Suite 7, Level 1, 118 Halifax Street,
Adelaide, SA 5000

Ph (08) 8227 1223
Mobile 0438 639 552

Email tim@campbelllaw.com.au
www.campbelllaw.com.au

Campbell law

CITIZENSHIP OPINION FOR JOHN LOVETT

Overview

This opinion examines whether or not John Lovett (born in 1947) of Hamilton, Victoria, a Boandik Gunditjmara Aboriginal man, is an Australian Citizen. It concludes that he is not an Australian citizen.

Findings

Prior to the 1967 Referendum, the Parliament of the Commonwealth had no power to legislate with respect to Aboriginal people in the States, or to count Aboriginal people in the population of Australia.

Therefore, when the *Australian Citizenship Act 1948* (Cth) ('1948 Act') was enacted, it did not apply to Aboriginal people, and did not make them Australian citizens. The *Australian Citizenship Act 2007* ('2007 Act') was prospective only and did not make Aboriginal people such as our client who was born more than 10 years before its commencement on 1 July 2007 Australian citizens.

Relevant Legislation

The operation of Australian citizenship legislation hinges upon the validity of the Commonwealth's power to legislate for Aboriginal persons in accordance with the *Constitution*. The statutory citizenship criteria are set out below.

'Australian Citizen'

The statute governing Australian citizenship is the *Australian Citizenship Act 2007* (Cth). It defines 'Australian Citizen' by reference to the superseded *Australian Citizenship Act 1948* (Cth) (hereon in 'the 1948 Act') in instances where it is necessary to determine the status of a person's citizenship before the commencement of the Act.[1] Therefore, the 1948 Act is the relevant statute.

Citizenship is a statutory construction which was only established in 1948.[2] To allow for the citizenship of the population born prior to 1948, the 1948 Act originally provided for 'Transitional Provisions,' under which a person considered to be a 'British subject' immediately prior to the commencement of the Act, would become an Australian citizen.[3] This proposition is affirmed as expressed by Justice Kirby in *Singh v Commonwealth* in the following statement:

> 'Before the passage of the *Nationality and Citizenship Act 1948* (Cth), later renamed the *Citizenship Act 1948* (Cth), the concept of nationality within Australia was substantially subsumed, so far as the law was concerned, in that generally operating throughout the British Empire. Australians were identified as having the status of "British subject". Following the introduction of the statutory concept of citizenship, the status of "British subject" was retained until 1 May 1987, alongside that of "Australian citizen". The *Citizenship Act* from 1948 provided that a person born in Australia was an Australian citizen...'[4]

Commonwealth's power to legislate in relation to citizenship

As Commonwealth legislation, the 1948 Act must be supported by a constitutional head of power in order to be valid. However, there is no specific power for Parliament to make laws

---

[1] *Australian Citizenship Act 2007* (Cth), s 4.
[2] *Re Patterson; Ex Parte Taylor* (2001) 207 CLR 391, 399, [3]; *Singh v Commonwealth* (2004) 222 CLR 322.
[3] *Australian Citizenship Act 1948* (Cth) s 25(1)(a).
[4] *Singh v Commonwealth* (2004) 222 CLR 322, at [214] per Kirby J.

with respect to citizenship. Rather, the judiciary has affirmed the validity of the Act by virtue of s 51(xix) and acknowledges the possibility for other heads of power to support the Act.

Constitutional conferral of power

The *Constitution* confers no express power on the federal parliament to make laws with respect to citizenship.[5] This omission was intended by the framers. Dr John Quick was the only delegate that sought to include a definition of citizenship and confer power to Parliament over citizenship.[6] He proposed that the definition ought to be approximately:

> *All persons resident in the Commonwealth being natural born or naturalised subjects of the Queen, and not under any disability imposed by the Federal Parliament, should be citizens of the Commonwealth.*[7]

The proposal was opposed by the other delegates for various reasons. Isaac Isaacs feared all attempts to define citizenship would cause 'innumerable difficulties'.[8] A fear that the Commonwealth might use the power to deprive citizenship was also contemplated by Josiah Symon who considered citizenship a 'birthright'.[9] Further, there was an assumption that citizenship powers were unnecessary because British subjects were already citizens.[10]

Without an express power, it appears the Commonwealth cannot enact legislation on the subject of citizenship. However, the court upholds the validity of the 1948 Act, as established below.

Validity of Citizenship Act 1948

The validity of the *Citizenship Act 1948* (Cth) is considered in *Singh*. Justice McHugh did not consider the deliberate omission of citizenship from the Australian Constitution as fatal to the validity of the 1948 Act.[11] It is assumed to be supported by either the external affairs power by virtue of Australia's ratification of Convention on Certain Questions Relating to the Conflict of Nationality Laws (adopting Article 1 of that Convention which says "for each State to determine under its own law who are its nationals"), the naturalisation and aliens

---

[5] *Singh v Commonwealth* (2004) 222 CLR 322, at [45].
[6] 1898 Melbourne Convention, 1750, per Dr John Quick.
[7] 1898 Melbourne Convention, 1752, 1788, per Dr John Quick.
[8] 1898 Melbourne Convention, 1797, per Mr Isaac Isaacs.
[9] 1898 Melbourne Convention, 1763-1764, per Mr Josiah Symon.
[10] 1898 Melbourne Convention, 1763, per Sir Edward Braddon.
[11] *Singh v Commonwealth* (2004) 222 CLR 322, at [134].

power, or an implied nationhood power.[12] Justice Kirby similarly found the 1948 Act was supported by the aliens power of s 51(xix) and was therefore constitutionally valid.[13] He further acknowledges there may be other heads of power available in support of the Act. For the other judges, the validity of the 1948 Act was not contentious. In the case of *Re MIMIA; Ex parte Ame* the majority refers to the judgment of *Singh* to affirm the 1948 Act is valid and asserts it is not in dispute.[14]

Whilst judicial interpretation appears to deviate from the framers' reluctance to grant power with respect to citizenship, it reflects the current position of the law which finds the 1948 Act constitutionally valid.

Commonwealth's power to legislate in relation to Aboriginal people

Originally, there were no references to Aboriginal people in the *Constitution*, except for in s 51 (xxvi), granting the Commonwealth's legislative powers and s 127, in reckoning the people of Commonwealth. Following the 1967 Referendum, there is now no reference to Aboriginal people at all.

Prior to the 1967 Referendum, the *Constitution* contained exclusionary provisions relating to Aboriginal persons. Among the heads of legislative power of the Commonwealth was s 51(xxvi), which provided:

> *The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:*
>
> ...
>
> *(xxvi) the people of any race, other than the aboriginal [sic] race in any State, for whom it is deemed necessary to make special laws;*

The 1967 Referendum removed the exclusionary words, "other than the aboriginal [*sic*] race in any State". The view was widely held that the result was that the Commonwealth Parliament thereby acquired the power to legislate with respect to Aboriginal people in the States, a power which it had lacked under the original provision.

---

[12] *Singh v Commonwealth* (2004) 222 CLR 322, at [134] per McHugh J.
[13] *Singh v Commonwealth* (2004) 222 CLR 322, at [273] per Kirby J.
[14] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, at [33]-[35], per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

This legislative power in s 51(xxvi), when translated to the pre-1967 Constitution, requires that the effect of the exclusionary words be considered. Therefore, whatever the other heads of legislative power are relied on, and whatever the range of subject-matter of an Act, it could not apply to Aboriginal people in the States.

Based on the research set out in this document, it is concluded that the exclusionary clauses contained in the pre-1967 Referendum *Constitution* prevented Parliament from legislating with respect to Aboriginal people. The exclusionary clauses contained in s 51(xxvi) and s 127 of the *Constitution* limited the capacity for Aboriginal people to be citizens, and prevented them from being subject to Commonwealth legislation. This potentially leads to an entire generation of Aboriginal persons being considered non-citizens.

S 51(xxvi) *Constitution*

If the race power, before it was amended in 1967, precluded the Commonwealth from making any laws in relation to Aboriginal people, the citizenship legislation in force before the 1967 Referendum might not apply to Aboriginal people. Consequently, Aboriginal people born before that time could not be Australian citizens. The meaning of 'special laws' determines the scope of the power.

S 127 *Constitution*

Prior to the 1967 referendum, 127 of the Constitution provided:

> *In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal [sic] natives shall not be counted.*[15]

When read in a literal sense, the language of the provision indicates it is only relevant to counting the population. However, the intention behind the inclusion of the provision in the *Constitution* must be analysed further. The intention of the framers is relevant in determining whether the clause was intended to have wider application in preventing Aboriginal people from being citizens.

[15] *Constitution*, s 127 [REPEALED].

Intention of the Framers

Sir Samuel Griffith first proposed the clause, worded as it was adopted, on the basis that it had been prepared by the drafting committee and should be reinserted.[16] Further discussion indicates the reasoning behind the provision was expenditure and the futility of including the Aboriginal population when its small size would not affect representation.[17] When it was finally adopted, Barton finally affirms the purpose is 'merely statistical' and 'solely to the reckoning of the number of people in a state when the whole population has to be counted.'[18]

When the operation of s 127 was considered in the Constitutional Review of 1959, the Committee concluded that the limited means of communication and the nomadic nature of Aboriginal people made it impossible to obtain an accurate account of the Aboriginal population of a State, which led to their exclusion from population counts.[19] This was adopted in Menzies' second reading speech of the Constitutional Alteration (Repeal of s 127) Bill.[20]

These views are illogical, given the purposes of counting the population; it would be unnecessary for the *Constitution* to contain a provision relating to the conducting of censuses. If practical difficulties were the only reason for its inclusion, it would be unnecessary to have this provision in the *Constitution*. The census could have included a note to the effect that the count was not complete, as an unknown number of Aboriginal people were leading nomadic lives in the bush. Declining to count any Aboriginal people because some were difficult to locate is no justification for s 127.

S 127 is a constraint on the legislative power of the Commonwealth through the words "subject to this Constitution" in s 51. Once preconceptions about censuses and statistics are discarded, it becomes clear that there is hardly a more obvious way to "count" people than to confer on them nationality or citizenship. Conferring citizenship on a person is to count that person among the numbers of the people of the Commonwealth. If Parliament purported to make Aboriginal people citizens, the Act would have to be read down, to exclude those who could not be counted.

---

[16] 1891 Sydney Convention, 898-899, per Sir Samuel Griffith.
[17] 1897 Adelaide Convention, 1020, per Deakin, Cockburn, Barton and Walker.
[18] 1898 Melbourne Convention, 713.
[19] Aust, Joint Committee on Constitutional Review (O'Sullivan, Chair) *Report* (1959) p 55.
[20] Constitutional Alteration (Repeal of s 127) Bill 1965, second reading speech.

Additionally, had the 1948 Act applied to Aboriginal persons, the Commonwealth Government would have had to explain to all Aboriginal persons that although they were now considered Australian citizens but they would not be counted amongst the people in any censuses. This is contradictory and inconceivable on Parliament's behalf.

Further Legislative Provisions

On 26 January 1949, the *Nationality and Citizenship Act 1948* (Cth) (later renamed the *Citizenship Act 1948* (Cth) and subsequently the *Australian Citizenship Act 1948* (Cth)) came into operation. Section 10(1), which created Australian citizenship by birth, is prospective only: it applies to "a person born in Australia after the commencement of this Act".

The *Australian Citizenship Act 2007* (Cth) ('2007 Act') was the next major piece of legislation. The relevant sections of this Act commenced on 1 July 2007,[21] and the 1948 Act was repealed on the same day.[22]By that time, there was no constitutional barrier to the Australian Parliament conferring citizenship on Aboriginal people, if it chose to do so. If the 2007 Act contains a provision conferring citizenship on Aboriginal persons, that would be valid and operative and our client would be a citizen (specifically, eligible to be a citizen).

The 2007 Act's effect on pre-2007 entitlement to citizenship appears to be dealt with in s 4:

> *4(1) For the purposes of this Act, **Australian citizen** means a person who:*
>
> *(a) is an Australian citizen under Division 1 or 2 of Part 2; or*
>
> *(b) satisfies both of the following:*
>
> *(i) the person was an Australian citizen under the Australian Citizenship Act 1948 immediately before the commencement day;*
>
> *(ii) the person has not ceased to be an Australian citizen under this Act.*
>
> *Citizenship under the old Act*
>
> *(2) If, under this Act, it is necessary to work out if a person was an Australian citizen at a time before the commencement day, work that out under the Australian Citizenship Act 1948 as in force at that time.*

[21] *Australian Citizenship Act 2007* (Cth) s 2.
[22] *Australian Citizenship (Transitionals and Consequentials) Act 2007* (Cth) s 3; sch 1 cl 42.

As mentioned previously, this definition makes it clear that a person's pre-commencement day entitlement to citizenship is still governed by the 1948 Act as it stood immediately before the commencement day. Hence, our client will not have retrospectively become a citizen with the commencement of the 2007 Act.

Division 1 of Part 2 outlines the automatic acquisition of Australian citizenship. Section 12 states:

> **Citizenship by birth**
>
> *12 (1) A person born in Australia is an Australian citizen if and only if:*
>
> *(a) a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born; or*
>
> *(b) the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born.*

It is necessary to define 'permanent resident' and 'ordinarily resident' for the purposes of determining the scope of section 12.

Section 5 of the 2007 Act defines 'permanent resident' as:

> **5 Permanent resident**
>
> *(1) For the purposes of this Act, a person is a* ***permanent resident*** *at a particular time if and only if:*
>
> *(a) the person is present in Australia at that time and holds a permanent visa at that time; or*
>
> *(b) both:*
>
> *(i) the person is not present in Australia at that time and holds a permanent visa at that time; and*
>
> *(ii) the person has previously been present in Australia and held a permanent visa immediately before last leaving Australia; or*
>
> *(c) the person is covered by a determination in force under subsection (2) at that time.*
>
> *(2) The Minister may, by legislative instrument, determine that:*
>
> *(a) persons who hold a special category visa or a special purpose visa; or*
>
> *(b) persons who have held a special category visa; or*

(c) persons who are present in Norfolk Island or the Territory of Cocos (Keeling) Islands;

and who satisfy specified requirements are, or are during a specified period, persons to whom this subsection applies.

'Ordinarily resident' is defined in section 3 as:

> ***ordinarily resident**: a person is taken to be **ordinarily resident** in a country if and only if:*
>
> *(a) he or she has his or her home in that country; or*
>
> *(b) that country is the country of his or her permanent abode even if he or she is temporarily absent from that country.*
>
> *However, the person is taken not to be so resident if he or she resides in that country for a special or temporary purpose only.*

The operation of s 12 is further clarified by Schedule 3, clause 4 of the *Australian Citizenship (Transitionals and Consequentials) Act 2007* ("transition Act")[23], which provides that:

> ***4 Citizenship by birth under the new Act***
>
> *(1) Paragraph 12(1)(a) of the new Act applies to a person born on or after the commencement day.*
>
> *(2) Paragraph 12(1)(b) of the new Act applies to:*
>
> *(a) a person born on or after the commencement day; and*
>
> *(b) a person born before the commencement day who, immediately before that day, has not been ordinarily resident in Australia throughout the period of 10 years beginning on the day the person was born.*
>
> *Note: The effect of paragraph (b) of subitem (2) is that the period for which the person has been ordinarily resident in Australia before the commencement day will be counted under the new Act.*

The transition Act makes it clear that s 12(1)(a) does not apply to people such as our client who were born before the commencement day.

---

[23] This Act commenced at the same time as the 2007 Act, and has a number of provisions governing the transition from the 1948 Act to the 2007 Act. These provisions are still in force.

To understand the retrospective operation of cl 4(2)(b), s 10(2) of the 1948 Act must be considered. It provided that:

> *(2) Subject to subsection (3), a person born in Australia after the commencement of the Australian Citizenship Amendment Act 1986 shall be an Australian citizen by virtue of that birth if and only if:*
>
> *(a) a parent of the person was, at the time of the person's birth, an Australian citizen or a permanent resident; or*
>
> *(b) the person has, throughout the period of 10 years commencing on the day on which the person was born, been ordinarily resident in Australia.*

cl 4(2)(b) is clearly intended for a very specific purpose: to cover anyone who would have been eligible to qualify for citizenship under s 10(2)(b) of the 1948 Act, but was born within 10 years prior to the commencement of the 2007 Act (and hence had not completed their 10-year period before the 2007 Act's commencement).

Hence, s 12(1)(b) cannot have conferred citizenship on our client, who was born in 1947 and had completed his 10-year period of post-birth ordinary residency well before the commencement date.

Division 2 of Part 2 outlines four categories of the acquisition of Australian citizenship by application: by descent[24], by adoption[25], by conferral[26], and resuming citizenship[27]. These divisions do not relate to Aboriginal persons born in Australia.

---

[24] Subdivision A outlines the citizenship application process for those eligible to become an Australian citizen by descent. This section does not apply to Aboriginal persons born in Australia, as this subdivision concerns persons born outside of Australia.

[25] Subdivision AA outlines the citizenship application process for those eligible to become an Australian citizen after being adopted outside of Australia by an Australian citizen.

[26] Subdivision B outlines the citizenship process for those eligible to become an Australian citizen by conferral. Each section in this subdivision requires the applicant to be a 'permanent resident'. As outlined earlier, this excludes Aboriginal persons born in Australia, as they are unlikely to hold a permanent visa.

[27] Subdivision C outlines the citizenship application process for those eligible to resume their Australian citizenship. As earlier mentioned in this document, the 1948 Act did not apply to Aboriginal Australians, and thus, this section does not apply also.

'Alien' vs 'Non-citizen'

In *Love & Thoms v Commonwealth of Australia* [2020] HCA 3 (*'Love & Thoms'*), the High Court held that Aboriginal Australians are not within the reach of aliens as per s 51(xix) of the *Constitution*. The High Court also distinguished between the terms 'alien' and 'non-citizen'. This case concerned two plaintiffs of Aboriginal descent, born outside of Australia. By 4:3 split, the High Court held that for the purposes of s 51(xix) of the Constitution, Aboriginal people could not be classified as aliens.

Chief Justice Gleeson stated in *Re Minister for Immigration and Multicultural Affairs; Ex parte Te*[28]:

> *"there are many people who entered Australia as aliens, who have lived here for long periods and have become absorbed into the community, whose activity of immigration has long since ceased, but who have never sought formal membership of the community... Whether by design, or simply as the result of neglect, they remain aliens."*

Similarly, here, as a result of Constitutional limitations and lack of further legislating by Parliament, Aboriginal persons born in Australia are not automatically Australian citizens. Justice Nettle further explains in *Love & Thoms* that[29]:

> *So to conclude does not mean that a resident non-citizen member of such an Aboriginal society is to be accounted an Australian citizen or other than a "non-citizen" as that term is defined. Citizenship is a statutory concept which it is within the legislative competence of Parliament to prescribe.*

Love & Thoms also established that the term 'alien' for the purpose of s 51(xix) of the *Constitution*, is not synonymous with the term 'non-citizen'. Justice Gordon held that 'The constitutional term "aliens" does not apply to Aboriginal Australians... Non-citizenship does not equate, in all cases, with alienage'.[30]

This is relevant to the Constitutional limits on the power of the Parliament. To the extent that the 1948 Act depends on the aliens power for its validity, *Love & Thoms* makes clear that the Parliament could not legislate with respect to Aboriginal persons in the exercise of that

---

[28] (2002) 212 CLR 162 at 172 [27].
[29] *Love & Thoms v Commonwealth of Australia* [2020] HCA 3, at 98 [280] per Nettle J.
[30] *Love & Thoms v Commonwealth of Australia* [2020] HCA 3, at 107 [304] per Gordon J.

power. Aboriginal persons could not be aliens, and therefore, the aliens power could not be used to make them citizens.

Conclusion

On this basis, and for the abovementioned reasons, our client did not by virtue of his birth in Australia, become an Australian citizen.

4 September 2021

CAMPBELL LAW

Tim Campbell
Principal