PROTECTING AUSTRALIAN PROTECTED PERSONS: STATELESSNESS AND PAPUA NEW GUINEA'S INDEPENDENCE

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This article examines the changing concepts of racialised citizenship in two intertwined nations: the Independent State of Papua New Guinea ('PNG') and the Commonwealth of Australia ('Australia'), PNG's former colonial ruler, as the latter sought to shake off the legacies of its recently abandoned 'White Australia' policy. It examines the historical intersection between PNG's developing citizenship criteria, with its racialised articulation of who was 'in' and who was 'out', and Australia's efforts to recast its image on the international stage as a multi-racial, non-racist and anti-imperial nation. Specifically, it demonstrates how the intersection of these policy choices impacted on a particular cohort of so-called 'Australian Protected Persons' ('APPs'). APPs who happened also to fall outside PNG's citizenship criteria were left stateless at PNG's independence. Drawing on newly released Australian archival material, this article casts light on the particular historical moment that allowed for this outcome.

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I INTRODUCTION

On 16 September 1975, the Independent State of Papua New Guinea ('PNG') came into existence. Its constitution conferred automatic PNG citizenship on most, but not all, of the people living in the country on Independence Day. Prior to 16 September 1975 ('Independence Day'), PNG was governed by the Commonwealth of Australia ('Australia') as a colonial power in relation to the part known as the Territory of Papua and as a United Nations Trust power in relation to the part known as the Territory of New Guinea. During the period of Australian rule, birth in the Territory of Papua conferred the status of Australian

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citizen.[1] However, birth in the Territory of New Guinea conferred only the status of Australian Protected Person ('APP'). APPs were stateless but entitled to Australia's diplomatic protection.

This distinction between Australian citizens born in Papua and New Guinean APPs was, however, of no practical significance as long as Australia governed both territories. Indeed, despite their different statuses under international law, the *Papua and New Guinea Act 1949* (Cth) provided for the Territory of Papua and the Territory of New Guinea to be administered together as the Territory of Papua and New Guinea ('TPNG') and created a local legislature for the administrative union.[2]

Moreover, of particular relevance in the present context, prior to 1973, Australian immigration policy centred on keeping non-whites out of metropolitan Australia. Indeed, for many years the Department of Immigration ruled that 'a prospective migrant [to Australia] had to be of 75 per cent "European blood"'.[3] Therefore, not only was it the case that APPs could not enter metropolitan Australia without prior permission but neither could those who were Australian citizens by virtue of birth in the Territory of Papua.

The election of the Labor Whitlam Government in December 1972 was a watershed event. As well as precipitating PNG's hurried path to independence, it also saw the formal demise of the 'White Australia' policy.[4] The effect of these events on the 'regimes of race' that, as Patrick Wolfe argues, reflected and reproduced particular forms of colonialism and colonial relationships, would be almost immediate.[5] Indeed, the distinction between Australian citizens born in Papua and APPs suddenly had the potential to become very consequential indeed, depending on the policy choices that were made by the political actors on each side of the Torres Strait.

In this context, the notion of citizenship became an intense site of official focus as each nation sought to formulate, or reformulate, ideas of who did and who did not belong. Rachel Sharples and Linda Briskman have argued that 'citizenship is a powerful construct that is legally framed as denoting inclusion within a nation-state by birth or conferral, or as a force for exclusion that denies both granting of citizenship and the provision of rights afforded to others'.[6] The bases of inclusion and exclusion and the new and emerging legal parameters of racialised identity in the two countries would, in the years leading to independence, significantly shape the debate around nationhood and citizenship.

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1 The High Court referred to this citizenship status as a 'veneer': *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, [88] cited in Kim Rubenstein and Jacqueline Field, 'What Is a "Real" Australian Citizen: Insights from Papua New Guinea and Mr Amos Ame' in Benjamin N Lawrance and Jacqueline Stevens (eds), *Citizenship in Question: Evidentiary Birthright and Statelessness* (Duke University Press 2017) 100, 101.

2 The *Papua and New Guinea Act 1949* (Cth) replaced the *Papua Act 1905* (Cth) and the *New Guinea Act 1920* (Cth). Article IV of the Trust Agreement permitted the Commonwealth of Australia ('Australia') to govern New Guinea as an integral part of Australia.

3 Rachel Sharples and Linda Briskman, 'Racialized Citizenship: Challenging the Australian Imaginary' in Leanne Weber and Claudia Tazreiter (eds), *Handbook of Migration and Global Justice* (Edward Elgar Publishing 2021) 202, 204.

4 This was the colloquial name for the policy of preventing non-white immigration to Australia, which was in place from federation (1901) to 1973 when it was formally abolished by the Whitlam Government.

5 Patrick Wolfe, *Traces of History: Elementary Structures of Race* (Verso 2016) 8.

6 Sharples and Briskman (n 3) 202.

On PNG's side, the decision to impose strict criteria to qualify for automatic citizenship in the new nation-state's constitution threatened to exclude specific categories of TPNG inhabitants, determined largely by race. As Edward P Wolfers noted in 1977,

> the colonial world in the separate pre-war territories of Papua and New Guinea, as well as the post-war combined Territory of Papua and New Guinea, was divided by race, loosely defined-into 'Europeans' or 'expatriates'; Asians (more than 90 per cent of whom were Chinese or Malay); mixed race; and 'natives', 'indigenes', 'locals', ultimately 'Papua New Guineans'.[7]

In its August 1974 report (compiled after extensive consultations with people throughout TPNG),[8] PNG's Constitutional Planning Committee ('CPC') maintained and relied upon these racial categories.

The CPC report recommended that a person born in TPNG prior to independence should automatically become a PNG citizen, provided that they had at least two Indigenous grandparents (defined as a grandparent all of whose own grandparents were born in PNG or an adjacent area) *and* that they did not have the 'real' citizenship of a foreign country. The final version of the *Constitution of the Independent State of Papua New Guinea* ('*PNG Constitution*') softened the qualification for automatic citizenship from having at least two Indigenous grandparents to simply having at least two grandparents who were born in PNG or an adjacent area. While this reduced the number of people born in PNG who would fail to qualify for automatic citizenship, it still left a significant number of people disenfranchised on, effectively, a racial basis.

On the Australian side, successive governments had been keen not to draw the ire of the UN and had begun moving away from racialised categories of governance in TPNG since the early 1960s.[9] The Whitlam Government's overt renunciation of the 'White Australia' policy in 1973 embraced an expectation that TPNG would be 'a fully independent member of the UN and of the Commonwealth of Nations' sooner rather than later.[10] Independence for TPNG was also the preference of the UN and, in Gough Whitlam's view, ensuring that outcome as quickly as possible was necessary to protect Australia's international reputation.[11] Despite this shift, the legacy of racialised governance left an

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7 Edward P Wolfers, 'Defining a Nation: The Citizenship Debates in the Papua New Guinea Parliament' in Frank S Stevens and Edward P Wolfers (eds), *Racism: The Australian Experience: A Study of Race Prejudice in Australia* (Australia and New Zealand Book Company, 2nd edn, 1977) vol 3, 301.

8 See Jonathan Ritchie, 'Making Their Own Law: Popular Participation in the Development of Papua New Guinea's Constitution' (PhD thesis, University of Melbourne, 2003) ('Making Their Own Law'); Jonathan Ritchie, 'Defining Citizenship for a New Nation: Papua New Guinea, 1972–1974' (2013) 48(2) *The Journal of Pacific History* 144 ('Defining Citizenship for a New Nation'); Jonathan Ritchie, 'From the Grassroots: Bernard Narokobi and the Making of Papua New Guinea's Constitution' (2020) 55(2) *The Journal of Pacific History* 235 ('From the Grassroots').

9 See Paul Hasluck, 'Citizenship Status of Mixed Blood People in the Territory of Papua and New Guinea' (Cabinet Submission, archived at National Archives of Australia, A6980/S251217, 23 February 1960):

> On balance, it is thought that citizenship and the right of entry to Australia should be granted to individuals as the result of a judgment on their individual suitability. That is, we should apply social tests rather than racial tests.

10 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 October 1972, 2300 (Edward Gough Whitlam).

11 ibid, 2298.

administrative mark as well as social resentments that would be played out in the developing citizenship criteria of PNG and its racialised articulation of who was 'in' and who was 'out'.[12]

This article seeks to identify a correlation between the racialised categories by which PNG inhabitants were governed in the colonial period and the citizenship statuses that flowed from these post-independence. In the lead up to PNG independence, Australia had to decide what responsibility, if any, it would take for APP inhabitants of PNG who did not become automatic citizens of that country on Independence Day. Drawing on recently opened Australian Government files, this article demonstrates how the intersection of Australian policy choices with those of PNG resulted in the aforementioned cohort of APPs remaining stateless in the aftermath of PNG independence.

At present, there is little to nothing written about APPs beyond explanations of the legal basis of the status in Australian citizenship law.[13] The likely explanation for this rests in the fact that APP status has not had the same judicial scrutiny or press attention as that had by the status of Australian citizen (without right of entry). Further, it may also be the case that APPs have had little scholarly attention because of the faint, and, as yet unresolved, trace that the category has left in the archival records. Despite these issues, this article offers a close examination of these archival remnants and attempts to cast light on the particular historical moment that had such unhappy consequences for a cohort of individuals whose perceived racial characteristics left them betwixt and between in the separation of PNG from Australia.

In Part II, an overview is offered of the legal basis for Australia's administration of pre-independence PNG. It explains why Territory of New Guinea inhabitants were not given the status of Australian citizen and considers how racial considerations in relation to both PNG and Australia were front and centre in formulating how Australian nationality law and Australian immigration law were applied to PNG inhabitants, as a matter of policy, in the period leading up to the election in December 1972 of the Whitlam Labor Government.

Part III describes the political process within PNG over the period of 1972–75, which resulted in the *PNG Constitution*'s citizenship provisions effectively imposing a racial qualification for the acquisition of automatic PNG citizenship on independence. Following on from this, Part IV offers a discussion of how the Australian Government decided over the same period what its policy response should be to PNG inhabitants who did not become automatic PNG citizens on Independence Day. Finally, Part V attempts to trace the specific and separate fate of those who retained or obtained APP status in the period between PNG independence and the formal abolition of APP status in Australian law on 1 May 1987.

Ultimately, the article concludes that the story of the APPs cannot be fully excavated within the extant and currently available archives. It does, however, identify an important lacuna in the history of Australian citizenship law, in particular, concerning the relationship between racialised categories of national belonging and incidences of statelessness. It is suggested that future releases of Government archives may, in time, enable this gap to be more comprehensively explored.

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12 Michael Somare quoted in Wolfers (n 7) 346.

13 See, eg, ibid 301–303; Rubenstein and Field (n 1) 104–106; John Goldring, *The Constitution of Papua New Guinea: A Study in Legal Nationalism* (Law Book Co 1978) 204.

II AUSTRALIAN ADMINISTRATION OF TPNG AND THE QUESTION OF NATIONALITY

Throughout the period of Australian colonial rule, racial categories were embedded into the administrative structures governing the Territories.[14] As independence approached, there was a growing awareness among both PNG and Australian officials of the potential complications that would likely flow from the different rights associated with different racial categories derived from the historical divisions imposed on the island.

Australia took control of German New Guinea during World War I and was given a League of Nations 'C' mandate over German New Guinea after that war.[15] The Territory of New Guinea, as it was subsequently renamed, became an Australian trust territory when the League of Nations mandate system was replaced by the United Nations Trusteeship system after World War II.[16] Therefore, from the outset, Australia had an international duty in relation to the Territory of New Guinea to act in the best interests of its inhabitants and prepare them for an independent future, if that was their choice.[17]

As mentioned, one of the consequences of the different statuses of the Territories under international law was played out in the different statuses of their inhabitants under Australian law. Individuals born in Papua, like those born in metropolitan Australia, were automatically British subjects and, after the commencement of the *Nationality and Citizenship Act 1948* (Cth), Australian citizens.[18] However, citizenship on the basis of birth in Papua did not confer a right of entry to metropolitan Australia. Rather, such citizens could only enter Australia if granted a temporary or permanent entry permit under the *Migration Act 1958* (Cth).

By contrast, birth in New Guinea did not confer the status of British subject or Australian citizen but rather, as indicated previously, the status of 'Australian Protected Person'.[19] APPs were issued with Australian passports because they were entitled to Australian diplomatic protection when outside TPNG. However, unless a person born in New Guinea acquired the citizenship of Australia or

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14 Some examples of racialised ordinances: *Transactions with Natives Ordinance No 1 of 1959* (TPNG); *Native Emigration Restriction Ordinance No 55 of 1958* (TPNG); *Liquor (Natives) Ordinance No 19 of 1958* (TPNG); *Trading with Natives Ordinance No 4 of 1946* (TPNG); *Native Employment Ordinance No 73 of 1967* (TPNG); *Native Regulation (Papua) Ordinance No 56 of 1963* (TPNG); *Native Women's Protection Ordinance No 57 of 1957* (TPNG); *White Women's Protection Ordinance No 2 of 1926* (Papua).

15 Hank Nelson, 'Liberation: The End of Australian Rule in Papua New Guinea' (2000) 35(3) *The Journal of Pacific History* 269, 275. Article 22 of the *Versailles Treaty of Peace* provided for a 'C' mandate to be administered as an integral part of the Mandatory's territory subject to safeguards in the interests of the Indigenous inhabitants: F M Brookfield, 'New Zealand Citizenship and Western Samoa: A Legacy of the Mandate' (1981) 5(3) *Otago Law Review* 367, 371. As a matter of domestic law, German New Guinea was placed by the Queen under the authority of the Commonwealth and accepted by the Commonwealth pursuant to the *New Guinea Act 1920* (Cth) thus meeting the requirements of s 122 of the *Australian Constitution*: Peter M McDermott, 'Australian Citizenship and the Independence of Papua New Guinea' (2009) 32(1) *UNSW Law Journal* 50, 52.

16 McDermott (n 15) 53.

17 Nelson (n 15) 275.

18 McDermott (n 15) 53–54.

19 Ibid 54–55. The status of Australian Protected Persons was conferred by reg 5 of the *Australian Citizenship Regulations 1960* (Cth).

another country by descent or naturalisation, they were born and remained stateless.[20]

The denial of automatic Australian citizenship to those born in the Territory of New Guinea was entirely consistent with international law. Upon the creation of 'C' mandates, the Indigenous inhabitants lost German nationality without automatically acquiring the nationality of the Mandatory.[21] Similarly, it was not intended that their descendants would automatically acquire the Mandatory's nationality.[22] This continued to be the international law position in respect of the Indigenous inhabitants of the Territory of New Guinea after Australia's League of Nations mandate was replaced by UN trusteeship.[23]

An amendment to the *Nationality Act 1920–1946* (Cth) in 1946 softened this exclusion from nationality and allowed residence in New Guinea to count towards the residence qualification for Australian naturalisation. However, though 'technically embracing all inhabitants of PNG', the Australian Government reinforced racial divisions and announced that naturalisation would be granted only to persons 'substantially (ie more than one half) of European extraction'.[24] As Wolfe notes, race was (and remains) a 'classificatory concept' defined and deployed according to the form and needs of the colonial administration. Racial categories functioned to organise the subject populations hierarchically in relation to access to resources and how the law applied to them, as well as to distinguish those subject populations as both 'different' to those of the metropole and from each other.[25]

As Kim Rubenstein and Jacqueline Field note, the 1946 amendment and subsequent changes were targeted at people categorised as having 'mixed racial origins' and 'Asians' living within TPNG.[26] These changes, which allowed these groups to apply for naturalised citizenship, were prompted in part by criticisms stemming from a UN visit to the Territory and in part by the Minister for Territories' anxieties about the future prospects of these populations in an independent PNG.

Paul Hasluck, who was Minister for Territories from May 1951 to December 1963, was keen to avoid the problems that he foresaw might arise if TPNG had a significant Asian population at the time it attained self-government and was also aware of the international pressure Australia faced in TPNG.[27] In a submission to Cabinet in May 1962, he noted that there

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20 A stateless person means 'a person who is not considered as a national by any State under the operation of its law': *Convention relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) art 1(1). This provision also reflects the customary international law definition: Michelle Foster and Hélène Lambert, 'Statelessness as a Human Rights Issue: A Concept Whose Time Has Come' (2016) 28(4) *International Journal of Refugee Law* 564, 566.

21 H Duncan Hall, *Mandates, Dependencies and Trusteeship* (The Carnegie Endowment for International Peace 1948) 77–78; D P O'Connell, 'Nationality in Class C Mandates' (1954) 31 *British Yearbook of International Law* 458, 460–61.

22 Hall (n 21) 77–78; O'Connell (n 21) 460–61.

23 Alex C Castles, 'International Law and Australia's Overseas Territories' in D P O'Connell (ed), *International Law in Australia* (Law Book Co 1965) 322.

24 C Vening, 'Citizenship Status of Mixed Race People in PNG' (Document, archived at National Archives of Australia, A452, 1970/5934, 19 June 1972).

25 Wolfe (n 5) 11.

26 Rubenstein and Field (n 1) 104.

27 Ian Downs, *The Australian Trusteeship Papua New Guinea 1945–1975* (AGPS 1980) 197–98.

> are at present Australian citizens without the right of residence, if born in Papua, and Australian protected persons, if born in the Territory of New Guinea. Increasing attention is being given within the Territory to the position of the mixed race people, who fall between the two main racial groups, the indigenous and expatriate [ie white European]. There have already been Parliamentary representations about them. In the past two years international interest has increased and events in West New Guinea have provided a background of greater tension.[28]

As well as placing strict limits on Asian immigration into TPNG, Hasluck convinced his colleagues to make Asians living in TPNG eligible to apply for Australian citizenship with right of entry to metropolitan Australia,[29] notwithstanding the 'White Australia' policy in place at the time. As a result of his efforts, a series of Cabinet decisions between 1957 and 1963 made the following categories of Asians[30] eligible for naturalisation as Australian citizens with the right of entry to metropolitan Australia:

- Asians not born in TPNG, who were lawfully admitted into TPNG before 7 December 1949 and who had lived there for 15 years;
- Asians not born in TPNG and living there not under restriction, subject to the usual conditions;
- Asians born in TPNG, subject to the usual conditions; and
- Asian wives and children of Asians granted Australian citizenship, subject to the usual conditions.[31]

Additionally, a 1962 Cabinet decision gave the Minister for Immigration the discretion 'to accord the status of Australian citizen with the right of residence in Australia to a mixed-race person[32] born in Papua or New Guinea', if 'the individual has been brought up in the European manner, has English as his principal language and is European in outlook'.[33] Cabinet emphasised that 'persons of mixed-race would have no absolute right to Australian citizenship'.[34]

As the 1960s progressed, there was a growing anxiety among the 'indigene' APP population about their own citizenship status. In April 1966, a visiting delegation from the local TPNG legislature met with Australian Government ministers and officials in Canberra and, among other things, wanted an explanation for New Guineans being APPs rather than Australian citizens. Billy Snedden, who was Attorney-General at the time, responded, 'We cannot change New Guinea

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28 Paul Hasluck, Minister for Territories and A R Downes, Minister for Immigration, 'Position of Mixed Race Persons in The Territory of Papua And New Guinea' (Cabinet Submission, archived at National Archives of Australia, A6980/S251217, 16 May 1962).

29 Downs (n 27) 197–98.

30 'Asian' in this context included mixed-race people of Asian/European descent: Department of Territories, 'Australian Immigration Policy: Cabinet Decisions of 15/9/64 — Effect on Immigrants from Papua and New Guinea' (Document, archived at National Archives of Australia, A452, 1970/5934, 26 October 1964) ('Cabinet Decisions of 15/9/64').

31 'Undated File Note (circa 1970)' (Document, archived at National Archives of Australia, A452, 1970/1453) citing Cabinet Decision No 801 of 29 May 1957, subsequently modified by Decision No 428(GA) of 2 September 1959 and No 962 of 6 August 1963.

32 'Mixed-race' in this context included those with Indigenous blood: 'Cabinet Decisions of 15/9/64' (n 30).

33 'Cabinet Minute, Canberra, 17 May 1962, Decision No 238' (Document, archived at National Archives of Australia, A1838, 1468/13, 17 May 1962).

34 ibid.

citizenship until the trusteeship has been achieved and concluded.'[35] When the matter was pressed, a Department of External Affairs official elaborated as follows:

> This is the question of sovereignty not power — we have power in Papua and power in New Guinea but sovereignty in Papua but not sovereignty in New Guinea. I wanted to describe this as it is the reason for the difference between the Papuan as an Australian citizen and a New Guinean as an Australian protected person.
>
> We cannot call an Australian protected person in New Guinea an Australian citizen because we have not yet been given sovereignty over New Guinea. In Papua you have an inherent right to be an Australian citizen, in New Guinea you don't have that inherent right.
>
> Having explained that difference I would like to say that it doesn't matter. The Australian Government can give the same privileges to a Papuan as to a New Guinean or Australian protected person and can give the same penalties. When one of them goes out of the Territory into another country his status is practically the same.[36]

The official's point was valid for as long as TPNG remained governed by Australia.

However, in December 1972, the Australian Labor Party came into power at the federal level and drastically reduced the timeline for independence to no longer than three years. In 1973, a report on the future of mixed-race people in PNG noted the 'natural resentment which had arisen from the privileged position of mixed-race [public service] employees' and expressed concern that, at independence, 'pressure will be brought to bear on substantial numbers of them to leave'. It noted further the 'natural apprehension with which persons of mixed race view the future'.[37] The report commented that the 'example of Uganda' and its expulsion in 1972 of Asian peoples weighed heavily in this contemplation.[38] As noted by *The Sydney Morning Herald*,

> It now seems likely that the bill for past and present racial wrongs will be presented in the final report of Papua New Guinea's Constitutional Planning Committee. And, as is so often the case in such situations, it seems that the innocent may be those told to pay most in the squaring of an unhappy account.[39]

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35 'Notes of Discussions Between Ministers, Officials and Select Committee Canberra, 18–20 April 1966' (Document, archived at National Library of Australia, MS 8254, Box 8, Folder 1) <https://webarchive.nla.gov.au/awa/20190813221740/https://dfat.gov.au/about-us/publications/historical-documents/volume-26/Pages/038-notes-of%20discussions-between-ministers-officials-and-select-committtee.aspx>, archived at <https://perma.cc/8MXR-899U>.

36 ibid.

37 'Study Group Report on the Future of Mixed Race People in Papua New Guinea' (Document, archived at National Archives of Australia, A6980/S251218**,** November 1973).

38 ibid. See also Sara Cosemans, 'Undesirable British East African Asians. Nationality, Statelessness, and Refugeehood after Empire' (2022) 40(1–2) *Immigrants & Minorities* 210; Sara Cosemans, 'The Politics of Dispersal: Turning Ugandan Colonial Subjects into Postcolonial Refugees (1967–76)' (2018) 6(1) *Migration Studies* 99.

39 'An Eye for an Eye', *The Sydney Morning Herald* (Sydney, 27 May 1974).

III RACE AND THE THORNY ISSUE OF PNG CITIZENSHIP

Perhaps ironically, just as the racialised formation of identity worked to support the colonial state in TPNG, racialised ideas of citizenship were also put to work in support of the decolonising state faced with the task of developing a 'national' identity. Influential among the educated elite of PNG politicians and activists, new notions about race and new forms of racial politics coming from decolonising Africa and post-civil rights United States of America, gave momentum to emerging ideas about who would belong in the newly independent nation. Indeed, as Tracey Banivanua Mar notes, 'a quiet revolution … was forming in and around the Pacific as Blackness, or colour, was transforming from a source of isolation and shame to one of transnational connectedness and strength'.[40]

Like Whitlam, Michael Somare, who became Chief Minister of TPNG leading a National Coalition government after elections held in February 1972,[41] was in favour of early independence.[42] However, he was aware that this was not the general sentiment among the TPNG public at the time. Therefore, when members of the legislature indicated that they wished to consult with their electorates about the timing of full self-government, Somare responded that the people should be consulted not just about when the country should become fully self-governing but also about how it should be governed.[43] As well as serving his desire for constitutional autochthony, Somare's belief was that getting parliamentarians to work on a constitution for a self-governing PNG would 'in practice bring forward the possibility of early self-government and independence'.[44]

In June 1972, Somare announced the formation of a 15 member all-party committee of parliamentarians ('CPC'), which would consult widely and then make recommendations for a PNG constitution.[45] Although Somare was the ex-officio Chair, and the Deputy Chief Minister, John Guise, was a member, neither was much involved in the work of the CPC.[46] That work was effectively led by the CPC's Deputy Chair, Father John Momis, an intelligent and charismatic Catholic priest from Bougainville, who was a member of Somare's Pangu Pati,[47] and John Kaputin, a highly-educated and 'fiery' Tolai man, who was a member of the Mataungan Association,[48] and the Minister for Justice in the National Coalition Government.[49]

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40 Tracey Banivanua Mar, *Decolonisation and the Pacific: Indigenous Globalisation and the Ends of Empire* (Cambridge University Press 2016) 183.

41 Ritchie, 'Defining Citizenship for a New Nation' (n 8) 145. Donald Denoon has described the multi-party coalition built by Somare as 'an awkward amalgam of nationalists and separatists, radicals and managers': Donald Denoon, *A Trial Separation: Australia and the Decolonisation of Papua New Guinea* (ANU Press 2012) 102.

42 Jonathan Ritchie, 'Bully Beef and Racism: The Real Origins of PNG Nationalism' (Deakin University, 6 March 2019).

43 Ritchie, 'Making Their Own Law' (n 8) 74.

44 ibid quoting Michael Somare, *Sana* (Niugini Press 1975) 98.

45 Wolfers (n 7) 317.

46 ibid 310, 317.

47 ibid 317; Ritchie, 'Defining Citizenship for a New Nation' (n 8) 146.

48 The Mataungan Association had been formed in 1969 by a group of Tolai, the Indigenous people of the Gazelle Peninsula in East New Britain, to defend themselves against what they perceived as unjust Australian policies: Ritchie, 'Defining Citizenship for a New Nation' (n 8) 146–47.

49 ibid.

Notwithstanding the mandate given to the CPC, the Somare Government and the Australian administration continued making arrangements for the transfer of power. In its First Progress Report to the Somare Government in October 1972, the CPC stated that it was 'concerned lest the Papua New Guinea Government agree to arrangements that may well limit the effective options available as to the system of government which it may recommend to the Government'.[50] This initial skirmish was resolved by the Somare Government agreeing to consult with the CPC about the handover process but what was already clear was that the CPC would not be 'a mere cypher for the wishes of the governing coalition'.[51]

The CPC's Final Report was tabled in August 1974. Chapter 4 set out its recommendations regarding citizenship of an independent PNG. It explained that the recommendations regarding the conditions for citizenship were informed by a desire to 'safeguard the long-term interests of the majority of our country's inhabitants', ie, the Indigenous people, and to overcome 'the present serious imbalance in the distributions of benefits and opportunities in our society'.[52]

With these transformative objectives in mind, the CPC proposed that any person who was born in PNG prior to the coming into force of its new citizenship laws ('C-Day') would become a citizen automatically if they had at least two Indigenous grandparents[53] *and* did not have the 'real' citizenship of a foreign country.[54] Anyone born in PNG after C-Day to a PNG citizen parent would also become a citizen automatically.[55] The CPC further proposed that anyone who would have become a PNG citizen automatically but for being born outside PNG would be a citizen if registered as such within one year of C-Day or, if born after C-Day, within one year of birth.[56] Finally, the CPC proposed quite onerous conditions under which other individuals could acquire citizenship by naturalisation.[57] As Jonathan Ritchie implies, it would appear that Kaputin's experiences of unjust treatment at the hands of the Australian administration fostered a 'hatred' of colonialism and colonists that outweighed concerns for his own position as the father of mixed-race children.[58]

The Somare Government thought that the citizenship requirements recommended by the CPC were too exacting. Indeed, Somare labelled the

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50 Constitutional Planning Committee ('CPC'), *First Progress Report of the Constitutional Planning Committee, Made to the Chief Minister* (Report, October 1972) quoted in Ritchie, 'Making Their Own Law' (n 8) 92.

51 Ritchie, 'Defining Citizenship for a New Nation' (n 8) 147.

52 CPC, *PNG Constitutional Planning Committee Report 1974* (Report, August 1974), ch 4 [13] ('*PNG CPC Report 1974*').

53 The CPC defined an Indigenous grandparent as a grandparent all of whose own grandparents were born in Papua New Guinea or an adjacent area: *PNG CPC Report 1974* (n 52) ch 4 [22]. It defined an adjacent area as Irian Jaya, the British Solomon Islands or the Torres Strait Islands. The CPC explained that it did not want 'to draw too fine a line between people for whom four generations ago, the boundaries drawn for our country by the colonial powers had no meaning': *PNG CPC Report 1974* (n 52) ch 4 [22]–[23].

54 ibid, ch 4 [20]–[21]. The CPC explained that 'persons who are Australian citizens by virtue only of their birth in Papua, and persons who are Australian Protected Persons, are regarded as holding no real foreign citizenship, provided that they have not been granted the right to reside in Australia'. ibid ch 4 [22].

55 ibid ch 4 [24].

56 ibid ch 4 [27].

57 ibid ch 4.

58 Ritchie, 'From the Grassroots' (n 8) 237–38; Ritchie, 'Defining Citizenship for a New Nation' (n 8) 147. John Kaputin's position may be explained by the fact that, by 1970, he and his white wife had separated and his children had relocated to Sydney: see 'Kaputin' (1 February 1970) *Pacific Islands Monthly* 35–36.

proposals as 'worse than South Africa' (ie, worse than racist apartheid policies).[59] Like most of his compatriots, Somare experienced the paternalism and racism that characterised the Australian colonial administration and the unfairness of the social strata it produced. However, as noted by Don Woolford, he remained 'patient and inclusive with political opponents' regardless of racial category.[60] Pertinently, at the same time that the CPC report was tabled, the Government tabled a White Paper recommending amendments to it, softening the racial basis of the proposals.[61] One of the White Paper recommendations was that a person with two grandparents (rather than two Indigenous grandparents) born in PNG should become a citizen on C-Day, unless they had the real citizenship of another country.[62]

Momis responded to the White Paper by referring to the CPC report as the 'Black Paper',[63] while accusing the Government of accommodating the vested interests of white men.[64] Kaputin was similarly scathing.[65] Momis, Kaputin and most other former members of the CPC joined with a number of other parliamentarians to found the Nationalist Pressure Group, which pursued an agenda opposed to the Government on issues such as citizenship.[66] Despite the internal upheaval, in October 1974, the House of Assembly agreed that the CPC's citizenship recommendations as modified by the White Paper recommendations should be included in the draft constitution.[67] It took until 19 May 1975 for a complete draft constitution to be prepared for debate.[68] From May to August 1975, the membership of the PNG House of Assembly convened as the National Constituent Assembly for the purpose of debating the draft and formally adopting the final version.[69] Further changes were made to the citizenship provisions at this stage.[70] The final version of the *PNG Constitution* was adopted by the National Constituent Assembly on 15 August 1975.[71] It came into force on 16 September 1975, Independence Day.

The *PNG Constitution* deals with citizenship on Independence Day by providing in s 65(1) that '[a] person born in the country before Independence Day who has two grandparents who were born in the country or an adjacent area[72] is a

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59 'Worse than S Africa — Somare: PNG Citizenship Proposal "Racist"', *The Sydney Morning Herald* (Sydney, 6 April 1974).

60 Don Woolford, 'Somare, the Controversial Father of PNG', *Crookwell Gazette* (online, 25 February 2021) <https://www.crookwellgazette.com.au/story/7143781/somare-the-controversial-father-of-png/>, archived at <https://perma.cc/FE4T-L5UK>.

61 Wolfers (n 7) 318.

62 ibid 322.

63 Denoon (n 41) 121.

64 Wolfers (n 7) 320.

65 Sam Sirox Kari, 'The Origin and Setting of the National Goals and Directive Principles in the Process of Writing the Constitution of Papua New Guinea' (PhD Thesis, Queensland University of Technology, 2005) 235 n 117 <https://eprints.qut.edu.au/16071/1/Sam_Kari_Thesis.pdf>, archived at <https://perma.cc/VS25-VGQ5>.

66 Wolfers (n 7) 318; Denoon (n 41) 121.

67 Wolfers (n 7) 339.

68 ibid.

69 Unlike the House of Assembly, which was established under Australian law, the National Constituent Assembly was self-authorised: ibid 342.

70 ibid.

71 Ritchie, 'Defining Citizenship for a New Nation' (n 8) 160.

72 The *Constitution of the Independent State of Papua New Guinea*, s 65(3) ('*PNG Constitution*') defines an 'adjacent area' in line with the CPC's recommendation: ie Irian Jaya, the British Solomon Islands or the Torres Strait Islands.

citizen' and, in s 65(2), that a person born outside PNG before Independence Day would be regarded as a citizen from Independence Day as long as they had two grandparents born in PNG and registered within a year of Independence Day. However, in line with the CPC's recommendations, the provisions are subject to sub-s (4) which provides that

> Subsections (1) and (2) do not apply to a person who—
>
> (a) has a right (whether revocable or not) to permanent residence in Australia; or
> (b) is a naturalised Australian citizen; or
> (c) is registered as an Australian citizen under Section 11 of the *Australian Citizenship Act 1948–1975* of Australia;[73] or
> (d) is a citizen of a country other than Australia,
>
> unless that person renounces his right to residence in Australia or his status as a citizen of Australia or of another country in accordance with Subsection (5).[74]

In addition, s 64(1), which overrides the other sections dealing with citizenship in Part IV of the *PNG Constitution*, provides that 'no person who has a real foreign citizenship may be or become a citizen'.[75] Section 64(4) delimits the concept of 'real foreign citizenship' by stating

> 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 ban on dual citizenship was strongly recommended by the CPC and very much supported by the Somare Government.[76]According to the CPC,

> The people of Papua New Guinea have told us clearly and firmly that they do not believe that a person can be fully committed to more than one country. In making this point, they have frequently resorted to imagery; no man, it is said can stand in more than one canoe.[77]

PNG policy makers were aware that most non-Indigenous inhabitants of PNG wanted to retain their existing citizenship, even if they became PNG citizens. However, while accepting that non-Indigenous inhabitants could make important contributions to the PNG economy, policy makers were concerned that those who

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73 This provision allowed a person born outside Australia to an Australian citizen parent (or mother, if born out of wedlock) to claim Australian citizenship through descent by registration of the birth at an Australian consulate within five years of its occurrence. For the purposes of the *Australian Citizenship Act 1948* (Cth), 'Australia' was defined as including 'the Territories that are not trust territories' (s 5(1)).

74 *PNG Constitution* (n 72) s 65(5) enabled people with two PNG born grandparents who had foreign citizenship (or right of permanent residence in Australia) to become PNG citizens by renouncing their foreign citizenship (or right of permanent residence) within two months of Independence Day.

75 Those who have not yet attained the age of 19 are given until that age to renounce any other citizenship: *PNG Constitution* (n 72) s 64(2).

76 *PNG CPC Report 1974* (n 52) ch 4 [16]; Ritchie, 'Defining Citizenship for a New Nation' (n 8) 150–52.

77 ibid ch 4 [88].

acquired PNG citizenship but also retained another 'real' citizenship would have no incentive to work for PNG's betterment as opposed to their own. Unlike the Indigenous inhabitants, if life in PNG became too difficult or the obligations of PNG citizenship too onerous, dual citizens would have the option of abandoning the country. In short, providing for dual citizenship would not benefit PNG but rather would 'only confer additional benefits upon' the already 'privileged and mobile' non-Indigenous inhabitants.[78]

IV A Responsibility to Prevent Post-Independence Statelessness?

The Australian Government had to decide what its policy response should be to PNG inhabitants who did not become automatic PNG citizens on Independence Day. As Australia's understanding of the precise parameters of its obligations under international law to prevent statelessness was an important factor in formulating its policy response, this part begins with an examination of the international position. It then moves on to a detailed examination of the interactions between the Prime Minister, Minister for Labor and Immigration, Minister for Foreign Affairs and Attorney-General and their respective departments to discern the reasoning behind the policy position eventually announced on 20 August 1975. The announcement stated that Australian citizens and APPs who did not acquire PNG citizenship automatically on Independence Day (or by application thereafter) would retain their existing status pending a joint review to be conducted by the Australian and PNG governments not later than two years after Independence.

A *The International Law Position*

As previously discussed, the CPC had recommended that only persons with two or more Indigenous grandparents[79] should qualify for automatic citizenship on C-Day. The CPC acknowledged that there were some people born in PNG who were neither Australian citizens with a right of residence in metropolitan Australia nor had two Indigenous grandparents. The people in this category included those descended from the Malays and Chinese who had settled in PNG during the colonial era and those with only one Indigenous grandparent.[80] The CPC expressed the view that, as the outgoing colonial power and a party to the *Convention on the Reduction of Statelessness*[81] ('*1961 Convention*'), it was Australia's responsibility to ensure that such people were not stateless after C-Day by granting them 'full Australian citizenship rights and privileges' on that day.[82]

It is doubtful that international law imposed any obligation on Australia as the outgoing colonial power to ensure that the inhabitants of TPNG were not left stateless after independence. The International Law Commission ('ILC'), after looking into the matter in the late 1990s, came up with the Draft Articles on

78 ibid ch 4 [16].

79 See n 53 for the definition of an Indigenous grandparent.

80 *PNG CPC Report 1974* (n 52) ch 4 [32].

81 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('*1961 Convention*').

82 *PNG CPC Report 1974* (n 52) ch 4 [34].

Nationality of Natural Persons in relation to the Succession of States.[83] Draft Article 5 provides:

> Subject to the provisions of the present draft articles, persons concerned having their habitual residence in the territory affected by the succession of States are presumed to acquire the nationality of the successor state on the date of such succession.

Although the Draft Articles were intended not only to codify but also progressively develop the rules of international law, John Quigley notes that this proposition reflected the 'combined effect of human rights concepts and of State practice'.[84] On the other hand, the ILC expressly stated that the term 'persons concerned' encompasses 'only individuals who, on the date of the succession of States, had the nationality of the predecessor State and whose nationality may thus be affected by that particular succession of states.'[85] Similarly, Draft Article 4 provides:

> States concerned shall take all appropriate measures to prevent persons who, on the date of the succession of States, *had the nationality of the predecessor State* from becoming stateless as a result of such succession [emphasis added].

The commentary on this Draft Article underscores that the Article does not 'encompass persons resident in the territory of the successor State who had been stateless under the regime of the predecessor State', though the successor State 'has certainly a discretionary power to attribute its nationality to such stateless persons'.[86] In short, international law may have required PNG to give its nationality to Australian-citizen Papuans habitually resident in PNG but it imposed no obligation on either PNG or Australia to give their nationality to stateless APPs.

Australia's obligations under the *1961 Convention* were a different matter. At the time that Australia was preparing for accession to the *1961 Convention*, TPNG was an external territory of Australia. Article 15 of the *1961 Convention* provides:

> 1. This Convention shall apply to all non-self-governing, trust, colonial and other non-metropolitan territories for the international relations of which any Contracting State is responsible; the Contracting State concerned shall, subject to the provisions of paragraph 2 of this article, at the time of signature, ratification or accession, declare the non-metropolitan territory or territories to which the Convention shall apply ipso facto as a result of such signature, ratification or accession.

Paragraph 2 provides for the situation in which a non-metropolitan territory is not treated as one with the metropolitan territory for the purpose of nationality or domestic practice requires the consent of the non-metropolitan territory to be obtained for the application of the *1961 Convention* to it. This was the situation with TPNG. The TPNG Government decided that it did not wish the *1961*

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83 Although the International Law Commission ('ILC') did not expressly address the situation of newly independent states, it took the view that the Draft Articles would also cover those situations: see ILC, *Report of the International Law Commission on the Work of its Fifty-First Session*, Supp No 10, UN Doc A/54/10 (3 May–23 July 1999) 20–45 (*'Draft Articles on Nationality*').

84 John Quigley, 'Mass Displacement and the Individual Right of Return' (1998) 68 *British Yearbook of International Law* 65, 107.

85 *Draft Articles on Nationality* (n 83) 26.

86 ibid 28.

Convention to apply to the territory.[87] Accordingly, upon Australia's accession, it did not declare TPNG to be a non-metropolitan territory to which the *1961 Convention* applied.[88]

Australia, however, acceded to the *1961 Convention* on 13 December 1973. It entered into force for Australia and generally on 13 December 1975.[89] Although the *1961 Convention* would only come into force after PNG independence, the Attorney-General's Department acknowledged in July 1974 that, upon depositing the instrument of accession on 13 December 1973, Australia became obliged to refrain from acts which would defeat its object and purpose.[90]

Article 8(1) of the *1961 Convention* provides that, subject to exceptions that are not relevant for present purposes, 'A Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless.' The Attorney-General's Department thought the better view was that Australia would be in breach of art 8 if it legislated to deprive persons of existing Australian citizenship in circumstances where they were not granted PNG citizenship.[91] According to the Attorney-General's Department, however, art 8 did not apply to APPs because they did not have Australian citizenship. This meant that Australia 'would not be acting inconsistently with the Convention if it allowed these people to remain stateless after Papua New Guinea becomes independent.'[92]

B *Deciding the Australian Approach*

Whitlam believed that it was morally wrong and also a blot on its international reputation for Australia to continue to be a colonial power.[93] He started calling for PNG independence from 1960 against the position taken by the then Labor leader, Arthur Calwell.[94] Whitlam maintained his position after gaining the Labor

87 Letter from Chief Minister to PM Whitlam, 1 November 1973 (archived at National Archives of Australia, A1838, 932/3/2 PART 2).

88 In 1982, a Department of Foreign Affairs official expressed the view that arts 15(2) and (3) required Australia to formally notify the depository that the treaty would not apply to the Territory of Papua New Guinea ('TPNG') and observed that no such notification had been given at the time of accession or subsequently: Attachment to Internal Foreign Affairs Memo concerning Convention on the Reduction of Statelessness 1961 Territorial Application to K Berry UN Legal from W M Bush, Treaties Section, 14 January 1982 (Document, archived at National Archives of Australia, A1838, 932/3/2 Part 2). Regardless of whether such a notification was required, the independent state of PNG has never been considered a party to the *1961 Convention*.

89 *1961 Convention* (n 81) art 18(1). This is because art 18(1) of the *1961 Convention* provided for the treaty to enter into force two years after the deposit of the sixth instrument of ratification or accession. Australia's ratification was the sixth instrument.

90 Letter from Attorney-General's Department to Secretary of the Department of Prime Minister & Cabinet, 29 July 1974 (archived at National Archives of Australia, A1209, 1975/2970) ('Letter from AGs Dept, 29 July 1974') referring to arts 15 and 18 of the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force for Australia and generally on 27 January 1980) ('*VCLT*'). Australia acceded to the *VCLT* on 13 June 1974.

91 Letter from AGs Dept, 29 July 1974 (n 90). On the other hand, it also pointed out that nothing in the *1961 Convention* required a contracting state to grant a right of residence to its citizens: ibid.

92 ibid.

93 Michael Kirby, 'Whitlam as Internationalist: A Centenary Reflection' (2016) 39(3) *Melbourne University Law Review* 850, 878–79.

94 Denoon (n 41) 79.

leadership in 1967 and finally got it adopted as Labor Party policy in 1971.[95] Like Somare, Whitlam was aware that most people in TPNG were initially wary about the prospect of separation from Australia[96] but as far as he was concerned, PNG independence was 'not negotiable'.[97]

Another plank of Labor policy going into the 1972 election was the adoption of a racially non-discriminatory immigration and citizenship policy.[98] In late 1973, the *Nationality and Citizenship Act 1948* (Cth) was renamed the *Australian Citizenship Act 1948* (Cth) and amended to specify universally applicable eligibility criteria for Australian citizenship. Generally speaking, a person could be granted citizenship upon satisfying the Minister that:

- they had resided in Australia[99] and/or New Guinea for at least three years in the preceding eight years, including continuously during the year immediately preceding the grant of citizenship;
- they intended to reside in Australia or New Guinea after the grant of citizenship;
- they were of good character; and
- they had an adequate knowledge of English and the responsibilities and privileges of Australian citizenship.[100]

Further, the Department of Labor and Immigration instructed staff at all overseas posts that race was to be disregarded as a factor in the selection of migrants.[101] This marked the formal end of the 'White Australia' policy.

In August 1974, Peter Bayne, then Legal Counsel for the CPC, asked the Australian Government, 'What are the ways in which a person born in Papua, and a person born in New Guinea, may acquire a right of permanent residence in Australia?'[102] Later that month, the Department of Foreign Affairs addressed the question in a cable to its Office in Port Moresby by referring to the Cabinet decisions made between 1957 and 1963 and then noting: 'These earlier decisions have to some extent been overtaken by the introduction of new global immigration policies in 1973 but have not, to date, been reviewed in light of these policies.'[103] However, in a further cable sent to the Office in Port Moresby on 5 September

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95 Denoon (n 41). Ironically, Whitlam managed to convert the Liberal Prime Minister, John Gorton, even before he converted his own party, with the result that independence for PNG was also Coalition policy from 1970/71: ibid 80. Whitlam's zeal, however, was not matched by Gorton or his successors: ibid 100.

96 Kirby (n 93) 879.

97 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 October 1972, 2298 (Edward Gough Whitlam, Prime Minister).

98 Michael Klapdor, Moira Coombs and Catherine Bohm, 'Australian Citizenship: A Chronology of Major Developments in Policy and Law' (Background Note, Parliamentary Library, 2009) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BN/0910/AustCitizenship>, archived at <https://perma.cc/7FNT-AJME>.

99 The definition of 'Australia' included the Territory of Papua until 1975 when the *Acts Interpretation Act 1901* (Cth) s 17(a) limited 'Australia' to the area comprising the States and internal Territories.

100 *Australian Citizenship Act 1948* (n 73) s 14.

101 Victoria Mence, Simone Gangell and Ryan Tebb, 'A History of the Department of Immigration — Managing Migration to Australia' (Research Paper, Department of Immigration and Border Protection, June 2015) 51.

102 Letter from Peter Bayne, Legal Counsel to Mr Jolley, First Secretary, Immigration Australia Office, 12 August 1974 (archived at National Archives of Australia, A10865, G111 Part 2) ('Letter from Peter Bayne, 12 August 1974').

103 Cable from Department of Foreign Affairs Canberra to Port Moresby, 23 August 1974, (archived at National Archives of Australia, A1838, 3080/9/1 Part 1).

1974, the Department of Foreign Affairs made no mention of Cabinet decisions of the late 1950s and early 1960s. Instead, it advised that the answer to Bayne's question was that Australia's immigration policy was 'applied on a global basis, without discrimination on the basis of race, nationality or colour' but that there were four distinct migrant categories:[104]

1. Spouses, fiancé(e)s, dependent children and dependent parents of Australian residents, 'who may be admitted subject only to health and character requirements';
2. Non-dependent children, siblings and parents sponsored by Australian residents, who were required to show that they would be 'economically viable', would 'fit into the Australian community', were medically fit, had a satisfactory character and had a 'sincere intention of making a permanent home in Australia';
3. More distant relatives and friends sponsored by Australian residents, who met the personal criteria applying to the second category and also met certain occupational criteria; and
4. Unsponsored applicants who met the personal criteria applying to the second and third category and also met certain occupational criteria.

Bayne had also asked whether there was 'any distinction dependent on whether the person is born in Papua rather than New Guinea'.[105] The response to this question was a succinct 'No.'[106]

On 10 September 1974, the Minister for Labor and Immigration, then Clyde Cameron, wrote to Prime Minister Whitlam,[107] the then Acting Minister for Foreign Affairs, Lionel Frost Bowen,[108] and the then Attorney General, Lionel Murphy,[109] proposing that the approximately 2.5 million Australian citizens and APPs who automatically became PNG citizens upon independence should cease to be Australian citizens or APPs. Cameron proposed further that the balance — that is, those who did not qualify for automatic citizenship — should retain their status under Australian law 'for the time being'. Cameron noted that there were estimated to be about 8,000 Asians and mixed-race persons in PNG who would not become PNG citizens if the CPC's recommendations were implemented.[110] Of these, about 4,000 had taken advantage of the Cabinet decisions in the late 1950s and early 1960s that enabled them to acquire Australian citizenship and/or the right of residence in metropolitan Australia.[111] Cameron proposed in relation to the remainder that any applications for entry to Australia 'should be subject only to minimum requirements as to health, suitability for settlement and counselling on

104 Cable from Canberra to Port Moresby, 5 September 1974 (archived at National Archives of Australia, A10865, G111 Part 2) ('5 September 1974 Cable').

105 Letter from Peter Bayne, 12 August 1974 (n 102).

106 5 September 1974 Cable (n 104).

107 Letter from Minister for Labor and Immigration to Prime Minister, 10 September 1974 (archived at National Archives of Australia, A1209, 1975/415) ('Letter from Minister for Labor and Immigration, 10 September 1974').

108 Letter from Lionel Bowen, Acting Minister for Foreign Affairs to Minister for Labor and Immigration, 3 October 1974 (archived at National Archives of Australia, A1838, 1468/1/300) ('Letter from Lionel Bowen, 3 October 1974').

109 Referred to in Letter from AG to Minister for Labor and Immigration, 25 November 1974, (archived at National Archives of Australia, A1209, 1975/415).

110 Letter from Minister for Labor and Immigration, 10 September 1974 (n 107).

111 ibid.

employment and accommodation'.[112] He added: 'Should cases involving indigenes arise, these would need to be dealt with on their merits.'

Bowen responded to Cameron agreeing that where Asians and mixed-race persons who were Australian citizens or APPs, but without a right of entry into Australia or the ability to obtain PNG citizenship, applied to enter Australia, they should be subject only to minimum requirements.[113] He added that, 'in extreme cases, it could be desirable to waive even minimum requirements'.[114] Further, after noting that the 'great majority of Papua New Guineans' — meaning in this context, those regarded as Indigenous people by Australia — would obtain automatic citizenship, Bowen expressed the view that those who did not 'should be treated in the same way as those people of mixed race or Asian descent'.[115]

Whitlam's initial response was that Australian citizens and APPs in PNG who did not obtain automatic PNG citizenship should retain their status under Australian law 'only if they seek and are refused Papua New Guinea citizenship'.[116] Whitlam also decreed that there should be 'no differentiation in processing entry [into Australia] for residents of Papua New Guinea',[117] although what he meant by the latter stipulation was not clear to officials at the time.[118]

Lionel Murphy had a different concern about Cameron's proposal. As a matter of Australian law, there was no reason why APPs could not retain that status after PNG became independent.[119] However, Murphy questioned whether 'as a matter of international law and practice, it would be permissible or proper to continue to treat these persons as "Australian [P]rotected [P]ersons"'.[120] Citing the decision of the International Court of Justice in the *Nottebohm Case*,[121] he expressed the view that if Australia purported to exercise diplomatic protection in respect of APPs resident in PNG, who had no effective link to Australia, its ability to do so 'would not necessarily be recognised by other States'.[122] The issue of diplomatic protection was considered to be a live one. At a later interdepartmental meeting,[123]

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112 ibid.

113 Letter from Lionel Bowen, 3 October 1974 (n 108).

114 ibid.

115 ibid.

116 Letter from Prime Minister to Minister for Labor and Immigration, 24 October 1974 (archived at National Archives of Australia, A1209, 1975/415).

117 ibid.

118 Both stipulations originated with Whitlam rather than his Department. He wrote them on the margins of the letter from the Minister for Labor and Immigration dated 10 September 1974 (n 107), instructing the Department to respond accordingly. Moreover, at an interdepartmental meeting held on 27 November 1974, officials from the Department of Prime Minister and Cabinet 'felt unable to elaborate on the Prime Minister's views as expressed in his letter': 'Record of Interdepartmental Meeting on Citizenship in Papua New Guinea' (Document, archived at National Archives of Australia, A1209, 1975/415, 27 November 1974) ('Record of Interdepartmental Meeting on Citizenship in PNG').

119 Letter from Attorney-General to Minister for Labor and Immigration, 25 November 1974 (archived at National Archives of Australia, A1209, 1975/415) ('Letter from AG, 25 November 1974').

120 ibid.

121 *Nottebohm Case* (*Liechtenstein v Guatemala*) *(Judgment)* [1955] ICJ Rep 4.

122 Letter from AG, 25 November 1974 (n 119).

123 On 27 November 1974, officials from the Department of Labor and Immigration, the Department of Prime Minister and Cabinet, the Attorney-General's Department, the Department of Foreign Affairs and the Papua New Guinea Office met to discuss how to proceed in light of the Prime Minister's and Attorney-General's responses to the Minister for Labor and Immigration's letter of 10 September: Record of Interdepartmental Meeting on Citizenship in PNG (n 118).

it was pointed out that continuing APP status after independence 'entailed a group of people Australia was obliged to protect, yet who lived in another country and were possibly a focus for discriminatory treatment.'

On 4 December 1974, Cameron wrote back to Whitlam saying:

> I believe that if we were to follow the course you suggest we would need to take into consideration our obligations under the *International Convention on the Reduction of Statelessness* which requires that Australia should not take legislative action to deprive Australian citizens of their Australian citizenship if it would render them stateless. Although there would be no such inhibition under the *Convention* in relation to people who have protected person status, I believe that we have a moral obligation with respect to these also …
>
> At this stage we can make no real estimate of what the precise situation will be, but I do believe that it may not be practicable to require that those people who are already Australian citizens or who have protected person status and who do not automatically become PNG citizens on Independence should be allowed to retain that status only if they sought and were refused PNG citizenship. If they did not wish to apply for PNG citizenship, and we were then to consider depriving them of their Australian citizenship or protected person status, the question of our obligations under the UN *Convention* would arise.[124]

Cameron added that he was only proposing continuance of APP status for a period of perhaps three years 'by which time we would expect the various alternatives open to [APPs] to have been clarified'.[125]

Whitlam's response scrawled on Cameron's letter was:

> The view I have already expressed is still my view, subject always to our obligations under the *Convention*. We should not encourage an Australian enclave in PNG. We should not hold out false and divisive prospects of continuing Australian citizenship to residents of PNG (eg the residents of Papua, a colony).[126]

After further interdepartmental meetings and correspondence, Cameron wrote to Whitlam on 22 May 1975 expressing 'complete agreement' with Whitlam's desire not to encourage an Australian enclave in PNG.[127] However, he informed Whitlam that the Attorney-General's Department had advised that the *1961 Convention* did not permit Australia to deprive a person of Australian citizenship on the ground that the person had not applied for PNG citizenship.[128] He also drew Whitlam's attention to amendments recently made to the PNG *Migration Act* which provided that persons who were not PNG 'nationals' as defined, or, after enactment of PNG citizenship legislation, PNG citizens, could be refused permission to remain in the

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124 Letter from Minister for Labor and Immigration to Prime Minister, 4 December 1974 (archived at National Archives of Australia, A1209, 1975/415) ('Letter from Minister for Labor and Immigration, 4 December 1974').

125 ibid.

126 This was accompanied by an instruction to 'write again to Cameron': Handwritten annotation on Letter from Minister for Labor and Immigration, 4 December 1974 (n 124).

127 Letter from Minister for Labor and Immigration to Whitlam, 22 May 1975 (archived at National Archives of Australia, A1209, 1975/415) ('Letter from Minister for Labor and Immigration, 22 May 1975').

128 ibid. The Attorney-General's Department had previously provided this advice directly to the Department of Prime Minister and Cabinet referring specifically to art 8(1) of the 1961 Convention: Letter from Secretary of Attorney-General's Department to Secretary of Prime Minister & Cabinet, 21 February 1975 (archived at National Archives of Australia, A1209, 1975/415).

country.[129] He pointed out that this meant that the PNG authorities themselves had the necessary power to prevent the development of an Australian enclave if they wished.[130]

In light of the foregoing and Whitlam's views, Cameron put forward a modified proposal for dealing with Australian citizenship and related matters in the context of PNG's approaching independence. The proposal was as follows:[131]

1. As previously approved by Whitlam, Australian citizens and APPs who automatically became PNG citizens upon independence should cease to be Australian citizens or APPs from that date.
2. Australian citizens and APPs who did not automatically become PNG citizens should retain their existing status for the time being.
3. Before independence but after the PNG constitutional provisions on citizenship had been finally adopted, the Australian Government should issue a statement covering the previous points and also expressing the hope that Australian citizens and APPs who did not automatically become PNG citizens but resided permanently in PNG would give positive consideration to applying for PNG citizenship if eligible. The statement should also say that at a date not later than three years after independence the status of any remaining APPs would be reviewed in consultation with the PNG Government.

In an internal memorandum commenting on Cameron's proposal, a senior official of the Attorney-General's Department informed the Secretary that the reason for maintaining the status quo for three years post-independence was that the Department of Labor and Immigration had 'strongly argued that it would be unwise to grant [APPs] Australian citizenship on [i]ndependence or shortly thereafter since there is no accurate information on the numbers of people involved or on their situation.'[132] The official noted that Australia had no obligation under international law with respect to APPs in PNG after PNG ceased to be a Trust Territory. It was therefore a policy question whether Australia should continue to take some responsibility for those APPs (including children born to them, if those children would otherwise be stateless).[133] He expressed the view that, 'since the retention of the protected person status after [i]ndependence represents somewhat of an anomaly at international law', the proposed review 'should aim to put an end to the protected person status in PNG once and for all'.[134] He added: 'since the *International Convention on the Reduction of Statelessness* has no application in this situation, consideration could be given to depriving persons who are eligible to apply for PNG citizenship and fail to do so, of their Australian protected person status.'[135]

After taking advice from his Department,[136] Whitlam wrote to the new Minister for Labor and Immigration, Jim McClelland, in early July 1975 saying that he

129 Letter from Minister for Labor and Immigration, 22 May 1975 (n 127).
130 ibid.
131 ibid.
132 Internal Attorney-General's Department memo from First Assistant Secretary Pat Brazil to Secretary, 23 June 1975 (archived at National Archives of Australia, A5034, SR 1974/3060).
133 ibid.
134 ibid.
135 ibid.
136 Internal Department of Prime Minister & Cabinet memo from A M Ponsford to PM, 26 June 1975 (archived at National Archives of Australia, A1209, 1975/415).

accepted Cameron's modified proposal.[137] In relation to entrance into Australia by PNG residents, Whitlam clarified that the point he was making was that 'there should be no differentiation in the criteria applied or the administrative procedures followed in processing entry to Australia for all residents of Papua New Guinea whatever their racial grouping'.[138] However, this was not to say that Australian citizens had to be treated administratively in the same way as PNG citizens.[139]

On 20 August 1975, following finalisation of the *PNG Constitution* and as recommended by Cameron, the Minister for Labor and Immigration and the Minister for Foreign Affairs released a joint statement. The statement made the following announcements:[140]

1. Australian citizens and APPs who automatically became PNG citizens on PNG Independence Day would cease to be Australian citizens/APPs on that day.
2. Other Australian citizens and APPs would retain their existing status in the immediate post-independence period but would lose it upon applying for and receiving PNG citizenship. 'It was the hope of the Australian Government that those Australian citizens and Australian [P]rotected [P]ersons who did not automatically become Papua New Guinea citizens and who intended to live permanently in Papua New Guinea would give positive consideration to applying for Papua New Guinea citizenship if they were eligible to do so.'
3. The Australian Government had agreed with the PNG Government that at a date no later than two years after independence the status of any remaining APPs would be reviewed in consultation with the PNG Government.
4. Persons resident in PNG who required prior authority to enter Australia and who wished to do so after independence would be considered against the same criteria as applied to other people entering from abroad. However, it was acknowledged that some applications for entry might warrant special consideration.

V AUSTRALIAN PROTECTED PERSONS AFTER PNG INDEPENDENCE

Taking effect from 16 September 1975, Australian law was amended to provide that a person who was an Australian citizen immediately before Independence Day and on that day became a citizen of PNG under its *Constitution* would cease on that day to be an Australian citizen.[141] Taking effect from the same date, the

137 Letter from Prime Minister Whitlam to Minister for Labor and Immigration, 8 July 1975 (archived at National Archives of Australia, A1209, 1975/415).

138 ibid.

139 ibid.

140 'Foreign Affairs, Papua New Guinea — Citizenship and Related Matters' (Press Release No M58, 20 August 1975) (archived at National Archives of Australia, A9737, 1991/80800 Part 1).

141 *Papua New Guinea Independence (Australian Citizenship) Regulations 1975* (Cth) ss 2, 3 and 4. The *Papua New Guinea Independence Act 1975* (Cth) s 6 authorised the making of regulations relating to PNG independence, including regulations modifying or adapting any Act.

definition of an 'Australian Protected Person' in reg 5 of the *Australian Citizenship Regulations* was amended to mean:[142]

(a) a person who immediately before 16 September 1975 was an Australian Protected Person as then defined and who has not acquired the citizenship of any country;
(b) a person born on or after 16 September 1975 who has not acquired the citizenship of any country and one of whose natural parents was, at the time of birth, an Australian Protected Person; or
(c) a person who on or after 16 September 1975 was registered as an Australian Protected Person[143] and has not acquired the citizenship of any country.

In November 1976, the Australian Government informed Parliament that APP status had been retained for a 'transitional period of [three] years' during which it was hoped that APPs would have 'opted for New Guinea citizenship or Australian citizenship where eligible for the latter'.[144] In January 1977, in advance of a planned visit to PNG, the Australian Prime Minister was briefed that it was 'not known how many (if any)' APPs there were but inquiries would be made with a view to completing by September 1977 the review foreshadowed in the joint statement of 20 August 1975.[145] On 12 September 1977, the Secretary of the Department of Immigration wrote to the Secretary of the Department of Foreign Affairs requesting that, 'prior to any action being taken to commence formal discussions with the Papua New Guinea authorities', the Australian High Commission in Port Moresby be asked to provide the following information:[146]

(a) an estimate, if available, of the numbers involved;
(b) the problems, if any, being encountered by Australian Protected Persons which have come to the notice of the High Commission; and
(c) the views, if any, which have been expressed by PNG officials or by community groups relating to the future status of protected persons.

This is the last reference to the review that could be found in available archival records.[147] There is no evidence in the accessible archive, press or elsewhere, that

142 Amendment to the *Australian Citizenship Regulations* reg 5 made by *Statutory Rules No 181 of 1975* (Cth) ss 1 and 3. It was noted in the Explanatory Statement (archived at National Archives of Australia, A9737, 1991/80800 Part 1) that these provisions would be reviewed within two years.

143 A woman who was not a citizen of any country could, at the Minister's discretion, be registered as an APP upon marriage to an APP: *Australian Citizenship Regulations* reg 5(3) and (4).

144 Commonwealth, *Parliamentary Debates*, Senate, 4 November 1976, 1682 (Margaret Guilfoyle, Minister for Social Security).

145 Department of Immigration and Ethnic Affairs, 'Extract from Officials' Brief for the Prime Minister's Visit to Papua New Guinea, 7–11 February 1977' (Document, archived at National Archives of Australia A1838, 3081/1/4 TEMPORARY, 19 January 1977).

146 Memo from Secretary of the Department of Immigration to Secretary Department of Foreign Affairs (SECRET), 12 September 1977 (archived at National Archives of Australia, No A1838, 1634/207/2 PART 2).

147 While most Commonwealth archival records relating to this period are in the open access timeframe stipulated by the *Archives Act 1983* (Cth), there are provisions which exempt access to this material on the basis that it could: damage Australia's security, defence or international relations (s 33(1)(a)); reveal confidential information provided to the Australian Government by a foreign government or an international organisation (s 33(1)(b)); or be a breach of confidence (s 33(1)(d)).

formal consultations with PNG authorities or a formal review ever took place. Regulation 5 remained in the *Australian Citizenship Regulations* unchanged from 16 September 1975 until its repeal on 21 May 1987.[148]

In the financial years 1975–76 to 1981–82 inclusive, a total of 158 APPs were granted Australian citizenship.[149] Unfortunately, there is no information available about the number of citizenship applications made by APPs during the same period. From the 1982–83 financial year onwards, 'Australian Protected Person' was no longer included as an 'original nationality' in the Australian citizenship statistics. Whatever the reasons, APPs ceased to exist as a legal category on 1 May 1987 and became lost to the accessible historical record even earlier. It may well be the case that everyone who retained or obtained APP status after PNG Independence Day subsequently obtained the citizenship of PNG, Australia or a third country; we just do not know.

VI CONCLUSION

Despite near exhaustive archival research and engagement with key scholars in the field, we have uncovered no definitive answer to the question of the ultimate fate of APP inhabitants of PNG who were left stateless at independence. Consequently, rather than offering legal certainty, this article looks outside of what Anne Orford calls the imagined 'closed world of international law' for the 'possibility of openness to the social environment'.[150] In other words, without a definitive legal or regulatory solution to the problem of stateless APPs, this article has drawn on the social and political context accessible in the archival material to navigate towards the likely outcome to this conundrum. Indeed, it is suggested that this lacuna, now laid bare, may be further investigated, perhaps ethnographically or using other methods, facilitating engagement with those who experienced statelessness at PNG's independence.

There are, however, some useful conclusions to be drawn from the existing evidence and the historical context. The link between racialised citizenship and de facto or de jure statelessness is evident in the experience of both Australian citizens without right of entry and APPs, particularly those categorised as Asian

148 *Statutory Rules No 87 of 1987* reg 3. According to the Explanatory Statement, the repeal of this and two other regulations was related to the repeal of the British subject status provisions of the *Australian Citizenship Act 1948* (n 73). However, this explanation is clearly erroneous in relation to reg 5 as APP status and British subject status were unrelated. The supporting provision for reg 5 was the *Australian Citizenship Act 1948* s 5(3A). This provision was repealed by the *Australian Citizenship Amendment Act 1984* (Cth), which came into force on 1 May 1987. The Explanatory Memorandum accompanying the amending Act provides no explanation for the repeal.

149 *Australian Citizenship Act — Annual Return, for 1975–76* (Parliamentary Paper No 1924, 1976) (127 grants); *Australian Citizenship Act — Annual Return, for 1976–77* (Parliamentary Paper No 1790, 1977) (20 grants); *Australian Citizenship Act — Annual Return, for 1977–78* (Parliamentary Paper No 2062, 1978) (7 grants); *Australian Citizenship Act — Annual Return, for 1978–79* (Parliamentary Paper No 1575, 1979) (1 grant); *Australian Citizenship Act — Annual Return, for 1979–80* (Parliamentary Paper No 368, 1980) (no grants); *Australian Citizenship Act — Annual Return, for 1980–81* (Parliamentary Paper No 594, 1981) (2 grants); *Australian Citizenship Act — Return for Year 1981–1982* (Parliamentary Paper No 89, 1984) (1 grant).

150 Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021) 296.

or mixed-race under the colonial administration.[151] Indeed, where 'statelessness is often the result of systemic racial discrimination',[152] in the case of PNG, it was the systematic instantiation of separate and superior privileges according to racial categories that motivated those who had been left out to use citizenship as a transformative device.

For Australia's part, it may have been politically convenient to let the status of APPs and Australian citizens without right of entry remain without formal resolution in law or regulation but this does not mean that nothing has been learnt. Looking at the politics and at the historical moment tells a story of Australia's efforts to formally de-racialise its own citizenship laws in line with the prevailing wish to be rid of the legacy of the 'White Australia' policy. In contrast, on PNG's part, racialised categories were also put to work in the service of social justice; specifically, to achieve some social or economic justice for those who had been previously denied the privileges and advantages enjoyed by the non-Indigenous categories of PNG inhabitants.

151 See Michelle Foster and Timnah Rachel Baker, 'Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law?' (2021) 11(1) *Columbia Journal of Race and Law* 83, 85.

152 ibid.