying on documents (or the lack thereof) as evidence of an individual's citizenship. See, in particular, chapters 4–8, chapter 10, and chapter 12.

14. For a comprehensive overview of the situation in the United States, see Leibowitz 1989. See also Villazor 2008, 2015.

15. Another example of citizens being afforded different rights based on racial divisions is the inferior citizenship of indigenous Australians (see Chesterman and Galligan 1997).

16. The acts he lists include Aden, Perim and Kuria Muria Islands Act 1967 (UK), Sec. 2(1) and Sch; Bahamas Independence Act 1973 (UK), Sec. 2; Barbados Independence Act 1966 (UK), Sec. 2; Botswana Independence Act 1966 (UK), Sec. 3; Cyprus

Act 1960 (UK), Sec. 4, and British Nationality (Cyprus) Order 1960 [No. 2215]; Fiji Independence Act 1970 (UK), Sec. 2; Gambia Independence Act 1964 (UK), Sec. 2; Ghana Independence Act 1957 (UK), Sec. 2; Guyana Independence Act 1966 (UK), Sec. 2; Jamaica Independence Act 1962 (UK), Sec. 2; Kenya Independence Act 1963 (UK), Sec. 2; Lesotho Independence Act 1966 (UK), Sec. 3; Malawi Independence Act 1964 (UK), Sec. 2; Malaysia Act 1963 (UK), Sec. 2; Malta Independence Act 1964 (UK), Sec. 2; Mauritius Independence Act 1968 (UK), Sec. 2; Nigeria Independence Act 1960 (UK), Sec. 2; Seychelles Act 1976 (UK), Sec. 3; Sierra Leone Independence Act 1961 (UK), Sec. 2; Swaziland Independence Act 1968 (UK), Sec. 3; Tanganyika Independence Act 1961 (UK), Sec. 2; Trinidad and Tobago Independence Act 1962 (UK), Sec. 2; Uganda Independence Act 1962 (UK), Sec. 2; West Indies Act 1967 (UK), Sec. 12 and Sch 3; Zambia Independence Act 1964 (UK), Sec. 3; Zanzibar Act 1963 (UK), Sec. 2. See also Bangladesh Citizenship (Temporary Provisions) Order 1972 (Bangl), para. 2.

17. The difficulty of defining citizenship by reference to voting rights was recognized in 1897–98 by the framers of the Australian Constitution, as women (as well as infants and “lunatics”) would still be considered “citizens” but were not entitled to vote. See, for example, *Convention Debates* (1897, 1793–94).

18. See Rubenstein (2002, 24–46) for a more detailed discussion of the need for constitutional articulation of the nature of Australian citizenship.