

The Legal Expression of Slovenia and Australia's National Identity:

A comparative analysis of Slovenia and Australia's citizenship, immigration, rights and private international laws

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Abstract

Slovenia and Australia each have a national identity, although quite different. A national identity includes but is not limited language, culture, religion, democracy and its institutions, and the rule of law. National identity is a contested concept and can invoke different responses. Part of a state's national identity is conferred through citizenship. A state's legislation framework includes citizenship, immigration, rights and private international laws. These laws are used by a state to reinforce, underpin and strengthen its national identity. This thesis will discuss the public and private aspects of citizenship. The public constitutes the state developing laws for citizenship, immigration, rights and conflict of laws. The private constitutes those private activities undertaken by a citizen such as migrating from one state to another, and engaging other citizens in marriage and divorce. The rights of citizens also constitute the private as it enables a citizen protect themselves from other citizens and the state.

Slovenia has been under the rule of the Holy Roman Empire, the Habsburg Monarchy, the Austrian Empire, the Austro-Hungarian Empire, the Kingdom of Serbs, Croats and Slovenes (later renamed the Kingdom of Yugoslavia), Democratic Federal Yugoslavia, the Federal People's Republic of Yugoslavia. The Federal People's Republic of Yugoslavia would later become the Socialist Federal Republic of Yugoslavia and in 1990 the Republic of Slovenia was born. Both states have transitioned from being provinces of empires to fully independent states. Slovenia only achieved statehood in 1990-1 and has joined the European Union. Australia federated in 1901 and gradually achieved full independence from Britain during the twentieth century but still shares a Queen with Britain and some other members of the Commonwealth. Australia has a contested and confused national identity upon rejecting becoming a republic in 1999, and embracing multiculturalism. This thesis favors cosmopolitan societies with free movement of people subject to an orderly migration regime but takes account of the desire for national identity and social cohesion.

This thesis explores the historical development, and current day citizenship laws and national identities of Australia and Slovenia. Immigration is a pathway to citizenship and the respective laws are compared, although limited. A comparative analysis is undertaken of the express constitutional rights provided by both states to their citizens. The thesis also explores the role of citizenship in cross-border engagements such as marriage and divorce. Citizenship is multidimensional and has been known to include, and be used to define the legal status of a citizen. Citizenship is used to assist the state to integrate and unify its citizens. This thesis will demonstrate that citizenship contributes to national identity. This research has confirmed that there is currently no consensus of what citizenship will look like in the future. The comparative study will enrich the scholarly work in relation to citizenship for Australia and Slovenia.

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Declaration

I, Robert Walters, declare that the PhD thesis entitled: The Legal Expression of Slovenia and Australia's national identity: 'A comparative analysis of Slovenia and Australia's citizenship, immigration, rights and private international laws', is no more than 100,000 words in length including quotes and exclusive of tables, figures, appendices, bibliography, references and footnotes. This thesis contains no material that has been submitted previously, in whole or in part, for the award of any other academic degree or diploma. Except where otherwise indicated, this thesis is my own work.

Signature:



Date: 16/10/2016

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Chapter 1

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1.1 Introduction

Australia and Slovenia have had very different beginnings, but today they have similarities being both western democratic nations with similar values. Slovenia has had a national identity for centuries, well before the modern day independent Slovenian state emerged in 1991.¹ Australia's identity is a combination of indigenous culture, colonisation by the British and the migration of people from different countries throughout the world. Today Australia is a mixture of ethnic groups, making for a complex and multiple national identity.

This thesis explores the development of the two states and their citizenship laws to examine the effect of those laws on their national identities. In a globalising world, states must balance their peoples' desires for identity, shared culture and homogeneity with the need to interact with the wider world. This thesis explores how citizenship law, migration law, constitutional rights and private international law have affected this balance. It examines what each state can learn from the other, the European Union and the European Human Rights legal framework in formulating laws that both express identity and enable engagement with a globalising world.

Slovenia has been under the rule of the Austro-Hungarian Empire, the Kingdom of Serbs, Croats and Slovenes (later renamed the Kingdom of Yugoslavia), Democratic Federal Yugoslavia, and the Federal People's Republic of Yugoslavia. The Federal People's Republic of Yugoslavia would later become the Socialist Federal Republic of Yugoslavia and in 1991 the Republic of Slovenia was born. Today, Slovenia is a member of the European Union, which is

¹ Felicita Medved, *Nationality, Citizenship and Integration, A European Perspective*, Council of Europe, 2001, 2-30.

made up of 28 member states² developing its own citizenship, based on human rights and free movement.

Over the past century, Australia has been a destination country for many Slovenians.³ Upon Slovenia's independence in 1991, Slovenia had the ability to develop a modern day legal framework that included a constitution, citizenship, immigration, human rights and private international laws. Additionally, upon independence, the Slovene diaspora in Australia and other parts of the world played an important role in broadening the citizenship base. The diaspora pushed the Slovenian government to extend the citizenship laws to enable individuals who are descendants of Slovenes to obtain citizenship (discussed **chapter three**). The resulting effect was that Australian and Slovenians could have dual citizenship of the two states. Both states have established bilateral agreements to assist their respective citizens and dual citizens (discussed **chapter five**). Dual citizens can have an identity of both states.

National Identity Definition

For the purpose of this thesis, national identity is the collective imagination of the nation.⁴ National identity includes historic territory or homeland and common myths and historical memories, a shared culture and language.⁵ National identity⁶ is multidimensional,⁷ contestable and fluid in nature. Nationalism is a theory that every nation must have its own state.⁸

Nationalism, since the Treaty of Westphalia in 1648 has been used to build a world of nation states. The state can use national identity to foster unity amongst the population. Before Westphalia, the state system was based on kingdoms, empires and allegiance. Westphalia, did not do away with monarchs, empires or kingdoms, which lasted well into the 20th century.

² As at 30 June 2015, the European Union had 28 member states.

³ The first Slovene arrived in Australia in 1855, Immigration from Slovenia, <http://museumvictoria.com.au/origins/history.aspx?pid=54>, accessed 20 June 2015. In 2011, the number of people that arrived from the former Yugoslav Republics (post the breakup) resident in Australia was estimated to be 25,000 from Bosnia and Herzegovina, 48,828 from Croatia, 40,222 from the Former Yugoslav Republic of Macedonia and 20,167 people from Serbia. Slovenia recorded the least number of people resident in Australia at 4,955, with more than 17,000 individuals recording Slovenian ancestry. Australian Government, Department of Immigration and Citizenship, Community Information Summary, Slovenia born, <http://www.immi.gov.au/media/publications/statistics/comm-summ/pdf/slovenia.pdf>, accessed 22 February 2015. Australian Bureau of Statistics, 2011 Census, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/3202_0, accessed 21 February 2014. Also see **Appendix Three** – Slovenes Arriving in Australia.

⁴ Benedict Anderson, *Imagined Communities: Reflections On The Origin and Spread of Nationalism*, London: Verso, 1991. 7-8.

⁵ Anthony Smith, *National Identity*, London: Penguin, 1991, 14-15.

⁶ William Bloom, *Personal Identity, National Identity and International Relations*, Cambridge University Press, 1990, 52.

⁷ Anthony Smith, *National Identity and the Idea of European Unity*, International Affairs, 1992, 55-76.

⁸ Kaylan Bhandari, *Tourism and National Identity: Heritage and Nationhood in Scotland*, Channel View Publications, 2014, 22-24.

The Austro-Hungarian Empire was dismantled following the first world war through the Treaty of Versailles 1919. The ruling principle of the Treaty of Versailles was that each component nation of the empire would have its own state. However, for political reasons the Kingdom of Serbs, Croats and Slovenes was formed and not a nation state (discussed **chapter two**). The renaming to the Kingdom of Yugoslavia was an attempt to create a new nation for the kingdom that already existed. This was short lived as the Axis occupied the territory of current day Slovenia, dividing the territory between the Germans and Hungarians during world war two. The resistance to occupation by the Axis was divided by Serb nationalists and communists (Partisans cross-national), which resulted in civil war. The Partisans expelled the Axis in 1944 and Josip Broz Tito assumed leadership of Yugoslavia. He would attempt to create a single Yugoslav state and identity, which was a federal system based on the constituent nations. Yugoslavia would fail following the death of Josip Broz Tito 1980, which resulted in the rise of nationalism within each of the Republics (discussed **chapter two**). Slovenia would then become an independent state. This experience demonstrates that state based attempts to create national identity do not always succeed.

As further explained in **chapter two**, Slovenian identity has a long history. Slovenia has been an independent state for only 25 years, but a distinct Slovene language can be traced to the 12th century.⁹ The territory has fostered the current day identity of Slovenia and links to the church. When the opportunity came to establish a Slovenian independent state, it was founded on its language.¹⁰ Slovenia has recognised the Slovene language as the official language of the state within the Slovenian constitution.¹¹ Slovenia, today, presents a paradox of a nation state that is strongly engaged with the wider world. The state and the people have over the past 25 years transitioned from socialism within multinational Yugoslavia to an independent nation state. The state attempts to strengthen and retain its homogeneous society, while also catering for geographical based minorities and operating under the supranational polity of the European Union.

Australia was formed as a set of British colonies imposed on a continent that already had an indigenous population. The early period of Australia was not welcoming to non-whites, and ignored and persecuted the indigenous people. Following the Second World War Australia welcomed migrants from central and eastern Europe. In 1967, the Australian referendum bought the indigenous people under Commonwealth jurisdiction. As Australia expanded its migration

⁹ Aleš Črnič, Mirt Komel, Marjan Smerke, Ksenija Šabec and Tina Vovk, *Religious Pluralisation in Slovenia*, *Teorija in Praksa*, let. 50, 1/2013, 205-229.

¹⁰ Dimitrij Rupel, *Between National and European Identity: A view from Slovenia*, *Cambridge Review of International Affairs*, Vol 16, No 2, 2003.

¹¹ Article 11, Slovenian Constitution, *Official Gazette of the Republic of Slovenia*, Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

program, the white Australian policy would be abandoned, and Australia has welcomed ethnic groups from around the world for the past fifty years. The diversity of Australia is reflected with more than 200 ethnic groups that make up the population.¹² The indigenous population has many distinct groups and different languages, however they have never been formally recognised in the Constitution. The embrace of this diversity forms part of Australian identity. Australia continues to grapple with indigenous recognition. An Australian nation has gradually emerged and now combines indigenous heritage, British heritage, and migration from all corners of the world in a multicultural melting pot with a contested national identity.¹³ With the exception of some indigenous groups, Australia's minorities are mostly not geographically based within the state, although certain minorities have congregated in localised areas. Unlike Slovenia with its unique language, Australia shares English with many other countries but while it is not exclusive to Australia, it still forms an important part of Australian national identity.¹⁴ English is implicitly the official language of Australia, although it is not recognised in the constitution or by legislation. However, the current day citizenship laws require a person to successfully complete a test, which requires the individual to have a knowledge of the English language.

Slovenia and Australia's national identities have evolved and continue to evolve. A national identity cannot be imposed, but rather developed over a long period of time. Defining national identity can never be singular. National identity also involves inclusion, exclusion and discrimination (discussed **chapter two, three, four and five**).¹⁵

Citizenship Definition

Citizenship is the formal legal¹⁶ relationship¹⁷ between the individual and polity. Citizenship is a legal status and is the 'right' to have rights¹⁸ (civil and political).¹⁹ Citizenship is afforded by the state under national law. Citizens can undertake duties on behalf of the state such as serving in the military or one of the many institutions that govern the state. In the case of Slovenia, there is

¹² Akram Omeri, Lynette Raymond, *Diversity in the context of multicultural Australia: Implications for nursing practice*, In J. Daly, S. Speedy & D Jackson (Eds.), *Contexts of nursing: An introduction*, Ch. 19, 3rd Edition, Australia: Elsevier, Churchill Livingstone, 2009.

¹³ Mary Crock, *Defining Strangers: Human Rights, Immigrants and the Foundations for a Just Society*, Melbourne University Laws Review, Vol 31, 2007, 1050-1070.

¹⁴ James Jupp and Michael Clyne, *Multiculturalism and Integration: A Harmonious Relationship*, <http://press-files.anu.edu.au/downloads/press/p113381/html/intro.xhtml?referer=310&page=4>, accessed 12 October 2016.

¹⁵ Article 5, Slovenian Constitution, Official Gazette of the Republic of Slovenia, Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹⁶ *Ibid*, 6.

¹⁷ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002.

¹⁸ Hannah Arendt, *The Origins of Totalitarianism*, Harcourt, Brace and Company. New York, 1951, 266-298, in Daniel Tabb, *Statelessness and Columbia: Hanna Ardent and the Failure of Human Rights*, 2006, 40-52.

¹⁹ Thomas Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, 1950.

the added dimension of supranational rights afforded to them by the European Union. The European Union has developed its own citizenship, which has been conferred on all citizens of member states that make up the European Union. European citizenship has had little effect on establishing a broader European identity, and the European legal framework has ensured member states retain their identity (discussed **chapter four**). Similarly, the citizenship laws of the former Yugoslavia had little effect on establishing a broader Yugoslav identity (discussed in **chapter two**). The identity that has been projected by the nation state.

In the context of this thesis, both the public and private dimensions of citizenship will be discussed and analysed. The public side of citizenship is the legal relationship with the state. The private constitutes the private activities²⁰ a citizen undertakes in their daily lives such as marriage and being mobile across international borders (further discussed **Literature Review and chapter six**). Apart from citizenship being acquired by birth and descent, it may be acquired by naturalisation. Therefore, migration can be a pathway to citizenship. This thesis will examine the migration laws and the effect they have on the two states national identities (discussed **chapter five**).

The mass movement of people across international borders has resulted in citizens engaging in private activities such as marriage, divorce, paternity, child maintenance, parental responsibility, international adoption, purchasing property, inheritance and superannuation. Private international law helps facilitate these transnational activities. Exploring this in **chapter six** provides a more complete picture of the laws affecting migration and the daily lives of citizens in a globalised world.

Dual citizenship has gone some way to establishing a more global or regional concept of citizenship, by breaking down those barriers of entry, exit and stay. Dual citizenship has assisted states in retaining a connection with those citizens who are mobile. Slovenian citizens could then hold up to three citizenships. Firstly, Slovenian citizenship, secondly Australian citizenship and because the person is a Slovenian citizen they automatically assume citizenship of the European Union (discussed **chapter three**). Australian citizens could hold multiple citizenships, but not citizenship of a supranational polity. However, earlier British subject status came in three forms 1). British subjects permanently residing in Australia, 2). British subjects temporarily residing in Australia and 3). those individuals that were declared aliens and not British subjects.²¹

²⁰ Karen Knop, *The Private Side of Citizenship*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 101, 2007.

²¹ Kim Rubenstein, 'From Supranational to Dual to Alein Citizen: Australia's Ambivalent Journey' in Simon Bronitt and Kim Rubenstein (eds), *Citizenship in a Postnational World Australia and Europe Compared*, The Federation Press, 2008.

The Development of Citizenship

The development of citizenship law in Australia and Slovenia has been very different. Australia was colonised by the British, and its residents became British subjects. Up until federation in 1901, Australia had experienced an influx of people from Europe and Asia. After federation, one of the first acts of the new Commonwealth of Australia was the establishment of a restrictive policy approach that only allowed white people into the country. This restrictive approach continued through to post WWII, which saw the influx of people from central and eastern Europe. Australia introduced its first citizenship laws in 1948, and the 1967 referendum that finally saw the inclusion of aboriginal people being granted citizenship. Multicultural Australia took hold in the 1970s and 1980s, and today there is an amalgam of ethnic groups that make up Australia's population. Slovenians on the other hand had been ruled by others for centuries up until independence, but developed a strong national identity based on language long before they obtained independence. They also have had to grapple with minorities identifying with neighbouring countries of Austria, Hungary and Italy (discussed **chapter two and three**).

Since the late 1990s, the changes made by the two states' to their respective citizenship laws have been based on similar principles and concepts, requiring new citizens to understand the language and in the case of Australia undertake testing. The two states have implemented restrictive measures to make it difficult for people to obtain citizenship since the rise of terrorism, while at the same time establishing liberal measures allowing their citizens to participate regionally and globally. This is discussed in **chapter three**.

The development of citizenship has had a significant impact on women. The early developments of citizenship resulted in women following their husband, if married. The recognition of women in citizenship and the rise of human rights has seen a steady shift towards women becoming increasingly equal to men in society in both Australia and Slovenia.

Strengthening the concept of citizenship for the future should require a state to continue to account for globalisation, regionalisation and the economic, social and environmental impacts that will shape the world. Thus, the future of citizenship can never be conclusively determined, as there are too many variables. This thesis argues that an inclusive national identity can only be realised provided the Slovenian and Australian governments have a sound legislative framework. An effective legal framework must include citizenship, immigration, human rights and private international law. In the context of this thesis, the future of citizenship in Slovenia and Australia will benefit from implementing the recommendations that have been outlined in **Appendix One**.

Rationale for Research

The comparative study of Slovenia, the European Union and Australia's respective citizenship, migration, human rights and private international law (legislation) is new. The Slovene state and population is much smaller than Australia, and many Slovenes have migrated to Australia over the past fifty years. That is, there is no research that compares citizenship, immigration, human rights and conflict of laws as a collective. This research will enrich the discussion and understanding of citizenship in both Australia and Slovenia. This legal research makes a contribution to knowledge and builds on the long-standing relationship these two countries have developed. Since WWII there has been a steady flow of Slovenes to Australia. Australia has been seen as a destination country for many Slovenes. Following the breakup of Yugoslavia, Slovenes continued to migrate to Australia (see **Appendix Three**). Australia was one of the first countries outside Europe, along with Canada, to recognise Slovenia's independence on 16 January 1992 (discussed **chapter four**). The Slovene diaspora located in Australia played an important role in strengthening the citizenship laws of Slovenia in the mid 1990s. Australia is an immigration country, whereas Slovenia over the last fifty years can be best described as being an emigration country. The two states have established bilateral agreements to benefit their respective citizens, when present in either state (discussed **chapter five**). The two states can learn from each other and consider implementing the recommendations discussed in **Appendix One**.

1.2 Thesis Structure

This thesis has seven chapters. Chapter one introduces the thesis. Chapter two outlines the development of citizenship and national identity of Slovenia and Australia to 1990, and includes Australia's first citizenship laws in 1948. In chapter's three, four, five and six, European law is also compared and considered because today Slovenia is a member of the European Union and is obliged to implement its laws. Each chapter, except chapter one, commences with an 'Overview' and concludes with a 'Conclusion'. In chapters three, four, five and six, the comparative research will identify possible gaps in the law that can be used by either state in order to improve its respective laws. Any gaps identified will be presented in the Appendix One as a 'recommendation' for Slovenia, Australia and the European Union to consider adopting by means of borrowing and transplanting law. To ensure the discussion of citizenship and national identity is clear, these concepts have been discussed in time periods as both states have evolved. There is overlap in the discussion and analysis between 1990 and 1991 due to Slovenia becoming an independent state and establishing a new legal framework over those two years.

Chapter one outlines the structure of the thesis and chapters, purpose, research questions, methodology, application and limitations of the research. The chapter also provides a Literature Review of the nation state, national identity and citizenship. This chapter argues that transposing and transplanting laws from either jurisdiction is a valid option for improving the two states citizenship legal frameworks. This thesis proposes that the current day citizenship laws of Slovenia and Australia do not contribute to the states' national identities. The hypothesis also contends that the citizenship laws of both states have not adapted to national and international events, and historically, citizenship has not evolved concurrently with the evolution of both states. The thesis will demonstrate that citizenship contributes to national identity and continues to evolve as the nation state evolves.

Slovenia and Australia have had very different beginnings. **Chapter two** traces the historical developments of citizenship, constitutions and national identities of Slovenia and Australia. In the context of Slovenia, the research begins by tracing the habitation of the territory back to 32,000 BC. The study then moves to Slovenia during the 1700s when it was under the rule of the Habsburg Monarchy, and Australia from the late 1800s when it was still an out-post of the British Empire. Scholars were writing about citizenship in the 1700 and 1800s. The American, French, Haitian²² Greek and Spanish Revolutions all had an impact on the modern day nation state between 1770 and 1850. The revolutionary period saw the transition of the inhabitants of those territories from subjects to citizens.²³ Post WWI saw the collapse of the empires across

Publishing, 2012, 170-180.

²³ Malick Ghachem, *Slavery and Citizenship in the Age of the American Revolutions*, Historical Reflections, Vol 29. No 1, 2003, 10-15.

Europe and the borders redrawn that reflect modern day Europe. Australia had become a federation and in 1948 introduced its first citizenship laws. Following WWII, there was the rise of nationalism and democracy. Human rights began to form part of democratic society and formed part of national law. The collapse of socialism saw the breakup of Yugoslavia and Slovenian independence was finally realised. There is a year overlap between chapter two and chapter three from 1990 to 1991 because of the national legislative framework being developed during that period leading up to independence, and subsequent independence of Slovenia.

Chapter three compares the variables between the two states' citizenship laws and the reform process from 1990 to 30 June 2015. For Slovenia, it was a time of constitutional and legislative upheaval as it embarked on establishing a new state. During the transition from the former Yugoslavia to independence, the constitutionality of seceding presented difficulties. During the same period, Australia was reforming its citizenship laws. Australia's legal framework for citizenship was more than forty years old. This chapter demonstrates how, throughout the legislative reform process, citizenship continued to evolve and interact with both states' national identities.

Today Slovenia is part of the European Union, and therefore **chapter four** explores what it means for Slovenes to be part of this supranational polity. Throughout the research the term Slovenes has been used when discussing nationality, and the term Slovenian has been used when discussing the citizens. The steps taken by Slovenia when acceding to the European Union are traced from the late 1980s through to 2004. This membership has had direct (tangible) impacts on Slovene citizens, for instance, they now have the right to move and work in other European Union member states. This chapter also explores the differences between the Slovenian and Australian constitutions regarding human rights. Human rights are both public and private. The international, supranational and national laws discussed in this chapter all constitute the public. The rights afforded to citizens of either state enable them, in the course of their private activities, to protect themselves from other citizens and the state.

Chapter five argues that migration is a pathway to citizenship and the respective states' immigration policies do influence national identity. The law discussed in this chapter pertains to 2014 and 2015. The immigration laws and visa framework of a state (the public) allow citizens to be mobile across international borders and engage with citizens from other states (the private). Migration laws allow states to include or exclude non-citizens from entry and stay, which would hinder or even prevent a person from obtaining citizenship. It will be demonstrated how these regulatory mechanisms of the state contribute to national identity.

Chapter six explores how Private International Law helps facilitate the private activity of transnational engagement between citizens. The law discussed in this chapter pertains to 2014 and 2015. This chapter discusses the different approaches taken by both states when determining the choice of laws and relevant factors such as citizenship, residence and location (country) in the following areas: marriage, divorce, paternity, child maintenance, parental responsibility, international adoption, matrimonial property, inheritance and superannuation. It will be argued that citizenship plays a minor role in private international activities.

Chapter seven brings together the research findings and confirms that the evolution of citizenship began as a legal status and later evolved into a legal tool used by governments of nation states to manage their population. This chapter highlights some elements of what future citizenship might look like.

1.3 Research Purpose

This research will examine the legislation and policy of Slovenia and Australia's citizenship, immigration, rights and private international law, and is a key theme, in order to assess how each of these aspects contributes to the development, retention and enrichment of those states' national identities. The laws pertaining to the following are analysed:

- Citizenship;
- Immigration;
- Constitutional and legislated rights; and
- Private international law.

The comparative study of Slovenia and Australia is unusual and not often used as an example to highlight aspects of citizenship. However, both states have a long history of cooperation. As pointed out earlier, the comparative research is personal as the researcher is a dual Australian and Slovenian citizen. The first Slovenian arrived to Australia²⁴ in 1855. Even though Slovenia is small in size and has a small population, there has been continuous migration to Australia since WW II.²⁵ Following, the break-up of Yugoslavia in 1990, Australia was one of the first countries outside of Europe to recognise Slovenia's independence. Post the break-up, the next wave of Slovene migrants arrived in Australia. Australia has a significant Slovenian community.²⁶ Both states have established bilateral agreements to assist their respective citizens (discussed in **chapter 5**). There is a lot of scholarly justification to compare the two states, which has both emerged from empires to become independent liberal democratic states.

²⁴ Immigration from Slovenia, <http://museumvictoria.com.au/origins/history.aspx?pid=54>, accessed 20 June 2015.

²⁵ Australian Government, Community Information Summary, Slovenian-born, Department of Immigration and Citizenship, 2011.

²⁶ <http://sloveniansinaustralia.com.au/>, accessed 2 October 2016.

Slovenia is a country of emigration and diaspora, with a strong sense of national identity that has joined the European Union. Australia is mainly a country of European immigration located in Oceania - Asia, with a significant indigenous population, and now seemingly confused and conflicted about its national (multicultural) identity. Even though the two states have followed very different paths, they have much to learn from each other as discussed throughout and in the final chapter.

1.4 Research Questions

The above areas of law and policy are addressed by examining the following questions:

1. **Do the citizenship laws of Slovenia and Australia contribute to their respective national identity? 1.1 Can the laws discussed in this research be used to recommend law reform to achieve that objective?** Apart from discussing the historical developments of citizenship in Slovenia and Australia, the research examines the current day citizenship laws of both states. The research traces in detail the developments of citizenship laws from 1991, when Slovenia, for the first time became an independent state. Since 1991, both states have modified their respective citizenship laws to account for regional and global changes such as a greater focus on national security.
2. **This research will also address the question of whether citizenship is a key factor when identifying the choice of law between Slovenia and Australia, as citizens engage each other between the two states in private activities such as marriage.** Karen Knop²⁷ observes that most scholars when discussing citizenship usually begin with the state being able to protect its sovereignty and choose its citizens and not the private side of citizenship.²⁸ Migration at a personal level is the private act of someone moving between Slovenia and Australia. A citizen from either state or a dual citizen can, as part of their private activities, engage other citizens in marriage, divorce, and parenthood (discussed **chapter six**). Moreover, a citizen of a state is afforded rights from the state. A dual citizen is afforded rights from two states. This thesis will demonstrate how human rights operate in the private sphere (horizontally) and the public sphere (vertically).²⁹ That is, human rights are used by the citizen to protect themselves from each other (horizontal) and from the state (vertical). There is minimal impact to national identity from private international law, other than, these laws form

²⁷ Karen Knop, *The Private Side of Citizenship*, Proceedings of the Annual Meeting, American Society of International Law, Vol. 101, 2007, 94-97.

²⁸ Ibid.

²⁹ Willem Maas, *Multilevel Citizenship*, University of Pennsylvania Press, 2013, 200-202.

part of the overall legal framework of the state, which forms part of national identity. Private international law intersects with national identity where the sovereign nation state develops private laws that serve the nations policy objectives.³⁰ Additionally, there is a balance between the interests of claimants against those of defendants at the same time as balancing the interests of private parties with those of the state.³¹

This research proposes four hypotheses. Firstly, the current and historical developments of citizenship and national identity of Slovenia and Australia have not evolved differently. Secondly, the citizenship laws of Slovenia and Australia do not contribute to national identity. Thirdly, the existing notion of citizenship does not extend to migration, rights, and private international law (cross- border engagement between citizens). Fourthly, women are citizens of Slovenia and Australia, and their full inclusion has not yet been realised by having citizenship of either state. The thesis will demonstrate how citizenship has evolved and contributes to national identity, along with the other laws and concepts discussed throughout this research.

1.5 Methodology

According to Vernon Palmer comparative law is used as a means of effecting sameness and suppressing differences in the law.³² Comparative legal research is the practice of comparing legal norms, case law, legal jurisprudence and legislation from different states and legal families. A comparative study of law from two different countries can be used to effect change and strengthen the law. The comparative study, undertaken in this thesis will enable the thesis to provide recommendations, for Slovenia, Australia and the European Union to consider and to learn from each other. This can be achieved by borrowing, transplanting and transposing law and legal principles from each other. Australia, for example, has looked to the European Union (discussed **chapter four**) in the area of human rights law.

Peter de Cruz's methodology of comparative legal research considers the linguistic and terminological problems; the cultural differences between legal systems; and the tendency to put one's own interpretation on legal concepts.³³ To overcome these challenges the following work was undertaken to describe the legal and policy concepts and institutions involved by:

- identifying the differences and similarities across legal systems (imperialist, socialist and democratic) as well as the European Union legal system;

³⁰ Alex Mills, *The Confluence of Public and Private International Law, Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law*, Cambridge, 2009, 70-72.

³¹ Alex Mills, *The Identities of Private International Law: Lessons From The U.S. and EU Revolutions*, Duke Journal of Comparative & International Law, Vol 23:445, 2013, 450 – 460.

³² Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, Global Jurist Frontiers, Vol 4, 2, 2004:12-24.

³³ Peter de Cruz, *Comparative Law in a Changing World*, Cavendish Publishing Limited, 1991, 213.

- identifying the differences in legislation and court decisions of the European Union, Slovenia, the former Yugoslavia and Australia;
- analysing the historical development of and Slovenia's and Australia's citizenship laws and national identity;
- analysing the policy principles (economic, social and cultural) pertaining to citizenship and migration;
- comparing the rights of, and conflict between, laws associated with citizens having citizenship of either state; and
- understanding the legislation and legal principles that are influenced by citizenship law, in the international context.³⁴

Slovenia has adopted the civil law as the basis of its legal system, while Australia has inherited the common law legal system from its colonial origins. William Tetley³⁵ identifies thirteen differences between legal families that include the order of jurisprudence and doctrine (their function and style). For instance, the doctrine of *stare decisis* under common law compels lower courts to follow the decisions of higher courts, whereas, under civil law, the doctrine is unknown as judges only have the “authority of reason”.³⁶ Furthermore, the drafting of legislation, which is applicable to this research, is somewhat different. Under civil law, the legislation consists of codes and statutes that are concise.³⁷ The interpretation of legislation is undertaken differently by the legal codes. The doctrine of jurisprudence *constante*³⁸ is important when discussing and comparing rules established by the judiciary, as the rules evolve in civil law. The interpretation of common law legislation is construed according to certain common law rules.³⁹ On the other hand, the interpretation of civil law legislation is often ambiguous and its application may necessitate an examination of the entire legislation in order to understand the intention of the legislature. The legislative analysis also includes international treaties and conventions, international case law and legislation of the European Union (conventions, treaties, regulations, directives and decisions).

³⁴ Ibid.

³⁵ William Tetley QC, *Mixed jurisdiction: common law vs civil law (codified and uncoded) (Part1)*, Unif. L. Rev, 1999-3, 591 – 617.

³⁶ Ibid.

³⁷ Ibid.

³⁸ James Dennis, *The John Tucker Lecture in Civil Law: Interpretation and application of the civil code and the evaluation of judicial precedent*, Louisiana Law Review, 1993, 54:1.

³⁹ Ibid.

Citizenship, migration, human rights and private international law cannot be effective without being aligned to policy and programs for their effective implementation by states. That is, policy is developed to assist in the administration of legislation. When undertaking policy development and analysis of the above research areas, the methodology used is consistent with the approach undertaken by Peter Bridgman and Glyn Davis⁴⁰ and includes:

- analysing the policy and legal problem;
- conducting consultation across the academic community, legal institutions and consulting experts; and
- establishing which policy or legal and other methodologies are available to make recommendations so as to improve citizenship, migration, human rights and private international law.⁴¹

In addition, Eugene Bardach provides a similar approach which was also used in analysing the research questions by defining the problem, assembling the evidence, telling the story, selecting the criteria and providing options and recommendations.⁴² Applying this methodology reinforces the scientific and evidence-based approach to this research. An evidence-based approach is evident in public administration regardless of the policy area (such as, environmental, economic or social). This methodology accords with a similar approach taken by Greg Marston and Rob Watts⁴³ as it identifies the question, then gathers the evidence to answer the question. An examination of the legal and policy principles pertaining to citizenship, immigration, human rights and private international law, was undertaken utilising qualitative research methods to enhance the formulation of the research questions. This process saw the development of a structure for the thesis and its arguments, as well as the development of recommendations (**Appendix One**) for Slovenia, the European Union and Australia to consider for the purpose of legal reform.

Norman Denzin and Yvonna Lincoln⁴⁴ argue that qualitative research is ‘a situated activity that locates the observer in the world and consists of interpretive material practices that make the world visible’. Furthermore, the authors point out that qualitative research involves the studied use and collection of a variety of empirical material and case studies; personal experience; life story; interview; cultural; observational and historical texts. Qualitative research ‘helps form an

⁴⁰ Peter Bridgman and Glyn Davis, *The Australian Policy Handbook*, Allen and Unwin, 2nd ed, 2000, 151.

⁴¹ Ibid.

⁴² Eugene Bardach, *A Practical Guide for Policy Analysis: The Eightfold Path to More Effective Problem Solving*, Chatham House Publishers, 2000, xiv.

⁴³ Greg Marston and Rob Watts, *Tampering with the Evidence: A critical appraisal of evidence-based policy-making*, The Drawing Board: An Australian Review of Public Affairs, School of Economic and Political Science, University of Sydney, 2003, 143-163.

⁴⁴ Norman Denzin and Yvonna Lincoln (eds), *Handbook of Qualitative Research*, 2nd ed, 2000, 1- 27.

understanding of relationships between law and legal practices'.⁴⁵ In considering the action theory approach, the researcher and practitioner work hand in hand, in all stages of the research project. This commences when conceptualising the problem, identifying a need to change by resolving problems to improve practices. Jennifer Wood's method assists in uncovering the gap or gaps in the law or policy. This method is found to be an approach used by practitioners to interrogate and analyse legislative debates and committee reports in order to provide empirical material not only for further analysis⁴⁶ but also to make recommendations. This approach will assist with the analysis and identification of gaps in the laws of Slovenia and Australia.

These principles have all been used by the researcher particularly to explore the relevant historical context of Slovenia and Australia. Additionally, the broader principles of qualitative research were employed when conducting interviews with civil servants from the Slovenian government. These questions were in English, reviewed and approved by Professor Arne Mavčič. The questions did not require any formal ethics approval because they were legislative and policy-based and are relevant only to government officials. The questions were provided well in advance of the interview.

Tomaž Deželan, when explaining the concept of the 'citizenship regime'⁴⁷ takes an approach that is consistent with those of Jo Shaw and Igor Štiks, focusing on the different legislative regimes in post-Yugoslavian states.⁴⁸ This research in the past has not had extensive scholarly attention. Rather, the research into citizenship has focused on the economic and social benefits and impacts on a nation state of citizenship and migration. Consequently, the methodology used is an extension of Deželan, Shaw and Štiks work, whereby the comparative analysis focuses on legislation and the procedural aspects of the law. Furthermore, Linda Bosniak's⁴⁹ work will provide a solid foundation for exploring how citizenship contributes to national identity. This research focuses on the legislative frameworks (historical and current) of Slovenia and Australia in the areas of citizenship, human rights, migration and private international law, and their contribution to these states' respective national identity. According to Bruno Zeller, 'it is important to analyse law-making in general'.⁵⁰ Understanding the law-making process is an important part of the background to this research, as legislation is made by the parliaments of Slovenia and Australia. This is evident particularly in Chapter 3 where the development of

⁴⁵ Jennifer Wood, *Using Qualitative Research Strategies for Public Health Law Evaluation*, A Methods Monograph, Robert Wood Johnston Foundation, 2012, 1-35.

⁴⁶ Ibid.

⁴⁷ Tomaž Deželan, *Citizenship in Slovenia: the regime of nationalising or Europeanising state?* Working Paper, 2011/16, University of Edinburg, 4-52.

⁴⁸ Jo Shaw and Igor Štiks, *Introduction: Citizenship in the new states of South Eastern Europe*, in Jo Shaw, Igor Štiks, *Citizenship after Yugoslavia*, Routledge, 2012, 1-13.

⁴⁹ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, Indiana Journal of Global Legal Studies, Vol 7: Iss 2, 2000, 483.

⁵⁰ Bruno Zeller, *CISG and the Unification of International Trade Law*, Routledge-Cavendish, 2007, 26.

citizenship laws in both states is analysed and discussed in order to understand how citizenship has evolved.

The European Parliament and the European Council have a role in the preparation of European law. At the national level, Bruno Zeller in referring to Schwartz and Scott⁵¹ notes that three models are used to develop legislation. Firstly, the 'bright line model' is where the development of law is heavily influenced by interest groups.⁵² This can be seen today in many states where citizens become passionate about environmental issues and place considerable pressure on governments to establish controls over business and other groups of citizens in the community. Secondly, the 'abstract rule' affords discretion to the decision-maker (s), and is used when the pressure of interest groups is weak. The third is a combination of the first two models. However, many conventions in the international arena that are also discussed throughout this research do not come under any of these three models, but rather, are part of a three-tiered system. That is, an international convention may involve the position of a conference delegate who will sometimes prevail whether or not the entire conference of delegates is agreeable. Further complications can arise upon the signing and ratification of the convention by individual nation states.⁵³ There is an abundance of literature in this area of international relations.

The legislation, scholarly articles and reports of the European Union and Slovenia used in this thesis have all been translated to English. Slovenian is an official language of the European Union, and therefore, the text of European Union law needs to be translated into Slovene as well as English. Any reports and text that were only in Slovenian, have been translated by the researcher and verified by Professor Arne Mavčič and colleagues in government and the legal profession located in Slovenia. Additionally, the Slovenian government has, through its legislation, case law and Ministry websites, established an automatic translation process from Slovenian into English, and this translation has also been verified and approved by Professor Arne Mavčič. Throughout this research, care has been taken to ensure all referencing is consistent with Slovenian,⁵⁴ European Union, and Australian legal citation conventions. The referencing styles between Slovenia and Australia are different. Due to the breadth and depth of law used, duplication and full referencing has been used to ensure that readers from the different jurisdictions can easily identify the source. The law and theory will be discussed according to time periods beginning with the first millennium BC to 1990. The analysis is structured in time periods, so as to better articulate the evolving nature of both citizenship and national identity

⁵¹ Alan Schwartz and Robert Scott, *The Political Economy of Private Legislatures*, University of Pennsylvania Law Review, 1994, 595.

⁵² Ibid.

⁵³ Bruno Zeller, *CISG and the Unification of International Trade Law*, Routledge-Cavendish, 2007.

⁵⁴ The general standard that is applied and used by the Ljubljana University has been used. Mednarodni standard ISO 690 za klasične in ISO 690-2 za elektronske vire.: <https://www.pef.uni-lj.si/fileadmin/Datoteke/Knjiznica/Datoteke/iso.pdf>, accessed 20 October 2014.

from 1990 to 2015, because independence for Slovenia began in 1990. Where possible in **chapter 3**, themes have been identified and discussed within the time periods. There is overlap in the discussion and analysis between 1990 and 1991 due to Slovenia having become an independent state and establishing a new legal framework over those two years. The law is stated up to 30 June 2015.

Legal Transplantation, Transposing and Borrowing

According to John Gillespie comparative lawyers generally adopt the application of the transfer of legal norms and legislation to assist states in effectively undertaking legal reform. The globalisation of the law has been influenced by international trade agreements, foreign investment, communication, travel and education'.⁵⁵ Over the past century it has become easier to trade and move goods, capital, people and services across international borders that have different legal families. This has resulted in states borrowing and transplanting law from each other. Gillespie refers to this process as being horizontal or vertical.⁵⁶ Horizontal transfer is from one country to another, whereas vertical is from an international organisation to the country's national (domestic) laws. The vertical transfer of law has been utilised by Slovenia and Australia when adopting international legal norms, for instance, human rights law into their respective legal frameworks. The horizontal transfer has seen states borrow and transplant law from other states and jurisdictions, which has been effective in the legal reform process (discussed **Literature Review**). Thus, today, Slovenia, the European Union and Australia could borrow and transplant law from each other to assist in current and future developments in citizenship law.

The adoption of law from a civil to common law jurisdiction (and vice-versa) has many historical precedents. During the Holy Roman Empire, 'jurists equated *ius gentium* applying it to the colonised people *ius naturale*, and were superimposed over indigenous cultural beliefs and practices'.⁵⁷ This marked the early beginnings of laws being transferred during the expansion of the Holy Roman Empire.⁵⁸ Gibson argues that "governments use comparative law to promote desirable social or legal changes which have arisen from the implementation of laws in other countries."⁵⁹ Legal transplants consider not only the law, legislation and legal principles, but

⁵⁵ John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, New York University Journal of International Law and Politics (JILP), Vol. 40, No. 657, 2008, 655-675.

⁵⁶ *Ibid.*

⁵⁷ David Nelken and Johannes Feest, *Comparative Law and Legal Transplantation in South East Asia: Making Sense of the Nomic Din*, Law Reform by Translation, http://www.ashgate.com/pdf/SamplePages/Transplanting_Commercial_Law_Reform_Intro.pdf, accessed 30 November 2013.

⁵⁸ *Ibid.*

⁵⁹ James Gibson, *Impact of Legal Culture and Legal Transplants on the Evolution of the Australian System*, International Academy of Comparative Law, 2010, 2-5.

also sociological, anthropological, historical and psychological methods'.⁶⁰ They also appear as a consequence of cultural interaction.⁶¹ That is, regionalisation (the European Union) has enabled citizens from states to interact more efficiently and effectively across international borders. This interaction can result in legal scholars and governments comparing laws of one state to another, whereby law is transplanted and borrowed.

Alan Watson describes the practice of borrowing as the most fruitful source of legal change.⁶² Watson argues that 'borrowing' can take different forms, for example, from within the legal system, or, from an external legal system,⁶³ such as from common to civil law and vice versa. Watson further argues that the borrowing of law from other states is economically efficient.⁶⁴ This accords with the current policy of legislative reform in Slovenia,⁶⁵ Australia⁶⁶ and the European Union⁶⁷ when implementing their respective jurisdictional 'better regulation programs' (smart regulation). This also applies to programs that identify areas of regulation that could be improved to reduce the regulatory burden to business, government and individuals. Today, individuals, businesses and governments have to compete in the global arena. Regulation and regulatory structures and frameworks allow business and individuals (citizens) to operate in the state where they are located, but also, they also allow them to operate across international borders in the most effective and efficient manner.⁶⁸

Regulatory burden are those obligations and requirements which businesses and individuals must meet (public and private administrative, action and financial). Gregor Virant and Polonca Kovač state that regulatory burden principles include necessity, proportionality, transparency, accountability, accessibility and simplicity.⁶⁹ It is in regard to these principles, particularly those of accessibility and simplicity, that it could be argued that reform is required by Australia, Slovenia and the European Union. The proposed reform discussed in this research, could contribute to Slovenia and Australia's national identity, and enhance the legislative framework of the European Union (discussed chapter **three, four, five and six**).

⁶⁰ Ana Batricevic, *Legal Transplants and the Code of Serbian Tsar Stephan Dushan: A Comparative Study*, Pravni Fakultet University Beograd, 2007, 1-58.

⁶¹ Ibid.

⁶² Alan Watson, *Aspects of Reception of Law*, Georgia Law, University of Georgia School of Law, The American Journal of Comparative Law, Vol.44, 1996, 335 – 351.

⁶³ Ibid.

⁶⁴ Ibid, 335.

⁶⁵ Resolution on Regulatory Activities, Official Gazette of the Republic of Slovenia 95/2009.

⁶⁶ Productivity Commission, Achieving Better Regulation of Services, <http://www.pc.gov.au/research/supporting/better-regulation>, accessed 23 September 2016.

⁶⁷ European Commission, Smart Regulation, Refit, Simplification, http://ec.europa.eu/smart-regulation/refit/simplification/index_en.htm, accessed 26 February 2014.

⁶⁸ Australian Government, Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business, Productivity Commission, 2006, 5.

⁶⁹ Gregor Virant and Polonca Kovač, *Reducing Administrative Burdens as Part of Better Regulation Programme – the Case of Slovenia*, Lex Localis, Journal of Local Self-Government, Vol. 8, No 4, 369 – 393.

The European Union under the smart regulation program and 'cohesions' policy, emphasises the need to review, repeal and revise legislation to ensure any unnecessary laws are removed, or, modified, reflecting the contemporary world by keeping them up to date.⁷⁰ The European Union according to William Tetley 'has bought together many legal systems under a single legislature that is a mix of jurisdictions and law (that include civil law of continental countries and common law of the United Kingdom, Wales and Ireland).⁷¹ Both the common and civil law families, as can be seen today, share the similar social and economic objectives of individualism, liberalism and personal rights.⁷² Today legal transplants are a major part of a state's legal development.⁷³

A meaningful legal transplant occurs when both the propositional statement and its invested meaning, which jointly constitutes the rule, are transported from one culture to another'.⁷⁴ Arguably, the European Union has effectively achieved this by adopting legal norms and principles from both common and civil law families into the European legal framework. However, this has not always been easy to achieve, and today there continues to be complications particularly in the European Union context of transplanting or transposing European Union law into member states law. The rule, as it finds itself technically integrated into another legal order is invested with a specific cultural meaning at variance with the other one.⁷⁵ Accordingly, a 'crucial element of the rule – its meaning – does not survive the journey from one legal culture to another'.⁷⁶ This can be demonstrated where the legal principle of 'good faith' in the European Consumer Protection Directive, when transplanted into British

⁷⁰ Commission of the European Communities, Action Programme, for Reducing Administrative Burdens in the European Union, Communication from the Commission to the Council, The European Parliament, The European Economic and Social Committee and the Committee of the Regions, COM, 2005, 5.

⁷¹ William Tetley, *Mixed jurisdictions: common law vs civil law (codified and uncoded)*, Rev. dr. unif. 1999-3, 591-618.

⁷² Rene David, and John Brierley, *Major Legal Systems in the World Today*, 3rd Ed, Stevens & Sons, London, 1985, in William Tetley, *Mixed jurisdictions: common law vs civil law (codified and uncoded)*, Rev. dr. unif. 1999-3, 591-618.

⁷³ Salvatore Mancuso, *Legal Transplants and Economic Development: Civil Law vs. Common Law?* University of Macau, in Jorge Costa Oliveira and Paulo Cardinal, *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Springer Berlin Heidelberg, 2009, 75 – 89. Curtis Mihaupt and Hideki Kanda, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, *The American Journal of Comparative Law*, 2003, in Salvatore Mancuso, *Legal Transplants and Economic Development: Civil Law Vs. Common Law?* University of Macau, in Jorge Costa Oliveira and Paulo Cardinal, *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution*, Springer Berlin Heidelberg, 2009, 75 – 89.

⁷⁴ Pierre Legrand, *The Impossibility of Legal Transplants*, *Maastricht Journal of European and Comparative Law*, 1997, 11-114.

⁷⁵ *Ibid.*

⁷⁶ Pierre Legrand, *Corporatists at Law and the Contrarian Challenge Inaugural Lecture*, Tilburg, 1995, in Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Laws Ends Up in New Divergences*, *The Modern Law Review Limited*, 1998, 1-22.

contract law creates problems by causing an imbalance in the parties' rights and obligations arising under a contract.⁷⁷

Gunther Teubner states that the British courts also rejected the doctrine at the time.⁷⁸ This is one example, amongst many that have arisen between the European Union and its member states. Furthermore, Anthony Forsyth highlights 'that the impact of European Union law on the British legal culture has shown that when a common law system borrows from the civil law, and the fundamental concepts underpinning the civil law are borrowed with them, it can create tensions with common law traditions into which they are transplanted'.⁷⁹ This observation has been supported by Holger Spamann when referring to Rodolfo Sacco. Sacco states 'a legal system cannot borrow elements that are expressed in terms that are foreign to its own doctrine'.⁸⁰ Conversely, where two systems have the same codes or both have a system of judge made law, the judges of each country may find it easier to borrow from each other'.⁸¹ This is an important observation, because in chapter four, it is argued that judges from the Australian High Court have looked to the European Court of Human Rights for guidance and borrowed law and legal principles to assist in making decisions in relation to human rights within Australia. Within the European Union the three legal families, the English common law, the French Civil law and the German civil law have dominated the process of consolidation and formalisation in Europe.⁸² The three families of law can be found today in European law. European law becomes important when discussing Slovenia, as it is now part of the European Union. Slovenia is obligated to implement European Law into its national law.

Slovenia

Historically, Slovenia's legal system has been heavily influenced by Austrian and German law, including the legal systems of the former Holy Roman Empire, Austrian-Hungarian Empire, Kingdom of Serbs, Croats and Slovenes, Socialist Federal Republic of Yugoslavia, Independent State, and now as a member of the European Union. This section only discusses borrowing and transplanting laws from the time Slovenia became independent. Slovenia upon departing the former Yugoslavia, transplanted many of its laws into the newly formed national legal

⁷⁷ Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Laws Ends Up in New Divergences*, The Modern Law Review Limited, 1998, 1-22.

⁷⁸ Ibid.

⁷⁹ Anthony Forsyth, *The 'Transplantability' debate in Comparative Law and Comparative Labour Law: Implications for Australian Borrowing from European Labour Law*, Center for Employment and Labour Relations Law, The University of Melbourne, 2006, 20-30.

⁸⁰ Holger Spamann, *Contemporary Legal; Transplants-Legal Families and the Diffusion of (Corporate) Law*, Harvard John M Olin Centre for Law, Economics and Business, Fellows' Discussion Paper Series, 2009, 15-35.

⁸¹ Ibid.

⁸² Daniel Berkowitz, Katherine Pistor and Jean-Francois Richard, *The Transplant Effect*, The American Journal of Comparative Law, 2003, 163-185.

framework. For instance, the Obligations Act was adopted in 1978 as a federal act of former Yugoslavia, and had been influenced by the ‘Swiss *Obligationenrecht*, Italian *Codice Civile*, German BGB and Austrian ABGB’.⁸³ Mozina notes that upon independence Slovenia continued with the Obligations Act.

Slovenia, as a member of the European Union, has been obliged to accept the European Community *acquis*. That is, the relevant legislation has been implemented and transposed into national legislation so that the state gives effect to the Community *acquis*.⁸⁴ In modern day Slovenia, the state transposes European Union law⁸⁵ and policy principles into its national legislative framework, as part of its agreed membership of the European Union.⁸⁶ The European Court of Justice determined that a breach will consist of an act contrary to the legislation but also where there has been a failure to act, such as failing to implement European Union legislation.⁸⁷ In 2009, the European Union handed down a decision that recognised the legal and supervisory framework of Australia as equivalent to Council Regulation (EC) No 1060/2009 in regards to credit rating agencies.⁸⁸ That is, while not formally transplanting laws from Australia, the European Union clearly recognised the legislative framework that had been established in accordance with Australia’s *Corporations Act 2001*, for credit rating agencies.

Australia

Australia has adopted the common law of the United Kingdom. Australia adopted the land titles system (which requires proof of ownership of a particular piece of land) from the United Kingdom. Other legislation as having been adopted by Australia from Britain include the *Statute of Westminster 1931 (UK)* and the *Statute of Westminster Adoption Act 1942 (Cth)*. The *Australia Act 1986 (UK)* and the *Australia Act 1986 (Cth)* mirror legislation that reduced the capacity of Britain to legislate for Australia. Australia has also provided horizontal transplantation opportunities for nation states within its region. For instance, Holger Spamann argues that the ‘Singaporean 1967 *Companies Act* is identical to the equivalent legislation in Malaysia and was based on legislation that had been established in the Australian state of

⁸³ Damjan Mozina, *Harmonisation of Private Law in Europe and the Development of Private Law in Slovenia*, *Juridica International* XIV/2008, 173-180.

⁸⁴ The conditions are provided for under article 49 and principles established in article 6(1) of the Treaty of the European Union, Official Journal of the European Union, C83/43.

⁸⁵ *Ibid*, article 258.

⁸⁶ Treaty on the Functioning of the European Union, Official Journal of the European Union C 326. Article 1, Aliens Act 2011, Official Gazette Republic of Slovenia, No 50/2011, Council Directive 2001/51/EC OJ L 187, 10.7.2001.

⁸⁷ Treaty Enforcement Obligations Against Member States, Learning Objectives, <http://fds.oup.com/www.oup.com/pdf>, accessed 14 September 2013.

⁸⁸ European Commission, Commission Implementing Decision of 2012, on the recognition of the legal and supervisory framework of Australia as equivalent to the requirements of Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies http://ec.europa.eu/internal_market/securities/docs/agencies/20121005-equiv-australia_en.pdf, accessed 14 September 2013.

Victoria in 1961.⁸⁹ Spamann notes that a similar example can be drawn in relation to securities law in Malaysia and Singapore which were copied from Australia, which in turn had utilised the laws that existed in the United Kingdom.⁹⁰

Australia has also transposed international law into national domestic law. The Australian High Court stated that, “section 36 of the *Migration Act 1958* has transposed the text of the treaty or provisions of a treaty into statute so as to enact it as part of domestic law”.⁹¹ Not only have the legal principles and legislation been borrowed and transplanted to Australia from other jurisdictions today individual Australian states and territories also implement this practice of comparative legislative development, looking at what other states and territories are doing. The transposing of law is not new and, Australia similar to Slovenia has undertaken the same process. However, there are potential obstacles to transplanting and borrowing law from one jurisdiction to another.

Potential Obstacles to Legislative Reform

Slovenia has a distinctive language,⁹² which is very different from English, and this could pose difficulties when transplanting law from Slovenia to Australia. The language structure and phonetics are very different from English. Even so, Slovenian Constitutional Case Law has been translated into English for the past twenty years.⁹³ Therefore, the translation of Slovene to English may not be an obstacle. For example, French law is used in Arabic speaking countries, and thus, is another demonstration of where the law of one state is used by other states that have a different language.

A good example of the intersection of civil and common law outside of Europe, has been analysed by Jorge Sanchez Cordero who argues that China has seen the convergence of both the civil and common law.⁹⁴ China being culturally and linguistically diverse and different to western states, began transplanting civil law in the 1800s.⁹⁵ Through the 19th century China's law continued to be influenced by civil law, and the neighboring states including the former Soviet Union. By the 20th century, common law had found its way into China. The inclusion of

⁸⁹ Holger Spamann, *Contemporary Legal; Transplants-Legal Families and the Diffusion of (Corporate) Law*, Harvard John M Olin Centre for Law, Economics and Business, Fellows' Discussion Paper Series, 2009, 15-35.

⁹⁰ *Ibid.*

⁹¹ *NBGM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54; (2006) 231 ALR 380; 81 ALR 337, 11.

⁹² Paul Gillert, *Legal Transplants in International Copyright: Some Problems of Method*, Pacific Basin Law Journal, Vol. 13:199, 1994, 198-220.

⁹³ See, www.us-rs.si.

⁹⁴ Jorge Sanchez Cordero, *Legal Culture and Legal Transplants*, International Academy of International Law, 2010, 1-23.

⁹⁵ *Ibid.*

the common law supplemented deficiencies in case law made by the courts, and adopted such principles into contract, consumer protection and product liability law.⁹⁶ As globalisation continues to strengthen, legal transplants will not only continue to be viable, but, the intersection between states and their citizens from civil and common law jurisdictions will continue, and thus, legal norms and principles will continue to find their way into the respective legal families. Transplantation or borrowing law and policy from one legal system or legal family can be used no matter what legal system they have inherited. In the context of this research, to enhance and strengthen the legal and policy framework in relation to citizenship, immigration, rights and private international law between Slovenian, the European Union and Australia, legal transplantation or borrowing is an entirely valid and necessary option. Doing so, will further demonstrate that the law used in this thesis continues to strengthen and contribute to the national identity of both states.

1.6 Application of Research

The legal themes that form part of this research include an understanding of the intersection and the application of European Union law within member states, particularly Slovenia. This application and intersection, has had, and will continue to have, a strong influence on citizens and their rights; the migration of people from third countries to Slovenia who take out citizenship, and the application of private international law. Furthermore, this research builds on the current legislation that has been used by Australia, Slovenia and the European Union to develop, maintain and continually improve citizenship law and enhance its contribution to national identity. This research is intended to point the way to desirable law reform in Australia, Slovenia and the European Union. This research also builds on the work of Linda Bosniak⁹⁷ and Kim Rubenstein⁹⁸ and reinforces that a desirable legal framework for citizenship is that it is retained at the national level. Secondly, that citizenship law allows citizens to be mobile and transcend international borders. Thirdly, citizens are protected from the state and from each other.

1.7 Limitations of this Research

This thesis offers a deliberate focus on the legislation that was developed from 1990, following the fall of the former Yugoslav state, and the creation of an independent Republic of Slovenia. There has also been significant change to Australian citizenship law in that time. The comparative approach was selected to identify improvements that are desirable for both states,

⁹⁶ Ibid.

⁹⁷ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, Indiana Journal of Global Legal Studies, Vol 7: Iss 2, 2000.

⁹⁸ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002.

in order to maintain and enhance the ongoing adaptability of citizenship law for Slovenia, the European Union and Australia. However, this research is limited. For example, due to the breadth of legislation including reports and case law to be analysed, the researcher decided in consultation with supervisors to focus only on those key elements of the law that directly relate to citizenship (obtained by birth or descent and naturalisation) in the context of their role as a pathway to citizenship.

Due to the large number of visa types available for a person to enter Australia, this research discusses only the common visas used (business [skilled], family, education, humanitarian and long-term residence). The discussion in relation to human rights is vast. Therefore, the thesis identifies and compares only those rights afforded to Slovenian citizens by the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the European Charter of Fundamental Rights 2000, and the Slovenian constitution (SC), and compares the rights expressed in these legal instruments with those in the Australian constitution (AC) and national laws. The research does not discuss how the rights expressed in the law have been implemented. The discussion of private international law has been limited to the extent of how citizenship is a connecting factor in matters pertaining to choice of law.

1.8 Literature Review

The literature review is divided into four parts. The first section discusses the development of the nation state. The second discusses national identity. Thirdly, the literature review traces the evolution of citizenship and its linkages to the nation state and national identity. The literature review highlights scholars writing in relation to citizenship over many centuries. The fourth part examines how citizenship and nationality are recognised in national and international law.

i. [The] Nation State

The nation state has been described as a legal fiction⁹⁹ that is based on the present and the past.¹⁰⁰ The nation state is by its nature a modern institution that emerged from kingdoms and empires. The Treaty of Westphalia in 1648 paved the way for what can be seen today as the pillars of the modern nation state.¹⁰¹ Westphalia rejected the idea that an Emperor had universal authority, and established the concept of territorial sovereignty.¹⁰² Westphalia also represented

⁹⁹ Douglas Howland and Louise White, *The State of Sovereignty: Territories, Laws, Populations*, Indiana University Press, 2009, 182.

¹⁰⁰ Ernest Renan, 'Qu' est-ce qu' une nations' Paris, Calmann-Levy, 1826, in Jiri Pribán, *Legal Symbolism, On Law, Time and European Identity*, Ashgate Publishing Limited, 2007, 80.

¹⁰¹ Richard Falk, *Revisiting Westphalia, Discovering Post-Westphalia*, The Journal of Ethics, 2002, 312.

¹⁰² Carolyn Gallaher, Carl Dahlam, Mary Giltmartin, Alison Mountz, Peter Shirlow, *Key Concepts in Political Geography*, SAGE Publications 2009, 69.

the critical developments from colonisation to decolonisation; including the establishment of national, regional and international institutions.¹⁰³ Even so, there have been significant developments a throughout Europe and the world between the period of Westphalia and modern democracy.

Between 1770 and 1850 much of the world experienced a period of Revolution. The American, French, Haitian¹⁰⁴ Greek and Spanish Revolutions all saw the transition of the inhabitants of those territories from subjects to citizens.¹⁰⁵ The revolutions resulted in a change in government from absolute monarchs to constitutionalist states and republics. The period saw many people being slaves, which begin to revolt against the elites and resulted in the power of the imperialists being reduced significantly. The British lost many of their former colonies and the Asia Pacific became their new focus for expansion and colonisation. This resulted in Australia being located and later colonised by the British (discussed **chapter two**).

The rise of the nation state established a common identity that incorporated ethnicity, historical ancestry, language and culture.¹⁰⁶ The idea of the nation state is ancient, but, Westphalia laid the groundwork for a world in which nations could aspire to be a state. From Westphalia to the realisation of the Slovenian nation state, took more than three centuries. Up until 1990, Slovenia was part of a socialist federal state, kingdom and ruled by monarchs and emperors. Australia was not a nation state when colonised (discussed **chapter two**). There is significant overlap regarding the nation state and national identity. On the one hand, the nation state being a legal fiction has legal consequences that come with it. On the other hand, national identity doesn't have legal consequences. They are complex concepts that are made up of a number of interrelated components such as territory, ethnicity and culture whereby the laws of the state contribute to both concepts. The next section discusses national identity.

¹⁰³ Ibid.

Publishing, 2012, 170-180.

¹⁰⁵ Malick Ghachem, *Slavery and Citizenship in the Age of the American Revolutions*, Historical Reflections, Vol 29. No 1, 2003, 10-15.

¹⁰⁶ James Gordon Finlayson, Habermas: *A very short introduction*, Oxford University Press, 2005, 120-125.

ii. National identity

National identity is a “condition in which a mass of people have made the same identification with national symbols”.¹⁰⁷ National identity is multidimensional,¹⁰⁸ contestable, fluid in nature and a political concept. Anthony Smith highlights that the foundation of a community is a collective name, shared history, shared culture, a sense of solidarity and nostalgia, organised religion and formal institutional structures.¹⁰⁹ Smith argues that nation identity is the common laws and customs, which are established by institutions by the citizens for the citizens.¹¹⁰ Smith also argues that national identity includes 1.) historic territory or homeland and 2.) common myths and historical memories.¹¹¹ These principles influence and enable the state to manage national identity. National identity¹¹² includes the idea of patria, which is a community of laws and institutions that regulate society with a single political will.¹¹³ A patria is the place where a person or group of persons have a long history or connection. Smith also highlights those community laws also extend to civil and legal rights, political rights and duties, and socio-economic rights. These concepts all contribute to binding the population of a state together. This thesis argues that citizenship (law) is just one component that assists a state in managing national identity. National identity has also shaped citizenship (discussed **chapter three**). That is, citizenship law has been used by Slovenia and Australia to strengthen and reinforce national identity. Slovenia, for example used citizenship to define who its citizen are, at independence. Australia has also defined who is and who is not a citizen of the country. Law that also contribute to national identity that will be discussed in this thesis include human rights, migration and private international law (discussed **chapters four, five and six**).

National identity in the context of this research constitutes what Linda Bosniak argues is the common identity of each state at the national level, and not local or regional identities that have formed within a state.¹¹⁴ Bosniak also highlights that different ethnic groups have a presumed national identity, whether that is within the current state they reside, or with their state of origin or an amalgam of both. The territory of a state contributes to national identity, as this represents the territory where citizenship is regulated and provided. Bosniak goes onto say that citizenship has begun to question the presumption that national identity fundamentally characterizes

¹⁰⁷ William Bloom, *Personal Identity, National Identity and International Relations*, Cambridge University Press, 1990, 52.

¹⁰⁸ Anthony Smith, *National Identity and the Idea of European Unity*, *International Affairs*, 1992, 55-76.

¹⁰⁹ Anthony Smith, *The Ethnic Origins of Nations*, Basil and Blackwell, 1986, 20-32.

¹¹⁰ *Ibid.*

¹¹¹ Anthony Smith, *National Identity*, London: Penguin, 1991, 14-15.

¹¹² Anthony Smith, *National Identity*, University of Nevada Press, 2011, 9-11. Smith cites the work undertaken by Federick Meinecke.

¹¹³ *Ibid.*

¹¹⁴ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, *Indiana Journal of Global Legal Studies*, Vol. 7: Iss 2, 2000. 480-482.

people's sense of citizenship in liberal democratic nation-states. That is, people often maintain greater allegiances to, and, identification with particular cultural and social groups within the nation than they do with the nation at large. The very notion of a common national identity is a chimera, one dependent upon the suppression and marginalisation of social and cultural differences. Thus, there has been a call for differentiated citizenship, which accords to members of certain groups who have been incorporated into the political community as individuals through a cultural group.¹¹⁵ This cultural pluralist as Bosniak points out offers a powerful challenge to the default presumption in people's collective identifications and solidarities that are bound-up with the state.

Benedict Anderson argues national identity is the imagined community.¹¹⁶ Anderson further argues that the imagined nation is limited because even the largest of them such as North America, Russia, China and Australia has finite, elastic boundaries beyond which lies other nations.¹¹⁷ For Anderson, no nation imagines itself coterminous with mankind, and the most passionate of nationalists do not dream of a day when all the members of the human race will join their nation. It is argued this could not be done, as the world's population is too high for any one nation to accommodate all humans, unless the territorial boundaries changed and nations expanded their territory. It is the imagined sovereign because the concept was born in an age in which enlightenment and revolution were destroying the legitimacy of the divinely ordained, hierarchical dynastic realm.¹¹⁸ Nevertheless, the imagined nation (community) today is limited. Most states do not restrict their people from exiting and transcending national boundaries. In the contemporary world, citizens of a state can migrate and engage with other citizens from other states in private activities. States through their respective citizens and polity have imagined, at different times, the community they wanted to develop.

National identity is the bond between the citizen and the state. The citizenship laws of a state go some way to providing this bond. This assertion is correct provided the individual citizen feels that at a personal level. This thesis compares and examines the effects that citizenship law of Australia and Slovenia have, and contribute to national identity. National identity is used to protect and unite¹¹⁹ the citizens and residents.¹²⁰ Uniting the people in a defined territory is an important part of national identity (e.g. political community, history, territory, patria, language,

¹¹⁵ Ibid.

¹¹⁶ Benedict Anderson, *Imagined Communities: Reflections On The Origin and Spread of Nationalism*, London: Version, 1991, 7-8.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Jurgen Habermas, *Citizenship and National Identity*, in Bart Van Steenberghe, *the Condition of Citizenship*, SAGE Publications, 1994, 19-20.

¹²⁰ Montserrat Guibernau, Anthony D. Smith 'On nations and national identity: a critical assessment', *Nations and Nationalism* 10 (1/2), 2004, 133.

citizenship, common values and traditions).¹²¹ National identity assists the state to deliver a standard cultural message to the entire population of a state.¹²² Furthermore, elements of nationalism come from the people themselves when speaking the same language and practicing the same culture. Citizenship contributes to uniting the people by providing the sense of being a citizen. Citizenship helps to shape the citizenry sentiment.¹²³ However, this becomes problematic in multicultural societies such as Australia, where people often maintain a greater allegiance to their ethnic group than they do to the nation state itself.¹²⁴

Felicita Medved argues that culture is an important part of national identity, and is distinctive and associated with an individual language and social environment.¹²⁵ Culture is the totality of a society's distinctive ideas, beliefs, values and language.¹²⁶ The thesis argues that the Slovene language, for many centuries has been the single common principle of continuity to the Slovene people when developing the Slovene identity. This has been reaffirmed by Tomaž Deželan who argues that the Slovene language has been an important part of what it means to be Slovenian and the development of Slovenia as a nation state.¹²⁷ For Australia, the English language is an important part of what it means to be Australian,¹²⁸ however it could be argued that it does not distinguish who is Australian in the same way the Slovenian language has been able to achieve. As discussed later in this chapter the English language in Australia has not been codified in the same way as the Slovenian language has been in Slovenia. The English language is universal, whereas the Slovenian language is not and is largely confined to the territory of modern day Slovenia.

The state is continuously faced with legitimising itself to the citizens of the state.¹²⁹ Ernest Renan argued that citizens and residents conduct a daily 'plebiscite', choosing whether to affirm

¹²¹ Ibid.

¹²² Lynn Jamieson, *Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity*, Department of Sociology, University of Edinburgh, *Sociologia* 34, 2002, c 6.

¹²³ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, *Indiana Journal of Global Legal Studies*, Vol 7: Iss 2, 2000, 447.

¹²⁴ Emily Flahive, *National Identity in Crisis: The Politics of Constructing National Identity and Mandatory Detention of Asylum-Seekers in Australia and Japan*, https://sydney.edu.au/law/anjel/documents/ZJapanR/ZJapanR23/ZJapanR23_13_Flahive.pdf, accessed 2 August 2016.

¹²⁵ Felicita Medved, *Nationality, Citizenship and Integration, A European Perspective*, Council of Europe, 2001, 2-24.

¹²⁶ Oliver Serrat, *Culture Theory*, Knowledge Solutions, Asian Development Bank 2008, 1-3.

¹²⁷ Tomaž Deželan, *Citizenship in Slovenia: the regime of nationalising or a Europeanising state?* CITSE Working Paper Series, The University of Edinburgh, 2011, 2-30.

¹²⁸ Jill Sheppard, *Australian Attitudes Towards National Identity: Citizenship, Immigration and Tradition*, *Australian Centre for Applied Social Research Methods*, ANU College of Arts and Social Sciences, Report No 18. 2015, 1-15.

¹²⁹ Frank Bechhofer and David McCrone, *National Identity, Nationalism and Constitutional Change*, Palgrave MacMillan, 2009, 1-5.

their cultural heritage.¹³⁰ The idea of a daily plebiscite followed the defeat of France by Prussia in 1871, whereby the rights of the inhabitants of Alsace-Lorraine were attached without their consent to the emerging German Empire, which took control and decided their destiny through the expression of their collective will.¹³¹ The collective will can be in the form of culture.¹³² It is the culture and history of state that has played an important role in the development and evolution of national identity. National identity is formed under constitutional patriotism, and a common set of constitutional principles such as fundamental rights and democratic institutions that bind the community.¹³³ National identity is defined by a national consciousness,¹³⁴ which is facilitated by political activation and culture of the citizen.¹³⁵ The political culture serves as the common denominator for a constitutional patriotism, which simultaneously sharpens an awareness of the multiplicity and integrity of the different forms of life, which coexist in a multicultural society. Citizenship as a membership assist in establishing a national identity and provides obligations that give effect to legal bonds of a community.¹³⁶ Therefore, in the context of this thesis, national identity constitutes how the citizenship, migration, human rights and private international laws contribute to this concept.

iii. Citizenship

Citizenship has evolved as the nation state has evolved. Most scholars have concluded citizenship is the legal relationship between the state and citizen. Citizenship includes and excludes people from a state. Citizenship comes with rights. Citizenship must be considered in light of mass migrations and wars which were a driving force behind the development of a fully-fledged status for citizens.¹³⁷ Citizenship is one of the fundamental elements of statehood and differentiates among the population living within the state.¹³⁸ Over the past century, conceptions of citizenship despite the many differences has a single commonality that the necessary framework for citizenship is retained by the sovereign, territorial state. However, a

¹³⁰ Ernest Renan, What is a Nation? ('Qu' est-ce qu' une nations') in Bernard Yack, *Nationalism and Moral Psychology of Community*, The University of Chicago Press, 2012, 29-30

¹³¹ Patrick Weil, *From conditional to secured and sovereign: The new strategic link between the citizen and the nation-state in a globalised world*, I-CON, Vol. 9 No. 3-4, 2011, 615-635.

¹³² Bernard Yack, *Nationalism and Moral Psychology of Community*, The University of Chicago Press, 2012, 29-30.

¹³³ Jurgen Habermas, *Struggles for recognition in the democratic constitutional state*, in Amy Guttmann, *Multiculturalism: Examining the politics of recognition*, Princeton University Press, 1994.

¹³⁴ Jurgen Habermas, *The European Nation State. Its achievements and limitations. On the Past and Future of Sovereignty and Citizenship*, Ratio Juris, 1996, 125 –137.

¹³⁵ Ibid.

¹³⁶ Ronald Beiner, *Citizenship and Nationalism: Is Canada a Real Country?* In K Slawner and M E Denhim, *Citizenship after Liberalism*, Peter Lang Publishing, 1998, 185.

¹³⁷ Jurgen Habermas, *Citizenship and National Identity*, http://www.jura.uni-bielefeld.de/lehrstuehle/davy/wustldata/1994_Bart_van_Steenbergen_The_Condition_of_Citiizenship_OC.pdf, accessed 31 October 2016.

¹³⁸ Riina Kionka, "Who Should Become a Citizen of Estonia?", RFE/RL Report on the USSR, 27 September 1991, 23.

major controversy exists is whether citizenship should be universal or confined to the nation state.

The contemporary understanding of citizenship has been heavily influenced by classical traditions of Western (classical),¹³⁹ postcolonial¹⁴⁰ denationalised thought.¹⁴¹ The classical traditions of citizenship date back to ancient civilisation of the fourth and fifth centuries BC and from the third century B.C. to the first A.D. in Athens and Rome.¹⁴² Postcolonial thought is relevant to citizenship and this study as it presents how, for example, the law either included or excluded people from citizenship, when territorial rule changed. In postcolonial thought, it is essential that a state create an identity to ensure there is a stable society. However, this is continually challenged with regionalisation and globalisation. Denationalised citizenship has been affected by regionalisation and globalisation. Scholars have argued that the meaning of citizenship is highly contested, and the term has a broad range of uses. Citizenship has been difficult to define and is considered one of the oldest institutions in Western political thought and practice. It is not one of the easiest concepts to grasp.¹⁴³ Furthermore, citizenship has several interlocking factors that include globalisation, international migration, ethnic and cultural differences within a nation state, the fragmentation of a nation state.¹⁴⁴ Thus, modern day governments use citizenship as a civic identity to draw the citizens together under a form of commonality within a nation state.

Citizenship in the modern day straddles the boundary of law and politics,¹⁴⁵ sociology¹⁴⁶ and psychology.¹⁴⁷ Citizenship and politics is nothing new and provides the basis for citizens to actively participate in the polity. Sociology of citizenship is important in the contemporary world because citizenship has been developed as a response to regional and global challenges. Psychological citizenship is the shared identity that citizens of the state have with the community. Importantly, a shared identity is part of national identity. Citizenship plays an important role in assisting a state to preserve a shared identity (national identity). Citizenship is the legal relationship between the citizen and the state (discussed in **chapter two and three**)

¹³⁹ John Pocock, *The Ideal of the Citizen Since Classical Times*, in Robnald Beiner, *Theorising Citizenship*, State University of New York Press, 1995, 30-50.

¹⁴⁰ Alphana Ray, *Post Colonial Theory and Law: A critical Introduction*, *Adelaide Law Review*, Vol 29: No ½, 2008, 315-325. Postcolonial thought is relevant to citizenship and this study as it presents how for example the law either included or excluded people from citizenship, when territorial rule changed. In postcolonial thought, it is essential that a state create an identity to ensure there is a stable society.

¹⁴¹ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, *Indiana Journal of Global Legal Studies*, Vol. 7: Iss 2, 2000.

¹⁴² Above, n 76.

¹⁴³ Paul Resenberg, *Citizenship in the Western Tradition*, *Chapel Hill and London: The University of North Carolina Press*, 1992, xvi.

¹⁴⁴ Derek Heater, *What is Citizenship?* Cambridge: Polity Press, 1999, 2-5.

¹⁴⁵ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002.

¹⁴⁶ Brian Turner, *Outline of a Theory of Citizenship*, *Sociology*, Vol. 24, 1990, 190 - 2010.

¹⁴⁷ Denis Sindic, *Psychological citizenship and national identity*, *Journal of Community and Applied Social Psychology*, 2015.

Classical Citizenship

The Pericles' Citizenship law of 451-50BC of Athens required both parents to be citizens and to share in the city.¹⁴⁸ Aristotle defined this activity as the *polis* which represented the community of citizens that were organised by a constitution.¹⁴⁹ Aristotle referred to citizens as those who rule and are ruled, which involved the power to take part in the deliberative or judicial administration of society. Shafir explains that the “citizen Greek *polites* or Latin *civis* has been defined as the Greek *polis* or the Roman *republica*.”¹⁵⁰ Engin Isin argues that in Rome the conception of citizenship was defined in terms of judicial status. Citizenship became part of the law as opposed to the function (s) undertaken by an individual.¹⁵¹ John Pocock argues that citizenship has been inherited from both the Greeks (a collective of self-rule) during antiquity and the Romans (legal status).¹⁵² The concept that citizenship is a legal status forms part of modern day Australia and Slovenia’s legal framework. Throughout antiquity and the middle-ages citizenship was associated with townships.¹⁵³ The development of the Roman empire resulted in provinces being integrated into the empire, which resulted in four key elements. Firstly, the construction of a network of roads. Secondly, the introduction of provincial administrations. Thirdly, the inclusion of provincials into the Roman military. Fourthly, there was the extension of Roman citizenship to provincials, and the process of urbanisation.¹⁵⁴ The nation state had not been fully realised and therefore citizenship was localised. Shafir highlights that citizenship changed three times over history: during antiquity Greek *polis*, to the Roman law, to where citizens are now part of the modern times of nation states. Australia and Slovenia both resemble the historical developments of the former Roman Empire, as they have urbanised. However, the difference is that citizenship is not localised, but rather national. Slovenes were part of the Roman Empire. Australia was not. Slovenes found themselves being drawn into the cultural life of the German princes, within the jurisdiction of the Roman Church.¹⁵⁵ Fred Singleton argues that this was an important influence on the early developments of the national character of Slovenians.¹⁵⁶ The continent of Australia at the time had not yet been discovered by the British and was inhabited by the aboriginal people.

¹⁴⁸ Cynthia Patterson, *Pericles Citizenship Law of 451-50 BC*, 1981, 1-8, in Kim Rubenstein, *Citizenship in Australia: Unscrambling its Meaning*, Melbourne University Law Review, 1995, 504-508.

¹⁴⁹ Fred Miller, *The State and Community In Aristotle's Politics*, Bowling Green State University, pp 1-9, http://www.reasonpapers.com/pdf/01/rp_1_5.pdf, accessed 28 January 2011.

¹⁵⁰ Gershon Shafir, *The citizenship Debates*, University of Minnesota Press, 1998, 31.

¹⁵¹ Engin Isin, *Who is the new citizen? Towards a Genealogy*, *Citizenship Studies*, 1997, 115-131.

¹⁵² John Pocock, *The Ideal of Citizenship since Classical Times*, 1998, 20-50.

¹⁵³ Max Weber, *Citizenship in Ancient and Medieval Cities*, in Gershon Shafir, *The citizenship Debates*, University of Minnesota Press, 1998, 43-49.

¹⁵⁴ David Feedman, Allen Miles, *Dictionary of the Bible*, William Eerdman Publishing Company, 2000, 1141.

¹⁵⁵ Fred Singleton, *A Short History of the Yugoslav People's*, Cambridge University Press, 1989, 15.

¹⁵⁶ *Ibid.*

During the middle ages the lords provided protection and there was a relationship, which was characterised as reciprocal with bonds between lords and vassals.¹⁵⁷ The basis of the feudal system was to ensure control over the land. The loyalty of a person was not to the law or constitution, or an abstract concept such as a nation, but to a person, namely the level up such as a knight or king. Over time, the persona ties linking vassals with lords were replaced with contractual and more impersonal relationships.¹⁵⁸

Liberalism and Republican Citizenship

In the 1600s and 1700s philosophers such as Thomas Hobbes, John Locke,¹⁵⁹ Jean-Jacques Rousseau¹⁶⁰ and Immanuel Kant¹⁶¹ began writing about citizenship and all espoused the social contract theory. The social contract theory establishes society as a collective having a set of equal rights.¹⁶² Locke's notion of society is based on voluntary agreements that are not political. A political society formed by individuals representing their families also theoretically came together under the State of Nature and agreed to give power to their government.¹⁶³ An important point made by Locke is that the government is formed by its people (the citizens) who have established laws to protect themselves, people and property; it also includes the protection of people from the state.¹⁶⁴ Locke's work has influenced European thought separating public and private (rights, freedoms and protections). That is, citizens act as part of society and for themselves (the private), and by coming together to form communities delegating some of their power to government (the public). Governments make the laws in order to create societal norms and protect the

Jean-Jacques Rousseau¹⁶⁵ argues that the social contract provides equality as society develops, and thus no single individual has a right to govern others; but rather, that authority is generated by agreements or covenants.¹⁶⁶ Within the modern day states of Slovenia and Australia, the social contract is well entrenched through the acceptance of the rule of law. The legal frameworks of both states protect their citizens and ensure equality before the law and go some

¹⁵⁷ Derek Heater, *A Brief History of Citizenship*, New York City: New York University Press, 2004, 156-158.

¹⁵⁸ Peter Zorrows, Joshua Fogel, *Imagining the People: Chinese Intellectual and the Concept of Citizenship*, 1890-1920, Armonk, New York: M.E. Sharpe, 1997, 2-4.

¹⁵⁹ Stephen Olynik, *Convenient Fictions: A comparison and Critical Analysis of Hobbes and Locke's Social Contract Theories*, *The Western Australian Jurist*, Vol. 1, 2010, 132-140.

¹⁶⁰ Alubabari Desmond Nbeta, *The Social Contract Theory: A Model for Restructuring a True Nigerian Nation-State*, *International Journal of Humanities and Social Science*, Vol. 2 No. 15, 2012, 267-270.

¹⁶¹ Ibid.

¹⁶² Social Contract Theory: *Internet Encyclopedia of Philosophy, A Peer-Reviewed Academic Resource*, www.iep.utm.edu/soc-cont/print, accessed 20 December 2012.

¹⁶³ Ibid.

¹⁶⁴ John Locke, *Two Treatises of Government*, edited by Peter Laslett, Cambridge, United Kingdom: Cambridge University Press, 1998, 93-122.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

way to ensuring equality across society, even though in practice this is not always evident. Rousseau further argues that citizenship is an “attachment to a political community that has a set of traditions and customs”.¹⁶⁷ However, this was not the case for women. He concluded that women's rights were restricted and administered by their husbands.¹⁶⁸ Not only would Rousseau be criticised for this position today, Mary Wollstonecraft¹⁶⁹ criticised him for advocating that women should not be educated in the same manner as men. In applying the natural law of man to women, Wollstonecraft promoted the idea that women have the right to educate themselves and participate in society equal to that of men. The challenges for women were immense, not only had the law reduced their acceptance and participation in society, but scholars such as Rousseau were writing to ensure that women retained second place behind men. This thesis argues that as citizenship and the nation state have evolved over time, the idea that women would assume greater equality in society began to take shape.

Bryan Turner argues that the historical development of citizenship has two dimensions.¹⁷⁰ Turner in comparing the English and German traditions highlights that the first dimension is the passive-active, and the second is the tension between a private realm of the individual and family in relationship to the public arena of political action.¹⁷¹ In the German tradition, citizenship stands at the passive relationship to the state because it is an effect of state action. The ascending view was that a free man was a citizen, an active bearer of rights. In the northern areas of Italy, the Roman law facilitated the adoption of a populist notion of citizenship, which was the aggregate of citizens who possessed some degree of autonomous sovereignty.¹⁷² Importantly, the difference between English and German traditions of political participation are considerable. The constitutional law in Roman continental system and the judge made law by the English within the common law tradition. The constitutionalism provided safeguards for the individual but underestimated the importance of the common law tradition in providing precisely a common basis for rights.¹⁷³ Turner notes that the struggle of the absolutist state in England had resulted in the execution of the king, and expansion of parliamentary authority, the defense of the English common-law tradition and the assertion of individual religious rights. The constitutional settlement of 1688 created British citizenship as the British subject (discussed **chapter two**). The notion of citizens as subjects are constituted by a monarch and an extensive notion of civil rights but also a passive character of British civil institutions. Yet, the French experience was different again as it was as a consequence of a long historical struggle to break the legal and political monopoly of a court society within a social system which was

¹⁶⁷ Derek Heater, *A Brief History of Citizenship*, Edinburg University Press, 2004, 67-72.

¹⁶⁸ Jean-Jacques Rousseau's philosophy on gender 1762, in Sirkkuy Hellsten, Anne Maria Holli, Krassimira Daskalova, Palgrave MacMillan, 2005, 14-16.

¹⁶⁹ Mary Wollstonecraft, *Vindication of the Rights of Women*, 1792, University of Oregon, 2000.

¹⁷⁰ Bryan Turner, *Outline of a Theory of Citizenship*, Sociology, Vol. 24 No 2. 1990, 189-217.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

rigidly divided in terms of estates.¹⁷⁴ Thus, for Rousseau, the viability of citizenship required the destruction of all particular intervening institutions, which separated the citizen from the state.

During the 1800s, Karl Marx highlighted that the state stands in the same opposition to civil society and overcomes it in the same way as religion overcomes the restrictions of the profane world. Man in civil society is a profane being.¹⁷⁵ Marx drew the distinction of man (citizen) being part of not only a political community but a much broader part of society as a whole.¹⁷⁶ This new membership ensured that there was equality before the law and the legal right to private property while encouraging political participation by the citizens.¹⁷⁷ That is, the citizen could choose to participate in the polity and the development of the law to ensure equality and rights were afforded to citizens. Throughout the period of colonisation, law played a major role in shaping colonies. Those territories ruled by empires had law imposed upon them. Marx endorsed European legal superiority and promoted the idea of ‘mankind’ that saw predictive laws¹⁷⁸ being established to govern larger areas of territory that the modern state has become. The resulting effect of the rise of the modern day state has seen a change in territorial boundaries, rulers and the law. At different periods, the change in law created the subaltern,¹⁷⁹ classes were formed (richer and poorer slaves). This was particularly the case when the British colonised Australia and the indigenous aboriginal people were viewed as the ‘other’. Ninety years later, in the Slovenian context, the ‘other’ were the former Yugoslav citizens. The ‘other’ being those inhabitants on a territory who had been excluded by the citizenship laws. The subaltern today is alive and well as states use their immigration laws to manage skilled labour into the country. Linda Bosniak argues that today the ‘other’ is the ‘alien’ or non-citizen. Today, a non-citizen has been provided the ability to reside on the territory of Australia or Slovenia for the long term. Permanent (long-term) residents have assumed many of the rights a citizen has. However, this research will highlight the subtle shift that is taking place particularly in Australia and to a lesser extent in Europe (Slovenia included), where long-term residents are being removed. These long term, permanent residents make a contribution to the nation state’s national identity by contributing to and being part of the wider Australian or Slovenian community.

¹⁷⁴ Ibid.

¹⁷⁵ Karl Marx, *On the Question of the Jewish Community*, T.B Bottomore, McGraw-Hill 1963.

¹⁷⁶ Ibid.

¹⁷⁷ Rogers Brubaker, *The French Revolution and Invention of Citizenship*, French Politics and Society, Vol 7, No 3, 1989, 30-49.

¹⁷⁸ Donald Kelly, *The Human: Social Thought in the Western Legal Tradition*, Harvard University Press, 1990, 263-268.

¹⁷⁹ Gayatri Spivak, *Can the Subaltern Speak?* in Patrick Williams and Lara Chrisman, *Colonial Discourse and Post-Colonial Theory: A Reader*, Hertfordshire: Harvester Wheatsheaf, 1994, 93.

The First World War had a significant impact across Europe and the modern day territory of Slovenia. There was a reordering and push by the former president Woodrow Wilson of the United States of America to set the direction of self-determination and that frontiers should be recognisable by nationality. The Austro-Hungarian territory was to be protected and able to develop themselves autonomously. However, the Austro-Hungarian territory would fall, rule would change. Some of the northern territory, which today is modern day Slovenia, would become part of the newly formed Kingdom of Serbs, Croats and Slovenes, which resulted in citizenship be administered by new rulers (discussed **chapter two**).

Liberal Democratic Citizenship

The 20th century saw a renewed interest in citizenship. Thomas Marshall's book *Citizenship and Social Class and Other Essays*, would become one of the most influential studies into citizenship.¹⁸⁰ Marshall saw citizenship as part of the interrelated processes of nation building and the emergence of commercial and industrial society. Furthermore, Marshall also aligned citizenship with the construction of a national consciousness. The national consciousness is part of national identity where citizens feel they belong to a nation state. Marshall's account of citizenship was modelled on Britain, which reflected the modern day democratic (welfare) state. Marshall aligned citizenship to social class and categorised a citizen as having three sets of rights that included political, civic and social.¹⁸¹ Human rights have evolved over many centuries, and today citizens are afforded national, supranational and international rights, which Marshall would describe as an egalitarian society.¹⁸² The same can be said for Australian citizens however, they haven't been afforded supranational rights. For Marshall, gaining social equality is the final step in developing citizenship.¹⁸³ The rights based model has shaped political and social thought about citizenship during the post-war period. Marshall was writing at a time when western democratic states were expanding their welfare protections for their citizens. The economic shocks experienced by western states in the 1970s, 1980s, and 1990s would see an economic decline, which resulted in states reviewing their welfare programs. However, that social equality that Marshall espoused can be found in the international, human rights (discussed **chapter four**) is an important part of the modern day legal framework for citizenship.

¹⁸⁰ Thomas Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, 1950.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

Hannah Arendt¹⁸⁴ describes citizenship as the ‘right’ to have rights (civil and political)¹⁸⁵ which is absolute and guaranteed, even though the rights afforded are limited by fellow citizens and the boundary of the state. This is an aspirational proposition, because in practice there are more than 12 million people who have no citizenship of any state in the world, with more than 600,000 of these people located across Europe.¹⁸⁶ On the other hand, citizenship has been described as providing something that all citizens have in common no matter what their race, religion, color, political persuasion or gender,¹⁸⁷ and therefore, the law applies to everyone in the same way.¹⁸⁸ Citizenship¹⁸⁹ has been discussed over time by scholars, the political elite and community when particular events have taken place, whether locally or globally. That is, as states become increasingly multicultural, social equality ensures stability and goes some way to unifying the citizenry. In the post war period citizenship was largely viewed in terms of possession of rights,¹⁹⁰ as a result of the development and rise of human rights law.

Following WWII, decolonisation resulted in the emergence of newly independent nation states.¹⁹¹ They would assume political independence, which resulted in a centralised system of government and control being established. There was a shift from the former colonies, in the primary loyalty of a citizen from family, community or religious ties, to the nation state.¹⁹² The postcolonial period saw the rise of identity as fundamental to constructing the state. Even though there was a continued push to the hegemonic position that states held by excluding outsiders, this began to change. The engagement of new ethnic and political identities was embraced by states.¹⁹³

¹⁸⁴ Hannah Arendt, *The Origins of Totalitarianism*, Harcourt, Brace and Company. New York, 1951, 266-298, in Daniel Tabb, *Statelessness and Columbia: Hanna Ardent and the Failure of Human Rights*, 2006, 40-52.

¹⁸⁵ Thomas Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, 1950.

¹⁸⁶ Statelessness, European Network on Statelessness, Everyone has the right to nationality, <http://www.statelessness.eu>, accessed 2 February 2014.

¹⁸⁷ Ruth Lister, *Feminist Perspectives*, Macmillan: Basingstoke, 1997, 190 -196.

¹⁸⁸ Iris Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, *Ethics*, Vol. 99, No 2. 1989, 205.

¹⁸⁹ Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, *Ethics*, 1994.

¹⁹⁰ *Ibid.*

¹⁹¹ Alphana Ray, *Post Colonial Theory and Law: A critical Introduction*, *Adelaide Law Review*, 2008, 315-325.

¹⁹² *Ibid.*, 334.

¹⁹³ *Ibid.*

a) Membership

Citizenship sets the boundaries of full membership in the political community.¹⁹⁴ Jean Bethke Elshtain argues citizens participate in politics and emphasises the importance of society as a whole for the common good.¹⁹⁵ Elshtain favors this form of citizenship as it establishes a national identity, while maintaining relationships with other states. By focusing on the national identity, Elshtain¹⁹⁶ argues that citizens will contribute to a global community because of the awareness of inequalities between states. That is, states today are not equal and are different, culturally, economically and socially. Matthew Gibney points out that opening global borders would take away the legal role that citizenship has in regulating the movement of people.¹⁹⁷ The concept of a global citizenship¹⁹⁸ in its extreme sense could allow any individual to move and take up residence anywhere they wish without any monitoring from an institution. That is, every person of every nation state has a single citizenship that operates across all nation states. This is an aspirational concept, as the institutional framework is not established to accommodate or administer a global citizenship. As an extreme form of citizenship, it would not benefit states in maintaining their national identity, sovereignty, culture and heritage. However, done under a set of tight international, national constitutions and laws, this could be achieved, in the same way that can be seen in the European Union. What this could achieve is minimising or even seeing statelessness fully extinguished. Barrington describes a citizen as an official member of the state,¹⁹⁹ thus, participating in the nation building process. That is, non-citizens in most states do not have the right to vote and stand for elections, thus they cannot be full members of the community. Therefore, citizenship brings with it a greater sense of assurance of the social benefits provided by the state. Full citizens are afforded and enjoy all the social rights practiced by the community. This assurance, as Barrington argues comes in the form of those political rights then enable the citizen to vote and stand for election.

¹⁹⁴ Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality*, Oxford, 1983, 43.

¹⁹⁵ Jean Bethke Elshtain, *Women and War*, United States of America: Basic Books, 1987, 250-265.

¹⁹⁶ Ibid.

¹⁹⁷ Matthew Gibney, *Statelessness: Statelessness and the right to citizenship*, Refugee Studies Centre, University of Oxford, 2009, 51-52.

¹⁹⁸ Benjamin Barber, *Strong Democracy*, University of California Press, 1984, 118 - 225.

¹⁹⁹ Lowell Barrington, *Nation, States and Citizens: An Explanation of the Citizenship Policies in Estonia and Lithuania*, Review of Central Eastern European Law, 1995, 103 – 150.

Citizenship is a balance of rights and responsibilities²⁰⁰ that are tied to a membership of a community. Scholars have identified citizenship to include, but not limited to, the social contract,²⁰¹ political²⁰² community or participation,²⁰³ social equality,²⁰⁴ is inclusive (active) and enables full participation in public life and the law.²⁰⁵ Thus, many scholars have concluded citizenship to mean similar things, even though some scholars had written about the concept decades apart. Similar to other scholars Jean Cohen argues that citizenship is a political principle of democracy, a juridical status of legal personhood and a form of membership and political identity. The political identity, it is argued, forms part of the collective identity that makes up part of national identity. The modern paradigm of citizenship was based on the assumption that these components would neatly map onto one another on the terrain of the democratic welfare state. Globalisation, new forms of transnational migration, the partial disaggregation of state sovereignty and the development of human rights legal frameworks have rendered this model anachronistic.²⁰⁶ John Rawls argues that the goal of a good society is the greatest achievement of individual interests for the greatest number of citizens, and the role of the political realm is to protect individuals by leaving them unhindered in pursuit of their interests.²⁰⁷ Rawls portrayed participation as a political process in the public sphere, whereby all citizens have an equal right (equal citizenship) to take part in, and determine, the constitutional process, which establishes the laws to which they are to comply. Equal citizenship is defined by rights and liberties that men and women have equal rights and responsibilities to the state. Rawls also argued that to achieve a rational consensus in the political arena, religious and philosophical matters on which agreement cannot be reached should not be included in public debate, and that no definition of the good life should be imposed on people in their private lives.²⁰⁸

²⁰⁰ Herman van Gunsteren, *A Theory of Citizenship: Organising Plurality in a post 1989 Democracies*, Westview Press, 1998.

²⁰¹ Stephen Olynyk, *Convenient Fictions: A comparison and Critical Analysis of Hobbes and Locke's Social Contract Theories*, *The Western Australian Jurist*, Vol. 1, 2010, 132-140. Alubabari Desmond Nbeta, *The Social Contract Theory: A Model for Restructuring a True Nigerian Nation-State*, *International Journal of Humanities and Social Science*, Vol. 2 No. 15, 2012, 267-270.

²⁰² Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos", *International Sociology*, 1999, 14 (3): 245–268. Joseph Carens, J. H., 1987, "Aliens and Citizens: The Case for Open Borders", *The Review of Politics*, 1987, 49 (2): 252–273. Joseph Carens, 2000, *Culture, Citizenship, and Community. A Contextual Exploration of Justice as Evenhandedness*, Oxford: Oxford University Press, 2000.

²⁰³ Rogers Brubaker, *The French Revolution and Invention of Citizenship*, *French Politics and Society*, Vol 7, No 3, 1989, 30-49. Karl Marx, *On the Question of the Jewish Community*, T.B Bottomore, McGraw-Hill 1963. Ruth Lister, *Feminist Perspectives*, Macmillan: Basingstoke, 1997, 196.

²⁰⁴ Thomas Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, 1950. John Rawls, *A Theory of Justice*, Harvard University Press, 1971, 3-5.

²⁰⁵ Iris Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, *Ethics*, Vol. 99, No 2. 1989, 250-270.

²⁰⁶ Jean Cohen, "Changing Paradigms of Citizenship and the Exclusiveness of the Demos", *International Sociology*, 1999, 14 (3): 245–268.

²⁰⁷ John Rawls, *A Theory of Justice*, Cambridge, Mass: Belknap Press, 1971, 227.

²⁰⁸ Ibid.

b) Exclusion and Inclusion

Nations exclude rather than include by providing an individual with rights.²⁰⁹ For Ackerman, citizens participate in political dialogue, and they have the right to vote and stand for election. However, the other (alien or permanent resident), are restricted and their participation in the state's political discourse is limited as they are unable to vote and stand for elections. The active citizen is able to fully participate in society. However, this is not always the case and scholars such as Iris Young argue that the concept of the citizen serves to hide the realities of citizenship exclusions under a veil of formal equality.²¹⁰ The citizen themselves are not all equal in ability and capability to engage in and with the polity, and state policies by their very nature are formulated to often exclude the needs of particular groups.²¹¹ Immigration is considered a pathway to citizenship and by their very nature a state uses immigration laws to include and exclude individuals from entering, staying and applying for citizenship. Furthermore, the residency requirements by states, which can be up to ten years, is lengthy, and, is somewhat exclusionary by its very nature when a person wants to obtain citizenship of that state. Inclusionary measures of citizenship has seen the rise of dual citizenship, as states embrace the idea of maintaining a connection with their citizens even though they reside in another state.²¹² Therefore, universality of citizenship continues to be challenged by nation states protecting their sovereign needs.

Kymlicka and Norman²¹³ argues citizenship constitutes three types of demands. Then first is the special representation of rights. Secondly, multicultural rights and thirdly self-government rights (national minorities). The first two are inclusive as part of mainstream society with special representation rights are measures that alleviate obstacles that minorities have to participate in society. The rise of multicultural rights by immigrant groups since the rise of human rights law has seen inclusionary measures being established by states in their legal framework, even though in practice different ethnic groups are continually excluded. Jurgen Habermas argues that the concept of citizenship has been used as a policy principle by nation states to build the "nation state."²¹⁴ For Habermas there are two theoretical concepts in relation to citizenship, one communitarian and the other individualist. The first concept is based on people's individual rights and equality before the law, and secondly, the citizen being part of a community. Furthermore, democracy as a set of procedures, can secure legitimacy in the

²⁰⁹ Ronald Beiner, *What's the matter with liberalism*, University California Press, 1992, 99.

²¹⁰ Iris Young, *Polity and group difference: a critique of the ideal universal citizenship*, Ethics, Vol 99: 250-70.

²¹¹ Ibid.

²¹² Lowell Barrington, *Nation, States and Citizens: An Explanation of the Citizenship Policies in Estonia and Lithuania*, Review of Central Eastern European Law, 1995, 103 – 150.

²¹³ Will Kymlicka and Wayne Norman, *Return of the Citizen: A Recent Work on Citizenship Theory*, Survey Article, 1994, 352-381.

²¹⁴ Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, 1998, 110-115.

absence of more substantive commonalities between citizens and achieve social integration (inclusion), and generate a common political culture.²¹⁵ In complex societies, it is the deliberative opinion and will of the citizens, grounded in the principles of popular sovereignty that forms an abstract, legally constructed solidarity that produces itself through political participation (provided by citizenship).²¹⁶ For citizenship to continue to be a form of solidarity, it has to be seen as a valuable status, associated not only with civil and political rights, but also with the fulfilment of fundamental social and cultural rights.²¹⁷

c) Post National - Citizenship

Yasemin Soysal argued in the 1990s that citizenship is no longer part of the national political collective.²¹⁸ She argues that the concept of postnational citizenship has been on the rise, with the increased acceptance by states to allow their citizens to hold more than one citizenship. Dual or multiple citizenship comes with its own challenges. Having more than one citizenship allows a person to move with ease between two states. Citizenship today also includes the diaspora,²¹⁹ or invisible citizenry located in other states.²²⁰ The diaspora has increasingly become more important to the state, and this thesis will demonstrate how the diaspora forced the Slovenian government to change its citizenship laws (discussed **chapter three**). At the state level, governments grapple with the idea of dual or multiple citizenship because on the one hand they are implementing liberal reforms to allow for this. On the other hand, governments, as identified in chapter three, continue to make it harder for non-citizens to become citizens in the modern day. More recently, Linda Bosniak has argued rather than postnational citizenship, dual citizenship should be characterised as multinational citizenship.²²¹ This thesis argues that the current day citizenship laws of Slovenia and Australia are both postnational and multinational. That is, both postnational and multinational, provide for dual citizenship.

²¹⁵ Jurgen Habermas, *The Postnational Constellation, Political Essays*, Cambridge (Mass.): MIT Press, 2001a, 76.

²¹⁶ Ibid.

²¹⁷ Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, 1998, 118-119.

²¹⁸ Yasemin Soysal, *Changing Parameters of Citizenship and Claims-Making: Organised Islam in European Public Spheres*, *Theory and Society*, Vol 26, No 4, 1997, 509-513.

²¹⁹ Michel Beine, Frederic Docquier, and Calgar Ozden, *Diasporas*, University of Luxembourg, *Journal of Development Economics*, 2009. Stine Neerup, *Diasporas in the Commonwealth, Focus on diasporas in the Commonwealth*, Institute for the Study of Global Movements, Monash University, Vol 6 No 1, 2009.

²²⁰ Katherine Betts and Bob Birrell, *Making Australian Citizenship Mean More*, *People and Place*, Vol 15, No 1, 2007, 44-55.

²²¹ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, *Indiana Journal of Global Legal Studies*, Vol 7: Iss 2, 2000, 463.

Yasemin Soysal's basis for citizenship is the notion of universal personhood as opposed to a citizen belonging to a single nation. Soysal argues that since WWII, there has been a steady rise in the development of international human rights law, which are now global.²²² International law, globalisation and agreements between nations has indirectly resulted in the rights of citizens going far beyond the nation state they are in.²²³ This evolution supports a component of this research that citizenship can no longer be considered at the state level. It must also be considered in the private sphere, because the body of law now straddling the boundary of nation states enable the citizen to engage in private activities with ease, compared to a century ago. Furthermore, Soysal's position extends to non-citizens (those holding a visa or permit), that are also players within the international sphere (as private citizens of a state), migrating to other states to improve their economic situation. For instance, the guest worker (a person from a third country) program across the European Union provide these people with certain rights. However, and while the law crosses the territory of nation states, the state has retained its ability to choose who its citizens will be. The state, provides citizenship and allows its citizens to be regional and global, transcending national boundaries. Similar exists in Australia where a foreigner can obtain a short-term visa to work and reside in the state. In Australia this person certainly is not afforded the same level of rights as those given to a permanent resident or citizen.

European citizenship reflects Soysal's notion of citizenship. This is because a citizen of Slovenia may be resident in France, and be afforded the same European rights as a French citizen. However, European citizenship poses a challenge to this hegemonic concept of national citizenship".²²⁴ Issever and Rummelili argue that "European citizenship²²⁵ does not bring a solution to the dichotomy of the nation-state citizenship.²²⁶ From a theoretical perspective European citizenship does not clearly distinguish between citizens and foreigners. It renders third country nationals (such as Australians) as others and creates categories of Europeans versus non-Europeans".²²⁷ European member states, while transferring some of their sovereignty to the European Union, have and continue to struggle, but, have retained much of their sovereignty in the area of citizenship law (discussed **chapter four**). Citizenship²²⁸ has been identified as being the cosmopolitan (multicultural and multinational).²²⁹ Multicultural

²²² Yasemin, Soysal, *Limits of Citizenship: Migrants and Postnational Membership in Europe*, Chicago University Press, 1994, 1-15.

²²³ *Ibid*, 140-145.

²²⁴ Chris Shore, *Building Europe: The Cultural Politics of European Integration*. London and New York, Routledge, 2000, 72.

²²⁵ Esra Issever and Bahar Rumelili, *European Citizenship and Third Country Nationals: A Comparative Analysis of Germany and Britain*, 2009, INTL 533, 1.

²²⁶ *Ibid*.

²²⁷ Willem Maas, *Migrants, States, and EU Citizenship's Unfulfilled Promise*, *Citizenship Studies*, 2008, pp 583-596.

²²⁸ Andrew Linklater, *Cosmopolitan Citizenship*, *Citizenship Studies*, Vol. 2, No. 1, 1998, 26.

²²⁹ John, Salmond, *Citizenship and Allegiance, Nationality in English Law*, *The Law Quarterly Review*, 1902.

citizenship is evident in both states.²³⁰ However, both states have adopted restrictive measures (language and testing) to protect their national identities.

Citizenship can provide a sense of belonging within and with a state.²³¹ Citizenship enables a citizen to be an active participant within the state and beyond.²³² Citizenship has been used in areas such as participation and governance within a state or territory, rights and duties, identities (both national and at an individual level). Thus, citizenship can be differentiated between individuals to mean different things. The evolution of citizenship has played an important role in building a nation, and assists a nation to formulate an identity.

d) Public and Private

In the contemporary world, citizenship law straddles the boundary of public and private law.²³³ That is, citizenship is regulated by the state, which allows the individual to partake in private activities within and outside the borders of the state. It has also been argued that citizenship is exclusive,²³⁴ a desirable activity,²³⁵ including a civic virtue²³⁶ and universal,²³⁷ which all represent citizenship in the modern state. The concept of citizenship as a desirable activity, promotes the idea that the citizen abides by the laws of the state, is a good citizen towards the state and other citizens. Closely related to desirable activity, civic virtue encompasses what citizens understand society to be and uphold the status quo. Iris Young argues that the universality of citizenship is where the state provides a legal status and framework that defines all inhabitants equally.²³⁸ There is no class or racial distinction between the inhabitants of the state from the application of citizenship. The citizenship laws of Slovenia and Australia apply to all the people who have citizenship, no matter what race, colour or ethnic background the person is from. Thus, citizenship laws, while being exclusive are at the same time inclusive.

²³⁰ Stephen Castles, *Migration and Community Formation Under Conditions of Globalisation*, International Migration Review, 2005, 1143-1166.

²³¹ Prina Werbner and Nira Yuval-Davis, *Women and the New Discourse of Citizenship*, Zed Books, London, 1999, 2, in Lyn Jamieson, *Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity*, Soliologia 34, 2002, 14-15.

²³² Felicita Medved, *EUDO Citizenship Observatory, Country Report: Slovenia*, 2013, 20-27, <http://eudocitizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-24-Slovenia.pdf>, accessed 28 July 2016.

²³³ Patrick Weil, *Access to Citizenship: A comparison of twenty-five nationality laws*, in Thomas Aleinikoff and Douglas Klusmeyer, *Citizenship Today: Global Perspectives and Practices*, Carnegies Endowment for International Peas, Washington DC, 2001, 17-35.

²³⁴ Jelka Zorn, *The Politics of Exclusion Citizenship, Human Rights and the Erased in Slovenia*, UDK, 2004, 1-7.

²³⁵ Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104, *Ethics*, 1994, 351-354.

²³⁶ Ibid.

²³⁷ Iris Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, *Ethics*, Vol. 99, No 2, 1989, 250-270.

²³⁸ Ibid, 250.

They play an important role in the state by providing an equal status for all, particularly in multicultural societies such as Australia. However, and while on paper the legal status does not separate citizens based on ethnic, racial or gender grounds, there is an ongoing tension in the community on these grounds. Therefore, citizenship in itself does not resolve the overall dichotomy that a state can fully assimilate citizens into the community. Other laws such as immigration, human rights and private international law also contribute, even though their contribution is small.

For Linda Bosniak, people within the community challenge the notion of universal citizenship as they are nearly full participants of the community and polity.²³⁹ Therefore, there is an ongoing tension for the nation state in managing the inclusive and exclusive nature and principles that are afforded by citizenship and citizenship law. It could be argued that by states continuing to provide for, and not force permanent residents to take out citizenship, not only dilutes citizenship, but also, national identity. This is because permanent residents do not require the level of understanding and knowledge of a state's values or undergo testing to assume permanent residency. However, this thesis argues that the state is caught between a rock and a hard place. The state cannot force a person to take out citizenship, where that person may not want to revoke their citizenship of origin. Additionally, the state of origin may not allow the person to hold dual citizenship. The resulting impact to national identity is complex. The state may miss out on the opportunity of having a person being part of, and, contributing to the state. On the other hand, the state reinforces national identity by retaining certain individuals as citizens of that state, even though they are residing in another state.

Linda Bosniak²⁴⁰ highlights that there has been a struggle regarding citizenship beyond the nation state, because citizenship is a core concept in the current day political vocabulary. Bosniak argues citizenship is multidimensional, and denotes citizenship in four ways. Firstly, the legal classification or legal status. Secondly, the enjoyment of rights and privileges. Thirdly, the collective of self-governance and active participants in the political community. Fourthly, citizenship is the form of identity (collective identity) and social membership. It is argued that this collective identity is a component of national identity. Kim Rubenstein also argues that citizenship is a legal status.²⁴¹ Rubenstein sees citizenship as a desirable activity (civic virtue), where the community directs the citizenry to act and behave in a certain way. In a modern day democracy such as Australia and Slovenia this is achieved through the rule of law. Citizenship and the law provides that citizenship is also linked with other laws of the state that the

²³⁹ Linda Bosniak, *Universal Citizenship and the Problem of Alienage*, Northwestern University Law Review, Vol 94, P 93, 2000, 962-964.

²⁴⁰ Linda Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princetown University Press, 2006, 18-19.

²⁴¹ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002.

community has entrusted the government to establish, ensuring people act according to community expectations. These other laws discussed include, but not limited to, immigration, human rights and private activities that transcend international borders. Both Linda Bosniak and Kim Rubenstein's work provide a solid foundation to study the evolution of citizenship in modern day Australia and Slovenia. Both scholars highlight the importance of citizenship as a legal status, and the connection between the citizen and state, and national identity.

Broadly speaking citizenship is the broad right to lead a private life.²⁴² The private, as Bosniak argues, is where the citizen is transnational. Today, with the emergence of regionalisation and globalisation citizens of both states can conduct their private activities that transcend the respective borders. Karen Knop argues that citizenship in the private sphere is triggered by travel and cross-border engagements between citizens from different states.²⁴³ The private act of a citizens constitutes an individual's ability to decide to marry, divorce, purchase property and have a family. The state does not intervene in a citizen's private activities, other than providing the legal framework to facilitate this cross-border private engagement. Moreover, citizens are afforded human rights, which also constitute the private. Human rights operate in the private sphere (horizontally) between citizens and the public sphere (vertically).²⁴⁴ Human rights are used by the citizen to protect themselves from each other and from the state. The citizen has the right to participate in politics, public affairs, reside in the state, marry and can choose to serve in the military. Citizens as part of their private activities can be employed or establish a business, and has a duty to pay taxes. Thus, the comparative research in this thesis extends to a citizen's private life, and constitutes rights, travel and engagement with citizen across international borders between Australia and Slovenia. Baubock, Perching and Sievers argue an individual can obtain citizenship by naturalisation (through the act of migration) provided they meet certain requirements such as duration of residence, economic, social and family ties.²⁴⁵ Residence becomes important when discussing those people that choose to reside in a state long term and not take out citizenship (discussed **chapter five**). Furthermore, residence is a key connecting factor when choosing the right law to be applied in private international law matters such as an Australian citizen marrying a Slovenian citizen in Slovenia (discussed **chapter six**).

²⁴² Charles Lund Black, *Structure and Relationship in Constitutional Law*, Ox bo Press, 1969, in Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, Indiana Journal of Global Legal Studies, Vol 7: Iss 2, 2000, 447.

²⁴³ Karen Knop, *Citizenship Public and Private*, Law and Contemporary Problems, Vol. 71:309, 2008, 309-340.

²⁴⁴ Willem Maas, *Multilevel Citizenship*, University of Pennsylvania Press, 2013, 200-202.

²⁴⁵ Rainer Baubock, Bernard Perching and Wiebke Sievers, *Citizenship Policies in the new Europe*, Amsterdam University Press, 2007, 220.

Richard Falk argues that citizenship is global and is where a man or women can participate in transnational affairs on a private level.²⁴⁶ Falk argues that citizenship has been global for some time and has been the case in the Europe Union has challenged the traditional notion of national citizenship. The global citizen adheres to a normative perspective of what needs to happen to create a better world. They participate in global activities such as environmental protection and refugee management. In addition, the global citizen reinforces the already globalisation framework by participating in the economy and financial markets (the active citizen). Many citizens today have vast friends and networks that are no longer limited to their state of citizenship or residence. Their networks and friendships transcend national borders, and the citizen can experience the global culture, symbols and infrastructure that supports their daily lives. Falk also argues that global citizenship has been as a consequence of regional political consciousness, such as rise of the nation state and supranational polity, the European Union. Subsequently, the citizen finds themselves not only participating regionally as in the case within the European Union, but that European citizenship status also provides a pathway to greater global participation.

Most scholars have concluded citizenship to mean similar things. Citizenship is facing significant challenges into the future with the intensification of migration from poorer to richer nations. The increased mobility of the rising middle class. Secondly, as Baubock highlights, the mismatch between citizenship and territorial scope of legitimate authority by the state, has prompted a growing questioning of the acceptability of the different rights accorded to citizens and non-citizens living in the same state.²⁴⁷ This assumes that the nation state is the only institutional framework for citizenship to be effective. However, European citizenship while protecting national citizenship has broadened the institutional scope of citizenship to only rights and not registration. Nevertheless, even though citizenship today is universal, it is provided by the nation state under national laws, and looks to continue that way for many years to come.

²⁴⁶ Richard Falk, *The Making of Global Citizenship*, http://www.jura.uni-bielefeld.de/lehrstuehle/davy/wustldata/1994_Bart_van_Steenbergen_The_Condition_of_Citiizenship_OC.R.pdf, accessed 31 October 2016.

²⁴⁷ Rainer Baubock, *Stakeholder citizenship: An idea whose time has Come?* In *Delivering Citizenship*. The Transatlantic Council on Migration, Gutersloh: Verlag Bertelsmann Stiftung.

e) *National Citizenship*

Citizenship is bound up with the nation state and is often thought of in national terms.²⁴⁸ Citizenship in national terms is how the state regulates citizenship,²⁴⁹ through national laws.²⁵⁰ Linda Bosniak and Kim Rubenstein argue that citizenship is a legal status.²⁵¹ More than 18 million people have Australian citizenship.²⁵² Australia's population is 24 million.²⁵³ Slovenia has more than 1.9 million people holding citizenship out of 2.07 million in total population.²⁵⁴ This thesis adopts the definition by Bosniak and Rubenstein that citizenship is the legal relationship between the citizen and state. The thesis also adopts the definition that citizenship is the right to be protected from other citizens and the state, and the right to be mobile and participate in private activities across international borders. This provides a good legal framework for which citizenship is to be maintained. The most effective way for this to occur, is at the national level, by nation states. It must be noted that Slovenia is much smaller in population and territory than Australia (discussed **chapter five**). This research will demonstrate how citizenship in Australia and Slovenia has evolved and contributed to national identity. Historically, citizenship was not always linked to the nation state. This was evident when monarchs, kings and empires ruled over a territory. This thesis addresses the central purpose and question that citizenship law contributes to national identity. This research highlights that the future of citizenship in modern day Slovenia and Australia will continue to be shaped by political and religious debate, language, world, regional and local events. The next section discusses the difference between citizenship and nationality.

Citizenship and Nationality

Patrick Weil argues that citizenship also stands at the boundary of national and international law.²⁵⁵ Nationality is synonymous with public international law. Citizenship is national. Kim Rubenstein²⁵⁶ states that “conceptually and linguistically the terms emphasise two different

²⁴⁸ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, Indiana Journal of Global Legal Studies, Vol 7: Iss 2, 2000, 449. Kim Rubenstein, Daniel Adler, *International Citizenship: The Future of Nationality in a Globalised World*, Indiana Journal of Global Legal Studies, Vol. 7: Iss. 2, 2000, 521.

²⁴⁹ Helen Irving, *Still Call Australian Home: The Constitution and the Citizen's Right of Abode*, Sydney Law Review, Vol 30: 133, 2008.

²⁵⁰ Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration Law, Policy and Practice in Australia*, The Federation Press, 2011, 17-20.

²⁵¹ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002.

²⁵² Australian Bureau of Statistics, 2011 Census, <http://www.censusdata.abs.gov.au>, accessed 29 July 2016.

²⁵³ Ibid.

²⁵⁴ Slovenia Statistics Office, Republic of Slovenia, Population data, , <http://pxweb.stat.si/pxweb/dialog.asp>, 2016H, accessed 29 July 2016.

²⁵⁵ Ibid.

²⁵⁶ Kim Rubenstein, *Globalisation and Citizenship and Nationality*, The University of Melbourne, Faculty of Law, Legal Studies, Research Paper No.69, 2004, 1-29.

aspects of the same notion.nationality stresses the international,²⁵⁷ while citizenship is the national”.²⁵⁸ Federich Nottebohm, who was born in Germany and received citizenship by naturalisation from Liechtenstein in 1939, later lived and conducted business in Guatemala,²⁵⁹ but frequently returned to Germany to visit family, and in 1941 the United States (US) froze his assets, which were located in the US. In 1943, he was arrested in Guatemala and deported to the US, where he was held as an enemy until 1946.²⁶⁰ Liechtenstein took Guatemala to the ICJ, where the court found that Nottebohm’s Liechtenstein nationality was effective.²⁶¹ The court repeatedly referred to nationality rather than citizenship. The reference to nationality by the court in international matters reinforces the point that citizenship is used nationally and nationality is used internationally.

European law has defined nationality to mean 1) “the legal bond between a person and a state and does not indicate a person’s ethnic origin²⁶² and, 2) multiple nationality is also defined as a person having the simultaneous possession of two or more nationalities.²⁶³ Kay Hailbronner believes that European citizenship is having an impact on nationality because of the expanded rights associated with the supranational polity citizenship.²⁶⁴ Citizenship of the European Union was first established in the Maastricht Treaty 1992 and provided every person holding nationality of a MS would automatically become a citizen of the European Union’.²⁶⁵ This in itself could be somewhat confusing to the lay person. In *Micheletti*²⁶⁶ the Advocate General argued that possession of nationality of a member state is the only prerequisite, which an individual must satisfy in order to be able to exercise their rights. There is a general theme in most European Union case law that either nationality or citizenship is used depending on the legal matter. In *Carlos Garcia Avello v Etat Belge*²⁶⁷, the Advocate General referred to nationality rather than citizenship of a member state, in relation to discrimination. The Federal Court of Australia described the concept of nationality when referring to the application by a person for a protection visas. Weinberg J in the Federal Court of Australia stated²⁶⁸ that the

²⁵⁷ Ibid.

²⁵⁸ Paul Weis, *Nationality and Statelessness in International Law*, Hyperion, Connecticut, 1979, 2-7.

²⁵⁹ *Liechtenstein v Guatemala*, International Court of Justice, 1955, ICJ 4, in Kim Rubenstein, *Globalisation and Citizenship and Nationality*, The University of Melbourne, Faculty of Law, Legal Studies, Research Paper No.69, 2004, 18.

²⁶⁰ Ibid.

²⁶¹ Ibid.

²⁶² Article 2, European Convention on Nationality, Strasbourg, 6.XI 1997.

²⁶³ Ibid.

²⁶⁴ Kay Hailbronner, “Nationality in public international law and European law”, in R Baubock, E Ersholl, K Groenendijk and H Waldrauch, *Acquisition and Loss of Nationality: Policies and Trends in 15 European States*, Amsterdam University Press, 2006, 70-79.

²⁶⁵ Article 8 Maastricht Treaty 1992.

²⁶⁶ Case C-369/90 Mario *Vincente Micheletti and others v Dlelacion del Gobierno en Cantabria* (1992) ECR I-4239.

²⁶⁷ Case C-148/02 *Carlos Garcia Avello v Etat Belge* (2003) ECR I-11613.

²⁶⁸ *VSAB v MIMA* (2006) FCA 239, 48.

term nationality lacks precision. It is generally used to signify the legal connection between an individual and a state.

The European University Institute has focused on what and how the terms are used by MS and other countries outside of the EU. The European Union Democracy Observatory is consistent with the views of scholars and also points out that ‘nationality’ is part of public international law, while citizenship is part of national domestic law.²⁶⁹ EUDO explain that in Croatia, Serbia and Bosnia and Herzegovina “citizenship is known as *državljanstvo* which is a neutral term designating a person’s link to the state”.²⁷⁰ While nationality (*nacionalnost or, narodnost - people*) “refers to an individual’s ethnic background”.²⁷¹ That said, EUDO²⁷² outlines the complexity and differences of how European languages apply both terms within national law. Across the European Union both terms have been used, broadly linking the state and citizen though rights, responsibilities, culture and historical community. *Državljanstvo* (citizenship) is the legal bond between citizen and state. However, the English translation of *državljanstvo* refers to both nationality and citizenship.²⁷³

Sociological

Nationality can be best described as the imagined community while citizenship²⁷⁴ is a legal connection between the citizen and state. Nationality is expressed in the 1948 Universal Declaration of Human Rights²⁷⁵ and states that no person shall be arbitrarily deprived of nationality or denied the right to change nationality.²⁷⁶ Additionally, the Hague Convention on Certain Questions Relating to the Conflict of Nationality Law²⁷⁷ states that it for each state to determine under its own law who its nationals,²⁷⁸ will be. This thesis argues that both nationality and citizenship provide a citizen with an identity to a state. Nationality is reflected in international law whereas citizenship is provided for by national law. For instance, people refer to themselves as Australians who belong to Australia (the state that gives legal status to the citizens).

²⁶⁹ European University Institute, European Union Democracy Observatory, *Citizenship or Nationality*, www.eudo-citizenship.eu, accessed 10 January 2012.

²⁷⁰ Ibid.

²⁷¹ Ibid.

²⁷² EUDO Observatory on citizenship, *Citizenship or Nationality*, European University Institute, <http://eudo-citizenship.eu/databases/citizenship-glossary/terminology>, accessed 12 April 2014.

²⁷³ Ibid.

²⁷⁴ Lynn Jamieson, *Theories Identity, Nationality and Citizenship: Implications for European Citizenship Identity*, Department of Sociology, University of Edinburgh, *Sociology* 34, 2002, 10 - 12.

²⁷⁵ Article 15, Universal Declaration of Human Rights, 1948.

²⁷⁶ Ibid.

²⁷⁷ Hague Convention on Certain Questions Relating to the Conflict of Nationality Law of League of Nations, of 13 April 1930, League of Nations, Treaty Series, vol. 179, 89, No. 4137.

²⁷⁸ Ibid, article 1.

Although the legislative translation of ‘citizenship’ is commonly used, ‘nationality’ has been used when translating decisions into English.²⁷⁹ Furthermore, *narodnost* when translated into English is also ‘nationality’, indicating the condition of belonging (narod, nation as a cultural, ethnic and historic community).²⁸⁰ *Narodnost* is also used when referring to autochthonous minority communities such as Italians and Hungarians, and the term *nacionalnost* is a synonym for *državljanstvo* that indicates a tie to a certain ethnic or cultural group. In the United Kingdom, the term ‘nationality’ has a wider application than ‘citizenship’, and similar to Australia, both terms are interchangeable. It was not until the *British Nationality Act 1981* that the term ‘British citizen’ was introduced.²⁸¹ British citizenship refers to a citizen with a British passport, while nationality is seen as a citizen’s identity or ethnicity.²⁸² The word ‘citizenship’ can be readily found in the national laws of Slovenia and Australia. Citizenship and nationality can be easily discerned. Citizenship is synonymous with national law. Nationality is commonly used in international law, and confirms the legal status of an individual and the state or states to which that individual belongs.

1.9 Conclusion

This chapter has outlined the purpose of this research is to assess Slovenia and Australia's citizenship, immigration, human rights and private international law, and determine their contribution to national identity. The chapter also discussed the political concepts of what a nation state and national identity constitute. The chapter clarified the research by clearly identifying the boundary between the public and private in citizenship. Chapter one has confirmed that Australia has more than 18 million and Slovenia has 1.9 million people who have a legal status (citizenship). This chapter has also confirmed that Linda Bosniak and Kim Rubenstein’s scholarly work provide a good framework in which to study citizenship, human rights, immigration and private international law. This chapter highlighted that the research (chapter three, four, five and six) will identify areas and gaps in the law that will form the recommendations outlined in **Appendix One**. Some of these recommendations involve transplanting, borrowing or transposing law, legal norms, legal and policy principles from Slovenia, the European Union to Australia and vice versa. If adopted, the law reform could assist both states in strengthening their respective national identities.

²⁷⁹ Ibid.

²⁸⁰ Ibid.

²⁸¹ Ibid.

²⁸² Ibid.

Chapter 2 - [The] Slovenian, Australian Citizenship and National Identity

2. Overview

This chapter traces the evolution of citizenship in both Australia and Slovenia. The French and United States (American) Revolutions have had a significant influence on the historical development of citizenship law. In practice citizenship shapes the citizenry sentiment and goes some way to providing a sense of solidarity. Citizenship also has a role in contributing to national identity.²⁸³ National identity is an important thought as it provides a sense of solidarity and patriotism amongst citizens.²⁸⁴ Both states have been influenced by history, former rulers, inhabitants, geography, location, and the rule of law. The disintegration of empires and kingdoms shaped citizenship, and exclusionary approaches were adopted to restrict people from being a citizen or resident. Chapter two highlights how citizenship was used to ensure continuity and unify inhabitants when a change in rulers occurred. This chapter will highlight how the two world wars impacted on citizenship. As a result of WWII there was outward migration from Europe and Slovenia, and Australia was considered a destination state. Citizenship transitioned from allegiance to a legal status. This chapter has been structured to discuss the very different historical beginnings of Australia and Slovenia separately. Even though many aspects of their citizenship laws and national identities would evolve along similar periods of time, the actual period of events that distinguish this evolution are different. Both the law and theory will be discussed in time periods beginning in the first millennium BC to 1990. There is overlap in the discussion and analysis between 1990 and 1991 due to Slovenia becoming an independent state and establishing a new legal framework over these two years. **Chapter three** discusses the developments in national identity and citizenship of both states from 1990 to 2015. The next section traces the historical identity, constitutions and citizenship laws of Slovenia and Australia.

²⁸³ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, Indiana Journal of Global Legal Studies, Vol 7: Iss 2, 2000, 447.

²⁸⁴ Ibid.

2.1 Slovenes [early period]

Evidence of the occupation of the current day Slovenian territory dates to the Mesolithic (Neanderthals) period, from which a human cranium has been found.²⁸⁵ According to Peter Štih, inhabitants were known to have occupied caves in the eastern Savinja Alps around 32,000 BC.²⁸⁶ By the end of the first millennium BC, the Celts began to exert their presence and control over much of the current day Slovene territory.²⁸⁷ The Celts had brought with them religion, culture, technologies (swords and tools for daily survival) and language.²⁸⁸ Slovenes are a mix of Old Slavic descent with the majority of genetics deriving from Europe (the Balkans and the Ukraine).²⁸⁹

The Pericles' Citizenship law of 451-50BC of Athens required both parents to be citizens and to share in the city.²⁹⁰ Citizenship represented membership of the *polis*,²⁹¹ which was organised by a constitution.²⁹² In early Roman times²⁹³ the concept of citizenship was defined in terms of a judicial status, whereby citizenship became part of the law as opposed to the function (s) undertaken by an individual.²⁹⁴ John Pocock argues that aspects of modern citizenship were inherited from both the Greeks (a collective of self-rule) and the Romans (legal status).²⁹⁵ Slovenians were part of the Holy Roman Empire. Slovenes found themselves being drawn into the cultural life of the German princes, within the jurisdiction of the Roman Church.²⁹⁶ Fred Singleton argues that this was an important influence on the early development of the national character of Slovenians.²⁹⁷ The continent of Australia had not yet been settled by the British and was occupied by the Aboriginal people.

²⁸⁵ Oto Luthar, *The Land Between: A History of Slovenia*, Peter Lang International Academic Publishers, 2008, 10-13. Peter Štih, Vasko Simoniti, Peter Vodopivec, *Slovene History, Society-Politics-Culture, Besedilni podatki*, Ljubljana: Inštitut za novejšo zgodovino: Sistory, 2008.

²⁸⁶ Peter Štih, Vasko Simoniti, Peter Vodopivec, *Slovene History, Society-Politics-Culture, Besedilni podatki*, Ljubljana: Inštitut za novejšo zgodovino: Sistory, 2008. 9.

²⁸⁷ Oto Luthar, *The Land Between: A History of Slovenia*, Peter Lang International Academic Publishers, 2008, 32 – 33.

²⁸⁸ Ibid.

²⁸⁹ Jože Škulj, *Genetske raziskave in njihov pomen za preučevanje Venetov*, Hindu Institute of Learning Canada, <http://www.korenine.si/zborniki/zbornik02/skulj02.htm>, accessed 23 December 2013.

²⁹⁰ Cynthia Patterson, *Pericles Citizenship Law of 451-50 BC*, 1981, 1-8, in Kim Rubenstein, *Citizenship in Australia: Unscrambling its Meaning*, Melbourne University Law Review, 1995, 504-508.

²⁹¹ Gershon Shafir, *The citizenship Debates*, University of Minnesota Press, 1998, 31.

²⁹² Fred Miller, *The State and Community In Aristotle's Politics*, Bowling Green State University, 1-9, http://www.reasonpapers.com/pdf/01/rp_1_5.pdf, accessed 28 January 2011.

²⁹³ Aristotle, *Politics* (ed Sir Ernest Barker, 1946), 134, in Kim Rubenstein, *Citizenship in Australia: Unscrambling its Meaning*, Melbourne University Law Review, 1995, 504-508.

²⁹⁴ Engin Isin, *Who is the new citizen? Towards a Genealogy*, *Citizenship Studies*, 1997, 115-131.

²⁹⁵ John Pocock, *The Ideal of Citizenship since Classical Times*, *Queen's Quarterly*, Vol.99, No. 1, 1992, 10-50.

²⁹⁶ Fred Singleton, *A Short History of the Yugoslav People's*, Cambridge University Press, 1989, 15.

²⁹⁷ Ibid.

Slovenians in the ninth century were part of the Frankish Empire, which became the Holy Roman Empire where the people inherited Roman Christianity.²⁹⁸ The Freising Manuscripts (*Brižinski spomeniki*)²⁹⁹ are a record of the Slovene language that was spoken in a much larger territory than modern day Slovenia, and included most of the present day Austrian states of Carinthia and Styria.³⁰⁰ The Slovenian language was also spoken in East Tyrol, South Tyrol, and some areas of Upper and Lower Austria.³⁰¹ Moreover, rare writings have been located that date back to 1227 in the Carinthia region, referring to written text that had been prepared by Styrian Ulrich von Liechtenstein who apparently upon his arrival in Carinthia was greeted in Slovenian.³⁰² Slovenian phrases were also used in poetry written by Oswald von Wolkenstein during the thirteenth and fourteenth centuries.³⁰³ Primož Trubar published the first two books in Slovenian the *Katekizem* and *Abecednik*.³⁰⁴ His image and some fragments of his writings are on the 10 Tolar banknote.³⁰⁵ Trubar translated the New and Old Testament psalms into Slovene.³⁰⁶ One of Trubar's protégés Jurij Dalmatin translated the entire Bible into Slovene (from 1547-1589).³⁰⁷ More importantly, the works and teachings of Trubar brought to life the Slovenian language, which was the catalyst for spreading the language across Europe. Trubar was a great advocate for establishing schools so local people could receive an education in their native Slovene language.

American Revolution

The American Revolution provided for the allegiance of the people to the state, through voluntary citizenship.³⁰⁸ Moreover, people would become legal citizens as opposed to maintaining the status of subservient subjects. This new - found legal status has contributed to the way citizenship has been developed as a concept by nation states ever since. In 1779, the state of Virginia established a statute describing 'citizens as all those born within the state or who had resided within the state for at least two years (at the time the statute was passed)'.³⁰⁹

²⁹⁸ Aleš Črnič, Mirt Komel, Marjan Smerke, Ksenija Šabec and Tina Vovk, *Religious Pluralisation in Slovenia*, *Teorija in Praksa*, let. 50, 1/2013, 205-229.

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Goranka Kreacic and Bogo Grafenauer, *Karantanija: izbrane razprave in članki*, Zavod Republike Slovenije za šolstvo, Ljubljana, Slovenska matica, 2000.

³⁰² Ibid.

³⁰³ Ibid, 160.

³⁰⁴ Tajana Resnik-Planinc, *Development and present situation of Slovene didactics of geography*, *Annales Universitatis Paedagogicae Cracovensium*, 2013, 113.

³⁰⁵ Slovenian Fact, *Famous Slovenians*, <http://www.un.int/slovenia/famous.html>, accessed 24 December 2012.

³⁰⁶ Aleš Črnič, Mirt Komel, Marjan Smerke, Ksenija Šabec and Tina Vovk, *Religious Pluralisation in Slovenia*, *Teorija in Praksa*, let. 50, 1/2013, 205-229.

³⁰⁷ Oto Luthar, *The Land Between: A History of Slovenia*, Peter Lang International Academic Publishers, 2008, 225-240.

³⁰⁸ Joan Gundersen, *Independence, Citizenship, and the American Revolution*, Chicago Journals, The University of Chicago Press, 1987, 60-77.

³⁰⁹ Ibid, 62.

Obtaining citizenship by naturalisation or relinquishing citizenship could be undertaken by attending a local court and taking an oath.³¹⁰ The 13th 14th and 15th amendments to the United States constitution would make American citizenship a national status of rights that would be protected by the national courts but these were not made until after the civil war.³¹¹

Comparatively, citizenship between America and Britain was very different. The social organisation of life in America was defined and protected by the common law, as it was in British Empire.³¹² However, allegiance (for British subjects) was based on natural obligations.³¹³ That is, subjects looked up to a master (king) and were considered to be his servants, even though they were afforded shared liberties.³¹⁴ Citizens possess a right to sovereignty and were granted protection from other citizens and the state.³¹⁵ According to John Salmond citizenship was an association of members incorporated by a body politic, and citizens were bound to one another.³¹⁶ Citizens under the English common law were not bound to one another, but bound to a common superior, owing an allegiance to the Crown.³¹⁷ Frederick Pollock and Frederic Maitland reaffirmed the position of the court in the *Calvin*³¹⁸ case that determined those individuals who were not born in the territory were aliens and not subjects of the king. Pollock and Maitland stated that in the history of the English common law, defining the subject included:

*As regards to the definition of two great classes of men which have to be distinguished from each other, the main rule is very simple. The place of birth is all important, a child within any territory that is subject to the king of England is a natural-born subject of the king of England and is no alien of England. On the other hand, with some exceptions, every child born elsewhere is an alien, no matter the nationality of his parents.*³¹⁹

Allegiance was absolute and permanent whereby the individual was provided protection in return for duties of fealty.³²⁰ Furthermore, allegiance to the monarchy emerged with the establishment of the Church of England in the sixteenth century.³²¹ Therefore, citizens during the early period can be described as a collective of people who possess sovereignty while

³¹⁰ Ibid.

³¹¹ Douglas Bradburn, *The Problem of Citizenship in the American Revolution*, Binghamton University, State University of New York, Blackwell Publishing, 2010, 1096-1099.

³¹² Ibid.

³¹³ Ibid.

³¹⁴ Ibid. Polly Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, *Yale Journal of Law and the Humanities*, Vol 9. 2013, 73-80.

³¹⁵ Ibid.

³¹⁶ John Salmond, *Citizenship and Allegiance, Nationality in English Law*, *The Law Quarterly Review*, 1902, 50-54.

³¹⁷ Ibid.

³¹⁸ *Calvin Case* [1572] Eng.R. 384.

³¹⁹ Frederic Maitland and Sir Frederick Pollock, *The History of English Law before the Time of Edwards I*, vol. 2, Liberty Fund, 1898 (reprinted 1968), 458.

³²⁰ John Salmond, *Citizenship and Allegiance, Nationality in English Law*, *The Law Quarterly Review*, 1902, 50-54.

³²¹ Caroline Sawyer, Helena Wray, *Country Report: United Kingdom*, EUDO Citizenship Observatory, European University Institute, 2014, 7.

subjects were under the power of another.³²² The American Revolution was important to the development of citizenship, providing a legal status to the inhabitants of the new republic and developing a sense of what it is to be American. Not long before the American Revolution Australia was claimed for the British crown by James Cook. Australia was inhabited by Aboriginal people and was yet to be colonised by the British. Therefore, the laws of Britain did not apply to Australia. Slovenia on the other hand was part of the Austrian-Hungarian Empire.

French Revolution

The next major influence on the theory and practice of citizenship and the evolution of the national identity was the French Revolution beginning in 1789. A year earlier in 1788, the First Fleet arrived in Australia³²³ and the beginnings of British rule would see British law slowly being introduced in the Australian territory. As discussed later in this chapter, Australia would be colonised as a whole by the British, who brought with them their laws, identity and culture. The French Revolution included ‘a bourgeois, democratic, national and bureaucratic, and state strengthening revolution’.³²⁴ The French Revolution built on the idea of the nation state and national citizenship by introducing legislation that would differentiate between French citizens and foreigners, by affording them different sets of rights.³²⁵

Karl Marx asserted that medieval, seigniorial rights, local privileges, municipal monopolies and provincial constitutions were all swept away by the French Revolution, which allowed the nation state to form.³²⁶ The democratic revolution expanded to include political rights. This is an important observation because political rights were afforded only to citizens of France. French citizenship was codified.³²⁷ Citizenship could be obtained by a person who was born in France if at least one of the parents was French and was domiciled in France.³²⁸ However, women would not be fully recognised and continued to play a subordinate role to men. The principle of acquiring citizenship through birth on the territory and having one parent being French still exists today. **Chapter 3** explores the acquisition of citizenship in modern day Slovenia and Australia.

³²² Douglas Bradburn, *The Problem of Citizenship in the American Revolution*, Binghamton University, State University of New York, Blackwell Publishing, 2010, 1096-1099.

³²³ David Richards, *Transported to New South Wales: medical convicts 1788-1850*, British Medical Journal, Vol 295, 1987, 1609.

³²⁴ Rogers Brubaker, *The French Revolution and Invention of Citizenship*, French Politics and Society, Vol 7, No 3, 1989, 30-49. Jurgen Habermas, *Citizenship and National Identity*, in Steenberghen Bart Van, *The Condition of Citizenship*, SAGE Publications, 1994, 20-22.

³²⁵ Ibid.

³²⁶ Rogers Brubaker, *The French Revolution and Invention of Citizenship*, French Politics and Society, Vol 7, No 3, 1989, 30-49.

³²⁷ French Civil Code 1803, in Marie-Claire Foblets, Zeynep Tanasmayan, *Country Report: Belgium*, EUDO Citizenship Observatory, European University Institute, 2010, 2.

³²⁸ Ibid.

The Declaration of the Rights of Man and Citizen in 1789 reinforced the rights of the citizen and man within the French territory. Even though there was limited reference to the citizen, Article 6 provided that 'every citizen has a right to participate personally, or through his representative, in its foundation', and that all citizens were equal in the eyes of the law.³²⁹ The Declaration reinforced the notion that no one individual could exercise any authority, which had not been afforded to them by the nation state.³³⁰ Therefore, it provided greater inclusion of the people and no longer gave sole power to a single individual. The rights extended to protecting an individual's liberty, property, security and resistance to oppression.³³¹ More importantly, the thesis argues that the rights afforded to citizens by the 1789 Declaration have been the basis for the rights afforded to citizens by states and the international community in the modern day. Free communication and opinion was also an important freedom (article 11). This freedom continues today in the legal frameworks of Slovenia and Australia (discussed **chapter 4**). The natural rights and freedoms had no limits other than those determined by the law.³³² The thesis argues that the human rights established in this early period was the beginning of states steering their citizens to behave according to the values of the state. That is, not only human rights law, but the law in general has been used by states as a demographic tool to control and develop society. Furthermore, this saw the beginnings of the rights taking a greater role in the daily lives of citizens. Citizens were afforded protection not only against the state but also against other citizens.

The French Revolution as leveling the legal distinction inside the nation state and providing a common substance of civil equality for all citizens.³³³ National citizenship had been strengthened, which provided the basis for modern nationalism.³³⁴ The 1804 French Civil Code was introduced³³⁵ and went some way to define who a French citizen was. It also allowed the state to determine who was not a citizen.³³⁶ Interestingly, women followed the husband, and article 213 stated that 'The man owes his wife protection; the wife owes the husband obedience'.³³⁷ The wife was under the legal guardianship of the husband and required authorisation from the husband to undertake legal proceedings, sign contracts, establish a profession and be a member of a political party or trade union.³³⁸ However, this was private and

³²⁹ Declaration of the Rights of Man and Citizen, National Assembly of France August 26 1789, http://www1.curriculum.edu.au/ddunits/downloads/pdf/dec_of_rights.pdf, accessed 2 February 2014.

³³⁰ Ibid, article 3.

³³¹ Ibid, article 2.

³³² Ibid, article 4.

³³³ Rogers Brubaker, *The French Revolution and Invention of Citizenship*, French Politics and Society, Vol 7, No 3, 1989, 30-49.

³³⁴ Ibid.

³³⁵ Christophe Bertossi, Abdellali Hajjat, *Country Report: France*, EUDO Citizenship Observatory, European University Institute, 2013, 1-2.

³³⁶ Ibid.

³³⁷ Ruth Rubio-Marin, *The achievement of female suffrage in Europe: on women's citizenship*, I CON, Vol. 12 No. 1, 2014, 4-34.

³³⁸ Ibid.

not public citizenship.³³⁹ The private is where the husband assumed authority over the wife. The public, which is not mentioned in the law, is where a woman or man can participate in society. It was unclear whether the laws excluded women from political participation, and because the accepted norm was for the man to assume that role, women automatically assumed the subordinate role. The American, French, Haitian³⁴⁰ and Spanish Revolutions all saw the transition of the inhabitants of those territories from subjects to citizens.³⁴¹ The nation state and democracy are two concepts that emerged from the French Revolution that can still be seen today in current citizenship laws.³⁴² The influence of these events on Europe and other states cannot be underestimated. The laws of modern day nation states including Slovenia and Australia have evolved and adopted many of the principles pertaining to citizenship, deriving from these events. That is, for the first time citizenship gained a legal status. However, that legal status did not fully extend to women.

1800 - 1848

From the mid 1800s to the break-up of the Habsburg Monarchy, the Slovenians continued their struggle to be formally recognised. Between 1813 and 1888, the Klagenfurt priest Andrej Einspieler worked towards creating a United Slovenia and recognition of Slovenian autonomy within the inner provinces of Austria, however there was little support for the idea.³⁴³ Citizenship of the Slovenian people was regulated by the 1811 Austrian Code.³⁴⁴ The wife was bound by the husband. Citizenship could be obtained by birth³⁴⁵ or for a female foreigner marrying an Austrian citizen.³⁴⁶ Citizenship could also be obtained by accepting employment in the Public Service, provided there was an uninterrupted period of residence of ten years. Additionally, those individuals that lost their citizenship could have it reinstated by the Imperial Majesty.³⁴⁷ Thus, the principle of residency and loss of citizenship emerged into the legal framework. Today, modern states have retained the residency principle as part of a person wanting to acquire citizenship by naturalisation, or reside on the territory long term without taking out citizenship. Slovenia and Australia allow for the loss of, and reinstatement of

³³⁹ Carole Pateman, *The Sexual Contract*, Cambridge: Polity Press, 1988. Publishing, 2012, 170-180.

³⁴¹ Malick Ghachem, *Slavery and Citizenship in the Age of the American Revolutions*, Historical Reflections, Vol 29. No 1, 2003, 10-15.

³⁴² Jurgen Habermas, *Citizenship and National Identity*, in Steenberghen Bart Van, the Condition of Citizenship, SAGE Publications, 1994, 20-22. Jurgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, Edited by Ciaran Cronin and Pablo De Greiff, Translated by Carian Cronin, Cambridge: MIT Press, 1998, 130-135.

³⁴³ Peter Štih, Vasko Simoniti and Peter Vodopivec, *Slovene History, Society-Politics-Culture*, Besedilni podatki, Ljubljana: Inštitut za novejšo zgodovino: Sistory, 2008. 296.

³⁴⁴ Felicita Medved, *EUDO Citizenship Observatory Country Report Slovenia*, European University Institute, Robert Schuman Centre for Advanced Studies, 2010, 5-30.

³⁴⁵ Section 28 Austrian Civil Code 1811, Great Britain, Report of the Royal Commission for Inquiring into the Laws of Naturalisation and Allegiance: An account of British and Foreign Laws, and of the Diplomatic Correspondence, Reports from Foreign States, and other Papers, 1896, 2- 30.

³⁴⁶ Decree of the Imperial Chancery, 23 February 1833, No. 2.569.

³⁴⁷ Ibid, article 29.

citizenship. However, today the decisions are not retained by an Imperial Majesty, but rather a Minister, institution or judiciary of a state. These principles become important in **chapter three**.

1848 - 1900

The March Revolution in 1848 (known as the Spring of Nations) resulted in Slovenes demanding unification of all territories into one unit under the Austrian emperor.³⁴⁸ Slovene nationalism would be strengthened by peasants' signing petitions between 1848 and 1849 seeking to unite Slovenes.³⁴⁹ However, women would continue to be denied full participation in the political process, being excluded from being able to vote.³⁵⁰ Citizenship was very much in favour of men. Josip Mursec and other scholars also petitioned and prepared a memorandum for the Slovene nationality and language to be formally recognised.³⁵¹ Matija Majar (a Carinthian, Slovenian Catholic priest) would attempt to establish a Kingdom for Slovenes [Slovenian: Zdržena Slovenija] in their own right in 1848.³⁵² However, a Kingdom was not successfully proclaimed. In an attempt to establish a Kingdom, Majar³⁵³ wrote 'What We Slovenians, Demand':

1. *Slovenians must unite and have a general local assembly.*
2. *The Slovenian language in the Slovenian region must have the same rights as German has in German regions and Italian in Italian regions.*
3. *Slovenians are free to introduce the Slovenian language to all institutions, universities and secondary schools whenever they choose.*
4. *Each civil servant must learn the Slovenian language before being appointed to a civil institution in Slovenian regions.*
5. *In each high school in Slovenia, Slovenian language teachers must understand all Slavic dialects.*
6. *Slovenes do not want to be in the German alliance, they are loyal to their emperor and constitutional government. Any alliance with the Germans (outside Austria) would obviously hurt us, they would dominate us with the German language and culture, take over our cities, then our castles and finally our fields and vineyards, as this has already happened in some area.³⁵⁴*

The importance of the words used by Majar cannot be underestimated. Majar was demanding the Slovenian language be used in all areas of life. [Iskra] Čurkina in referring to Janko Pleterški argues that Majar's activities and writing played a major role in the further development of the Slovenian national movement.³⁵⁵ Between 1869 and 1871, Matjaž Klemenčič and Mitja Žagar

³⁴⁸ Matjaž Klemenčič and Mitja Žagar, *Ethnic Diversity within Nations, The Former Yugoslavia's Diverse Peoples: A Reference Sourcebook*, 2004, 49.

³⁴⁹ *Ibid.*

³⁵⁰ Ruth Rubio-Marin, *The achievement of female suffrage in Europe: on women's citizenship*, I CON, Vol. 12 No. 1, 2014, 4-34.

³⁵¹ Matjaž Klemenčič and Mitja Žagar, *Ethnic Diversity within Nations, The Former Yugoslavia's Diverse Peoples: A Reference Sourcebook*, 2004.

³⁵² *Ibid.*

³⁵³ Iskra Vasiljeva Čurkina, *Matija Majar Ziljski, Enlightener, Politician, Scholar*, Traditions, 40/2, 2011, 9-26.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.*

argue the demands for a United Slovenia were reaffirmed when the taborsko gibanje occurred (English: mass meetings movement), through which the modern Slovenian national consciousness began to spread to peasants and townspeople.³⁵⁶

The first newspapers in Slovene began appearing in Ljubljana in about 1848. In the same year Fran Milkošič published a manifesto in the Slovene newspaper *Novice*. During the same period “Zdravljica” (English: A Toast), a poem was written by a Slovene poet France Prešeren, in Slovenian. The poem would become one of the fundamental elements of the current day Slovenian identity. It was later adopted as the national anthem in the 1980s and is referred to in article 6 of the current day Slovenian constitution. Furthermore, its importance to the Slovenian state and national identity ensured the national anthem was codified following independence by the Act Regulating the Coat-of-Arms, Flag and Anthem of the Republic of Slovenia of the Slovenian Nation.³⁵⁷

In 1849, the Austrian Civil Code was translated into Slovenian by the government and was backed by an order issued to the local provinces to translate provincial laws into the provincial languages (including Slovenian).³⁵⁸ Australia at the time was being colonised and the first Slovenian arrived to Australia³⁵⁹ in 1855 along with many other immigrants from Europe including from the United Kingdom, France, Italy, Germany, Poland and Hungary. This was an important moment for Australia and Slovenia. This thesis argues that it was this first arrival to Australia of a Slovenian, which saw the beginnings of a long-standing relationship between the two states and their respective citizens that can still be seen today.

The Hungarian nationality laws of 1868 provided equal rights to its people,³⁶⁰ which were part of the creation of the separate Hungarian crown. People who did not speak or use Magyar were granted the right to use their mother tongue in special circumstances such as in the courts, books, texts and lectures at the National University. The nationality laws did not extend to the regions of Slavonia (Croatia) and Dalmatia.³⁶¹ Rainer Bauböck and Dilek Cinar argue that in 1867 when Hungary gained autonomy of their citizenship legislation, citizens within the Austrian part of the empire were treated as foreigners.³⁶² During the same period, Slovenian academia and cultural life became closely entwined with national politics. The academic

³⁵⁶ Matjaž Klemenčič and Mitja Žagar, *Ethnic Diversity within Nations, The Former Yugoslavia's Diverse Peoples: A Reference Sourcebook*, 2004, 49.

³⁵⁷ Official Gazette of the Republic of Slovenia, 67/1994.

³⁵⁸ Peter Štih, Vasko Simoniti, Peter Vodopivec, *Slovene History, Society-Politics-Culture*, Besedilni podatki, Ljubljana: Inštitut za novejšo zgodovino: Sistory, 2008. 287.

³⁵⁹ Immigration from Slovenia, <http://museumvictoria.com.au/origins/history.aspx?pid=54>, accessed 20 June 2015.

³⁶⁰ Scotus Viator, *Racial Problems in Hungary*, Hungary Law on Nationalities 1868, <http://www.oocities.org/gogastransylvania/Seton-Watson/Appendice03.htm>, accessed 28 December 2011.

³⁶¹ Ibid.

³⁶² Rainer Bauböck and Dilek Cinar, *Nationality law and Naturalisation in Austria*, (draft) 2011, 1-12.

associations of Germans and Slovenians worked together to promote Slovenian culture.³⁶³ This was reinforced with The Society of Hermagoras working in Klagenfurt which had 25,000 members, which released books and educational material.³⁶⁴

Despite Slovenians being present in both the Austrian and Hungarian sections of the empire, those Slovenians residing in the Hungarian sector were subject to the Hungarian Nationality Law of December 1879. These laws outlined how a person could become a citizen of the territory. Similar to the Austrian Code, individuals could obtain citizenship by descent, legitimisation, marriage and naturalisation.³⁶⁵ Legitimation was quite progressive for the time allowing citizenship to be obtained by a Hungarian's illegitimate children born to an alien woman.³⁶⁶ However, the provision did not extend to women who were Hungarian citizens. Citizenship by descent³⁶⁷ could only be obtained following ten years of continuous residence in the territory. A notable difference between the two territories was the acceptance of dual citizenship under the Hungarian territory. Dual citizenship was not permitted under Austrian law. The citizenship laws under Habsburg rule continued through to the formation of the Kingdom of Serbs, Croats and Slovenes.

Prior to World War I being declared, the rulers within the Austro-Hungarian Empire were concerned about issues surrounding the Balkan region, particularly in the area occupied by the Bosnians.³⁶⁸ What followed was the assassination of Archduke Franz Ferdinand on 28 June 1914 [who was], the heir to the Austrian throne. The assassination resulted in a diplomatic crisis and the fighting began.³⁶⁹ Russia came to the defence of Serbia and Germany began to invade its neighbours Belgium and Luxembourg.³⁷⁰ World War I was declared and Austro-Hungary, Russia and Germany were all embroiled.³⁷¹ The war would eventually find its way to France and Britain, and the allied forces that included Australia would become involved in the conflict. The war spread throughout Europe, Turkey and parts of the Middle East.

³⁶³ Peter Štih, Vasko Simoniti, Peter Vodopivec, *Slovene History, Society-Politics-Culture, Besedilni podatki*, Ljubljana: Inštitut za novejšo zgodovino: Sistory, 2008. 296.

³⁶⁴ Ibid.

³⁶⁵ Richard Floumoy and Manley Hudson, *A Collection of nationality laws of various countries*, as contained in Constitutions, Statutes and Treaties, Carnegie Endowment for International Peace, 1930, 337 – 344.

³⁶⁶ Ibid, legitimation Article 4, citizenship is acquired by a Hungarian citizen's illegitimate children born by an alien woman through legitimation.

³⁶⁷ Ulrike von Hirschhausen, *From imperial inclusion to national exclusion: citizenship in the Habsburg monarchy and in Austria 1867-1923*, *European Review of History*, 2009, 551-573.

³⁶⁸ Ibid.

³⁶⁹ Ibid.

³⁷⁰ Ibid.

³⁷¹ Samuel Williamson, *The Origins of World War I, The Journal of Interdisciplinary History*, Vol. 18, No. 4, 1988, 795-818.

World War I (WW I)

WW I began in July 1914 and concluded in November 1919. The Austrian-Hungarian, German and Ottoman Empires all disintegrated while the internal borders of Europe would be redrawn. During WW I the Slovenians sought to align themselves with the South Slavs who spoke a similar language, and in “1915 the Yugoslav Committee was founded in Paris”.³⁷² The Australian territory was not impacted from the war, however many Australians would find themselves across Europe assisting the Allied Forces. According to Ben Bagwell, the Slovenes and Croats, by joining the South Slav alliance would be granted greater autonomy in the new Kingdom.³⁷³ The committee was represented by Slovenes, Croats and Serbs who advised the Allied Forces in relation to those people who inhabited the Austrian-Hungarian territory and how to establish an autonomous state.³⁷⁴ William Bartlett argues that the committee's work was unsuccessful and the Entente Powers (the Allies) had already reached agreement in Italy, where Italy inherited parts of Dalmatia.³⁷⁵ As the war progressed Slovenes³⁷⁶ found themselves being drawn closer to aligning with the South Slavs.

The May Declaration of 1917 demanded the unification of the Slovenes, Croats and Serbs (three peoples) residing under Habsburg rule to be under a single constitutional entity.³⁷⁷ In July 1917, the Corfu Conference and Declaration led to the formation and unification of the Kingdom of Serbs, Croats and Slovenes.³⁷⁸ Importantly, the Corfu Declaration was considered to be a legal agreement between the Yugoslav Committee and the Ravai Serbian Government, attempting to be a final settlement on the political form, function and organisation of the new Kingdom.³⁷⁹

The first Vidovdan (St Vitis Day) constitution declared the temporary royal dictatorship of the new Kingdom of Serbs, Croats and Slovenes, and centralised administration to Belgrade.³⁸⁰ The Slovene territory had been divided into two districts of Ljubljana and Maribor.³⁸¹ The declaration allowed for the Kingdom to be formed under a constitution in October 1918.³⁸² The Kingdom of Serbs, Croats and Slovenes (renamed the Kingdom of Yugoslavia 1918) was finalised in 1919. The Slovene territory began to take shape with the borders being drawn

³⁷² Ulrike von Hirschhausen, *From imperial inclusion to national exclusion: citizenship in the Habsburg monarchy and in Austria 1867-1923*, *European Review of History*, 2009, 551-573.

³⁷³ Ben Bagwell, *Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics*, 21, *Georgia. J. Int'l & Comp. L.*, 1991, 489-499.

³⁷⁴ Arne Mavčič, *The Slovenian Constitutional Review*, www.concourts.net, 2009, 10.

³⁷⁵ William Bartlett, *Croatia between Europe and the Balkans*, Routledge, 2003, 13.

³⁷⁶ Viktor Meier, *Yugoslavia: A History of its Demise*, Routledge, 1999, 53

³⁷⁷ Arne Mavčič, *The Slovenian Constitutional Review*, www.concourts.net, 2009, 10.

³⁷⁸ Richard Frucht, *Eastern Europe: an introduction to the people, land, and culture*, Library of Congress in Publication data, 2005. 420-430.

³⁷⁹ Vladislav Sotirovič, *The 1917 Corfu Declaration*, *The South Journal*, Vol. 33. No 1-2, 214. 2-6.

³⁸⁰ James Gow and Catherine Carmichael, *Slovenia and Slovenes: A Small State and the New Europe*, C. Hurst & Co, 2001, 35.

³⁸¹ *Ibid.*

³⁸² Arne Mavčič, *The Slovenian Constitutional Review*, www.concourts.net, 2009, 10.

between Italy, Austria, Hungary and Croatia.³⁸³ However, the southern border of Slovenia with Croatia was an internal administrative border of Yugoslavia. The Slovene territory was being defined, and the other Republics within Yugoslavia also had administrative internal borders such as Croatia with Serbia. It is argued that the defining of territories in 1918 would provide and strengthen the identity and nationalism of the Slovene people. The Slovenes would for the first time have a defined territory of their own.

Treaties of Versailles and Germain

At the conclusion of WWI the 1919 Treaty of Versailles was signed and implemented. The Treaty was an important step to ending the war between Germany and the Allied Forces. Even though the fighting did not stop across Europe in 1919, the road to peace for the people of Europe and those people who occupied the modern day Slovene territories had begun. The League of Nations was established in June 1919. The official languages of the League of Nations were English, French and Spanish.³⁸⁴ The League of Nations played a major role in promoting international cooperation, peace and security across Europe. The road to international co-operation would help to promote transnational activities such as trade, transport and finance. Despite the short history of the League of Nations, both the former Yugoslavia and Australia were members. However, the League of Nations was powerless to prevent the rise of Nazism.

The peace treaties of St Germain in 1919, declared the Austrian Hungarian Empire to be dissolved. Article 70 provided that every person possessing the right of citizenship in the territory of the Austro-Hungarian Monarchy shall obtain exclusion of Austrian nationality.³⁸⁵ Article 76 went further stating that persons who acquired the rights to citizenship after 1 January 1910 did not acquire nationality without a permit from the state of Serbs, Croats and Slovenes. Married women continued to follow citizenship of the husband (in the eyes of the law), while children under the age of 18 followed one or both of the parents.³⁸⁶ The Treaty of Trianon came a year later in 1920, and provided citizenship through succession, ensuring continuity throughout the region, and defined the Hungarian borders. Individuals having the right to citizenship under the Austro-Hungarian monarch, who differed in race and language, could opt for either citizenship of either Austria, Italy, Poland, Romania or the Kingdom of Serbs, Croats and Slovenes.³⁸⁷ Citizenship had begun expanding its role confirming the legal status of citizens within a territory, but also provided continuity of that legal status in the transition from one ruler

³⁸³ Peter Radan, *The Breakup of Yugoslavia and International Law*, Routledge, 2002, 137-145.

³⁸⁴ Arne Mavčič, *The Slovenian Constitutional Review*, www.concourts.net, 2009, 10.

³⁸⁵ Article 70 Treaty of Peace between the Allied and Associated Powers and Australia: Protocol, Declaration and Special Declaration (St. Germain-en-Laye, 10 September 1919) Australian Treaty Series 1920 No.3.

³⁸⁶ *Ibid*, article 82.

³⁸⁷ *Ibid*, article 80.

to another and the changing territorial boundaries of empires and kingdoms. The continuity, provided by the law, would also allow the rulers over the territory to impart the identity of the empire or kingdom. That is, ensuring people retained their citizenship, also provided a sense of belonging and it is argued would have provided a sense of certainty as rulers and territory changed.

Kingdom of Serbs, Croats and Slovenes

The citizenship laws of the Habsburg period were carried over to the Kingdom of Serbs, Croats and Slovenes.³⁸⁸ Australia, on the other hand, became a Federation in 1901. Full membership in Australia was identified as being either a British subject or having the status of an alien,³⁸⁹ the evolution of this status will be further explained later in this chapter. That is, a person born in Australia, or naturalised the person became a British subject. All other people were considered aliens. According to Andre Liebich, “individuals with citizenship of the former Austro-Hungary territory could choose to have either citizenship of the state or citizenship of the state where the population was predominantly of the same race and spoke the same language”.³⁹⁰ This flexibility of choice may have favoured Slovenes by enabling individuals with a common language to remain together. This recognition of the common Slovenian language would contribute to the formation of a wider community of Slovenians. As the community and population grew, the Slovenian language was used by more people within the Kingdom and within other neighbouring states, thus ensuring its widespread recognition.

The recognition of women and their acceptance into political life began in the early 1900s. At the end of WWI, the political parties in the Slovenian territory supported women’s enfranchisement. During the early days of the Kingdom, the General Slovenian Women’s Association played a role in promoting women. Women gave public speeches and the Liberal Party accepted the idea of having women’s quotas established to allow them greater societal and political participation. In 1919, the issue of women’s right to vote was taken to the National Council for Women. In 1920, a Bill was passed by the Liberal government giving women the right to vote in local elections.³⁹¹ However, in the same year, this right to vote was abolished after the Liberal Party was removed from office.³⁹² The women’s movement was supported by the Catholic Church throughout the 1920s; however, in 1929 King, Alexander banned all

³⁸⁸ Nenad Rava, *Country Report: Serbia*, European University Institute, EUDO Citizenship Observatory, 2010, 3.

³⁸⁹ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 47-48.

³⁹⁰ Article 64, Treaty of Trianon and Article 80 Treaty of Saint Germain, in Andre Liebich, *Altneulander or the vicissitudes of citizenship in the new EU states*, Working Paper Series 5, Osterreichische Akademie der Wissenschaften, Commission for Migration and Integration Research, 2005, 2-21.

³⁹¹ Blanca Rodriguez, Ruth Rubio-Marin, *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (International Studies in Sociology and Social Anthropology), Brill Academic, 2012, 348-38.

³⁹² *Ibid.*

political action by women. It was not until after 1935 that women's groups began to organise themselves again.³⁹³

The Austrian Civil Code 1811 remained in place until the 1946 Yugoslav constitution had been implemented. The Austrian Civil Code removed the paternalistic patterns of economic organisation for women. However, women would still require consent from their husbands in relation to legal matters. In 1911, there was an attempt by the Lower House of the Austrian Parliament to pass legislation that would allow women's participation in political associations. The legislation was not passed.³⁹⁴ It was not until after WWII that women's rights in Yugoslavia would be extended and they again would have a greater role in the political discourse of the Kingdom.

In an attempt to unify the people, the 1921 constitution of the Kingdom of Serbs, Croats and Slovenes stated that 'all citizens were equal'.³⁹⁵ The constitution reinforced the administrative districts (*oblasti*) as the basis of political, economic and administrative units within Yugoslavia.³⁹⁶ It was not until 1928 that the citizenship laws³⁹⁷ were agreed to by the Slovenes, Croats and Serbs and legislation introduced into the Kingdom.³⁹⁸ These new laws were based on the principle of *ius sanguinis*.³⁹⁹ Medved reinforces this point and argues that the 1928 citizenship laws went some way to unifying the people and developing a single Yugoslav identity.⁴⁰⁰ However, as explained later in this chapter a single Yugoslav identity was never achieved. Furthermore, this thesis argues that creating a single Yugoslav identity would have been difficult because the languages used across the territory are different, but people could converse and understand each other. The citizenship laws also confirmed the legal status of people under the new kingdom. As discussed later in this chapter, a single Yugoslav identity would never be realised. King Alexander proclaimed personal rule over the Yugoslav territory on 6 January 1929.⁴⁰¹ In 1929, the Kingdom's name was changed to the Kingdom of Yugoslavia.

³⁹³ Ibid.

³⁹⁴ Ibid.

³⁹⁵ Paul Shoup, *Yugoslavia's National Minorities Under Communism*, Slavic Review, 1963, 65.

³⁹⁶ 1921 Constitution of the Kingdom of Serbs, Croats and Slovenes, in Peter Radan, *The Break-up of Yugoslavia and International Law*, Routledge, 2002, 137-145.

³⁹⁷ 1928 Citizenship Act, in Felicita Medved, *Country Report: Slovenia*, University Institute, EUDO Citizenship Observatory, 2010, 2.

³⁹⁸ Zakon o državljanstvu kraljevine S. H. S. z 21. 9. 1928, *Uradni list ljubljanske in mariborske oblasti z dne 19. 11. 1928*, št. 109

³⁹⁹ 1928 Citizenship Act, in Felicita Medved, *Country Report: Slovenia*, University Institute, EUDO Citizenship Observatory, 2013, 1-5.

⁴⁰⁰ Ibid.

⁴⁰¹ Peter Radan, *The Break-up of Yugoslavia and International Law*, Routledge, 2002, 137-145.

King Alexander's rule came to an end in September 1931 with the introduction of the unitarist Constitution of the Kingdom of Yugoslavia.⁴⁰² There was considerable restructuring of the districts, which were reduced from thirty-three to nine provinces. Ljubljana (the capital of modern day Slovenia) and the Slovene territory came under the province of *Dravska*.⁴⁰³ In 1934, King Alexander was assassinated by Croatian and Macedonian revolutionaries⁴⁰⁴ and the Regency Council was installed, which was headed by the King's cousin Prince Paul.⁴⁰⁵ The Regency Council was considered to be a mock parliamentary system maintaining central power that continued until 1941,⁴⁰⁶ when the Yugoslav territory was invaded by the Axis. The Draft Decree of the Banovina Slovenia in August 1939 (drafted on the basis of the Decree of the Banovina Hrvatska) had incorporated some elements of the constitution.⁴⁰⁷ In August 1939, a quasi-federal system in Yugoslavia was introduced that resulted in the creation of the Croatian *banovina*.⁴⁰⁸ Peter Radan argues that Slovenes supported the establishment of the Croatian *banovina* in the hope that they (the Slovenes) would also be granted a *banovina*.⁴⁰⁹ However, this did not occur. It could be argued that, had the *banovina* been granted at the time, it would have further enhanced the Slovene identity and strengthened their move towards independence.

1939 - 1945

WWII began in 1939, and again Europe and its inhabitants would be subject to war and conflict until 1945. Slovenes would be particularly impacted by the German (including Italian and Hungarian) invasion. Many Slovenes would leave the territory and migrate to other countries within and outside of Europe. This included countries such as Austria, Italy, Germany, Switzerland, Australia, Argentina and the United States. The Axis Powers created an Independent State of Croatia in 1941, which saw the Serbs persecuted.⁴¹⁰ Across Yugoslavia including the Slovenian territory, national and religious tension emerged between Croats and Serbs, which escalated into further conflict. According to Irina Ognyanova the war became increasingly nationalistic and within Croatia Ustasha's nationalism reached its highest and most extreme.⁴¹¹ The Ustasha was an organisation made up of Croatian nationalists and their oath demanded independence - 'I swear to fight in the Ustasha army for a free Independent Croatian

⁴⁰² Peter Radan, *The Break-up of Yugoslavia and International Law*, Routledge, 2002, 137-145.

⁴⁰³ Ibid.

⁴⁰⁴ Dejan Djokic, *National Mobilisation in the Kingdom of Yugoslavia*, in Dejan Djokic and Jker-Lindsay, *New Perspective on Yugoslavia: Key Issues and Controversies*, London and New York: Routledge, 2010.

⁴⁰⁵ Fred Singleton, *A Short History of the Yugoslav Peoples*, Cambridge University Press, 1989, 145.

⁴⁰⁶ Ibid.

⁴⁰⁷ Peter Radan, *The Break-up of Yugoslavia and International Law*, Routledge, 2002, 137-145.

⁴⁰⁸ Ibid.

⁴⁰⁹ Ibid.

⁴¹⁰ Irina Ognyanova, *Nationalism and National Policy in Independent State of Croatia (1941-1945)*, in *Topics in Feminism, History and Philosophy*, IWM Junior Visiting Fellows Conferences, Vol. 6, edited by Rogers, Dorothy, Joshua Wheeler, Marina Zavacka and Shawna Casebier. Vienne: IWM 2000.

⁴¹¹ Ibid.

State'.⁴¹² Even though the Ustasha assumed power that was created by the Germans, an independent state did not succeed and Croatia would again become part of Yugoslavia. Despite the support from the Allied Forces in the defence of the Yugoslav territory, there continued to be internal power struggles between the Četnick and Partisans.

The Partisans led by Josip Broz Tito would prevail. Tito inherited the leadership, bringing a flexible leadership style and approach to the territory to ensure the equality of the different ethnic groups that resided throughout Yugoslavia. Tito's influence cannot be underestimated. As a leader, not only did he make a valuable contribution to uniting the Yugoslav people; he also managed to ensure that there would be very little conflict throughout the territory. This stability would be good for Slovenians who could continue to quietly pursue their position within Yugoslavia. Slovenians were progressive and considered economically advantaged as they had access to Central and Western Europe

Despite the war spreading across Europe and throughout the Slovenian territory, in September 1941 the first Slovenian Parliament (Committee of National Liberation) was established to represent the whole nation and was considered to be a crucial step towards independent sovereignty.⁴¹³ A year later in 1942, the first session of the Antifascist Council of the People's Liberation of Yugoslavia (AVNOJ), an ostensibly multi-party 'partisan Parliament' organised by the Communist Party of Yugoslavia - declared itself the legitimate representative of the Yugoslav Peoples.⁴¹⁴ In October 1943, in Kočevje, the next iteration of the Slovenian National Liberation Committee was formed, which adopted a declaration incorporating Slovenia into federal Yugoslavia, on the basis of self-determination.⁴¹⁵ In February 1944, the "Council" and the National Committee of the Liberation Front was established, and the first Slovenian Government was constituted on 5 May 1945 in Ajdovščina.⁴¹⁶ Zoran Polič became the first Slovenian Minister for Interior and in June of the same year the government would invite all former state employees to report to their former employment.⁴¹⁷ Due to the war, most of the government services ceased and many employees would defend Yugoslavia (and Slovenian) interests.

⁴¹² Ibid.

⁴¹³ Drago Ferš, *From Security and Intelligence Service to Slovene Intelligence and Security Agency*, Slovenian Intelligence and Security Agency, National Security and the Future, 1-2 (3), 2003, 61-65.

⁴¹⁴ Peter Radan, *The Breakup of Yugoslavia and International Law*, Routledge, 2002, 137-145.

⁴¹⁵ Janko Prunk, Jožko Šavli, *Slovenian in light of Parliamentary Tradition*, 2008, <http://imss.dz-rs.si/imis/6eb718f995c33fb7ce4f.pdf>, accessed 11 June 2014.

⁴¹⁶ Ibid.

⁴¹⁷ Marko Pogorevc, *Director General of the Police*, The Slovene Police, http://www.policija.si/eng/images/stories/Publications/book_slovene-police.pdf, accessed 30 July 2015.

The 1928 citizenship legislation of the former Kingdom of Serbs, Croats and Slovenes was used as the basis of forming the citizenship laws of Yugoslavia from 1945 to 1989.⁴¹⁸ By doing so, the citizenship law continued to define the legal status of people within the territory and provided continuity of the people within the state. However, during the war period from 1941 to 1945 German and Hungarian citizenship law applied to the territories, because of their occupation.⁴¹⁹ Thus many Slovenes, depending on where they were located, were considered either German or Hungarian citizens. This had a significant impact on the development of the single Yugoslav identity. The separation of the citizenship laws resembled the legal framework for citizenship in the former Austrian Hungarian Empire, where there were separate laws for the Austrian and Hungarian territories. German and Hungarian influence had reigned over the Slovenian territory during the war. The resulting effect was Slovenians found themselves having to become citizens of a foreign occupying power. Germany and Hungary have a national identity that is different in many ways to that of Slovenia. For example, the Slovenian language is very different from Hungarian and German.

At the conclusion of WWII, the law on citizenship for the Democratic Federal Republic of Yugoslavia⁴²⁰ was adopted on 23 August 1945.⁴²¹ The new laws provided that a citizen of the state is all those people who on the 6th of April 1941 had been domiciled in one of the previous Yugoslavian municipalities. The laws ensured ongoing continuity and unification of the citizenry across the territory. The constitution of the Yugoslav Federation of 1946 (named the Federal Peoples' Republic of Yugoslavia) was modelled on Stalin's Soviet constitution,⁴²² and strongly emphasised the federal system. The 1946 constitution⁴²³ provided for the six Republics, which included Slovenia, Croatia, Serbia, Macedonia, Montenegro as well as Bosnia and Herzegovina.⁴²⁴ Article 1 stated that the Federative People's Republic of Yugoslavia is a federal people's State, Republican in form, a community of peoples equal in rights who, on the basis of the right to self-determination, including the right of separation, have expressed their will to live together in a federative State.⁴²⁵ The inclusion of this provision (and the words 'right to self-determine and right of separation') was a pivotal moment in the history for Slovenes and

⁴¹⁸ Janko Prunk, Jožko Šavli, *Slovenian in light of Parliamentary Tradition*, 2008, <http://imss.dz-rs.si/imis/6eb718f995c33fb7ce4f.pdf>, accessed 11 June 2014.

⁴¹⁹ Rainer Bauböck, Bernard Perching and Viebke Sievers, *Citizenship Policies in the New Europe*, Expanded and Updated Edition, Amsterdam University Press, 2009, 330 - 350.

⁴²⁰ From 10/8-1945 to 29/11-1945: based on the agreement of Tito-Šubašić signed on 16 June, 1944, the delegates of the third session of Anti-Fascist Council in Belgrade 10 August 1945 announced a new country as the Democratic Federal Yugoslavia (DFJ).

⁴²¹ Zakon o državljanstvu DFJ, Official Gazette DFJ, No. 64/1945.

⁴²² Katrine Haug Hilde, *Creating a Socialist Yugoslavia: Tito, Communist Leadership and National*, I.B. Tauris, London, 2012, Chapter 4.

⁴²³ Constitution of the Federative People's Republic of Yugoslavia, Official Gazette of the Federative People's Republic of Yugoslavia 1946.

⁴²⁴ Article 12, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

⁴²⁵ Article 1, Constitution of Yugoslavia 1946, in Ben Bagwell, *Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics*, 21, Georgia. J. Int'l & Comp. L., 1991, 489-499.

Slovenia, by providing Slovenia and other Yugoslav Republics with the first steps towards independence. The 1945 citizenship legislation introduced the concept of dual citizenship that allowed for citizenship at both the Federal and Republic level. However, citizenship at the Republic level had no legal effect.

1946 - 1950

The 1946 constitution of Yugoslavia stated that all republican citizenships across the entire territory of Yugoslavia were equal in status.⁴²⁶ That is, article 2 of the citizenship act stated that citizenship excluded any other citizenship and there was no ability for any person to have dual citizenship. A Slovene could have Republic and Federal citizenship; however, they were not entitled to have citizenship of another state such as Australia. Furthermore, the 1946 constitution provided the basis for the rights and duties of its citizens. Most notable, was the introduction of article 21 that ensured there was equality before the law of all citizens (men and women) no matter what race or nationality. The right to elect and be elected, along with equal rights for women, the right to education, and the freedom of conscience, religion, the protection of the family, and the freedom of speech, association, assembly⁴²⁷ could be considered progressive law for its time. These rights went some way to unifying the citizens of Yugoslavia. Furthermore, as part of the modern day legal framework of the European Union and Slovenia, these rights form part of the national identity of Slovenia (discussed **chapter four**). More importantly, women began to be considered more broadly to ensure they actively participated across all areas of the state including politics. In 1946, elections were held by the Slovenian Assembly, which resulted in twelve women being elected among one hundred and twenty seats.⁴²⁸ Even though women occupied a small number of seats, their acceptance within the Assembly was an important statement and part of the wider acceptance of women in the community.

The people's right to self-determination⁴²⁹ was reinforced within the 1946 constitution. Article 1 was reinforced by articles 2 and 10 of the constitution of the People's Republic of Slovenia 1947. That is, while there was a federal constitution for the whole of Yugoslavia, the Slovenian Republic had its own constitution that resembled in large part the federal constitution. The thesis argues that this was also a pivotal step towards Slovenian independence. The Slovenian constitution of 1947 ensured the organisation of Slovenia as a Constituent Republic of the

⁴²⁶ Ustava FLRJ, Official Gazette FLRJ, No. 10/46. Citizenship Act of the Peoples Republic of Slovenia, Official Gazette of the Democratic Republic of Yugoslavia 64/1945.

⁴²⁷ Katrine Haug Hilde, *Creating a Socialist Yugoslavia: Tito, Communist Leadership and National*, I.B. Tauris, London, 2012, Chapter 4.

⁴²⁸ Blanca Rodriguez, Ruth Rubio-Marin, *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (International Studies in Sociology and Social Anthropology), Brill Academic, 2012, 348-38.

⁴²⁹ Arne Mavčič, *The Slovenian Constitutional Review*, www.concourts.net, 2009, 10.

Yugoslav Federation, and was based on the principles of unity of power, democratic centralism and double responsibility.⁴³⁰ The government was the head of state administration, however the power was with the People's Assembly and its Presidium.⁴³¹

Up until 1948, Slovenians had experienced new rule, territorial change and two world wars. For a short period their push towards unification within Yugoslavia and the advancement of their identity had been placed on hold due to German occupation. The impact to the Slovenian territory and Slovenians was vast and varied. There were significant civilian casualties and property throughout the territory was damaged, particularly those having a religious connection such as churches. Nonetheless, Slovenes quickly assumed greater autonomy within the constitutional framework of Yugoslavia. As WWII drew to a close the international community came together and began to work through a process of ensuring such a bloody conflict would not occur again. The United Nations would be established, and Australia took a leading role in the creation of the organisation.

The United Nations promoted and implemented co-operation amongst states and kingdoms to ensure there was no repeat of the bloody conflict that had raged across Europe. The United Nations would quickly work to ensure citizens' rights of nation states were protected and in 1948 the Declaration of Human Rights was created. The declaration, while not binding law was a first step towards states taking into consideration the broader rights of its citizens and people of the world. Importantly, many of the provisions of the 1948 Declaration were expressed in the 1946 Yugoslav constitution. Doing so would assist the state to further unify and integrate the different ethnic groups. Since 1948, there has been a significant increase in the development of international law, which has attempted to protect the rights of citizens and people of all nation states (discussed **chapter four**).

Following WWII, the European Community began to take a greater role in cooperation amongst states with the European Coal and Steel Community being introduced. The founding members included Belgium, France, Germany, Italy, Luxembourg and the Netherlands. **Chapter four** discusses the evolution of the European Community, European citizenship and Slovenia in the European Union. Post WWII there were three waves that had an impact on a states' citizenship policies and law. The first was the 'struggle for decolonisation between 1948 and 1965. The second phase⁴³² saw the struggle against racial segregation and discrimination, and the third phase was the struggle of multiculturalism and the rights of minorities.

⁴³⁰ Ibid.

⁴³¹ Ibid.

⁴³² Will Kymlicka, *Multiculturalism: Success, Failure, and the Future*, Migration Policy Institute, 2012, 6.

The Cold War began in 1947 and continued through to the 1990s, which saw the rise of the civil rights movement. However, the Cold War period could be best be described as Yugoslavia wanting to have a foot in each camp. This thesis argues that Yugoslavia despite adopting and copying Soviet (communist) policies, and relying on economic assistance from the East, needed economic assistance from the West could not be excluded.⁴³³ Even with sustained pressure from the Soviets in their attempt to create a satellite Soviet territory in Yugoslavia, the West intervened and provided economic support to Yugoslavia. The action by the West to support a communist country changed the perception of the Cold War bloc, and Yugoslavia began to change its policy direction. The new direction enabled Yugoslavia to separate themselves from the Soviets.⁴³⁴ The Belgrade Declaration in 1955 was an important time for Yugoslavs, which formalised the Soviet acceptance of Yugoslavia's independence.⁴³⁵ This was important to Yugoslavia's ongoing unification and push towards establishing an identity that all citizens and Republics would accept. However, this was not successful because of the push by each of the Republics to gain more autonomy over their internal affairs.

The structure⁴³⁶ was fundamental to the governance of Yugoslavia and the establishment of the six Republics⁴³⁷ (including the autonomous provinces of Vojvodina and Kosovo-Metohija within the Republic of Serbia).⁴³⁸ This was important to Slovenians. This thesis argues that the establishment of the Slovenian Republic cannot be underestimated, for the role it would play when Slovenia would eventually break away from Yugoslavia. Yugoslavia was highly centralised under the rule of Tito. The structure of Yugoslavia had many similarities to the structure that Australia had established, with a central government along with State and Territory governments that had autonomy to govern their respective territories.

1950 - 1960

In 1950, Slovenia (part of Yugoslavia) adopted the citizenship laws for the People's Republic of Slovenia. Republican citizenship⁴³⁹ was valid from 21 June 1950 to 8 April 1965. Article 1 stated that a citizen of the Slovene Republic is a person who at the same time is a citizen of Yugoslavia.⁴⁴⁰ The adoption of Republican citizenship would later provide continuity for

⁴³³ Ante Batovič, *The Balkans in Turmoil-Croatian Spring and the Yugoslav position Between the Cold War Blocs 1965-1971*, London School of Economics, Cold War Studies Programme, 2009, 1-10.

⁴³⁴ Ibid.

⁴³⁵ Ibid.

⁴³⁶ Peter Radan, *The Breakup of Yugoslavia and International Law*, Routledge, 2002, 137-145.

⁴³⁷ Ibid.

⁴³⁸ Ibid.

⁴³⁹ Official Gazette LRS, No. 20/50.

⁴⁴⁰ Ibid, Article 2 provided that a citizen of another Yugoslav republic could be an honorary citizen of the Slovenian Republic. Articles 4 and 5 granted citizenship to a child where both parents or, one of the parents were a Slovene citizen. Article 7 enabled citizenship by birth on the territory of Slovenia, or, found and both of the parents were unknown or couldn't be known up until 14 years of age.

Slovenia when developing its citizenship laws at the time of independence, in 1990 (discussed **chapter three**). Furthermore, the Republican citizenship enabled a legal status to be developed that defined what it meant to be Slovenian.

Slovenians would continue to reside in Austria and due to the many changes in borders where they were located, those who remained in the Austrian territory became a minority.

Nevertheless, The Slovenians were assured equal rights in accordance with article 19 of the Basic Law of Austria (*Staatsgrundgesetz*) that stated:

“(1) All the ethnic entities of the empire enjoy equal rights, and each ethnic entity has an inviolable right to the preservation and fostering of its nationality and language.⁴⁴¹

(2) The state recognises the equal rights of all current languages in schools, administration and public life”.⁴⁴²

However, in practice Austria continued to deny Slovenes living on its territory the use of their language in offices, schools, on topographical tables of towns and villages. The situation persisted until the Austrian Federal Constitutional Court ordered that relevant local communities to remedy the violations.⁴⁴³ The Austrian Independence Treaty re-established Austria as a sovereign state, and was signed on May 15, 1955. The Treaty came into force on July 27, 1955.⁴⁴⁴ Article 7 ensured the minority rights of Slovenes and Croats were protected.

The Slovene minority in Italy (Slovene: *Slovenska manjšina v Italiji*), also known as the Slovenes in Italy (Slovene: *Slovenci v Italiji*) would also enjoy special protection. The vast majority of members of the Slovenian ethnic minority resided in Trieste, Gorizia and Udine. The Slovene minority in Italy enjoyed legal protection of its collective rights, guaranteed by the Italian constitution and international treaties (London Memorandum 1954). The London Memorandum of 1954⁴⁴⁵ regulated the conduct of the inhabitants comprising the Free Territory of Trieste. The Slovene minorities located throughout the Province of Friuli-Venezia were protected⁴⁴⁶ under article 5 of the Peace Treaty, as well as article 3 of the Statute of the Province of Friuli Venezia Giulia following its approval in

⁴⁴¹ Council of Europe, *Report by the Republic of Austria pursuant to Article 25 paragraph 1 of the Framework Convention for the Protection of National Minorities*, 2000, 5-14.

⁴⁴² Ibid.

⁴⁴³ Austrian Constitutional Court VfSlg 16404/2001 and 17733/2005, pertained to the use of the Slovenian language in local schools.

⁴⁴⁴ State Treaty for the Re-establishment of an Independent and Democratic Austria, 1955, http://www.cvce.eu/content/publication/1999/3/2/5c586461-7528-4a74-92c3-d3eba73c2d7d/publishable_en.pdf, accessed 29 July 2015.

⁴⁴⁵ United States of America, United Kingdom of Great Britain and Northern Ireland, Italy and Yugoslavia, Memorandum of Understanding Regarding the Free Territory of Trieste, signed 1954, Treaty Series, No. 3297, vol 49 and 50.

⁴⁴⁶ The Constitution of the Italian Republic 1948, Official Gazette, December 27, 1947, no. 298.

1963.⁴⁴⁷ Slovenians were gradually being recognised by laws of other states outside of Yugoslavia. This recognition would be important to the ongoing development of the Slovenian identity. Even so, similar to the Australian territory their rights, in practice would continue to be restricted.

Internationally, women were gaining greater recognition and in 1957 the Convention on the Nationality⁴⁴⁸ of Women was implemented to recognise the conflicts in law related to the loss and acquisition of citizenship by women upon marriage. The convention reinforced the 1948 Declaration of Human Rights that everybody has the right to nationality regardless of gender. The former Yugoslavia signed and ratified the convention on 27 March 1957 as did Australia in 1961. This was an important and a progressive step towards the acceptance and recognition of women's rights in broader society.

1960 - 1975

The 1963 Yugoslav constitution expanded the concept to further decentralise the self-managed society.⁴⁴⁹ The country was renamed again to the Socialist Federal Republic of Yugoslavia. The Yugoslav Citizenship Act was passed in 1964.⁴⁵⁰ Section 2 of that Act provided that Republic (Slovenian) citizenship could only be held by a Yugoslav citizen,⁴⁵¹ thus retaining the primacy of federal citizenship. Loss of Yugoslav citizenship entailed loss of Republic citizenship. At that time there was a strong official preference towards Yugoslav citizenship as opposed to Republican citizenship. The importance of national citizenship meant that there would be a continued push towards developing a single identity for the Yugoslav state. It also reinforced the legal status of citizenship within the Yugoslavia. It is argued the citizenship laws went some way to strengthening the sense of solidarity of all citizens across the Yugoslav territory. However, this was at the same time as the Republics had assumed more autonomy. The federal laws certainly played a role in providing a sense of who and who was not Yugoslav. For example, when travelling abroad it was the Yugoslav citizenship that allowed a person to obtain a Yugoslav passport.

⁴⁴⁷ Autonomous Region of Friuli Venezia Giulia, Association of European Border Regions, http://www.aebr.eu/pdf/fmanager/Regionen/F/Friuli_Venezia_Giulia/Fact_sheet_Friuli_Ven_Giulia_EN.pdf, accessed 20 February 2014.

⁴⁴⁸ Convention on the Nationality of Married Women 1957, Treaty Series, vol. 309, p 65.

⁴⁴⁹ Autonomous Region of Friuli Venezia Giulia, Association of European Border Regions, http://www.aebr.eu/pdf/fmanager/Regionen/F/Friuli_Venezia_Giulia/Fact_sheet_Friuli_Ven_Giulia_EN.pdf, accessed 20 February 2014.

⁴⁵⁰ Zakon o jugoslovanskem državljanstvu – Official Gazette of the SFRY, No. 38/64 of 1964.

⁴⁵¹ By the Constitution of 1963 the State was renamed as the Socialist Federal Republic of Yugoslavia (SFRJ), Official Gazette SRS, No. 10/63.

During this period, the Republic of Slovenia and Republic of Croatia demanded greater control over their economic resources.⁴⁵² The fall of Aleksandar Ranković who was Vice President of Yugoslavia, would be seen by Slovenian and Croatian reformers as an opportunity to strengthen their respective nationalist sentiments. However, Tito would view this as a potential threat to the wider unification of Yugoslavia and intervened to suppress any further growth in nationalism.⁴⁵³ This was a complex period for Yugoslavia. On the one hand, Tito was continuing to develop a common culture amongst the Yugoslavs that would lead to a shared identity.⁴⁵⁴ On the other hand, the thesis argues that reformers within Republics were steering the nationalist argument towards greater autonomy and possibly independence.

The rise in civil rights saw citizens being able to vote and there was recognition of racial and gender inequality (across America, Canada and Ireland amongst other states). For instance, America established the 1964 *Civil Rights Act* that outlawed discrimination on the grounds of race, religion and national origin. Civil rights in Australia resulted in greater recognition of the indigenous people and women. Across Yugoslavia the federal constitution had an expanded set of rights to ensure equality amongst the different ethnic groups. It is argued the development and rise of civil and political rights expanded the earlier traditional concept of citizenship. States began to include their citizens in the political process and consequently the private side of citizenship began to be an important component of citizenship (discussed **chapters four, five and six**).

The 1968 constitutional reforms⁴⁵⁵ saw the provinces of Kosovo and Vojvodina being granted greater autonomy⁴⁵⁶ (redefining the six Republics and two Socialist autonomous provinces).⁴⁵⁷ The constitutional amendments of 1971 came into effect in 1974 and saw the number of the presidency reduced from twenty-three to nine members. Originally, there were three members from each of the Republics, which would be reduced to one. The two members from Kosovo and Vojvodina would also become one. In 1971, the Federal constitutional amendments provided wider powers to the Federal Chamber of Nationalities and the Republics.⁴⁵⁸ As part of the constitutional amendments of 1974, the Chamber of Republics and Provinces was formed. The main function of the Chamber was to provide [other] nationalities with an equal level playing field, as the Serbians dominated most of the governance bodies that had been established under the constitution. All citizens were considered equal before the law and enjoyed equal rights in accordance with article 21.

⁴⁵² Peter Radan, *The Breakup of Yugoslavia and International Law*, Routledge, 2002, 137-145.

⁴⁵³ Ibid.

⁴⁵⁴ Thomas Marshall, *Class, Citizenship and Social Development*, New York, Anchor, 1965, 101-103.

⁴⁵⁵ Arne Mavčič, *The Slovenian Constitutional Review*, www.concourts.net, 2009, 10.

⁴⁵⁶ Lenard Cohen and Jasna Dragović-Soso, *State Collapse in South-Eastern Europe: New Perspectives on Yugoslavia*, Purdue University Press, 2008, 101-103.

⁴⁵⁷ Ibid.

⁴⁵⁸ Ibid.

More importantly, the 1974 amendments decentralised society by providing the six Republics and two autonomous provinces with more control over internal affairs.⁴⁵⁹ A collective presidency was set up to ensure the Federative state would continue following the death of Josip Broz Tito.⁴⁶⁰ The 1970s served well for the continued rise and acceptance of women in political life. In 1974, a quota for women was inserted into social organisation rules to ensure women had greater participation, however the quota system was not legislatively binding.⁴⁶¹

During the 1970s, European countries began thinking about and discussing the idea of a European citizenship. At the 1972 meeting of the Heads of Government of the European Communities wider integration and the concept of European citizenship were discussed.⁴⁶² This is an important point because the beginnings of a wider citizenship for the region was being considered to further unify the citizens of Europe. Two years later in 1975, the European Commission released a report 'Towards European Citizenship' considering the political rights to be afforded to citizens of the European Communities such as the right to vote and participate in elections.⁴⁶³ These early ideas of what European citizenship might constitute become important to Slovenia and Slovenians following the break-up of Yugoslavia and their membership to the European Union (discussed **chapter four**).

1975 - 1980

The legal arrangement concerning the territory and borders of Yugoslavia and Italy had not been finalised by 1975. Subsequently, the Treaty of Osimo was signed on 10 November 1975⁴⁶⁴ by the Socialist Federal Republic of Yugoslavia and the Italian Republic in Osimo, Italy and became effective on 11 October 1977. Article 3 provided that nationality of persons who on 10 June 1940 were Italian nationals and had their permanent residence in the territory would become citizens in the territory they resided, with the option of being able to move to either the Italian or Yugoslav territory.⁴⁶⁵ Article 8 stated Italy was obliged to ensure the Slovene minority had the same protections as

⁴⁵⁹ Ben Bagwell, *Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics*, 21, Georgia. J. Int'l & Comp. L., 1991, 489-499.

⁴⁶⁰ Ibid.

⁴⁶¹ Blanca Rodriguez, Ruth Rubio-Marin, *The Struggle for Female Suffrage in Europe: Voting to Become Citizens* (International Studies in Sociology and Social Anthropology), Brill Academic, 2012, 348-38.

⁴⁶² Meeting of the Heads of State or Government ARIS, The First Summit Conference of the Enlarged Community (II), Resolution of the European Parliament on the Results Reproduced from the Bulletin of the European Communities, No. 11, 1972.

⁴⁶³ Commission of the European Communities, Towards European Citizenship, COM (75) 321, July 1975.

⁴⁶⁴ Italy and Yugoslavia Treaty on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947, Signed in Osimo, Ancona, 10 November 1975, No. 24848, United Nations Treaty Series, 1987.

⁴⁶⁵ Ibid.

provided by the London Memorandum. The memorandum handed civil administration of Zone A to Italy and of Zone B to Yugoslavia. The Slovene language had been recognised in many of the municipalities where the Slovenian minority resided. This would have suited the Slovenes and enabled the Slovenian identity to be retained, if not strengthened because the Slovene language is one of the most important elements used to define who is and is not Slovene. That is, Slovenes were not forced to adopt and use Italian or any other language.

Apart from defining the territory and protecting the Slovenian language, Slovenians and Italians residing in either Yugoslavia (later Slovenia) or Italy were afforded legislative rights.⁴⁶⁶ Similarly, the Rába Slovenes who speak a different dialect (*Prekmurje*) to the other Slovenians across modern day Slovenia and are located within modern day Hungary have also assumed legal protection under the Hungarian law. When there had been changes to the border (s), at least on paper, those individuals that had been affected by the change assumed a level of legal rights and protections.⁴⁶⁷ Today, many of the minority rights still exist but they do vary between the states, both in practice and their respective legislative frameworks. The 1976 citizenship laws maintained continuity of Yugoslav citizenship, however a provision was inserted into article 22 to ensure disputes between Federal and Republic citizenship could be resolved.⁴⁶⁸ It is argued that Yugoslavia by inserting this provision within the law reinforced the earlier position that Federal law provided the legal status of citizens within the territory and Republic law was symbolic.

The legal norms allowed the status of a child to be recognised by Republic law of which the parents were citizens. Importantly, the laws allowed the parents who might have been a Republican citizen of Slovenia and Serbia to choose the child's Republican citizenship.⁴⁶⁹ In 1977, new laws were introduced⁴⁷⁰ that were adopted across Yugoslavia and provided the Republic with the right to begin to choose their citizens. However, the federal laws still prevailed. At the federal level, the legislation enabled citizenship to be obtained in a similar manner, but expanded on the naturalisation requirements by allowing Yugoslavia to choose who could become a citizen, even if he or she did not fulfil all of the conditions.⁴⁷¹ Article 274 of the constitution created the situation where a citizen of one Republic who was on the territory of

⁴⁶⁶ Božo Marinac and Arne Mavčič, *Pravni položaj slovenske manjšine v Sloveniji: magistrsko delo*, Brdo pri Kraju, 2004.

⁴⁶⁷ Teodora Grča and Arne Mavčič, *The situation of the Hungarian minority in Slovenia with an emphasis on the Lendava region and Slovenian in Hungary*: Kranj, 2007.

⁴⁶⁸ Council of Europe, *Citizenship and state succession: proceedings*, Unidem seminar, European Democracy through law, 1998, 195-200. Official Gazette SFRY 58/76.

⁴⁶⁹ Ibid.

⁴⁷⁰ Law on Citizenship, Official Gazette Socialist Republic of Slovenia, No. 23/76.

⁴⁷¹ Article 9, Law of Citizenship 1976, Social Federal Republic of Yugoslavia 58/76.

another Republic, had the same rights and obligations of a citizen of that Republic.⁴⁷² However, as it has been argued above, Federal citizenship prevailed, because there was greater guarantee of the rights and protections afforded to Yugoslav citizens under the constitution, no matter where they resided.⁴⁷³

1980 – 1990 [Death of Josip Broz Tito]

The president of the former Yugoslavia Josip Broz Tito⁴⁷⁴ died in 1980, and the state would never recover. Upon Tito's death the policy of 'polycentrism' collapsed due to ineffective leadership, and with a greater focus on economic policy, division amongst leaders from across Yugoslavia and the Republics emerged.⁴⁷⁵ According to Olivia Hinerfield, there was a lack of clear direction by the leaders, and eventually the economy collapsed.⁴⁷⁶ The state reverted to a collective presidency, which was headed by Milka Planinc.⁴⁷⁷ Milka Planic, a woman whose heritage was Croatian and Serbian commenced her political career in 1959. The acceptance of a woman as a leader would have been viewed as a positive step for the acceptance of women in political life, within communist regimes, but also in western democratic society [states].

In June 1980, the first *Nova revija* (English: New magazine) was published in the Slovenian Republic, which played an important role in influencing the process of Slovene nationalism throughout the decade. The economic situation continued to decline and in 1984, the United States issued a National Security Directive seeking to topple communist nations, which was designed to force Europe to participate in a market-oriented economy.⁴⁷⁸ Furthermore, the West established trade barriers that halted the economic growth of the Yugoslav economy, forcing the government to obtain loans from the International Monetary Fund. By 1985 the net foreign debt of Yugoslavia had been estimated at more than \$18 billion [US].⁴⁷⁹ The political trust of the population reached its lowest point, creating an unprecedented crisis of legitimacy for political institutions and leaders.⁴⁸⁰ Furthermore, the changes imposed by the 1974 constitution were designed to restructure the performance of the economy, however they were never realised.⁴⁸¹

⁴⁷² Igor Štiks, *A Laboratory of Citizenship: Shifting Conceptions of Citizenship in Yugoslavia and its Successor States*, University of Edinburgh, School of Law, 2010/12.

⁴⁷³ Ibid.

⁴⁷⁴ Olivia Hinerfield, *The Rise and Fall of Yugoslavia, Modern European History*, Portland State University, 2013, 1-12.

⁴⁷⁵ Ibid.

⁴⁷⁶ Ibid.

⁴⁷⁷ Ibid.

⁴⁷⁸ Ibid.

⁴⁷⁹ Peter Jambreč, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 37.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

In 1986, the Slovenian national program had begun and in 1987 the concept of the constitutional program was prepared by Slovene intellectuals.⁴⁸²

In 1988, the 'Theses' for the Slovene constitution, which had been drafted by the Constitutional Commission of the Slovene Writers Association and the Working Group for Constitutional Development, was released to the public.⁴⁸³ The 'Theses' (otherwise known as the 'Writers Constitution') was an important document outlining the constitutional text but more importantly was one of the steps to democracy. The 'Theses' disregarded the socialist provisions of the former Yugoslavia and Slovenian Republic constitutions. Furthermore, it directed the state to decide how it would establish associations with other states. Slovenia was defined as a state based on sovereignty, a nation of all people who have the right to Slovenian citizenship, in accordance with the law.⁴⁸⁴ Importantly, it indicated that the country was progressing towards democracy and the rule of laws as foundational principles for the establishment of the new independent Slovenian state. This was an expression of Slovenia's identity that would be used to set it apart from other Yugoslav Republics.

Slobodan Milošević emerged in the 1980s and by 1987 he had placed himself in a position to lead the Serbian's and declared Serbia to be Communist by name and nationalist by choice. Milošević began exerting his nationalist tendencies across the territory. The 1989 May Declaration of Slovenia demanded independence and the creation of a new Slovenian state. For all of its [Yugoslavia] complexities, and even at the conclusion of Yugoslavia, it is argued that citizenship went part way to uniting the people. However, citizenship could not construct a single identity on its own due to the disunity amongst the Republics and the economic decline of the state.

Towards the end of the 1980s there was fundamental changes occurring across Europe, particularly in socialist states. The rise of nationalism swept across central, south eastern and eastern Europe. The Berlin Wall would fall in 1989, which eventually saw the unification of East and West Germany. Additionally, the Soviet Union began to breakup. At the same time Yugoslavia was beginning to disintegrate. The citizenship laws of East and West Germany were independent of each other between 1967 and 1990.⁴⁸⁵ Following the unification of Germany on

⁴⁸² Ibid.

⁴⁸³ Ibid. 259.

⁴⁸⁴ Marijan Pavčnik and Materija Constitutionis, *Glosses on the Writers' Constitution upon the Occasion of its 20th Anniversary*, Ljubljana, Vol. 63, 125, Nos. 11-12, 2009, 567-580. Peter Jambrek, *Nation's Transitions, Social and Legal Issues od Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 260.

⁴⁸⁵ Kay Hailbronner, *Country Report: Germany*, EUDO Citizenship Observatory, European Union Institute, 2012, 1-4.

3 October 1990, the citizenship laws of East Germany were abolished.⁴⁸⁶ However, as a result of immigration into the territory, those individuals who were long term residents were only afforded limited political rights.⁴⁸⁷ The German Constitutional Court ruled that this was unconstitutional and stated that the basic concept of democracy does not permit disassociation of political rights.⁴⁸⁸ Interestingly, the unification of Germany and the introduction of a single citizenship was to some degree used to exclude individuals from fully participating in the newly formed political community. Today, all Germans enjoy a single citizenship and political rights. The unification of Germany bore some similarity to Yugoslavia, since Germany had single citizenship for the entire state. Citizenship was being used to unify the East and West of former German states into a single unified Germany.

As the former Soviet Union disintegrated between 1989 and 1991, the nationalist movement within Estonia, Lithuania, Latvia and other Republics emerged, seeking independence. The historical event was not only swift but the impact it had on citizens of former Republics⁴⁸⁹ would be enormous. The structure and formation of citizenship within the former Soviet Union and its fifteen Republics resembled the same structure to that of Yugoslavia.⁴⁹⁰ Each of the Republics had their own citizenship laws, however they had very little legal basis. At least on paper Soviet citizenship appeared inclusive and allowed foreigners to apply for citizenship. However, dual citizenship was prohibited.⁴⁹¹ Throughout the life of the Soviet Union citizens were able to move freely across the territory.

The break-up had a profound impact on the people who previously had access to the right of residence, citizenship and property as a result of emigrating within the Soviet territory. Many people found themselves without citizenship or any rights in the new territory, and were effectively stateless.⁴⁹² The resulting impact to citizens across the Soviet Union would be later resemble in the break-up of Yugoslavia, where citizens lost citizenship and many of their rights. Furthermore, the break-up of the Soviet Union clearly demonstrated that socialism had

⁴⁸⁶ Ibid.

⁴⁸⁷ Ibid.

⁴⁸⁸ Federal Constitutional Court, vol. 83, p. 37, 59. in Kay Hailbronner, *Country Report: Germany*, EUDO Citizenship Observatory, European Union Institute, 2012, 1-4.

⁴⁸⁹ The fifteen Republics included Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

⁴⁹⁰ Shushanik Makaryan, *Trends in Citizenship Policies of the 15 Former Soviet Union Republics: Conforming the World Culture or Following National Identity?* Washington State University, 2006, 1-10.

⁴⁹¹ Ibid.

⁴⁹² Valery Tishkov, Zhanna Zayinchkovskaya and Galina Vitkovskaya, *Migration in the countries of the former Soviet Union*, A paper prepared for Policy Analysis and Research Programme of the Global Commission on International Migration, 2005, 5-15.

collapsed across Europe. Some but not all of the Republics that left the Soviet bloc would today be part of the European Union (Estonia, Lithuania, Latvia).⁴⁹³

The history of Slovenians is quite remarkable for such a small population, which had been repeatedly denied their right to form an independent state of their own, following several attempts. Those failed attempts only galvanised the Slovenians and made them more determined to raise and promote themselves and their identity to Europe and the world. Following the WWI Slovenians changed their master from the Habsburg Empire to Yugoslavia, which was ruled by a Serbian King.⁴⁹⁴ According to Peter Jambreč, Slovenes were never asked to become subjects of the Austrian Kaiser, or the Serbian King, or of a Communist Party Boss.⁴⁹⁵ The fate of the entire people was decided by political factions of the nation, foreign occupation, mass violence and institutional decay.⁴⁹⁶ This is an important point made by Jambreč, and the thesis argues that history had not favored the Slovenian people. There was the continued oppression of Slovenians and the Slovene identity by rulers and political allegiances. However, all this did not deter the Slovenians, and they continued to push forward enhancing and strengthening their identity and place in Europe and the former Yugoslavia.

Yugoslavia experimented with nearly all forms of governance and government, and still failed to resolve differences between ethnic groups and nationalist ideology. Yugoslavia had been a monarchy, a republic, a multi-party and one-party state, centralised, regionalised to decentralised, a federal state, ruled by civilian and military elites. Yugoslavia had also experienced dominant private and state-owned companies. Yugoslavia had been made up by eight major ethnic groups that included Slovenes, Croats, Hungarians, Serbs, Montenegrins, Macedonians, Bosnians, Austrians and Albanians. Linguistically and religiously, these were very different. However, the 'elites in former Yugoslavia never opted for the obvious choice to allow the nations driven into uneasy cohabitation to freely express their will in a democratic procedure of self-determination'.⁴⁹⁷ Had this been realised, this research might be discussing a single Yugoslav identity and citizenship, immigration, rights and private international laws, from a very different perspective. Alternatively, had Slovenia gained independence and formed a state of their own before 1990 (their identity today - while based on similar principles of language and culture) the historical narrative would be very different.

⁴⁹³ Michael Bradshaw, *The Russian Far East and Pacific Asia: Unfulfilled Potential*, Routledge, 2001, chapter 14. The collapse of the Soviet Union had no effect on Australia or citizenship. However, with the decline in the standard of living across Russia, Australia had to expand its export trade to other regions.

⁴⁹⁴ Peter Jambreč, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 244-245.

⁴⁹⁵ Ibid.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid.

Minority in Austria

[While at least on paper] the Slovene minority located in other neighboring territories outside of Yugoslavia were afforded legal rights, however this was far from the case in practice. In the 1980's the rights of the Slovene minority were tested in the Austrian Constitutional Court. The court held in Marianne Pasterk-Reisinger that article 7 of the State Treaty of Vienna recognised that the Slovene language would be official in the judicial districts of Carinthia, Styria and Burgenland,⁴⁹⁸ and that the language was protected by extension to members of minority and other social groups. The court went on to rule that it may be justified or even require more favorable treatment of minorities,⁴⁹⁹ so as to protect small minority communities within the Austrian territory. This demonstrated that from region to region the actual implementation of rights on the ground varied greatly; and it wasn't until the courts or government intervened that the Slovene minorities would be afforded the same treatment as local Austrian citizens. Furthermore, this demonstrated that not only was the language an important part of a Slovenes' own identity, it highlighted that Slovenians as a people were being accepted and recognised for their identity.⁵⁰⁰

Towards Independence

In 1990, the Slovenian elites had worked towards full independence during the final years of Yugoslavia. The rise of Serbian nationalism and the centralisation of power in Belgrade had begun to undo the previous forty years of work of continuing to decentralise and provide more autonomy to the Republics. Slovenians made up only eight percent of Yugoslavia's total population but provided one-third of Yugoslavia's exports and funded twenty percent of the overall federal budget.⁵⁰¹

Republics were beginning to lean further towards Europe as the economic gap between the two regions was ever widening. Following the termination of autonomy to Kosovo, Vojvodina and Montenegro by Serbia, other Republics became increasingly concerned with the approach taken

⁴⁹⁸ Article 7 State Treaty of Vienna, for the Re-establishment of an Independent and Democratic Austria, Federal Law Gazette No. 152/1955, in Marianne Pasterk-Reisinger, *Constitutional Developments in Austria*, State Treaty of Vienna, 2008, 131.

⁴⁹⁹ Austrian Constitutional Court, Judgment 28 June 1983, VfSlg. 9744/1983.

⁵⁰⁰ Ronald Beiner, *Citizenship and Nationalism: Is Canada a Real Country?* In K Slawner and M E Denhim, *Citizenship after Liberalism*, Peter Lang Publishing, 1998, 185. Will Kymlicka and Wayne Norman, *Return of the Citizen: A Recent Work on Citizenship Theory*, Survey Article, 1994, 352-381. Jean Bethke Elshtain, *Women and War*, United States of America: Basic Books, 1987, 250-265.

⁵⁰¹ Ben Bagwell, *Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics*, 21, Georgia. J. Int'l & Comp. L., 1991, 489-499.

by Serbian and its nationalist ideals.⁵⁰² Additionally, there was a goal to establish and implement democracy, the rule of law and the respect for human rights.⁵⁰³

That goal was expressed by Peter Jambrek (the United Slovene Opposition) in a letter to the United States Undersecretary and the United States Embassy in Belgrade, stating:

'[t]he objective of the Declaration of Slovene Self-determination is to undertake democratic reforms which began in January 1990 and the need to find a new regulatory formula for coexistence of Yugoslav nations, encouraged by the profound political changes in Eastern Europe, and inspired by the new thinking about a future European Confederation, the Slovene democratic and oppositional parties joined into the Slovene United Opposition to promote by peaceful means the democracy and independence of the Slovene people. The political objective of the Slovene United Opposition is to secure free and honest election resulting in a representative and legitimate parliament, hold a plebiscite to allow Slovenes to freely express their will and decide on the political future and hold a referendum to let the Slovene nation determine the nature of its state in the form of a new constitution. For Slovenes, democracy and national independence are inseparable'.⁵⁰⁴

Importantly, this correspondence clearly demonstrates that Slovenians were looking to self-determine and become independent from Yugoslavia and the other Republics. Furthermore, and while there was an attempt to coexist with other Yugoslav Republics, Slovenians were promulgating their credentials and identity to establish a new democratic state, which other Republics had not yet expressed. The importance of the expression by Slovenian's desire to adopt democracy cannot be underestimated as separating themselves from their socialist past. It is argued that adopting democracy was one of the most important means of finally achieving their independence. Once independence had been achieved, it was the Slovenian language and territory that would be used to define its citizens.

The Constitutional Court did not escape the transition from socialism to democracy. The election cycle for judges coincided with the timing of transition to independence. As it turned out, five of the nine posts of the Constitutional Court became available in 1990. The filling of these positions was delayed due to the transition phase Slovenia was undertaking and the distrust that had formed when transitioning from communist rule to a parliamentary democracy.⁵⁰⁵ Subsequently, the Constitutional Court was not in session from April to October in 1990. In April of the same year, elections were held, which resulted in the defeat of the Communists, Socialists, and Liberal Democrats (the Socialist Youth Organisation).⁵⁰⁶ What followed was the formation of a coalition of parties that were made up of prominent Slovenian

⁵⁰² Mojmir, Matija Rojec and Carlos Silva-Jauregui, *Slovenia: From Yugoslavia to the European Union*, The World Bank, 2004, 5-15.

⁵⁰³ Peter Jambrek, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 19-22.

⁵⁰⁴ Ibid, 248-251.

⁵⁰⁵ Ibid, 328.

⁵⁰⁶ Ibid.

intellectuals, politicians and the Farmers Union, who formed government.⁵⁰⁷ The Catholic Church also played a major role due to its widespread influence across Slovenia. There were contributions to the Slovenian National Program, also known as *Nova revija 57*, or, 57th edition of *Nova revija* which was a special issue of the Slovenian opposition (intellectual) journal.⁵⁰⁸ It contained 16 articles by non-Communist and anti-Communist dissidents in the Slovenian Republic, outlining the possibilities and conditions necessary for Slovenia to achieve independence.

Independence

Slovenia had the opportunity to establish a modern day constitution. In 1990, the Draft Slovenian Constitution⁵⁰⁹ was published and the Declaration of Sovereignty of the Republic of Slovenia was proclaimed.⁵¹⁰ The Slovenian Assembly passed the constitutional amendments XCVI-XCVIII in 1990, which invalidated all constitutional laws of the Socialist Federal Republic of Yugoslavia (that were not in conformity with the Slovenian Constitution).⁵¹¹ On 25 June 1990, the Basic Constitutional Charter was promulgated and Sovereignty of the Republic of Slovenia was established. The people of Slovenia decided that they no longer wanted to be part of Yugoslavia, which was expressed in the Statement of Good Intentions on 6 December 1990⁵¹² [that stated]:

“Through the will expressed in the plebiscite by the Slovene nation, the Italian and Hungarian ethnic communities and all other voters in the Republic of Slovenia, Slovenia may finally and actually become a sovereign, democratic and social state based on the rule of law”.⁵¹³

The next legislative step was the implementation of The Plebiscite on the Sovereignty and Independence of the Republic of Slovenia Act on 6 December 1990.⁵¹⁴ Article 4 determined that '[t]he decision adopted at the plebiscite that the Republic of Slovenia become a sovereign and independent state bound the Assembly of the Republic of Slovenia to adopt within six months

⁵⁰⁷ Ibid.

⁵⁰⁸ Ibid, 5.

⁵⁰⁹ Peter Jambreč, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 5.

⁵¹⁰ Ibid, Official Gazette of the SFRY, 41/1991.

⁵¹¹ Ibid.

⁵¹² Mag. Neza Kogovšek and Roberto Pignoni, *Erased People of Slovenia*, Peace Institute Report on Discriminatory Practices in Slovenia concerning Legal Statuses of Citizens of the Former Republics of Yugoslavia, http://www.europarl.europa.eu/hearings/20070626/libe/pignoni_en.pdf, accessed 10 September 2012.

⁵¹³ Ibid.

⁵¹⁴ The Plebiscite on the Sovereignty and Independence of the Republic of Slovenia Act, Official Gazette of the Republic of Slovenia, No 44, 6 December 1990. in Peter Jambreč, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 257.

from the date of the declaration of the decision the constitutional and other acts and actions necessary for the Republic to take over the exercise of the sovereign rights transferred to the bodies of the Socialist Federal Republic of Yugoslavia regarding the legal succession of the Socialist Federal Republic of Yugoslavia and the future regulation of mutual relations on the basis of principles of international law, which includes the proposal of a treaty on a confederation'.⁵¹⁵ This legislative step towards independence was important to ensure the transition would be as efficient as possible, with the resulting legal acts having the power of law on the constitutional territory of the Republic of Slovenia, binding all state parties. This step was also important in establishing the first phase of authority for the new Slovenia to begin to operate as an independent state. The Slovenian Republic was founded on 23 December 1990.

In 1991, the Slovenian parliament passed the independence amendments, providing the basis for the new sovereign state to conduct internal and international affairs.⁵¹⁶ On 20 November 1991, the Denationalisation Act⁵¹⁷ came into effect to assist the newly independent Slovenia in managing the transition of property owned and occupied under the former Yugoslavia to the new Slovene state. The process for handing back property under the denationalisation law varied from the process and practice of the European Court of Human Rights in Strasbourg.⁵¹⁸ On the one hand, the national law allowed a person to make an application for the return of the property and was subject to administrative decision.⁵¹⁹ On the other hand, the European Court of Human Rights (ECtHR) process enabled an individual to initiate a court proceeding for compensation. However, this can only be achieved when the person has fully exhausted all legal avenues in Slovenia.

On 23 December 1991, the constitution of the Republic of Slovenia was adopted. The Slovenian constitution served to reinforce the state's new-found independence and more importantly establish a Slovenian identity. The constitution states that 'citizenship is regulated by the law'.⁵²⁰ The constitutional amendment⁵²¹ of XCI-XCV was an important step towards the new democratic Slovenia, because it deleted the term "socialist" from the Republic's name. The amendment also established the freedom to found political organisations and provided these

⁵¹⁵ Ibid.

⁵¹⁶ Ibid.

⁵¹⁷ Official Gazette of the Republic of Slovenia 27/1991.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid, 358.

⁵²⁰ Article 12, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

⁵²¹ Arne Mavčič, *Modern Constitutionalism and the Slovenian Constitution of 1991*, The Analysis and International Department, Constitutional Court of the Republic of Slovenia, 2006, 1-21.

organisations with equal rights.⁵²² The constitution justified the independent process by the constitutional doctrine to self-determine.⁵²³

The Slovenian state was in a rapid transition phase to implement new laws, democratic values and principles, along with transitioning the people from socialism to democracy and a market based economy. At the same time, the new state was establishing its own identity and defining its citizens. The Slovenian constitution recognised Slovenia as an independent nation state and provided its citizens with rights, freedoms and protections, with the supreme power vested in the people.⁵²⁴ Citizens exercise this power directly and indirectly through the legislature that adopts and implements national laws. These laws include but are not limited to the public and private side of citizenship. Therefore, the power can be considered as a two-way street, from the top down and bottom up. The same principle apply in Australia where the power is in the people to inform and force government and the legislature to implement national laws. The national laws of Slovenia must conform to international and European law.⁵²⁵ Furthermore, the Slovenian constitution stated that citizenship of Slovenia is to be regulated by law.⁵²⁶ Article 6 describes the Coat-of-Arms that is in the form of a shield, and in the middle of the shield there is the outline of the highest mountain peak in Slovenia, Mount Triglav. The new constitution was a statement to the people, the state, Europe and the world of its new found independence. There was hardly a mention of Slovenia's historical past; rather, the focus was on the future state. The preamble strongly emphasised the importance of fundamental rights and freedoms, and the fundamental and permanent rights of the Slovene nation to self-determine. Thus, the drafters of the constitution were focused on statehood and establishing for the first time an independent identity for the first time.

However, some commentators have suggested the right to self-determine and secede by Slovenia from Yugoslavia was unconstitutional.⁵²⁷ The 1963 and 1974 constitution of Yugoslavia stated that the right to self-determine belonged to Yugoslavia. Richard Igar argues that article 203 precluded the use of constitutionally-granted rights that threatened the existence of the state, and article 244, guaranteed Yugoslavia territorial integrity. Yet, articles 5 and 283 provided the ability for Yugoslavia's borders to be changed. According to Iglar the Presidency contended that Slovenia before seceding was required to explore options to restore relations

⁵²² Ibid.

⁵²³ Peter Jambrek, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 278.

⁵²⁴ Article 3, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

⁵²⁵ Ibid, articles 8 and 153.

⁵²⁶ Article 5, Official Gazette of the Republic of Slovenia 27/1991.

⁵²⁷ Richard Igar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination: Slovenia's and Croatia's Right to Secede*, 15 B.C. Int'l &Comp.L.Rev.213, 1992, 213-418.

with other Republics and that the process of constitutional reform must be implemented in a democratic way. Nevertheless, the federal government did acknowledge that the constitution provided the right to secede, however Slovenia should have convinced and negotiated a pathway to independence with the rest of Yugoslavia.⁵²⁸

Despite the relatively smooth road to independence, Slovenes and the Slovenian territory experienced the beginnings of the wider conflict that engulfed the former Yugoslav Republics from 1991 to 1999. What is often referred to as the ten-day war (Slovene: *desetdnevna vojna*) began on 27 June and concluded on 7 July 1991 in Slovenia.⁵²⁹ Slovenia was the victor in this short conflict and with the signing of the Brioni Accord⁵³⁰ both Slovenia and Croatia agreed to independence. As Slovenia became an independent state, there were many legal and policy issues had to be dealt with concurrently. This was no more evident that Slovenia was grappling with determining who and who was not Slovenian under the new citizenship arrangements, while also providing its new citizens and others with rights and protections.

The transition of Slovenia from a socialist republic to a new independent democratic state was a significant shift for the state and its people and the Slovenian identity. Apart from the potential constitutional issues, Slovenia during the transition phase found itself having to transition its economy from state owned enterprises to a market-based economy. The privatisation of land and other building assets was a gradual process that saw the Catholic Church regaining many of the assets it had lost forty years prior to independence.⁵³¹ Slovenia reinstated the Catholic Church to its former standing in the region.

Symbols of Statehood

The national flag of Slovenia retained the colours of white, blue and red⁵³² similar to the former Yugoslavia. However, the blue is a slightly lighter shade. Most of the former Yugoslav Republics have also adopted similar colours of red, white and blue that represent their national flags, with the exception of Macedonia which has adopted red and yellow. Australia's national flag is also red, white and blue. The national flag of a state represents and is a symbol of a state's identity. According to Dimitrij Rupel⁵³³ the Slovenian nation state was founded on

⁵²⁸ Ibid.

⁵²⁹ Annika Brändström and Marjan Malesic, *Crisis Management in Slovenia: Comparative Perspectives*, Eslanders Gotab, Stockholm 2004, 58-61.

⁵³⁰ Bart Van Vooren, Steven Blockmans and Jan Wouters, *The EU's Role in Global Governance: The Legal Dimension*, Oxford University Press, 2013, 115.

⁵³¹ Sabrina Petra Ramet, *Slovenia's Road to Democracy*, *Europe Asia Studies* 45.5, 1993, 887.

⁵³² Uradni List, Republic of Slovenia, October 1994, <http://www.uradni-list.si/pdf/1994/Ur/u1994067.pdf>, accessed 6 June 2015.

⁵³³ Dimitrij Rupel, *Between National and European Identity: A view from Slovenia*, *Cambridge Review of International Affairs*, Vol 16, No 2, 2003.

linguistic affiliation. That is, this thesis argues that it is the Slovene language that was one of the most important policy principles of continuity when establishing the new state and its people (citizens). Another important component of the new Slovene identity was the introduction of the modern day national anthem. The Slovenian national anthem was created to reflect the historical past and the conflicts the Slovene people and its lands have experienced over the past century. The national anthem of Slovenia also seeks to reinforce the idea that Slovenia wants to be friends with its neighbors and no longer foes:

*'God's blessing on all nations, Who long and work for that bright day, When o'er earth's habitations', No war, no strife shall hold its sway, Who long to see, That all men free, No more foes, but neighbors be.*⁵³⁴

The European Union and Slovenia

On 27 August 1991, the European Community and its member states convened a meeting on the Peace in Yugoslavia. However, initially the European Community appeared to have taken a hands-off approach towards the conflict. Germany had decided to recognise Slovenia and Croatia and supported independence, and thus pressured the European Community to also take an interest. According to Anuradha Chenoy the Germans had urged the European Community (later the European Union) to broker a ceasefire.

The European Commission attempted to keep Yugoslavia together. This resulted in Germany falling in behind the European Commission.⁵³⁵ There were many Croatians who were resident in Germany, and consequently Germany recognised these historical links. With continued pressure from Germany on the European Commission, following the Maastricht negotiations, the European Community eventually supported Slovenia and Croatia, and the protection of the people.⁵³⁶ As the world and Europe had not fully recognised Slovenia as a state upon independence, this placed the people and the territory in a precarious legal position between 1990 and 1991. That is, they had fully separated from Yugoslavia, established a constitution and, were working towards establishing the institutional arrangements required to run a state. However, they had not been recognised legally by any other states. This legal recognition would have wider ramifications as other states and their citizens would have been concerned about the stability within the state and surrounding region to undertake business and other social engagements.

⁵³⁴ Protocol of the Republic of Slovenia, Republic of Slovenia, http://www.protokol.gov.si/en/useful_information/national_insignia/text_of_the_slovenian_national_anthem_in_different_languages/, accessed 19 July 2014.

⁵³⁵ Anuradha Chenoy, *The European Union and the Breakup of Yugoslavia*, International Studies, Sages, 33, 4, 1996, 442-446.

⁵³⁶ Ibid.

The European Commission would conclude a total of thirteen opinions on the separation of Yugoslavia, focusing on the application of international law.⁵³⁷ The Commission noted that there were well-established principles in the Vienna Conventions on the Succession of States 1978 and 1983 that provide guidance for state succession (discussed **chapter three**). The Commission also noted that the succession of states should be based on core principles that include complying with international law and agreements, the protection of fundamental rights of peoples and minorities.⁵³⁸ **Chapter four** discusses the road to membership of the European Union by Slovenia.

The New Slovenian Constitution

The protection of peoples and minorities would be accepted by Slovenia as a core principle of the new state by formal recognition within the Slovenian constitution (discussed **chapter four**). In the same year, the first citizenship laws were introduced (discussed **chapter three**). In the same year, the state was also considering how to ensure that women had a greater role, which saw the implementation of a national gender equality policy.⁵³⁹ This policy would determine the way in which the foundation of how the state would progress women and their role in the new state. Furthermore, the Commission for Women's Politics was established by the National Assembly and the Office of Women's Politics to provide women with greater access to the political process. The constitution would be gender neutral and recognised women as equal citizens in the new Slovenia. However, in practice there was a lot of work ahead to ensure women would for instance be equal in all areas of Slovenian society.

National identity is the collective imagination of the nation. National identity includes historic territory or homeland and common myths and historical memories, a shared culture and language. National identity is multidimensional, contestable and fluid in nature. Nationalism is a theory that every nation must have its own state. The national identity of the Slovenian people from the time of the Holy Roman Empire ruling over the lands to the end of Yugoslavia can be considered a complex road towards independence. The lands of Slovenia had experienced two world wars and internal conflicts and been ruled by empires, monarchs and socialist regimes. Throughout all of that, the Slovenian people managed to strengthen who they were as a people and their identity. Additionally, throughout this period, Slovenes were afforded continuity and a legal status, depending on the region in which they resided (Austrian, Hungarian, Italian, and later Yugoslavian). Citizenship law throughout this period no longer had a single dimension of

⁵³⁷ Matthew Craven, *The European Community Arbitration Commission on Yugoslavia*, University Leicester, 1996, 60-80.

⁵³⁸ Ibid.

⁵³⁹ Živa Humer, Saša Panić, *Citizen's Rights and Constitutional Affairs, The Policy on Gender Equality in Slovenia*, European Parliament, 2015, 5-10.

confirming the legal status of a citizen to a state. Rather, citizenship began taking on a multidimensional role. The multidimensional application of citizenship included continuity for the people (citizen and inhabitants) from one ruler to the next, unification of citizens within a defined territory, and as Bosniak and Rubenstein (discussed **Literature Review**) confirmed the legal status of citizenship. As discussed **chapter three**, Slovenia has continued to use the citizenship laws to enhance and strengthen its identity. The same can be said of Australia, but Australia has taken a very different path in the development of its national identity and citizenship laws. The next section traces the development of Australia and its national identity.

2.2 Australia

Australia is an island continent, unlike Slovenia, which borders Italy, Austria, Hungary and Croatia. Australia has had a very different beginning to Slovenia. It is well recorded that Australia has been occupied for many millennia by the Aboriginal peoples. It was relatively recent in historical terms that Australia was occupied by European settlers and democratically governed. Australia's national identity has been influenced by the indigenous inhabitants and then initially by the first British arrivals in the late 1700s. James Cook mapped the east coast of Australia and landed at Botany Bay in present day Sydney in 1770.⁵⁴⁰ However, the first Europeans (Spanish, Dutch and possibly Portuguese) had visited Australia by the 17th century.⁵⁴¹ The First Fleet arrived in Sydney Cove in 1788⁵⁴² and brought with it British culture, way of life, food, farming techniques, trade, governance and political structure as well as the English language.

In the early period of Australia, the colonies of Australia had responsibility for developing their own legislation. Naturalisation laws began in the 1820s.⁵⁴³ In New South Wales there was law in 1828 that allowed the Governor to grant letters, which was the first act of naturalisation.⁵⁴⁴ An important observation to make in Australia's history and identity was the application of the British legal system and the establishment of the doctrine *terra nullius*. The New South Wales court⁵⁴⁵ stated that the inhabitants of the Australian territory were subject to the laws of England. It was later confirmed by the Australian High Court that upon colonisation Australia was not a sovereign nation and that *terra nullius* did not apply, as the territory was inhabited by

⁵⁴⁰ Department of Environment, Australian Government, http://www.environment.gov.au/cgi-bin/ahdb/search.pl?mode=place_detail;place_id=105812, accessed 8 January 2012.

⁵⁴¹ Ernest Scott, *A Short History of Australia*, The University of Melbourne, 1916, 3-91, www.ebooksoneverything.com, accessed 8 January 2012.

⁵⁴² David Richards, *Transported to New South Wales: medical convicts 1788-1850*, British Medical Journal, Vol 295, 1987, 1609.

⁵⁴³ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 50.

⁵⁴⁴ Ibid.

⁵⁴⁵ *R v Tommy* [1827] NSW SupC70.

indigenous Aboriginal people.⁵⁴⁶ The *Australian Constitutions Act 1842* provided for the New South Wales Colony to be divided into separate colonies. Two years later the *Australian Constitutions Act 1844* would define the colony and provide the Governor and Legislative Council the power to repeal, vary or alter legislation.⁵⁴⁷

Between 1851 and 1890 mining for gold became so popular that it had attracted people from many different countries. The first Slovene was recorded as arriving in Australia in 1855.⁵⁴⁸ This was the beginning of a long-standing relationship between Australia and Slovenes that continues today. During the same period, all colonies agreed to restrict the entrance of Asian, particularly Chinese people into the territory. By 1859 it was estimated there were more than 42,000 Chinese people in Victoria.⁵⁴⁹ The *Chinese Immigrants Statute 1865 (Vic)* and later *The Chinese Act 1881 (Vic)*, imposed a tax on individuals arriving in Australia, and restricted the number of immigrants to one per 100 tonnes of goods on an individual shipping vessel. Even though there was no formal multicultural policy established, many immigrants from around the world had arrived in Australia to be part of the gold rush, coming from the United Kingdom, the Americas, France, Italy, Germany, Poland, Hungary and China.⁵⁵⁰

The colonies were granted the right to self-govern with the implementation of the *Australian Constitutions Act (No.2) 1850*.⁵⁵¹ Section 35 enabled Legislative Councils to be established within the colonies, whereby members could be elected and conduct elections.⁵⁵² Importantly, the Act recognised the institution of parliamentary democracy in Australia, which has been a fundamental and core value of Australia's identity. The Aboriginal people had their own customs, culture, languages and community governance structures. However, they were not adopted by the new arrivals who imposed their own system of governance and law upon the indigenous people.

Discussing the laws of each of the individual colonies is outside the scope of this research due to the breadth and depth of the law. However, the following section briefly discusses the laws in the State of Victoria. The first Victorian Parliament was elected in accordance with the

⁵⁴⁶ *Mabo v Queensland* [2] (1992) 175 CLR 1, *Co v Commonwealth* (1979) HCA 68.

⁵⁴⁷ Australian Heritage, <http://www.heritageaustralia.com.au/articles/features/4576-a-nation-subdivided>, accessed 5 June 2015.

⁵⁴⁸ Immigration from Slovenia, <http://museumvictoria.com.au/origins/history.aspx?pid=54>, accessed 20 June 2015.

⁵⁴⁹ Kim Rubenstein, *Australian Citizenship Law in Context*, 2002, 27.

⁵⁵⁰ Immigration from Slovenia, <http://museumvictoria.com.au/origins/history.aspx?pid=54>, accessed 20 June 2015.

⁵⁵¹ *Australian Constitutions Act (No.2) 1850* (UK), http://ozcase.library.qut.edu.au/qlhc/documents/qc_cons_australian_1850_13-14_Vic_c59.pdf, accessed 1 June 2015.

⁵⁵² *Ibid.*

establishment of the 1855 *Constitutional Act*.⁵⁵³ Sir [Zelman] Cowen highlights that the laws constituted a Legislative Council and created the district of Port Phillip from the Murray River to the Murrumbidgee at its northern boundary. Section 1 of the *Constitutional Act 1855* provided the authority for the Victorian Legislature to make laws, which regulated the behavior of its citizens; however, the citizens remained British subjects under the law of Britain.

In 1865, the *Colonial Laws Validity Act*⁵⁵⁴ was enacted to remove any inconsistency between the colonies and Britain. The British Parliament retained the power to make laws for each of the colonies. The *Colonial Laws Validity Act 1865* provided the Governor with the power to grant a letter of naturalisation of residence and take the oath of allegiance to the British Crown to inhabitants.⁵⁵⁵ To obtain naturalisation the individual was to verify on oath; stating their name, age, birthplace, occupation and length of residence in the colony.⁵⁵⁶ Individuals who were resident in Victoria and had been naturalised in the United Kingdom or another British colony were able to be naturalised by the Governor, provided a certificate was presented confirming their naturalisation in the other colony.⁵⁵⁷ Following the passage of the *Naturalisation Act 1870*, British women who married alien men lost their status as British subject on the legislative assumption that their allegiance to the Crown ceased.⁵⁵⁸ This reinforced the earlier exclusive developments in citizenship where the women would continue to follow the husband.

In 1891, constitutional conventions were held and based on those of the United Kingdom, the United States, Canada and Switzerland.⁵⁵⁹ The delegates discussed the concept of double citizenship, which would be conferred by the constitution on every citizen of these states and the nation. However, this was never realised. The *Constitutional Bill of 1891* brought together the colonies as a federated state. Nonetheless, the first legislation, the *Naturalisation Act 1897* was introduced, which provided for the recognition of naturalisation throughout the Australasian territories. In the same year the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* was introduced in Queensland, and was the first Aboriginal protection legislation in Queensland and Australia. It ushered in the long era of protection and segregation

⁵⁵³ Zelman Cowen, *A Historical Survey of the Victorian Constitution, 1856 to 1956*, Melbourne University Law Review, vol 1, 1957, 1-5.

⁵⁵⁴ *Colonial Laws Validity Act 1865*, <http://caid.ca/CollLawValAct1865.pdf>, accessed 1 June 2015.

⁵⁵⁵ Great Britain, Report of the Royal Commission for Inquiring into the Laws of Naturalisation and Allegiance: An account of British and Foreign Laws, and of the Diplomatic Correspondence, Reports from Foreign States, and other Papers, 1896, 12-15.

⁵⁵⁶ *Ibid.*

⁵⁵⁷ *Ibid.*

⁵⁵⁸ Helen Irving, *Still Call Australia Home: The Constitution and the Citizen's Right of Abode*, Sydney Law Review, Vol 30: 133, 2008 135.

⁵⁵⁹ Barton, 379-381, *Official report of the National Australasian Convention debates, Adelaide, 22nd March to 5 May, 1897, Parliament of Victoria*. Frank McGrath, *The Intentions of the Framers of the Commonwealth of Australia Constitution in the Context of the Debates at the Australasian Federation Conference of 1890*, and the Australasian Federal Conventions of 1891 and 1897-8, Doctor of Philosophy, 2000, 6.

during which the Aborigines and Torres Strait Islanders lost their legal status as British subjects and became wards of the state.⁵⁶⁰ The power provided by the law enabled government authorities to remove Aboriginal people and place them on a reserve.⁵⁶¹ This was a difficult period for the Aboriginal people as they witnessed their own culture and identity being diluted by the new settlers in the latter's efforts to impose assimilation.

During the debates, dual citizenship⁵⁶² was a consideration for Australia. The idea was to have citizenship at both the State and Federal level. However, there was no discussion as to how this would operate.⁵⁶³ Sir Richard Baker stated:

*[T]here must be dual citizenship. In a Federation the people are citizens of two different nationalities, if I may so express myself. They are citizens of the States and also of the Federation. Both the States and Federal Governments act directly on them.*⁵⁶⁴

During the 1898 Melbourne Convention, the treatment of people from one state who were present in another state was discussed to ensure they would be equal. The resulting affect saw the current day sections 51 and 117 form part of Australia's constitution, allowing the commonwealth to legislate in certain areas. Today, the commonwealth has responsibility for citizenship and immigration. The opposition to ensuring equality highlighted the different understandings of the meaning of citizenship.⁵⁶⁵ Richard O'Connor suggested that citizenship was to be defined as a franchise.⁵⁶⁶ Josiah Symon stated that it was not necessary to frame a definition of citizen, but went onto say that the expression of citizen included women. However, he stated that women except in South Australia did not exercise the franchise.⁵⁶⁷ A citizen is one who is entitled to immunities of citizenship.⁵⁶⁸ The notion of excluding other races was also raised during the debates, whereby James Howe argued that the first duty is to ourselves and to make Australia a home for Australians and the British. The reference to the British reinforced the connection and influence the Empire had over the Australian territory. Even though the Empire had exerted a lot of influence throughout the territory, the beginnings of an Australian identity could be seen. At the convention debates the drafters noted that 'A

⁵⁶⁰ Henry Reynolds, *Race relations in northern Queensland*, Townsville, James Cook University, 2003, 20-24. *Aboriginal Protection and Restriction of the Sale of Opium Act 1897*
http://www.foundingdocs.gov.au/resources/transcripts/qld5_doc_1897.pdf, accessed 29 July 2016.

⁵⁶¹ Ibid.

⁵⁶² *Official report of the National Australasian Convention debates, Adelaide, 22nd March to 5 May, 1897*, Parliament of Victoria.

⁵⁶³ *Official Record of the Debates of the Australasian Federal Conventions*, Melbourne 1898, 673-675.
<http://parlinfo.aph.gov.au/parlInfo/search/summary/summary>, accessed 20 October 2014.

⁵⁶⁴ Sir Richard Baker, 99-101, *Official report of the National Australasian Convention debates*, Adelaide, 22nd March to 5 May, 1897, Parliament of Victoria.

⁵⁶⁵ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 24-35.

⁵⁶⁶ Above, n 471.

⁵⁶⁷ Ibid.

⁵⁶⁸ Above, n 476.

state shall not make or enforce any law abridging any privilege or immunity of citizens from other states of the commonwealth'.⁵⁶⁹

In 1900, the inhabitants (British subjects) voted⁵⁷⁰ in favor of a constitution that would see the formation of the Australian federative state. However, while citizenship was not included into the constitution, the topic was raised and considered during the drafting of the constitutional conventions.⁵⁷¹ Further, there was a proposal put forward to define a 'citizen of the Commonwealth' to include: the citizens of each state and all other persons owing allegiance to the Queen, and residing in any territory of the Commonwealth shall, be citizens of the Commonwealth.⁵⁷² However, neither proposal was accepted. The debates considered discrimination between the states, and how to deal with the Chinese and Indian residents. This also failed. Had this been realised, citizenship would have gained formal recognition in the national law of Australia at the time of Federation. Citizenship would have also gained formal constitutional recognition, in the same way as modern day Slovenia.

The *Commonwealth of Australia Act* was passed by the British Parliament in July 1900 and on 9 July was given Royal Assent by Queen Victoria,⁵⁷³ taking effect on 1 January 1901.

Comparatively, Australia and Slovenia had been ruled by an Empire. However, Slovenian citizens had their legal status grounded within the territory they resided. Australian citizens during the same time were considered subjects of Britain and more importantly, their legal status rested in Britain and not the territory in which they resided. Therefore, the identity of historical and modern day Australia has been significantly influenced by the former British Empire, Britain and current day United Kingdom. It also demonstrates that colonisation of a territory, can result in citizenship law being forced upon a territory and its inhabitants.

1900 - 1948

In 1901, Australia was Federated and the first Australia constitution came into effect. Australia at Federation was at a significant advantage to that of Slovenia upon independence. Australia did not have to separate its legal framework and institutions from another state. Australia inherited its legal framework and institutions from Britain. Citizenship was not recognised in the constitution and citizens were defined as British subjects. Mary Crock highlights the lack of

⁵⁶⁹ Ibid.

⁵⁷⁰ Donald Gibb, *National identity and consciousness: commentary and documents*, Melbourne, Victoria, 1982.

⁵⁷¹ John Quick and Robert Garran, *Annotated Constitution of the Australian Commonwealth*, 1901, in Kim Rubenstein, *Citizenship in Australia: Unscrambling its Meaning*, Melbourne University Law Review, 1995, 504-508.

⁵⁷² Ibid.

⁵⁷³ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge University Press, Melbourne, 1997.

recognition of citizenship in the constitution dates back to its development and preparation at Federation.⁵⁷⁴ Crock further argues that the silence in the constitution created ongoing uncertainties about who Australians (the citizens) think they are, and what citizenship should mean.⁵⁷⁵ This along with the other citizenship measures Australia adopted in the early period of Federation was indicative of the racial approach taken by Australia's "White Australian Policy". This exclusionary approach would go on to dominate the citizenship landscape for decades.

The Australian High Court argued that 'citizenship is a concept that is not constitutionally necessary'.⁵⁷⁶ This is an important point because the lack of recognition of citizenship in the constitution allowed the British Empire to strengthen its rule over the territory and exert its identity, rather than, a new identity being forged. Conversely, it could also be said that an Australian identity began to develop despite lacking a distinct citizenship. The resulting effect was a limited national identity. The people of the states of Victoria, New South Wales, South Australia, Queensland, Tasmania and Western Australia agreed to become a united Federal Commonwealth under the Crown of the United Kingdom.⁵⁷⁷ Australia was a collection of six self-governing colonies. However, the constitution does not mention the two Territories, the Australian Capital Territory (where the capital of Australia, Canberra is located) and the Northern Territory because they did not exist at Federation.

The *Immigration Restriction Act 1901* came into effect to regulate immigration into the Australian territory. Immigration is a pathway to citizenship. The early immigration law required a migrant to take a dictation test to assess their command of the English language. Immigrants who failed the test could be deported.⁵⁷⁸ The dictation test was used as an exclusionary tool that reinforced the 'White Australia Policy', where a person was required to write without errors fifty words in a European language.⁵⁷⁹ Not only was it a tool to manage convicts, it was also a tool to reinforce the White Australia Policy and discriminate on racial ground, where a person did not complete the language test. Moreover, if the person failed the test, or was convicted of any crime of violence, they could be deported.⁵⁸⁰ In the early period following Federation, the policy was that convicts were not to be sent back to Britain.⁵⁸¹

⁵⁷⁴ Mary Crock, *Defining Strangers: Human Rights, Immigrants and the Foundations of a Just Society*, Melbourne Law Review 39, 2007, 1-14.

⁵⁷⁵ Ibid.

⁵⁷⁶ *Chu Kheng Lim v MILGEM* (1992) 176 CLR 1, 54.

⁵⁷⁷ Preamble, Australian Constitution, 1900.

⁵⁷⁸ *Immigration Act 1901*, section 5.

⁵⁷⁹ Above, n 482.

⁵⁸⁰ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*, The Federation Press, 2011, 521.

⁵⁸¹ Ibid.

Helen Irving describes the conceptual difference between a British subject and Australian British subject.⁵⁸² The 1901 Act served Australia's 'white' citizenship policy, even though many coloured people were born throughout the British Empire.⁵⁸³ British subjects born India or Hong Kong, for example, would be able to travel freely amongst the colonies. Irving highlights this placed Australia in an uncomfortable position. On the one hand the British government opposed immigration restrictions based on race and colour as they were discriminatory. On the other hand, British subjects were, in principle, able to move quite freely amongst the colonies. Australia established the 1901 Act to restrict the entry of people who were not-white. Australia was in a building phase and ethnicity was the principal policy approach for colonisation and citizenship. Alfred Deakin made the point that the Bill was an expression of the national manhood, the national character, and the national future.⁵⁸⁴ Deakin was expressing the beginnings of the Australian identity making reference to the national character and future, and the importance migration law would have in contributing to the identity.

The constitution was constructed gender neutral and provides the right to vote⁵⁸⁵ amongst others (discussed **chapter four**). It is argued that even though the common law 'doctrine of coverture' was still very relevant as part of society, the constitution would begin to provide the opportunity for greater participation of women. The introduction of the *Commonwealth Franchise Act 1902*, extended the rights of women to vote in Australia, however indigenous people were excluded.⁵⁸⁶ Section 51 (xxvi) provided the Commonwealth with the ability to make laws relating to the people of any race, other than Aborigines in any state. This was yet another exclusionary measure applied to the indigenous community. Furthermore, section 127 of the constitution excluded Aboriginal people from being counted in the census.⁵⁸⁷

Australia introduced the *Naturalisation Act* in 1903 detailing how immigrants could obtain the rights of a British subject.⁵⁸⁸ Importantly, the legislation reinforced the British law that women would assume the rights and privileges of their husband.⁵⁸⁹ The indigenous populations of Asia,

⁵⁸² Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge University Press, Melbourne, 1997, 144.

⁵⁸³ Ibid.

⁵⁸⁴ Australia, House of Representatives, *Parliamentary Debates* (12 September 1901), 4804 (Alfred Deakin, Attorney-General), in Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 52.

⁵⁸⁵ Kim Rubenstein, *Citizenship and the Centenary-Inclusion and Exclusion in 20th Century Australia*, Melbourne Law Review, 2000, 576.

⁵⁸⁶ *Commonwealth Franchise Act 1902*, ss 3 & 41.

⁵⁸⁷ David Mercer, *Citizen Minus?: Indigenous Australian and the Citizenship Question*, Citizenship Studies, Vol. 7, No. 4, 2003, 424 – 430.

⁵⁸⁸ Michael Klapor, Moira Coombs and Catherine Bohm, *Australian citizenship: a chronology of major developments in policy and law*, Parliament of Australia, www.citizenship.gov.au/pdf/cit_chron_policy_law.pdf, accessed 6 April 2012.

⁵⁸⁹ *Naturalisation Act 1903*, s9.

Africa and the Pacific Islands, except New Zealand, were excluded from naturalisation.⁵⁹⁰ At the time Aborigines were considered to be British subjects by birth and therefore, they were not required to be naturalised.⁵⁹¹ However, this did not allow them to fully embrace the Australian way. In fact, their experience of membership of the Australian community did not enhance their standing.⁵⁹² Even though they had formal status, it has been well documented that Aboriginal people were excluded from many areas of daily life.

The *Australian States Constitutions Act 1907* enabled the British Government to disallow legislation passed by colonial parliaments. Britain would still retain a lot of control over the governance of the territory, transferring its identity. In 1908, Issacs J in *Potter* stated the ultimate fact to be reached as a test whether a given person is an immigrant or not, is whether he is or is not at that time a constituent party to the community known as the Australian people.⁵⁹³ Nationality and domicile are not the tests'.⁵⁹⁴ The test was required to better understand the practices and norms of society on a daily basis. The court went onto say that 'A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community and is entitled to the rights and benefits which membership of the community involves'.⁵⁹⁵ However, dissenting Issacs J dissented stating that he did not accept that birth in Australia concluded that someone was a member of the community.⁵⁹⁶ This is an important observation because it could be argued that Issac's position was squarely directed at those Aboriginal people who were born on the territory. This thesis argues that the judiciary did not accept the Aboriginal people as being members of the broader community.

⁵⁹⁰ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 52-53.

⁵⁹¹ Ibid.

⁵⁹² Ibid.

⁵⁹³ *Potter v Minahan* (1908) 7 CLR 277.

⁵⁹⁴ Ibid.

⁵⁹⁵ Ibid, O'Connor J, 305.

⁵⁹⁶ Ibid, 308.

The commencement of World War I saw Australia send troops to the front line in Europe. The Australian and New Zealand Army Corps (ANZACs) was born, along with the notion of mateship that entrenched a spirit of solidarity and heroism.⁵⁹⁷ This was a defining moment in the history and development of national identity, which was summarised as:

'[t]he price of nationhood must be made in blood and tears....Before the Anzacs astonished the watching nations, our sentiment was flabby and sprawling character. We were Australian in name and had a flag but we had been taught by our politicians not to trust ourselves, in tail of the great Empire....Anzac Day has changed that. The Australian flag has been bought from the garret and has been hoisted on a lofty tower in full sight of the people. No matter how the war may end – and it can only end one way – we are at last a nation, with one heart, one soul, and one thrilling aspiration'.⁵⁹⁸

The legacy of the ANZACs continues today to be an important part of the spirit and identity of Australia. Additionally, the landing of Australian troops in Gallipoli and the impact that this event had on the soldiers at the time has been etched in history and is celebrated annually, not only in Australia but also in Turkey.⁵⁹⁹ Women also played a vital role during the war serving as medical nurses. Comparatively, Australia was not invaded during WWI, unlike the current day Slovenian territory. The inhabitants of Australia were not displaced as were many Slovenians. The Australian military who made up of individuals who were British subjects, has and continues to contribute to national identity. The importance of the military to the state is also reflected in a national holiday being declared annually (discussed later in this chapter). Citizens of Australia represent the country in times of war and conflict. The recognition of the contribution these citizens make in protecting the values and the state, go some way to enhancing national identity.

The 1918, Imperial War Conference was held in London and attempted to resolve the functions of governments across the Commonwealth, including Australia. There was a clear recognition from London that it was time for Australia to have complete control over the composition of its population by means of restricting immigration.⁶⁰⁰ The *1920 Nationality Act* (Cth) was based on the *British Nationality and Status of Aliens Act 1914* which recognised the uniform naturalisation certificate within any of the countries of the British Empire.⁶⁰¹ Kim Rubenstein makes the point that in 1914, a British common code was introduced, which was intended to be implemented throughout the dominions and mirror the *British Nationality and Status of Aliens*

⁵⁹⁷ Rick Kuhn, *Class and struggle in Australia seminar series*, Australian National University, October, 2004, 8.

⁵⁹⁸ Frank Crowley, *Modern Australia in Documents: 1901-1939*, Wren Publishing, 1973, Vol 1, 250-255.

⁵⁹⁹ Ibid.

⁶⁰⁰ Arthur Berriedale Keith, *Speeches and Documents on the British Dominions, 1879-1944*.

⁶⁰¹ Rick Kuhn, *Class and struggle in Australia seminar series*, Australian National University, October, 2004, 8.

Act 1914.⁶⁰² Australia was involved in its development, however it was not introduced until 1920 when the *Naturalisation Act 1903* was repealed and the *Nationality Act 1920* was introduced.⁶⁰³ The legislation introduced a definition of a natural born British subject (s) who was a person born within or outside His Majesty's dominions. This included a person who was born on a British ship, residing within His Majesty's dominions for a period of five years; of good character and having the intention to serve the Crown.⁶⁰⁴ Elements of these principles such as residency, being born on a ship and being of good character remain in Australia's current day citizenship laws.⁶⁰⁵ However, the indigenous people suffered greatly from the incursion and colonisation by the British and had an uncertain status. One of the most important changes to the law in relation to the indigenous peoples came with the introduction of the 1920 Nationality Act, which removed the exclusionary provisions related to them.⁶⁰⁶ Even so, exclusionary provisions were retained in section 10 that enabled a person to be categorised as having a disability. A disability at that time included being a married woman, a minor lunatic or idiot. Therefore, while it appeared exclusion of indigenous people had been removed, section 10 could still be used to exclude anyone.

Women

The 1920s were also an important phase of the law and the recognition of women. Women were British subjects, however, this came in three forms 1). foreign-born women, 2). Australian-born women and 3). non-married women.⁶⁰⁷ The situation for foreign-born wives of people naturalised in Australia subsequent to marriage, was that the wife acquired British subject status provided the husband had become naturalised between 1 January 1921 and 31 March 1937. However, the wife did not obtain British subject status if the husband had acquired naturalisation between 1 April 1937 and 25 January 1949. This also applied if the husband had been naturalised before 1 January 1921, and it was questionable as to whether the wife (may or may not) acquired the status of British subject. Women born on the territory of Australia automatically obtained British subject status by birth or naturalisation. However, that status could be lost where the person was naturalised in a foreign state, were declared alienage, or been revoked by the Minister and by marriage to an alien.

⁶⁰² Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 53. The Act was amended with similar titled Acts of 1922 (No 24); 1925 (No 10); 1930 (No 9); 1936 (No 62) and 1946 (No 9 and 28).

⁶⁰³ Ibid.

⁶⁰⁴ Ibid.

⁶⁰⁵ Ibid.

⁶⁰⁶ Ibid, 55.

⁶⁰⁷ Ibid, 55-57.

In 1921, the first woman⁶⁰⁸ was elected to an Australian Parliament, the Western Australian Legislative Assembly in Perth. The broader recognition of women in Australian society had begun, along with their ability to have a greater role in the political process. The 1929 Imperial Conference noted the beginnings of a broader multidimensional approach that nationality provided, stating:

'[that] 'nationality as a term comes with varying connotations. In one sense it is used to indicate a common consciousness based on race, language, traditions, other ties and interests.Nationality has existed in the older communities of the Commonwealth and is a connexion between with a State and Government. With the constitutional developments within the British Commonwealth of nations, the terms 'national, 'nationhood', and nationality', in connexion with each member, have come into common use'.⁶⁰⁹

The reference to common consciousness based on race, language and traditions are principles that connect to nationality, and provide an understanding of the national identity that Australia has been built on. It is argued that the foundations of Australia's modern day identity has been shaped by inheriting the legal system of Imperial Britain.⁶¹⁰ As discussed in **chapter three and four**, language and constitutional law have also assisted in shaping and continued to shape and underpin the national identity of Australia and Slovenia.

Internationally, the Convention on Certain Questions Relating to the Conflict of Nationality Law was established in 1930,⁶¹¹ with Australia ratifying the convention in 1937. Article 1 states that it is for each state to determine under its own law who its nationals are. This principle despite being more than eighty years old remains important to the international community. Today the European Union, Slovenia and other member states have maintained the right to choose their nationals. When Slovenia was part of the former Yugoslavia, the state chose who its citizens would be. The Montevideo Convention on Nationality of Women 1933⁶¹² was established, providing there would be no distinction based on sex in relation to nationality in national law. Even though the convention applied to Inter-American countries in South America, it was a step forward for women's equality in other states such as Australia and Slovenia (Yugoslavia). It provided the basis for the recognition and equality of women even though it preceded the United Nations conventions that would come after 1948.

⁶⁰⁸ Dr Joy McCann and Janet Wilson, *Representation of Women in Australian Parliaments*, Parliament of Australia, Department of Parliamentary Services, 2012, 12.

⁶⁰⁹ Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation 1929, in Arthur Berriedale Keith, *Speeches and Documents on the British Dominions, 1879-1944*.

⁶¹⁰ Leslie Zines, *The Common Law in Australia: Its Nature and Constitutional Significance*, *Federal Law Review*, Vol 32, 2004, 337-338.

⁶¹¹ Convention on Certain Questions Relating to the Conflict of Nationality Law was established in 1930, <http://eudo-citizenship.eu/InternationalDB.pdf>, accessed 5 August 2015.

⁶¹² Convention on the Nationality of Women (Inter-American) 1933, 49 Stat. 2957, Treaty Series 875.

The *Statute of Westminster* 1931, would replace the 1865 *Colonial Laws Validity Act*⁶¹³ but it continued to apply to the States until the *Australia Act of 1986* came into effect. The *Statute of Westminster* enabled the state to develop its own legislation. The importance of relations between Britain and Australia was also reflected in the establishment of a Trade Agreement in 1932 to secure Australian goods.⁶¹⁴ This agreement would be important to Australia's continued connection to Britain, even though it had little relevance to citizenship. In 1936, the *Nationality Act 1920* was amended to provide greater recognition of women. Section 6 allowed women to regain their British subject status, having lost it on their marriage to an alien, if their husband naturalised and the women had the opportunity to make the declarations of naturalisation once the husband had naturalised.⁶¹⁵

The state of Queensland introduced the *Aboriginal Preservation and Protection Act 1939*, but did little to provide equality for indigenous Australians in Queensland. The Act reinforced that Aborigines could be segregated and isolated from mainstream society and be concentrated in reserves and missions. The Act provided extensive powers that enabled children to be relocated without their parents. Even though the legislation was limited to Queensland, it is argued Australia continued to practice discriminatory behavior towards all people that were not white. This identity of 'whiteness' worked in its favor as Australia was continuing to implement British law throughout the territory. Furthermore, it restricted the rights of these people to be full and active citizens. On the one hand, the Australian Constitution had been established, with rights that were afforded to British subjects, including Aboriginal people. However, as this example highlights, states were imposing their own laws to further discriminate against and restrict the rights of Aboriginal people.

As stated earlier, WWII had such an impact on Europe, and the current day Slovenia and Australia would not be spared. The then Prime Minister of Australia, Robert Gordon Menzies announced to the nation that as a consequence of Germany invading Poland, Britain had declared war and as such, Australia was at war.⁶¹⁶ The Prime Minister was linking national identity to the historical connection to Britain. In 1942, as the war spread to South East Asia, British and Australian forces would come together to defend Singapore. WWII saw the development of a new global community where modern nationhood established human rights.⁶¹⁷ Human rights are an important part of modern day citizenship (discussed **chapter four**). The large number of men that left Australia for Europe resulted in women having to take on much of the role of men outside of the home. Women would become part of the

⁶¹³ *Colonial Laws Validity Act* 1865, https://www.legislation.qld.gov.au/ColoniLwsValA1865_01_.pdf, accessed 1 June 2015.

⁶¹⁴ United Kingdom and Australia Trade Agreement Act 1932 (No. 57, 1932).

⁶¹⁵ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 57.

⁶¹⁶ Frank Crowley, *Modern Australia in Documents: 1901-1939*, Wren Publishing, 1973, Vol 1, 1-4.

⁶¹⁷ Lisa Kepple, *Jewish Immigrants in Australia Before, During and After WWII*, The Monitor, 2009.

manufacturing industry while still maintaining a household. They would also serve in the medical core providing medical assistance to the armed forces.⁶¹⁸

In 1944, Western Australia established the *Native (Citizenship Rights) Act*, which provided indigenous people with the right to apply for state citizenship, of that state. However, the individual must have demonstrated that they could speak English and be of good character for a period of two years. The legislation was a step forward for the indigenous community, however, there was no formal citizenship and it was still subject to the powers within the Australian Constitution.⁶¹⁹ According to John Chesterman, successful applicants who obtained the certificate of citizenship were deemed to no longer be a native Aboriginal, and therefore, they were excluded from other racially discriminatory legislation.⁶²⁰ During the time in which the legislation was operational, 1,615 certificates were issued from more than 2,000 applicants.⁶²¹ However, there were more than 1,500 people who were protected from the legislation but had not received their certificate of citizenship. These people were in no man's land, as they were not entitled to any of the benefits that state citizenship had attributed.⁶²² Broadly, this state-based form of citizenship resembled the former Yugoslav citizenship, where each of the Republics had established citizenship, although it was federal citizenship that prevailed legally.

This was the first formal recognition of the indigenous people in Australia; however, the legislation expired in 1971. In 1945, the Department of Immigration was established to assist Australia in managing its postwar reconstruction and large-scale immigration program.⁶²³ Since then the department has had oversight and administrative responsibility on behalf of the government for all immigration and citizenship programs including deportation, detention, passports and naturalisation. As the war ceased, Lisa Keppel argues that as a result of international pressure, Australia adopted a new vision for assimilation, which saw the traditional race-based immigration policies (White Australia) becoming outdated.⁶²⁴ In 1946, the *Nationality Act 1920* was amended. Section 18B reinstated British subject status to women who lost that status due to being married to an alien. No longer were women denied the status of British subject as a result of marrying an alien. It is argued this was an important change, being two years away from Australia having its own citizenship laws, the state had begun to be more inclusive of women.

⁶¹⁸ Ibid.

⁶¹⁹ *Native (Citizenship Rights) Act 1944 (WA)*, section 2.

⁶²⁰ John Chesterman, *Civil Rights: How Indigenous Australians won formal Equality*, University of Queensland Press, 2005, 126.

⁶²¹ Ibid.

⁶²² Ibid.

⁶²³ Laurie Ferguson and Warren Gardner, *Fostering Australian Citizenship in a Changing World*, in Glenn Patmore, Gary Jungwirth, *The Vocal Citizen*, Fitzroy Vic, 2004, 163.

⁶²⁴ Ibid.

Australia began to industrialise and major infrastructure projects were developed, which required migrants from other states to converge on Australia as the local population was not large enough. The policy of the Australian Government was becoming more flexible towards accommodating other nationalities, which saw the beginnings of the transition to multicultural Australia. Following WWII, many displaced people from across Europe including Yugoslavia (Slovenia) found themselves making their way to Australia to take up permanent residence and citizenship.⁶²⁵ Citizenship in the early period of Australia was a term of popular usage by the press and debates about political entitlements.⁶²⁶ Citizenship entailed commitment, belonging and contribution to Australian society.⁶²⁷ However, Kim Rubenstein argues the courts appeared to look at citizenship as an administrative concept. This would be used to develop the policy for establishing Australian citizenship in 1948. Even in this early period citizenship had become more than a legal status. The nation state had begun using citizenship to provide its inhabitants with a sense of who they were – Australians.

From colonisation through to 1948, citizenship across the Australian territory remained under the laws of the British and all inhabitants retained the status of British subjects. Allegiance to the British Crown was central in the first forty-eight years, since Federation. The policies towards aliens during this period was that citizenship status provided an accurate guide to the political allegiance. There was a clear distinction between British subjects and aliens. At common law, an individual's legal status was determined by allegiance to the monarch, either by birth or naturalisation.⁶²⁸ Up until this point citizenship had been considered defacto administrative, which operated during a period of necessity to distinguish between British subjects who were permanent residents and belonged to the Commonwealth, and those British subjects who were visitors and did not reside in Australia long enough to be regarded as belonging.⁶²⁹ Thus, as Rubenstein notes, there were three forms of membership 1) those British subject permanently residing in Australia, 2) those British subject temporarily in Australia, and 3) those people who were not British subjects (aliens).⁶³⁰ The foundations of citizenship in Australia had begun to develop, whereby a person who was born on the territory or was naturalised became a British subject. There was a clear desire to preserve the identity and historical links to the British. However, this changed in 1948. Citizenship and the national

⁶²⁵ Australian Government, Department of Immigration and Border Protection, More than 65 year of postwar Migration, <https://www.immi.gov.au/media/fact-sheets/04fifty.htm>, accessed 20 September 2014.

⁶²⁶ Helen Irving, 'Citizenship before 1949' in Kim Rubenstein (ed), *Individual, Community, Nation: 50 Years of Australian Citizenship*, 2000, 10, in Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 47.

⁶²⁷ Ibid.

⁶²⁸ Michael Pryles, *Australian citizenship law*, Sydney: Law Book Co, 1981.

⁶²⁹ David Dutton, citizenship in Australia: A guide to Commonwealth Government Records, 1999, in Kim Rubenstein, *The vulnerability of dual citizenship: The impact of the recent changes to the Australian Citizenship Act (2007) on the place of citizenship in Australia today*, Australian National University, Law Council of Australia conference, 4 March 2016.

⁶³⁰ Ibid.

identity began to move away from the historical past and become what can be defined as independent. This new beginning for Australia resembled the scholarly work of Bosniak and Rubenstein (discussed **chapter one**), which would come later, but identified that a state provides its citizens with a legal status. Australia was also expressing its desire to clearly separate itself from other British colonies such as Canada, and establish its own identity.

1948 - 1980

The first citizenship laws of Australia in 1948 were an opportunity for the state to develop its own identity.⁶³¹ Additionally, the laws provided the ability for the state to develop their own treaties and define with absolute precision who the individuals that belong to the state will be.⁶³² Not only did these first laws assist in developing the national identity, the citizenship laws also provided continuity to existing British subjects (men and women). Furthermore, the new act enabled women to make their own choice so far as their national status was concerned. Moreover, the new citizenship laws confirmed the legal status of what it meant to be an Australian citizen, including Aboriginal and Torres Strait Islander people, within the Australian territory. This reinforced the early developments of the concept of citizenship by Locke and Rousseau where laws define the legal status of the inhabitants of a territory.

The legislation underpinned Australia's immigration program and strengthened the nation building exercise.⁶³³ In the words of the first Minister of Immigration, Arthur Calwell, Australia was to 'populate or perish'.⁶³⁴ Lord Tweedsmuir stated that the real basis of the legislation was that it would provide recognition to a separate identity. He was referring to a separate identity to that of Britain.⁶³⁵ By fully recognising the individual identity of each community while preserving the common nationality possessed by all, will prove to be a unifying factor between the communities that make up the commonwealth. Importantly, the legislation was an expression of Australia's identity (common bond, rights, unification, sharing democratic beliefs and upholding the rule of law). This also saw the beginnings of a greater acceptance of multiculturalism that began to enrich the national identity with the introduction of many different ethnic and religious groups. The creation of Australian citizenship in no way lessens the advantages and privileges which British subjects who may not be Australian citizens enjoy

⁶³¹ Australia, Nationality and Citizenship Bill 1948, Explanatory Memorandum, Department of Immigration, 2.

⁶³² Ibid.

⁶³³ Arthur Calwell, Parliamentary Debates, House of Representatives, Second Reading Speech of the Nationality and Citizenship Bill, 1948, 1060-1065.

⁶³⁴ Ibid.

⁶³⁵ Nationality and Citizenship Bill, 1948, Second Reading Speech, House of Representatives, 30 September 1948.

in Australia.⁶³⁶ In a similar fashion this bill, by fully and properly recognising the individual identity of each Commonwealth community and at the same time preserving the status of a common nationality possessed by all these people, will prove a binding and unifying factor between the various communities comprising the British Commonwealth.

The Commonwealth chose to exclusively regulate for immigration and citizenship under section 52 of the *1948 Citizenship Act*, whereby the Act shall apply to the exclusion of any provisions, providing for Australian citizenship of any law of a State.⁶³⁷ The new legislation did not regulate the activity of aliens entering the Australian territory. The Act came into effect on 26 January 1949. Up until this point, the status of British subject was shared with various Commonwealth countries. It is asserted that the former status of British subject was a form of supernational citizenship and similar to supernational citizenship afforded by the European Union, today. However, Australians would retain the status of British subject, and it wasn't until 1987 that this status would be replaced fully by Australian citizenship law. The Act enabled a person to obtain citizenship by birth, descent, adoption and resumption. A comprehensive discussion related to each of these principles is outside the scope of this research between 1948 to 1990. Citizenship by registration was also allowed where the Minister could grant a certificate of Australian citizenship to a person, for example, an Irish citizen, or the person resided in Australia or New Guinea for not less than five years. The person was also required to be of good character and have a knowledge of the English language. These criteria still exist today.

Dual citizenship was not accepted and section 17 of the Act specified that any Australian citizen who acquired citizenship of another country would cease being an Australian citizen. As this thesis will demonstrate, the restrictive approach by Australia and Slovenia towards dual citizenship existed until the decade of 2000. Nevertheless, Australia would allow a restricted form of dual citizenship to be held from 1986 to 2002, where it was fully realised. Dual citizenship and the principles for acquiring citizenship exist in Australian law today (discussed **chapter three**).

⁶³⁶ Arthur Calwell, Parliamentary Debates, House of Representatives, Second Reading Speech of the Nationality and Citizenship Bill, 1948, 1060-1065.

⁶³⁷ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 65.

The changing policy of welcoming other ethnic groups was important for the next phase in Australia's growth, while maintaining its historical links to Britain. This was affirmed by the Minister for Immigration Harold Holt in 1950 who stated:

'we attach importance to ensuring British immigration is first and foremost in order to retain as much as reasonably can the present balance of our population. This is a British community, and we want to keep it a British community living under British standards and by the methods and ideals of British parliamentary democracy'.⁶³⁸

This was a clear message to the community that the foundation of the Australian identity has been derived from the British. It is argued that the British standards, ideals and parliamentary democracy have been and continue to be an important part of the current day Australian identity expressed by the constitution, citizenship, immigration and private international laws. Harold Holt reiterated the importance of the historical links to Britain stating that Australia had an opportunity to make a nation with basically British characteristics but with a distinctly Australian tradition.⁶³⁹ What Holt was arguing was that Australia's traditional; 'white' and Christian beliefs had originated in Britain and remained fundamental to Australia's developing identity.

WWII concluded and Australia strengthened its legislation towards deporting non-citizens. The *Alien Deportation Act 1948* provided the government with power to deport a non-citizen on grounds of bad character and conduct. A Commissioner was established to provide advice on deportations. The *Migration Act 1958* would be introduced and effectively adopted the deportation principles of the earlier *Alien Deportation Act 1948*. British subjects were absorbed into the community and immune from deportation. However, this was not the case for other non-citizens (immigrants) that were not British subjects or Irish nationals. At the time 'aliens' could be deported at any time, whereas 'immigrants' could only be deported on the basis of offences or conduct which occurred within the first five years of their entry onto the territory. Thus, immigrants appeared to be immune from deportation following the five-year period elapsing. This was an extension of two years that previously existed under the 1901 immigration laws.⁶⁴⁰

The *Migration Act 1958* removed the dictation test. This is an important observation because Australia was taking a far more liberal approach to migration by removing obstacles for new entrants. However, the visa system was introduced, which has grown into a comprehensive framework today (discussed **chapter five**). Thus, on the one hand Australia was removing

⁶³⁸ NAA: A438/1, 1950/7/217, Address to the Australian Citizenship Convention by the Minister for Immigration the Honourable Harold Holt, 1950.

⁶³⁹ NAA: A445/1, 146/3/3A, Opening Address of Immigration Minister Harold Holt to Citizenship Convention, 1952, 1.

⁶⁴⁰ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*, The Federation Press, 2011, 523.

obstacles for entry and stay, while on the other hand the visa system was introduced to provide greater accountability for the person entering the territory. In modern day Australia and Slovenia, the visas and permits are a common feature of the state's legal framework used to restrict non-citizens entrance and stay. The migration laws of Australia and Slovenia make a significant contribution to national identity by allowing the state to regulate who will enter and stay.

Small steps had been taken by the government to consider the indigenous peoples during the 1960s. The *Commonwealth Electoral Act 1962* was introduced to allow Aboriginal people to enroll and vote as electors of the Commonwealth.⁶⁴¹ In 1967, the laws were amended to allow those individuals who had served in the Australian armed forces to obtain citizenship, provided they had served for a minimum of three months.⁶⁴² The state wanted to recognise those people (non-citizens) who had assisted Australia and its Allies in a number of conflicts around the world. Australia was demonstrating to the world that it was a country that recognised those people who believed in and practiced the values of the state. The Act stated that a person would not be an Australian citizen, at birth, if that person's father at the time of the birth was not an Australian citizen themselves. Additionally, if the father was not ordinarily resident in Australia, or the father was an enemy alien and the birth occurred in a place occupied by an enemy force.⁶⁴³ In the same year, there was a national referendum on whether section 51(xxvi) and 127 should be amended to include Aboriginal people. Consequently, the *Constitution Alterations (Aboriginals) Act 1967* was passed to give effect to the outcome of the referendum. The Australian constitution was amended⁶⁴⁴ and section 51 now ensures that laws can be made for the Australian people. Section 127 ensured that the Aboriginal people are accepted as part of the entire population of Australia. Before this constitutional amendment, the indigenous people had their rights restricted to the extent that this impacted on their community way of life. They were not able to vote, marry whomever they chose, and in some cases their movements were restricted. Additionally, their right to own property was restricted, and in many cases they were paid far less than white people for the same job. Professor Geoffrey Sawer suggested that because the provision had the potential to allow adverse discriminatory treatment, it should be completely repealed.⁶⁴⁵ Australia was yet to realise and establish a common culture or social equality that was inclusive of Aboriginal people, something that Marshall⁶⁴⁶ would have been concerned with. Australia began to include indigenous people in national identity.

⁶⁴¹ *Commonwealth Electoral Act, No. 31, 1962.*

⁶⁴² *Nationality and Citizenship Act 1967.*

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁴ Constitutional Recognition of Indigenous Australians, *Discussion paper*, Law Council of Australia, 2001.

⁶⁴⁵ *Ibid.*, 20.

⁶⁴⁶ Thomas Marshall, *Class, Citizenship and Social Development*, New York, Anchor, 1965, 101-103.

The *Citizenship Act 1969* required a person to be able to read, write, speak and understand English.⁶⁴⁷ Section 5 was amended to define an alien as a person who does not have the status of a British Subject and is not an Irish citizen or a protected person.⁶⁴⁸ The inclusion provided clarity as to who was not an alien. The legislation also clarified that when a person was born outside the Australian territory to an Australian citizen that person could claim citizenship by virtue of descent.⁶⁴⁹ Even though the recognition of women by the law is broader than citizenship law, it did reflect the changing identity of the state. The equality and acceptance of women in the work place was gathering pace and in 1972, the Commonwealth Commission recognised the right for equal pay between men and women. However, the minimum wage was not made equal between women and men, because the male wage took into consideration the family.⁶⁵⁰ Men were still considered the principal household wage earners.

Between 1970 and December 1973, there was an additional form of acquisition of citizenship by notification. This was restricted only to those people who were British subjects in countries such as the United Kingdom and Colonies of Canada, New Zealand, the Union of South Africa, Newfoundland, India, Pakistan, Southern Rhodesia and Ceylon.⁶⁵¹ In 1973, the Australian Government undertook further amendments to the law. The Minister could grant a certificate to a person who qualified as an Australian citizen. However, a certificate was granted only if the person was of full age, capable of understanding the application, resided in Australia or New Guinea for one year, resident no less than two years during eight, of good character and have a knowledge of the English language.⁶⁵² Additionally, the person needed to have a knowledge of the responsibilities and privileges that are afforded by Australian citizenship. An important observation to make in 1973 was the Act no longer gave preferential treatment to British subjects wanting naturalisation in Australia. They were required to meet the same criteria as every other alien. The status of British subject remained. The Australian Government was also promoting multiculturalism, describing Australia as a ‘family of a nations’⁶⁵³ by placing everyone on an equal footing with the changes to the citizenship laws. In 1974, Australia introduced a further category to enable a person to acquire citizenship – by grant.⁶⁵⁴ This new category saw Australia was opening its doors to other ethnic groups and the law reflected the multicultural direction in which the country was heading. Thus, national identity of Australia

⁶⁴⁷ *Citizenship Act 1969*, Section 10.

⁶⁴⁸ *Ibid*, *Citizenship Act 1969*.

⁶⁴⁹ *Ibid*, section 11.

⁶⁵⁰ *National Wage and Equal Pay Case* (1972) 147 CAR 172.

⁶⁵¹ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 102-103.

⁶⁵² *Citizenship Act 1973*, section 14.

⁶⁵³ Al Grassby, *Second Reading Speech: Australian Citizenship Bill 1973*, House of Representatives, Debates, 11 April 1973, 1312.

⁶⁵⁴ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 102-103.

was about to be influenced by other identities from other countries. No longer was national identity exclusively British.

Dual Citizenship

Dual citizenship became part of the wider discussion on citizenship in Australia in the 1970s and 1980s. In 1976, dual citizenship was reviewed by the Joint Committee on Foreign Affairs and Defence.⁶⁵⁵ The committee supported the idea that every person should only have one nationality and not two. However, the committee recognised that holding dual citizenship by some Australians would be inevitable due to the differences in domestic national laws. In 1982, dual citizenship was a topic of interest in relation to the national agenda on multiculturalism.⁶⁵⁶ However, dual citizenship was not accepted by the government, and the citizenship laws retained the status quo. This postnational approach to citizenship gained acceptance by both states between 2000 and 2005 (discussed **chapter three**). This is an important point, as dual citizenship enables a person to potentially carry two identities. The person holding dual citizenship may consider themselves an Australian by citizenship and identity when in Australia, and conversely Slovenian when in Slovenia. Therefore, this may have an impact on national identity because of the individual may never truly identify with a single state.

National Symbol

Australia's national anthem reflects the historical connection to the British Empire and does not form part of the Australian constitution. The national anthem of Australia describes the vast island continent that is surrounded by sea and has vast areas of soil that houses the natural wealth of the state.⁶⁵⁷ The National Anthem, *Advance Australia Fair*, was adopted through a plebiscite in 1977, and includes the lyrics:

'Australian all let us rejoice, for we are young and free, we've golden soil and wealth for toil, our home is girt by sea, our land abounds in nature's gifts, of beauty rich and rare, in history's page, let every stage, advance Australia Fair. In joyful strains then let us sing advance Australia Fair.

*Beneath our radiant Southern Cross, we'll toil with hearts and hands, to make this Commonwealth of ours, renowned of all the lands, for those who've come across the seas, we've boundless plains to share, with courage let us all combine, to advance Australia Fair, in joyful strains then let us sing advance Australia Fair.'*⁶⁵⁸

⁶⁵⁵ Joint Committee on Foreign Affairs and Defence, *Dual Nationality*, Report, 1976, 8.

⁶⁵⁶ Department of Immigration and Ethnic Affairs, *National Consultation on Multiculturalism and Citizenship*, Report, 1982, 28.

⁶⁵⁷ Australian National Anthem, https://www.itsanhonour.gov.au/symbols/docs/anthem_words.pdf, accessed 19 July 2010.

⁶⁵⁸ Ibid.

Unlike Slovenia's national anthem, the Australian national anthem makes no reference to the individual struggle of the people or state as a result of war or conflict with regional neighbours. Legally, a national anthem has no influence on the acquisition or loss of citizenship in Slovenia or Australia. However, the national anthem of a state does contribute to national identity and goes some way to uniting the people (citizens), in the same way that citizenship does. In the same year Sir Garfield Barwick argued that Australia and even the courts in Australia had been inherited from the British Empire. Barwick argued that '[t]here had not been a substantial reason to resort to the Privy Council from the colonists and [b]y the time federation was in discussion amongst the colonists, the Supreme Courts...had attained in general a reputation for sound administration'.⁶⁵⁹ Although there was no requirement for colonialists to refer to the Privy Council located in Britain, the Supreme Court had been established in each of the colonies and were modelled on the British system. This reinforces an earlier point that Australia's national identity has been strongly influenced by the former British Empire.

1980 - 1990

In 1981, the United Kingdom implemented the *British Nationality Act* and it was seen by the Australian High Court of Australia as a critical point in the relationship between Britain and Australia. The High Court of Australia⁶⁶⁰ determined that the allegiance which Australians owed to Her Majesty was owed not as British subject but as subject of the Queen of Australia. In 1984, the Australian legislation was changed again to include a more liberal approach and make it easier to obtain citizenship. The amendments removed discriminatory aspects in relation to sex, marital status and nationality. However, the language requirements were changed from adequate to basic and, applicants over the age of fifty were exempted from the language requirement. The legislative changes reduced the level of burden an individual had to have in order to meet the language requirement. The definition of British subjects was removed from the definitions in the *Australian Citizenship Act 1948*, and, as a result strengthened the new Australian national identity by affirming that citizenship of Australia had finally broken away from its historical roots. Australian citizenship had been based on a social rather than a territorial concept due to the indigenous Australians who were grouped together with migrants and subject to exclusion and deprivation.⁶⁶¹ Mary Crock and Laurie Berg highlight that this was a 'double irony for the first Australian peoples, because Australian citizenship should have been solely based on *jus soli*, as the original and true native Australians who had a connection to the land'.⁶⁶² The Aboriginal people also had their own customs, culture and law. Therefore, it could be argued that they had their own identity, even though any identity may have varied depending

⁶⁵⁹ Sir Garfield Barwick, 'The State of the Australian Judicature', Australian Law Journal, 1977, 481-2.

⁶⁶⁰ *Pochi v MacPhee* (1982) 151 CLR 101, 100-112.

⁶⁶¹ Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration, Law, Policy and Practice in Australia*, The Federation Press, 2011, 19.

⁶⁶² *Ibid.*

on the tribe and its location. The resulting effect over time, has seen, an erosion of their identity, as they have been absorbed into the Australian system, including citizenship.

Throughout the 1980s, the Australian Government changed its course on migration policy and allowed greater diversity of people into the country, particularly from South East Asia. The former [Bob] Hawke government in 1983 described national identity as being multicultural, with the country needing to embrace its cultural diversity.⁶⁶³ Michael Barnes⁶⁶⁴ argues that the global conditions and government policy at the time began to threaten the Anglo-Celtic identity of Australia. This resulted in the state reverting back to its constructed past and links to the British. However, Australia had to balance the retention of its national identity with the nationalist program of building the state. In the same year the *Migration Amendment Act 1983* was introduced and retained the idea that there continued to be a meaningful distinction between a non-citizen and alien. However, deporting permanent residents convicted of offences became an issue and the High Court in *Pochi* highlighted the extraordinary power afforded to the parliament to legislate with respect to aliens under section 51 (19) of the constitution.⁶⁶⁵ The court accepted that immigrants would escape the reach of the legislature by being absorbed into the community, and thus by passing the 'immigration power'.⁶⁶⁶ However, the 'aliens' power was held to apply to all persons who did not have the status of Australian citizen.⁶⁶⁷ Thus, in 1983 the migration laws were amended and concessions that were previously afforded to British subjects and Irish nationals were abolished and deportation was extended to all permanent residents. The new section 12 allowed the Minister to issue a deportation order where a person had been convicted of an offence within a period of less than ten years. The timeframe was extended again, from the previous position in 1948 of five years and 1901 three years. Thus, the possibility for immunity from deportation continued to be extended by the government. Additionally, the ability for a permanent resident to enter and exit the country was relatively free after the first two years of residence, provided the individual did not remain outside of the country for more than five years.⁶⁶⁸ The next change would come in 1992 (discussed **chapter three**).

The amendments to the citizenship laws in 1986 marked a shift in policy approach taken by the government with the acceptance that some people may hold dual citizenship. However, this was very limited and only applied to those individuals that were wanting to renounce their citizenship. Removing the requirement for a person to renounce their citizenship allowed

⁶⁶³ Michael Barnes, *Anglo-Celtic Australians Perspective of Multiculturalism*, Macquarie University, 2004, 1-20.

⁶⁶⁴ Ibid.

⁶⁶⁵ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*, The Federation Press, 2011, 524 - 525. *Pochi v Macphee* (1982) 151 CLR 101.

⁶⁶⁶ Ibid.

⁶⁶⁷ Ibid.

⁶⁶⁸ Ibid.

migrants from countries that allowed for dual citizenship to retain their original citizenship. A year later, on 1 May 1987, marked an important period in Australian citizenship law. The definition of British subject and alien were finally removed by the *Australian Citizenship Amendments Act 1984*. As Rubenstein highlights the change to the definition was particularly important to British subjects who did not become an Australian citizen and were subject to deportation.⁶⁶⁹ Australian citizenship was exclusive for the first time, even though Australia continued to retain close ties with Britain. The removal of the term ‘British subject’ was also viewed as removing discrimination against migrants who were not British. By 1987, Australia’s acceptance of migrants from various other countries was well underway. Migrants began to settle in Australia from Asia, Central and Eastern Europe. The White Australia Policy was no longer formally relevant to Australia. The impact to national identity cannot be underestimated. The shift saw the opening up of Australia, welcoming many different ethnic groups, which brought with them different values and behaviors that would find their way into the Australian culture.

Despite the 1948 citizenship laws being in place for forty years, the 1988 Constitutional Commission⁶⁷⁰ recommended that section 51 of the constitution be amended to provide for citizenship. The proposal would have provided the Australian Parliament with the express power to make laws with respect to nationality and citizenship. Had the proposal been implemented, it would have further reinforced the legal status of citizenship in Australia and contributed to strengthening national identity. However, it was not adopted.

The Year of Citizenship was declared in 1989.⁶⁷¹ A letter was sent to every household in Australia encouraging those eligible to apply for citizenship. This government program resulted in more than 130,000 people taking out citizenship between 1989 and 1990.⁶⁷² This thesis argues that apart from Australia recognising the growth in multiculturalism, the policy of citizenship began to also focus on unification and integration. Slovenians were still part of Yugoslavia and had already experienced a similar policy approach by their leader Josip Broz Tito, with the implementation of citizenship laws to unify and integrate the citizens of the state. However, the cracks in the Yugoslav state had begun to show and by 1989, Slovenians were well down the path of becoming independent for the first time. A similar policy approach of establishing the ‘Year of Citizenship’ could be undertaken by both Slovenia and Australia every decade or every five years to encourage those individuals who are long-term residents (permanent residents) to take out citizenship. Importantly, citizenship will enhance an

⁶⁶⁹ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 81.

⁶⁷⁰ Constitutional Commission, *Final Report of the Constitutional Commission*, 1988, vol 1, 4.176-4.199.

⁶⁷¹ National Archives Australia, <http://www.naa.gov.au/collection/explore/cabinet/by-year/1988-89/background.aspx>, accessed 20 February 2015.

⁶⁷² Ibid.

individual's sense of belonging and the knowledge of what it means to be either Australian or Slovenian. As a program, the Year of Citizenship benefited both the citizen and state by enhancing the sense of belonging of an individual to the state and what it means to be either Slovenian or Australian.

Citizenship encourages inclusion and full participation in public life and the law.⁶⁷³ Citizenship includes the rules and laws that are blind to any one individual or group (community) within a state.⁶⁷⁴ States throughout the nineteenth century largely focused on defining and unifying their citizens. However, citizenship began to be extended by states in attempt to integrate their citizens. A prime example was Yugoslavia having a federal framework for citizenship and constitutional rights. It is argued that the universality of citizenship espoused by Iris Young began to see states using the law to direct their citizens to embrace the states' values and behave accordingly. That is, through the law, states began to consider their citizenry and state identity. By identifying a national identity through the law, a state is directing its citizens to embrace the values, customs and rule of law. The acceptance of, and, increased participation of women in public life has enabled them to defend their interests along with men.⁶⁷⁵ The earlier exclusion of women from citizenship contributed to their lack of participation in shaping the policies and laws of a state. It is argued that since the full inclusion of women in citizenship during the late nineteenth and twentieth centuries, there has been greater involvement of women in political life. That is, as a result of the legal framework for citizenship that has been applied in Australia since 1901, women have slowly been included in citizenship law. Therefore, a part of national identity is the acceptance of women as part of the broader national community.

A study undertaken of the Australian, German and Swedish national identities confirmed what it means to be Australian, and what is important to Australians. It included being born in the territory; having resided (citizens and migrants) for most of the individual's life in the territory; able to speak the English language; having citizenship; respecting and understanding the laws and institutions.⁶⁷⁶ The study reinforced that language and a sense of feeling or belonging to a nation state by a person having citizenship of that state, is part of what it means to be a member of a community. Thus, while Australia's multicultural community consists of many different ethnic groups that speak many different languages, citizenship and the English language are two very important common principles that people identify with as being part of Australia. These same applies in Slovenia. The national identity of Australia while having its historical

⁶⁷³ Iris Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, Ethics, Vol. 99, No 2. 1989, 250-270.

⁶⁷⁴ Ibid.

⁶⁷⁵ John Rawls, *A Theory of Justice*, Harvard University Press, 1971, 220-230.

⁶⁷⁶ Mikael Hjerm, *National identity: a comparison of Sweden, Germany and Australia*, Journal of Ethnic and Migration Studies, Vol 24 No. 3: 1998, 452-462.

connection to Britain has become a blended national identity.⁶⁷⁷ However, that blended identity is made up of different ethnic groups.

From 1970 when the former Prime Minister Gough Whitlam recognised China through to 1990 when consecutive national governments enhanced that engagement with Asian countries,⁶⁷⁸ the establishment of the Asia Pacific Economic Co-operation (APEC) forum and the Association of South East Nations Regional Forum, saw Australia move ever closer to Asia. However, Australia like many other nations including Yugoslavia, was having to juggle different policy issues. On the one hand, Australia was continuing to develop its national identity and maintaining its historical connection to Britain. On the other hand, Australia was opening its doors to migrants and economically establishing closer ties with Asia. Therefore, the complexity and issues a state has to grapple with in developing, establishing, protecting and enhancing a national identity cannot be underestimated. In the context of this research, citizenship, immigration, constitutional rights and private international laws all contribute to national identity. Without these laws a state's identity would be weakened and in some cases it would be difficult for a state to assert and define what and who it represents. Therefore, reaffirming the research questions that these laws make a contribution to national identity.

2.3 Language

As identified above, language is an important part of a nation state and citizen's identity. Languages have been grouped into language trees by Dario Benedetto, Emanuel Caglioti and Vittorio Loreto⁶⁷⁹ who present the phylogenetic-like tree constructed on about fifty different versions of the Universal Declaration of Human Rights, and its interpretation. The authors in outlining the language tree use the Fitch-Margoliash method of realistic entropy between linguistic groups that consists of Romance, Celtic, Germanic, Ugro-Finnic, Slavic and Baltic branches. Slovenian for example falls within the Slavic languages.⁶⁸⁰

Within the Slavic branch, all of the main languages spoken in the former Yugoslav Republics are represented, i.e. Croatian, Serbian, Bosnian, Montenegrin and Macedonian.⁶⁸¹ In a study undertaken by David Bennett in relation to the differences between Slovene and Serbo-Croatian text (up to 14,000 words long), it was concluded that the major difference between the

⁶⁷⁷ Mark Nolan and Kim Rubenstein, *Citizenship and Identity in Diverse Societies*, Humanities Research, Vol XV. No 1. 2009, 29.

⁶⁷⁸ Mark Beeson, *Australia and Asia: The Years of Living Aimlessly*, in Daljit Singh, Anthony Smith Southeast Asian Affairs, Singapore: Institute for Southeast Asian Studies, 2001, 44-55.

⁶⁷⁹ Dario Benedetto, Emanuel Caglioti and Vittorio Loreto, *Language Trees and Zipping*, Physical Review Letters, Vol 88, La Sapienza University, Mathematics Department, Rome Italy, 2002, 1-5.

⁶⁸⁰ Ibid.

⁶⁸¹ Ibid.

languages is the word order.⁶⁸² That is, the order of words differs. A similar study was undertaken by Benjamins who determined that the textual comparison between the two languages is the position of the finite main verb.⁶⁸³ In fifty-two of the fifty-four cases examined, the finite verb in Slovene was in the second position, whereas, in Serbo-Croatian it came later.⁶⁸⁴ However, it must be noted that the Serbo-Croatian language was artificially constructed under the creation of Socialist Yugoslavia after WWII. In fact, Serbian and Croatian are two distinctly separate languages that exist today as separate languages, even though they are similar. English,⁶⁸⁵ which is from the Germanic group, is the official language of Australia and is very different from the Slovenian language. With the arrival of many different ethnic groups in Australia, the English language has taken on some different, but not officially recognised dialects. However, it must be noted that a full examination and comparison of the Slovene and Australian languages is outside the scope of this research. Even so, chapter three highlights how both states citizenship laws have adopted language as a key principle today, in order for a person to obtain citizenship.

2.4 National Days

The national identity is also reinforced by a state regulating its national (official) days, allowing their citizens to recognise and appreciate the importance of the achievements and progress of the state and its citizens. For Slovenes, the Slovenian Statehood Day (Slovene: *Dan državnosti*) is a holiday that occurs annually on 25 June to commemorate the country's formal declaration of independence from Yugoslavia in 1991. Although the formal declaration of independence did not occur until 26 June 1991, Statehood Day is considered to be 25 June, as this was the date on which Slovenia became independent. Slovenia's declaration saw the commencement of the ten-day war with Yugoslavia, which was defeated by the Slovenes. Slovenia's Independence and Unity Day is another important national day, which is celebrated annually on 26 December to mark the official proclamation of the results of the plebiscite in which 88.5% of all Slovenian voters were in favor of Slovenia becoming a sovereign independent state in 1990. Australia's most important days include the 26th of January (Australia Day), 25th of April (Australia and New Zealand Army Corps - ANZAC Day) and Queen's Birthday⁶⁸⁶ celebrating the historical connection to the British Empire. Along with the other national holidays such as Christmas Day,

⁶⁸² David Bennett, *Towards an Explanation of Word-Order Differences between Slovene and Serbo-Croat*, *The Slavonic and East European Review*, Vol. 64. No. 1, 1996, 1-20.

⁶⁸³ John Benjamins, *Functional Approaches to Language, Culture and Cognition*, Library of Congress Cataloging in Publication Data, 2000, 448.

⁶⁸⁴ *Ibid.*

⁶⁸⁵ Daniel Short, *History of the English Language*, 2003-2007, <http://www.danshort.com/ie/timeline.htm>, accessed 11 April 2014.

⁶⁸⁶ Australian Government, special dates and events, <http://www.australia.gov.au/about-australia/special-dates-and-events>, accessed 28 July 2016.

Boxing Day and Easter, all reflect the Judeo-Christian heritage.⁶⁸⁷ Similar religious days are also celebrated in Slovenia. Even though national days have no direct link to citizenship law, each citizen enjoys these days as a day of enjoyment. The national days of both states reflect their historical beginnings and contribute to national identity.

2.5 Religion

Religion, while having no bearing on the acquisition or loss of citizenship has played an important role in the identity of Slovenians, the Slovenian state, and the development of Australia. Slovenes have been influenced by the Roman Catholic Church for centuries, dating back to the Frankish (Carolingian) Empire and Roman Empire⁶⁸⁸ right through to contemporary Slovenia. Slovenians and the current day Slovenian territory were on the front line of the border of Orthodoxy and close to the frontier of the Ottoman Empire, to its south. Slovenia, unlike Serbia, was never ruled by the Ottoman Empire. The Hungarians and Italians while also Catholics, had their own distinct culture. Even so, in modern day Slovenia there are a mix of religions that include Roman Catholicism, Eastern Orthodox and Islam, with Roman Catholicism still being predominant. A recent study confirmed that thirty eight per cent of the people residing in the capital of Slovenia, Ljubljana province, are Roman Catholic, eight per cent follow other Christian denominations.⁶⁸⁹ The Orthodox domination accounted for 7.3 per cent of the eight per cent, with 4.8 per cent of the total population being Muslim.⁶⁹⁰

Australia on the other hand, has its religious roots in its Anglo Saxon heritage and Christianity (Catholicism, and Protestantism). The Indigenous [Aboriginals] had their own religious traditions. However, since Australia opened its doors to immigrants from across the world, Christianity is still the majority amongst many other religions such as Islam and Buddhism, amongst other faiths. Today about sixty per cent of the population in Australia are Christian (Catholic, Anglican, Baptist, Uniting Church, Lutheran, Orthodox).⁶⁹¹ The remaining forty per cent of the population are practitioners of Islamic, Buddhist, Hinduism, Sikhism and Judaism faiths. Religion has helped shaped the values and identity of both states.⁶⁹² Thus, in Australia the religious diversity has prevented a single religion from being dominant and has given effect to secularism. Religion has little to no effect on citizenship and is not present in the citizenship

⁶⁸⁷ Farida Fozdar, *The importance of Christianity in Australian national identity construction*, Institute for Citizenship and Globalisation, Deakin University, 2009, 14-15.

⁶⁸⁸ Aleš Črnič, Mirt Komel, Marjan Smerke, Ksenija Šabec and Tina Vovk, *Religious Pluralisation in Slovenia*, *Teorija in Praksa*, let. 50, 1/2013, 205-229.

⁶⁸⁹ Ibid.

⁶⁹⁰ Ibid.

⁶⁹¹ Australian Bureau of Statistics, 2011 Census, 2012-2013, <http://www.abs.gov.au/ausstats/abs@.nsf/lookup/2071.0main+features902012-2013>, accessed 30 June, 2015.

⁶⁹² Ibid.

laws of either state today. However, religion has had a pivotal role in shaping the identity of both states. This is particularly evident in Slovenia where the state is predominantly catholic, as opposed to the other former Yugoslav Republics.

2.6 Conclusion

The historical paths of Slovenia and Australia have been very different but share some similar features. This chapter identified the measures that were applied by the rulers of the current day Slovenia and Australia. Both territories had inherited laws from their respective rulers. Modern day Slovenia had been under the rule of the Roman Empire, the Habsburg Monarchy, the Austrian Empire, the Austro-Hungarian Empire, the Kingdom of Serbs, Croats and Slovenes (later renamed the Kingdom of Yugoslavia), Democratic Federal Yugoslavia, to the Federal People's Republic of Yugoslavia. The Federal People's Republic of Yugoslavia would later become the Socialist Federal Republic of Yugoslavia and in 1990 the Republic of Slovenia was born. Throughout this long history, citizenship had evolved by adopting exclusionary and inclusionary measures. More importantly, for Slovenes, the various rulers over the territory had brought with it elements of socialism to modern day democracy.

The territory of current Slovenia between 1800 and 1900 had been ruled by the Habsburg's and later came under the Austro-Hungarian Empire. A combination of Austrian and Hungarian law used to regulate citizenship, and afford rights to citizens, depending on where the individual resided (Austrian section or Hungarian section). Slovenian nationalism had gained momentum and the language would be used across the territory. The Slovene language, at least on paper, received formal recognition and could be used in book and lecture. Women would continue to be excluded from the law and dual citizenship was not permitted by anyone. Importantly, the Australian and Hungarian citizenship laws would be used as the basis to provide continuity of the inhabitants, in the respective regions when the Empire collapsed.

Australia's relationship with Slovenia began in 1855, with the first Slovenian arriving on the Australian territory. Australia had been occupied by indigenous aboriginal people, and settled by the British Empire who imposed their governance and legal framework over the people and the territory. Australian citizenship had evolved from the British Empire and allegiance to the King, and later to a single legal status of the country in 1948. The commencement of the 20th century saw the collapse of Austrian-Hungarian Empire and the internal borders of Europe were redrawn, and the Federation of Australia was established. The border regions of current day Slovenia with Austria, Italy and Hungary were being shaped. Individuals could choose whether they wanted to remain a citizen in Austria or take out citizenship of the Kingdom. This choice suited those who wanted to align themselves on linguistics.

Federation of Australia occurred in 1901, and the inhabitants were defined as British subjects. However, Australia had adopted a very restrictive policy that excluded anyone that was not deemed to be white. Not only did the immigration laws require persons to undertake a dictation test, the constitution was silent on citizenship. Australia had excluded the indigenous people from citizenship, the polity and community. Women were also restricted and at the time followed the traditional laws of the British, where they followed the man or husband. The discriminatory approach taken in Australia during the early years, assisted in the British retaining and strengthening their influence across the territory. World War One commenced and a new Kingdom was born. The Kingdom of Serbs Croats and Slovenes would form, and in 1928 the new citizenship laws were introduced to unify the citizens. The early period was good for women being included into the political discourse, however this lasted a decade and they found themselves again excluded from political participation.

World War Two had a profound impact to current Slovenia. They would come under the rule of the Germans and Hungarians. The resulting effect was German and Hungarian citizenship laws were introduced. WWII concluded and stability began to find its way back to Europe. Yugoslavia had begun to reinstate its laws, and in 1945 the new citizenship laws were introduced. Dual citizenship would emerge, but not in the modern day sense. It would be restricted to each of the Republics that made up Yugoslavia, with no legal status. The introduction of the 1946 constitution promoted the idea that rights were important to the state and its citizens. Yugoslavia was on the road to unifying the population. At the same time, the Republics were beginning to seek more autonomy from Yugoslavia. Following WWII there was outward migration from Europe and Slovenia, and Australia would become a destination country.

In 1948, the first citizenship laws of Australia were implemented that assisted the state to establish its own identity but also define who its citizen would be. Since then, consecutive Australian Governments have changed its policy direction from that of White Australia to multiculturalism. The influx of many different ethnic groups has contributed to shaping national identity. That identity, while retaining its historical roots from Britain has what could be argued as transitioning to an amalgam of cultural mixes that define Australia. The *Migration Act 1958* was introduced that began to change how migration was managed. A visa system was established, and non-citizens would have to have a visa to enter the country. British subjects and Irish nationals would be absorbed into the migration laws, ensuring all non-citizens were equal according to the law. They along with other non-citizens' resident in the state could be deported upon conviction of a criminal activity. The most notable change was the increased timeframe imposed by the government since 1901, which applied three years residence, and in 1948 this

was increased to five years. By 1983, a ten-year timeframe was imposed on residency before immunity from deportation could be applied. The resulting effect to national identity was that the state was asserting its values, by demonstrating to the country, its citizens and citizens from other states that it was less tolerant towards individuals that have been convicted of a criminal activity.

In 1950, the Slovenian Republic had adopted its own citizenship laws; however, they had no legal standing. During the same period, Australia began implementing a mass migration program that saw many people arrive from Europe. The citizenship law, apart from providing a legal status was welcoming of people wanting to take out citizenship. The previous policy of White Australia had all but gone, and different ethnic groups began to arrive from Asia. However, the indigenous Aboriginal peoples remained excluded. In 1967, the Australian constitution was amended to recognise these people. Upon the death of Josip Broz Tito the longtime leader of Yugoslavia, the state went into economic, social and political decline. Towards the end of the 1980s, Slovenia and Croatia began the process of separating from Yugoslavia. By 1986, Australia was embracing migrants from across the world to participate in building the nation, and accepted the fact that some citizens would hold dual citizenship. A defining moment for Australia was in 1987 when finally the term British subject was removed from the legislation.

The collapse of socialism across Europe would see the collapse of Yugoslavia in the late 1980s. In 1989, the Year of Citizenship was declared in Australia, which went some way to promoting citizenship to residents who did not have citizenship.⁶⁹³ A similar policy approach of implementing the 'Year of Citizenship' could be undertaken by both Slovenia and Australia every decade or every five years to encourage individuals that are long-term residents (permanent residents) to take out citizenship.

In 1990 and 1991 a new legal framework would be established across Slovenia, which assisted in establishing a new identity that today is known as Slovenian. During these two years Slovenia was establishing a new state, citizenry and beginning to align themselves to the European Union. Most notably Slovenia was transitioning from socialism to democracy. Australia had inherited democracy. Even though both states have used similar principles and concepts to develop their respective national identities (including heritage, location, geography, political institutions, language and the rule of law-citizenship), citizenship has evolved very differently.

⁶⁹³ National Archives Australia, <http://www.naa.gov.au/collection/explore/cabinet/by-year/1988-89/background.aspx>, accessed 20 February 2015.

Up until 1990, citizenship in both jurisdictions has been used to define the legal status of a citizen and unify citizens within a state. The citizenship laws had been used to ensure continuity of inhabitants within a state or territory, and contributed to developing national identity. Citizenship had transformed from allegiance to a master, to a legal status. However, a notable difference between the two states was that Australia had gone from being very restrictive at federation, to opening its doors and embracing multiculturalism. Slovenia upon independence had followed a similar path to Australia's early period of being very restrictive (discussed further **chapter three**). The restrictive approach adopted by both states was important in the early period for establishing a national identity because, it allowed the state to clearly define and determine who and who was not going to be part of the state. Being part of the state would allow those individuals to participate in, and contribute to national identity, by implementing the values and laws of the state. This chapter has confirmed citizenship assisted the state in forming a collective identity that has contributed to developing Australia and Slovenia's current day national identity.

The next chapter explores the legislative reform both states undertook from 1990 to June 2015 and how they have contributed to the national identity. The next chapter is important part of this research. During 1990 and 1991 Slovenia was undertaking extensive legal changes and had established a new constitution and citizenship laws. Both states, were being impacted by regionalisation and globalisation, which resulted in the respective citizenship laws being changed to accommodate their citizens operating across national borders. The world would see the rise of terrorism and states would react by adopting restrictive measures into their citizenship laws. States would have to balance their economic needs with national security and protecting the state and its citizens. The next chapter will demonstrate how the citizenship laws of both states would have a significant role in reaffirming, enhancing and strengthening national identity.

Chapter 3 – Slovenia, Australia Citizenship Law and Links to National Identity

3. Overview

Citizenship can be obtained by birth, descent or naturalisation and in this chapter the variables between both states for the acquisition and loss of citizenship according to the law are explored. The central purpose and question of this thesis is to assess how citizenship law contributes to the development, retention and enrichment of a state's national identity. Therefore, this chapter will assess the developments in citizenship law from 1990 through to June 2015, and how they have contributed to national identity. Slovenia became an independent state in 1990, which resulted in the development of new citizenship laws for the first time. This chapter will identify themes where both states amended their respective citizenship laws as a result of world, regional or national events. This chapter will also highlight patterns that have been adopted by both states and used to make changes in the laws. These patterns constitute how both states have developed citizenship law to exclude and include individuals. Both states have also used citizenship law to enhance their respective economies and provide for multiculturalism. Citizenship law was also changed during this period by Australia and Slovenia to ensure administration of the laws by the state was efficient and effective.

The comparative discussion will be undertaken in four parts. The first will commence in 1990 and conclude in 2000. The second will be between 2000 and 2005 when Slovenia moved closer to membership of the European Union. Thirdly, there were considerable developments in citizenship law that will be discussed from 2005 to 2008. Fourthly, the citizenship laws and expression of the national identity continued to be strengthened between 2008 and 2013, although differently. The chapter also discusses the amendments to citizenship laws by both Slovenia and Australian from 2013 and concludes in 2015. Chapter three will identify possible areas where both Slovenia and Australia could improve their respective citizenship laws. There will also be improvements identified for the European Union to consider. These improvements will form part of the overall recommendations presented in **Appendix One**.

It must be noted that due to the extent of law reform undertaken by both states, the discussion will describe the changes. Some of the changes are minor in nature and do not directly relate to national identity, but rather, highlights the full extent of legislative change that took place. These minor changes will be highlighted in footnotes.

3.1 Citizenship and Exclusion

The discussion in this section commences with Slovenia being an independent state for the first time. This early period in Slovenia's history and the implementation of its new citizenship laws would attract considerable attention from scholars, legal community and the European Union because of the way that Slovenia excluded many former Yugoslav citizens that had migrated to Slovenia from other Republics.

Slovenia

During the early period of independence Slovenia was establishing a new democratic state, legal framework and ensuring continuity of its people and economy. Furthermore, it was also fending off criticism and conflict from former Yugoslavian Republics. Citizenship at the time was socially complex for former Yugoslav citizens. Citizens from the former Yugoslavia who had not registered as permanent residents of the new Slovene Republic were required to apply for Slovenian citizenship. Subsequently, many people did not register and found themselves without citizenship of any state (stateless). This is what Carol Batchelor would define as *de jure* statelessness.⁶⁹⁴

At the time of the Yugoslavian break up, it was thought that the Slovenian territory was populated with about 90% Slovenes and the remaining 10% of the population was made up of Croats, Serbians, Bosnians and others.⁶⁹⁵ Many of the 10% of people who were not Slovene, had only found themselves resident in Slovenia, because under the former Yugoslav state, citizens were able to freely move and reside anywhere. According to Neza Salamon at the time of Yugoslavia's break up there were approximately 200, 000 people residing in the Slovenian territory that were from other Yugoslav Republics, and it was confirmed that 170,000 people did obtain Slovene citizenship upon application.⁶⁹⁶ Yelka Zorn estimates that there were 18,305 people that were erased from the residency register. The ratio of men to women being excluded was estimated at 58% and 42% respectively.⁶⁹⁷ Even though there was a choice and the ability for people to apply for citizenship, Janja Žitnik argues many people did not know or in some cases chose not to apply.⁶⁹⁸ This lack of knowledge and failure of the then government to adequately inform people of the new citizenship laws was problematic. Had the government

⁶⁹⁴ Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, International Journal of Refugee Law, 1998.

⁶⁹⁵ Maarten Lak, *The Involvement of the European Community in the Yugoslav Crisis during 1991*, Yearbook of European Studies 5, 1992, 175-185.

⁶⁹⁶ Neža Kogovšek Salamon, *Still Waiting: The Erased People of Slovenia*, in Building and Open Society in Western Balkans, Open Society Foundations, 2001, 27 – 29.

⁶⁹⁷ Impact to Women from being Erased, statistics www.mirvni-institut.si8/izbrisani/en/statistics, accessed 20 August 2015.

⁶⁹⁸ Janja Žitnik, *Immigrants in Slovenia: Integration Aspects*, Scientific Research Centre of the Slovenian Academy of Sciences and Arts, Institute of Emigration Studies, Ljubljana, 2004.

implemented a comprehensive program to ensure everyone had knowledge of and understood the new citizenship laws, the result may have been very different.

The new citizenship laws came under increasing scrutiny by lawyers, government and legal scholars. Throughout the 1990s the case of the erased would be in and out of the Slovenian Constitutional Court on a number of occasions. The first case was heard in 1992. The Slovenian Constitutional Court held that article 28 should be repealed in accordance with article 25 of the constitution to ensure everyone has the right of appeal against decisions of the state including local authorities.⁶⁹⁹ The court focused on the discretionary nature the authorities had in determining who would and who would not obtain citizenship in the new independent Slovenia. The discretionary power under article 41, afforded to the Ministry of Internal Affairs was considered a problem enabling officers to make decisions at their own discretion.⁷⁰⁰

Article 41 of the Nationality Law required that persons deprived of nationality of Slovenia and of the Federative People's Republic of Yugoslavia in accordance with the Act on Depriving Un-commissioned Officers and Officers of Former Yugoslav Army who are not Willing to Return to their Fatherland, Members of Military Formations Having Collaborated with Occupational Forces and Having Fled Abroad, and the Persons Fleeing Abroad after the Liberation, of Nationality⁷⁰¹ and their children may acquire the nationality of the Republic of Slovenia if applied for within two years from the passing of this Law. The second section of the said article specified that the nationality of the Republic of Slovenia may be acquired by Slovenian emigrants who have ceased to be citizens of the former Republic of Slovenia and the Federative People's Republic of Yugoslavia due to their absence. Decisions concerning the acquisition of nationality according to the first and second sections of Article 41 of this Law shall be made by competent administrative authorities of internal affairs of the Republic of Slovenia (Article 42 of the Law) on the basis of their 'discretion'. It was this free discretion that posed the greatest problem. There was no oversight of individual decisions at the local level. The Slovenian Constitutional Court ruled⁷⁰² that articles 41 should be repealed. The Court considered that this did not conform with article 120 of the Constitution.⁷⁰³

Article 120 of the Slovenian constitution ensures the protection of rights of citizens is guaranteed against the actions and decisions of administrative bodies and their representatives. Thus, citizens are protected by the constitution from individual decision making within

⁶⁹⁹ U-I-98/91, Constitutional Court, Official Gazette of the Republic of Slovenia, No, 1/91-I, 30/90-I and 38/92.

⁷⁰⁰ U-I-69/92 Nationality Law, Slovenian Constitutional, Official Gazette of the Republic of Slovenia, no. 61/92.

⁷⁰¹ Official Gazette of the Republic of Slovenia 86/46.

⁷⁰² U-I-69//92-03, Official Gazette of the Republic of Slovenia, 61/1992.

⁷⁰³ Ibid.

government institutions. Such was the importance of the infringement of individuals rights that the Slovenian Constitutional Court in the same case, also referred to article 8 of the 1948 Declaration of Human Rights and article 13 of the European Convention on Human Rights (even though at the time Slovenia was not a signatory to the European Convention) that there is a right of remedy where it is found that a person has had their rights violated. With Slovenia moving closer to the European Union, the Slovenian Constitutional Court also noted that providing 'the necessary law was important to ensure the provisions of the Nationality Law be amended to meet international and European Union standards.'⁷⁰⁴ However, the discretionary power remained.

As discussed in **chapter two**, when Slovenia was part of Yugoslavia, effectively people had two levels of citizenship, one by the individual Republic such as Slovenia, Serbia or Croatia, as well as having Federal citizenship of Yugoslavia. Republic citizenship did not come with any legal status. Yugoslav citizenship was considered the legal citizenship and was internationally recognised by other states. The newly formed Slovene government used the earlier Republican legal framework to its advantage in creating the new Slovenian state. They allowed those who had citizenship of the former Republican level to obtain citizenship in Slovenia. In 1994, the Slovenian National Assembly established the Act on the Regulation of the Status of Citizens of Other Successor States to the Former Social Federal Republic of Yugoslavia that would allow those former citizens of Yugoslavia who had been removed by the register of permanent residence, to obtain a valid residence permit.⁷⁰⁵ More importantly, the Court noted that by adopting the Act they had in fact established the unconstitutionality of the statutory regulation as it did not recognise 'permanent residence' retroactively to those citizens of the former Yugoslavia.

The National Assembly was given a six-month time-limit to remedy the anomaly, however this was not achieved. During 1994, the Slovenian Constitutional Court established the unconstitutionality of the statutory regulation in relation to the legal status of citizens of other Republics from the former Yugoslavia, who were removed from the register of permanent residence, and annulled the three month waiting period.⁷⁰⁶ The Court asserted that by treating former Yugoslav citizens within Slovenia un-equal in comparison to other aliens who were considered citizens of other states, caused those individuals to find themselves in a situation of legal uncertainty, which was inconsistent with article 2 of the Slovenian constitution (the state is governed by the rule of law).⁷⁰⁷ The other issue discussed by the court was the Act and the legal certainty in relation to the words 'actual presence' in the Republic of Slovenia". It was

⁷⁰⁴ Ibid.

⁷⁰⁵ U-I-246/02, Official Gazette of the Republic of Slovenia 36/2003.

⁷⁰⁶ U-I-248/94, Official Gazette of the Republic of Slovenia 14/99.

⁷⁰⁷ Ibid.

established that the Act was not clear enough, and was considered to be an undefined legal notion. Therefore, even with the implementation of the new legislation in 2002, the erased issue had not been dealt with in the eyes of some, who continued challenging the state.

In 1999, the Slovenian Constitutional Court would again revisit the erased issue and considered the acquisition of citizenship in accordance article 40.⁷⁰⁸ The court ruled there was a statutory problem that required the third paragraph of article 40 to be repealed.⁷⁰⁹ That is, applicants for citizenship would need to meet the public order test. The court ruled that the legislature did not have any basis for imposing the public interest test because it would outweigh the protected trust in law. When the new citizenship laws of Slovenia came into force on 25 June 1991, the contentious article 40.3 allowed an application to be rejected if the individual was deemed to be a threat to the public order, security or defence of the State. It appears that Slovenia could have used the public order test broadly and rejected citizenship applications by people who may not have necessarily been a threat to the state, but may have been involved in the earlier and wider Yugoslav conflict. However, the issue of the erased would remain unresolved. In U-II-1/10, the Slovenian Constitutional Court decided that unconstitutional consequences would occur due to the rejection of the Act on the amendments and modifications of the Act on the Regulation of the Status of Citizens Other Successor States to the Former Social Federal Republic of Yugoslavia at a referendum.⁷¹⁰ There was a push by government to take the laws to a referendum. The Act on the Regulation of the Status of Citizens Other Successor States to the Former Social Federal Republic of Yugoslavia, established a remedy for the violations of human rights towards the erased people. Human rights violations had become the principal argument for the protection of the erased people against the state.

The constitutional rights of the erased people (former Yugoslav citizens who were excluded by the new citizenship laws) had been violated. They included the protection of human personality and dignity; the right to equal protection of rights; the prohibition of torture; the protection of personal liberty; freedom of movement; the right to personal dignity and safety and protection of family integrity”, as a result of the individuals becoming stateless.⁷¹¹ These rights can be found in the Slovenian Constitution (discussed **chapter four**) and form an important part of Slovenia's modern day transition from a socialist Republic to a democratic state. Furthermore, these rights noted by Jelka Zorn are a fundamental part of the long-standing European Rights framework that began in 1950 with the introduction of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁷⁰⁸ U-I-89/99, Official Gazette of the Republic of Slovenia 59/99.

⁷⁰⁹ Ibid.

⁷¹⁰ U-II-1/10-26, Official Gazette of the Republic of Slovenia. No. 50/2010.

⁷¹¹ Jelka Zorn, *The Politics of Exclusion Citizenship, Human Rights and the Erased in Slovenia*, UDK , 2004, 1-7.

In 2010, the European Court of Human Rights (ECoHR) got involved as a result of individuals making an application to the court under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950. The ECoHR found in favour of *Kuric*⁷¹² ruling that the Slovenian government had failed to issue residency permits and amend the legislation. In 2012, the ECoHR would further consider the case of *Kuric*,⁷¹³ and ruled Slovenia had violated articles 8, 13 and 14 of the 1950 ECoHR. It wasn't until 2014 that the Grand Chamber of the ECoHR made the final judgment in relation to the 'Erased' by awarding €250,000 to human rights protestors (the group who applied to the court) who lost their permanent residence upon Slovenia becoming independent.⁷¹⁴ It is worth noting that the decision of the ECoHR is final and there is no appeals process for either party. Finally, it took nearly fifteen years for the 'Erased' issue to conclude, and it wasn't until the European Court of Human Rights stepped in that the matter was finalised.

Australia

During 1990, the citizenship laws of Australia were forty years old. Australia had not experienced the same conflict and separation from a state, as Slovenia had. Statelessness in the Australian context has not been evident in the same way as in Slovenia. The indigenous people had occupied the Australian territory long before colonisation. However, the indigenous people were not considered to be stateless even prior to being recognised as citizens (British subjects) in 1949. During this transition from a British subject to an Australian citizen, there were no records of people becoming stateless, because people did not have to apply for citizenship upon the 1948 Act being implemented. It is worth noting that during this period neither the United Nations Convention Relating to the Status of Refugees 1951 and the 1954 Convention Relating the Status of Statelessness had been implemented. However, these legal instruments had been in place for more than forty years when the former Yugoslavia broke up.

The potential for statelessness to have occurred in the Australian was when Papua New Guinea became independent, and Australia relinquished sovereign rights over the territory. In 1975, the Papua New Guinea Independence Act and the Papua New Guinea Independence (Australian Citizenship) Regulations were introduced. On 16 September of the same year, a person who was an Australian citizen that was born in and resident of Papua and New Guinea, ceased to be an Australian citizen and automatically took up citizenship of Papua New Guinea.⁷¹⁵ There are

⁷¹² *Kurić and Others v. Slovenia*, European Court of Human Rights, 26828/06.

⁷¹³ *Ibid.*

⁷¹⁴ Council of Europe, Human Rights Europe, <http://www.humanrightseurope.org/2014/03/slovenia-erased-people-human-rights-protest-leads-to-e250000-award>, accessed 6 December 2014.

⁷¹⁵ Regulation 4, Papua New Guinea Independence (Australian Citizenship) Regulation 1975, A person who immediately before independence day, was an Australian citizen within the meaning of the Act and

no records that indicate any person became stateless through this transitional process. Today section 16, 19G and 21 of the Australian Citizenship Act 2007, provides that any person is eligible to apply for citizenship where they have been declared stateless.

In August 2005, the High Court⁷¹⁶ of Australia decided Ame who was born in the former Australian territory of Papua was facing deportation from Australia due to overstaying his visa. It was argued that Ame was born an Australian citizen and continued to retain that status, allowing him to reside in the current day territory of Australia. However, the High Court determined that people born in Papua were never full Australian citizens, and that nationality ceased to exist when Papua and New Guinea became independent in 1975. The High Court ruled that people such as Ame had no right of entry to Australia without a current visa and were not deemed to be Australian citizens. Therefore, these people could be removed from the territory. In an earlier case the Australian court⁷¹⁷ held that a person born as an Australian citizen in Papua in 1970 had not been absorbed into the Australian community, never having ever resided in the territory, and remained an immigrant under Australian law with no automatic right of entry onto mainland Australia. Even though these cases did not determine these people as stateless, it did show how people from Papua were viewed by the courts in Australia.

Today, Slovenia is a partner to the United Nations Convention relating to the Status of Stateless Persons of 1954.⁷¹⁸ Australia is also a signatory and has ratified both international conventions in relation to stateless persons. The United Nations Convention Relating to the Status of Refugees 1951 and the 1954 Convention Relating the Status of Statelessness⁷¹⁹ are fundamental to ensuring every person has citizenship of at least one nation. From the early beginnings of citizenship many centuries ago, statelessness was not even a consideration. People were either citizens or subjects of an empire or kingdom. It wasn't until the conclusion of WWII that citizenship became important internationally and laws were developed to minimise the occurrence of when a person would find themselves without citizenship of any state. However, even with strong national laws in place, should there be a change in rulers within both Slovenia

on independence day becomes a citizen of the independent state of Papua and New Guinea ceases on that day to be an Australian citizen.

⁷¹⁶ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 36.

⁷¹⁷ *Minister for Immigration and Multicultural Affairs v Walsh* [2002] FCAFC 205 AS [16]-[17].

⁷¹⁸ Akt o notifikaciji nasledstva glede konvencij organizacije združenih narodov in konvencij, sprejetih v mednarodni agenciji za atomsko energijo, Official Gazette of the Republic of Slovenia, No. 35/92.

Official Gazette FLRY, MP, No. 17/67. Article 4, Constitutional Law Implementing the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, Official Gazette of the Republic of Slovenia, No. 1/91-I. The Conventions are also included into the Act notifying succession to conventions of the United Nations and conventions adopted by the International Atomic Energy Agency, Official Gazette of the Republic of Slovenia, No. 9/92.

⁷¹⁹ Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, International Journal of Refugee Law, 1998, 238 – 249.

and Australia in the future, there is no guarantee that statelessness would not occur.⁷²⁰ Today the evolution of citizenship law at a national level has incorporated aspects of the international law and ensures where possible that no person is made stateless.

State Succession

State succession is when a state no longer exists, the laws and policy of that state are no longer applicable. Paul Weis like many other scholars is of the opinion that when a state ceases to exist, so do the nationals of that state.⁷²¹ However, Weis goes on to say that in many circumstances it is difficult to determine when exactly a state ceases to exist. The international legal principles for state succession can be found in the 1978 Vienna Convention on Succession states in relation to treaties, and the 1983 Vienna Convention on Succession of States in respect of State property, archives and debt.⁷²²

The provisions of international treaties that dealt with nationality can be found in the peace treaties following the First World War.⁷²³ Following WW I, the territorial boundaries of a number of states changed and as a consequence the issue of nationality had to be resolved in the succession states. Kay Hailbronner notes that the rules surrounding the acquisition and loss of nationality upon territorial changes are some of the most complex at international public law.⁷²⁴ Chapter VI, article 18 of the European Convention on Nationality refers to ‘State Succession and Nationality’, outlining the principles that states should consider when forming a new state. Article 18 states that in matter of nationality in cases of State succession, each State Party concerned shall respect the principles of the rule of law, the rules concerning human rights and the principles contained in articles 4 and 5 of the Convention. Furthermore, article 18 states that in deciding to grant or allow retention of nationality in cases of State Succession, each State Party concerned shall take account of the genuine and effective link of the person concerned with the state and the habitual residence of the person at the time of state succession. However, this convention was established post 1990 and was not relevant to the Yugoslav break-up. In 1996, the ILC developed ‘draft’ articles and a Declaration setting out the rules that deal with ‘nationality of persons in relation to state succession’. The International Law Commission has

⁷²⁰ *Australian Citizenship Act 2007*, sections 3, 16, 19.

⁷²¹ Paul Weis, *Nationality ad Statelessness in International Law*, Sijthoff & Noordhoff, 1979, 135-140.

⁷²² Articles 1 I, Is(a), 16, 24(1), Vienna Convention on succession of States in respect of Treaties, 1978, No. 33356, Articles 12, 14(2), IS(I)(a), 18, Vienna Convention on Succession of States in Respect of State Property, Archives and Debts 1983, <https://treaties.un.org>, accessed 4 June 2015.

⁷²³ Kay Hailbronner, *Nationality in public international law and European law*, 2006, in R. Bauböck, E. Ersböll, K. Groenendijk and H. Waldrauch, *Acquisition and Loss of Nationality: Policies and trends in 15 European countries*, Amsterdam: Amsterdam University Press, 49.

⁷²⁴ Kay Hailbronner, ‘Nationality in public international law and European law’, in R. Bauböck, E. Ersböll, K. Groenendijk & H. Waldrauch, 2006, *Acquisition and Loss of Nationality: Policies and trends in 15 European countries*, volume 1, Amsterdam: Amsterdam University Press, 60-70.

attempted to expand these rules by obliging successor states to ensure that nationality is granted to all people that are residing permanently within the new territory.

State succession and citizenship for the Slovene people can be traced back to end of the Austro-Hungarian Empire in 1918. The 1919 Saint-Germain Treaty and the Trianon Treaty were concluded following the break-up of the Austro-Hungarian Monarchy. The treaties stated that:

‘every person possessing the rights of citizenship in territory which formed part of the territories of the former Austro-Hungarian Monarchy were entitled to nationality of State exercising sovereignty over the territory.’⁷²⁵

That is, everybody having citizenship and domicile within the territory was automatically entitled to citizenship under the State of the new territory. A similar approach could have been taken during the break-up of Yugoslavia, which may have gone some way to minimising the potential for people to become stateless. The impact to national identity from the Slovenian experience resulted in the newly formed state expressing to the world who Slovenia was and who Slovenians are. Slovenia for the first time in its history had the opportunity to develop and express its identity that was very distinct from other former Yugoslav Republics and other nation states. No longer were they required to follow another national identity and leadership. The next section traces the legislative reform that has been undertaken by both states from 1990 to 2015.

3.2 Citizenship Law - Amendments and Links to National Identity from 1990 – 2015

Between 1990 and 2015 Slovenia and Australia would reform their respective citizenship laws. The next section discusses the reforms undertaken and, the inclusionary and exclusionary measures adopted by both states, and their contribution to national identity.

Slovenia

Article 40 of the Slovenian citizenship laws was amended for the first time in 1991, which extended the restrictive policy approach taken by the government to exclude individuals from citizenship. As discussed above, the amendment allowed a person’s application to be rejected if that person was considered to pose a threat to public order and security of the state. This also extended to those non-citizens that had committed a criminal offence directed against the

⁷²⁵ Section VI, Article 70, Clauses Relating to Nationality, Saint-Germain Treaty 1919, <http://www.dipublico.com.ar/instrumentos/145.html>, accessed 28 May 2011.

state.⁷²⁶ Article 40 of the original citizenship laws stated that 'any citizen of another Yugoslav Republic who was on the day of the Plebiscite, on the independence and sovereignty of the Republic of Slovenia, dated 23 December 1990, a registered permanent resident in the Republic of Slovenia, and who actually resides in the country, may acquire Slovenian citizenship, if he or she submits an application to the internal affairs administration body of the municipality where he or she is a permanent resident, within six months from the date of this Act coming into force'.⁷²⁷ The public order test was decisive in excluding former Yugoslav citizens. As pointed out earlier, the Slovenian Constitutional Court had ruled extensively on article 40, which will be discussed later in this chapter.

A year on, and in 1991, Slovenia finally adopted the Aliens Act,⁷²⁸ which regulated immigration and imposed conditions on non-citizens, on how they could enter and stay in the country. One feature of these new laws was the implementation of a permit system that required non-citizens to have before entering the Slovenian territory. The Aliens Act also provided the legal framework for refugees to enter and stay. Comparatively, the immigration laws, visa and permit system of Slovenia and Australia are very different (discussed **chapter five**). In 1992, article 13 was amended to allow individuals to obtain Slovene citizenship by naturalisation. However, this was restricted to those persons of Slovenian descent (having at least one parent who is Slovene) if their Slovenian citizenship had ceased as a result of release, renunciation or deprivation because they had not acquired Slovenian citizenship due to historical circumstances.⁷²⁹ This reinforced Slovenia's sovereign right to choose its citizens, but also strengthened the links of the state with Slovenes that were located abroad.

A year later in 1993, it was an important year for Slovenia. Even though Slovenia's membership to the European Union was a decade away, the European Court of Human Rights underwent reform. The number of judges was increased to twenty-nine. Slovenia was represented by Dr Peter Jambrek.⁷³⁰ In May 1993, Slovenia became a member of the European Council. This was a good sign for Slovenia that they had been accepted by the European Community as embracing democracy and making a speedy transition from former socialism. **Chapter four** discusses the transition from independence to being a member of the European Union, by Slovenia, and the impact this had on Slovenian citizens and national identity.

⁷²⁶ Article 40, Zakon o spremembi in dopolnitvi zakona o državljanstvu Republike Slovenije (ZDRS-A), Official Gazette of the Republic of Slovenia, No. 30/1991-1.

⁷²⁷ U-I-89/99, Official Gazette of the Republic of Slovenia, No. 59/99.

⁷²⁸ Alien Act, Official Gazette of the Republic of Slovenia, No. 1/1991. These laws were not valid from 1999.

⁷²⁹ Article 13a, Zakon o spremembi in dopolnitvi zakona o o državljanstvu Republike Slovenije (ZDRS-A), Official Gazette of the Republic of Slovenia, No. 38/1992. Command declaring Law amending and supplementing the Law on Citizenship of the Republic of Slovenia.

⁷³⁰ Peter Jambrek, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 301.

Australia

Throughout the 1990s in Australia there was a renewed interest in the national identity.⁷³¹ The concept of citizenship as a legal status had been entrenched into the state's legal framework for more than forty years. Forty years on from Thomas Marshall writing about citizenship, scholars began to take a lot of interest in the concept throughout the 1990s. Citizenship was expanding and considered a desirable activity,⁷³² including a civic virtue⁷³³ and universal⁷³⁴ (discussed **chapter one**). Immigration had become an important part of citizenship and the wider economic and population policy of Australia. In 1992, the Australian Government introduced major amendments to the *Migration Act 1958* which resulted in the immigration program and visa framework being codified. The changes also resulted in strengthening the national interest by placing visas requirements on all non-citizens entering the state.⁷³⁵ Migration is considered a pathway to citizenship. **Chapter five** discusses migration and the visa framework in more depth, to demonstrate the differences between both states. The visa framework becomes important because non-citizens require a visa or permit to legally enter Australia or Slovenia, stay and apply for citizenship.

The migration laws were changed to eliminate deportation of permanent residents. These were replaced by the stipulation that visas could be cancelled on the grounds of the applicant's character and conduct.⁷³⁶ The new provision allowed the Minister to refuse to grant a visa or entry permit to a person, or may cancel a valid visa entry permit.⁷³⁷ Thus, upon cancellation of a visa or permit, the person was effectively an illegal migrant and could no longer stay in the territory. This would have wider impacts to the individual who could no longer stay on the territory of the state, as they would not be eligible to apply for citizenship. However, the non-citizen could appeal against the decision on grounds of merit.

⁷³¹ Kim Rubenstein, *Citizenship in Australia: Unscrambling its Meaning*, Melbourne University Law Review, Vol 20, 1995, 504-505.

⁷³² Will Kymlicka and Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104, Ethics, 1994 351-354.

⁷³³ Ibid.

⁷³⁴ Iris Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, Ethics, Vol. 99, No 2, 1989, 250-270.

⁷³⁵ Second Reading Speech: Migration Reform Bill 1992, House of Representatives, 2620.

⁷³⁶ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*, The Federation Press, 2011, 526.

⁷³⁷ *Migration Act 1958*, s180A.

Indigenous Australians

The plight and exclusion of the indigenous people in Australia has been well documented.⁷³⁸ Upon colonisation by the British, these people lost their right to the land and its resources. It was not until 1992 that the Australian High Court recognised the impact that the colonisation of the continent had had on the indigenous community.⁷³⁹ This is an important observation in the discussion of the Australian national identity, however it had no impact on citizenship law. The Australian High Court ruled that Aboriginal and Torres Strait Islander peoples have the right to land, and that those rights existed before the British arrived.⁷⁴⁰ They were considered nationals of the Australian territory. This reinforced the notion that citizenship was national and nationality was international. In the same year, the Prime Minister Paul Keating in his speech in relation to the Year of the World's Indigenous People acknowledged the importance and contribution of indigenous music, art and dance being recognised in the community, and how these aspects of Aboriginal culture enriched the national life and identity of Australia.⁷⁴¹ The Australian Government introduced the *Native Title Act 1993* (the Act). This was an important step forward for Australia in its recognition of the Aboriginal people. However, constitutional recognition still eluded them. The Act⁷⁴² also recognised the past injustices that had been done to the Aboriginal and Torres Strait islander people, and gave them full recognition of the role they have played in the development of Australia. It is asserted that the 1993 Act was a major step forward for the Australian people and Australia in recognising and understanding its past. As discussed later, in 2012, the plight of indigenous people in relation to citizenship would be raised by the United Nations. **Chapter four** discusses the recognition of indigenous Australians in the Australian constitution. Slovenia on the other hand, had by 1993 established a modern day constitution that recognised its citizens, its past and the other inhabitants of the territory such as the national communities of Italy and Hungary, and provided a special status of the Rom community. The Rom community has resided in the Slovenian territory since the 17th century.⁷⁴³ They have been considered as co-inhabitants with Slovenes across the current day Slovenian territory.

⁷³⁸ Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution*, Cambridge University Press, 1997, 100.

⁷³⁹ *Mabo and others v Queensland* (No 2) (1992) 175, CLR 1.

⁷⁴⁰ *Ibid.*

⁷⁴¹ Redfern Speech (Year for the World's Indigenous People), Prime Minister Paul Keating, 1992, https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf, accessed 21 August 2015.

⁷⁴² *Native Title Act 1993*, Preamble.

⁷⁴³ Nada Stropnik, *Promoting Social Inclusion of Roma; A Study of National Policies*, Institute of Economic Research, Ljubljana, 2011, 1-3.

In 1993, the *Australian 1948 Citizenship Act* had some minor inclusion to sections 15, 41, 46A and 53, whereby the words ‘oath or affirmation of allegiance’ were replaced with the words ‘a pledge of commitment’.⁷⁴⁴ The pledge of commitment would remove all reference to ‘God’, ‘allegiance’ and ‘Her Majesty Elizabeth the Second, Queen of Australia’.⁷⁴⁵ The pledge of commitment aimed to strengthen the beliefs upheld by the Australian state and the rule of law, and reinforced the Australian identity. The introduction of the pledge came about as a commitment by the Australian Labor Party to emphasise the importance of the core values and character of Australia which was designed to unify the citizens of the country.⁷⁴⁶ The Preamble was also introduced which took effect in 1994, and states:⁷⁴⁷

“Australian citizenship represents formal membership of the community of the Commonwealth of Australia; and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity; and

Persons granted Australian citizenship enjoy these rights and undertake to accept these obligations by pledging loyalty to Australia and its people, and by sharing their democratic beliefs, and by respecting their rights and liberties, and upholding and obeying the laws of Australia”.

The Preamble represents the core principles of what citizenship means to Australia. Moreover, the reference to common bond, rights, democratic beliefs, respecting rights and liberties as well as upholding the law, all reflect different elements of how citizenship contributes to national identity. Australia is a democratic state that has provided rights and obligations to all its citizens through the law. However, the Act did not define citizenship. In 1994, a Joint Standing Committee identified eight ways to strengthen citizenship.⁷⁴⁸ Most notable was encouraging citizens to be active and participate in Australian life. A national citizenship week and awards was introduced to promote the idea of citizenship, what it means to be Australian and enhance the understanding of Australian values.⁷⁴⁹ The Australian values originated from its historical past and connection to Britain, and was considered an important part of the ongoing identity of the state. It is argued that by raising the awareness and promoting citizenship to the broader community enables the state to reinforce what it means to be Australian. Thus, in turn, raising the awareness of Australian identity. Therefore, the introduction of the pledge reaffirms the

⁷⁴⁴ Australian Citizenship Amendment Bill 1993, The Parliament of the Commonwealth of Australia, Senate, Explanatory Memorandum, No. 933576 X, http://www.austlii.edu.au/au/legis/cth/bill_em/acab1993344/memo_0.pdf, accessed 20 December 2012.

⁷⁴⁵ *Australia Citizenship 1973*, sections 15 & 26A.

⁷⁴⁶ Australian Citizenship Amendment Act 1993. 16. Australian Labor Party, Advancing a Multicultural Australia, Immigration and Ethnic Affairs Policy, 1993 federal election. 17. Senate, Debates, 29 September 1993, 1439

⁷⁴⁷ Kim Rubenstein, *Citizenship Law in Context*, Lawbook Co, 2002, 75.

⁷⁴⁸ The Parliament of the Commonwealth of Australia, Joint Standing Committee on Migration, *Australians All Enhancing Australian Citizenship*, Australian Government Publishing Services, 1994.

⁷⁴⁹ *Ibid.*

central question and argument of this thesis that citizenship law not only contributes to national identity, but also, reinforces and strengthens national identity.

Slovenia

The citizenship laws of Slovenia underwent further reform in 1994. Article 10, of the Law on Amendments and Supplements to the Law on Citizenship of the Republic of Slovenia⁷⁵⁰ minimised the possibility that individuals could become stateless (particularly those individuals from the former Yugoslavia). However, this provision was introduced to make it possible for some people, not all, who were part of the former Yugoslavia, and resident in Slovenia, to continue to stay in Slovenia. However, this was on the condition that the applicant no longer had citizenship of a former Republic such as Serbia or Croatia.

In the same year, 'The Slovene May Declaration on Independence' was released and reinforced the earlier 1989 May Declaration. The declaration demanded national independence, democracy, a multiparty parliamentary system and an economy based on the modern welfare state.⁷⁵¹ The public statement reminded Slovenians of what they had already achieved in establishing independence by adopting a constitution of a sovereign state, based on democratic principles, the rule of law and protection of human rights.

Paragraph 4 of article 3 was included to read ' if the person is a frequent offender is prosecuted ex officio and offences against public order, if the person despite the call by the competent authority refuses to meet with the Constitution and statutory duties of a citizen of the Republic of Slovenia'. A new paragraph 3 was included to read as follows ' It is considered that a person has the nationality of a foreign country if the foreign national's travel document or, if exercised military duty under the regulations of that country or, if employed in a state body or in the armed forces of a foreign country'. This reflects strongly Slovenia's national identity because it is confirming who is a national of a foreign country and not a Slovene citizen. Furthermore, in article 8, a new second paragraph was inserted that read: 'In order to obtain citizenship a child over 14 years require his or her consent'. These minor changes were a small but an important expression of national identity, because Slovenia was reinforcing its public order test where individuals had committed a crime against the state.

⁷⁵⁰ Official Gazette of the Republic of Slovenia 25/1994.

⁷⁵¹ Peter Jambreč, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 262.

National Interest

Article 12 focused on the 'national interest' whereby emigrants and their descendants to the third generation could obtain citizenship of Slovenia. However, the individual was required to have resided continuously in the territory of Slovenia for at least one year. Those who had been married to a Slovene citizen for two years could also apply for citizenship. The second paragraph of article 13 was amended and stated 'The existence of the grounds referred to in the preceding paragraph on the basis of the opinion of the competent bodies previously found Government of the Republic of Slovenia, which at the same time be required to meet one or more of the conditions referred to in paragraph 10'. The change was to allow the administrators of the law to make a decision on whether the applicant had met the other exclusive requirements set out in article 13, in order to obtain citizenship. The third paragraph of article 14 was replaced with a new paragraph that read: 'A child who has no parents, or whose parents have lost their parental rights or their ability from birth and living in Slovenia can obtain citizenship of the Republic of Slovenia at the request of the administrator who is a citizen of the Republic and with whom the child lives, if for the benefit of the child to his the granting of citizenship to the consent of a state administrative body responsible for social welfare'. The article was an important inclusion to ensure that children did not become stateless.

In article 16, the first paragraph was replaced with a new paragraph that read 'The decision to set aside even if the person has been admitted to citizenship of the Republic of Slovenia on the basis of assurances from foreign countries to who the foreign citizenship has been terminated if the citizenship of the Republic of Slovenia if within the period specified in the decision on admission to citizenship of the Republic of Slovenia does not submit evidence that it has closed its previous citizenship'. The inclusion was to ensure that Slovenian citizenship was exclusively Slovene and ensured a person could not have dual citizenship.

A new article 28 was introduced outlining a criteria for determining the 'national interest of the Republic of Slovenia'. Article 10 requires that a person must be 18 years of age, have or obtain release from current citizenship be living in Slovenia for 10 years and have a guaranteed income. The person must have a good knowledge of the Slovene language and able to prove they have not been in prison or sentenced for crimes in Slovenia. It is argued throughout this research, the single common denominator that separates Slovenes from other states is their language. Hence, in citizenship law, importance was given to language. These exclusionary measures reinforced the Slovenian position that it was in a building phase and wanted to ensure that people understood the Slovenian values and national identity.

The introduction of article 39 represented a significant policy shift in allowing a person to be a citizen of the state if they had been a resident in the Slovene Republic on 23 December 1990 at independence. This is an important observation as Slovenia began to recognise in law those former Yugoslav citizens. To ensure the individual could obtain citizenship, evidence had to be provided by the person proving that the individual was actually resident in Slovenia at the time the state became independent. It was argued that, when resident in a state, a person can better understand the values and identity of the state. Yet, it was a further exclusionary position included in the law.

A new article 41 was inserted to allow a person between 18 and 23 years of age to obtain citizenship by descent. Article 10, the first sentence was amended to ensure those applying for naturalisation also met the national interest test. Article 10 paragraph 5 was also amended so that an active command of the Slovenian language in written and oral form was required and had to be demonstrated via a test. A further inclusion in article 10 required that a person seeking citizenship by naturalisation not have any outstanding tax liabilities. Obtaining citizenship by descent can be viewed as Slovenia wanting to make a connection with those Slovene residing in other states. It is argued that due to the small population inside and outside of Slovenia, the state wanted to expand its citizenry and enlarge national identity.

European Union

The European Union would implement the European Convention on Nationality 1997 (ECN).⁷⁵² Apart from the ECN establishing a set of consistent principles for the acquisition and loss of citizenship across member states, there was greater recognition of women. Article 4 states that neither marriage nor the dissolution of a marriage between a national of a state party and alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect nationality of the other spouse. Furthermore, article 5 protected individuals (race, colour and sex) from discrimination. There was a continued push towards citizenship and rights equality for women. The ECN also addressed the issue of statelessness and state succession to provide the basis for the transition by states and ensure the inhabitants within the territory would retain their nationality based on habitual residence.⁷⁵³ Importantly, and while the ECN was established long after the fall of Yugoslavia, it reinforced the importance of nationality as a human right and the need to minimise the occurrences of people becoming stateless. However, even today the full principles of the ECN have not been fully realised or used by the European community to ensure, when there is a change in rule, people retain citizenship of the territory in which they reside.

⁷⁵² European Convention on Nationality, 6XI.1997.

⁷⁵³ Articles 18 & 19, European Convention on Nationality, Strasbourg, 6.XI.1997.

Australia

The citizenship laws underwent changes as a result of amendments to the Migration and family law legislation.⁷⁵⁴ The national identity was summarised in 1995 by the Prime Minister Paul Keating as 'all Australians must accept the basic principles of Australian society including the constitution and the rule of law, parliamentary democracy, freedom of speech and religion, English as the national language, equality of the sexes and the right of every Australian to express his or her views and values'.⁷⁵⁵ Keating was not only reaching out to multicultural Australia but more importantly reinforcing the historical identity of Australia and what it means to be an Australian. The reference to the English language, rights, the constitution and rule of law have and continue to be fundamental pillars of the Australian identity. In 1996, there was a change of government in Australia, and John Howard would be elected as Prime Minister. The government denounced racial intolerance as being incompatible with the kind of society Australia wanted to be.⁷⁵⁶ Pauline Hanson entered the political stage through her 'One Nation Party', and attempted to exploit the xenophobic elements in the Australian community and political discourse. Xenophobic behavior was specifically directed toward the Asian population.⁷⁵⁷ It is argued that the xenophobic behavior had an impact on national identity. On the one hand, national identity was reminiscent of the old days of 'white' Australia. On the other hand, the government wanted national identity to reflect the unification of diverse ethnic groups. At this time, it would appear that there were different notions about what constituted a national identity.

The Prime Minister John Howard, rather than agree, praised the tolerance of the community towards the many different ethnic and religious groups that make up the Australian citizenry.⁷⁵⁸ The Australian Government stated that the country remained confused about its identity and concluded that citizenship is fragile by having no constitutional recognition.⁷⁵⁹ McHugh J of the High Court of Australia had argued that Australia is in need of a statutory Bill of Rights.⁷⁶⁰ Rather than a Bill of Rights, it is

⁷⁵⁴ *Migration Reform Act 1992, Family Law Reform (Consequential Amendments) Act 1995, Statue Law Revision Act 1996, Federal Magistrates (Consequential Amendments) Act 1999, Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000.*

⁷⁵⁵ Paul Keating, Opening Address, Global Cultural Diversity Conference, Sydney, Australia, 1995, 23, www.immi.gov.au/media/publications/multicultural/confer/speech, accessed 20 May 2014.

⁷⁵⁶ Motion from the then Prime Minister on this matter; Racial Tolerance, Parliament of Australia, House of Representatives, Official Hansard 30 October 1996, in Australian Citizenship Council, *Australian Citizenship for a New Century*, 2000, Commonwealth of Australia, 18.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ *Ibid.*

⁷⁵⁹ *Ibid.*

⁷⁶⁰ *Al- Kateb* [2004] HCA 37; (2004) 219 CLR 562.

proposed that Australia reform its constitution to resemble Slovenia's modern day constitution (discussed **chapter four**) because a constitution provides greater legal certainty than national legislation. Thus, as citizenship and the national identity have evolved, national courts have also come to understand the importance of both concepts to the state. Moreover, the statements made by the Australian Government reinforced the amalgam of identities that had and continues to form part of the Australian society.

In 1998, the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* was introduced to strengthen the powers of the Immigration Minister to cancel or refuse to grant a visa, and remove a non-citizen on the grounds of criminality and bad conduct.⁷⁶¹ The changes altered the individual's ability to access an independent merits review, and the role of the Australian Administrative Tribunal, which had jurisdiction in reviewing matters of visa cancellations.⁷⁶² Effectively the Minister could override the decision of the tribunal. The Minister could provide a written direction to an individual, and reversed the onus of proof to the person to prove they are of good character. The resulting effect was the bar had been raised for migrants having to comply with the deeming provisions. Effectively, these legislative changes could limit the ability for a person to enter, stay and obtain citizenship. **Chapter five** discusses the current day removal and deportation of residents.

In 1999, women's equality was firmly on the mind of government, which introduced the *Equal Opportunity for Women in the Workplace Act 1999*. Political rights for women had been well established in Australia, however their representation was still well behind men. It is argued that the full and active participation of women as citizens, is part of a state's identity. Today gender equality is at the forefront of the national community and policy debate in both Australia and Slovenia. As discussed in **chapter two**, historically women were excluded from citizenship and followed the man. Over an extended period throughout the last century women obtained full recognition in Slovenia and Australia's citizenship laws. That recognition went some way to assist in improving their equality, which has slowly extended to other areas across society. In the same year there was considerable debate surrounding a possible referendum to revise preamble to the Australian constitution. Helen Irving highlights the preamble would be an attempt to address the social character rather than the political or constitutional practices.⁷⁶³ This was on the backdrop of what Australia generally viewed citizenship as a community as

⁷⁶¹ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration, Law, Policy and Practice in Australia*, The Federation Press, 2011, 527.

⁷⁶² *Ibid.*

⁷⁶³ Helen Irving, *Citizenship before 1949*, in Kim Rubenstein (Eds.), *Individual Community Nation: Fifty Years of Australian Citizenship*. Australia: Australian Scholarly Publishing, 2002, 5-15.

opposed to civic or political. It spoke of the ‘ancestry’ and origins of Australian people, their culture and practices, their relationship to the environment, and of the national spirit to bind citizens together.⁷⁶⁴ This thesis argues ancestry and origins have influenced national identity. This is very evident in Slovenia and Slovenes who struggled over centuries to obtain an independent state. That is, for more than a century Slovenes and the current day state, and Australia have been developing a national identity that include an historical territory or homeland, common myths and memories, a shared culture and language (discussed **Literature Review**).

By the end of the 1999, Slovenia had been independent for nearly a decade. The people and territory had transitioned from socialism to democracy. The state implemented new citizenship laws that were nationalist in their approach welcoming Slovenians but excluding former Yugoslav citizens from the other Republics. Slovenia was moving ever closer to Europe and preparing itself for accession to the European Union. Economically, Slovenia had also transitioned to a market based economy that was integrated with Western and Central Europe. Australia continued to take in large numbers of immigrants from across the world. The economy had been shifting from agriculture to mining and the next decade would see huge wealth and exports from Australia to South East Asia and China.

2000 - 2005

100 Years Post Federation

The most notable change to citizenship law during this five-year period was the introduction and acceptance of dual citizenship by both Australia and Slovenia, although quite differently. Both states began to embrace postnational or multicultural citizenship, and took a more liberal policy approach towards their citizens. It is argued that by adopting this postnational approach, both states enabled their citizen’s greater participation in an ever-increasingly globalised world. Citizens would experience and possibly adopt elements of other states’ identities, which would be brought back to their state of origin and integrate into the wider identity of the state. That is, an Australian citizen who also held citizenship of Slovenia could adopt the values and identity of both states. Thus, in part national identity of the single state could be diluted as a result of dual citizenship. On the other hand, national identity could be strengthened where the individual did not identify with the values and identity of the other state.

⁷⁶⁴ Ibid.

Australia

The *Australian Citizenship Legislation Amendment Act 2001* made a number of amendments to the *Australian Citizenship Act 1948*.⁷⁶⁵ For Australia, 2001 was an important year as it marked one hundred years of Federation, and it was nearly fifty years since the first citizenship laws had been introduced. The Australian Citizenship Council identified sixty-four recommendations to strengthen the country's national identity.⁷⁶⁶ In response, the Australian Government released a report "*Australian Citizenship Our Common Bond*", in 2001.⁷⁶⁷ Despite the Australian Government agreeing with the Council's view that citizenship law is important to the state and citizens, the government found that there was no need to change the laws. The Australian Government held that citizenship is an important concept that 'unifies' society, bringing citizens closer together.⁷⁶⁸ This was reaffirmed when the Prime Minister John Howard stated that 'there is something special about being an Australian'. That Australian spirit; that capacity; that mateship allows us to pull together in times of challenge and times of adversity is something that is very special. The things that unite us are infinitely greater and more enduring than the things that divide us.⁷⁶⁹ Clearly, there was an attempt by government to further unify the amalgam of ethnic groups that make up the Australian society. Furthermore, the government was addressing the people and directing them to embrace and practice the values of the state. That is, embrace the Australian spirit, the concept of what Australians have traditionally done in coming together to assist each other. Further minor amendments were undertaken, even though they did not directly reflect strengthening or enhancing national identity.⁷⁷⁰

⁷⁶⁵ Australian Citizenship Legislation Amendment Bill 2001, The Parliament of the Commonwealth of Australia, House of Representatives, Explanatory Memorandum (Circulated by authority of the Minister for Immigration and Multicultural Affairs, The Hon Phillip Ruddock MP), <http://www.comlaw.gov.au/Details/C2004B01003/Explanatory%20Memorandum/Text>, accessed 18 December 2014.

⁷⁶⁶ Australian Citizenship Council, *Australian Citizenship for a New Century*: February 2000, Ausinfo, Canberra, 2000.

⁷⁶⁷ Australian Government, *Australian Citizenship....A Common Bond*, Government Response to the Report of the Australian Citizenship Council, 2001, <http://www.citizenship.gov.au/pdf/0501report.pdf>, accessed 20 February 2014.

⁷⁶⁸ Ibid.

⁷⁶⁹ John Howard Election Speech, Sydney, 10 November 2001, <http://pmtranscripts.dpmc.gov.au/browse.php>, accessed 5 August 2015.

⁷⁷⁰ The minor changes were required to clarify points of law. Section 5 was changed to clarify what it meant by the Australian reserve force; the Naval Reserve, Army Reserve and Air Force Reserve, and their predecessors. Paragraph 10B (1)(a) of the section omitted the number '18' which was substituted with '25'. The following paragraph was also inserted (1A): 'if the relevant person referred to in subsection (1) has attained the age of 18 years, the name of the relevant person must not be registered for the purposes of this section unless the Minister is satisfied that the relevant person is of good character'. Section 13(3) had (3A) inserted to provide that (1)(d) and (e) do not apply in relation to (a) a person who has completed full-time service as a member of an Australian reserve force for a period of, or for periods amounting in the aggregate to, not less than 6 months; or (b) a person who (i) has been discharged from service as a member of an Australian reserve force before completing full time service as such a member for a period of, or for periods

Within section 15, 15(4) was repealed and at the end of section 15 was added (6) A person to whom a certificate of Australian citizenship has been granted under subsection (13)(9B) is an Australian citizen on and after: (a) the day on which the responsible parent mentioned in that subsection becomes an Australian citizen under section 15, or (b) if the certificate is granted after the responsible parent becomes an Australian citizen under section 15 the day on which the certificate is granted. Subsection (7) was clarified to include 'A person to whom a certificate of Australian citizenship has been granted under subsection 13(9E) is an Australian citizen on and after the day on which the certificate is granted'. It is argued the Australian citizenship certificate formalises the process of becoming a full citizen of the state. Today the certificate is formally presented to new citizens in a ceremony. Furthermore, it is argued the citizenship certificate provides a greater sense of belonging and individual identity of the person, connecting them to the

amounting in the aggregate to, 6 months; and (ii) was so discharged while undertaking unfit for service or further service; (iii) was so discharged while undertaking full-time service as a member of the reserve force; and (iv) became medically unfit for service because of the person's service as a member of the reserve force. Even though these changes had little effect on national identity, it is argued they reinforced that Australia considers the military as an important part of national identity. Section 13(9A) was established to provide that the Minister may have the discretion on application in accordance with the approved form, to grant a certificate of Australian citizenship to a child if: (a) the child was under 16 at the time of the application; and (b) the application is set out in the same document as an application made under subsection (1) by a responsible parent of the child for the grant of a certificate of Australian citizenship to the responsible parent. Section 13(9C) (9D) described the forms to be used as an application for citizenship. The application form assists a non-citizen to apply for citizenship. The application form is a formal government document. Section 13(9E) (a) and (b) a child under the age of 16 can be granted citizenship and a responsible parent of the child is an Australian citizen. Section 13(11) Omitted 'or (9)', substitute, (9), (9B) or (9E), and, omit 'or include the name of the person in a certificate of Australian citizenship under subsection (10)'. Section 13(11)(a),(b) and (c) at the end of the paragraphs add the word 'or'. These minor changes had no direct impact to either enhancing or diluting national identity. After paragraph 13(11)(c) the following was inserted (ca) if the person is a serious repeat offender in relation to a sentence of imprisonment (within the meaning of subsection (11A) during the period of 10 years after the end of any period during which the person has been confined in a prison in Australia because of the imposition on the person of that sentence. Section 13(11)(d) after the words 'from serving', inserted the words 'the whole or'. Additionally, the following was omitted 'the whole or part of the remainder of that sentence', substitute, 'the whole of that sentence, or the whole or part of that sentence of the remainder of that sentence, as the case requires'. In addition, the word 'or' was added to s13(11)(e) after 'from serving', insert 'the whole or', and, add 'or'. Additionally, (11)(ca)(a) a serious prison sentence was imposed on a person; and (b) the person was confined in a prison in Australia because of the imposition of that sentence; and (c) another serious prison sentence was imposed on the person in relation to an offence committed by the person at a time after the person ceased to be confined in prison because of the imposition of the sentence mentioned in paragraph (a), serious prison sentence means (d) a sentence of imprisonment for life; or (e) a sentence of imprisonment for a period of not less than 12 months. The restrictive approach adopted by Australia reinforced its policy of welcoming new arrivals provided they were of good character and had not been convicted of criminal offences. It is argued that through its citizenship laws, Australia is asserting its national identity by ensuring that only those who become citizens do not have a criminal background that could harm the state. Section 14A(2) was changed to omit 'or for periods that in total, exceed', substitute 'that exceeds, or for periods that in total exceed' and the following was inserted; '14B Revocation of grant of certificate of Australian citizenship before conferral of citizenship. 14C Deferral of conferral of Australian citizenship'.

state. Bosniak (discussed **chapter one**) emphasised the importance that citizenship provides a connection to the state and sense of belonging, which the birth certificate form part of that process. This is a positive outcome for national identity because the person should better understand what it means to be Australian.

Dual Citizenship - Australia

It was not until 2002⁷⁷¹ that cosmopolitan, multinational or post-national (dual) citizenship became fully effective in Australia. Throughout the eighteenth, nineteenth and twentieth centuries, states imposed a strong sense of nationalism and territorial competition, resulting in dual citizenship being viewed as undesirable.⁷⁷² For Andrew Linklater,⁷⁷³ the cosmopolitan resembles post-national citizenship and obliges all human beings to extend hospitality to strangers as fellow citizens of a universal state of humanity.⁷⁷⁴ Furthermore, postnational citizenship extends the concept of citizenship and no longer restricts it to a single state. In terms of national identity, dual citizenship allows a citizen to be an active participant across international borders – with ease. It is argued a citizen from Australia who is a dual citizen of Slovenia enriches the identities of both states by transferring knowledge and experiences afforded to him/her in both states.

Section 17 having been amended, subsequent amendments were made to s23 and then to s23B to enable a person to resume their Australian citizenship.⁷⁷⁵ The benefits of dual citizenship are discussed later in this chapter in section 3.4. The additional amendments detailed in the table below were intended to strengthen aspects of the integrity of Australian citizenship in sections 21, 23 and 52,⁷⁷⁶ and clarified the application of the law and addressed other minor drafting errors. Section 21(1) was inserted so that a person who was convicted of an offence pertaining to people smuggling in accordance with

⁷⁷¹ Australian Citizenship Legislation Amendment Bill 2002, House of Representatives, Information and Research Services, No. 78 2001-02.

⁷⁷² Saskia Sassen, *The Repositioning of Citizenship: Emergent Subjects and Spaces for Politics*, Berkley Journal of Sociology, vol 6, 2002, 1-10.

⁷⁷³ Andrew Linklater, *Cosmopolitan Citizenship*, Citizenship Studies, Vol. 2, No. 1, 1998, 26.

⁷⁷⁴ Ibid.

⁷⁷⁵ Australian Government, *Australian Citizenship....A Common Bond*, Government Response to the Report of the Australian Citizenship Council, 2001, <http://www.citizenship.gov.au/pdf/0501report.pdf>, accessed 20 February 2014.

⁷⁷⁶ Section 52A(1) following the word 'review of' insert 'the following decisions'. Section 52A(1)(a) at the conclusion of this paragraph the following was inserted (ab) decisions of the Minister under section 14B revoking the grant of a certificate. That is, the Minister has the ability to issue or revoke a certificate of citizenship. Section 52A(1)(e) Omitted '(2)' and substitute 'under subsection 23AA(2)'. Section 52A(1)(e) omitted 'and' and further inserted (ea) decisions of the Minister under subsection 23AB(3) refusing to register a declaration or under subsection 23AB(3) refusing to include the name of a child in a declaration. Even though these minor changes did not directly reflect strengthening national identity, the amendments provide a complete understanding of the legislative change undertaken by Australia.

section 232A, 233 or 233A of the *Migration Act 1958*, and is sentenced to imprisonment for a period of not less than 12 months, may be deprived of citizenship. In Section 23AA(1)(e) the word 'and' was added along with (f) that the person be of good character. 23AB was inserted to provide that a 'Person may resume citizenship lost under section 18'. Section 23D(3)(a)(i) Omitted the number 18 which was substituted by the number 25.

Chapter five argues that migration is a pathway to citizenship and that law and policy of citizenship is intertwined with migration law and policy. Migration law also makes a significant contribution to national identity, as it allows a state to determine who and who cannot enter and reside in the state.

Slovenia

By 2002, a number of minor amendments had been made to the citizenship laws of Slovenia.⁷⁷⁷ Slovenia would again reaffirm its identity by ensuring that individuals had a command of the Slovenian language.⁷⁷⁸ This restrictive policy approach reinforced Deželan's theory of nationhood where language is to be protected,⁷⁷⁹ and that the Slovenian language is part of the national identity. The language requirement was considered to have been met if a person had completed primary school, secondary school, a certificate of education to VI or VII, degree, college or university studies.⁷⁸⁰ Article 2 had a small change where number 23 was replaced with the number 36. It is argued throughout this thesis that for Slovenia and Slovenes, language has been one of the most important components of its national identity. For more than a century, the Slovene language has been used to identify who is and who is not Slovene. Comparatively speaking, Slovenia has placed a higher value on language than has Australia.

⁷⁷⁷ Minor changes were made to clarify punctuation errors. Article 3 also had minor changes. The 10 paragraph of article 3 the word 'application' and the words 'and the alien status' were included. The 4th paragraph included the words 'provided that the apartment and'. Paragraph 5 was amended to include '5 the command of the Slovenian language for everyday communication needs, attested by a certificate of successful completion of the exam of Slovene at the basic level'. The 7th paragraph the word 'failure' replaced the word 'prohibition'. The 9th paragraph the word 'obligation' full stop is replaced by a semicolon. A new 10th paragraph was added: 'to make a statement that the acquisition of citizenship of the Republic of Slovenia agrees with the legislation of the Republic of Slovenia'. The existing 5th paragraph became the 7th paragraph and was amended to read 'It is considered that the condition of the first paragraph of this Article shall be satisfied if the conditions are for deletion are from the conviction from criminal records'. Similarly, in article 11, the first paragraph the number '7', the word 'and' was replaced with a comma and the number '8' was added to the comma and the numbers '9' and '10' were also included. These small changes did not contribute to national identity, however, they were important to the overall legislative framework.

⁷⁷⁸ Promulgation of amendments to the Law on Citizenship of the Republic of Slovenia (ZDRS-D), 2002, Official Gazette of the Republic of Slovenia 96/127.

⁷⁷⁹ Tomaž Deželan, *Citizenship in Slovenia: the regime of nationalising or Europeanising state*, Working Paper, 2011/16, The University of Edinburgh, 2 - 13.

⁷⁸⁰ Promulgation of amendments to the Law on Citizenship of the Republic of Slovenia (ZDRS-D), 2002, Official Gazette of the Republic of Slovenia 96/127.

Article 12 would enable the acquisition of citizenship by those who had lost their citizenship of Slovenia as a result of being denied citizenship. People could now apply for, and obtain citizenship provided they had resided in the Slovene territory for a minimum of six months.⁷⁸¹ New fifth, sixth, seventh and eighth paragraphs were added, which read as follows: 'to provide the authorities with the discretion for granting citizenship to a refugee or stateless person'. Firstly, this enables the state to fulfil its commitment under international law towards refugees and ensuring people do not remain stateless. However, it appears to have taken Slovenia more than a decade after independence to fully commit to the idea that they should protect people from statelessness, according to the law. The 1st paragraph of article 13 was amended to read: 'Slovenian citizenship can be acquired by naturalisation if the individual provides a benefit to the country such as scientific, economic, cultural, national, or similar reasons provided that actually lived in Slovenia continuously for at least one year prior to the application and the alien status and qualifies under the Aliens Act'. It is argued that Slovenia while welcoming foreigners wanted to ensure they make a valuable contribution to the state. A new paragraph was inserted and stated that: 'The person referred to in the preceding paragraph, which claims the benefit of the country for national reasons, need not comply with the requirement of actual residence in Slovenia'. In the third paragraph, the word 'Slovenia and comma' was replaced by a dot, and the remainder of the text was deleted. Not all of the above changes directly relate to national identity. These minor changes provide a complete understanding of the legislative change undertaken by the state. Nevertheless, Slovenia was only twelve years old and scholars had already taken an interest in the state, its size and its people.

Slovenia (Size)

In 2002, Milan Brglez and Zlatko Šabič highlighted several studies on Slovenia's identity.⁷⁸² What makes Slovenia stand out from other countries is its size in terms of both geography and population. They noted that Slovenia's size did not hinder the state's efforts to create its own identity.⁷⁸³ Slovenia has one of the smallest populations when compared to many states in Europe. Thus, in the eyes of Slovenes, they are potentially vulnerable due to their 'smallness'.⁷⁸⁴ The 'smallness' as an independent variable⁷⁸⁵ affecting the Slovenian national identity appears pertinent.⁷⁸⁶ Many scholars begin a discussion of Slovenia's viability in the international arena

⁷⁸¹ Ibid.

⁷⁸² Milan Brglez and Zlatko Šabič, *The national identity of post-communist small states in the process of accession to the European Union: the case of Slovenia*: Faculty of Social Sciences, University of Ljubljana, 2002, 2-18.

⁷⁸³ Ibid.

⁷⁸⁴ Irena Brinar and Bojko Bučar, *Slovenian foreign policy*. Civil Society, Political Society, Democracy. Ljubljana, Slovenian Political Science Association, 1994, 425-447.

⁷⁸⁵ Karin Fierke, *Multiple identities, interfacing games: the social construction of western action in Bosnia*. *European Journal of International Relations*, 1996, 467-497.

⁷⁸⁶ Ibid.

by presupposing Slovenia's smallness.⁷⁸⁷ Given Slovenia's size within the European community, Luxembourg has a quarter of the population (about 509,000) in an area of approximately 2,586 square kilometers.⁷⁸⁸ Malta is another state that has a smaller population of about 409,000 with a land mass of just 316 square kilometers.⁷⁸⁹ Thus, Slovenia's smallness should not be viewed as a threat to its long-term viability. Slovenia's national identity is defined, in part, by its smallness, geographical location and population size. However, this smallness must not be confused with the place that Slovenes and Slovenia have in the European Union, Australia and the rest of the world. Slovenes and Slovenia have a remarkable story to tell the world. In the same way, Australia has a great story to tell about its beginnings and its current place in Asia and the world.

With Slovenia being two years away from becoming a full member of the European Union in 2004, the state was well down the road to conforming to the principles of European Union law. There was a collective effort to harmonise the national laws to ensure consistency with the European Convention on Nationality 1997 (ECN). Citizenship by naturalisation was to a certain extent becoming more liberal in accordance with article 14, whereby children who were under the age of eighteen, could acquire citizenship provided that their parents had citizenship of the state.⁷⁹⁰ Additionally, further changes were made to article 14. At the end of the second paragraph, the words 'continuously for at least one year prior to the application and the alien status' were added. A new third and fourth paragraph provided that a child born in the Slovene Republic could obtain citizenship if requested by one of the parents who had received citizenship by naturalisation. This also extends to a person under the age of 18, provided that the parent has acquired citizenship by naturalisation. The words 'a state administrative body responsible for social security' were replaced by 'the ministry responsible for family and social affairs', in the fifth paragraph.

However, Slovenia had not ratified this convention and should do so. Even today, Slovenia has not ratified the ECN although it should. Furthermore, there was a greater effort in the recognition of women with the adoption of the Equal Opportunities for Women and Men Act.⁷⁹¹ The legislation aims to improve opportunities for women in political, education and social life. It also minimises discrimination and imposes obligations on the government to submit to

⁷⁸⁷ Marjan Svetličič, *Small States: New Challenges and Opportunities: Development and International Cooperation*, 1997, 24–25. in Zlatko Šabič, Charles Bukowski, *Small States in the Post-Cold War World: Slovenia and NATO Enlargement*, PRAEGER, 2002.

⁷⁸⁸ Central Intelligence Agency, *Country Comparisons to the World*, <https://www.cia.gov/library/publications/the-world-factbook/fields/2119.html>, accessed 27 December 2012.

⁷⁸⁹ Ibid.

⁷⁹⁰ Promulgation of amendments to the Law on Citizenship of the Republic of Slovenia (ZDRS-D), 2002, Official Gazette of the Republic of Slovenia 96/127.

⁷⁹¹ Equal Opportunities for Women and Men Act, Official Gazette of the Republic of Slovenia, 69/2004.

parliament proposals to improve equal opportunities for both women and men. The importance of the ECN is that it provides the framework for all member states of the European Union so that a consistent approach can be taken to regulate citizenship. It does not take away any further sovereign right of member states to continue to regulate citizenship at the national level. Therefore, ratifying the ECN would have little to no impact to Slovenia's national identity.

Dual Citizenship – Slovenia

Slovenia began expanding its direction to encourage individuals who could provide scientific, economic or a cultural benefit to the state, with a pathway to citizenship. However, the pre-condition was that the individual must have resided in Slovenia continuously for at least one year. A year later, in 2003, the Slovenian Law on Citizenship would be amended again allowing an individual to obtain dual citizenship. Slovene citizen would be allowed to become part of the broader regional and global world. The European Union encouraged member state to accept dual citizenship as part of their citizenship laws. This change was one of the most liberal changes Slovenia undertook since independence.⁷⁹² However, dual citizenship is restricted and has been exclusively reserved to those individuals who can demonstrate a connection to Slovenia (discussed later in this chapter). As stated earlier, dual citizenship was introduced in Australia in 2001. Prior to this, Australian citizenship law did not allow a person to hold dual citizenship. However, there was exceptions where a person could hold dual citizenship where their state of origin did not require them to revoke their citizenship upon obtaining citizenship of Australia. Where the person applied for and obtained citizenship of another state they were required to revoke their Australian citizenship. Section 17 of the 1948 Citizenship Act mandated the loss of Australian citizenship upon acquisition of another citizenship. This remains today where individuals lost their citizenship before 4 April 2002. Slovenia could adopt the same provisions as Australia and ensure dual citizenship is not restricted. This is likely to conflict with the current policy approach taken by Slovenia to restrict citizenship by descent to fourth generation. Many people wanting citizenship by descent are likely to want to have dual citizenship. Today, across European member states, Australia and most other western democratic states dual citizenship has become the norm.⁷⁹³ Dual citizenship in itself is multidimensional and serves to allow a state to maintain a connection with their citizens. Dual citizenship allows the individual to be more global gaining access to other regions of the world where they would not otherwise be able to do, with ease. This saw Slovenia beginning to embrace the postnational concept of citizenship as described by Yasemin Soysal (discussed **chapter one**). Some argue that the introduction of dual citizenship devalues national

⁷⁹² Law on the Citizenship of the Republic of Slovenia, Official Gazette (ZDRS-OCT1) 7/2003.

⁷⁹³ Kim Rubenstein, Daniel Adler, *International Citizenship: The Future of Nationality in a Globalised World*, Indiana Journal of Global Studies, 2000, 519-548.

citizenship.⁷⁹⁴ However, this thesis argues that it is an inevitable part of the evolution and expansion of citizenship in a globalised world that states have had to embrace the idea that their citizens can be citizens of another state. That is, as states begin to open up and allow their citizens to participate across the world, eventually, it appears other states follow.

The introduction of dual citizenship was seen by the Slovenes as continuing down the road to membership and meeting the requirements of the European Union leading up to membership in 2004.⁷⁹⁵ From a unification perspective the state was wanting to provide a pathway (for those Slovenians abroad that had a connection with the state) to citizenship. There was a minor change to article 5 allowing an application for citizenship to be submitted with a Slovenian Embassy abroad.⁷⁹⁶ The fifth paragraph, second sentence of article 10 was changed to read 'evidence of compliance with this requirement, the alleged cause of failure for the test shall be carried out by experts'. The legislation also determined that a person is residing in Slovenia when that person is physically present in the territory. Additionally, it would also require a person to determine where the center of their interests would be (this would be assessed on the basis of that person's professional, economic, social and other ties, which indicate that the person and the Republic of Slovenia have a close and lasting connection). Article 13 was amended to allow the Ministry of Interior to have determination and jurisdiction on decisions of citizenship.⁷⁹⁷ Article 27 set out the requirements for submitting an application of loss of citizenship, and a minor change was inserted to clarify the notification statement where the application may be submitted to either an Embassy abroad or the local Administrative Unit within Slovenia.⁷⁹⁸ The changes largely focused on ensuring appropriate administrations of the laws by officials. It is argued that the laws for administering citizenship also contribute to national identity because all officials must make decisions as consistently. That is, in the early period of administering citizenship law in Slovenia, it was largely left to local administrative units that are similar to local councils in Australia. This was problematic because if the Australian citizenship laws were administered by local councils, the potential for errors in decision-making and a lack of consistency would arise. The state cannot have an official in Maribor administer the laws differently to an official in Koper. The remaining minor amendments of 2002 focused on numbers and word changes. They do not directly relate to

⁷⁹⁴ Peter Spiro, *Dual Nationality and the Meaning of Citizenship*, Emory Law Journal, 1997, 46-50.

⁷⁹⁵ Felicita Medved, *Unified Slovenian Nation: Slovenian Citizenship Policy towards Slovenians Abroad*, In Gyöző Cholnoky, Zoltán Kántor, András Ludányi and Eszter Herner-Kovács, *Minority Studies Special Issue Trends and Directions of Kin-State Policies in Europe and Across the Globe*, Lucidus Kiadó, 2014, 153- 184.

⁷⁹⁶ Law on the Citizenship of the Republic of Slovenia, Official Gazette (ZDRS-OCT1) 7/2003. Article 12 replaced the word two with the word three.

⁷⁹⁷ Ibid.

⁷⁹⁸ Ibid, after the first paragraph, the second paragraph is added to read as follows: Statement of the notification referred to in the preceding paragraph may be filed with the embassy of the Republic of Slovenia abroad or in the administrative unit.

national identity, but they provide a complete understanding of the legislative change undertaken and footnoted below.⁷⁹⁹

Despite Slovenia becoming a member of the European Union in 2004, there was no requirement to amend its citizenship laws because the impact on its citizens pertained to the rights afforded to all citizens of the European Union. Consequently, Slovenia was required to undertake a comprehensive law reform program across all policy areas that included, but not limited to, agriculture, environment, health, education, transport, financial and banking. Since the fall of Yugoslavia, Slovenians had experienced three separate currencies', the Yugoslav Dinar, Slovenian Tolar and the Euro. The Prime Minister Janez Janša reinforced to Slovenian citizens (at home and abroad) Slovenia's past, its national identity and independence even though they were part of the European Union. He stated in celebrating Independence Day:

'Slovenia's autonomy was built over the course of centuries. The past was marked by Carantania, the Freising Monuments, the peasant uprisings, Trubar, the United Slovenia project, the national resistance against Fascism and Nazism, and the opposition to communism. Slovenia fought for religious freedom and resisted the attempts to denationalise literature classes in schools. The decision 14 years ago to independence was done so in the most democratic manner, through a plebiscite in which the whole of Slovenia's population expressed support for its establishment. The fall of the Berlin Wall was symbolic and a real milestone which enabled tectonic political and geostrategic shifts in Europe and the world at large. It ended the cold war and a year later on 1990 the parliamentary party and leadership of DEMOS, headed by Dr Jože Pučnick, seized the initiative of Dr Peter Jambrek and formulated a proposal for holding a referendum on an independent Slovenia...governed by the rule of law. Today Slovenes live in a time aspired to and predicted with such clairvoyance by our greatest poet France Prešeren in his poem Zdravljica, which became the national anthem. Since the time these words were written, the Slovene nation has undergone great and bloody trials. It has had to defend its origin, its land and its freedom in three wars, before its dream came true.....'¹³¹

The importance of this speech in 2004 and marked not only the historical connection of the development in the Slovenian identity over many centuries. The reference to Carantania, the Freising Monuments, the peasant uprisings, Trubar, the United Slovenia project (discussed

⁷⁹⁹ There minor changes to articles 15, 22, 32, 37, 43, 44 and 46. Article 15, number '40' deleted the word 'or' and the number '41'. The 1st paragraph in article 16 the words 'set aside the decision of the words 'within three years after it is delivered'. The 2nd paragraph in article 18 the words 'a state administrative body responsible for defence matter' were replaced by 'the ministry responsible for defence matter'. In article 22, the third paragraph, the words "a state administrative body responsible for social security" is replaced by "the ministry responsible for family and social affairs". In paragraph 27 of article 32 the words "a state administrative body responsible for internal affairs" was replaced by "the ministry responsible for internal affairs". Additionally, the words "a state administrative body competent for internal affairs" was replaced by "the Ministry of the Interior." The first paragraph of article 35, the words' internal affairs bodies "shall be replaced with the word" police". In the second paragraph of article 36 the words 'internal affairs bodies was replaced with the word 'police'. In both article 37 and 44 the words 'administrative unit' replaced the words 'the interior competent authority of the municipality'. The number 40 was deleted the word 'and' as well as the number 41, in article 42. Article 43 the word 'competent administrative unit' replaced the words 'competent municipal body'. In article 46, the phrase 'a republican administrative body responsible for internal affairs' was replaced with 'The Minister of the Interior'. These changes had no effect on national identity, but clarified important provisions in the legislation to ensure the law was current and effective.

chapter two) go back well before Yugoslavia and independence in 1990. The speech acknowledged in the same way that Australia does, Slovenian's involvement in war and conflict, and what it means to be Slovene. Thus, citizenship law was not exclusively used by Slovenia to further develop its national identity. Importantly, the speech emphasises that by embracing democracy, the rule of law, the national anthem including national days all form part of what it means to be a Slovene. Additionally, the speech noted the Slovenians at home and abroad (the diaspora) are both important to the identity of the state. The reference to Dr Jože Pučnik and Dr Peter Jambrek was a clear acknowledgement of the important work these two people have contributed to the formation of the current day national identity of Slovenia.

In the same year Slovenia adopted the *Implementation of the Principle of Equal Treatment Act 2004*⁸⁰⁰ which coincided with membership to the European Union, and was the umbrella act in the field of non-discrimination. The legislation prohibits direct and indirect discrimination, harassment and victimisation. Apart from these principles being European Union norms, they would play a significant role in further protecting and enhancing the political participation of women in Slovenian political life. The economies of both Slovenia and Australia had done well from 2000 to 2004. Slovenia upon joining the European Union, subsequently inherited citizenship, immigration, rights and private international law of the Union. Both states continued to strengthen and retain their historical connection of national identity while allowing their citizens to participate regionally and globally. However, the world was experiencing a different phase of conflict. There was a shift from the traditional notion of war between states to the rise of individuals taking action against citizens of other states. Terrorism was on the rise and Slovenia and Australia responded by strengthening their citizenship and immigration laws. This, in turn, would assist both states in reaffirming their respective nation identities not only to the world, but also, to their citizens. This approach would continue to be taken through to 2015.

2005 - 2008

Australia

In 2005, the Australian citizenship laws would be amended again. In 2002, Australia and Australians were directly affected by bombings that occurred in Bali, Indonesia, with many Australian lives lost. As a result, there was a significant security response by the Australian Government between 2005 and 2007. The citizenship laws were amended in 2005 to require the collection, use and storage of personal identifiers.⁸⁰¹ However, further changes and a greater focus on national security was introduced as part of the 2007 Citizenship Act, being introduced.

⁸⁰⁰ Principle of Equal Treatment Act 2004, Official Gazette of the Republic of Slovenia 50/2004.

⁸⁰¹ *Australian Citizenship Bill 2005 (Transitionals and Consequential)*, Parliament of Australia, Department of Parliamentary Services, 2005, Nos 72-72, 1-19.

This was reaffirmed by the Prime Minister John Howard who announced the need to strengthen the state's terrorism laws and extend the waiting period for citizenship.⁸⁰² Australia took a cautious and restrictive approach that included measures to ensure a person applying for citizenship had basic knowledge of the English language, and increased the residential qualifying period from two years in the previous five years, to three years. It is argued that the government was expressing to its citizens, future citizens and immigrants that the English language was an important part of the state's identity. Additionally, the reference to Australia's values was an attempt to not only unite the people but also send a message to the amalgam of ethnic groups within Australia and abroad that the state has embraced certain values that must be adhered to. These values include, but are not limited to, pulling together through adversity and mateship, along with the historical connection with Britain.

Multiculturalism

Domestically, Australia was grappling with multiculturalism. There were riots in Sydney, which spread to other parts of the country, with people expressing their displeasure at the perception of some ethnic groups in the community not conforming to the Australian way. The distinction was made between people born in the country to those who were not (*'we grew here you flew here and go home'*). This attitude by some had seen the rise of xenophobic behavior creeping into the community.⁸⁰³ Apart from identifying the lack of understanding from all sectors of the community in relation to the different cultural mix that makes up the Australian society, what stood out was the complex position that government policy had taken. For instance, for more than fifty years Australia had opened its doors to migrants, while at the same time holding on to its identity and historical connection to Britain. This balance will continue in Australia as it allows large numbers of immigrants to enter and reside in the country annually. Xenophobic behavior and race violence is not limited to Australia and has also been present across Europe and in smaller pockets of Slovenia. Xenophobic behavior in Slovenia has largely occurred in the workplace in the form of discrimination.⁸⁰⁴ However, this may change with the huge influx of refugees into Slovenia and Europe in 2015 as a result of the Syrian conflict (discussed **chapter five**). The impact that 'other ethnic' groups have on national identity cannot be underestimated. Australia's traditional 'white' policy officially lasted for more than fifty years. However, with the increased acceptance of other nationalities, it could be argued that the national identity today is blended. Even so, and while multiculturalism is alive and well in Australia and to a lesser

⁸⁰² *Australian Citizenship Bill 2005 Australian Citizenship (Transitional and Consequential) Bill 2005*, Law and Bills Digest Section, Parliament of Australia, Department of Parliamentary Services, 2005, <http://www.aph.gov.au/binaries/library/pubs/bd/2005-06/06bd072.pdf>, accessed 20 February 2014.

⁸⁰³ Clemence Due and Damien Rigs, *We Grew Here You Flew Here: Claims to Home in the Cronulla Riots*, , Colloquy text theory critique, Monash University, 2008, 1-5.

⁸⁰⁴ European Union, Report on Racism and Xenophobia in Member States, European Union Agency for Fundamental Rights, 2007.

extent in Slovenia, both states have placed a great emphasis on language. This thesis argues that while language has and continues to be used as a core principle in national identity and citizenship, it sits awkwardly with the concept of multiculturalism. Furthermore, this thesis argues that the citizenship laws appeal to one sector of the community. That is, those foreigners who arrive legally into the state and take out citizenship. It does not account for the long term residents who arrive and stay in the state. However, in practice it would be difficult to survive in Slovenia without a basic knowledge of the Slovene language. In Australia, the person could rely on their individual networks to get by, and never fully understand and converse in English. The resulting effect has seen both states citizenship laws require a person to have a knowledge of the official state's language, which reaffirms national identity of both states.

Adoption

In addition, changes were made to take into account citizenship of people who were adopted in accordance with the Hague Convention on Intercountry Adoption.⁸⁰⁵ Adoption, enables couples to establish a family, which is a right under European Union law (discussed **chapter four**). International adoption adds to the citizenry, and enables people from other countries and cultures to become an Australian citizen. However, it is argued that international adoption would have very little impact to national identity.

By 2006, the *Transitional and Consequentials Bill 2006* largely applied amendments to other Commonwealth legislation in Australia such as the *Australian Passports Act 2005* and *Administrative Appeals Tribunal Act 1975* amongst others, to recognise the enactment of the *Australian Citizenship Act 2006*.⁸⁰⁶

In an Australian Day address, the Prime Minister stated:

'Nations experience different levels of cultural diversity while having a dominant cultural pattern running through them. In the case of Australia, that dominant cultural pattern comprises of Judeo-Christian ethics, the progressive spirit of enlightenment and institutions and values of British political culture'.⁸⁰⁷

Importantly, although Australia continues to develop a national identity of its own, there is still a concerted effort to maintain and strengthen the historical values and political culture that had

⁸⁰⁵ Supplementary Explanatory Memorandum, House of Representatives, http://www.austlii.edu.au/au/legis/cth/bill_em/acacb2005598/memo_1.html, accessed 20 December 2012.

⁸⁰⁶ *Australian Citizenship (Transitionals and Consequentials) Bill 2006*, House of Representatives, The Parliament of the Commonwealth of Australia. Other legislation amended included *Age Discrimination Act 2004*, *Air Navigation Act 1920*, *Australian Security Intelligence Organisation Act 1979*, *Migration Act 1958*, *Commonwealth Electoral Act 1918*, *Commonwealth Serum Laboratories Act 1916*, *Consular Privileges and Immunities Act 1972*, *Crimes Act 1914*, *Criminal Code Act 1995*, *Diplomatic Privileges and Immunities Act 1967*, *Electronic Transactions Act 1999*.

⁸⁰⁷ John Howard, *A Sense of Balance: the Australian Achievement in 2006*, Australia Day Address to the National Press Club, the Great Hall, Parliament House Canberra, 2006.

been inherited from Britain. Not only has this been reflected in the national policy discourse of the Australian Government since Federation, but it is also reflected in the constitution and national laws of citizenship and immigration.

Slovenia

There were no major policy changes for the citizenship laws of Slovenia in 2006.⁸⁰⁸ In the same year, a working group was established to identify changes to the naturalisation and clarify record keeping requirements.⁸⁰⁹ Article 4, paragraph 6 included 'that was not sentenced to a term of imprisonment of more than three months, or that he has not been given a suspended sentence of imprisonment with a probation longer than a year. The 2nd point in the 4th paragraph was amended to read 'if the person has successfully completed a state approved program of secondary education in the Republic of Slovenia. The 4th point dot was replaced by a semicolon, and the following was added 'if the person has completed primary or secondary school with Slovene language as instruction in areas inhabited by indigenous members of the Slovenian minority in neighboring countries'. The 5th paragraph, second sentence added the text to read 'evidence of compliance with this requirement, the alleged actual state of incapacity to perform the examination is carried out by experts. Costs incurred due to the implementation of this evidence, the burden of the person'. The minor changes of costs were to ensure that the state would not be liable. The change requiring the completion of primary school, was to ensure that the person understood the Slovene language. Today, Slovenia continues to value the language as one of its single most principles to retain its national identity.

Naturalisation

Naturalisation is a pathway to citizenship in both states. By a state requiring a person to meet the requirements of their naturalisation process, it is the state expressing national identity. Article 11 guaranteed that a person who had applied for citizenship by naturalisation would do so, provided they had met the requirements set out in article 10. That is, the individual would need to be 18 years old and have been residing in Slovenia for ten years (and 5 years prior to the submission of the application must be continuous). Additionally, the person was required to have a command of the Slovenian language, posed no security threat to the state and fulfilled all their tax obligations.⁸¹⁰ Slovenia was imposing restrictive measures that excluded people from automatically obtaining citizenship. This policy approach strengthened Slovenia's national identity by ensuring individuals had a longer stay on the territory, which translated to a better

⁸⁰⁸ Law on the Citizenship of the Republic of Slovenia, Official Gazette (ZDRS-D) 127/2006.

⁸⁰⁹ Felicita Medved, EUDO Citizenship Observatory, *Country Report: Slovenia*, 2013, 20-27, <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-24-Slovenia.pdf>, accessed 20 February 2014.

⁸¹⁰ Law on the Citizenship of the Republic of Slovenia, Official Gazette (ZDRS-D) 127/2006.

understanding of what it meant to be Slovenian. Article 11, 1st paragraph added a new second, third and fourth paragraphs to include 'Against the assurance of the preceding paragraph may be filed'. Before deciding on the naturalisation of an alien who submit proof of eligibility of 2 the first paragraph of 10 of the Act, the competent authority shall re-examine the conditions of 6 and 8 the first paragraph of 10 of the Act. If the applicant does not meet the conditions set out in the preceding paragraph, the application may be rejected. Further minor amendments were included to clarify the conditions in relation to naturalisation.⁸¹¹

Central Registry

Article 30 was changed to require that personal information in relation to an individual's citizenship to be collected by central registry. This includes the identity number, gender, permanent or temporary residence status, occupation, schooling, citizenship by naturalisation name and date of birth. Additionally, article 31 changes related to information on citizenship for citizens of the Republic of Slovenia is collected and further processed in the base register in accordance with the purpose of collection and further processing of personal data in the base register under the provisions of the law governing the register. Article 37, the amendments related to the keeping of records by the Ministry of Interior and Administrative Unit in relation to citizenship obtained by naturalisation, or on the basis of international treaties. Article 41, the number 23 was replaced with the number 36. Article 43, the words 'birth' was replaced with the words 'the register', the word 'Registers' but by 'regulating the entry in the register'. Article 44, the emended article related to the issuing of a certificate of citizenship by the state no matter where the person was resident. The changes were aimed at unifying Slovenes⁸¹² who could demonstrate an active link to the Republic by being part of an association or a Slovenian language school.

⁸¹¹ There were minor changes made to articles 12 and 27. The 1st paragraph of article 12 was amended to read 'the competent authority may, if it is in line with the national interests, at the discretion adopt the citizenship of the Republic of Slovenia, Slovenian emigrants and their direct descendants to the fourth generation in a straight line, if they have resided in the Republic of Slovenia for at least one year. In the third paragraph the word 'two' and replaced this with the word 'three', and at the conclusion of the paragraph the following was inserted 'it is considered that the continuous residence requirement is satisfied, even if the person is not physically present in the territory of the Republic of Slovenia for reasons which on its part or on the side of the spouses are not considered terminating the stay'. In the fourth paragraph the words 'condition of 2, 10 points Article 'the words' and the condition of continuous residence in the preceding paragraph'. Articles 27a, 27B, 27c, 27d, all relate to an application being submitted for citizenship and the administrative processes of how and where that application can be submitted (whether abroad or to an Administrative Unit). Additionally, 27B provided that a decision made by the administrative unit can be reviewed by the Ministry of Interior.

⁸¹² Official Gazette of the Republic of Slovenia, No. 45/2010.

National Council of the Republic of Slovenia

In 2007, the National Council of the Republic of Slovenia which represents local interests lobbied for the citizenship laws to be changed. The National Council is the representative body for professional and local interests and articles 91 to 101 of the Slovenian Constitution outlines the Council composition, power, election, decision-making, immunity and rules of procedure. The National Council, consisting of forty members includes the upper chamber of the parliament that represents the social, economic, professional, local and territorial interests of the state.⁸¹³ The Council was established to neutralise political parties involved in the legislative process in the National Assembly.⁸¹⁴ The rules and procedures established by the National Council assign matters and decides on jurisdictional disputes between the National Council Commission.⁸¹⁵ As a result, article 13a was finally repealed,⁸¹⁶ thereby allowing an individual over the age of 18 to obtain citizenship by naturalisation. However, it was on the condition that the individual was of Slovenian origin, having one parent who was Slovene. Additionally, the parent must have had their citizenship renounced, dismissed or invalidated due to historical circumstances such as the break-up of the former Yugoslavia.⁸¹⁷ The proposal resulted from discussions at the National Assembly's Committee of Interior Affairs, Public Administration and Justice from the Slovenian diaspora in Argentina, Australia, Brazil and Canada. The diaspora put forward the amendment, which was promised by Slovene politicians.⁸¹⁸ The important contribution the diaspora community has made to strengthening the Slovenian identity cannot be underestimated (discussed later in this chapter). Comparatively, the diaspora of Slovenia has been very active in Slovenian political affairs and the development of citizenship, when compared to the Australian diaspora. The involvement of the diaspora has gone some way to reaffirming the Slovene identity abroad.

⁸¹³ Ibid.

⁸¹⁴ Ibid.

⁸¹⁵ Dušan Štrus, *Poslovník Državega sveta s komentarjem*, The National Council of State, Slovenia, 2009.

⁸¹⁶ Law on the Citizenship of the Republic of Slovenia, Official Gazette (ZDRS-OCT2) 24/2007.

⁸¹⁷ Ibid, the Government of the Republic of Slovenia shall preliminarily state their opinion on the acquisition of citizenship of the Republic of Slovenia pursuant to the preceding paragraph.

⁸¹⁸ Felicita Medved, EUDO Citizenship Observatory, *Country Report: Slovenia*, 2013, 20-27, <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-24-Slovenia.pdf>, accessed 20 February 2014.

Australia

Citizenship Testing

In 2006, the Australian Government released a discussion paper, *Australian Citizenship: Much more than a Ceremony*, which sought community views on whether citizenship testing should be implemented. It was noted that citizenship as being the single most unifying principle that lies at the heart of the national identity.⁸¹⁹ Citizenship testing was identified as a way to promote the values of Australia and what it means to be Australian. The test consists of 20 multiple-choice questions drawn randomly from a pool of confidential questions that focused on the responsibilities and privileges of Australian citizenship.⁸²⁰ The policy approach also linked testing to assist immigrants to integrate into the Australian community. This was done by expanding the knowledge and values of Australia and its identity.⁸²¹ Integration was considered to be easier where a person has an understanding of their responsibilities and the privileges that are afforded to them by having Australian citizenship. Furthermore, it is argued testing is also exclusionary because those who do not pass the test are potentially excluded from citizenship. The *Australian Citizenship Amendment (Citizenship Testing) Bill 2007* was introduced. Section 19 was changed to require that an applicant in order to meet the eligibility requirements in s21(2) must have successfully completed a citizenship test. Section 21 of the Act was amended to reflect and ensure an individual successfully completes the citizenship test before submitting an application. A pass mark of 50% was required to determine whether the individual had successfully completed the test. This inclusion ensured the individual had a basic understanding of the English language.⁸²² Section 23A was a new subsection that was introduced to enable the Minister to approve in writing the citizenship test. Subsection 40(1) was replaced and extended the power in section 40 to also apply to a person who has sought to sit a test approved in a determination under the new section 23A. Technical and consequential amendments were made to ss40 (3) by omitting 'paragraph (1)(b)' & (4) omitted 'paragraph (1)(c) which was substituted with paragraph (1)(e). New subsection 46(1A) provides that the fee prescribed by the regulations for applications made under section 21 of the Act, in relation to persons who have sat a test or tests approved in a determination under new section 23A. This new section allows for some or all of the costs of a person sitting a test or tests to be recovered. New subsection 53(2) provides that the Minister's power to delegate any of the Minister's powers or functions under the Act or regulations made under the Act does not apply to the Minister's function under

⁸¹⁹ Australian Government, *Citizenship: Much more than a ceremony*, discussion paper considering the merits of introducing a formal citizenship test, 2006, 2-5.

⁸²⁰ Kevin Andrews, *Second Reading Speech*, Minister for Immigration and Citizenship, Australian Citizenship Amendment (Citizenship Testing) Bill 2007, House of Representatives, Debates, 30 May 2007, 2-3.

⁸²¹ Australian Citizenship Amendment (Citizenship Testing) Bill 2007, Explanatory Memorandum, House of Representatives, the Parliament of the Australian Commonwealth of Australia, 1-6.

⁸²² *Ibid.*

new subsection 23A(1) to approve a test by written determination for the purposes of subsection 21(2A). These changes are administrative and allow the government to effectively manage the test. The test is seen as an important part of what it means to become and Australian citizen. The test enables the person to understand the values and identity of Australia.

The introduction of the citizenship test has in the eyes of Stephen Castles *et al* undermined the Australian policy of multiculturalism.⁸²³ However, citizenship testing has become an important aspect of Australia expressing a small part of its identity. That is, it requires a person to engage with and understand a small component of what it means to be Australian, and therefore, could be seen to strengthen multiculturalism overall. It allows a person from a different ethnic background to not only be aware of their own ethnic values but also Australia's. This can only benefit all. Australia has embraced an amalgam of ethnic groups that form part of Australian society. The diversity of Australian society is seen in the fact that it is a nation where forty-five percent of the population were born overseas, with more than 300 languages spoken by people from 230 different countries.⁸²⁴ The Prime Minister, John Howard, stated 'citizenship provides an opportunity for people to maximise their participation in society and to make a commitment to Australia's common values, which includes the respect of the freedom and dignity of the individual, our support for democracy and commitment to the rule of law'.⁸²⁵

The Minister for Immigration at the time, Kevin Andrews expressed the importance of the national identity and the historical foundation of that identity, in the speech to the Australian Parliament in relation to the Bill. He stated:

'[t]he material which will form the basis of the citizenship test will highlight the common values we share, as well as something of our history and our background'.⁸²⁶

The changes made it more difficult for an individual to obtain citizenship in Australia. The Prime Minister and Minister for Immigration and Citizenship were also sending a clear message and reference to Australia's past that includes the connection to Britain, but also the multicultural society Australia has become.

⁸²³ Stephen Castles, Elle Vasta, Dya Ozkul, *The Internal Dynamics of Migration Processes and their Consequences for Australian Government Migration Policies*, Working Paper for the Department of Immigration and Citizenship, University of Sydney, 20012, 1-16.

⁸²⁴ Laurie Ferguson, *Diversity of Australia's People*, Media Release, Parliament House, 26 November 2008, www.minister.immi.gov.au/parlsec/media/media-release/2008, accessed 10 June 2014.

⁸²⁵ Mark Nolan and Kim Rubenstein, *Citizenship and Identity in Diverse Societies*, Humanities Research, Vol XV. No 1. 2009, 29.

⁸²⁶ Kevin Andrews, Minister for Immigration and Citizenship, Second Reading Speech, Debates, House of Representatives, 30 May 2007, 3.

The *Australian Citizenship Act 2007* is the principal legislative instrument today that provides for the acquisition and loss of citizenship. The *Australian Citizenship Regulations 2007* were also implemented in the same year, however, the regulations will not form part of this research because they support the administration of the principal Act. The introduction of the *Citizenship Act 2007* saw the entitlements to citizenship being changed from the 1948 Citizenship Act. Firstly, a person automatically assumes citizenship of Australia at birth. Secondly, a person can apply for citizenship by descent or if adopted under the Hague Convention on Intercountry Adoption, or bilateral agreement between Australia and a third country.⁸²⁷ Kim Rubenstein highlighted that the 2007 Act was a complete restructure from the former 1948 Act, upon the recommendations from the Australian Citizenship Council's Report: *Australian Citizenship for a New Century*. The 2007 Act moved away from the terminology used to describe the concepts of obtaining citizenship by birth, adoption or descent to automatically assuming citizenship at birth. Even so, there was little changes to the actual content of the legislation, and the changes were largely structural to bring the legislation in line with the modern day drafting.⁸²⁸ Sir Ninian Stephen highlighted in 1993 that the citizenship laws should spell out our own understanding as citizens of our nation and tell us who are our fellow citizens.⁸²⁹ The 2007 Act, similar to its predecessors does not achieve this because it does not contain a history of the way Australian citizenship could be acquired. Moreover, by the end of 2007 similar themes and approaches taken by Australia and Slovenia in the development of their citizenship laws had emerged. The states and their respective identities differ, but language, legal status, unification, integration, participation by men and women had all formed part of their respective citizenship law. The most notable difference had been Slovenia putting the past socialist system behind them and embracing modern day democracy. Additionally, Slovenians were now part of the European Union. While their identity had been retained they were now part of a supernational polity and were required to implement European Law into their domestic national laws (discussed **chapter four**). Australia, however, had begun to think about expanding its citizenship. The introduction of the 2007 Citizenship Act in Australia resulted in national security provisions being introduced that applied to citizenship by descent, adoption, conferral and resumption. This, in itself reaffirmed Australia's national identity to the world and to its citizens by stating that it would not allow anyone or everyone into the state. A future citizen was required to understand the values and what it meant to be an Australian.

⁸²⁷ Kim Rubenstein with Jacqueline Field, *Australian Citizenship Law*, 2nd ed, Thomson Reuters, 2017, 127-130.

⁸²⁸ Ibid.

⁸²⁹ Ibid.

2008 – 2013

Slovenia

With an election looming in 2008, the ongoing debate surrounding citizenship in Slovenia continued. Felicita Medved noted that there was a shift in political debate regarding citizenship. Up until 2008, the debate focused on the erased people (discussed earlier in **this chapter**). However, in 2008 the debate shifted to include active citizenship.⁸³⁰ Active citizenship (discussed **chapter one**) promotes participatory democracy by focusing on the integration of foreigners.⁸³¹ The political discourse began focusing on the greater inclusion and cohesion of the states citizenry and newcomers. Additionally, there was also a need to continue strengthening and reinforcing the collective identity of what it means to be Slovenian.⁸³² Thus, it is argued that 2008 was the start of Slovenia shifting its approach to citizenship, from consolidating the legal status of Slovenians within the new state, to integrating and being more accepting of foreigners. However, as discussed in **chapter four**, the constitution had partly achieved this upon independence by expressing a comprehensive set of rights, freedoms and protections to its citizens.

2008 was an important milestone for Slovenia. They held the European Union Presidency⁸³³ and continued the process of integration by meeting the requirements of the European community.⁸³⁴ Slovenia's return to Europe had been smooth when compared to those of the former Yugoslav Republics.⁸³⁵ Croatia for example, only became a member of the European Union only in 2013. None of the other former Yugoslav Republics are close to becoming full members today. Croatia finalised its accession negotiations on 30 June 2011, and signed the Treaty of Accession in Brussels on 9 December 2011. This was followed by approval in the national referendum on 22 January 2012. Croatia completed the ratification process on 4 April 2012. Entry into force and accession of Croatia to the European Union took effect on 1 July 2013. For Slovenia, their national identity while being distinctive to the nation, was being subtly influenced by the broader European community. However, it demonstrated that Slovenia had moved away from its socialist past and fully embraced the democratic principles of the European Union and other European Union member states.

⁸³⁰ Felicita Medved, EUDO Citizenship Observatory, *Country Report: Slovenia*, 2013, 20-27, <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=2013-24-Slovenia.pdf>, accessed 20 February 2014.

⁸³¹ Ibid.

⁸³² Ibid.

⁸³³ European Parliament, Slovenia takes over EU presidency: prime minister addresses European Parliament, <http://www.europarl.europa.eu/sides/getDoc.do?pub>, accessed 1 February, 2011.

⁸³⁴ Jaroslav Jaks, *EU enlargement and current adaptation challenges*, Central European Journal of International and Security Studies, 2010, 125-134.

⁸³⁵ Ana Juncos, *The EU's post-conflict intervention in Bosnia and Herzegovina: (re) Integrating the Balkans and (re) Inventing the EU?* South East European Politics, 2005.

Australia

National identity has become increasingly important to states by reinforcing their respective nationalist principles and values. In today's globalised world, countries want to hold their citizenry closer to the state.⁸³⁶ This was no more evident than in Australia when in 2009 the Australian Government established a committee to review the Australian citizenship test. The aim of the review was to assist the government in examining the content and operation of the test as well as ensuring effective pathways were in place for a foreigner to become an Australian citizen.⁸³⁷ The review found that the test was intimidating and discriminatory and needed to be rewritten in basic English.⁸³⁸ It is argued that with the diverse ethnic groups arriving and residing in Australia, new migrants might never be able to fully understand English. However, it is argued that Australia continues to use English as its working language and is part of the fabric of the modern day Australian identity. The changes introduced a requirement that those applying for citizenship had to sit the test within a specified period of time. A citizenship course was introduced to provide applicants with a chance to understand the test and the types of questions to expect. Further changes were introduced, however they were largely administrative.⁸³⁹

Citizenship in Australia turned sixty in 2009. It was an opportunity for all Australians, whether citizens by birth or by choice, to understand the role that Australian citizenship plays in building a strong, harmonious and unified nation.⁸⁴⁰ The approach taken by government was not to impede or jeopardise those individuals that were physically or mentally incapacitated from becoming Australian citizens. Political participation⁸⁴¹ at the highest levels of government in Australia was recognised and was a momentous event for women. Both the Australian Prime

⁸³⁶ Frank Bechhofer and David McCrone, *National Identity, Nationalism and Constitutional Change*, Palgrave MacMillan, 2009, 1-10.

⁸³⁷ Commonwealth of Australia, *Moving Forward Improving Pathways to citizenship: A Report by the Australian Citizenship Test Review Committee*, 2008, http://www.citizenship.gov.au/_pdf/moving-forward-report.pdf, accessed 2 February 2014.

⁸³⁸ *Ibid.*

⁸³⁹ Minor changes were made to sections 19, 21 and 26. The changes to s19 removed the word 'permanent' to ensure consistency with ss21(3)(d) and 21(3) in relation to physical and mental incapacity. It required a person to take a test and have a basic knowledge of the English language. Section 19G also included consequential changes to s21. The purpose of the new subsection 21(2A) was to remove the 'requirement that a person must sit and successfully complete a citizenship test before making an application' and require the person to sit the test within a certain period of time. Section 21(3B) was also inserted to account for those individuals incapable of understanding the contents of an application, as a result of trauma received outside of Australia. Section 26 (1)(ba) was amended, providing an exemption from having to sit the citizenship test and take the pledge for those individuals who had suffered from torture, trauma, a mental or physical incapacity. A fee was now required to be paid by the individual sitting the test. It is argued that the cost of sitting a test, is a means by which the government is seeking to retrieve its administrative costs. The timeframe for a person to undertake and complete the test ensures that people do not start the test in month one and then complete it twelve months later.

⁸⁴⁰ Chris Evans, *Australia Celebrates Australian Citizenship Day*, Minister for Immigration and Citizenship, 2009, www.minister.immi.gov.au/media/media-release/2009, accessed 10 June 2015.

⁸⁴¹ Ruth Lister, *Feminist Perspectives*, Macmillan: Basingstoke, 1997, 196.

Minister and Australian Governor-General would be both women (Julia Gillard and Quentin Bryce). Slovenia had not had a woman as prime minister of the state since independence. In 2010, the Prime Minister Kevin Rudd expressed the importance of the ANZACs as part of the identity of the country. Rudd stated:

All nations are shaped by their memories and their stories, by their triumphs, tragedies, myths and legends. For Australia, our identity has been etched deeply by what we call ANZAC and nearly a century on, ANZAC has occupied a sacred place in the nation's soul, and shapes what we do in the world.⁸⁴²

The importance of this speech reinforced the notion that in Australia the military plays an important role in shaping, maintaining and strengthening national identity. Even though the speech had nothing to do with citizenship, the words 'shaped by their history' were not only directed at the history of the ANZAC's but also the ongoing history of Australia before, during and after federation. This is an area of difference between Slovenia and Australia. Slovenia does not appear to attach the same level of identity and value to its past military. The only reference to military appears at the time of breaking away from the former Yugoslavia, when Slovenia won the ten-day war. Since independence, Slovenia has not been involved in conflict other than sending military to assist peace-keeping forces in other regional conflicts across Europe, the Middle East and central Asia. On the other hand, Australia, since WWII has continued to be part of and contribute to Allied forces in major conflicts around the world. Most notably, in the past decade has been Australia's contribution to the Iraq and broader Middle Eastern conflicts. Australia has also assisted emerging states such as East Timor, which is located on the doorstep of Australia to the north.

The Australian government introduced the *Australian Citizenship Amendment (Defence Service Requirement) Bill 2012* and *Australian Citizenship Amendment (Defence Families) Bill 2012*. In summary, there were no major policy inclusions as a result of these Bills other than minor changes or words in s21 and substitutions in s23.⁸⁴³ Sections 21(2)(c), 21(3)(c) and 21(4)(d) omitted 'has completed relevant defence service' to include 'satisfies the defence service requirements'. Further amendments were included in 2013. The recognition of defence in Australia's national identity dates back to the First World War (discussed **chapter two**). Today defence continues to contribute to national identity, since Australian citizens represent the country during times of conflict and war.

⁸⁴² Anzac Day 2010 National Ceremony Commemorative Address, Kevin Rudd, Prime Minister of Australia.

⁸⁴³ *Australian Citizenship Amendment (Defence Service Requirement) Bill 2012*.

Sport and national identity

Following vigorous lobbying from Cricket Australia, whereby there was political intervention (a Minister) to allow a former asylum seeker to obtain citizenship and represent Australia in cricket.⁸⁴⁴ Section 22A(9) allows an individual to become an Australian citizen where at the discretion of the Minister in accordance with s22A(1) where there is an administrative error in the assessment of an application for citizenship. Section 24(2) was changed to avoid the split in decision making in relation to an application for citizenship between the Minister and the Minister's delegate.⁸⁴⁵ The common thread of Australia's national identity has been summarised as a 'common commitment to Australian civic values of democracy, the rule of law, respect for the rights of individual men and women and a deep intuitive sense of a fair go'.⁸⁴⁶ Arguably, Australia and Australian's typically being sports lovers had little concern over the political interference on this occasion. However, had the asylum seeker not been a good sports person that had the necessary skills and talent to represent the country, the outcome would most likely have been very different. Sport is commonly used by states to represent and reaffirm to other nation states and their citizens what and who Australia or Slovenia are. This is no more evident when every four years the Olympic Games is held in a different country and most, if not all countries are represented. At this event, Australia and Slovenia are able to display who they are through their respective national colours, uniforms, anthem and citizens.

Birth certificate

The United Nations in 2012 criticised Australia for its failure to fully implement of the Convention on the Rights of the Child.⁸⁴⁷ Citizenship can be acquired by birth in the territory of a state. As discussed later in this chapter the current day laws of Australia and Slovenia reflect this position. The registration of a birth provides the individual with a certificate.⁸⁴⁸ The birth certificate enables a citizen to be fully active within the community and state. For instance, to obtain a passport and travel abroad, the individual must be able to produce their birth certificate. The same applies to gaining full access to a bank and other government services. Therefore, this restrictive measure has been identified by the United Nations as impacting on the citizenship of these people. It is argued that those individuals who do not receive registration of birth are only

⁸⁴⁴ James Glenday, *Fawad Ahmed asylum case: Spin-bowler 'got special treatment' in borderline citizenship case*, 2014, <http://www.abc.net.au/news/2014-01-30/documents-suggest-fawad-ahmed-asylum-case-was-borderline/5225808>, accessed 28 July 2016.

⁸⁴⁵ Australian Citizenship (Special Residence Requirements) Bill 2013, Explanatory Memorandum. The Parliament of the Commonwealth of Australia, House of Representatives, 2013.

⁸⁴⁶ Malcom Turnbull, *My Australia: How it has Changed*, Australian Financial Review, 2013.

⁸⁴⁷ Article 7, 8, 13-17, 19 and 37, Convention on the Rights of the Child 1989, Treaty Series, vol. 1577, p. 3.

⁸⁴⁸ United National CRC/C.AUS/CO/4, General 28, August 2012.

⁸⁴⁸ Birth, deaths and marriages, Victoria Australia, <http://www.bdm.vic.gov.au/home/births/register+a+birth>, accessed 2 September 2015. Birth Registration Slovenia, <https://e-uprava.gov.si/e-uprava/en/zivljenjskeSituacijeStran.euprava?dogodek.id=12594>, accessed 2 September 2015.

partly receiving citizenship of the state. They are not full citizens and able to fully participate (be active) in the community, even though their parents might be. Since the report was tabled the Governments of each of the States has undertaken their own review. The resulting impact to national identity is the exclusion of certain groups and individuals in the community.

In Victoria, for example, there were a number of recommendations to improve the registration and availability of birth registrations and certificates for aboriginal people (active citizenship). Nevertheless, this is another example of the lack of recognition and effort by consecutive governments in Australia towards the aboriginal people. This issue is a very important component of active citizenship and full participation of these people within the community. The lack of registration affects the daily lives of individuals. It is argued that such a restriction does not allow a citizen to be a full and active citizen and participant in the community. It is also argued this is discriminatory in nature, and restricts people's full access to basic rights and participation in society beyond the border of the nation state. State, Territory and Australian governments should undertake a review of this practice every five years. A similar review was undertaken recently in Slovenia and found there were no cases of births not being registered.⁸⁴⁹ Historically, there appears to have been issues with the Rom people in Slovenia, however in more recent times this group of people have also registered all births. It is argued a citizen can only be a full and active citizen when they are able to participate in the community. The exclusion of citizens this way further highlights the discriminatory measures states will take against certain groups in the community. Any element of the law or government practice that excludes active citizenship, dilutes citizenship and in turn dilutes national identity. This is an important point because national identity and citizenship assist the state to include and be inclusive of its citizens.

Women

The rise of equality amongst citizens is part of the daily fabric of society and national identity. There has been a rise and greater acceptance of women in citizenship and society for more than a century. In Australia, the *Equal Opportunity for Women in the Workplace Act 1999* would be replaced with the *Workplace Equality Act 2012*, and its objective is to improve gender equality and promote equal pay for women, along with minimising discrimination of women in the workplace. In 2012, Slovenia's reform program resulted in the Act Amending the State Administration Act,⁸⁵⁰ which resulted in the Office of Equal Opportunities to be dissolved and the functions transferred to the Ministry of Labour, Family and Social Affairs and the newly established Equal Opportunities and European Coordination Service. At the time of undertaking

⁸⁴⁹ Ending Childhood Statelessness: A Study on Slovenia, Working Paper 08/15, European Network on Statelessness, 2015, 18-19.

⁸⁵⁰ Act Amending the State Administration Act, Official Gazette of the Republic of Slovenia 75/2012.

this research, it was difficult to determine whether this administrative change has diluted the progress of women's equality and participation in Slovenian society. Nonetheless, now part of the European Union, Slovenia is obligated to implement the Union norms which include protecting women's rights and their participation in the political discourse of the state. As highlighted throughout this research, Slovenia being a member of the European Union has been able to retain and strengthen its national identity through citizenship law.

2013 - 2015

European Member States [purchasing citizenship]

The traditional means of obtaining citizenship by birth, descent or naturalisation has been tested. In November 2013, Malta allowed citizenship to be purchased for €650,000.00.⁸⁵¹ In December 2013, the Maltese government increased the price to €1,150,000 million and required the individual to invest in real estate and government bonds. The Maltese government settled on an 'Individual Investor Programme' that requires a person to make a contribution to the government's national development and social fund, of € 650,000 for the application, €25,000 for a spouse and minors, and €50,000 for a person over 55 years old. The individual must also purchase €150,000 of government approved securities.⁸⁵² In exchange, the person obtains citizenship and a passport (enabling them to also become a European citizen). However, the Vice President of the European Commission Viviane Reding stated in 2014 that citizenship should not be up for sale.⁸⁵³ In her view, citizenship should only be issued to a person where there is a genuine link or genuine connection to the country in question.⁸⁵⁴ This thesis supports the European Commission and suggests that allowing states to put a price on citizenship will exclude many who do not have the financial resources to pay such a high price. The problem with member states going it alone and implementing these types of programs, is that by default they are affording these people the same rights as other European citizens. For instance, a person could buy their way into Malta and move freely⁸⁵⁵ along with their family anywhere throughout the Union. Furthermore, with such a precedent being set, other nations could establish a similar framework that could result in further dividing citizens within a state. The balance between economic advancement of the state and citizenship needs to be measured

⁸⁵¹ Ayelet Shachar and Rainer Bauböck, *Should citizenship be for sale?* European University Institute, European Union Democracy Observatory on Citizenship, 2014, 1- 20.

⁸⁵² Malta Individual Investor Programme, <http://malta-citizenship.info/individual-investor-program-faq.html#IIP-GRP>, accessed 10 June 2015.

⁸⁵³ Viviane Reding, *Plenary Session debate of the European Parliament on 'EU citizenship for sale'*, Strasbourg European Parliament Plenary, 15 January 2014, <http://www.europarl.europa.eu/plenary/en/newsgasearch.html>, accessed 2 June 2015.

⁸⁵⁴ Ibid.

⁸⁵⁵ Article 21, Treaty on the Functioning of the European Union, Official Journal of the European Union C 326.

against the long-term impact of such a program to the nation state and its citizens. Conversely, those who invest in the state have a positive impact by providing economic opportunity to the citizens and residents. Even so, the impact to national identity can at one level, be purely economic and assist the state in improving its economic credentials to other states and prospective citizens, thus attracting others to invest in the state and take out citizenship. Conversely, and depending on where the investment [funds] are derived, it could have a negative impact on national identity due to ability for money to be legitimized through this process. **Chapter five** argues migration is a pathway to citizenship, and that states including Australia have established similar investment (visas) schemes that enable a person to obtain citizenship.

Slovenia

In 2013 and 2014, Slovenia did not undertake any legislative change in relation to citizenship. However, another milestone had been reached in Slovenia with the appointment of Alenka Bratušek as the first female Prime Minister of Slovenia, since independence. Her term commenced on 20 March 2013 and concluded on 18 September 2014. The full and active participation of women in the Slovenian political process was recognition that the state had embraced the democratic values that had been exhibited across the Europe Union and Australia. As discussed earlier, Australia had already experienced women heading government affairs. Across Europe, there has been a steady acceptance of women as leaders of countries; these leaders include Radmila Šekerinska of Macedonia, Yulia Tymonshenko of the Ukraine, Margaret Thatcher of the United Kingdom, Jóhanna Siguroardottir of Iceland, Jadranka Kosor of Croatia, Helle Thorning-Schimdt of Denmark and Angela Merkel of Germany, to name a few.

At the conclusion of Alenka Bratušek's term as of Prime Minister, Miroslav Cerar was elected to the position. On Independence and Unity Day 2014, Cerar asserted the importance of the national identity, stating:

'that one of the brightest eras in Slovenia's history was at the time of independence, where the people were proud of the national identity and joyful in self-determination and establishing a new state. Slovenians decided to establish a democratic country and the expressed will of the citizens was the political, legal and moral foundation of independence'.⁸⁵⁶

Importantly, the speech referred to the national identity of the state and its citizens to their historical past. Slovenia makes the connection to its independence. Independence marked the

⁸⁵⁶ Speech by the Prime Minister Cerar on the occasion of Independence and Unity Day: 'Slovenia must wake up and start building', http://www.kpv.gov.si/nc/en/press_centre/news/article/252/7604/, accessed 20 August 2015.

transition from socialism to democracy, something Slovenians had been pushing for in the lead-up to 1990 and 1991.

Australia

Citizens Abroad

In 2014 Australia began to look more broadly at regulating the activities of citizens and residents abroad, from a security perspective. It is argued that the postnational concept of citizenship has been expanded by Australia with the introduction of the *Counter Terrorism Legislation Amendment [Foreign Fighters] Bill 2014* into the Australian Parliament. Furthermore, the state has also extended the notion of what its citizens should be from historically shaping their behavior through human rights law and policy to understanding and living the national identity. The Bill reaffirmed national identity by excluding those individual citizens that were engaged in terrorism activities not only within the state, but also beyond. The role citizenship now has within a state has gone beyond a legal status of inclusion and exclusion, to a population tool that shapes the way that citizens are to think about the state and the broader community.

Australia has taken the concept one-step further to regulating the activities of its citizens when abroad. The new laws prevent a person from travelling to areas that have been declared by the Australian Government as areas where citizens or permanent residents cannot go due to the presence of terrorist organisations.⁸⁵⁷ Even though the new legislation does not revoke or cancel a person's citizenship or residence status, they may lose the right to travel outside Australia or re-enter the country in the future. The new law also makes it an offence to advocate and promote terrorism. This approach demonstrates that the government is extending the field of regulation to include the activities of its citizens when abroad. Slovenia has not established similar laws to regulate its citizens' movements abroad in the same way as Australia has done. This action by Australia clearly demonstrates that citizenship law is used by government to strengthen and reaffirm national identity.

⁸⁵⁷ Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Second Reading Speech, 24 September 2014, Senator George Brandis Commonwealth of Australia Parliamentary Debates.

Terrorism

In May 2015, the Australian Government debated whether citizenship should be renounced if the person can be linked to terrorist activities.⁸⁵⁸ Several members of government wanted to apply this proposal to those who held single citizenship of Australia.⁸⁵⁹ Other members of the Australian Government wanted the proposal to apply only to those people holding dual citizenship.⁸⁶⁰ The new proposals ignited constitutional debate within the Australian Government Solicitors Office. On 12 June 2015, the Solicitor General declared the proposed new laws (bill) unconstitutional, because the new powers would directly allow the Minister to exercise discretion and declare a person guilty without a judicial review.⁸⁶¹ Only five days later on 17 June 2015, a senior member of the Cabinet of the Australian Government stated that the proposed changes to the citizenship laws should not be supported if they eroded the rule of law or contravened the doctrine of the separation of powers within the constitution.⁸⁶² It was considered that the ministerial discretion afforded as a result of the changes to citizenship had gone too far, without a conviction recorded against the person who might be stripped of citizenship.⁸⁶³ On 25 June 2015, the *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015*⁸⁶⁴ was introduced into the Australian Parliament for the first time. The Bill stipulated three reasons for the renunciation of a person's citizenship.⁸⁶⁵ These include instances when: the person's actions are inconsistent with the pledge of allegiance to Australia by engaging in specified terrorist-related conduct; the individual fights for or is in the service of a declared terrorist organisation; and/or the individual is convicted of a terrorist offence. The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* is now in force in Australia. The Act applies to those individuals who held dual citizenship. Furthermore, the Act linked the offences to the Commonwealth Criminal Code, whereby the Minister can make a decision to renounce citizenship on the grounds of public interest. In this circumstance, it would involve those engaged in terrorist activities, providing or receiving training, directing terrorist

⁸⁵⁸ Sydney Morning Herald Sun, Cabinet revolt over Tony Abbott and Peter Dutton plan to strip Australians of citizenship, <http://www.smh.com.au/federal-politics/political-news/cabinet-revolt-over-tony-abbott-and-peter-dutton-plan-to-strip-australians-of-citizenship-20150526-gh9q8y.html>, accessed 26 May 2014.

⁸⁵⁹ James Massola, The Age Newspaper, Citizenship Compromise, 2 June 2015, page 8.

⁸⁶⁰ Dual-national Jihadis risk Australian citizenship, SBS Television, <http://www.sbs.com.au/news/article/2015/05/21/dual-national-jihadis-risk-australian-citizenship>, accessed 6 June 2015.

⁸⁶¹ Abbott Government hits legal hurdle over bid to strip suspected terrorists of citizenship, <http://www.msn.com/en-au/news/australia/abbott-government-hits-legal-hurdle-over-bid-to-strip-suspected-terrorists-of-citizenship/ar-BB11tnv?ocid=SKY2DHP>, accessed 12 June 2015.

⁸⁶² Malcolm Turnbull breaks ranks on citizenship, declaring constitution cannot be compromised, <http://www.msn.com/en-au/news/australia/malcolm-turnbull-breaks-ranks-on-citizenship-declaring-constitution-cannot-be-compromised/ar-BB1cEwt?ocid=SKY2DHP>, accessed 17 June 2015.

⁸⁶³ Ibid.

⁸⁶⁴ Helen Irving and Rayner Thwaites, *Australian Citizenship Amendment (Allegiance to Australia) Bill 2015 (Cth)*. Public Law Review, 2015, 143-149.

⁸⁶⁵ Australian Citizenship Amendment (Allegiance To Australia) Bill 2015, The Parliament of the Commonwealth of Australia, House of Representatives, Explanatory Memorandum, 2015, 2.

activities, recruitment of individuals to undertake terrorist activities, and financing and engaging in foreign incursions.⁸⁶⁶ On 24 July 2015, the Commonwealth Ombudsman, Colin Neave, entered the public debate stating that the proposal to strip dual citizens of their Australian citizenship was a legal fiction and could result in people being detained long term.⁸⁶⁷ Neave was concerned that the Bill did not outline or clearly define what standard an official would use to make a judgment as to what constituted conduct that (the) (person's conduct) was (in fact) likened to terrorist activities (planning, operation or assistance).⁸⁶⁸ Kim Rubenstein argued that using citizenship to deal with this issue is inappropriate and would create division among Australians.⁸⁶⁹ This thesis endorses Rubenstein's assertion that citizenship is a 'secure status that affirms a sense of national cohesion and inclusion.'⁸⁷⁰ This is an important point because, similar to European and Slovenian citizenship, citizenship in Australia has also evolved to bring the community together. Australia does not need laws that divide citizens, but rather, laws that continue to unify the citizenry. The Slovenian Parliament has not had to deal with similar proposals of legislative controls for its citizens. However, Slovenia should consider adopting a similar approach to that of Australia.

Australia and Slovenia - Similarities

There are many similarities between Slovenia and Australia in the ongoing development of their respective national identities and citizenship laws. The multidimensional approach taken by both states has seen citizenship go beyond being a mere legal status, to be used as a tool for unification, integration, political participation, rights, maintaining a connection (registration and certification) with a state, active, postnational, civic virtue, universal, and a state directing the citizens to embrace its values. This chapter has confirmed that the legislative changes made by both states have been inclusive, exclusive, post-national, economic, multicultural and ministerial. These principles all contribute to how a state strengthens, retains and enhances national identity.

The exclusive aspect has seen both states requiring knowledge of the language. In the case of Australia, this has been determined by a citizenship test. In Slovenia, to be an active citizen one must be able to converse (verbally and in writing) in Slovene. The exclusive, in the Slovenia context, extended to developing law to ensure language. More importantly, this was extended to include restricting dual citizenship to those individuals who can prove their direct line of

⁸⁶⁶ Ibid.

⁸⁶⁷ Nicole Hasham, *Citizenship strip plan rests on legal fiction*, The Age, 24 July 2015, 4.

⁸⁶⁸ Ibid.

⁸⁶⁹ Louise Yaxley, *Citizenship expert, Kim Rubenstein, questions PM's claim potential terrorists given 'benefit of the doubt'*, The World Today, <http://www.abc.net.au/news/2015-02-17/expert-questions-tony-abbotts-citizenship-security-claims/6129248>, accessed 1 March 2015.

⁸⁷⁰ Ibid.

descent from a Slovenian family. Slovenia has not fully liberalised its dual citizenship laws in the same way as has Australia. The exclusive approach adopted by Slovenia in the early years involved denying citizenship to former Yugoslav citizen's resident in Slovenia at the time of its breakup. Today, Australia has taken the principle of exclusivity to a new level. Australia not only excludes non-citizens, but it may revoke the citizenship of its own citizens who have been proven to be a threat to national security. This is an expression of national identity by Australia sending a message to its citizens and the world that a citizen must accept the values and the rule of law, of the state.

Australia and Slovenia adopted a postnational or multinational (liberal) policy approach to dual citizenship, although differently. The acceptance of dual citizenship appeared to be a balancing act for both states at a time when security was high on the agenda of government. The states were tightening their respective citizenship laws, while at the same time loosening them to allow their citizens to participate, with ease, globally. The economic benefit has resulted in Slovenia accepting those people that can have a benefit to the state. The economic benefit of citizenship also extends to the respective states migration programs. Both Slovenia and Australia undertook reforms of their respective migration programs, at the same time that they reformed their citizenship laws. Their respective migration programs along with dual citizenship form part of what Linda Bosniak describes as multicultural or multinational citizenship (discussed **chapter one**). It is also argued that migration and dual citizenship constitutes the inclusive. Interestingly, Ministerial intervention formed part of the legislative reforms in both Australia and Slovenia. In Slovenia, this extended to the management and continual exclusion of former Yugoslav citizens. Yet, Australia adopted an inclusive approach to allow the citizen to represent the country in sport.

Mary Crock argues that there continues to be confusion about what the Australian identity is.⁸⁷¹ Crock argues that there have been few countries that have been able to build a community and polity as the case has been for Australia.⁸⁷² This is an important observation because Slovenia is similar with Australia in this area. They have been one of the only other few countries that have built a community and nation, even though elements have been inherited from its past rulers. Australia can be best described as multicultural and Slovenia as monocultural. Finally, this section outlined the legislative amendments that Australia and Slovenia made from 1990 to 2015, and described the many amendments that have made a contribution to national identity. Even though some of the amendments did not directly relate to national identity, it was

⁸⁷¹ Mary Crock, *Defining Strangers: Human Rights, Immigrants and the Foundations for a Just Society*, Melbourne University Laws Review, Vol 31, 2007, 1054-1056.

⁸⁷² Mary Crock, *Contract or Compact skilled migration and the dictates of Politics and Ideology*, in *nation Skilling, migration, labour and the law*, in Australia, Canada, New Zealand and United States, National library of Australia, 2002, 49-50.

important that they be highlighted in footnotes to provide a complete picture of the reform undertaken. The next section compares the current day citizenship laws of Slovenia and Australia.

3.3 Citizenship Legislation at 2015

The *Australian Citizenship Act 2007* (ACA) is the principal legislative instrument today that provides for the acquisition and loss of citizenship, in Australia. Justice Mary Gaudron of the High Court of Australia⁸⁷³ stated that citizenship is a concept that is entirely statutory and falls within the citizenship legislation.⁸⁷⁴ In *Te and Dang*, this was also confirmed in relation to aliens entering Australia, whereby the process for naturalisation is statutory based.⁸⁷⁵ In 2015, Jill Sheppard released a report on the 'Australia's Attitude Toward's National Identity' that identified the ability to speak English as an important to what it means to be Australian.⁸⁷⁶ Language plays an important role in national identity. Shepard also stated that other measures of what it meant to be Australian included citizenship, respect for political institutions and the law. The report reinforces the argument presented throughout the thesis that citizenship underpins, contributes to and strengthens national.

Slovenian citizenship is regulated by the Law on Citizenship (LC).⁸⁷⁷ Not only did the new citizenship laws of Slovenia provide an opportunity for the state to unify its citizens, Slovenia was able to for the first time legally define who its citizens would be. Australia on the other had confirmed the legal status of its citizens in 1948, and was already moving towards expanding its laws to include the civic virtues and postnational concepts. The Slovenian Constitutional Court noted that Slovenia is required to regulate citizenship because their population is one of the constitutive elements⁸⁷⁸ of their national identities. Citizenship of the new Slovenia was an opportunity to define an independent national identity,⁸⁷⁹ in a similar way that Australia's first citizenship laws were established in 1948. Today, both states citizenship laws are based on both *ius soli and ius sanguinis*. The citizenship act of Australia states that the parliament recognises

⁸⁷³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) CLR 1, 54.

⁸⁷⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [2005] HCA 35, Justice Kirby noted that citizenship is no more than a statutory status. *Shaw v Minister for Immigration and Multicultural Affairs* (2004) ALR 168. *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

⁸⁷⁵ *Te and Dang* (2002) 212 CLR 170, 180, 188, 194.

⁸⁷⁶ Jill Sheppard, *Australian Attitudes Towards National Identity: Citizenship, Immigration and Tradition*, Australian Centre for Applied Social Research Methods, ANU College of Arts and Social Sciences, Report No 18. 2015, 1-15.

⁸⁷⁷ Law on Citizenship, Official Gazette of the Republic of Slovenia, No. 30.91.

⁸⁷⁸ U-I-89/99, Official Gazette of the Republic of Slovenia, No. 59/99 and OdIUS VIII, 147.

⁸⁷⁹ Felicita Medved, *Unified Slovenian Nation: Slovenian Citizenship Policy towards Slovenians Abroad*, in Gyözö Cholnoky, Zoltán Kántor, András Ludányi and Eszter Herner-Kovács, *Minority Studies Special issue Trends and Directions of Kin-State Policies in Europe and Across the Globe*, Lucidus Kiadó, 2014, 153- 184.

that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.⁸⁸⁰ Additionally, the preamble outlines the policy approach for citizenship that has been approved by the Australian Parliament, particularly to those individuals who apply to obtain citizenship in the country. Thus, a person applying for citizenship has certain obligations such as pledging their loyalty to Australia, sharing its values and beliefs; respecting rights and liberties, and obeying the laws of the country.⁸⁸¹ These principles form part of the Australian national identity. On the other hand, the Slovenian legislation does not have a preamble and has no reference to policy (rights and obligations) for people wanting to be a member of the Slovenian state.⁸⁸² Slovenia could expand its legislation to provide a preamble similar to Australia. The citizenship laws of Australia and Slovenia are gender neutral and do not separate women from men, unlike the early citizenship laws and doctrines of the British common law and French civil law.

3.3.1 Birth and Descent

The current laws as they relate to acquiring citizenship by birth and descent can be traced back to the French Revolution⁸⁸³ for which citizenship could be obtained by a person who was born in France; and at least one of the parents was French. The acquisition of citizenship by birth automatically confirms the legal status of the person and connects them to either Slovenia or Australia.

An individual can obtain citizenship at birth provided the person is born in the territory to a parent that is an Australian citizen. This also includes a parent who is a permanent resident at the time of the birth, or where the person has been a resident for ten years.⁸⁸⁴ Citizenship will not be granted where a parent is an enemy alien and the place of birth was under the occupation by an enemy.⁸⁸⁵ Interestingly, the ACA does not define ‘enemy’ or ‘enemy alien’, and furthermore, the Slovene legislation does not discuss a similar approach to enemy aliens.⁸⁸⁶

⁸⁸⁰ Preamble, *Australian Citizenship Act 2007*, Sections 1, 2, 2A and 3 of the ACA were structural elements of the legislation that explain the commencement dates for particular provisions and the legislation commenced on the day of Royal Assent, on 15 March 2007. The summary in s2A explains where a person can locate the relevant provisions in the ACA as well as citizenship by conferral that is common for those people on permanent residency visas to gain citizenship in Australia. Additionally, s3 defines up to 29 words such as Australia and permanent resident that have been defined for the purposes of the legislation, outside of the traditional definition of the same word with a dictionary.

⁸⁸¹ *Ibid.*

⁸⁸² Article 1, Law on Citizenship, Official Gazette of the Republic of Slovenia 24/2007.

⁸⁸³ Rogers Brubaker, *The French Revolution and the Invention of Citizenship*, French Politics and Society, vol 7, No 3, 1989, 30-32.

⁸⁸⁴ *Australian Citizenship Act 2007*, section 12.

⁸⁸⁵ *Ibid.*, s12 (b).

⁸⁸⁶ *Ibid.*, s12 (d).

Comparatively, Australia recognises that citizenship cannot be granted twice.⁸⁸⁷ The Slovenian law does not.

In Slovenia, both of the child's parents must be citizens at the time of the birth, or one of the parents is a citizen, and the child was born on the territory.⁸⁸⁸ If one of the parents is a citizen of the Republic and the other parent is unknown, or, of unknown citizenship, or the child was born in a foreign country,⁸⁸⁹ they can acquire citizenship in Slovenia. This reinforces Locke's position that 'family is a natural social unit and parents possess dominion over their children' and, a child when born is no subject of any country or government'.⁸⁹⁰ Additionally, there may be situations where a person will be born outside of a state, on a ship or an aircraft.⁸⁹¹ Australian law allows a person to obtain citizenship in this situation.⁸⁹² Article 5 of the Slovenian law provides that a child born abroad where one of the parents has Slovenian citizenship⁸⁹³ can obtain citizenship. It could be argued that the use of the term 'origin' in article 4 could apply to a person being born on an aircraft. In accordance with article 4 (3), provided one of the parents is a Slovene citizen at the time of the birth and the individual was born in a foreign country, they are entitled to citizenship by origin. Ships⁸⁹⁴ and aircraft⁸⁹⁵ are considered to be the territory of the nation state they are registered in. The Slovenia legislation is not clear and may cause confusion to individuals that do not understand the law. Therefore, it would be beneficial for Slovenia to tighten this section to include reference to ships and aircraft.

In the contemporary world, children are being conceived and by artificial conception. Arguably, Australia has recognised the importance of this conception by ensuring the citizenship laws cater for this technology. Doing so, demonstrates that many elements of Australia's citizenship laws have evolved as society and technology have similarly evolved. Under the provisions of s8 of the ACA, a child that has been born as a result of artificial conception with the consent of the husband provided the child is not the biological child of the husband can obtain citizenship. The child must be created with the consent of the husband or defacto partner. The ACA is silent on whether this would apply to a single mother. However, s60B of the *Family Law Act 1975* considers both parents having a meaningful involvement in a child's life as an important factor when artificial conception is involved. Slovenian citizenship law is silent on artificial

⁸⁸⁷ Ibid, s12 (c).

⁸⁸⁸ Article 4, Law on Citizenship, Official Gazette 24/2007.

⁸⁸⁹ Ibid, article 4.

⁸⁹⁰ Peter Schuck and Rogers Smith, *Citizenship without Consent*, The Social Contract, Yale Law School, 1996, 2.

⁸⁹¹ *Australian Citizenship Act 2007*, s7.

⁸⁹² Ibid, s7 (a).

⁸⁹³ Article 5, Law of Citizenship, Official Gazette of the Republic of Slovenia 24/2007.

⁸⁹⁴ Article 91 & 92, United Nations Convention on the Law of the Sea 1982.

⁸⁹⁵ Annex 7, Convention on International Civil Aviation 1944. Article 77 of the convention permits joint operating organizations, 'Common Mark Registered Authority' and "International Operating Agency" to enable an aircraft of international operating agencies to be registered other than on a national basis.

conception. Article 4 allows a person to obtain citizenship where one parent is a Slovene citizen. Slovenia could include a similar provision to Australia to ensure there is clarity in situations that involve a child who has been artificially conceived being able to obtain citizenship.

The acquisition of citizenship at birth is a process within itself. On paper, the individual automatically gains citizenship of the state. However, if born on the territory in Australia to a parent who is neither a citizen of permanent resident, the individual does not automatically assume Australian citizenship. Australia is expressing its national identity by excluding those that do not have parents that are citizens of the state. Thus, reaffirming the central argument of this thesis that citizenship law is being used by states to retain and strengthen national identity. The person must be registered and provide evidence in the form of a birth certificate that details of the birth and the day on which the birth occurred. As discussed above, the importance of a person obtaining registration and a birth certificate enables them to fully participate in the community (the private side of citizenship). If this process is not undertaken, it is argued the person is being excluded from full participation in society and does not have full citizenship of the state.

Descent

Citizenship by descent is a powerful mode for acquiring citizenship of a state when a person's parent or parents are residing in another state. Citizenship by descent can be obtained under Slovenian and Australian citizenship law. However, the conditions that apply within the respective state's citizenship laws vary. It is not necessary for the person to be born in the territory of either state to obtain citizenship in this manner. A person born to an Australia citizen while in France can obtain citizenship of Australia. At least one parent must be an Australian citizen.⁸⁹⁶ This was confirmed by the Federal Court of Australia in 2010 in *Hudson*.⁸⁹⁷ The court in referring to section 16(2) of the ACA stated that the reference to parent in this section was a reference to the child's parent who is an Australian citizen.⁸⁹⁸ The Minister has the power to refuse the application where a person is unable to prove their identity, and where the individual poses a risk to national security.⁸⁹⁹ The person must be 18 years of age, of good character and is not a national or a citizen of another state, at the time of application.⁹⁰⁰ The ACA is silent on the level of descent that applies.

⁸⁹⁶ *Citizenship Act Australia 2007*, s15A.

⁸⁹⁷ *Hudson v Minister for Immigration and Citizenship* [2010] FCAFC 119-130.

⁸⁹⁸ *Ibid*, s16, (2) (a).

⁸⁹⁹ *Citizenship Act Australia 2007*, s17.

⁹⁰⁰ *Ibid*, s16 (2), note that where the parent was an Australian citizen under this subdivision AA, or section 10B, 10C or 11 of the old Act at the time, the parent has been present in Australia for a period of 2 years, or, the person is not a national or a citizen of any country at the time of application.

In Slovenia obtaining citizenship by descent, extends to the fourth generation and must be in direct descent.⁹⁰¹ That is, there must be a clear line of descent from the child to the parent, grandparent and great grandparent. It could be argued that Slovenia continues to allow the nation state to build and retain its identity over the longer term, by ensuring the state is connected to Slovenians regardless of what state in which they reside. This could apply to those people that have permanently migrated to other states and their grandchildren want to become an Australian citizen. Importantly, the legislation is gender neutral and does not discern between male and female in either state. Thus, as the law has evolved the recognition and equality of women in citizenship law has also evolved to ensure there is no segregation of either sex. The Australian Citizenship Act 2007 does not describe a generational principle. Australia should amend the Act and borrow from Slovenia to include a similar provision. Such an inclusion would assist those individuals born to former Australian citizens, now residing in other states to obtain Australian citizenship. This could be an opportunity for Australia to expand its diaspora.

3.3.2 Abandoned or Found Children

The protection of children is not only a parental responsibility but in cases where the child, at birth is abandoned or found, the state has a role to ensure that the child belongs to a state. Section 14 of the ACA allows citizenship to be granted where a child has been abandoned in Australia. This may occur whether the individual has parents that are or are not citizens of the state. However, the legislation states that “unless and until the contrary is proved”.⁹⁰² That is, the commonwealth department responsible for citizenship has the burden to prove otherwise and could be in the form of a birth certificate from another country.⁹⁰³ Where it is found that the child’s parents cannot be located, and they are declared stateless, an application for citizenship can be made under s21(8) of the ACA. However, abandonment in Australia is restricted to post 2007. The Federal Court of Australia concluded that s14 of the ACA 2007 applied only to a child who was found abandoned prior to 1 July 2007.⁹⁰⁴ This was recently reaffirmed by the Federal Court of Australia in *SZRTN*,⁹⁰⁵ whereby the person was deemed not to be abandoned where the individual was born outside of Australia in 1981 and arrived in the state in 1987 in the company of a parent. Within months of arrival the individual was abandoned by the parent and resided with a relative. Slovenia recognises that a child could be ‘found on the territory’ to have unknown parents. In this situation the individual is entitled to acquire citizenship.⁹⁰⁶ Comparatively, the legislation of both states provide a mechanism for the state to manage

⁹⁰¹ Article 12, Law on Citizenship, Official Gazette 24/2007.

⁹⁰² *Australian Citizenship Act 2007*, s14.

⁹⁰³ *Nicky v Minister for Immigration and Border Protection* [2015] FCA 174 at 38.

⁹⁰⁴ *Ibid*, 25.

⁹⁰⁵ *SZRTN v Minister for Immigration and Border Protection* [2015] FCAFC 110.

⁹⁰⁶ Article 9, Citizenship Act of the Republic of Slovenia, Official Gazette of the Republic of Slovenia 24/2007.

situations where a child has been abandoned or found in the territory, and the parents are not known. Arguably, this not only protects the child but also ensures the child does not become stateless.

3.3.3 *Conferral*

Immigration is a pathway to citizenship (discussed **chapter five**). In a globalised world, individuals are moving from one state to another to improve their lives or experience a new culture and surroundings. Migration not only allows citizens to be naturalised in another state, but also, engage with other citizens across international borders in personal activities such as marriage (discussed **chapter six**). The rules of naturalisation between Slovenia and Australia vary. The current process for obtaining citizenship by naturalisation is to enter the state on a valid visa or permit, meet the necessary residency conditions and make an application for citizenship. This can also extend to a person who has previously been in Australia and held a valid visa before leaving the territory.⁹⁰⁷

To obtain citizenship in Australia, an individual must be 18 years of age; be a permanent resident and possess a basic knowledge of the English language. The individual must be able to understand the responsibilities and privileges that come with being an Australian citizen. This is an important point where the state appears to be directing new citizens to meet certain expectations in understanding the Australian identity. The individual must also be of good character and be likely to reside in the Australian territory or continue a close association with Australia.⁹⁰⁸ The person must also meet the residency requirements (discussed **chapter five**).⁹⁰⁹ During the residency period, the person must not have at any stage been in the Australian territory unlawfully.⁹¹⁰ Section 23 of the ACA is another general requirement whereby an individual can obtain citizenship on completion of three months service in the armed forces, or six months in either the Navy, Army or Air Force reserves.⁹¹¹ This further reinforces the level of respect given to people by the people and government of those who contribute to the military. The military has a significant role in Australia's history and the current day national identity. The above conditions also relate to those individuals that are applying for citizenship that have a permanent physical or mental illness, except there is no requirement to undertake duties in either of the armed forces.⁹¹²

⁹⁰⁷ *Australian Citizenship Act 2007*, s5. Australia has described what constitutes permanent residency, to also include special category visas, which are issued for humanitarian reasons, and those individuals who are present in Norfolk Island, or, the Cocos Islands.

⁹⁰⁸ *Ibid*, s21 (2).

⁹⁰⁹ *Ibid*, s22.

⁹¹⁰ *Ibid*, s22 (1) (b).

⁹¹¹ *Ibid*, s23.

⁹¹² *Ibid*, s21 (3).

A person who is aged sixty or over and has a hearing, speech or sight impairment is also eligible to become an Australian citizen, although certain specific conditions apply.⁹¹³ The individual must be of good character, be eighteen years of age and born outside the Australian territory.⁹¹⁴ Citizenship will not be granted where one of the parents is not an Australian citizen. Additionally, citizenship will not be granted where the person holds dual citizenship and is not of good character. An individual who was born in Papua before 16 September 1975 and one parent was an Australian citizen at the time of birth, will be granted citizenship. A person who has been determined stateless can become an Australian citizen.⁹¹⁵ In Slovenia, article 10⁹¹⁶ provides that an individual can apply for Slovene citizenship by naturalisation.

Comparatively, Slovenia's requirements go further than Australia whereby the person must be 18 years of age,⁹¹⁷ have release from their current citizenship or can prove that such a release will be granted if the individual acquires citizenship of Slovenia.⁹¹⁸ The individual must have resided in the Slovene territory for a period of ten years, and five of those years must have been continuous.⁹¹⁹ A comparison is explored further in **chapter five**. Furthermore, the person must prove they have a permanent source of income that is of an amount to sustain themselves while in Slovenia.⁹²⁰ This could be in the form of income derived while working in Slovenia or income and investments they bring with them to Slovenia. Similar to the character test in Australia, the person can apply for citizenship provided they have not been sentenced in the state where they currently reside (origin), or sentenced while present in Slovenia to a prison term no longer than one year.⁹²¹ The requirement to have knowledge of the Slovenian language reinforces the Slovenia's long held position that language is what sets Slovenes apart from others. However, there are exemptions. It is considered that an individual will have met this requirement where they have 1) completed primary school within the Republic; 2) completed a state approved program of secondary education in Slovenia; 3) the person has completed level VI or VII certificate education; 4) the individual is over the Age of 60; and 5) the person has completed primary or secondary school in Slovene.⁹²²

⁹¹³ Ibid, s21 (4).

⁹¹⁴ Ibid, s 21.

⁹¹⁵ Ibid, s21 (8).

⁹¹⁶ Article 10, Law on Citizenship, Official Gazette of the Republic of Slovenia 24/2007.

⁹¹⁷ Ibid, article 10 (1).

⁹¹⁸ Ibid, article 10 (2).

⁹¹⁹ Ibid, article 10 (3).

⁹²⁰ Ibid, article 10 (4).

⁹²¹ Ibid, article 10.

⁹²² Ibid, article 10 (10).

Oath and Pledge

Both states require prospective citizens to undertake the oath⁹²³ or pledge,⁹²⁴ which reinforce the need for new citizens to understand what it means to become an Australian or Slovenian.

The Slovenian oath is:

Loyalty, gives my new homeland, the Republic of Slovenia and the oath I undertake to respect the freedom of a democratic constitutional order of the Republic of Slovenia, values and principles of freedom and democracy, and that I as a citizen of the Republic of Slovenia to meet its duties and obligations. I swear that I will work and support the operation against the free and democratic constitutional order or the existence of the Republic of Slovenia and unlawfully will not undermine the authorities of the Republic of Slovenia or representative bodies. I swear that I will support the operation against the interest of the Republic of Slovenia with the use of violence or acts preparatory to the use of violence.

The Australian pledge is:

From this time forward, under God, I pledge my loyalty to Australia and its people, whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey. From this time forward, I pledge my loyalty to Australia and its people whose democratic beliefs I share, whose rights and liberties I respect, and whose laws I will uphold and obey.

However, in Australia there are exemptions for those under the age of 16, those who are physically or mentally incapacitated and do not understand the nature of the pledge or those who demonstrate a lack of command of the English language.⁹²⁵ A pledge cannot be made before the Minister has approved the individual's application to become a citizen. The person taking the pledge can delay it for up to twelve months where the person has been charged under Australian law, or in the event that the individual holds a valid visa under the *Migration Act 1958* (and that visa has been cancelled).⁹²⁶ Importantly, the naturalisation laws are gender blind and do not separate women from men. Furthermore, the oath of Slovenia and the pledge of Australia refer to the democratic principles that uphold both states. The oath and pledge reinforce the obligations of a citizen towards the respective state. It is argued that by requiring citizens to understand and uphold the principles of the oath and pledge, both states are directing future citizens to participate in and embrace their values. Additionally, it enables new citizens to understand an element of a state's national identity. The modern day democratic state encourages and promotes political participation by all citizens including women. Therefore, new arrivals and citizens to both Slovenia and Australia are assured that there is equality for both men and women. Despite the current approach taken by both states, the 'oath' and 'pledge' could be expanded to include further reference to the respective states national identities. This could include recognising dual citizenship, and the need to continue to maintain their loyalty to

⁹²³ Ibid, article 10(10),

⁹²⁴ Ibid, schedule 1.

⁹²⁵ *Citizenship Act Australia 2007*, s26.

⁹²⁶ Ibid.

the state whether abroad or in the territory. In addition, greater emphasis could be placed on an individual's rights and obligations to the state. For example, an outline of the rights, freedoms and protections could be included in both the Slovenian 'oath' and the Australian 'pledge' to reinforce to prospective citizens that Slovenia and Australia are democratic thereby further informing new citizens of how the state wants them to behave (upholding and implementing fundamental elements of a democratic society) and strengthening their belonging to the state.

Citizenship Test

A person must take a Slovenian language test, both written and oral⁹²⁷ (having a working knowledge of the language). The test⁹²⁸ in Australia is not on the person's ability or level of comprehension of the English language.⁹²⁹ However, in order to undertake the test the person needs to have a basic understanding of the English language. The test consists of about 20 questions that cover the following topics: Australia and its people; the state and territory boundaries, indigenous people, traditional symbols, the coat of arms, national flowers and the national colors of green and gold. The test also covers Australia's democratic beliefs, rights and liberties (citizen's freedoms such as freedom of speech, religious and association). There is also the requirement for a new citizen to have knowledge of the Australian state and government and the law, including the Australian constitution, Head of State, and parliamentary structure (three levels of government: commonwealth state and local) and the courts.⁹³⁰ Individuals must have a pass rate of no less than 75 per cent.

⁹²⁷ Article 10, Citizenship Act 2007, of the Republic of Slovenia, Official Gazette 24/2007.

⁹²⁸ *Australian Citizenship Act 2007*, s23A.

⁹²⁹ Regulation 1.15B, 1.15C, 1.15D, 1.15E, 1.15EA, *Migration Regulations 1994*, outlining the different levels of English that includes; vocational English, competent English, proficient English, concessional English, superior English.

⁹³⁰ Department of Immigration and Citizenship, Practice Test,

http://www.citizenship.gov.au/learn/cit_test/pdf/practice-questions.pdf, accessed 16 December 2011.

The test⁹³¹ demonstrates Australia's commitment to ensuring the national identity is accepted and understood by newcomers. Some of the questions include:

What happened in Australia on 1 January 1901(?): What is the name of the legal document that sets out the rules for the government of Australia; What is a referendum; Which arm of government has the power to interpret and apply laws; Which of these is a role of the Governor-General; Which of these statements about state governments is correct; What is the name given to the party or coalition of parties with the second largest number of members in the House of Representatives.

The test provides the opportunity for the individual applying for citizenship to better understand the values and identity of the state. It is argued that citizenship testing has seen a dramatic shift in Australia to the earlier migration laws of 1900s where there was a dictation test. On the one hand Australia is expressing to new citizens that you must understand and know the identity of the state. On the other hand, Australia is still welcoming large numbers of migrants on to the territory (discussed **chapter five**). As stated earlier in chapter one, while the large majority of both state's populations, people hold citizenship, in the case of Australia there are also large numbers that do not. Permanent residency is a feature of both Australia and Slovenia's legal framework. Testing (language, history and culture), could be imposed on permanent residence every five years. This has a double benefit. It could encourage people to take out citizenship, and also provides a mechanism for the state to push the nationalist agenda and get people to better understand national identity.

Adoption

Naturalisation can also be obtained by a person through adoption, in accordance with the Hague Convention on Intercountry Adoption 1993. Both Australia and Slovenia have ratified this convention in 1998 and 2002 respectively. The convention ensures states establish institutional arrangements so that intercountry adoption is undertaken with the interest and wellbeing of the child being foremost. Article 4 of the Slovenian citizenship laws provide that the state of origin

⁹³¹ Australian Government, Australian Citizenship – Our Common Bond, 2009, 5. The following test questions include; which of these is an example of freedom of speech. Which of these statements about government in Australia is correct. Which of these is an example of equality in Australia. Which of these is a responsibility of Australian citizens aged 18 years or over. Which of these statements about passports is correct. Which of these statements about voting in Australian elections is correct. What happened in Australia on 1 January 1901. What is the name of the legal document that sets out the rules for the government of Australia. What is a referendum. Which arm of government has the power to interpret and apply laws. Which of these is a role of the Governor-General. Which of these statements about state governments is correct. What is the name given to the party or coalition of parties with the second largest number of members in the House of Representatives. What is the name of a proposal to make a law in parliament. Who maintains peace and order in Australia.
http://www.citizenship.gov.au/learn/cit_test/pdf/practice-questions.pdf, accessed 4 January 2013.

has determined the child can be adopted⁹³² and that the child is able to be placed with parents.⁹³³ Additionally, the child will be authorised to enter the state and reside permanently within the territory.⁹³⁴ In accordance with section 13 of the ACA, citizenship can be obtained where the individual has been adopted by two people and only one of those people is an Australian citizen or a permanent resident.⁹³⁵ This form of acquiring citizenship, confirms the legal status of an individual to the state. The process of naturalisation such as testing, language proficiency and length of stay all contribute to national identity. The process provides the individual with a better understanding of the state and its core values, and in turn provides that individual with a sense of belonging. More importantly, the above naturalisation requirements are a reflection of the high value placed on acquiring citizenship by the respective states.

3.3.4 Dual Citizenship

Dual citizenship has increasingly gained acceptance⁹³⁶ from nation states across the world. Joachim Blatter argues dual citizenship creates innovation,⁹³⁷ through the transfer and mobility of citizens, values, culture and heritage from one state to another. In Australia dual citizenship had been subject to review by government in 1976 and 1982.⁹³⁸ However, it did not gain full acceptance in Australia until 2002 and a year later in 2003 Slovenia.

Dual citizenship expands the notion of postnational citizenship, allowing a person to transcend international borders and participate in more than one state. Dual citizenship enables a state to maintain a connection with their citizens while abroad.⁹³⁹ However, dual citizenship has been seen to challenge the nation state.⁹⁴⁰ Historically, single citizenship has assisted states for centuries to maintain control of the territory and its inhabitants.⁹⁴¹ A Slovenian citizen can have citizenship of another state.⁹⁴² Dual citizenship in Slovenia is restricted.⁹⁴³ A foreigner who does not have any connection with Slovenia, cannot obtain Slovene citizenship. Therefore, dual

⁹³² Article 4, Hague Convention on Intercountry Adoption 1993, Hague Conference on Private International Law, Proceedings of the Seventeenth Session (1993), Tome II, Adoption – co-operation (ISBN 90 399 0728 X), 695. Australia signed, ratified and was entered into force in 1998. Slovenia signed, ratified and was entered into force 2002.

⁹³³ Ibid, article 5.

⁹³⁴ Ibid.

⁹³⁵ *Australian Citizenship Act 2007*, s13.

⁹³⁶ Kim Rubenstein and NiaLenagh-Maquire, *Citizenship and the boundaries of the Constitution*, Social Science Research, Legal Scholarship Network, The Australian National University, Law Research Paper, No. 11-15, 2011, 143-153.

⁹³⁷ Joaschim Blatter, *Dual citizenship and theories of Democracy*, Citizenship Studies, Institute of Political Science, University of Lucerne Switzerland, 2011, 769-798.

⁹³⁸ Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co, 2002, 141.

⁹³⁹ Kim Rubenstein, *Chair of the Citizenship Council*, The Australian National University, 2007, 80.

⁹⁴⁰ Marc Morjt Howard, *Variation in Dual Citizenship Policies- in the Countries of the EU*, International Migration Review, 2005, Vol 39. No 3, 697.

⁹⁴¹ Ibid.

⁹⁴² Article 2, Law on Citizenship, Official Gazette 24/2007.

⁹⁴³ Ibid, article 10(3).

citizenship along with single citizenship and immigration is inclusive and exclusive. Apart from states outside of Slovenia and Australia allowing their citizens to obtain citizenship of another state, Slovenia with its current restrictive approach is rather exclusive. Dual citizenship can increase naturalisation rates,⁹⁴⁴ and thereby allows a state to expand its citizenry. However, many scholars oppose dual citizenship as demonstrating a lack of loyalty, resulting in a lack of integration within a state and a reduced sense of national identity. On the other hand, it could be argued that dual citizenship provides the opportunity for skills, knowledge and capacity to be transferred between Slovenia and Australia, thus enhancing national identity. Furthermore, dual citizenship confirms the legal status of the person by two states. In the following subsection, some of the benefits that a dual Slovenian and Australian citizen can enjoy have been identified.

Entry to the EU, Slovenia and Australia

A dual citizen of Slovenia and Australia is entitled to hold a passport of both states. This allows an individual to enter Australia or Slovenia including anywhere in the European Union. For instance, a dual citizen entering Slovenia using their Slovene passport, wherever they first enter the European Union (this could be Germany), obtains immigration clearance and can stay and move freely for as long as they choose, subject to European Union and Slovene national law. However, where the dual citizen only uses their Australian passport entering the European Union and Slovenia (whether as a tourist or other visa type) they will be subject to the restrictions of a non-citizen.

Voting and Standing for Elections

A dual citizen of Slovenia and Australia is eligible to vote in Australian elections, however, under section 44(i) of the Australian Constitution, an individual is not eligible to stand for election in the national parliament (men and women). In *Sykes v Cleary*⁹⁴⁵ the Australian High Court held that those individuals of foreign birth having acquired Australian citizenship and severed links with their country of birth, but having not renounced their foreign nationality would not be eligible under section 44(i) of the constitution to stand for election in the national parliament. Conversely, a Slovenian citizen is eligible to have residence in another member state as well as the right to vote and stand for elections in that member state.⁹⁴⁶ Council Directive 94/80/EC, outlines the arrangements for European Union citizens that are residing in another member state of which they are not a citizen, enabling them to stand as a candidate in

⁹⁴⁴ Thomas Faist and Jurgen Gerdes, *Dual Citizenship in an Age of Mobility*, Migration Policy Institute, 2008, 3 – 20.

⁹⁴⁵ *Sykes v Cleary* [1992] HCA 32; (1992) ALR 577; (1992) 66 ALJR 577 (9 July 1992),

⁹⁴⁶ Article 20 (2), Treaty of the European Union, Official Journal of the European Union C 326/57.

municipal elections.⁹⁴⁷ A dual citizen could also vote and stand as a candidate in Municipal and European Parliament elections.⁹⁴⁸ The European Court of Justice ruled that while a member state could restrict the right to vote and stand in the European Parliament elections, the principle of equal treatment applies and thus a person may stand for election.⁹⁴⁹ However, this is restricted to elections at the municipal level (local government units) and not national elections.⁹⁵⁰ Therefore, an Australian Slovenian dual citizen could stand for local municipal elections in another member state outside of Slovenia.⁹⁵¹ In theory there may be an opportunity for a dual citizen to stand for election to the European Parliament, however, in practice this may never be achieved unless the individual is actually resident in the European Union.

Employment (Civil Service)

A dual citizen is allowed to seek employment in either state. However, it is a little more difficult in practice for an Australian wanting employment in Slovenia, as they would need to be able to converse (read and write) in the Slovene language. It may be a little easier for a Slovene to gain employment in Australia because English is used across Europe and in Slovenia. The rules on employment in the national civil (public) service are controlled by legislation. In Australia a dual citizen would be able to obtain employment in the Victorian and other State public service sectors including local government. In Slovenia, a dual citizen would be eligible for employment within local municipalities. It is usually determined that these employment positions, unlike the national level, do not engage in, or, undertake duties that are in the national interest. However, to be eligible for employment within the Australian commonwealth civil service there is a requirement for a person to be an Australian citizen.⁹⁵² There are exemptions depending on the government department (agency).⁹⁵³ Furthermore, prospective employees must undertake a probation period, security, character and health clearance, and provide formal qualifications.⁹⁵⁴ According to the Slovenian Civil Servant Act, appointment is on the condition

⁹⁴⁷ Council Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not a national, Official Journal of the European Communities, L 368/38.

⁹⁴⁸ Article 22 Treaty on the Functioning of the European Union, Official Journal of the European Union C 83/47. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.

⁹⁴⁹ Case – 300/04 *Eman and Sevinger v College van burgemeester en wethouders van Den Haag* [2006] ECR I - 8055

⁹⁵⁰ Article 2, Council Directive 94/80/EC, laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in Member States of which they are not nationals, Official Journal of the European Communities, L 368/38.

⁹⁵¹ Article 7, *National Assembly Elections Act 1992*, Official Gazette of the Republic of Slovenia, 44/92.

⁹⁵² *Public Service Act 1999*, s22 (8).

⁹⁵³ *Ibid*, s22 (8).

⁹⁵⁴ *Ibid*, s22 (6).

of having citizenship of the Republic and subject to similar security and character testing as required in Australia.⁹⁵⁵

3.3.5 Loss of Citizenship

Gerard René de Groot and Maarten Vink⁹⁵⁶ argue that an important aspect of citizenship law is where an individual loses their citizenship, as this not only allows a state to protect its national interest and identity, but also, protect its citizens.⁹⁵⁷ The loss of citizenship allows a state to continue to reinforce its sovereign right to choose who its citizens will and will not be.

Importantly, the principle of loss of citizenship poses difficulties for states, particularly where an individual who loses their citizenship and may become stateless. In Slovenia, an individual can lose their citizenship by remission, renouncement, deprivation or international agreement. In Australia, the loss of citizenship is different and has been described as renunciation and revocation where it is proved that a person has served in the armed forces of an enemy country.⁹⁵⁸

Renouncing Australian citizenship can be decided by the Minister provided the individual is over the age of eighteen⁹⁵⁹ and must be a national of another nation state to ensure the person does not become stateless.⁹⁶⁰ The renouncement of citizenship cannot be undertaken unless the person can be identified or where the application was submitted in war time, provided Australia is a participant.⁹⁶¹ Furthermore, the Minister may not approve the renouncement of citizenship where it has been determined it is not in the best interest of Australia. The Minister cannot approve renouncing of citizenship unless the person is a citizen of another state, or will become a citizen of another state upon cessation of Australian citizenship.⁹⁶² A person can independently decide to renounce their citizenship in Australia. The Minister cannot approve the person becoming a citizen again during the twelve months from the day the citizenship ceases.⁹⁶³ A person's citizenship may cease where the individual is a citizen of a foreign country and serves in the armed forces of that country in war with Australia.⁹⁶⁴ In Slovenia, a person will be considered a foreign national where they have undertaken foreign military

⁹⁵⁵ Article 88, *Civil Servant Act*, Official Gazette No. 020-05/98-20/8, 2002.

⁹⁵⁶ Gerard René de Groot and Martin Vink, *Loss of Citizenship*, EUDO Citizenship Policy Brief No. 3, Maastricht University and University College Dublin, http://eudo.citizenship.eu/docs/policy_brief_loss.pdf, accessed 9 March 2014.

⁹⁵⁷ *Ibid.*

⁹⁵⁸ *Australian Citizenship Act 2007*, s33 and 34.

⁹⁵⁹ *Ibid.*, s33 (3) (a).

⁹⁶⁰ *Ibid.*, s33 (3) (b).

⁹⁶¹ *Ibid.*, s33 (5).

⁹⁶² *Ibid.*, s33 (7).

⁹⁶³ *Ibid.*, s24 (7).

⁹⁶⁴ *Ibid.*, s35.

service or are employed in a State agency.⁹⁶⁵ While there is no guidance on what is in Australia's best interest, this would be a policy decision for government that would consider economic, security or social issues.

Revoke

Both Australia and Slovenia have the ability to revoke - or in the case of Slovenia - force the loss of citizenship. Revoking (the term used) Australian citizenship can be undertaken by the government in situations where the individual has obtained Australian citizenship either by descent or is a person adopted under the Hague Convention for Intercountry Adoption.⁹⁶⁶ In summary, revocation of citizenship in Australia will occur when a person has committed an offence and been convicted against national or foreign law.⁹⁶⁷ This involves those offences that have been determined serious enough that the individual has been sentenced to death or long term imprisonment. Citizenship may also be revoked where that person has been convicted of the offence of providing false and misleading information when applying⁹⁶⁸, or, providing false and misleading information and documents to the Commonwealth.⁹⁶⁹ On the other hand, in Slovenia an adult citizen who was born and living in another nation state, provided they have citizenship of another state. In addition, the person up to twenty five years of age can renounce their citizenship⁹⁷⁰ that is, the individual can renounce their own citizenship in Slovenia. However, this has little bearing on national identity.

Section 34(6) of the ACA provides the Minister with the power to revoke citizenship where the individual has committed fraud related offences under the *Migration Act 1958*.⁹⁷¹ That is, where an individual has provided false or misleading information to obtain an entry visa, or, uses a visa contrary to the law, such as, giving the visa to another person to assist with entry and stay in Australia. There is also a significant emphasis placed on third party fraud for various offences under *the Commonwealth Criminal Code Act 1995*⁹⁷² that relates to crimes such as conspiracy, bribery, corruption, and forgery.⁹⁷³ Loss of citizenship can also occur where it has been determined that the person is part of an organisation whose activities are in contravention with the provisions of the constitution.⁹⁷⁴ Additionally, if a person is a member of a foreign intelligence service, that is determined to be detrimental to the Slovene state, the person can lose

⁹⁶⁵ Ibid, article 26 (4).

⁹⁶⁶ *Australian Citizenship Act 2007*, s34.

⁹⁶⁷ Ibid, s34 (1) (2) (5).

⁹⁶⁸ Ibid, s50.

⁹⁶⁹ *Commonwealth Criminal Code Act 1995*, s137.1 or 137.2,

⁹⁷⁰ Article 25, Law on Citizenship, Official Gazette 24/2007.

⁹⁷¹ *Migration Act 1958*, s234, 236, 243, s236.

⁹⁷² *Commonwealth Crimes Act 1914*, s19B, Discharge of offenders without proceeding to conviction.

⁹⁷³ *Australian Citizenship Act 2007*, s34(8), refers to the *Criminal Code Act 1995*.

⁹⁷⁴ Article 26, Law on Citizenship, of the Republic of Slovenia, Official Gazette 24/2007.

their citizenship.⁹⁷⁵ This also applies in Australia, although citizenship would be revoked. The Australian legislation goes into more detail by describing what illegal activities such as bribery, fraud, providing false and misleading information and documents, or, migration related fraud that will constitute loss of citizenship. In the case of Slovenia, the loss of citizenship can occur when the person resides in another nation state and has taken out citizenship of that state, with the individual having the option of withdrawing their citizenship. This is another example of the citizenship laws expressing a component of national identity by ensuring the state has the ability to remove and decline citizenship where a person has been convicted of criminal offences.

The loss of Slovene citizenship can occur where the child has been granted citizenship as a result of being found in the territory, at the request of the parents provided the child is over 18 years of age and the parents are foreign nationals.⁹⁷⁶ A person may also have their citizenship released (dismissed).⁹⁷⁷ The criteria for what constitutes the ‘national interest’ in article 28 must be read in conjunction with articles 10 (3)⁹⁷⁸(4)⁹⁷⁹(8)⁹⁸⁰, 12 (citizenship by naturalisation)and 13 (citizenship by descent). Refusing an application for citizenship applies where the person has incurred debt or is subject to criminal proceedings. This test ensures that the person does not pass the burden of debt to the state and also requires that the person has fulfilled their obligations under the judicial system, which would be a deterrent of others to not undertake the same or similar conduct. Release from citizenship can be cancelled within one year of being notified of the cessation in accordance with article 21.⁹⁸¹ Dismissal of citizenship commences on the date the decisions has been made and served.⁹⁸²

A parent of a child can request release of citizenship of that child provided they are under 18 years of age, but only applies to the parent who has custody or with whom the child resides.⁹⁸³ However, where the other parent may not agree with the release of citizenship, consent is required from the Ministry of Labour, Family, Social Affairs and Equal Opportunities. Release is not necessary where the other parent’s residence cannot be determined.⁹⁸⁴ For instance, with the international adoption of a Slovene child that has full citizenship, the individual may obtain release of Slovene citizenship, provided they do not become stateless.⁹⁸⁵ Article 24 requires a child who is over fourteen years of age to obtain consent. This age limit requirement is something the ACA does not provide. National identity is expressed by the state through these

⁹⁷⁵ Ibid, article 26 (4).

⁹⁷⁶ Ibid, article 9.

⁹⁷⁷ Ibid, article 18.

⁹⁷⁸ Reside in Slovenia for 10 years with the last 5 continuous.

⁹⁷⁹ Funds provided that can sustain the individual whilst in Slovenia.

⁹⁸⁰ Poses no threat to public order, security or national defence.

⁹⁸¹ Ibid, article 21.

⁹⁸² Ibid, article 20.

⁹⁸³ Ibid, article 22.

⁹⁸⁴ Ibid, article 22.

⁹⁸⁵ Ibid, article 23.

provisions by establishing clear rules around who can and who cannot be released from citizenship.

3.3.6 Resuming Citizenship

The resumption⁹⁸⁶ of citizenship has many benefits to the individual, state and national identity. The state benefits from having former citizens returning and resuming their citizenship by contributing economically and socially. A person applying for resumption of citizenship in Australia will need to meet the national security requirements.⁹⁸⁷ Slovenia's citizenship laws do not provide for resumption of citizenship, although an individual could resume their citizenship in accordance with the naturalisation requirement in article 10. It could be argued that Slovenia should amend their citizenship laws to clear up any confusion that might exist in the law.

Other provisions

An examination of the administration of citizenship laws is outside the scope of this research. However, the following sections largely relate to national security and good character. For example, section 6A of the ACA provides for issues of national security, whereby the government through the Attorney General can determine what constitutes a national security offence.⁹⁸⁸ Furthermore, there is consideration of a person in psychiatric care and subject to the good character test (the criminal history of the person).⁹⁸⁹ National security has become important to a state's identity by not only protecting the state but also its citizens. In Australia, this includes the personal identifying features of a person such as fingerprints or handprints, the height and weight of the person and a photograph of the persons face and shoulders, a scan of the eyes and the person's signature.⁹⁹⁰ These requirements in Slovenia can be found in the Aliens Act.⁹⁹¹ The final provisions are outside the scope of this research and relate to records, storage and collections of data in Slovenia.⁹⁹² However, they are important to national identity, as the provisions allow the state to identify the person seeking resumption of their citizenship. This is important because without these rules a state would not be able to identify the person.

⁹⁸⁶ *Australian Citizenship Act 2007*, s29.

⁹⁸⁷ *Ibid*, s30.

⁹⁸⁸ *Crimes Act 1914*.

⁹⁸⁹ 2.11, *Australian Citizenship Instructions*, 2012.

⁹⁹⁰ *Australian Citizenship Act 2007*, s10.

⁹⁹¹ Article 119, *Law on International Protection Slovenia*, Official Gazette of the Republic of Slovenia 2011/11

⁹⁹² *Ibid*, article 41.

3.3.7 *Citizens Abroad*

Diasporas constitute the invisible nation that resides outside of their state of origin.⁹⁹³ The diaspora can consist of citizens who are resident in another state or dual citizens resident in another state other than the state they hold citizenship. Individuals that form a diaspora have migrated (under a state's migration laws discussed **chapter five**) from their home country to another. Diasporas are important to the state of origin and the state of destination, and are considered an extension of the nation state.⁹⁹⁴ Diasporas contribute to trade, investment and the transfer of knowledge and skills,⁹⁹⁵ and usually engage citizens from other states in private activities (discussed **chapter six**).

Slovenia has established the Act Regulating the Relations Between the Republic of Slovenia and Slovenes Abroad,⁹⁹⁶ which has been used to unify Slovene residing abroad.⁹⁹⁷ The legislation is predominantly intended for those Slovenes (the diaspora) located in those minority communities on the borders of Austria, Italy, Hungary and Croatia. The legislation defines those Slovenes who do not necessarily have citizenship of Slovenia but are of Slovene origin. This Act allows Slovenes to participate in organisations outside of Slovenia. According to Felicita Medved, there has been political debate as to whether Slovenia should continue its efforts to engage with the diaspora. In 2013, it was proposed that the Office of Slovenes Abroad be moved to the Ministry of Culture, which would have resulted in the Ministry for Slovenes Abroad being abolished.⁹⁹⁸ However, it was the Slovene diaspora that placed enough pressure on the Slovene government to shelve the proposal.⁹⁹⁹ The diaspora saw this as a significant step backwards in Slovenia's engaging those of its people who did not reside in the state. Nevertheless, it is argued that this Act should be extended to include those Slovenes that are located in third countries such as Australia. Australia could investigate the opportunity of establishing similar legislation, particularly to engage those diasporas located in the European Union and Association of South East Asian Nations (ASEAN) member states.

⁹⁹³ Michel Beine, Frederic Docquier, and Calgar Ozden, *Diasporas*, University of Luxembourg, Journal of Development Economics, 2009, 1-12.

⁹⁹⁴ Ruud Koopmans and Paul Statham, *How national citizenship shapes transnationalism: A comparison analysis of migrant claims-making in Germany, Great Britain and the Netherlands*, WPTC-01-10, 1-5.

⁹⁹⁵ Kathleen Newland and Sonia Piazza, *What we know about Diasporas and Economic Development*, Migration Policy Institute, No 5, 2013.

⁹⁹⁶ Act Regulating the Relations Between the Republic of Slovenia and Slovenes Abroad, Official Gazette of the Republic of Slovenia No. 43/2006.

⁹⁹⁷ Felicita Medved, *Unified Slovenian Nation: Slovenian Citizenship Policy towards Slovenians Abroad*, In Gyöző Cholnoky, Zoltán Kántor, András Ludányi and Eszter Herner-Kovács, *Minority Studies Special issue Trends and Directions of Kin-State Policies in Europe and Across the Globe*, Lucidus Kiadó, 2014, 153- 184.

⁹⁹⁸ Ibid.

⁹⁹⁹ Ibid.

Stine Neerup argues that “in order to create benefits for all parties involved in the migration process, the diaspora needs to be taken seriously”.¹⁰⁰⁰ For example, the Slovene diaspora in Australia has been estimated at approximately 25,000.¹⁰⁰¹ Diasporas have had a role in shaping nation states such as Slovenia and its independence.¹⁰⁰² Throughout the 1980’s Slovenes made a concerted effort to establish closer ties with Austria.¹⁰⁰³ With proponents and opponents in Austria for Slovenia’s independence, the diaspora kept the pressure on the decision makers and government, who by the late 1980s had supported the Slovenes as their good neighbours.¹⁰⁰⁴ The National Council of Slovenes called on Austria to assist in diplomatic discussions with the European Union. The Slovene diasporas in Italy also took up the cause, and at the time Italy held the European Presidency, thus having direct access to Brussels. This line of communication proved to be very positive for the Slovenes. Furthermore, the Slovenian World Congress conducted protests in Italy and offered its support for the Slovene diaspora’s across Europe.¹⁰⁰⁵

Engaging the diaspora is seen as an important part of expanding national identity. It is argued that by ensuring that the diaspora is engaged, this provides continuity and a connection and with their state of origin. Upon their return the diaspora can enrich the citizenry with new ideas and thought. Even while the diaspora is abroad, their connection to their state of origin also enables them to pass on knowledge, which can be used by other citizens to enrich the state. Half of all Australian diaspora are reside in the European Union.¹⁰⁰⁶ A smaller diaspora community is located throughout ASEAN member states such as Singapore.¹⁰⁰⁷ Australia can benefit from Australian citizens working and living in other nation states.¹⁰⁰⁸ Both states could do more to engage their respective diasporas. Arguably, the future of citizenship will in part depend on the state’s ability of states to engage and maintain their connection with their citizens who reside abroad. This will be particularly important to Slovenia which has a small population within and outside the country. The establishment of these laws by Slovenia has significantly enhanced

¹⁰⁰⁰ Stine Neerup, *Diasporas in the Commonwealth, Focus on diasporas in the Commonwealth*, Institute for the Study of Global Movements, Monash University, Vol 6. No 1, 2009, 5. <http://www.globalmovements.monash.edu.au/publications/documents/atgissues/Volume.pdf>, accessed 17 January 2013.

¹⁰⁰¹ Matjaz Klemenčič and Mary Harris, *European migrants, diaspora and indigenous ethnic minorities*, Pisa: Plus-Pisa University Press, 2009, 56-78. Note the data used appears to have come from 1994, Cebulj Sajko, *Settling Slovenes in Australia*, Slovenian Emigration, 256.

¹⁰⁰² Branislav Radeljić, *Diaspora impact on European Community policy-making*, Ex-Yugoslavia as a case study, in Ulrike Ziemer and Sean Roberts, *East European Diasporas*, Migration, and Cosmopolitanism, Routledge, 2013, 43-57.

¹⁰⁰³ Ibid.

¹⁰⁰⁴ Ibid.

¹⁰⁰⁵ Ibid.

¹⁰⁰⁶ Graeme Hugo, Dianne Rudd and Kevin Harris, *Australia’s Diaspora: Its size, Nature and Policy Implications*, Committee for Economic Development of Australia, 2003, 9-13

¹⁰⁰⁷ Ibid.

¹⁰⁰⁸ Ibid.

their ability to spread their identity across international borders. Thus, reinforcing the earlier point made in chapter one that citizenship law contributes to national identity.

3.3.8 European Union Observatory on Democracy

This research has focused on comparing the laws of Slovenia and Australia. However, the European Union Observatory on Democracy (EUDO) undertakes important work to better understand citizenship law across European member states. Slovenia is represented in the EUDO. The work has extended to reviewing the citizenship laws (legal norms and modes of acquisition, loss of citizenship and protection against statelessness).¹⁰⁰⁹ EUDO's work also ensures that member states consider the impact their citizenship laws have on other member states and their citizens.¹⁰¹⁰ Due to the breadth and depth of work undertaken by EUDO, this section focuses on the laws relating to the loss of citizenship. EUDO has identified that the loss of citizenship laws vary across member states. The variables constituted false information or fraud when a person was applying for citizenship. This also included information regarding the status of the individual's permanent residence abroad, retaining a foreign citizenship, foreign military service, loss of citizenship by parents, and employment in a foreign public service. Additionally, there were variables with the loss of citizenship by a spouse or registered partner, acquisition of foreign citizenship, and information pertaining to criminal offences.¹⁰¹¹ The EUDO could consider Australia as being a partner, which provide further enriches to the discussion regarding citizenship.

3.4 Conclusion

This chapter has confirmed that the citizenship laws of Slovenia and Australia have contributed, and continue to contribute, to their respective national identities. Since 1990, both state's legal frameworks have been strengthened as a result of regional and international events. Citizenship of the new Slovenia in 1990 not only confirmed the legal status of citizenship. Slovenia's new citizenship laws were based on a number of principles including 1) continuity and transition of the previous republic level citizenship upon state succession,¹⁰¹² 2) membership based on civic

¹⁰⁰⁹ The consortium consists of the European University Institute, Florence, Italy. University College Dublin, Dublin Ireland, University of Edinburgh, Edinburgh, Scotland, Maastricht University, Maastricht, Netherlands, Migration Policy Group, Brussels, Belgium. <http://eudo-citizenship.eu>, accessed 20 November 2013.

¹⁰¹⁰ Ibid.

¹⁰¹¹ Gerard-René Groot and Maarten Vink, *Loss of Citizenship: Trends and Regulations in Europe*, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies, European University Institute, 2010, 4.

¹⁰¹² Felicita Medved, *Unified Slovenian Nation: Slovenian Citizenship Policy towards Slovenians Abroad*, in Gyöző Cholnoky, Zoltán Kántor, András Ludányi and Eszter Herner-Kovács, *Minority Studies Special Issue Trends and Directions of Kin-State Policies in Europe and Across the Globe*, Lucidus Kiadó, 2014, 153- 184.

conception and participation in the political community,¹⁰¹³ 3) evolving statehood, and 4) the opportunity to define an independent national identity. Additionally, the laws embraced the multi-ethnic reality that in the former Republic the population comprised people from Austria, Italy, Hungary, Croatia, Macedonia, Serbia, Bosnia and Herzegovina, Montenegro and Albania. The chapter has also confirmed that Australia and Slovenia have a solid legal framework in place to regulate citizenship.

In 1991, Slovenia established its migration laws in the Aliens Act. With this, the new state was able to include or exclude foreigners from the state. Slovenia would in the same way as Australia implement a permit (Australia: visa) system, albeit very differently (discussed **chapter five**). This chapter confirmed that the new laws excluded many former Yugoslavian citizens,¹⁰¹⁴ making them stateless. Australia upon establishing its citizenship laws in 1948 did not create a situation where individuals were left without citizenship. From 1994 to 2010, the Slovenian Constitutional Court would make a number of rulings against the state, and ruled the citizenship laws should be changed.¹⁰¹⁵ Since the rise of international law and the recognition of statelessness, states such as Australia and Slovenia have ensured that statelessness is appropriately reflected in their national laws.¹⁰¹⁶ However, this does not preclude individuals from becoming stateless if and when territorial rules change and a new state is established or new citizenship laws are implemented.

In 1996, over one hundred years after Federation, Australia experienced a period of xenophobia and the Australian Government responded by encouraging tolerance, while acknowledging that the country remained confused about its identity. In 2001, in an attempt to unify the country, the Australian Government confirmed that citizenship is an important concept that unifies society. The deportation of residents was firmly on the government's mind, with additional measures being established to exclude non-citizens through cancellation of their visa upon them having to prove they were not of bad character.

Both states introduced dual citizenship, although to varying degrees. Slovenia decided to restrict dual citizenship to those who could demonstrate a connection with the state. Slovenia has taken a great interest in its diaspora introducing the Act Regulating the Relations Between the

¹⁰¹³ Felicita Medved, *Country Report: Slovenia*, EUDO Citizenship Observatory, European University Institute, Italy, 2010, 23.

¹⁰¹⁴ Jelka Zorn, *The Politics of Exclusion Citizenship, Human Rights and the Erased in Slovenia*, UDK, 2004.

¹⁰¹⁵ U-I-248/94, Official Gazette of the Republic of Slovenia 14/99. 499, U-I-89/99, Official Gazette of the Republic of Slovenia 59/99. U-II-1/10-26, Official Gazette of the Republic of Slovenia. No. 50/2010. U-I-69//92-03, Official Gazette of the Republic of Slovenia, 61/1992. U-I-246/02, Official Gazette of the Republic of Slovenia 36/2003.

¹⁰¹⁶ *Australian Citizenship Act 2007. Citizenship Act 2007*, of the Republic of Slovenia, Official Gazette 24/2007.

Republic of Slovenia and Slovenes Abroad. Australia has not considered its diaspora in the same way as Slovenia by implementing legislation.

The decade of 2000 to 2010 was very busy for Slovenia as it prepared for accession to the European Union, and in 2004 it obtained full membership. Australia was one of the first countries outside of the European Union to recognise Slovenia's independence. Moreover, their new-found membership obliged Slovenia to implement European law. All Slovenian citizens automatically assumed European citizens. The concept of a person being able to buy citizenship emerged in Malta and other nation states (including Australia through immigration, which is a pathway to citizenship, discussed in **chapter five**). However, it has been argued that this form of citizenship is on the one hand inclusive (for the wealthy), but exclusive for those people who do not have the financial resources to purchase citizenship.

Comparatively, over the past twenty-five years, both states have introduced and expanded the concept of citizenship, which has contributed to their respective national identities. The laws have also directed new citizens to be what the state wants them to be. There has been a balancing act by both states, implementing liberal reforms to allow for dual citizenship while establishing restrictive measures to make it harder to obtain citizenship. Slovenia was developing laws to reach out to their diaspora and descendants of Slovenes residing in other states. Australia has not. Slovenia and Australia have ensured that the language used in its citizenship law is gender-neutral, not making a distinction between male and female within the law on citizenship. Australia has begun to extend the postnational concept of citizenship further by beginning to regulate the activities of its citizens when abroad. Furthermore, and a notable difference between Australia and Slovenia was that Australia had embraced a multicultural society, whereas Slovenia would predominantly become a monoculture. Slovenia had become more accepting of minorities, particularly former Yugoslav citizens, only when the European Union got involved. This chapter has identified possible areas where both Slovenia and Australia could borrow from each other and change their respective laws (recommendations discussed **Appendix One**). These include:

- Australia must ensure Aboriginal people are able to fully participate as citizens. In 2012, the United Nations criticised Australia for its handling of Aboriginal people at birth, denying many the opportunity to obtain a birth certificate. Australian and Slovenian governments should undertake a review of this practice every five years to ensure all people are registered and provided a certificate at birth.
- The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* introduces three ways that a citizen of Australia can have their citizenship removed. These include

where the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, or where the individual fights for or is in the service of a declared terrorist organisation, and where the individual is convicted of a terrorist offence. The Act only capture those individuals who hold dual citizenship. Slovenia has not put a similar proposal to the Slovene Parliament. Slovenia should consider similar laws to protect the state and its citizens from people wanting to undertake terrorist activities.

- The notion of dual citizenship has gained wide acceptance from nation states across the world. Slovenia and Australia have recognised dual citizenship as part of their respective citizenship laws, however Slovenia should further liberalise dual citizenship with no restrictions.
- In the contemporary world, children are being conceived by artificial means. Slovenia could include a provision similar to that of Australia.
- Ships and aircraft are considered territory of the nation. The Slovenian legislation is not clear and may cause confusion to individuals who do not understand the law. Therefore, it would be beneficial for Slovenia to tighten this section to include reference to ships and aircraft.
- To obtain citizenship by descent in Slovenia, the individual must be able to prove a connection to the state. The person must be able to demonstrate they have a connection that extends to fourth generation. The Australian Citizenship Act 2007 does not describe a generational principle. Australia could amend the Act and borrow from Slovenia to include a similar provision. Such an inclusion would assist those individuals born to former Australian citizens, now residing in other states, to obtain Australian citizenship.
- The ‘oath’ and ‘pledge’ could be expanded to include further reference to the respective states’ national identities. This could include the recognition of dual citizenship, and the need to continue to maintain loyalty to the state whether abroad or in the territory. In addition, greater emphasis could be placed on an individual’s rights and obligations to the state. For example, an outline of the rights, freedoms and protections could be included in both the Slovenian ‘oath’ and the Australian ‘pledge’ to reinforce to prospective citizens that Slovenia and Australia are democratic, thereby strengthening their sense of belonging to the state.
- The resumption of citizenship has many benefits for the individual and the state. Firstly, the individual resumes political, social and economic ties with the state. The Slovenian

Law on Citizenship does not provide for resumption of citizenship, although an individual could do so through the naturalisation process in accordance with article 10. Slovenia should amend the Law on Citizenship and make it clear that an individual can resume citizenship.

- Slovenia has established the Act Regulating the Relations Between the Republic of Slovenia and Slovenes Abroad; this Act should be extended to include those Slovenes who reside in third countries such as Australia. Australia could investigate the opportunity of establishing similar legislation, particularly to engage those diasporas located in the European Union and Association of South East Asian Nations (ASEAN) member states.
- The Act Regulating the Relations Between the Republic of Slovenia and Slovenes Abroad could be extended to include Australia.
- There continues to be a low rate of acceptance of the European Convention on Nationality by member states including Slovenia. The European Union has further work to undertake to have this legal instrument fully implemented. Slovenia should sign and ratify the European Convention on Nationality 1997.
- The European Union Observatory on Democracy could consider Australia as a partner, which will further enrich the discussion regarding citizenship.

Finally, this chapter has highlighted the multidimensional role that citizenship plays today. It is more than a legal status (discussed in **Literature Review**). Citizenship is an important component of a state's national security, immigration, multicultural, economic, and population policy and law. More broadly, the citizenship reform undertaken by both states, while different, has been undertaken in the national interest and has reaffirmed the central argument of this thesis that citizenship contributes to national identity. National identity includes the historic and current day territory of the state, common myths and bonds, historical memories, a shared culture and language. National identity is multidimensional, contestable and fluid in nature, but supported by citizenship and citizenship law. The next chapter explores the rights afforded to Slovenian and Australian citizens. Human rights are an important component of a democratic states legal framework. Human rights established by a state, is that state expressing part of its national identity to others by protecting individuals from each and the state.

Chapter 4 – European Citizenship and Human Rights

4. Overview

Chapter four explores what it means for Slovenians to be part of the European Union. In the contemporary world, a solid legal framework for citizenship must include human rights (discussed **Literature Review**). Human rights are an expression of a state's national identity and allow an individual to protect themselves from others and the state. In the context of this thesis, human rights are an important component of citizenship and national identity. Slovenia became a member to the European Union in 2004. As a result, it inherited European law and its citizens became European citizens. This chapter begins by tracing the steps of what is known as European citizenship today, from 1957 and the implementation of the European Coal and Steel Community through to the 2007 Treaty of Lisbon. The 1957 establishment of the European Coal and Steel Community was the beginning of the first six European member states coming together to form economic partnerships and assist in integration. During this period European citizenship has developed significantly and now provides all citizens (including Slovenians) of the European Union with rights, protections and freedoms. European citizenship has not meant that member states have had to relinquish their sovereign right to choose who will and who will not be a citizen of their state. The Maastricht Treaty provides a legal status of European Union citizenship, although different from member states national law. The European Union and its institutions do not register citizens in the same manner as member states under nation laws. In 1991 when Slovenia became an independent nation state, the road to membership of the European Union had begun. This occurred with the conclusion of the Cooperation Agreement by the Former Socialist Republic of Yugoslavia in 1980. This chapter also discusses the road to full membership of the European Union and traces the steps Slovenia has taken on the path to joining the European Union in 2004. The most significant change for all Slovenians was the ability to move freely throughout the European Union. Slovenia would also find itself having to apply the European Union norms of equality for men and women. Equality is a component of modern democracy and national identity. Equality, or otherwise referred to as discrimination, is a fundamental principle of the European Union. This chapter highlights that equality is a fundamental right and freedom within European law.

Human rights are a reflection of a modern day states democratic values. Human rights constitute public law and in the context of this chapter can be found in international, supranational and national law. Human rights have and continue to be used by states to contribute to national identity. The law enables a citizen of Slovenia or Australia as part of their private activities to use the law to protect themselves from other citizens or the state. With the requirement for Slovenia to transpose European law into their national law, Slovenian citizens

found themselves gradually becoming part of the European internal (single) market. The chapter compares the constitutional and legislative rights afforded to citizens of Australia and Slovenia. The chapter highlights how Slovenia had the opportunity in 1991 to establish a new constitution, whereas Australia's constitution is more than one hundred years old (established in 1901). It will also be argued that Australia's constitution is in need of reform in light of citizenship and national identity. This chapter will identify areas that Slovenia and Australia could take into consideration and use them to change their respective laws in the area of human rights.

Rights and Citizenship

Karen Knop argues that citizenship provides the person with rights and is the private side of citizenship.¹⁰¹⁷ Citizenship is the right to have rights (discussed **chapter two**). Human rights are afforded to all citizens who have citizenship of a state, and are gender-blind. Kate Nash reaffirms this stance, arguing that human rights and citizenship have long been entwined.¹⁰¹⁸ A constitution can exclude¹⁰¹⁹ individuals who do not adhere to the values of the state. Put another way, the expressed and implied rights of a constitution is what Kymlicka would describe as a state directing its citizens to engage in society and embrace the values and expected behaviors of the state. This forms part of a state's identity, and in today's modern world where states have become multi-ethnic, rights assist a state in building an inclusive identity.¹⁰²⁰ Human rights are afforded to all citizens within a state, and have been and are currently used to unify and integrate citizens within a state, and across national boundaries. Not only is there national laws for human rights, there is international law that states have relied on to establish national law. However, by states directing their current and future citizens a certain way could be considered as suppressing multiculturalism. In suppressing rights of an individual would occur where that person has migrated from another country and brought with them other rights that may not be accepted by the state. This thesis argues that to some extent whether by accident or by design suppressing rights is evident. That is, states establish a common set of rights that can be enjoyed by all. The rights cut cross religious and ethnic boundaries. Even so, within states such as Slovenia and to a lesser extent Australia laws have been established to recognise, unify and integrate the amalgam of ethnic groups. However, in practice the human rights laws may not be applied equally to all citizens.

¹⁰¹⁷ Karen Knop, *Citizenship Public and Private*, Law and Contemporary Problems, Vol. 71:309, 2008, 309-340.

¹⁰¹⁸ Kate Nash, *Between Citizenship and Human Rights*, Goldsmiths University of London, Volume 43(6), 2009, 1067-1083.

¹⁰¹⁹ Bruce Ackerman, *Reviving Democratic Citizenship*, 2011, <http://www.ssc.wisc.edu/~wright/ASA/Ackerman%20Real%20Utopia%20Essay--%20Democratic%20Citizenship.pdf>, accessed 20 January 2014.

¹⁰²⁰ Claire O'neil, Tim Watts, *Two Future: Australia at a Critical Moment*, The Text Publishing Swann House, 2015, 200-205.

Human rights in Europe, Slovenia and Australia apply to humanity in general and citizens within their respective territories. Moreover, the rights afforded to Slovenian citizens, particularly women have reinforced the modern day democratic principles of the European Union. Equality between women and men has been a core element of integrating Union citizens, something Linda Bosniak and Hanna Arendt support (discussed **chapter two**). This core element is now part of Slovenia's identity. The rise in equality of women in the European Union has extended to work, equal pay, discrimination¹⁰²¹ and political participation. Importantly, the discussion below comparing the expressed rights of Slovenian and Australian citizens includes the rights of women. Thus, the current rights afforded to citizens also pertain to women. Therefore, without citizenship of Slovenia, Slovenian women would be restricted in their political participation within Slovenia and European Union institutions.

4.1 Slovenia and the European Union

Upon Slovenia becoming a member of the European Union (EU), Slovenes assumed citizenship of the Union¹⁰²² which has brought with it additional rights and responsibilities. The EU has been one of the most complex modern political projects ever undertaken, and has been portrayed as a symbol of unity.¹⁰²³ This unity has resulted in the shared sovereignty and unity.¹⁰²⁴ The unity developed by the EU is no more evident than the rights and responsibilities that have been afforded to all citizens of all Member States. These rights and responsibilities afforded to Slovene citizens with their new found acceptance into the European Union are consistent with being a member of a political community.¹⁰²⁵

The initial steps to establishing common rights and responsibilities for citizens of the EU can be found in the 1951 Treaty establishing the European Coal and Steel Community (ECSC)¹⁰²⁶ which expired in 2002. Apart from building a closer community, the beginnings of the recognition of women can also be found in the ECSC, which promoted the idea of equal pay for

¹⁰²¹ Article 23, European Charter of Fundamental Rights 2000. Article Treaty of the European Union. Article 153 Treaty of the Functioning of the European Union, Council Directive 2006/54/EC on the implementation of the principles of equal opportunities and equal treatment of men and women in matters of employment, Official Journal of the European Union, L 204/23.

¹⁰²² Article 20, Treaty on the Functioning of the European Union, Official Journal of the European Union 2012/C 326/01, Volume 55, 26 October 2012, Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

¹⁰²³ Robert Walters and Erazem Bohnic, *Constitutional citizenship, integration and dual citizenship among ASEAN member states*, DIGNITAS Državljanstvo, integracija in pravo nepremičnin, 2015, 83-102.

¹⁰²⁴ Ibid.

¹⁰²⁵ Patrick Weil, *Access to Citizenship: A Comparison of Twenty-Five Nationality Laws*, in *Citizenship Today* Global Perspectives and Practices, T Alexander Alienikoff and Douglas Klusmeyer, Carnegies Endowment for International Peace, 2001, 15-40.

¹⁰²⁶ Treaty establishing the European Coal and Steel Community 1951 <http://www.consilium.europa.eu/uedocs/cmsUpload/Community.pdf>, accessed 20 February 2014.

equal work.¹⁰²⁷ On paper there was no separation or discrimination between men and women, thus it could be argued the principle of equal pay for equal work applied to both. However, in practice this may have been very different. The principal objective was to unite countries and their people and encourage cooperation. In 1957, the Treaty of Rome, significantly extended the ECSC and introduced the right of “free movement of persons and services”.¹⁰²⁸ Citizens from Iceland, Lichtenstein and Norway who make up the European Economic Area have also been included and are able to freely work and reside in other EU member states (MS).

As Europe was looking to integrate economically and socially, at the same time there was greater consideration of women in society and what citizenship meant to women. As **chapter two** highlighted citizenship during and post the French Revolution excluded women. Men had a far greater role not only in the home but also socially and politically. The rise of human rights post WWII demanded greater recognition and consideration of women not only in society but also in the area of citizenship.¹⁰²⁹ This had a significant impact on national identity as states were expected to build a more inclusive society. In practice this did not occur right away, and is still a work in progress for many nation states. It could be argued Australia and Slovenia, and European member states are leading in establishing laws, legal frameworks and institutions to promote equality amongst genders.

In 1968, Council Regulation 1612/68 was introduced to distinguish between free movement and mobility of labour. Free movement constituted the right of a worker and their family to move, reside and work across the EU. However, mobility of labour extended to the worker being guaranteed the possibility of improving their living and working conditions and promoting their social advancement.¹⁰³⁰ Furthermore, the abolition of restrictions on movement and residence within the community for workers and their families was enhanced with the introduction of Council Directive 68/360/EEC that enables citizens to leave their territory to undertake activities (employment) in a territory of another member state.¹⁰³¹ However, the European Union in 1970 recognised that many citizens once they had moved to another state may want to move permanently, and introduced law enabling this to occur.¹⁰³² For example, at the time when this legislation was implemented, a German citizen who moved to take up employment in

¹⁰²⁷ Ibid, article 119.

¹⁰²⁸ Article 3 and Title III, The Treaty of Rome, 25 March 1957, http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf, accessed 20 February 2014.

¹⁰²⁹ International Covenant on Civil and Political Rights 1966, the 1966 Convention on the Elimination of All Forms of Racial Discrimination and the 1967 European Convention on the Adoption of Children.

¹⁰³⁰ Council Regulation 1612/68, on freedom of movement of workers within the Community, Official Journal of the European Communities L 257/2.

¹⁰³¹ Ibid, article 2.

¹⁰³² Regulation (EEC) 1251/70, on the right of workers to remain in the territory of a Member State after having been employed in that State, Official Journal of the European Communities L 142/24.

France generally had the same working rights¹⁰³³ as a French citizen (which included conditions of work, tax and social security). As discussed in **chapter two**, Britain, Denmark and Ireland became members of the European Economic Community in 1973.

As the European Union was taking shape, there were further advances in the recognition of women in international law pertaining to nationality reinforcing Article 119 of the ECSC that equal pay for men and women¹⁰³⁴ was important to the growth, unification and integration of the Union, along with expanding the idea of democratic values. In 1979, the Convention on the Elimination of all Forms of Discrimination against Women¹⁰³⁵ was established and ratified by Australia in 1983¹⁰³⁶ and Yugoslavia (Slovenia) in 1982.¹⁰³⁷ Article 9 states that women shall be granted equal rights with men to acquire, change or retain their nationality, and that a women would not lose her nationality upon her husband changing his nationality. The slow progress to equality was well underway and states began to reflect this in their legal frameworks. This addition expanded national identity by ensuring the legal frameworks of states, if adopted, took into greater consideration national identity.

Schengen

The next major change to the European legal framework was the introduction of the Schengen Agreement (SA), signed in 1985. The SA gave effect to the principle of free movement through the abolition of internal frontiers and the introduction of common conditions for the entry of third country nationals into (Schengen Zone of the European Union) member states. In 1986, the Single European Act (SEA) was implemented.¹⁰³⁸ The SEA reinforced the 'internal market' concept by allowing EU citizens to move, reside and work freely across the European Union, ensuring the area was without any internal frontiers.¹⁰³⁹ The SEA also played a major role in establishing economic and social cohesion across member states by reducing the differences in the level of development across the region, and between member states. The Berlin Wall existed and Slovenia was still part of Yugoslavia. Greece, Spain and Portugal would become members in 1985 and 1986. The SEA was a step forward in closing that gap. By closing the

¹⁰³³ Council Regulation 312/76, amending the provisions relating to the trade union rights of workers contained in Regulation (EEC) 1612/68 on freedom of movement for workers within the community, Official Journal of the European Union L 039.

¹⁰³⁴ Council Directive 76/207/EEC, on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Official Journal of the European Community L 39.

¹⁰³⁵ Convention on the Elimination of all Forms of Discrimination against Women, Treaty Series, vol. 1249, 13.

¹⁰³⁶ Australia Human Rights Commission, <https://www.humanrights.gov.au/convention-elimination-all-forms-discrimination-against-women-cedaw-sex-discrimination-international>, accessed 28 July 2016.

¹⁰³⁷ Slovenia automatically assumed ratification of independence, Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA.

¹⁰³⁸ Single European Act 1986, Official Journal of the European Communities L 169.

¹⁰³⁹ Ibid, section II, Article 13 EEC Treaty, Article 8a.

gap, the intention was for citizens across the European Union to become equal (economically and socially) encouraging unification and integration. However, to achieve full equality, unification and integration remains a work in progress.

European Citizenship

In 1992, the Maastricht Treaty (MT), was signed.¹⁰⁴⁰ The MT created the European Union (EU) itself, and also created European Union citizenship.¹⁰⁴¹ It is asserted that the MT confirmed the legal status of Union citizen. Even so, the new found legal status was very different to the legal status of a citizen under the national law of member states. European citizenship is not citizenship in the traditional sense of state based citizenship because the European Union does not register individuals in the same way as member states do. It had little to no impact to national identity. That is, member states identities were not impacted. Germans, remained Germans and retained their German identity. The same occurred to other member states and their citizens. The responsibility for registering and choosing citizens remains with member states. The MT also provided the basis to progress towards a single EU immigration and asylum framework through the new pillar of Co-operation in Justice and Home Affairs.¹⁰⁴² The immigration framework established under European law becomes an important part of this thesis, and **chapter five** argues that immigration is a pathway to citizenship.

Citizenship of the Union was not only developed to enhance and advance the single market concept, but it has also been used as a tool to further unify and integrate the European Union and its citizens. Seyla Benhabib argues that national citizenship is being devalued and is in decline because of the rise and impact of globalisation and regionalisation.¹⁰⁴³ Richard Falk highlights that traditional citizenship is being challenged by trans-national political and social evolution'.¹⁰⁴⁴ Globalisation progressively breaks down barriers and borders, and over time this could extend to citizenship.¹⁰⁴⁵ Furthermore, opening global borders takes away the legal role that citizenship has in regulating the movement of people.¹⁰⁴⁶ There is no better example than the European Union and its member states. Member states have retained their individual state

¹⁰⁴⁰ Article A, Maastricht Treaty 1992, Official Journal of the European Union C 191,

¹⁰⁴¹ Ibid, article 8, states citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby, <http://www.eurotreaties.com/maastrichtec.pdf>, accessed 20 April 2012.

¹⁰⁴² Ibid, article B.

¹⁰⁴³ Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens*, Cambridge University Press, 2004, 110-118.

¹⁰⁴⁴ Richard Faslk, *The Making of Global Citizenship in the Condition of Citizenship*, edited by Bart van Steenbergen, Sage Publications, 1994, 127-140.

¹⁰⁴⁵ Jannine Brodie, *Introduction: globalisation and citizenship beyond the nation state*, Citizenship Studies, 2004, 323-331.

¹⁰⁴⁶ Matthew Gibney, *Statelessness: Statelessness and the right to citizenship*, Refugee Studies Centre, University of Oxford, 2009, 51-52.

identities and responsibility for choosing their citizens while allowing their citizens to be part of the European community. However, European citizenship provides citizens of all member states with a consistent set of rights and freedoms. European citizenship does not dilute a member states national identity, but rather, reinforces the democratic principles of the Union providing citizens with two levels of identity. Firstly, an identity at the member state level, where they have been granted citizenship. Secondly, at the European Union level that enables the citizens to operate in another member states as though they are a citizen of that state. This concept is not different to how Australia has been functioning since federation.

The single European currency was also established by the MT and came into effect in 1999. The roll out of the currency would have negative impacts for Slovenes travelling abroad to other EU MS before Slovenia was a full member of the Union. For instance, the new single currency would be one of the most significant and tangible changes Slovene citizens would experience along with the dismantling of its borders with Austria, Italy and Hungary, when the state became a member of the Union. European citizenship provides rights to all citizens within their state of citizenship but in the same way as residence restricts full access to all rights, Union citizenship is also limited. Long-term third country national's resident in the Union have similar rights to long term residents in Australia. They are entitled to education, welfare benefits such as retirement pensions, recognition of qualifications, freedom of association and assembly, residence and movement. In both states their political rights are restricted. For instance, a Union citizen not resident in their state of origin can vote and stand for election in another member state. A third country national such as an Australian citizen cannot vote or stand for election in Slovenia. Likewise, a Slovenian citizen resident in Australia cannot vote or stand for elections. Thus, the difference in rights afforded to residents and citizens are subtle but are very important for a citizen to be fully active in the political community. Human rights are afforded to all citizens who have citizenship¹⁰⁴⁷ of a state and in the case of Slovenia, also part of the supernational polity. Human rights and citizenship have long been entwined¹⁰⁴⁸ and assist states and supernational polity to build an inclusive society. That inclusiveness at a state level contributes to a sense of belonging that forms part of national identity. However, in practice the implementation of rights may differ. For example, in Australia there has been and continues to be exclusion of indigenous Australians and their rights.

In 1997, the Treaty of Amsterdam (AT) followed the MT, and provided greater recognition of European Union citizenship, immigration, asylum and the inclusion of references to refugees. The AT would also provide greater economic and social activity through the single currency

¹⁰⁴⁷ Lind Bosniak, *The Citizen and the Alien: Dilemmas of Contemporary Membership*, Princetown University Press, 2006, 17-20.

¹⁰⁴⁸ Kate Nash, *Between Citizenship and Human Rights*, Goldsmiths University of London, Volume 43(6), 2009, 1067-1083.

that can be seen today in Slovenia, with the Euro being the only currency used by most EU member states (MS). However, not all member states of the European Union such as the United Kingdom have adopted the Euro as their currency. The AT also marked a new stage for the European Union by bringing the peoples of Europe closer together, and ensuring the decisions made by European Union included a greater dialogue and involvement of all citizens. This included greater participation by citizens in the affairs of the European Union. Citizens could use their language (Spanish, French, German etc.) when communicating with those institutions. The reference to the people or citizens was gender blind ensuring that men and women were equal in the law.

Apart from reinforcing the earlier principle of equal pay¹⁰⁴⁹ for all that had been established by the ECSC in 1957, the AT promoted gender equality across all activities in the Community. This included political participation and policy development in the areas of trade, education, health, agriculture and transport. There was a greater focus on strengthening the protection of rights and interests of all nationals (women and men) of member states through the introduction of citizenship.¹⁰⁵⁰ Article 1 confirmed the importance of fundamental rights that were defined in the 1961 European Social Charter and the 1989 Community Charter of the Fundamental Social Rights of Workers. These legal instruments expressed the same rights of work, conditions, collective bargaining, remuneration, health and safety and training that would apply across the Union.

In reinforcing these earlier rights afforded to citizens, the AT affirmed that the European Union had been founded on key democratic principles that include the right to liberty, respect for human rights and fundamental freedom, the rule of law, and guaranteeing the protection of those rights established by the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁵¹ These principles can be also found in the constitution of Slovenia today. The importance of the rights expressed by the European Union have contributed to the greater participation of women in society and political life at both the national and Union (and its institutions) levels. The participation of women was further reinforced by the 1997 Universal Declaration on Democracy, which required partnership between men and women.¹⁰⁵² Thus, the international, European Union and national rights laws are gender neutral, ensuring there is greater participation by women not only socially but also politically.

The Treaty of Nice (TN) followed the AT in 2001.¹⁰⁵³ It had little to say on citizenship and immigration (asylum and refugees) other than reinforcing the goal of harmonisation and co-

¹⁰⁴⁹ Article 137 and 141, Amsterdam Treaty, Official Journal of the European Union C 340.

¹⁰⁵⁰ Ibid, article 1 & B.

¹⁰⁵¹ Ibid, Article 6.

¹⁰⁵² Universal Declaration on Democracy, Inter-Parliamentary Council, 161st session, 1997.

¹⁰⁵³ Treaty of Nice 2001, Official Journal of the European Union C 80/1.

operation among EU MS, through a single institutional legal and policy framework. The main point of the TN was to prepare the EU for the accession of the Central and East European countries such as Slovenia, and it reinforced the right to move and reside freely within the territory of any MS'.¹⁰⁵⁴ It was also notable for the adoption of the European Charter of Fundamental Rights 2000, but on a political rather than legally binding basis. However as discussed later in this chapter, the 2000 European Charter of Fundamental Rights would later become an important and binding legal document on all European Member States.

In 2004, the European Council approved the Constitutional Treaty (CT),¹⁰⁵⁵ which was signed by the then twenty-five MS. On 1 February 2005, the Slovenian Parliament ratified the CT.¹⁰⁵⁶ However, the constitution was rejected by the citizens of France and the Netherlands. After the failure of the Constitutional Treaty, the Lisbon Treaty (LT) was signed in late 2007. The LT was initially rejected by the voters of Ireland, the only MS to hold a referendum on the establishment of this European Union Treaty, however the Irish people subsequently approved the LT at the second referendum.¹⁰⁵⁷ The LT came into effect in 2009, incorporating many of the principles of the Constitutional Treaty. Article 2 of the LT outline the common values for MS of the European Union that are based on pluralism,¹⁰⁵⁸ and aims to create a closer union whereby decisions are inclusive of all citizens.¹⁰⁵⁹ This then encourages citizens to take a greater role in developing and deciding where the EU should head in the future.

More importantly, the treaty formally recognised and guaranteed rights to citizens, including reference to the European Union Charter of Fundamental Rights of 2000, as well as referring to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁰⁶⁰ That guarantee extended to all citizens of the community and did not separate men from women. Moreover, the rights framework established by the EU promotes and protects political citizenship, allowing women to have a greater say and participation in the political discourse of the Union. The Slovenian Constitutional Court in U-I-109/10¹⁰⁶¹ ruled that the European Union Charter of Fundamental Rights became binding law of the EU, protecting the rights of all citizens of the Union, including Slovenians. The treaty also created a common immigration and asylum policy¹⁰⁶² that focused on border checks,¹⁰⁶³ subsidiary and temporary

¹⁰⁵⁴ Ibid, article 18,

¹⁰⁵⁵ Treaty establishing the Constitution for Europe, Official Journal of the European Union C 310.

¹⁰⁵⁶ Act ratifying the Treaty on the Constitution for Europe and the Final Act, Official Gazette Republic of Slovenia, No. 1/2005.

¹⁰⁵⁷ Vaughne Miller, *The Treaty of Lisbon after the second referendum*, Research Paper 09/75, House of Commons, 2009.

¹⁰⁵⁸ Article 2, Treaty of Lisbon, Official Journal of the European Union, C 83/171, 2010.

¹⁰⁵⁹ Ibid, article 1.

¹⁰⁶⁰ Ibid, article 6.

¹⁰⁶¹ Official Gazette of the Republic of Slovenia 78/2011.

¹⁰⁶² Chapter 2, Consolidated Versions of the Treaty of the European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, 2010.

protection and migration flows. Additionally, conditions of entry and residence, rights of non-citizens and the protection of individuals subject to people trafficking and illegal immigration were introduced.¹⁰⁶⁴ Furthermore, the LT, rather than making reference to the 'people' as it did when discussing the role of the European Parliament, now refers to the 'citizens'.¹⁰⁶⁵ The LT provides an 'identity clause' that builds on the express duty to respect national identities that was introduced by the Maastricht Treaty.¹⁰⁶⁶

The citizen's initiative was also introduced to provide greater participation in European Union affairs by all citizens and transcend member states borders. Article 11 requires that no less than one million citizens can petition the European Commission to submit a policy proposal on behalf of the citizens to the European Union (for a policy change that could include economic, social or the protection of the environment). However, for Slovenia, meeting this requirement could be problematic due its population only being approximately 2 million. Article 11 is better suited to the larger states such as the United Kingdom, France and Germany. To build a more inclusive European Union, particularly for the smaller member states such as Slovenia, there should be a threshold included in this provision to allow those states with a population of less than 10 million to be able to submit a policy proposal provided there are between 250,000 and 300,000 citizens who form part of that submission. This would allow for greater participation and is essential for citizenship to be fully effective.

Issever and Rummelili¹⁰⁶⁷ note that “European citizenship does not bring a solution to the dichotomy of the nation-state citizenship¹⁰⁶⁸ between citizens and foreigners, “but rather, replaces it with a new one that renders third country nationals (non-citizens) as others and creates categories of Europeans versus non-Europeans”.¹⁰⁶⁹ Moro argues that for European citizenship to be fully effective it must eventually replace MS citizenship, to ultimately validate the supranational state.¹⁰⁷⁰ A single European citizenship and identity where member states' citizenship no longer exists is a long way off. Member States would have to concede more of their sovereignty to the European Union, which is very unlikely in the short term. However, and while a single citizenship or European identity has not yet been realised, progress towards a coherent and a more inclusive society has certainly taken shape over the past fifty years. The

¹⁰⁶³ Ibid.

¹⁰⁶⁴ Ibid.

¹⁰⁶⁵ Article 10, Treaty of Lisbon, Official Journal of the European Union, C 83/171, 2010.

¹⁰⁶⁶ Article 4 (2) of the TEU, provided by the LT, ensures the European Union respects MS national identities by recognising a states identity as an inherent part of the political and constitutional structure of the country.

¹⁰⁶⁷ Esra Issever and Bahar Rumelili, *European Citizenship and Third Country Nationals: A Comparative Analysis of Germany and Britain*, 2009, INTL 533, 1.

¹⁰⁶⁸ Ibid.

¹⁰⁶⁹ Willem Maas, *Migrants, States, and EU Citizenship's Unfulfilled Promise*, Citizenship Studies, 2008, 583-596.

¹⁰⁷⁰ Giovanni Moro, *The Lab of European Citizenship: democratic deficit, governance approach and non-standard citizenship*, International Institute of Sociology Congress, 2001, 2-11.

establishment of European Law; the European Union, the European Commission, the European Bank and European Parliament along with other European institutions is what John Rawls would define as an ordered society where everyone accepts the same principles of justice and principles'.¹⁰⁷¹ The same can be said of Australia and Slovenia, which have established a well ordered society through strong institutions and the rule of law that protect, guide, direct and enhance participation of their respective citizens, within and outside the state. Today, both Australia and Slovenia have developed strong democratic legal frameworks that allow their citizens to obtain citizenship, contribute to the state and the global community, which is an element of national identity.

It could be argued that the European Union has not been particularly successful in creating a European identity. People have European Union citizenship, but they still feel like MS citizens first, and European citizens second (if at all). For Slovenes this was evidenced in the 2010 research project undertaken by the European Commission (the Flash Eurobarometer). The project surveyed European citizens on how familiar they were with their understanding of European Union citizenship and the rights they possess. The report found that 79% of European Union citizens interviewed had minimal understanding and familiarity of the term "citizen of the European Union".¹⁰⁷² About 22% of people surveyed had not even heard of the term. For Slovenia, having been a member for six years, only 49% were familiar with and understood what a European citizen means, with 36% being familiar, but, not sure of its meaning, and 15% never having heard of the term.¹⁰⁷³ Further work is needed by Slovenia to promote European Union citizenship and the benefits this has afforded its citizens. The treaties of the Union have specifically preserved member states identities.¹⁰⁷⁴ Therefore, the national identity of Slovenia will be retained under the current legal framework of the European Union.

The European Union had an opportunity, but failed to strengthen the identity with the proposed constitution. The major reform from the introduction of the LT was establishing a single legal framework that would remove the three pillars (1. European Communities, 2. Common Foreign and Security Policy, 3. Police and Judicial Co-operation in Criminal Matters) by merging the first and the third pillar. One of the outcomes was improved controls over the number of third country nationals entering member states. Article 79 (5) allows for MS to maintain their control on the numbers of non-citizens (third country nationals) seeking to work (employed or self-employed) in their respective territories.

¹⁰⁷¹ John Rawls, *A Theory of Justice*, Oxford University Press, 2005, 4-6.

¹⁰⁷² European Commission, *Flash Eurobarometer European Union Citizenship; Analytical Report*, 2010, 7.

¹⁰⁷³ *Ibid*, 8.

¹⁰⁷⁴ Deirdre Curtin, *Postnational democracy: the European Union in search of a political philosophy*, Kluwer Law, 1997.

Member states are required to transpose European Union legislation, legal principles and norms from treaties, conventions, regulations and directives into their respective legislation. The European Union develops and implements legislation in the areas of immigration, citizenship, rights and international protection in accordance with article 288, which reinforces the position of the European Union that regulations are binding in their entirety on MS. Directives are also binding, but left to MS on how they implement them. Decisions of the European Union will be binding on those to whom the decision is addressed and recommendations including opinions remain without any binding force. Article 289 of the LT is important, outlining the ordinary legislative procedure (otherwise known as the Co-decision procedure) and consists of joint adoption by the European Parliament and the European Council. This procedure is defined in Article 294. Despite the European Parliament and European Council having the initiative to prepare Union legislation, MS do have the ability under article 289 of the LT to also put forward a legislative proposal. There are specific powers provided that allow, on behalf of Member States, the European Union competence to legislate and adopt binding acts, and for MS to implement those legal instruments.¹⁰⁷⁵ Furthermore, the European Parliament has established the Rules of Procedure.¹⁰⁷⁶ Rule 36 is particularly important to the citizens of the European Union, in which the 2000 Charter of Fundamental Rights and Freedoms should be considered as part of all activities undertaken by the Union.¹⁰⁷⁷ Articles 37 and 37a ensure that any legislative act proposed, is verified as to its legal basis in accordance with article 290 of the Treaty on the Functioning of the European Union (TFEU). Where a new act or amendments are proposed, a resolution must be adopted pursuant to article 225 of the TFEU. The legislation can go through three readings before it is adopted. However, this can only occur on the recommendation of the European Central Bank or the Court of Justice of the European Union.

¹⁰⁷⁵ Article 2 (1), Lisbon Treaty, Official Journal of the European Union, C 83/171, 2010.

¹⁰⁷⁶ European Parliament, Rules of Procedure, Chapter 1, 2012, 29-65.

¹⁰⁷⁷ Article 2, 6 (2) and (3), Treaty of the European Union, Official Journal of the European Union C 83/19.

The Slovenian National Assembly (NA) has responsibility for the adoption of a constitutional act amending the Constitution and national laws¹⁰⁷⁸ that at the time and continuing today can be undertaken by referendum or the general business of government.¹⁰⁷⁹ That is, the draft laws are adopted by the NA¹⁰⁸⁰ and sent to either the President of the NA, National Council or at least 5000 voters,¹⁰⁸¹ for the laws to be accepted and implemented. The legislation must contain the reason for its adoption, a presentation of the harmonisation in regards to European Union law and a presentation of the legislation in the legal system of a minimum of three other MS.¹⁰⁸² The proposal must be accompanied by a presentation of the same European Union law and how it has been adopted in (three other) European Union member states. Slovenia's road to accession saw the state adopt and transpose European Union law into its national legislative framework. European Union citizenship along with national citizenship is multidimensional. Citizenship of the Union has been used to enhance the single market concept, while integrating and unifying member states and their citizens. Furthermore, Union citizenship has also confirmed the legal status of who is a citizen of the European Union and who is not. It must be noted that European Union citizenship has very little direct influence on Slovenia's national identity. However, the European Union and its law directly influences Slovenia's identity, because Slovenia is required to implement the values and expected behaviours the Union aspires to establish for all member states. This includes but not limited to a consistent set of human rights, democratic institutions and the implementation of the rule of law. Yasemin Soysal (discussed **chapter two**) argues that European citizenship and the rights afforded to them straddles national borders at the same time allowing member states to determine who and who will not be a citizen of the state and the European Union. There is a requirement for Slovenia to adopt the democratic principles and law of the European Union. Thus, in the context of this thesis, Slovenia's identity has adopted the values of the European Union, along with its laws pertaining to citizenship, human rights, migration and elements of private international law, amongst others.

¹⁰⁷⁸ Article 107, Rules and Procedure of the National Assembly, Official Gazette of the Republic of Slovenia No. 64/07.

¹⁰⁷⁹ Ibid, article 108.

¹⁰⁸⁰ Ibid, article 113.

¹⁰⁸¹ Ibid, article 114.

¹⁰⁸² Article 115, Rules and Procedure of the National Assembly, Official Gazette of the Republic of Slovenia No. 64/07.

4.1.1 Slovenia's Road to Accession

Relations with the European Union began on conclusion of the Cooperation Agreement by the Former Socialist Republic of Yugoslavia in 1980. In 1993, Slovenia began to consider the rights and obligation of the agreement.¹⁰⁸³ On 15 January 1992, not long after independence the European Community, which was the forerunner of today's European Union (EU) formally, recognised Slovenia as an independent state. Slovenia was also recognised by the international community, becoming the 176th member of the United Nations.¹⁰⁸⁴ Australia was one of the first countries outside Europe, along with Canada, to recognise Slovenia's independence on 16 January 1992.¹⁰⁸⁵ However, the European Union would be divided over the breakup of the former YU. For example, Germany provided support for Slovenia and Croatia in developing and becoming independent states, unlike France and the United Kingdom.¹⁰⁸⁶ The German motivation was to stop the expansion of Serbian nationalism that was spreading across the territory. The United Kingdom did not favour Slovenia breaking away from Yugoslavia (YU), and perceived the problem did not lie in the expansion of Serbian nationalism but rather with all the Republics of the former YU. The European Union saw Slovenia and Croatia as a threat to peace across Southeast Europe, and were of the view that the YU communist government and federal army stood for European stability.¹⁰⁸⁷ Marolov argues that the European Union feared other states and territories would follow the same path, and conflict would once again spread across Europe.

The diaspora community of Slovenia played a part in the former Republic's move towards independence. James Gow and Cathie Carmichael note that the Slovene World Congress of 1990 sought a common goal of independence establishing links with its diplomatic community abroad, including Slovene - Australians and particularly those Slovenes located in the neighbouring states of Austria, Italy and Hungary.¹⁰⁸⁸ What emerged was a diaspora community that got involved by influencing the diplomatic community of the benefit and need for Slovenia to become an independent state. One of those benefits was its geographic position to Europe providing easy access to the East and Southern European countries. Increasingly for states such as Slovenia the diaspora community has played and continues to play, a critical role

¹⁰⁸³ European Parliament, Briefing No 9, Slovenia and the Enlargement of the European Union, www.europa.eu/enlargement/briefings/9a3_en.htm, accessed 20 October 2013.

¹⁰⁸⁴ Ministry of Foreign Affairs, Twenty Years of Slovenia's International Recognition, Republic of Slovenia, http://www.mzz.gov.si/en/twenty_years_of_slovenias_international_recognition, accessed 6 September 2014.

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Dejan, Marolov, *The Policy of the USA and EU towards the Disintegration of Yugoslavia*, Goce Delcev University, Strip, Republic of Macedonia, International Journal of Social Science Tomorrow, Vol 1, No.2, 2012, 2-5.

¹⁰⁸⁷ Ibid.

¹⁰⁸⁸ James Gow and Cathie Carmichael, *Slovenia and the Slovenes: A Small State and the New Europe*, London: Hurst & Co, 2000.

in the politics and identity of the state. As discussed in **chapter three**, the Slovenian diaspora were instrumental in getting the state to expand its citizenship laws to allow second, third and fourth generation Slovenes to obtain citizenship of Slovenia. That work by the diaspora resulted in Slovenia's national identity be expanded and being acknowledged in other parts of the world, where it otherwise would not have occurred.

Not long after independence, Slovenia would commence the process of EU accession. There was a formal process and the EU required all future MS to meet certain economic, social and environmental criteria set out in the Amsterdam Treaty¹⁰⁸⁹, and the Copenhagen European Council¹⁰⁹⁰ as well as Madrid European Council. The Madrid principles are important to this research, requiring not only that EU law be transposed into national legislation, but also that EU law be implemented by MS. Following the signing of the European Agreement in 1996, Slovenia submitted an application for full membership of the Union. In July 1997, the agreement was ratified by the Slovenian National Assembly following an amendment to article 68 of the Slovenian constitution. This was based on the Constitutional Court's opinion¹⁰⁹¹ and enabled a four-year transition period for non-citizens to own real-estate within the Republic. Slovenia implemented the *acquis communautaire*, which began in 1998. The European Commission began negotiations with Slovenia and by 1999 the European Parliament announced that progress towards accession was on track, meeting the necessary economic criteria and implementation of the *acquis communautaire*.¹⁰⁹²

By 2000, Slovenia was required to have implemented major economic reforms including privatisation of banks and other institutions (telecommunications and pensions), to ensure there was a free market. This process would also see the demise of any legacy of the former YU socialist arrangements. By the end of 2002, Slovenia had adopted up to one thousand pieces of European legislation, into the national legislative framework. This included 288 parliamentary acts, 272 governmental regulations, and 784 ministerial regulations as part of the National Programme for the Adoption of the Acquis (NPAA).¹⁰⁹³ However, this only accounted for 67% of the NPAA being fulfilled, and being two years away from full membership, Slovenia still had considerable work to do.

¹⁰⁸⁹ Article 6 (1), upon application the principles of liberty, democracy, respect of human rights and fundamental freedoms and the rule of law apply.

¹⁰⁹⁰ Copenhagen European Council required stability of a nation states institutions guaranteeing democracy, rule of law, human rights and respect of minorities, the existence of a functioning market economy able to cope with market forces of the Union as well as the ability to take on obligations of membership, economic, economic and monetary.

¹⁰⁹¹ Paragraph 2, Article 160 Slovenian Constitution and article 70 Constitutional Court Act, Official Gazette of the Republic of Slovenia 64/07, Official Gazette of the Republic of Slovenia 40/97.

¹⁰⁹² Regular Report, From the Commission on Slovenia's Progress Towards Accession, 1999, 71, http://ec.europa.eu/enlargement/archives/pdf/key_documents/1999/slovenia_en.pdf, accessed 4 May 2014.

¹⁰⁹³ Republic of Slovenia, *Amendments to the Republic of Slovenia's National Programme for the Adoption of the Acquis*, 2002, 1.

The Slovenian constitution was amended to include article 3a (3) that provided legal effect for Slovenia to adopt European Union legislation and have representation to European institutions. The constitutional doctrine of the right to self-determination allows Slovenia to be a member of the European Union, but also allows that state to exit upon agreement from the European Union. However, there have been many positive benefits from integrating Slovenia into the Union such as securing further progress towards democracy, social justice, freedom and the basic rights of the Slovene citizens.¹⁰⁹⁴ The introduction of this provision also allowed for the automatic transfer of parts of the Slovene sovereignty to the European Union.¹⁰⁹⁵

Accession Treaty

The Accession Treaty 2004 was established to assist states in their transition in joining the EU including Czech Republic, Republic of Estonia, Republic of Cyprus, Republic of Latvia, Republic of Lithuania, Republic of Hungary, Republic of Malta, Republic of Poland, Slovak Republic and Republic of Slovenia. Article 53 of the Treaty stated that upon accession, the new MS shall be considered as being addressees of directives and decisions within the meaning of article 249 of the EC Treaty and Article 161 of the Euratom Treaty¹⁰⁹⁶ (Treaty establishing the European Atomic Energy Community). Along with other MS, Slovenia was now required to adopt EU law, which has had an impact on all Slovene citizens, including the free movement of goods and free movement for persons.¹⁰⁹⁷ However, despite full membership of the EU there were restrictions placed on Slovenes working in certain states, as discussed later in this chapter. Having this newfound freedom to move and reside in other MS saw a rise in emigration of

¹⁰⁹⁴ Peter Jambreč, *Nation's Transitions, Social and Legal Issues of Slovenia's Transitions 1945-2015*, Graduate School of Government and European Studies, Brdo pri Kranju and European Faculty of Law, Nova Gorica, Slovenia, 2014, 279.

¹⁰⁹⁵ The European Court of Justice developed legal doctrine that is the cornerstone of the interpretation and implementation of European Union legislation such as *direct effect*,¹⁰⁹⁵ *legal certainty*,¹⁰⁹⁵ *proportionality*,¹⁰⁹⁵ *conflict of laws*,¹⁰⁹⁵ and *supremacy*.¹⁰⁹⁵ These principles have a significant role to play in linking European Union and member states national laws that regulate the activities of citizens (immigration, rights and private international law). Similar legal principles exist in Australia's common law system, where national legislation interacts with state and territory law. In *Minister for Resources v Dover Fisheries Pty Ltd*,¹⁰⁹⁵ the Federal Court stated; the concept of proportionality' as a criterion for assessment of validity in constitutional and administrative law. Section 51 and 52 of the Australian constitution provide the Commonwealth with exclusive right to legislate for certain areas such as immigration. Section 109 provides that a valid law of the Commonwealth which is inconsistent with a State based law, the Commonwealth law prevails. Section 75 provides exclusive jurisdiction of High Court in matters that arise under any treaty provided that Australia is a signatory and ratified the legal instrument. The Commonwealth applies the principle of supremacy when it comes to the adoption of international law. Furthermore, sections 92, 99 and 117 effectively provides that Australia is a stand-alone country that is made up of states and territories, and national law takes precedence over state and territory law.

¹⁰⁹⁶ Title II Applicability of the Acts of the Institutions, Official Journal of the European Union, 2003, L 236.

¹⁰⁹⁷ Article 53, Official Journal L 236, Slovenia's Accession to the European Union, 2003.

Slovenes abroad totaling 8269 in 2004, up from 5876 in 2003.¹⁰⁹⁸ In 2002, 7,269 Slovenes moved abroad.¹⁰⁹⁹ The statistics do not state whether this movement was to other European Union MS, or other countries outside of Europe.¹¹⁰⁰ Finally, the 2003 Slovenian referendum for membership to the EU concluded that 89% of the voters, voted in favour of European Union membership. On 16 April 2003, Slovenia signed the Accession treaties in Athens, Greece.¹¹⁰¹ Slovenia and its citizens finally became a member of the EU on 1 May 2004.

Impact on Slovenes of European Union Accession

Arguably, the most notable immediate impacts on the citizens included the transition from the Slovene currency (the Tolar) to the Euro. The legal steps to adopting the Euro began on 28 June 2004 with Slovenia entering the ERM II (exchange rate mechanism).¹¹⁰² The adoption of the Euro currency was undertaken incrementally with the exchange rate mechanism to ensure stability between the currencies in 2004. It was not until 2006 that prices for goods and services began to be displayed in both currencies. The European Commission and European Central Bank at a meeting in the Economic and Financial Affairs Council approved Slovenia fully adopting the Euro on 11 July 2006. On 1 January 2007, the Slovene Tolar ceased to be used as a currency in Slovenia. The Euro is now the principal currency used by Slovenians in Slovenia and across the European Union (EU).

Slovenians were no longer inhibited by border crossings when travelling to other European Union member states (MS). They would also be afforded access to European institutions such as the European Central Bank, European Parliament, European Commission, the European Court of Human Rights and the European Court of Justice. The freedoms afforded to Slovene citizens included the freedom to move, work, establish a business, study or provide services also enabled Slovenes to gain access to other markets across the European Union. The mutual recognition process established by the EU, resulted for example, in an education qualifications obtained in Slovenia being recognised in other EU MS. One of the most significant changes was the requirement to allow foreigners from other EU MS to purchase property in Slovenia. The 1997

¹⁰⁹⁸ Migration changes and total increase, 2004, Statistical Office of the Republic of Slovenia, http://www.stat.si/eng/novice_poglej.asp?ID=705, accessed 4 May 2013.

¹⁰⁹⁹ Ibid.

¹¹⁰⁰ Ibid.

¹¹⁰¹ Facts about Slovenia, Slovenia a Member of the EU by 1 May 2004, <http://www.ukom.gov.si/fileadmin/ukom.gov.si/pageuploads/dokumenti/Publikacije/european-union.pdf>, accessed 4 May 2013.

¹¹⁰² Slovenia joins the Euro area, European Commission, http://ec.europa.eu/economy_finance/articles/euro/slovenia_joins_the_euro_area_en.htm, accessed 6 September 2014.

Constitutional Court¹¹⁰³ observed that the Article 68 was changed to enable aliens to acquire property in Slovenia.¹¹⁰⁴

Prior to 1997, the Slovenian Constitution went some way to enabling aliens to acquire property; however this was subject to the national laws.¹¹⁰⁵ No longer was Slovenian property an exclusive right for Slovenians as it was under the former Yugoslavia. Slovenians were able to get full access to employment only in the United Kingdom, Ireland and Sweden. It was not until 2011, that all restrictions would be lifted allowing Slovene citizens to work without a permit anywhere across the European Union.¹¹⁰⁶ Even so, there was no impact where a Slovene national was already working in a MS at the time of accession. However, the person needed to have been working in that MS for a period of 12 months or longer. Article 1 through to 6 of Regulation 1612/68, applied for seven years following accession, restricting access by Slovenes to other MS labour markets where that MS determined there could be a threat to their own citizens.

It was on 30 March 2008 that Slovenia finally released the control of its air borders. As a result, Slovenia would then be subject to the European Union common visa system and Schengen Information System (SIS), a database used by MS to track people entering and exiting the European Union. A Slovene citizen who had left Slovenia and the EU would, upon re-entry only had to produce their Slovene passport once, whether the individual arrived from Serbia or Switzerland.

Despite the long road to EU membership, in 2015, Slovenia's acceptance, accession, and membership to the European Union can be described as a great success following the breakup of the former YU. The only other former YU Republic to gain membership of the European Union is Croatia, in 2013. Joining the European Union and implementing European Union law has provided Slovene citizens with an expanded set of rights. The next section compares how Slovenia has reflected the rights afforded by the European Charter of Fundamental Rights 2000 in the Slovene constitution and compares those rights with Australia's constitution and national laws. The provisions of the 1950 European Convention on Human Rights and accompanying provisions of Protocol and Protocols No 4, No 6, No 7, No 12 and No 13, are also referenced where applicable. It must be noted that the 1950 European Convention on Human Rights, has been the basis for the further development of rights in the European Union and its legal

¹¹⁰³ Slovenian Constitutional Court, Official Gazette of the Republic of Slovenia No. 42/97.

¹¹⁰⁴ Peter Jambrek, Professor Graduate School of Government and European Affairs Substitute member, Venice Commission, Strasbourg 2009.

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU\(2009\)034-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2009)034-e), accessed 28 May 2014.

¹¹⁰⁵ Ibid.

¹¹⁰⁶ Regulation (ECC) No 1612/68, reinforces the right of freedom of movement for workers within the Community, Official Journal of the European Union, L 257.

framework. As stated earlier in this chapter, the European Union and its law directly influences Slovenia's identity. There is a requirement for Slovenia to adopt the democratic principles and law of the European Union. Thus, in the context of this thesis, Slovenia's identity has adopted the values of the European Union, along with its laws pertaining to human rights.

4.2 Supernational and Constitutional Rights

Australia's constitution could reflect a modern (twenty-first century) text (document), similar to the structure and text of Slovenia's constitution. Doing so, would provide a stronger legal foundation for human rights in Australia.¹¹⁰⁷ A constitution directs citizens to embrace the values and behaviors of the state, which form part of a state's identity.¹¹⁰⁸ A constitution provides the high level principles of a state's legal framework that enables the state to regulate the activities of the state and its citizens. The states of Australia and Slovenia provide rights to its citizens and the state through their constitutions and national laws. Helen Irving argues the constitution distributes power to government to make laws,¹¹⁰⁹ to protect the rights and freedoms of its citizens. The constitution provides legal certainty and can endure changes in society and the wider world. The constitution of a state is considered the highest level of law within the state. However, the constitution of Australia or Slovenia does not define national identity. Slovenia's constitution outlines some elements of what constitutes national identity such as language and citizenship (discussed later in this chapter). The population (citizens) of a state is one of the constitutive elements of nationalism and statehood and is supported by a state establishing citizenship laws¹¹¹⁰ and a constitution. A constitution is a state's basic legal document that has been designed to endure over a longer period than national legislation.¹¹¹¹ The Australian High Court has referred to the constitution of Australia¹¹¹² as being the foundation of the state,¹¹¹³ which provides the state with the highest legislative power.¹¹¹⁴

¹¹⁰⁷ Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Social Justice Report 2008, Australian Human Rights Commission, 2009, 63-65, http://www.humanrights.gov.au/sites/default/files/content/social_justice/sj_report/sjreport08/downloads/SJR_2008_full.pdf, accessed 3 February 2014.

¹¹⁰⁸ Claire O'neil, Tim Watts, *Two Future: Australia at a Critical Moment*, The Text Publishing Swann House, 2015, 200-205.

¹¹⁰⁹ Helen Irving, *Australia's Constitutional Identity: A conundrum for the 21st Century*. in Not known (Eds.), *Unity and diversity: a national conversation: Barton lectures*, Australia: ABC Books, 2001, 194-221.

¹¹¹⁰ U-I- 89/99, Official Gazette of the Republic of Slovenia, No. 59/99.

¹¹¹¹ Marko Novak, *Three Models of Balancing (in Constitutional Review)*, Ratio Juris, Vol. 1. 2010, 101-112. The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13. Slovenia on the other hand has been able to amend its constitution seven times since independence, with the most recent occurring in 2013. These changes are outside the scope of this research.

¹¹¹² Australia referendum requirements set out in section 128. Since the Australian constitution was established there has been 44 referendums to change the constitution, and only 8 referendums have been successful.

¹¹¹³ *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182.

¹¹¹⁴ *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539 at 587.

According to Gary Jacobsohn, a state's constitution is more than a written document.¹¹¹⁵ A constitution outlines the fundamental norms and principles of the states' society that blend the state's identity with its values and culture.¹¹¹⁶ The values and culture include the expressed constitutional rights of a state that forms part of the overall national identity. It is conveyed to the citizenry by governments through institutions and the law. The laws established by the constitution regulate and direct how citizens are to behave. Comparatively, the expressed constitutional rights of Slovenia and Australia are different. Slovenia, having what could be argued is a modern day constitution has explicitly expressed the rights and freedoms afforded to its citizens and non-citizens.

The Australian constitution¹¹¹⁷ has both expressed and implied rights. The express rights have been limited to the right to vote,¹¹¹⁸ with the right to trial by jury being another expressed right.¹¹¹⁹ However, this is restricted to where there is a trial by indictment.¹¹²⁰ Freedom of religion can be found in section 116 of the Australian constitution¹¹²¹ and applies to any religion and religious observance.¹¹²² The Australian constitution differs from the Slovenian constitution in the area of citizenship. The Slovenian constitution specifies that citizenship is regulated by the law.¹¹²³ Slovenia has also formally recognised their language.¹¹²⁴ Australia's does neither recognize citizenship is to be regulated by the law or the English language. Recognising the English language would be problematic for Australia with the vast ethnic groups now present. Furthermore, the Australian Commonwealth Parliament has the power to make laws with respect to the acquisition of property, medical or dental services, the High Court's jurisdiction to control the executive, guaranteeing that trade and commerce amongst states is free, and the imposition of discrimination.¹¹²⁵ George Williams and David Hume argue that there is an expanded list of rights and protections whereby the Commonwealth is prohibited from discriminating between states. These include; protecting public servants that have been transferred from the state to the Commonwealth and prohibiting the Commonwealth from preferencing one state over another in trade and commerce. Additionally, the Commonwealth is prohibited from abridging the right of a state or the residents of a state to the reasonable use of

¹¹¹⁵ Gary Jacobsohn, *Constitutional Identity*, Harvard University Press, Vol. 21 No.3, 2012, 132-134.

¹¹¹⁶ Ibid.

¹¹¹⁷ Matt Harvey, *Australia and the European Union: Some Similar Constitutional Dilemmas*, DeakinLaw Review, 2001, 312.

¹¹¹⁸ Australian Constitution 1900, s 41. *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254. *Kingsville v The Queen* (1985) 159 CLR 264. *Cheatle v The Queen* (1993) 177 CLR 541.

¹¹¹⁹ Australian Constitution 1900, s 80.

¹¹²⁰ *R v Bernasconi* (1915) 19 CLR 629.

¹¹²¹ Constitution of Australia 1900, s116.

¹¹²² *Adelaide Company of Jehovah's Witness Inc v Commonwealth* (1943) 67 CLR 116.

¹¹²³ Article 12, Slovenian Constitution, Official Gazette of the Republic of Slovenia, 33/91, 42/97, 66/2000 and 24/03, 68/06 and 47/2013.

¹¹²⁴ Article 11, Slovenian Constitution, Official Gazette of the Republic of Slovenia, 33/91, 42/97, 66/2000 and 24/03, 68/06 and 47/2013.

¹¹²⁵ George Williams and David Hume, *Human Rights under the Australian Constitution*, Oxford University Press, 2013, 112-113. Constitution of Australia 1901, s51(xxix), 51(xxiiiA), 75(v), 92.

water. Changing the constitution cannot be undertaken without the consent of the electors.¹¹²⁶ The ‘implied’ rights and freedoms can be summarised as the freedom of political communication,¹¹²⁷ the freedom of movement, association and speech.¹¹²⁸ Even though these rights and freedoms have not been explicitly expressed in the Australian constitution, the High Court of Australia has ruled that these rights do exist. Frank Bechhofer and David McCrone¹¹²⁹ argue that a state's constitution contributes to its identity, and modernising a constitution will enhance that state's identity and strengthen nationalism.¹¹³⁰ A constitution can be used by a state to direct its citizens to engage in society and embrace the values and expected behaviors of the state. Constitutions can set out the rights and obligations afforded to citizens, and assist a state in building an inclusive identity.¹¹³¹

The Slovenian constitution¹¹³² distinguishes between two groups to whom the rights apply. The first group applies to everyone¹¹³³ (including citizens and residents in the territory) and the second group only applies to Slovene citizens.¹¹³⁴ Australia's constitution does not make the same distinction. The rights of the citizen and non-citizen are a man-made ‘construct’. Since the establishment of the 1948 Universal Declaration on Human Rights, nation states have improved their regulatory frameworks that ensure their citizens are afforded expressed rights and freedoms. Both Slovenia and Australia have ratified the 1948 Universal Declaration on Human Rights. Since 1948, there have been a number of legal instruments established to promote and protect all people of the world, such as the International Convention on the Elimination of all Forms of Racial Discrimination 1965 and International Covenant on Civil and Political Rights 1966.¹¹³⁵ These international legal instruments have all assisted in shaping the European Union, Slovenian and Australian law. Since their adoption nationally or regionally, the principles laid out by the international community have been used by the state to ensure their citizens embrace the common values that are expected by the international community.

¹¹²⁶ Australian Constitution, ss84, 99, 100, 128.

¹¹²⁷ *Kruger v Commonwealth* (Stolen Generation Case) (1997) 190 CLR 1.

¹¹²⁸ *Australian Capital Television v Commonwealth* (1992) 177 CLR 212.

¹¹²⁹ Frank Bechhofer and David McCrone, *National Identity, Nationalism and Constitutional Change*, Palgrave Mcmillan, 2009, http://www.institute-of-governance.org/_data/assets/pdf_file/0011/35939/chap1_intro.pdf, accessed 3 February 2014.

¹¹³⁰ *Ibid.*

¹¹³¹ Claire O’neil, Tim Watts, *Two Future: Australia at a Critical Moment*, The Text Publishing Swann House, 2015, 200-205.

¹¹³² Arne Mavčič, *Constitutional Values in Practice with a Special Reference to the Slovenian System outline*, The Analysis and International Cooperation Department, Constitutional Court of the Republic of Slovenia, 2008, 1-18.

¹¹³³ Part II, Slovenian Constitution, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹¹³⁴ *Ibid.*

¹¹³⁵ International Legal Instruments include; International Covenant on Economic, Social and Cultural Rights 1966, adopted by UN General Assembly resolution 2200A (XXI), 16 December 1966, entry into force 3 January 1976, Treaty Series, vol. 993, p. 3. Convention on the Elimination of All Forms of Discrimination Against Women, adopted by UN General Assembly resolution 34/180 18 December 1979, entry into force 3 September 1981, Treaty Series, vol. 1249, 13.

That is, whether in a constitution or national law, there is an expectation that a state's citizens will conform to the rights provided (in terms of the state and other citizens).

The European Union considers human rights as one of the principal policy objectives of the ongoing integration and unification of MS and their citizens. This has been achieved along with the extensive European legal framework, with the implementation of the 1950 European Convention on Human Rights and Fundamental Freedoms (ECFF)¹¹³⁶ and more recently the European Charter of Fundamental Rights (ECFR) 2000. The ECFR is binding law¹¹³⁷ on all twenty eight member states of the European Union. However, it must be noted that the 1950 ECFF is also binding law and was established by the Council of Europe, which has a much broader membership than the European Union. For instance, the Council of Europe has 47 members that includes states such as Russia Armenia, Azerbaijan, Georgia, Serbia, Albania, Andora, Montenegro, Macedonia, Bosnia and Herzegovina, Switzerland, Moldova, Ukraine, Monaco, Iceland, Norway, San Marino, Liechtenstein and Turkey who are not members of the European Union.

Many of the principles found in the 2000 ECFR originated from the 1950 European Convention on Human Rights and Fundamental Freedoms (ECR&FF). This is an important point because the earlier decisions of the European Court of Human Rights (ECoHR) located in Strasbourg relied on the principles laid out in the 1950 Convention. Over a fifty-year period not only has the European Union and Slovenia relied on the decisions of the ECeHR, Australia has also referred to and borrowed from Europe in this very important area of law. In *Dietrich*¹¹³⁸ the High Court of Australia referred to the European Court of Human Rights and article 6 of the ECR&FF when determining what constituted the right to a fair trial. The court noted the 1950 European Convention for the Protection of Human Rights contains basic minimal rights for an accused to have adequate time to facilitate the preparation of their defence. Justice Michael Kirby¹¹³⁹ highlights that there have been many occasions where the Australian courts have looked to the European Court of Human Rights in Strasbourg for reference and guidance in relation to human rights (free speech, the right to fair trial), migration law and family law.

¹¹³⁶ Act ratifying the Convention on Human Rights and Fundamental Freedoms as amended by Protocols Nos. 3, 5 and 8 and amended by Protocol No. 2 and its Protocols Nos. 1, 4, 6, 7, 9, 10 and 11, Zakon o ratifikaciji Konvencije o varstvu človekovih in temeljnih svoboščin, spremenjene s protokoli št. 3, 5 in 8 ter dopolnjene s protokolom št. 2, ter njenih protokolov št. 1, 4, 6, 7, 9, 10 in 11, Official Gazette Republic of Slovenia Treaties, MP, No. 7/94.

¹¹³⁷ Article 6, Lisbon Treaty 2009, Official Journal of the European Union, C83/389, 2; contains the Charter of Fundamental Rights of the European Union, and has the same legal value as the Treaties.

¹¹³⁸ *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292.

¹¹³⁹ The Hon Justice Michael Kirby AC CMG, Australia's Growing Debt to the European Court of Human Rights, The Seventh FIAT JUSTICIA Lecture, Monash University, Faculty of Law 2008.

As stated above, Australia has been known to borrow human rights protections from the European Court of Human Rights, to help guide its decisions across various legal areas. It must be noted that there are two distinct institutions in Europe that deal with human rights. The Court of Justice of the European Union is the highest level court, and the Council of Europe has the European Court of Human Rights. This thesis has argued in chapter one that comparing the laws of Australia, Slovenia and the European Union, not only makes a contribution to knowledge but also may enhance the respective jurisdictions legal frameworks. Australia should not only borrow from Slovenia but also continue to borrow from the European Union and European Council in this important area of law. However, for Slovenia the implementation of human rights has not been as smooth as the transition from socialism to democracy. The ECoHR has convicted Slovenia on 275 occasions for violations of human rights.¹¹⁴⁰ Even though the majority of violations were related to the inefficient judiciary (length of proceedings and right of remedy), other areas where breaches were recorded include, the lack of effective investigation and inhumane or degrading treatment. Furthermore, the right to liberty and security, non-enforcement, respect for private and family life, discrimination and protection of property were identified as areas Slovenia had not fully upheld. This is an area for improvement for Slovenia. The benefit for Australia is that the state and its institutions and judiciary do not have the same oversight or scrutiny as Slovenia does with a supernational polity – the European Union.

The European Charter of Fundamental Rights 2000 consists of seven chapters that include dignity, freedoms, equality, solidarity, citizen's rights, justices and general provisions.¹¹⁴¹ The Slovenian constitution has expressed certain rights that are more relevant at the national level. Apart from the minimal rights expressed in the Australian constitution, the state has largely relied on the judiciary and legislation including:

- Australian Human Rights Commission Act 1986;
- Age Discrimination Act 2004;
- Disability Discrimination Act 1975; and
- Sex Discrimination Act 1984.¹¹⁴²

The above legislation assists the state in implementing its human rights commitments. Furthermore, the Australian Capital Territory and State of Victoria have both established the *Human Rights Act 2004* and the *Charter for Human Rights Act 2006* respectively. The development of the Victorian charter of human rights resulted in a lot of consultation and

¹¹⁴⁰ European Court of Human Rights, http://www.echr.coe.int/Documents/Stats_violation_1959_2013_ENG.pdf, accessed 2 August 2013.

¹¹⁴¹ Charter of Fundamental Rights 2000, Official Journal of the European Communities 2007 C 364/13.

¹¹⁴² George Williams and David Hume, *Human Rights under the Australian Constitution*, Oxford University Press, 2013, 14-15.

understanding of the European human rights law.¹¹⁴³ Australia, by establishing rights and freedoms within legislation, enables the parliament at any time to amend or change the nature, meaning or context of what a right or freedom is, and, how it can be applied. According to Augusto Zimmermann the effectiveness of human rights legislation is dependent on the socio-political context in which it operates.¹¹⁴⁴ That is, the social and political climate will in part determine how and when human rights will be enacted to protect citizens. Take for example the indigenous Australians who have the same rights as other citizens, but in practice their rights have been restricted by political practices, policy and the law. This can, in part, dilute national identity, where the state is viewed by other states as being discriminatory to a certain group in the community. Nonetheless, Australia has given effect to a large body of international human rights law that includes:

- The *Racial Discrimination Act 1975* implementing the International Convention on the Elimination of All Forms of Racial Discrimination (1966);
- *Sex Discrimination Act 1984* – implementing the Convention on the Elimination of All Forms of Discrimination Against Women (1979);
- *Disability Discrimination Act 1992*, implementing elements of the ILO Convention Concerning Discrimination in Respect of Employment and Occupation (1958); and
- *Human Rights and Equal Opportunity Commission Act 1986*, establishing a national human rights body for the purposes of law reform, education, intervention in court proceedings and investigations.¹¹⁴⁵

Slovenia has also given effect to the above international legal instruments through article 8 of the Slovenian Constitution. This also includes those international conventions and treaties that have been ratified and published. Similarly, section 51(xxix) of the Australian constitution gives the Australian Government the power to legislate in relation to issues such as the implementation of international treaties and conventions on human rights. The Australian framework does not provide the same level of legal certainty as does the Slovenian framework. Interestingly, the expansion of rights at an international and regional level (in the case of Europe) has impacted on and influenced states and citizenship in four ways. Firstly, more rights have been incorporated by states into their national law (constitutionalised or national legislation), thereby affording more civil and political rights to citizens. Secondly, many of these rights allow citizens to challenge the state. Thirdly, rights allow states to establish values and behaviors that they expect their citizens to follow. Fourthly, and most importantly, it could

¹¹⁴³ The Victorian Charter of human rights and Responsibilities, www.humanrightscommission.vic.gov.au/...rights.../1838_229730fbdd853ed92de6e9, accessed 2 October 2016.

¹¹⁴⁴ Augusto Zimmermann, *What is wrong with a Charter of Rights?* Orig Law Rev, Vol 1, 2006, 29..

¹¹⁴⁵ Above n 1105.

be argued that the institutionalisation of rights beyond the state has heightened the tension between globalisation and the nation state. That is, the state no longer has total control over the rights of its citizens. Citizens can choose to exercise their rights in the international arena, when they have exhausted all channels with the state. Therefore, the resulting effect on national identity by the institutionalisation of rights beyond the state has seen states having to evolve their identities to ensure rights form part of that identity.

Today, citizens after exhausting their national legal remedies citizens can seek representation to international institutions such as the United Nations. For Slovenians, they have an advantage whereby after exhausting their legal remedies at a national level, they can go directly to the European Union, European Commission, European Parliament or the European Court of Human Rights. Therefore, it could be argued that on the one hand states are using citizenship and rights to enhance their national identities, but on the other hand the national identity and citizenship is being diluted by the institutional framework that lies beyond the state. More importantly, and without providing a detailed comparison, the basis of rights that Slovenian and Australian citizens have been afforded can be found in the Declaration of the Rights of Man and Citizen 1789. This reinforces the earlier point that the American and French Revolutions (discussed **chapter two**) have had a significant influence on the development of citizenship, the nation state, national identity and shaping how citizens are to conduct themselves in everyday life. National identity is multidimensional and includes historic and current day territory, common myths, symbols, shared culture and language, democratic principles and institutions.

National Communities

Apart from Slovenia ensuring continuity of Slovenians upon independence, the ethnic communities of Italy and Hungary were also afforded the same recognition. Dating back to the 1963 Republic of Slovenia and its former constitution, Italian and Hungarian ethnic groups were guaranteed equal rights for the use of their language, education and media.¹¹⁴⁶ As such, the Slovenian constitution upon independence upgraded the level of protection for the Italian and Hungarian communities. Most notable was the recognition that the people were no longer considered minorities but rather had a status of being part of a national community. Raising the status of these minorities to national communities strengthened their participation in the state by allowing them to vote and stand for election. This has similarities with an individual having the status of citizenship or residence. Residence status does not allow a person to vote or stand for election. Thus, article 65 of the Slovenian constitution provides special rights for those Italian

¹¹⁴⁶ Sigrid Lipott, *The Hungarian National Minority in Slovenia: Assessment of Protection and Integration after the EU Accession*, Romanian Journal of European Affairs, 2013, Vol. 13, No. 3, 65-70.

and Hungarian national communities¹¹⁴⁷ residing in Slovene territory, and for those individuals determined to be part of the Rom community.¹¹⁴⁸

The autochthonous Italian and Hungarian national communities¹¹⁴⁹ (and their members) are guaranteed the right to use their national symbols freely and, preserve their identity. These national communities also have the right to establish organisations and develop economic, cultural, scientific and research activities. It must be noted that the national communities of Hungary and Italy are afforded quite different rights and freedoms to that of the Rom community under national laws. However, a comparison is not required as part of this research. Additionally, these national communities have the right to education and schooling in their own languages.¹¹⁵⁰ Article 61 of the Slovenian constitution provides a broader right for individuals resident in Slovenia to express their affiliation with their own nation and national community. Arne Mavčič argues this was a deliberate inclusion by the constitutional drafters to protect individuals from the former Yugoslav Republics. Arguably, the constitutional recognition of the Rom and national communities is an important component of continued unification and integration of these people within Slovenia. It can be argued within Australia, national minorities are protected by national discrimination laws. However, this thesis argues Australia has continued to exclude one national minority – the indigenous community, and it is time they are recognised in the constitution. This would expand and ensure a more inclusive identity for the state.

Discrimination

Article 63 of the Slovenian Constitution prohibits incitement to national, racial, religious or other discrimination as well as inflaming national, racial religious or other hatred and intolerance.¹¹⁵¹ This discrimination extends to protecting the rights of national communities of Hungarians and Italians. Furthermore, article 300 of the Penal Code of the Republic of Slovenia determines the nature of ‘stirring up Ethnic, Racial or Religious Hatred, Strife or Intolerance as

¹¹⁴⁷ Article 64 and 65 of the Slovenian Constitution, Official Gazette of the Republic of Slovenia, 33/91, 42/97, 66/2000 and 24/03, 68/06 and 47/2013.

¹¹⁴⁸ It is estimated the Roma people have been residing in Slovenia since the 15th century, and today they reside in the regions of Prekmurje, Dolenjska and Gorenjska, which has seen them come from the Hungarian, Croatian and Austrian regions, http://www.mnz.gov.si/en/minorities/roma_community/, accessed 1 December 2012. Arne Mavčič, Slovenia, *International encyclopedia of laws*, Constitutional law, suppl. 27, 28. The Hague; London; Boston; Kluwer Law International, 1998, 44, 302, 250-258.

¹¹⁴⁹ U-I-267/09-11-2-2010, Official Gazette of the Republic of Slovenia 14/2010, U-I-176/08-7-10-2010, Official Gazette of the Republic of Slovenia 84/2010, U-I-416/98-22-3-2001, Official Gazette of the Republic of Slovenia 28/01.

¹¹⁵⁰ Arne Mavčič, Slovenia, *International encyclopedia of laws*, Constitutional law, suppl. 27, 28. The Hague; London; Boston; Kluwer Law International, 1998, 44, 302, 250-258.

¹¹⁵¹ Arne Mavčič, *Constitutional Values in Practice with a Special Reference to the Slovenian System outline*, The Analysis and International Cooperation Department, Constitutional Court of the Republic of Slovenia, 2008, 1-18.

a criminal offence'.¹¹⁵² Moreover, Slovenia in accordance with the EU¹¹⁵³ has implemented the *Principle of Equal Treatment Act 2004 and Equal Opportunities for Women and Men Act of 2002* that determines a common ground for the assurance of equal rights of everyone. Australia should consider making special recognition of indigenous Australians.

Comparatively, Australia could do a lot more to eliminate discrimination against the indigenous peoples. Indigenous land rights have been established through the *Native Title Act 1993* (Cth) and respective state and territory laws such as the 1994 *Native Title (South Australia) Act*, these and other rights such as discrimination can be reviewed and changed at any time. Since implementing the national 1993 Native Title legislation governments have significantly reduced the rights to land by the indigenous aboriginal peoples.¹¹⁵⁴ However, this research does not have the scope to discuss those changes. The Australian constitution provides provision for the race power under section 51(xxvi), which goes some way to protecting the indigenous peoples of Australia from discrimination. The current national government in 2014 proposed repealing s18 of the *Racial Discrimination Act 1975*. Section 18 makes it unlawful for any person to offend, insult, humiliate or intimidate a person on racial or ethnic grounds. Repealing such a law would take Australia backwards in relation to the progress the state has made towards multiculturalism and closing the gap with the indigenous community. However, due to the negative public reaction to the proposal, the Australian Government backed down on 6 August 2014 and the changes were not going ahead at the time of writing this thesis.¹¹⁵⁵ Australia, as part of its identity had implemented laws to advance discrimination. Had this legislative change been realised national identity would have been diluted. Other nation states could have potentially viewed Australia as being less concerned about integrating the different ethnic groups that make up the Australian population.

Temporary Suspension and Detention

With the onset of war or a state of emergency, the Slovenian constitution could be restricted or temporarily suspended.¹¹⁵⁶ However, it must be noted there are certain basic rights that cannot be suspended even in the case of war, such as the right to life and prohibition against torture. The European Charter of Fundamental Rights and Australian constitution provides no similar provision. Suspending the European Charter of Fundamental Rights in war time, particularly if the conflict is within the borders of the EU, would significantly reduce the protection of

¹¹⁵² Ibid.

¹¹⁵³ Council Directive 2000/43/EC, established equal treatment between persons irrespective of their racial, or, ethnic origin for all citizens of all Member States.

¹¹⁵⁴ Sean Brennan, *Native Title in the High Court of Australia a decade after Mabo*, Tobin Centre of Public Law, Faculty of Law, University of New South Wales, 14 PLR 209, 2003, 209-201.

¹¹⁵⁵ The Australian Financial Review, 6 August 2014, 6.

¹¹⁵⁶ Slovenian Constitution, Official Gazette of the Republic of Slovenia, No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

member states citizens. The impact to national identity is minimal, however the citizens would have many of their protections either diluted or suspended towards each other and the state.

Rights and Freedoms

This section discusses the rights and freedoms afforded to citizens of modern day Europe, Slovenia and Australia. The basic rights afforded to individuals under the Slovenian constitution include equality before the law;¹¹⁵⁷ the exercise and limitation of rights;¹¹⁵⁸ the temporary suspension or restrictions of rights;¹¹⁵⁹ equality in the protection of rights;¹¹⁶⁰ and due process of the law.¹¹⁶¹ The most important provisions of the Slovenian constitution includes the protection of human rights against possible repressive state interventions against abuse of power;¹¹⁶² and the protection of economic, social and cultural rights.¹¹⁶³

Another important element of the Slovenian constitution is the reference to the Slovenian language, which has been recognised as the official national language (article 11). This has been reinforced by article 4 of the Slovenian constitution, which enshrines the language policy to also include the legal basis for its use.¹¹⁶⁴ Australia's constitution does not officially recognised the English language. The Slovenian language has also been reinforced by article 5 requiring its use by state bodies, local communities, public servants and public authorities. An individual who is employed as a professional, by government or the holder of a public authorisations must have a working knowledge of Slovenian.¹¹⁶⁵ The public use of the Slovenian language has been reinforced by articles 91 and 107 of the constitution.

The Act to Exercise of Public Interest in Culture was implemented in 2002 to promote the public interest of the Slovene culture. Article 6 relates to the national identity, whereby, cultural events should be announced, advertised and explained using the Slovene language.

Additionally, article 6 goes onto say that films should also be played in Slovenian or Slovenian subtitles used.¹¹⁶⁶ Furthermore, the Public Use of the Slovene Language Act¹¹⁶⁷ was established to reinforce that Slovene is the official language of the Republic. It is used in spoken and

¹¹⁵⁷ Article 14, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹¹⁵⁸ Ibid, article 15.

¹¹⁵⁹ Ibid, article 16.

¹¹⁶⁰ Ibid, article 22.

¹¹⁶¹ Ibid, article 23.

¹¹⁶² Ibid, articles 16, 17, 18-31, 34-38.

¹¹⁶³ Ibid, Part II.

¹¹⁶⁴ Article 4, Slovenian Constitution, Official Gazette of the Republic of Slovenia, Nos. 33/91, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13.

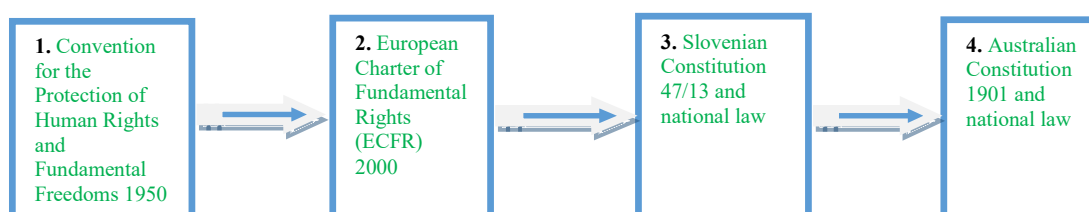
¹¹⁶⁵ Ibid, article 7.

¹¹⁶⁶ Article 6, Act to Exercise of Public Interest in Culture, Official Gazette of the Republic of Slovenia 96/2002.

¹¹⁶⁷ Public Use of the Slovene Language Act, Official Gazette of the Republic of Slovenia, Nos. 96/2004 and 91/2008.

written communication in all areas of public life, unless when the constitution states, such as, allowing Italian and Hungarian to be used as official languages. To enhance Australia's identity, Australia should investigate whether to recognise English as the official language in the constitution, in the same way as Slovenia. This is a complex area of public policy and such a proposal would need to be weighed up against the formal recognition of indigenous languages that exist throughout Australia. Nevertheless, Slovenia has reaffirmed the importance of language to the state and its national identity by codifying its language.

The next section (diagram below) compares the rights expressed within the Convention for the Protection of Human Rights and Fundamental Freedoms 1950, the European Charter of Fundamental Rights 2000, the Slovenian constitution (SC) and the Australian constitution (AC), and national laws.



The next section confirms that the right (s) has been recognised within the legal framework of Slovenia and Australia. There is no comparison of how the jurisdictions have applied or implemented the right (s). To compare the implementation of these rights is outside the scope of this research because it does not assist in addressing the central purpose and question of this thesis. The structure follows the format of the 2000 European Charter of Fundamental Rights including: 1). Dignity 2). Freedoms, 3) Equality, 4) Solidarity, 5) Citizens' (Political) Rights, and 7) Justice. The human rights concepts and principles discussed below have a role in expressing part of the identity of modern day Slovenia and Australia. Slovenia is a special case because they have been one of the rare states that has had the opportunity to develop new laws, when becoming independent in 1990. Unlike Australia, who inherited much of its legal framework from Britain, before adopting international legal norms that have been established post WWII. That is, being democratic states, both Slovenia and Australia have afforded rights, protections and freedoms to their respective citizens, which form part of national identity.

4.2.1 Dignity

The concept of dignity is fundamental to all citizens and non-citizens.¹¹⁶⁸ Dignity¹¹⁶⁹ includes the right to life,¹¹⁷⁰ integrity of the person,¹¹⁷¹ freedom from torture¹¹⁷² slavery¹¹⁷³ and forced

¹¹⁶⁸ Vienna Declaration 1993 World Human Rights Conference, <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx>, accessed 14 September 2013.

labour.¹¹⁷⁴ Jack Donnelly argues that 'dignity' is something that comes with being human and makes an individual worthy or deserving of respect.¹¹⁷⁵ The European Union respects human dignity as a fundamental human right.¹¹⁷⁶ The ECJ has recognised human dignity as being a general principle that is compatible with community law.¹¹⁷⁷ The ECoHR in *Guduz v Tukey*¹¹⁷⁸ ruled that 'dignity of all human beings (citizens and non-citizens) constitutes the foundations of a democratic and pluralistic society'. The Slovenian constitution ensures human dignity is considered and respected in criminal proceedings.¹¹⁷⁹ The Slovenian Constitutional Court ruled that human dignity is a fundamental part of human rights that are the legal-ethical essence of the constitutions of democratic states.¹¹⁸⁰ The Australian High Court has a similar position to that of the Slovenian Constitutional Court where it stated that "a human right may be subject to the law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity".¹¹⁸¹ The Australian constitution makes no express reference to the legal concept. The state of Victoria, in Australia, is an example of where human dignity has been provided by the *Charter for Human Rights and Responsibilities Act 2006*. The Australian High Court¹¹⁸² stated the validity of state based legislation in protecting human rights, provide that human rights such as dignity, equality and freedom are part of a free and democratic society. The majority ruled that the Charter was valid and compatible to human rights. However, the Charter is only applicable in the state of Victoria and no other state or territory of Australia.

¹¹⁶⁹ Article 1, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, (2007/C 303/01).

¹¹⁷⁰ Ibid, article 2.

¹¹⁷¹ Ibid, article 3.

¹¹⁷² Article 3, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI. 1950.

¹¹⁷³ Article 4, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI. 1950.

¹¹⁷⁴ Article 5, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, (2007/C 303/01).

¹¹⁷⁵ Jack Donnelly, *Human Dignity and Human Rights*, Geneva Academy of International Humanitarian Law and Human Rights in the framework of the Swiss Initiative to Commemorate the 60th Anniversary of the Universal Declaration of Human Rights, University of Denver, 2009, 10. Dignity was initially established in article 1 of the 1948 Declaration, that is, 'all human beings are born free and equal in dignity and rights'.

¹¹⁷⁶ Article 2 and 21 (1), Treaty on the European Union, Official Journal of the European Union, C 83/28.

¹¹⁷⁷ Case – 36/02, *OMEGA* [2004] (First Chamber), 23.

¹¹⁷⁸ 35071/97 *Gunduz v Turkey* (2003) (2004-Final) ECHR, 40, www.global.asc.upenn.edu/fileLibrary/.../20_mcgonagle_reading7.d... accessed 20 October 2012.

¹¹⁷⁹ Article 21, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹¹⁸⁰ Slovenian Constitutional Court, U-I-109/10, Official Gazette of the Republic of Slovenia 78/2011.

¹¹⁸¹ *Momcilovic v The Queen* 92011) HCA 34, 165.

¹¹⁸² Ibid.

The right¹¹⁸³ to life¹¹⁸⁴ is a controversial policy issue concerning, for example, abortion. While not expressed in either the SC or AC, article 17 of the SC states that human life is inviolable. The birth of a child will add to the citizenry of a state. However, in some circumstances the birth may not occur and a parent or parents could decide to abort the pregnancy. Apart from the moral and ethical issues surrounding abortion, opponents to abortion could argue that doing so denies an individual the right to a life. In circumstances such as this, a medical practitioner may have the 'right to conscientious objection'.¹¹⁸⁵ The woman must be informed of the right to refuse a procedure of abortion.¹¹⁸⁶

The integrity of the person (both physical and mental) has been included as part of the European Charter of Fundamental Rights 2000, to provide a broad right to minimise the potential of physical or mental torture, or degrading treatment of citizens.¹¹⁸⁷ While different in approach, the SC in accordance with article 35 guarantees the protection of every Slovene citizens' physical and mental integrity. In Australia, the legal principle is associated with those citizens who have a disability, and has been implied by the *Disability Discrimination Act 1992 (Cth)*. The legislation was established to protect citizens that may have a mental or physical disability and enables those citizens to have access to education, employment and public facilities in the same way as other citizens in the community. Discrimination is closely associated with other rights and freedoms, particularly equality.

Torture¹¹⁸⁸ can be found in article 5 of the 1948 Declaration on Human Rights, and article 7 of the United Nations Convention on Civil and Political Rights 1966. While not expressed in the AC, the Australian Government has ensured the protection against torture is covered under the Commonwealth *Criminal Code Act 1995*.¹¹⁸⁹ For example, the treatment by public officials of

¹¹⁸³ Council Regulation 1352/2011 concerning the trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, Official Journal of the European Union C 28/1. Charter of Fundamental Freedoms of the European Union, Official Journal of the European Union, C83/393.

¹¹⁸⁴ Article 2, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI. 1950.

¹¹⁸⁵ Article 10.2, Charter of Fundamental Freedoms of the European Union, Official Journal of the European Union, C83/393. *Abortion Law Reform Act 2008 (Vic)*, Australia, s8. Article 56 Health Services Act, Official Gazette of the Republic of Slovenia 23/05, 14/13.

¹¹⁸⁶ *Abortion Law Reform Act 2008 (Vic)*, Australia, s8.

¹¹⁸⁷ Council Directive 2011/36/EU preventing and combating trafficking in human beings, Official Journal of the European Union L 101/. Council Directive 2010/45/EU standards of quality and safety of human organs intended for transplantation, Official Journal of the European Union L 207. Council Directive 98/44/EC protection of biotechnological inventions, Official Journal of the European Union L 213. Council Directive 2006/17/EC standards of quality and safety for the donation, procurement of human tissue and cells, Official Journal of the European Union L 38/40.

¹¹⁸⁸ Article 4, Charter of Fundamental Rights of the European Union 2000, Article 18, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹¹⁸⁹ Division 274 Criminal Code Act 1995 defines what constitutes torture in accordance with the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, section 22 Extradition Act 1988, and other legislation.

citizens such as being detained for terrorism related offences within the Criminal Code. The second is the approach taken within the *Crimes (Torture) Act 1998* that prohibits acts of torture outside Australia where a person has committed the act in their capacity while acting as a public official on behalf of the state. This could apply to military personnel who are representing the state in conflict zones and may be engaged in detaining citizens from other states on foreign soil. This protects those individuals representing Australia in an official capacity while located in another state. In *Sadiq Shek Elmi v Australia*, it was considered Elmi would be subjected to torture if returned to Somalia.¹¹⁹⁰ Australia and Slovenia have obligations under international law not to return refugees to a country where the person could be subject to torture. Both states have a legislative framework that allows non-citizens to be granted a visa or permit under the international protection. In doing so, both states, to varying degrees, meet their international obligations under the Refugee Convention 1951 and 1967 Protocol and the respective national laws (*Migration Act 1958 and Law on International Protection 2011*).¹¹⁹¹ These protections also apply to a person in detention as an asylum, ensuring a non-citizen is not returned to their state of origin where it is proved they could be subject to torture or inhumane treatment¹¹⁹² (discussed **chapter five**).

Slavery¹¹⁹³ is generally associated with human trafficking (illegal migration).¹¹⁹⁴ Freedom from slavery is one of the oldest protections that has been recognised by the international community, dating back to the 1885 Berlin Treaty and the 1926 International Convention to Suppress the Slave Trade and Slavery. Rather than establish slavery as a constitutional right or protection, Slovenia¹¹⁹⁵ and Australia¹¹⁹⁶ have criminalised the legal principle. Slovenia and Australia have been consistent in the application of slavery. The European Court of Human Rights in *Siliadin*, ruled that it is incumbent on states to adopt criminal law provisions in relation to slavery.¹¹⁹⁷ The High Court of Australia stated that the definition of slavery is based on the definition of the 1926 Slavery Convention.¹¹⁹⁸ Forced migration (trafficking and smuggling) is an issue for both states and can result in a person being subject to slavery. Australia continues

¹¹⁹⁰ *Sadiq Shek Elmi v Australia* Communication No 120/1998, CT/C/22/D/120/1998, 6.9-7.

¹¹⁹¹ Migration Act 1958, s 36. Articles 27 & 28, Law on International Protection, Official Gazette of the Republic of Slovenia 2011/11.

¹¹⁹² *Cruz Varas and Others v Sweden* (Application no. 15576/89), HCHR, Judgment Strasbourg, 1991.

¹¹⁹³ Article 8, International Covenant on Civil and Political Rights 1976, adopted by the UN General Assembly resolution 2200A (XXII) 16 December 1966, entry into force on 23 March 1976, Treaty Series, vol. 999, p 171 and vol. 1057, p. 4077.

¹¹⁹⁴ Article 67 and article 79 Treaty on the Functioning of the European Union, Official Journal of the European Union, C83/49. Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, Official Journal of the European Communities, L 328/17. Council Directive 2004/80 EC relating to compensation to crime victims, Official Journal of the European Union L 261/15. Council Directive 2004/81/EC residence permit issued to third-country nationals who are victims of trafficking in human beings who have been subject to illegal immigration, official Journal of the European Union L 261.

¹¹⁹⁵ Articles 101-102, Slovenian Criminal Code Act, Official Gazette of the Republic of Slovenia 1/2008.

¹¹⁹⁶ Divisions 270, *Commonwealth Criminal Code Act 1995*. Section 245AH of the *Migration Act 1958*.

¹¹⁹⁷ *Siliadin v France*, European Court of Human Rights, No. 73316/01, 2005, 89.

¹¹⁹⁸ *The Queen v Tang* (2008) HCA 39, Order, 33.

to grapple with smuggling of people through South East Asia, particularly from Sri Lanka, Myanmar, Pakistan, Afghanistan and other central Asian countries through Malaysia and Indonesia. The European Union is facing similar issues on a much larger scale with people illegally arriving from North Africa and Eastern Europe and the Middle East. Article 5 of the European Charter of Fundamental Rights ensures there is protection for victims and individuals that are subject to trafficking. The European Union has also reaffirmed its commitment to protecting people from trafficking by establishing minimum rules for defining offences and sanctions across MS.¹¹⁹⁹ In *Tang*,¹²⁰⁰ the Australian High Court looked to the European Court of Human Rights for further guidance on the protection from modern day slavery, stating that slavery today includes those that become domestic workers and mail order brides. Dignity is a fundamental right and protection of Australia, Slovenia and the European Union. The concept plays an important part on the overall legal framework of rights and protections that form part of national identity. As discussed in **chapter two**, citizenship is the right to have rights and dates back to the French Revolution. As society has evolved and the nation state has evolved, rights and their importance to national identity have also risen. They have become fundamental to the international, European, Slovenian and Australian legal framework.

4.2.2 *Freedoms*

Freedoms are an important part of a citizen and non-citizens ability to participate in society.¹²⁰¹ Those freedoms include liberty and security,¹²⁰² private and family life,¹²⁰³ protection of personal data, marriage and family, conscious thought and religion.¹²⁰⁴ Moreover, the freedom of expression,¹²⁰⁵ information, assembly and association,¹²⁰⁶ arts and science, and the right to education¹²⁰⁷ are fundamental rights of the European Union. The right to engage in work of one's choosing, conduct of business and the right to property provide citizens with choice. The right to asylum and protection against expulsion or extradition have been identified as important freedoms to ensure people are not arbitrarily returned to a state where they may face torture or persecution.

¹¹⁹⁹ Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/269/JHA, Official Journal of the European Union L 101/1.

¹²⁰⁰ *The Queen v Tang* [2008] HCA 39

¹²⁰¹ Thomas Marshall, *Citizenship and Social Class and Other Essays*, Cambridge University Press, 1950.

¹²⁰² Article 5, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI. 1950.

¹²⁰³ *Ibid*, article 8

¹²⁰⁴ *Ibid*, article 9.

¹²⁰⁵ *Ibid*, article 10.

¹²⁰⁶ *Ibid*, article 11.

¹²⁰⁷ Article 2, Protocol, Paris, 20.III, 1952, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI. 1950.

Liberty and security

States have to balance security (state and community), the rule and implementation of the law, including the rights of the person when incarcerating individuals. The Australian High Court argued ‘the right to personal liberty is the most elementary and important of all common law rights.’¹²⁰⁸ The right has no Australian constitutional recognition. In *C v Australia*¹²⁰⁹, the Human Rights Committee found that Australia had violated articles 7 and 9 of the International Covenant on Civil and Political Rights 1966 (ICCPR) because the detainee had been held in detention for so long that he had developed a psychiatric illness. Moreover, deportation to the country of origin (Iran) would not enable the person to obtain effective treatment. Thus, despite being an illegal immigrant, the individual remained protected from deportation. This case demonstrated the complexities and impacts that detention can have on an individual’s personal liberties. Even so, a person who is detained when illegally entering either state, is not guaranteed citizenship upon release. Article 6 of the European Charter of Fundamental Rights 2000 states that everybody including citizens and non-citizens has the right to liberty and security. Article 19 of the Slovenian constitution allows the state to restrict liberties under national legislation. However, where personal liberty has been restricted, the citizen is to be informed by the state.¹²¹⁰ With ever-increasing border restrictions placed on immigration across Europe and Australia, the detainment and detention of non-citizens who have entered the jurisdictions illegally is a complex issue for authorities. On the one hand, authorities are protecting the external Schengen borders of the European Union and subsequently protecting the citizens of European Union member states. On the other hand, authorities must respect the rights of illegal entrants. Australia is also faced with similar issues. The European Union has implemented Council Directive 2003/9/EC for the detention of asylum seekers, to ensure that their liberties are protected whilst in detention.¹²¹¹ Personal liberty also extends to criminal law and procedure such as the detention and imprisonment of a citizen and non-citizen. That is, the imprisonment of a citizen for life without the possibility of ever being released contravenes article 1 of the European Charter of Fundamental Rights 2000. In *Vasileva v Denmark*, the ECoHR concluded the right to liberty should be narrowly interpreted to that ensure no-one is arbitrarily deprived of liberty.¹²¹² Moreover, article 9 of the ICCPR states that ‘everyone has the right of life, liberty and security’.

¹²⁰⁸ *Williams v The Queen* (1987) HCA 36; 161 CLR 278, 292.

¹²⁰⁹ *C v Australia*, Human Rights Committee, Communication No. 900/1999, 2002. CCPR/C/76/D/900/1999.

¹²¹⁰ Article 19(3), The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²¹¹ Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers, article 2(k) detention shall mean confinement of an asylum seeker by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement, Official Journal of the European Union L31/18.

¹²¹² *Vasileva v Denmark*, Application No. 52792/99, 25 September 2003, ECoHR, 32-33.

Private and family life

The respect for private and family life is a fundamental right in the European Union,¹²¹³ and international law.¹²¹⁴ This right is neither expressed in the SC or AC. The European Court of Human Rights in *Kurić*¹²¹⁵ ruled that Slovenia had violated the right to private or family life when the state did not grant citizenship or residence to individuals who were no longer considered citizens of Slovenia at the time of the breakup of the former Yugoslavia (discussed **chapter three**). Australia has not dealt with the same exclusionary measures as Slovenia did when the 1948 citizenship laws were introduced. The Federal Court of Australia in discussing the importance of this right referred to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 for guidance in relation to a visa being issued under the Australian *Migration Act 1958*.¹²¹⁶ This highlights another example where Australia is looking to the European Union and the European Council for guidance and assistance in human rights based law. The broad reach of the above legal principle could imply that the protection comes without interference from government. However, the right could be infringed by the state in situations where there is a public interest threat or prevention of criminal activity.

Protection of personal data

Article 29.2 of the 1948 Declaration of Human Rights states that 'in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for securing due recognition and respect of rights and freedoms in a democratic society'.¹²¹⁷ The International Convention on Civil and Political Rights 1966 (ICCPR) is more specific and states that 'no one shall be subject to unlawful interference with his privacy, family, home, correspondence or reputation'.¹²¹⁸ The Lisbon Treaty,¹²¹⁹ has reinforced article 8 of the European Charter of Fundamental Rights 2000 and article 38 of the SC that the protection of personal data is a fundamental right to an individual's privacy. This was also reaffirmed by the

¹²¹³ Regulation 1179/2011 Official Journal of the European Union OJL 301. Additionally, Regulation 996/2010 on the investigation and prevention of accidents and incidents in civil aviation, Official Journal of the European Union L 295. Council Directive 2011/98/EU a single procedure for a single permit for third country nationals to reside and work in the territory of a member state, Official Journal of the European Union L 343. Council Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, Official Journal of the European Union L 201.

¹²¹⁴ Article 4 (3), Council Directive 2003/86/EC on the right of family reunification, Official Journal of the European Union 251/12.

¹²¹⁵ *Kurić and Others v Slovenia*, Application no. 26828/06.

¹²¹⁶ *MZ RAJ v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) FCA 1261, 28-29.

¹²¹⁷ Article 29.2, Declaration of Human Rights 1948.

¹²¹⁸ Article 17, International Covenant on Civil and Political Rights, Treaty series, vol. 999, p. 171.

¹²¹⁹ Article 39, Lisbon Treaty, Official Journal of the European Union C 36.

Slovenian Constitutional Court in 1992.¹²²⁰ The European Union has implemented specific European Union legislation to also ensure there is a consistent approach taken by all member states in processing personal data.¹²²¹ In Australia, the protection of personal data falls within privacy laws such as the commonwealth *Privacy Act 1988*. The Australian High Court stated, the origin of this right can be found in article 17¹²²² of the ICCPR.¹²²³ The protection of personal data can extend to health, defence, and other areas of regulated activities of government, business and individuals. The *Privacy Act 1988 (Cth)* does not define privacy but rather specifies the many different principles of where privacy in Australia can apply. Personal information has been defined to mean information or opinion that can identify an individual. Additionally this applies where that information or opinion is true or not and is recorded in a material form.¹²²⁴ International legal instruments have provided a wider interpretation of protecting personal data and privacy.

Marriage and family

The right to marry and have a family is protected throughout the European Union,¹²²⁵ and ensures that individuals can be reunited with their children and spouse.¹²²⁶ Although the SC expresses the right to marriage,¹²²⁷ there is no mention that this is solely for heterosexuals or includes transsexual relationships. The ECoHR has confirmed that the right to marriage exists in accordance with article 12 of the 1950 European Convention of Human Rights and Fundamental Freedoms,¹²²⁸ and under the national laws of member states. This is another demonstration of member states retaining the sovereign right to determine what their respective citizens can and cannot do. The Slovenian Constitutional Court in 2015 attempted to adopt the Act Amending the Marriage and Family Relations Act.¹²²⁹ The court ruled that the 2015 legislation had not been declared or published in accordance with articles 91 and 154 of the constitution, and therefore the review was dismissed. The principle argument brought before the court was that the proposed law was not compatible with article 8 and the third paragraph of Article 53 of the SC, and article 16 of the 1948 Declaration of Human Rights (the right to marry). In Australia, the right to marry is not a constitutional right although the constitution

¹²²⁰ U-I-115/92, Official Gazette of the RS, No. 3/93. Article 38 of the constitution ensure the right to the protection of personal data.

¹²²¹ Council Directive 95/46/EC on the protection of individuals with regards to the processing of personal data and the free movement of such data, Official Journal of the European Union 281/31.

¹²²² Article 17 (1) and (2) International Convention on Civil and Political Rights 1966.

¹²²³ *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199.

¹²²⁴ *Privacy Act 1988*, s 6.

¹²²⁵ Article 9, Charter of Fundamental Rights of the European Union, Official Journal of the European Union, 2007, C 303/01.

¹²²⁶ Council Directive 2003/86/EC on the right to family reunification, Official Journal of the European Union 251/12.

¹²²⁷ Article 53, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²²⁸ *Schalk and Kopf v Austria*, Application No. 30141/04, ECtHR, 10.

¹²²⁹ UI -55/15, Official Gazette of the Republic of Slovenia, 15-10.

provides the power for the commonwealth parliament¹²³⁰ to legislate for marriage.¹²³¹ There has been community debate in relation to marriage between transsexuals. In Australia, if a person has had a sex change, s/he can subsequently get married. Despite the law in Australia, the Family Court¹²³² looked to Europe for guidance and referred to article 12 of the ECoHR, confirming countries across Europe recognise transsexual marriages. In Australia, the marriage laws do not recognise same-sex marriage; however, in Slovenia they do.

The family is an important part of the fabric of society.¹²³³ The AC does not expressly recognise the right to establish a family, although the AC has gone further than the SC by specifying what laws can be established to assist the family. These include support for widows, child endowment, unemployment, pharmaceuticals, sickness, hospital, medical treatment and students.¹²³⁴ This thesis is not suggesting that Slovenia would or should adopt the same principles as Australia in its constitution; however, Slovenia could consider whether it is plausible to do so.

Freedom of thought, conscience and religion

Freedom of thought and conscience¹²³⁵ are not constitutionally expressed in Australia. However, s116 disallows the government from making laws that will restrict the practice of religion. Religion constitutes the belief in a supernatural being, and the acceptance of canons of conduct in order to give effect to that belief.¹²³⁶ The Australian High Court in the *Jehovah's Witness Case* stated that due to the number of religions in the world it would be near impossible to define what religion is and means, but it is protected.¹²³⁷ The High Court has construed the meaning of section 116 to have a number of elements. One the religion was based on two object criteria, 'belief in supernatural Being, Thing or Principle and second the acceptance of canons of conduct in order to give effect to that belief.¹²³⁸ The Australian constitution specifies four prohibitions where the Commonwealth is not to make laws for establishing a religion, imposing religion, prohibiting religion or no religious test shall be required as a qualification for any

¹²³⁰ Sections 51 (xxi) & (xxii), Australian Constitution Act 1901.

¹²³¹ *Marriage Act 1961*, s7.

¹²³² *Re Kevin (Validity of Marriage of Transsexual)* (2001) FamCA 1074, 194, http://www.wallbanks.com/PDF/Re%20Kevin_ChisholmDecision.pdf, accessed 24 November 2012.

¹²³³ Article 9, European Charter of Fundamental Rights 2000, Official Journal of the European Communities C 364/1.

¹²³⁴ Australian Constitution, s51 (xxiiiA).

¹²³⁵ Article 10, Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2007, C 303/01. Australian Government, Attorney General's Department, Right of thought, conscience and religion or belief,

<http://www.ag.gov.au/RightsAndProtections/HumanRights/PublicSectorGuidanceSheets/Pages/Righttofreedomofthoughtconscienceandreligionorbelief.aspx>, 24 November 2012.

¹²³⁶ *Church of the New Faith v Commissioner of Pay-roll Tax* (1983) 154 CLR 120.

¹²³⁷ *Adelaide Company of Jehovah's Witness Inc v Commonwealth* (1943) 67 CLR 116, 123.

¹²³⁸ *Church of the New Faith v Commissioner of Payrol Tax* (1983) 154 CLR 120.

office or public trust under the Commonwealth.¹²³⁹ An individual's religious belief is protected from discrimination.¹²⁴⁰ Furthermore, the Australian Human Rights Commission has the power to ensure citizens are protected from religious discrimination in accordance with the ICCPR.¹²⁴¹ A prime example, could be where a person has their employment terminated because of their religious belief.¹²⁴² In Slovenia, the SC¹²⁴³ and the European Union¹²⁴⁴ have followed a similar path to Australia. The European Court of Human Rights in *Hasan & Chauch v Bulgaria*, ruled that one's religion is protected under Article 9 of the 1950 European Convention on Human Rights and Fundamental Freedoms.¹²⁴⁵ Slovenia considers the right to freedom of religion as a personal action and decision¹²⁴⁶ that must be protected at all times. Furthermore, the Slovenian Religious Freedom Act¹²⁴⁷ reinforces the position of the ECoHR, and ruled that religious freedom is guaranteed, and is one of the foundations of a democratic society.¹²⁴⁸ Both Australia and Slovenia are democratic. Democracy is one of the key principles Slovenia used to establish their independence. Democracy is a component of Slovenia and Australia's national identity.

Conscientious objection

Conscientious objection¹²⁴⁹ is a fundamental right that is closely connected to the freedom of thought and religion that has been provided for in accordance with article 18 of the 1948 Declaration of Human Rights, and, article 18 of the ICCPR. Citizens of Slovenia and Australia can choose to serve their respective national armed forces, when their respective states are involved in conflict or war. The European Court of Human Rights in *Bayatyan*¹²⁵⁰ found that Armenia violated the right to conscientious objection where a citizen who was a practicing Jehovah Witness was convicted for refusing to undertake military duties. The court went on to say that a person's deeply held religious belief, constituted a conviction or belief of sufficient cogency, seriousness, cohesion and importance to attract a guaranteed protection, and, that pluralism, tolerance and broad mindedness are all hallmarks of a democratic society.¹²⁵¹

¹²³⁹ Australian Constitution, section 116. George Williams and David Hume, *Human Rights under Australian Constitution*, 2nd edit, Oxford University Press, 2013, 256.

¹²⁴⁰ *Racial Discrimination Act 1975*, s18C, while no direct reference to religion is made, it has been implied it is unlawful to insult, humiliate or intimidate another person or group of people.

¹²⁴¹ Human Rights and Equal Opportunity Commission Act 1986, ss3, 8, 11.

¹²⁴² *Work Place Relations Act 1996* (Cth), section 695.

¹²⁴³ Article 63, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²⁴⁴ Article 11, Council Directive 2000/78/EC, discrimination based on religion or belief, Official Journal of the European Union L 303.

¹²⁴⁵ *Hasan & Chaush v Bulgaria*, Application No. 30985/96, ECHR, 62.

¹²⁴⁶ U-I-92/07, Official Gazette of the Republic of Slovenia 46/2010, OdiUS XIX.

¹²⁴⁷ Official Gazette of the Republic of Slovenia 14/07.

¹²⁴⁸ *Kokkinakis v. Greece*, App. No. 14307/88, 260 Eur. Ct. H.R., 31 (1993).

¹²⁴⁹ Article 10.2, Charter of Fundamental Rights of the European Union, Official Journal of the European Union, C 83/393.

¹²⁵⁰ *Bayatyan v Armenia*, no. 23459/03, ECHR, 7

¹²⁵¹ *Ibid.*

Both Slovenian and Australian citizens have been involved in wars and conflict during the past century. Most notably for Slovenes, was the breakup of former Yugoslavia. For Australian citizens the conflicts in Iraq and Afghanistan have seen many Australians killed in those conflicts. Both states have at different times invoked conscription of their citizens to undertake military service. Today, both Australia and Slovenia do not require their citizens to be conscripted. Those laws have been long abolished. For Slovenia the abolition of conscription only occurred in 2002,¹²⁵² and for Australia, this has been the case since 1973.¹²⁵³ However, the issue of conscientious objection to military service by those individual citizens currently serving their respective armed forces as professional service men and women, may be able to use this right to seek discharge from military service. Today, the right exists in both states. Slovenia, has guaranteed the right in accordance with article 46 of the constitution. Additionally, article 123 (2) of the Slovenian constitution states that 'citizens who for their religious, philosophical or humanitarian convictions are not willing to perform military duties, must be given the opportunity to participate in national defence in some other manner.'¹²⁵⁴ The right to conscientious objection to military service is not guaranteed by the Australian constitution, but rather, has been expressed in *Defence Act 1903*. Section 61A of the Act allows an Australian citizen to be exempt from military service where their conscientious beliefs do not allow them to participate in war. A Tribunal will determine what will, and, will not constitute a citizen's conscientious belief.¹²⁵⁵ Slovenia has guaranteed their citizens under the principle of conscientious objection from military service on grounds of religion, philosophical or humanitarian conviction. It is argued national identity straddles both the right to conscientious objection and the right of the citizen to partake in military service. As discussed in chapter two, Australia's national identity has been influenced by the participation of its military, more so than Slovenia.

¹²⁵² Marc Stolwijk, *The Right to Conscientious Objection in Europe: A Review of the Current Situation*, Quaker Council of European Affairs, 2005, 65.

¹²⁵³ Gary Brown, *Military Conscription: Issues for Australia*, Foreign Affairs, Defence and Trade Group, Parliament of Australia, 1999, http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib9900/2000CIB07, accessed 21 June 2014.

¹²⁵⁴ Articles 46 and 123, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²⁵⁵ *Defence Act 1903*, s61CA.

Freedom of expression

Every Slovene citizen has the right to expression and information¹²⁵⁶ in accordance with article 39 of the Slovenian Constitution. This freedom is also closely related to free speech and in Australia is an implied right¹²⁵⁷ that allows for free political communication.¹²⁵⁸ According to Zimmerman and Finlay free speech is a fundamental human right, and one that is a foundational requirement for the full realization of other human rights.¹²⁵⁹ Brennan J in referring to AV Dicey in *Nationwide News Pty Ltd v Wills* noted that the right to free expression of opinion is a fundamental doctrine of English law,¹²⁶⁰ which Australia's common law is derived. The freedom of expression is closely associated with many other freedoms such as the freedom of religion and information (media) and political communication. Australia has looked to Europe in determining the importance of the right to politically communicate. Mason J in *Australian Capital Television*¹²⁶¹ pointed out the freedom of political communication had been recognised by the European Court of Human Rights.¹²⁶² The ECoHR also recognised this freedom as being an important part of society and to the citizens of a state.

The expression of one's National Affiliation¹²⁶³ has been provided to those citizens of other former nationalities (minorities) that are citizens of, and, reside in Slovenia. This is particularly the case for those national minorities such as Austrian, Italian or Hungarian who have the right to use their culture, language and script. There is no express equivalent in the AC. The right for other minority groups in Australia to maintain their culture and language is protected by the freedom of expression, association, assembly and discrimination legislation. Article 19 of the ICCPR states that 'everyone has the right to expression and includes the ability for individuals to seek, receive and impart information and ideas regardless of whether this is undertaken orally or in writing through such medians as the media'. However, as many states restrict the right to expression, article 2 of the ICCPR provides that the right is subject to certain restrictions, providing states with the ability to develop national laws to regulate this area. Thus, the international law recognises the right as an important right but allows it to individual states to decide it is regulated.

¹²⁵⁶ Article 11, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01.

¹²⁵⁷ George Williams and David Hume, *Human Rights under Australian Constitution*, 2nd edit, Oxford University Press, 2013, 184.

¹²⁵⁸ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 146.

¹²⁵⁹ Augusto Zimmermann and Lorraine Finlay, *A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness*, Macquarie Law Journal, Vol 14, 2014, 187.

¹²⁶⁰ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR, 46.

¹²⁶¹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

¹²⁶² *Handyside v United Kingdom* (1976) 1 E.H.R.R 737.

¹²⁶³ Article 61, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

Access to information

Citizens of both Slovenia and Australia have the right to access information from government. Freedom of Information legislation exists throughout Australian,¹²⁶⁴ and is not a constitutional right. In Slovenia, the Access to Public Information Act¹²⁶⁵ came into effect in 2003 and allows citizens to access information from government.¹²⁶⁶ Access to information can also be undertaken by citizens to better understand the national identity. A prime example is the national archives¹²⁶⁷ that provide information on the history, culture and citizens of the state.¹²⁶⁸ The historical stories of Slovenia and Australia show very different paths it is this history and story that form the national identity. Richard Harvey Brown and Beth Davis-Brown suggest that an archive is a repository in which materials of historical interest are stored and is a place of the collective memory of the state and its citizens.¹²⁶⁹ The history of Australia's first citizenship laws has been documented by the Australian national archives.¹²⁷⁰ The first Australian Immigration Minister Arthur Calwell held a ceremony for new citizens, including former Yugoslavia citizens that had migrated to Australia after WW II. Mr Calwell stated that a Czech, a Spaniard, a Frenchman, a Yugoslav (YU), Norwegian and a Greek will take the oath of allegiance and receive their naturalisation certificates under the new legislation.¹²⁷¹ Without having access to this historical information citizens of Australia would not know or understand how the states citizenry and identity was formed. The importance of this moment in Australia's history is encapsulated by Calwell's comment that 'this is the first time such a ceremony has been held, and it is important that on such an occasion we should pause for just a few moments to consider what it is we do'.¹²⁷² It is with those words that new migrants from other states including the former YU, became Australian citizens for the first time, and began their contribution to the state and its growing identity. The former Yugoslav archives are located in Beograd (*English: Belgrade*), and are open to all citizens of the former Yugoslav Republics to gain an understanding of the operation and identity of Yugoslavia, Slovenia and the other

¹²⁶⁴ *Freedom of Information Act 1982*.

¹²⁶⁵ Official Gazette of the Republic of Slovenia 24/2003.

¹²⁶⁶ Official Journal of the European Union L 42, 14/2003.

¹²⁶⁷ Australian Government, National Archives of Australia, Your Story, our history, www.naa.gov.au, accessed 27 June 2014. Republic of Slovenia, Ministry of Culture, Archives of the Republic of Slovenia, http://www.arhiv.gov.si/en/use_of_archival_records/use_of_the_records, accessed 27 June 2014.

¹²⁶⁸ Legislation from Slovenia and Australia that regulates the establishment and access to archival information, Regulation on Administrative Authorities within Ministries (Official Gazette of the RS, 58/2003, 45/2004, 86/2004, 138/2004, 52/2005, 82/2005, 17/2006, 76/2006 in 132/2006, 41/2007), Regulation on administrative operations (Official Gazette of the RS, 20/2005), Access to Public Information Act (Official Gazette of the Republic of Slovenia, 24/2003)] Archives and Archival Institutions Act, Official Gazette of the Republic of Slovenia, 32/1997, *Archives Act 1983*, *Freedom of Information Act 1982*, *Australian Information Commissioner Act 2010*.

¹²⁶⁹ Richard Harvey Brown and Beth Davis-Brown, *The making of memory: the politics of archives, libraries and museums in the construction of consciousness*, History of the Human Sciences, 1998, 17-32.

¹²⁷⁰ Australian Government, National Archives of Australia, First naturalisation ceremony under 1948 Nationality and Citizenship Act: Excerpt from ABC broadcast 3 February 1949, <http://vrrroom.naa.gov.au/print/?ID=25355>, accessed 27 June 2014.

¹²⁷¹ Ibid.

¹²⁷² Ibid.

former Republics.¹²⁷³ Today, Slovenia has its own archives that document its history for its citizens, and of particular importance are records of the confiscation of property during German occupation in 1944, which affected many Slovenes.¹²⁷⁴ The archival information also records and informs citizens of Slovenia, the importance castles have in Slovenia's cultural heritage and identity, and which can still be seen today.

Arts and sciences

Arts and science form part of any nation's culture, history and identity,¹²⁷⁵ and can be closely associated with the right to education. Arts and science in most states including Slovenia and Australia form part of the national curriculum. Australia has neither expressed the right to arts, science or education within the constitution, but rather, legislates these activities at the national level. Article 57 of the SC guarantees the right to education and article 59 ensures the freedom of one's individual scientific and artistic endeavors. In addition, the right to arts and science is associated with the right of expression. The right to education¹²⁷⁶ is a fundamental part of the economic principles of growth and democracy that enables a nation state to build an educated, knowledgeable and informed society (citizenry). Across the European member states, children of a member state who is or has been employed in the territory of another Member State shall be admitted to that State's general educational courses¹²⁷⁷ under the same conditions as the nationals of that State.¹²⁷⁸ Slovenia recognises the importance of education and similar to Australia has national legislation in place to regulate this state activity.¹²⁷⁹ Education in Slovenia¹²⁸⁰ and Australia is compulsory, however, the SC does not describe an age limit, unlike Australian¹²⁸¹ legislation.¹²⁸² The right to education can also be found in article 5 of the International Convention on the Elimination of All Forms of Discrimination 1969 and was discussed by the court in relation to the exclusion of a student of Romanian national origin and

¹²⁷³ Yugoslavia Archives, http://www.arhivyu.gov.rs/active/en/home/glavna_navigacija/o_arhivu/delatnost_arhiva.html, accessed 27 June 2014.

¹²⁷⁴ Republic of Slovenia, Ministry of Culture, Inventory of Expropriated Castles, http://www.arhiv.gov.si/en/areas_of_work/exhibitions/archivalia_of_the_month/archivalia_of_the_month_december_2012, accessed 27 June 2014.

¹²⁷⁵ Article 13. Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007, C 303/01.

¹²⁷⁶ Ibid, article 14.

¹²⁷⁷ Case – 413/99 *Baumbast and R v Secretary of State for the Home Department*, European Court Reports I-07091, 61999J0413, 1.

¹²⁷⁸ Article 12 Council Regulation No 1612/68, on freedom of movement of workers within the community, Official Journal of the European Union L 257/19.

¹²⁷⁹ Ibid.

¹²⁸⁰ Article 57 (2), The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²⁸¹ Higher Education Funding Act 1988, School Attendance Act 2008, Disability Discrimination Act 1992.

¹²⁸² Ibid.

neither a citizen or having permanent residence in Australia.¹²⁸³ The Australian court distinguished between discrimination of a class of person and the concept of citizenship. The court ruled that completing high school was not predicated on whether the person had citizenship or permanent residence, but the fact the person resided in Australia indefinitely. Residence becomes important to this thesis in **chapter five** and **six** when discussing the private acts of citizens between Australia and Slovenia.

Association

The 2000 European Charter of Fundamental Rights enables all forms of association whether political, trade union or civil matters. On the other hand, the SC¹²⁸⁴ is narrow and only provides for the peaceful assembly and public meetings. The European Court of Human Rights, stated the freedom of association is particularly important for persons belonging to minorities, as laid down in the preamble to the Council of Europe Framework Convention.¹²⁸⁵ In Australia, the right has been connected with the implied right¹²⁸⁶ of free movement.¹²⁸⁷ Due to the broad and diverse area the freedom of association covers this section will focus on how Slovenia and Australia adopted the principle in relation trade unions. The Australian *Fair Work Act 2009* protects citizens and workers right to association in the workplace by allowing individuals to become members of unions. This right is also protected under the *Australian Human Rights Commission Regulations 1989* by protecting people from discrimination in employment based on one's membership or activity within a trade union. In U-I-249/10¹²⁸⁸, the Slovenian Constitutional Court ruled that the 'autonomy of collective bargaining, which is also the international standard of a constitutional right that is derived from the freedom of association and enshrined in article 76 of the Slovenian Constitution', is protected. The Slovenian Constitutional Court in UI-57/95¹²⁸⁹ ruled that the freedom association extends to citizens joining a union and that everyone has the right to peaceful assembly and association. A similar position has been taken by the Australian Federal Court in *Belandra*¹²⁹⁰ where North J highlighted that collective bargaining is an integral and primary function of association, and citizens associating with one another. Notwithstanding the right to association between citizens from both states in relation to employment, they are also allowed to assemble.¹²⁹¹ However, any assembly must be peaceful and according to national laws. Assembly is a guaranteed

¹²⁸³ *AB v State of New South Wales* (2005) FMCA 1113, 16.

¹²⁸⁴ Article 12 and 42, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²⁸⁵ *Gorzelik and Others v Poland* (Application No. 44158/98), Judgement 2004, ECoHR, 93.

¹²⁸⁶ *Kruger v Commonwealth (Stolen Generation Case)* (1997) 190 CLR 1, 115.

¹²⁸⁷ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 212.

¹²⁸⁸ Official Gazette of the Republic of Slovenia 27/2012.

¹²⁸⁹ Official Gazette of the Republic of Slovenia, 13/98.

¹²⁹⁰ *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910.

¹²⁹¹ Article 42, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

constitutional right in Slovenia, but not in Australia. The assembly of citizens can include protests against workplace relations laws. Both states have laws to restrict the coming together of citizens and non-citizens, in public, to protest.¹²⁹² The Slovenian Act on Public Assembly¹²⁹³ allows citizens of Slovenia to organise a public gathering, to express ones opinion on questions of public and common importance. In 2014, in the state of Victoria, Australia, the state government amended legislation to provide the authority (police) with greater power to manage protester activities such as entry to buildings, disrupting traffic and further protecting other citizens in the event the protest becomes violent.¹²⁹⁴ These laws extended to those who gather, assemble and associate in public protests that could include protests against workplace laws. Thus, states are looking at ways of restricting the extent and use of the right to association. These rights are core democratic principles of Australia and Slovenia, which form part of the overall rights framework that contribute to national identity.

Occupation

The freedom for a citizen to choose their occupation whether being employed by an employer, or undertaking their own business, assists in creating entrepreneurs across the European Union.¹²⁹⁵ However, forced labour¹²⁹⁶ is prohibited under the SC, consistent with international law. The *Fair Work Act* provides for international labour protections for Australian citizens.¹²⁹⁷ The right for citizens and others to choose their occupation (employment) is not an inherent expressed right in Australia, but is seen as a societal norm in accordance with article 23 of the 1948 Declaration on Human Rights. The freedom to conduct business¹²⁹⁸ was established to ensure all citizens of member states across the European Union have the ability to undertake and conduct business activities when trading with other nation states. This right is closely associated with the ‘single market’ policy of the European Union, ensuring there are minimal restrictions to economic activity. The ECJ¹²⁹⁹ stated it is a general principle of European Law, and is closely associated with the right of free movement being recognised as the right to establishment under the TFEU.¹³⁰⁰ Nevertheless, and while there is no direct expression of the freedom to conduct

¹²⁹² Australian state and territory laws regulate assembly and the peaceful protest.

¹²⁹³ Article 2, *The Act on Public Assembly*, Official Gazette of the Republic of Slovenia 90/05.

¹²⁹⁴ *Summary Offences Act 1996*, and *Sentencing Act 1991*, Victoria, Australia.

¹²⁹⁵ Article 15 and 16, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01.

¹²⁹⁶ Article 49, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹²⁹⁷ *Fair Work Act Australia 2009*, s3.

¹²⁹⁸ Article 16, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, (2007/C 303/01).

¹²⁹⁹ Case 70/10 *Scarlet Extended SA v Societe belge des auteurs, compositeurs et editeurs SCRL* (SABAM), Third Chamber, (2011) ECJ, 49.

¹³⁰⁰ Case – 1/11 *Interseroh Scrap and Metals Trading GmbH v Sonderbfall-Management- Gesellschaft Rheinland-Pfalz mbH* (SAM), Fourth Chamber, 2012, 43.

business in the SC, the right in accordance with article 49 ensures that work is guaranteed,¹³⁰¹ and that a citizen is able to choose their employment. Doing business in Australia is not a right that has been expressed formally within the constitution. However, there can be links to section 92 (trade and commerce) and section 51(i) of the constitution that provides the Commonwealth the power to make laws. That is, the *Corporations Act 2001* and *Competition and Consumer Act 2012 Act* have been established to regulate corporations and business activity across Australia.

Property

The right to property¹³⁰² is an accepted principle of European Union law,¹³⁰³ and is also accepted under national constitutional law.¹³⁰⁴ Article 33 of the SC guarantees a citizen the right to property in Slovenia.¹³⁰⁵ However, the state may limit the right to acquire and retain property on public policy grounds such as major infrastructure development and to expand the economic development of the state.¹³⁰⁶ The right to property not only ensures that a citizen has a right to land, but also has protection of intellectual property.¹³⁰⁷ Property can include many things such as land and dwellings as well as moveable property such as investments, incorporated interests,¹³⁰⁸ intellectual property,¹³⁰⁹ and personal possessions.¹³¹⁰ This section will discuss only immovable property (land) in both states. In Australia, property rights in regards to land have been subject to political debate and decisions by the Australian High Court, particularly in relation to indigenous peoples. The AC, while not directly providing a right to property, nevertheless does allow the Commonwealth to make laws in relation to the acquisition of property ‘on just terms’.¹³¹¹ Property rights in Australia pertaining to the Aboriginal people are closely associated with discrimination. Moreover, both Slovenia and Australia are aligned with article 17 of the 1948 Declaration on Human Rights, which provides that everyone has the right to own property. The purchasing of property by citizens is a private act and to the right is protected by private international law (discussed **chapter six**).

¹³⁰¹ Article 49(1), Slovenian Constitution, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³⁰² Article 1, Protocol, Paris, 20, III, 1952, European Convention on Human Rights, Council of Europe, Rome, 4.XI. 1950.

¹³⁰³ Case – 1/11 *Interseroh Scrap and Metals Trading GmbH v Sonderbfall-Management- Gesellschaft Rheinland-Pfalz mbH* (SAM), Fourth Chamber, 2012, 43.

¹³⁰⁴ Case 44/79 *Hauer v Land Rheinland-Pfalz* ECR 3727 (1980), CMLR 42 (1979).

¹³⁰⁵ Article 67, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³⁰⁶ Article 69, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13. Law of Property Code (SPZ; Official Gazette of RS, No. 87/2002, 18/2007) Building Act (Official Gazette RS, No. 110/2002, 102/2004- UPB1 (14/2005 revised), 126/2007 – ZGO-1). Australian legislation that may limit property rights include amongst others, Building Act 1993 and Planning and Environment Act 1987.

¹³⁰⁷ Case – 275 *Promusicae v Telefonica* (2008) ECR I-271.

¹³⁰⁸ *Newcrest Mining* (1997) 190 CLR 513.

¹³⁰⁹ *Attorney- General (NT) v Chaffey* (2007) 213 CLR 651, 664.

¹³¹⁰ George Williams and David Hume, *Human Rights under the Australian Constitution*, Oxford University Press, 2013, 297-298.

¹³¹¹ *Australian Constitution 1901*, s51(xxxi).

Right to asylum

The European Union,¹³¹² Slovenia¹³¹³ and Australia all apply the right to asylum consistently and in accordance with the 1951 Refugee Convention and 1967 Protocol. There is no constitutional right of asylum in Australia but rather section 51(xix) and (xxvii) of the constitution provides the parliament with the power to make laws in relation to aliens. Furthermore, Australia has looked to the European Court of Human Rights and borrowed the courts' standard in relation to a state's obligations to protect applicants in accordance with the Refugee Convention and Protocol.¹³¹⁴ However, the application of refugee, asylum and human rights law is in direct conflict with a state or supernational polity policy of exercising their right to exclude individuals from entering the territory. As discussed in **chapter five**, the recent Syrian conflict has seen a large number of people being displaced. Many of these people are now descending on and arriving in Europe and Slovenia. Even though both states have committed to accepting refugees from Syria, both Australia and Slovenia have to balance their sovereign needs to protect the state and their citizens, while protecting the rights of the refugee that are on the territory. Both Australia and the European Union (Slovenia) have strong border controls. **Chapter five** discusses international protection law (refugees and asylum). It is argued immigration including those individuals that are declared refugees can obtain citizenship of Slovenia or Australia. The act of regulating immigration enables Australia and Slovenia to protect the state and their citizens. It also enables both states to choose who will and who will not be accepted into their territory, and ultimately who will become a citizen. It is argued this act of regulating migration and choosing who can enter the territory is a component of national identity.

The rights and freedoms discussed thus far are an expression of both Australia and Slovenia's democratic society. They contribute to national identity by directing their respective citizens to behave in a certain way. Furthermore, the rights and freedoms allow citizens to protect themselves from each other and from the state. As stated above and in chapter two, the rights and freedoms afforded to citizens of a state allow those citizens to protect themselves from each other and the state. Since the French Revolution, and particularly post WWII, the rise of rights and freedoms have become part of the legal framework of democratic states such as Australia and Slovenia. In turn, their respective national identities have incorporated rights and freedoms, to demonstrate to other states how to treat their citizens. Additionally, the rights and freedoms

¹³¹² Article 18, European Charter of Fundamental Rights 2000, Official Journal of the European, (2007/C 303/01). Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union L 326/13.

¹³¹³ Article 48, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³¹⁴ *VRAW v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 113, *NAIS V Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470. *Koniug v Federal Republic of Germany* (1978) 2 EHRR 170, *Osman v United Kingdom* (1998) 29 E.H.R.R. 245.

afforded by Australia and Slovenia have and continue to direct their citizens on how the state expects them to behave.

4.2.3 Equality

Equality as a legal principle is important to all citizens (men, women and children of all ages). Equality is a legal norm that is synonymous with democratic states. In a globalised world that is continually having to cater for multiculturalism, equality ensures participation in public life and protection no matter the person's gender, ethnic or cultural background. Equality also forms part of the national identity whereby all people are equal, and ensures states and citizens maintain their identity and enhance their respective integration programs. This legal principle has been included into the European Charter of Fundamental Rights and the Slovenian Constitution, but not, the Australian Constitution.¹³¹⁵ The European Court of Justice affirmed the principle of equality is a legal rule of the highest order.¹³¹⁶ This was also reinforced by the Slovenian Constitutional Court, whereby, the court ruled the legislature has responsibility for prohibition against discrimination, including equality between men and women in relation to the right to access social security.¹³¹⁷ The court went onto say 'in Slovenia, as in the framework of the European Union and elsewhere in the world, the goal of enforcing the principle of equal treatment of men and women is universally accepted.'¹³¹⁸ Thus, equality before the law is also considered to be an important legal principle in Australia law, whereby, discrimination arises from not treating individuals (men and women) as equals.¹³¹⁹ This legal principle has been discussed by the courts and is enshrined in legislation such as the *Racial Discrimination Act 1975*.¹³²⁰ In *Leeth v Commonwealth*¹³²¹ Deane J and Toohey J stated there is an implied doctrine of equality between citizens, exists in Australia.

¹³¹⁵ Article 20, Equality before the law, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01. Article 14(2), The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³¹⁶ Cases 261 and 262/78 *INTERQUELL STARKE-CHEMIE GMBH & Co. KG, Grossaitingen (Federal Republic of Germany) and DIAMALTAG, Munich (Federal Republic of Germany v The European Economic Community)* (1979) ECR, 4(b).

¹³¹⁷ U-I-298/96, Official Gazette RS, No 98/99.

¹³¹⁸ *Ibid.* the court referred further the Council Directive 79/7/EEC that established the gradual introduction of the principles of equal treatment of men and women in relation to social security, Official Journal of the European Union L 6.

¹³¹⁹ *Waters v Public Transport Corporation* (1991) 173 CLR 349, 402.

¹³²⁰ Equality before the law as a legal principle can also be found in the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992* and *Age Discrimination Act 2004*.

¹³²¹ *Leeth v Commonwealth* (1992) 174 CLR 455, 486.

Equality also has enabled the European Union to give effect to the international conventions on the Rights of the Child¹³²² and is closely associated¹³²³ with persons (children) with disabilities. These two legal principles have also been replicated in the SC respectively, that ensure children are properly protected and cared for economically and socially so as children across the EU¹³²⁴ and in Slovenia are not wrongfully abused.¹³²⁵ The Slovenian Constitutional Court, discussed at length, the Convention on the Right of the Child when challenging the Law on Marriage and Family Relations. The Slovenian Constitutional Court ruled the convention was signed by countries to ensure children grow up in a family environment ensuring the child's interest is the foremost consideration and not the parents.¹³²⁶ The Federal Court of Australia recognised the importance of the Declaration of the Rights of the Child, and, International Covenant on Economic, Social and Cultural Rights in relation to parental responsibility of a child's education.¹³²⁷ The court ruled the right includes whether the child has a disability or not.

The prohibition of discrimination under article 63 of the SC and article 20 of the European Charter of Fundamental Rights focuses on racial and religious discrimination. Discrimination¹³²⁸ is a broad legal principle that covers physical and mental disabilities, and is closely associated with the right to religion, expression and association. For example, being dismissed from work on religious or gender grounds. In this section, it will be demonstrated how discrimination on the grounds of a disability has been defined by both states. In U-I-146/07¹³²⁹ the Slovenian Constitutional Court stated the Slovenian legal system provides no single definition of disability and is subject to individual areas of regulation, that is consistent with the second paragraph of article 1 of the Convention on the Rights of Persons with Disabilities¹³³⁰ (CRPD) in the same

¹³²² Article 24, Equality before the law, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007/ C 303/01. Article 56 The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³²³ Article 26, Equality before the law, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01.

¹³²⁴ Article 3 Treaty on European Union. Council Regulation 2201/2003/EC judgments in matrimonial matters and parental responsibility. Council Directive 2011/95/EC standards on international protection of third country nationals and stateless persons ensuring the best interests of the child. Council Directive 2011/92/EU combating sexual abuse and exploitation of children.

¹³²⁵ Article 56 and 52, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³²⁶ U-I-53/93, Official Gazette of the Republic of Slovenia, No. 20/95, the convention regulates the rights of the child concerning the personal status, inalienable rights, civil and political rights as well as economic, social and cultural rights.

¹³²⁷ *McBain v Victoria* (2000) FCA, 8-11.

¹³²⁸ Article 1 Protocol No. 12, and Article 14, European Convention on Human Rights, Council of Europe, Rome, 4.XI. 1950.

¹³²⁹ U-I-146/07, Official Gazette of the Republic of Slovenia, No. 111/2008.

¹³³⁰ Convention on the Rights of Persons with Disabilities, Treaty Series, vol. 2515, p.3. Discrimination on the basis of disability means any distinction or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

way the Australian *Disability Discrimination Act 1992* (DDA).¹³³¹ However, the DDA expands on the definition provided by the CRDP, and focuses on the disability at the personal level (physically or mentally [malfunction, illness or disease]). Both the TEU and TFEU have made discrimination one of the fundamental legal principles across the European Union to combat social exclusion, amongst European citizens, while promoting social justice.¹³³² To enhance the understanding, awareness and practice of equality a number of regulations and directives have been established. The European law in this area assist citizens to move freely, enjoy employment and an occupation irrespective of the individual's racial or ethnic origin.¹³³³ For the European Union, discrimination is considered important because it ensures not only equality but stability across the Union and assists in integrating member states.

Across Slovenia, the European Union and within Australia the diversity in cultural, religious beliefs and languages have become varied.¹³³⁴ This diversity can be seen through the recognition of minorities, particularly under Slovenian Constitution. Membership of a national minority is another important right because across the European Union there are minorities that exists in most MS. Slovenia for example, with its complex history has recognised under article 64 of the SC special rights of Italian and Hungarian national communities. In addition, article 65 has been put in place to ensure special rights of the Roma community that reside within the Slovene territory. Australia does not provide for minority rights within the constitution, except the race power that has allowed the Australian Parliament to pass laws to protect people and citizens of any race.¹³³⁵ This power has been used by consecutive governments to establish laws to protect indigenous peoples from discrimination. However, the constitution of Australia could be amended to not only recognise the rights of indigenous citizens, but also other minority groups, their language, culture and customs. The next section compares how each state has reflected the concept of solidarity within their legal framework.

¹³³¹ Disability Discrimination Act 1992, s4.

¹³³² Article 10, Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94.

¹³³³ Council Directive 2000/43/EC implementing the principle of equal treatment between persons no matter their racial or ethnic origin, Official Journal of the European Union L180. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, Official Journal of the European Union L 303. Council Regulation 492/2011 free movement of workers. Council Regulation 181/2011 rights of passengers in bus and coach transport, Official Journal of the European Union L 141/1. Council Regulation 1177/2012 passengers travelling by sea and inland waterway, Official Journal of the European Union L 334/1.

¹³³⁴ Article 22, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007, C 303/01). Article 10 Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94.

¹³³⁵ Australian Constitution, s51 (xxvi).

4.2.4 Solidarity

There are twelve articles within the European Charter of Fundamental Rights 2000 under solidarity, and only three have been duplicated or expressed in the Slovenian Constitution. None are expressed or implied under the Australian Constitution such as collective bargaining,¹³³⁶ the right to information¹³³⁷ and consultation,¹³³⁸ access to placement services,¹³³⁹ fair work conditions,¹³⁴⁰ and the protection from unjustified dismissal.¹³⁴¹ Across the European Union, it is recognised that human relations among persons, groups and peoples of a state, and a moral expression of major religious and cultural groups treat others as you would like to be treated.¹³⁴² This accords with Soysal's (discussed **chapter one**) position that citizenship is multicultural.¹³⁴³ That is, the European Charter of Fundamental Rights has established the minimum requirements to protect all citizens no matter what member state they are employed. The same has been achieved in Australia by the Commonwealth Parliament establishing legislation that regulates work places and employment throughout the country.

The principle of solidarity provides for a common set of employment rights throughout the European Union such as the ability for collective action that can be taken by trade unions when entering into collective bargaining and agreements for workers.¹³⁴⁴ Rather than discussing each of these rights individually, the discussion will focus on collective bargaining because the other rights could be captured as part of the bargaining process. National legislation ensures employees and employers can consult as part of the negotiation process in order to determine the working conditions and grounds for dismissal of citizens. The Federal Court of Australia¹³⁴⁵ stated it the federal legislation enabled individuals to exercise their right to collectively

¹³³⁶ Article 28, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01. Articles 151, 153, 155, 156, Treaty on the Functioning of the European Union.

¹³³⁷ *Kevin Denly v Commissioner of Taxation* (2012) FCA 1434, 40, the right to information was discussed in relation to tax related matters in relation to obtaining criminal records of the defendant.

¹³³⁸ Article 27, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01. Article 151, 153 and 154 Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94. Council Directive 91/533/EEC obligation to inform employees of conditions to contract or employment relationship, Official Journal of the European Union L 288. Council Directive 98/59/EC laws relating to member states collective redundancies, Official Journal of the European Union L 255. Council Directive 2001/23/EC safeguarding employees rights in the event of transfers of undertakings, business or parts of undertakings or businesses, Official Journal of the Union L 82.

¹³³⁹ *Ibid*, article 29.

¹³⁴⁰ *Ibid*, article 31.

¹³⁴¹ *Ibid*, article 30.

¹³⁴² Jorge Manuel Dias Ferria, Human Rights Council, www.new-humanity.org/.../human-rights/.../82-human-rights-internation, accessed 26 November 2013.

¹³⁴³ Yasemin Soysal, *Limits of Citizenship: Migrant and Postnational Membership in Europe*, Chicago University Press, 1994, 1-15.

¹³⁴⁴ Case 438/05 *International Transport Workers' Federation and Finnish Seaman's Union v Viking Line ABP and OU Viking Line Eesti*, (2007), 47-55.

¹³⁴⁵ *Automotive, Food, Metals, Engineering, Printed and Kindred Industries Union v Wesfarmers Premier Coal Limited* (2005) AIRC 873 – PR963714 (C2005/1044).

bargain.¹³⁴⁶ Article 76 of the Slovenian Constitution ensures citizens have the right to join a trade union and guarantees collective bargaining in accordance with 2006 Collective Agreements Act.¹³⁴⁷ Collective bargaining is closely associated with the ability for a citizen to join a union and the right to expression, association, assembly and discrimination. Article 156 of the TFEU allows the European Union to provide a consistent framework for labour law, working conditions, collective bargaining across all member states. The Community Charter of the Fundamental Social Rights of Workers¹³⁴⁸ establishes the minimum principles for European labour law and protection of workers, employment, remuneration and collective bargaining in accordance with article 151 of the TFEU. This also supports the rights set out in the European Charter of Fundamental Rights 2000. Furthermore, articles 11 to 14 reaffirms the ability for individuals to associate and collectively bargain as part of their employment.

The following principles that have been expressed under the SC is the prohibition of child labour¹³⁴⁹ and protection of young people at work,¹³⁵⁰ social security,¹³⁵¹ health care.¹³⁵² The international Convention on the Rights of the Child¹³⁵³ was the first international legal instrument developed to protect children's social, economic and political rights. The protection of children from being exploited through employment is closely associated with the protection against slavery (discussed earlier in this chapter).

A child born to parents who are either Slovenian or Australia citizens themselves, or born on the territory of either state, can be citizens of these states. Australia ratified the Convention on the Rights of the Child in 1990, and Slovenia did in 1992. Article 32 of the convention stated that the right of the child is to be protected from economic exploitation when performing work that could have an impact in that individual's education and health. The convention does not determine the minimum age for a child to work, however, the Convention on the Minimum Age for Admission to Employment¹³⁵⁴ provides the basis for states to describe the minimum legal age for employment. Article 2 specifies the minimum age of fifteen years old for completing compulsory education and following consultation with employees and other organisations the

¹³⁴⁶ *Fair Work Act 2009* establishes the framework for collective bargaining between employees, employers and nominated representatives.

¹³⁴⁷ The Collective Agreements Act, Official Gazette of the Republic of Slovenia 001-22-52/05.

¹³⁴⁸ The Community Charter of the Fundamental Social Rights of Workers <http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/communitycharterofthefundamentalsocialrightsofworkers.htm>, accessed 20 December 2013.

¹³⁴⁹ Chapter IV Solidarity, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, (2007/C 303/01).

¹³⁵⁰ Ibid, article 32.

¹³⁵¹ Ibid, article 34.

¹³⁵² Ibid, article 35.

¹³⁵³ Convention on the Rights of the Child United Nations, Treaty Series, vol. 1577, p. 3. Australian and Slovenia have both ratified this convention in 1990 and 1992 respectively.

¹³⁵⁴ Convention No. 138 on the Minimum Age for Admission to Employment 1973. Adoption: Geneva, 58th ILC session (26 Jun 1973).

minimum working age is fourteen years. However, Australia has not ratified this minimum age convention, whereas, Slovenia did in 1992. Australia should ratify and implement this convention.

The Australian Refugee Review Tribunal reinforces the above point that the international law surrounding child labour is important part of the social fabric of society and should be implemented by states.¹³⁵⁵ The state of Victoria, in Australia, allows children thirteen years old and above to be employed for a maximum time of three hours a day and not more than twelve hours per week.¹³⁵⁶ Whereas, Slovenia described a minimum age of fifteen years of age before a child can work, which is consistent with the European Union standard.¹³⁵⁷ Article 1 of the Directive 94/33/EC requires member states to protect children to the age of fifteen years of age. This applies to children when pursuing employment that is given effect by the Slovenian Employment Relationship Act 2002, the Rules on the Protection of Health at Work of Children, Adolescents and Young People, and the Rules on Permits for Work of Children Under the Age of 15 regulations.¹³⁵⁸ There is a difference in protecting the age of when children can undertake employment in Slovenia and Australia.

Social security and health care have been established by democratic states to protect the welfare of all citizens. Australia¹³⁵⁹ and Slovenia¹³⁶⁰ have established bilateral agreements (discussed **chapter five**) in this area for when a Slovene citizen is present in Australia and vice versa. Nevertheless, both states have national laws and policy programs to provide their citizens social security and health care. Section 51 (xxiii) of the Australian constitution enables the Australian Parliament to make laws in relation to social security, however this provision is limited to only invalid (citizens with a disability) and citizens that are determined to be old age. Slovenia has gone further than Australia to express the right to social security is a guaranteed constitutional right to ensure the special protection of its citizens (unemployment, aged care and disability).¹³⁶¹ Health care as a right in Australia has been dealt with through a Charter that ensure citizens are

¹³⁵⁵ *SZNP & Anor v Minister for Immigration & Anor* (2009) FMCA 738, 6-15.

¹³⁵⁶ *Child Employment Act* 2003.

¹³⁵⁷ Council Directive 94/33/EC on the protection of young people at work, Official Journal of the European Communities, L 216/12.

¹³⁵⁸ Employment Relations Act, Official Gazette of the Republic of Slovenia 42-2006/02, Rules on the Protection of Health at Work of Children, Adolescents and Young People, Official Gazette 82-3920/03, Rules on Permits for Work of Children Under the Age 15, Official Gazette of the Republic of Slovenia 60-2760/04.

¹³⁵⁹ *Social Security Act 1991, National Health Act 1953, National Health Amendment (Pharmaceutical Benefits Scheme) Act 2012, National Health Reform Act 2011, National Health Security Act 2007*, amongst others.

¹³⁶⁰ *Pension and Disability Insurance Act*, Official Gazette of the Republic of Slovenia 72/05. *Health Care and Health Insurance Act*, Official Gazette of the Republic of Slovenia 76/05.

¹³⁶¹ Article 50, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

provided the highest possible care.¹³⁶² The Grand Chamber in *Servet*¹³⁶³ stated that when determining social security, social assistance and social protection must be in accordance with the principle of equal treatment must comply with the rights set out in the 2000 European Charter of Fundamental Rights. Social security and health are a small part, but an important component of national identity, as they provide a citizen with a level of protection, by the state. Both concepts enable a citizen to be fully active within the community.

In a globalised world protecting consumers¹³⁶⁴ (protecting all citizens), access to services,¹³⁶⁵ and more broadly the environment¹³⁶⁶ has also become important. As a regional economic and social bloc, the Union and its citizens have greater consumer power than before the internal borders were extinguished. The improvements in technology with the ability for individuals to purchase consumer goods on the internet has risen significantly over the past decade. The dismantling of borders has also allowed citizens from Slovenia to more easily have access to services in not only neighboring states such as Austria, Italy and Hungary but also the other member states. At the national level citizens in both states have access to services equally and consumer protection laws provide that citizens are protected from business by the *Consumer Protection Act, Official Gazette of the Republic of Slovenia 86/2009* and the *Competition and Consumer Act 2010* as well as the *Trades Practices Act 1974*.

The European Union aims to protect the environment for all its citizens and to the highest standards for current and future generations. While there is no express protection stated in either the Slovenian or Australian constitutions, article 72 of the SC provides that every citizen and non-citizen has the right to a healthy living environment. Both states have implemented national law to meet their international environmental obligations and ensure the respective states and their citizens have a healthy living environment. In Slovenia, one of the principal acts is the *Environment Protection Act 1993*,¹³⁶⁷ and in Australia the equivalent is the *Environment and Biodiversity Conservation Act 1999*. The objectives of the national laws from

¹³⁶² Australian Charter of Health Care Rights, <http://www.safetyandquality.gov.au/our-work/national-perspectives/charter-of-healthcare-rights>, accessed 22 November 2012.

¹³⁶³ Case 571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)* [2012] ECR.

¹³⁶⁴ Article 38, Chapter IV Solidarity, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, (2007/C 303/01).

¹³⁶⁵ *Ibid*, article 36.

¹³⁶⁶ *Ibid*, article 37. Article 3 and 21 Treaty on European Union, Official Journal of the European Union C 191. Articles 4, 11, 191 and 192 Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94. Regulation 614/2007/EC Financial Instrument for the Environment, Official Journal of the European Union L 149. Regulation 401/2009/EC European Environment Agency and the European Environment Information and Observation Network, Official Journal of the European Union L 126/13. At a national level in Australia the *Environment Protection and Biodiversity Act 1999* along with state legislation provide similar.

¹³⁶⁷ Environment Protection Act, Official Gazette of the Republic of Slovenia 32/93.

either state is to protect the natural environment, ecosystems (flora and fauna) including natural resources such as water and aquatic biota.

The analysis shows that Australia and Slovenia have very different constitutionally expressed rights and freedoms for citizens and non-citizens. Australia has taken the common law approach by providing for most rights in national legislation. Slovenia on the other hand provides greater legal certainty of their rights and freedoms being expressed in the constitution. The right, freedoms and protections discussed all form part of the respective states legal frameworks, and considered an important part of their respective democratic principles that form part of the foundation of both states. It is argued, the above rights, freedoms and protections, even in a small way, contribute to national identity. They form part of good governance by the state, ensuring citizens have protections when employed by an employer. Additionally, the environment with which citizens reside is important as it is the basis for the production of food, water quality, and general wellbeing. Increasingly, the protection of the environment has become part of a state's identity so as their citizens and the broader global community have a diverse environment intact for future generations.

4.2.5 Citizen's rights [political]

The rights of citizens are different from the rights of others in Slovenia and Australia. As discussed in **chapter one**, citizenship is the 'right to have rights'. Firstly, the notion of political rights enables citizens to fully participate as part of the political community. Barrington when describing a citizen as being an official (active) member of the state, or in the case of the European Union a member of a supernational polity, are afforded certain rights over and above non-citizens that enable access to European Union institutions.¹³⁶⁸ This is an important point because, a dual citizen of Slovenia and Australia who is resident in Slovenia has the ability to participate not only in Australia and Slovenia's political community, but also the European Union. A dual citizen can vote and stand for elections in both Slovenia and the European Parliament.

The right to vote and stand for election¹³⁶⁹ is a guaranteed and is crucial to maintaining the foundations of an effective democracy established by a constitution.¹³⁷⁰ The right to vote and stand for election strengthens national identity, through citizens being active participants in the

¹³⁶⁸ Articles 20 and 223, Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94. Council Directive 93/109/EC laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not national, Official Journal of the European Union L 329.

¹³⁶⁹ *Scoppola v Italy* (No.3) (Application No 126/05), 2012, 81-82.

¹³⁷⁰ George Williams and David Hume, *Human Rights under the Australian Constitution*, Oxford University Press, 2013, 219.

political community. The analysis highlights that jurisdictions have ensured citizens have a right to participate in their respective community and political process.¹³⁷¹ However, all citizens across the EU are afforded these rights to enable them participation in the European Union and its institutions. This is an exclusive right only afforded to EU citizens. The right to vote and stand for elections also includes municipal elections in accordance with article 40 of the European Charter of Fundamental Rights 2000 and articles 20 and 22 of the TEFU, and Council Directives 96/30/EC.¹³⁷² Slovenes have the right to vote and stand for elections to the European Parliament, and municipal elections.¹³⁷³ The right to vote in Australia, in federal elections, is regulated under the *Electoral Act 1918*. The SC states the right exists provided the citizens wanting to vote is 18 years of age.¹³⁷⁴ Whereas, section 24 of the AC refers to the House of Representatives that the representatives can be chosen by the people (citizens) of the commonwealth. Section 25 allows individual states within Australia to exclude any race from voting at elections. Furthermore, section 41 provides an express right of electors to the states. No adult person who has or acquires the right to vote at elections for more than one House of the Parliament of a State. However, section 44 for the Australian constitution restricts candidates from Federal Parliament, whereby, a person who has allegiance, obedience or adherence to a foreign power or is a citizen who has obtained rights and privileges of a foreign power cannot be chosen or sit as a senator or member of the House of Representatives. Therefore, a dual citizen of Slovenia and Australia is not treated equally by either state, or the European Union. The dual citizen can stand for election and vote in and across the EU and Slovenia, although restricted. However, in Australia dual citizens cannot stand for election at the national level. Australia should consider amending the constitution to allow certain country citizens such as Slovenian Australians to stand for election in the national parliament. Doing so would enrich national identity by allowing new ideas and values to be considered by the parliament.

The participation of women in the political process has significantly improved within the European Union and in Slovenia. In 2009, members elected to the European Parliament consisted of 31% of women and 69% men.¹³⁷⁵ Clearly, more work is needed at the European level for the full inclusion of women. When Slovenia became an independent state in 1990,

¹³⁷¹ Article 3, Paris, 20.III. 1952, European Convention on Human Rights, Council of Europe, Rome, 4.XI. 1950.

¹³⁷² Outlining the arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union.

¹³⁷³ Article 39, 40 & 43 Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01.

¹³⁷⁴ Article 43, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³⁷⁵ Women in European politics – time for action European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities, January 2009.

women made up only about 8% of the National Assembly.¹³⁷⁶ By 2011, there was a substantial increase in the representation of women to the National Assembly, which rose to 32%.¹³⁷⁷ The National Assembly Election Act¹³⁷⁸ was amended in 2006 to establish a quota system of not less than 35%; however, through the transition period that quota was reduced to 25%.¹³⁷⁹ By 2013, the National Assembly was represented by 34% women. The expansion of the European Union's law and policy on citizenship has seen a significant increase in the participation of women at a national and supranational level. In 2001, the European Parliament was represented by 35% women.¹³⁸⁰ The European Union, Slovenia and Australia still have some way to go, to achieve parity between men and women in political institutions. In 2014, the Australian Parliament was represented by 30% women;¹³⁸¹ however, there is no legislation to encourage a greater representation of women. Australia relies on the major political parties to establish rules that allow for the representation of women.

Good administration¹³⁸² provides that citizen's affairs are handled impartially and fairly by the institutions of the European Union (EU). A democratic society ensures its institutions work on behalf of the citizens,¹³⁸³ and they can be accessed by all citizens.¹³⁸⁴ A similar approach allows citizens in Australia access to government¹³⁸⁵ institutions, however it is not an expressed constitutional right. Article 42 of the European Charter of Fundamental Rights 2000 enables any citizen of the Union the right to access documents¹³⁸⁶ of EU institutions, bodies, offices and agencies.¹³⁸⁷ Council Regulation 1049/2001/EC and Council Directive 2003/4/EC assist in facilitating access by citizens to the European Parliament, European Council and European Commission documents. Citizens of the Union can refer matters to the European Ombudsman.¹³⁸⁸ Australian national law enables citizens to refer matters such as immigration

¹³⁷⁶ Tanja Pleš, Klara Nahtigal, Angela Murka, *Women in Politics in Slovenia, More Women in European Politics*, Fundamental Rights and Citizenship Programme, European Union 2013/14, 1-5.

¹³⁷⁷ *Ibid.*

¹³⁷⁸ Official Gazette of the Republic of Slovenia, 109/2006.

¹³⁷⁹ Tanja Pleš, Klara Nahtigal, Angela Murka, *Women in Politics in Slovenia, More Women in European Politics*, Fundamental Rights and Citizenship Programme, European Union 2013/14, 1-5.

¹³⁸⁰ European Commission, *The Quota-instrument: different approaches across Europe*, European Commission's Network to Promote Women in Decision-making in Politics and the Economy, Working Paper, 2011.

¹³⁸¹ Joy McCann and Janet Wilson, *Women in Parliament*, Politics and Public Administration, Australian Parliament, 2014, 1-2.

¹³⁸² Article 41, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01.

¹³⁸³ *Ibid.*, article 11.

¹³⁸⁴ Articles 15, 24 and 228, Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94.

¹³⁸⁵ *Freedom of Information Act 1982*, Section 11A.

¹³⁸⁶ Article 15 (3), Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94.

¹³⁸⁷ Article 39, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³⁸⁸ Articles 20, 24 and 28, Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94.

detention to the Commonwealth Ombudsman.¹³⁸⁹ An Ombudsman was appointed for Slovene citizens through the *Human Rights Ombudsman Act 1993*.¹³⁹⁰ Slovene citizens may petition the European Parliament.¹³⁹¹ The right to petition is not absolute in Australia and a citizen may petition the House of Representatives for any issue under the responsibility of the constitution such as citizenship and immigration.¹³⁹² The notable difference between Australia and Slovenia is that Slovene citizens have access to a supranational polity, whereas Australian citizens do not. Access to these institutions ensures that a state, in accordance with the democratic principles of good governance, allows its citizens to have access to open, transparent and accountable government institutions. The establishment of good governance, laws and access to institutions enhance national identity by ensuring those democratic values with which Slovenia and Australia have implemented are maintained when compared to other nation states that are under totalitarian rule.

The right of citizens to freely move and reside anywhere in the EU and Slovenia is well established.¹³⁹³ While not an expressed right in the AC, section 92 provides an implied right to free movement allowing the free movement of goods, services and people throughout Australia. Australia could strengthen its constitution to resemble Slovenia's and clearly state that citizens have the right to enter and exit the territory. At the commonwealth level, rather than guarantee the right; the parliament has opted to restrict the right for example under division 104 of the *Criminal Code Act 1995* and the *Defence Act 1903*.¹³⁹⁴ However, this restriction only pertains to criminal matters and not trade. Thus, Australia similar to the EU has developed a common single market that allows free movement and trade between states and territories. In *Cole v Whitfield*¹³⁹⁵ the Australian High Court ruled that section 92 creates a free trade area throughout the Commonwealth enabling the free movement of people, goods and communications. The High Court of Australia went further stating 'a constitutional guarantee of freedom of interstate intercourse, if it is to have substantial content, extends to a guarantee of personal freedom to

¹³⁸⁹ *Ombudsman Act 1976*.

¹³⁹⁰ Official Gazette of the Republic of Slovenia 71/93, 15/94 and 109/12. Article 159, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³⁹¹ Article 44, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European Union, 2007, C 303/01. Article 45, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13. Articles 20, 24, 227 Treaty on the Functioning of the European Union, Official Journal of the European Union, C 83/94.

¹³⁹² House of Representatives, Amnesty for immigrants and refugees, 22 November 2010, http://aphnew.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=petitions/presented.htm, accessed 19 November 2012.

¹³⁹³ Article 45, Charter of Fundamental Rights of the European Union 2000, Official Journal of the European Union 2007, C 303/01. Article 32, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹³⁹⁴ Part IIIAAA Defence Act 1903, the freedom of movement may be restricted when orders have been established enabling the Defence Force to exercise certain powers.

¹³⁹⁵ *Cole v Whitfield* (1988) CLR 360, 391.

pass to and from states without burden, hindrance or restriction'.¹³⁹⁶ The right to freely move is a fundamental principle of national identity, by allowing citizens to engage with other citizens.

4.2.6 Justice

In building and establishing any democratic state including the EU, the rule of law and access to justice ensures every citizen has the right to an effective remedy to a fair trial.¹³⁹⁷ Section 80 of the AC guarantees a right to trial for those offences stated under commonwealth law only. This does not apply to state or territory law (Victoria, New South Wales, Queensland, Tasmania, Western Australia, South Australia, Northern Territory and Australian Capital Territory). The difference between the SC and AC is that Slovenia expresses the right to a 'fair' trial, whereas, the AC is specific to only refer to a 'trial by jury'.¹³⁹⁸ The Slovenian Constitutional Court in U-I-204/99,¹³⁹⁹ stated that article 29 of the Slovene constitution determined that anyone charged with a criminal offence must be guaranteed, in addition to absolute equality and the right to legal representation. Additionally, the Slovenian Constitutional Court in this case ruled that the free choice of a legal representative, as is explicitly provided in article 19 of the constitution, is to be understood as an element of the general right to defence determined in article 29 of the constitution. The court went further ruling that article 14 of the ICCPR allows an individual citizen to choose who may represent them in criminal proceedings. The High Court of Australia in *Dietrich*¹⁴⁰⁰ stated the right to a fair trial while not being an express constitutional right is to be granted a fair trial according to the law. The court also stated the right is a fundamental element of our (Australia's) justice system.¹⁴⁰¹ Not only did the court emphasise the importance of this right, but also, referred to the article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, whereby, everyone is entitled to a fair hearing. The court also stated that the obligations of the right for a person to choose their own defence council can be found in article 14(3) of the ICCPR. That is, everyone shall be entitled to the minimum guarantees in full equality, and in defending themselves the person is able to choose their own legal assistance.¹⁴⁰² Australia also having ratified the ICCPR, has given effect to this right by the *Human Rights and Equal Opportunity Commission Act 1986*.¹⁴⁰³

¹³⁹⁶ Ibid.

¹³⁹⁷ Article 47, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01.

¹³⁹⁸ *Kingswell v The Queen* (1985) 159 CLR 264.

¹³⁹⁹ Official Gazette of the Republic of Slovenia, No. 3/2003.

¹⁴⁰⁰ *Dietrich v R* [1992] HCA 57; (1992) 177 CLR 292.

¹⁴⁰¹ Ibid.

¹⁴⁰² Ibid.

¹⁴⁰³ The Human Rights and Equal Opportunity Commission Act 1986, states "whereas it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms".

Citizens are presumed innocent¹⁴⁰⁴ and have a right of defence in accordance with the principle of proportionality¹⁴⁰⁵ of criminal offence and penalties in Slovenia and Australia. However, the rights are expressed differently in case law and legislation. The presumption of innocence¹⁴⁰⁶ and proportionality are fundamental principles of common law. The High Court in *Momcilovic*¹⁴⁰⁷ stated it is a right to be presumed innocent until proven guilty according to the law⁷. In addition, a person cannot be punished twice¹⁴⁰⁸ in criminal proceedings for the same criminal offence. Not having such a principle reflected in EU law would allow a person to be found guilty in two member states for the same offence. That is, a citizen punished in Slovenia and then later punished for the same offence in Austria or Italy. The Australian constitution does not express this right. Furthermore, in *Up-383/11*¹⁴⁰⁹ the Slovenian courts recognise that the respect for final decisions is an important constitutional value and is fundamental to the rule of law providing stability of legal relationships that is aimed at protecting the holders of rights and obligations. The court when referring to divorce of Slovene citizens and who should be granted custody is closely associated to the rights and best interest of the child, and therefore, the final decision. Similarly, the High Court of Australia is the court of last resort and final appeal in a similar way to the Slovenian Constitutional Court. However, as stated earlier, Slovenes can take human rights matters to the European Court of Human Rights. One of the core legal principles associated with democratic states and in the common law in Australia, allows every citizen to be presumed innocent, until the contrary is proved by a court of law.¹⁴¹⁰ An expansion of the presumption of innocence in that no person is to be punished for something that has not been declared by law to be an offence.¹⁴¹¹ Court hearings are to be public, and the final judgement or judgements are to be made public,¹⁴¹² unless the state expresses otherwise. It is argued this is not so much an individual citizen's right. Rather a community right, enabling access to court information in relation to a particular individual or group of citizens. Even so, any citizen charged with a criminal offence has the right of adequate time and facilities to prepare for the defence; be present at trial and conduct their own defence or be defended; the

¹⁴⁰⁴ Article 48, Charter of Fundamental Rights of the European Union, 2000, Official Journal of the European, 2007 C 303/01. Article 27, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13. In Australia this is not an expressed right within the Constitution, but nevertheless, is Commonwealth Criminal Code Act 1995 established proof provisions for criminal offences under commonwealth law.

¹⁴⁰⁵ *Veen v The Queen* (No2) (1988) CLR 164 CLR 465, the High Court made it clear that proportionality is the key consideration to take into account in sentencing.

¹⁴⁰⁶ Article 14(2) International Covenant on Civil and Political Rights, Article 6(2) European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11 Universal Declaration of Human Rights 1948.

¹⁴⁰⁷ *Momcilovic v The Queen* (2011) HCA 34, 2-22.

¹⁴⁰⁸ Article 4, Protocol No. 7, Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Rome, 4.XI. 1950.

¹⁴⁰⁹ Official Gazette of the Republic of Slovenia, No. 85/2013.

¹⁴¹⁰ Article 27, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹⁴¹¹ *Ibid*, article 28.

¹⁴¹² *Ibid*, article 24.

right to represent evidence and not to incriminate themselves.¹⁴¹³ This was expressed by the Slovenian Constitutional Court in U-I-345/98, whereby, articles 22 and 23 of the SC define the basic right to a fair trial, and that this right is closely linked to the right to obtain legal representation under article 19 of the SC.¹⁴¹⁴ Furthermore, where a person has been wrongly convicted¹⁴¹⁵ they are able to be rehabilitated and seek compensation from the state.¹⁴¹⁶ No citizen shall be convicted or punished for the same criminal offence twice.

The state of Slovenia guarantees the equal protection of rights in any proceeding before a court,¹⁴¹⁷ while having the right to judicial protection. A judge appointed by the relevant court can hand down a decision to the individual citizen.¹⁴¹⁸ The protection is closely related to equality before the law. Citizens in their pursuit of free establishment (undertaking business) can fall into financial difficulties and be subject to a states bankruptcy and liquidation laws. In Up-328/04, U-I-186/04¹⁴¹⁹ the Slovenian Constitutional Court had to consider whether article 22 of the SC had been violated in connection with the Maribor District Court Rulings on the Bankruptcy and Liquidation Act.¹⁴²⁰ The court stated that while there was no violation of this right, the requirement that the equal protection of rights be guaranteed in proceedings before the court and other state authorities, does not mean a domestic court should apply the procedural law of the state which a foreign legal entity is from.¹⁴²¹ The court was referring to how the German courts had dealt with the equal protection of rights in insolvency proceedings. The protection also ensures discrimination of a person's race, sex, religion or cultural should not be a factor in court proceedings, as stated above the relevant state protections.

Equality before the law is closely associated with the right to legal remedies such as the ability to appeal¹⁴²² against the decision of the court or state authorities.¹⁴²³ The court¹⁴²⁴ ruled where authorities in performing their duties, do so, by exceeding their powers, a citizen has the right to compensation. Furthermore, equality before the law also encompasses the protection against discrimination, and the Australian High Court stated in *Walters*¹⁴²⁵ that 'discrimination can arise just as readily from an act which treats those as equals to those who are different as it can from

¹⁴¹³ Ibid, article 29.

¹⁴¹⁴ Official Gazette of the Republic of Slovenia, No. 63/94.

¹⁴¹⁵ Article 3, Protocol No. 7, European Convention on Human Rights, Council of Europe, Rome, 4.XI. 1950.

¹⁴¹⁶ Article 30 and 31, Official Gazette of the Republic of Slovenia, No. 63/94.

¹⁴¹⁷ Article 22, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹⁴¹⁸ Ibid, article 23.

¹⁴¹⁹ OdiUSXIII, 82.

¹⁴²⁰ Official Gazette RS 52/99.

¹⁴²¹ OdiUSXIII,82.

¹⁴²² Article 2, Protocol No. 7, Official Gazette of the Republic of Slovenia, No. 63/94.

¹⁴²³ Article 25, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia No. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹⁴²⁴ Official Gazette of the Republic of Slovenia, No. 103/2009.

¹⁴²⁵ *Walters v Public Transport Corporation* [1991] HCA 49 [10]; 173 CLR 349, 402.

an act which treats differently persons whose circumstances are not materially different'. That is, the national discrimination laws discussed in this chapter both in Slovenia and Australia, including the EU direct and indirect discrimination. The Slovenian Constitutional Court in U-I-284/94¹⁴²⁶ stated the principles of equality does not determine equality before law only for citizens of Slovenia but applies to all persons. The court went onto rule that Slovenia as the future state obliged itself in its acts concerning independence that it would guarantee the protection of human rights to all persons in the territory of Slovenia regardless of their nationality, and without any discrimination. The case centered around those individuals from former Yugoslav republics who were resident in Slovenia at the time of the breakup, and did not have citizenship of the Slovene Republic, finding themselves being erased from the internal registry (discussed **chapter three**).

The comparison demonstrates the recognition of rights afforded to citizens by the European Charter of Fundamental Rights 2000 and the Slovenian constitution are significantly more advanced in expressing rights and freedoms to citizens and non-citizen, than the constitution of Australia. Citizenship is the right to have rights that have been provided for in national, supranational and international law. Human rights are central to the ongoing relationship between the citizen, citizens and the state. Human rights assist a state in demonstrating to the world their democratic values and principles, by ensuring equality for all citizens and non-citizens. Human rights, freedoms and protections also protect citizens and non-citizens from each other and from the state. However, citizens are afforded additional rights to non-citizens, whereby, they are able to participate in the political community by voting and standing for election. With the continued expansion of globalisation states more than ever are wanting to retain their identity, one way to achieve this is following Slovenia's example of providing expressed rights within a state's constitution. The European Union has ensured member states achieve this through their respective institutional structures and constitutions. Slovenia has maintained its identity through constitutional recognition of rights. Thus, it is well documented that Australia's constitution is in need of reform. Australia could consider amending 1) the Constitution, 2) or develop a Charter or 3) or present certain rights the Citizenship Act. This third option may not be considered viable. Constitutional reform is needed in Australia and could resemble Slovenia's modern day constitution. Australia can learn a lot from the Slovenia and the European Union is further developing constitutional rights. Australia could amend its constitution, develop a commonwealth Human Rights Charter or express the rights within the citizenship act. By doing so, will advance the national identity of Australia with its citizens and residents.

¹⁴²⁶ Official Gazette of Republic of Slovenia, No. 14/99.

This thesis argues Slovenia is at an advantage compared to Australia in having access to and being part of a supranational legal framework and institutions.¹⁴²⁷ The rights and protections afforded to Slovenian citizens are easily located and clear within the current constitution and national laws. In Australia, many of the rights are spread across a large body of national law, even though both jurisdictions are signatories to the United Nations rights law. Australia having similar democratic principles and law to Slovenia and the European Union could enhance its legal framework by borrowing from Slovenia to change its constitution.

4.3 Conclusion

This chapter has sought to demonstrate how important rights are to citizens, the nation state including the European Union for national identity. This chapter has confirmed that rights are a reflection of a modern day states democratic values. This chapter has demonstrated the international, supranational and national rights law that constitutes the public. This chapter confirmed that citizens may use the rights afforded to them (the citizens), to protect themselves from other citizens and the state (the private). The rights expressed in this chapter also direct citizens to behave in a certain way that represents the values and customs of the state. The values and customs contribute to a state's identity. This chapter has demonstrated that rights have been, and continue to be, used by states to enhance their national identity.

In 2004, Slovenia was admitted to the European Union. This provided Slovene citizens with new rights and freedoms. The developments in European law resulted in women participating to a greater extent both nationally and in the European Union. European citizenship along with national citizenship is also multidimensional. European citizenship has established a legal status confirming who is and who is not a citizen of the European Union. It has been used to enhance the single (economic) market concept, while integrating and unifying member states and their citizens. European Union citizenship has provided the opportunity for the collective Union to direct its citizens to embrace and practice the democratic principles of the Union.

There are considerable differences between the constitutions of Slovenia and Australia. Australia should consider several aspects of Slovenia's constitution, particularly in the area of human rights. Slovenia's minority communities (Italian and Hungarian) have been afforded specific constitutional protections and guaranteed the right to use their national symbols freely and in order to preserve their identity. Australia could do a lot more to protect its indigenous peoples who should be considered as a part of the national community within the Australian constitution. More importantly, the Slovenian constitution makes it clear that citizens have

¹⁴²⁷ Matt Harvey, *Australia and the European Union: Some Similar Constitutional Dilemmas*, DeakinLaw Review, 2001, 312.

certain political rights that are denied to non-citizen residents in the state. This clarity is also something Australia could emulate.

The international regionalisation of rights has benefited the state and its citizens by protecting citizens from each other and the state. However, states have had to grapple with the concept of human rights for all of humanity, human rights for their citizens, and the management of the country.

This chapter has identified areas that Australia and Slovenia could adopt to improve their respective laws (discussed **Appendix One**) and include;

- The Slovenian constitution states that 'citizenship is regulated by the law'. Australia's constitution could be amended to resemble Slovenia's constitution.
- Australia's official language is English, although this has not been codified in the same way as it has in Slovenia. Australia could investigate whether the English language should be recognised in the constitution in the same way as article 11 of the Slovenian constitution has recognised the Slovenian language. However, there is likely strong opposition to such a proposal by many in the community.
- Australia has considerable work to do in the area of constitutional reform. While the rights of citizens and non-citizens in Australia have been reflected in a number of Acts, it is time for those rights to be better and more clearly reflected in 1) the Constitution, 2) a Charter or 3) the Citizenship Act. This third option may not be considered viable.
- There is much work Australia can do to recognise minorities in the state. Australia can look to Slovenia and resemble their constitution in this area of law, as they have done for national communities and the Rom community. Additionally, Australia can also look to the European Union to assist in better accommodating national minorities and their rights into the national legal framework.
- The indigenous aboriginal peoples must be recognised in the Australian constitution.
- Article 32 of the Slovenian constitution provides that citizens have the right to exit and return to the state at any time. While the Australian constitution does not provide a similar right, citizens have the right of exit and return. Australia could apply a similar provision within its constitution.

- To ensure children are not exploited the Convention on the Minimum Age for Admission to Employment. Australia should ratify this convention.

Human rights have become an important part of Australia, Slovenia and the European Union's legal and policy framework. Human rights have been used by the European Union to integrate the member states and their citizens. Slovenia, since becoming a member of the European Union has been required to transpose the human rights legal principles of the Union into national policy and law. Australia has done the same by recognising the extensive international legal framework pertaining to human rights into national law. Human rights forms an important component of a state's national identity, and by adopting the above recommendation, both states have an opportunity to learn from each other and enhance their respective national identity.

Chapter 5 - Naturalisation through Migration

5. Overview

This chapter examines migration as a pathway to citizenship. Immigration contributes to national identity. Immigration allows a state to strengthen and retain its national identity by restricting who enters and stays. Immigration law is also naturally exclusionary because it allows a state to restrict who can enter, stay, and take out citizenship. A citizen from either Australia or Slovenia can enter the respective territories, stay and apply for citizenship, provided s/he meets the respective immigration requirements. Immigration law developed by Slovenia, the European Union and Australia is public law. However, the act of a citizen migrating from Slovenia to Australia or vice versa is private. The immigration laws discussed in this chapter are for the period of 2014 and 2015. Immigration does not confirm or provide a person with a legal status of citizenship to or within a state. The national identity is further strengthened as a result of a state requiring a non-citizen to meet their respective residency requirements before they can apply for citizenship. An inclusive identity can be achieved only by a state having a strong legislative framework that includes immigration. The state can shape the new citizens so that they become what the state intends them to be. That is, citizens who understand, respect and implement the values, customs and rule of law, of that state.

The respective immigration policies of Slovenia and Australia are different, and are linked to other important national policies such as population, economic, social and international protection. In the case of Slovenia, their immigration policy must align with the immigration policy of the European Union. Entry and stay can only be achieved by non-citizens who have the appropriate authorisation (a valid visa or permit and passport). In this chapter, the discussion of the visas and permits issued by Slovenia and Australia includes professional (skilled migration) social (family reunification), permanent residency and international protection (refugees). Non-citizens bring with them culture, language and values from their state of origin and over time are mixed with the values and customs of the state of origin. However, it could be argued that different values and customs challenge the existing national identity of a state and contribute to the xenophobic behaviour of some in the community. The practice of permanent residence being able to be purchased by non-citizens to gain entry and residence to a state is now a reality, and this chapter argues that this is another pathway to citizenship. This chapter deals only with the residency requirements for citizenship and not the process of obtaining a bridging visa, undertaking a medical assessment, or providing evidence that a person can be self-supporting. Migration law in both Slovenia and Australia is gender-neutral. This chapter explores how the governments of these states have assisted their citizens and their movement between states by establishing bilateral arrangements regarding social security and health. This

chapter describes the long-standing relationship between Australia and Slovenia that has resulted from immigration. Australia has been a destination for Slovenes since the mid-1800s. This chapter will identify areas within the law that could be amended, which in turn will assist in enhancing national identity. Slovenia and Australia could consider adopting the suggestions, which should go some way to improving their respective immigration laws.

5.1 Immigration

Immigration is a pathway to citizenship. By regulating immigration Australia and Slovenia reinforce their respective national identities by protecting their sovereignty and choosing who will enter and stay, and may become a citizen. However, immigration can have an impact on social cohesion with the vast and varied different ethnic groups present in one state. It has been argued in the previous two chapters, citizenship reinforces (and has been used by states to strengthen their) national identity. There is nothing natural about a person becoming a citizen of a state through the naturalisation process.¹⁴²⁸ The naturalisation process of Slovenia and Australia are different. It is only when a non-citizen meets the respective states naturalisation requirements such as length of stay in the state, can the person apply for and obtain citizenship. However, as discussed in **chapter two and three** a person can obtain citizenship by birth or descent, which allows the person to obtain the necessary documents from the state to enable them to obtain a passport. This is an important step that citizenship is a requirement to enable a passport to be provided to the citizen that enables them to exit and enter their state of origin.

Immigration challenges and in some cases reaffirms the notion of national identity, sovereignty and state control.¹⁴²⁹ With the increased mobility of people across the world, the expansion of globalisation and the influx of various ethnic groups taking up residence and citizenship, it could be argued that the national identity is being diluted. Therefore, migration is one aspect of a far broader issue surrounding the economic and social impact to national identity. States have to balance the economic benefits from migration and globalisation with maintaining and enhancing national identity. Furthermore, a state has to balance the reaction of existing citizens to new citizens and the values, behaviours and identities they bring with them to their new state of residence. Claire O'Neil and Tim Watts¹⁴³⁰ argue it is important for states to build an inclusive national identity that requires the government to expand its actions to ensure a sense of inclusiveness. It is argued that an inclusive national identity can only be realised provided the Slovenian and Australian governments have a sound legislative framework. This legal

¹⁴²⁸ Sara Goodman Wallace, *Naturalisation Policies in Europe: Exploring Patterns of Inclusion and Exclusion*, EUDO Citizenship Observatory, Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School, 2010, 1-10.

¹⁴²⁹ Irene Bloemraad, Anna Korteweg, Gokce Yurdakul, *Citizenship and Immigration: Multiculturalism, Assimilation, and Challenges to the Nation-State*, *Annu, Rev, Sociol*, 2008, 153-179.

¹⁴³⁰ Claire O'Neil, Tim Watts, *Two Future: Australia at a Critical Moment*, The Text Publishing Swann House, 2015, 200-205.

framework must include citizenship and immigration law, along with the other laws discussed in throughout the research.

A state cannot force a non-citizen to be naturalised. Today, there may be the perception that there is no need to take out citizenship when a non-citizen is able to take up permanent residence in a state. Citizenship confers certain rights, and the difference in the rights of citizens and residents is subtle but important. Residents cannot participate fully in the political community. Citizens can vote and be elected to a national institution. However, dual citizens cannot be elected to the federal parliament in Australia.

Immigration is a complex balance between sovereignty and rights¹⁴³¹ and is highly politicised.¹⁴³² Apart from a state overseeing immigration, they also monitor emigration. Within Australia, emigration is common between states and territories. The same is the case in Slovenia where people may emigrate from Maribor to Kranj. Furthermore, with the dismantling of internal borders across Europe and the right to move and reside in another member state, emigration also occurs. However, this chapter does not discuss the breadth or depth of emigration in both jurisdictions.

Migration theory can be explained two ways. The first is how a state regulates immigration, and the second is the personal decision of an individual to migrate from one state to another. The 'management of immigration by states is not easy'¹⁴³³ and is both economic and humanitarian. Economic migration is those individuals who enter a state to contribute to the national economy through, for example, business, education, employment and tourism. Humanitarian migration is those non-citizens fleeing conflict in their state of origin. Douglas Massey and others view 'migration as a household decision taken to minimise the risk to family income, or, to overcome capital constraints on family production activities'.¹⁴³⁴ This is reinforced by Roel Jennissen¹⁴³⁵ who believes labour migration at a personal level involves a person wanting to improve their economic situation. This is particularly noticeable when states are competing for highly skilled individuals to contribute to their economy. Apart from the personal economic benefits of migrating, migrants are able to establish new networks. Jennissen argues that the 'network theory' becomes important when relatives and friends of the migrant encourage others to

¹⁴³¹ Mary Crock, Ben Saul and Azadeh Dastyari, *Future Seekers II, Refugees and Irregular Migration in Australia*, The Federation Press 2006, 23.

¹⁴³² Stephen Castles and Mark Miller, *The Age of Migration*, London, MacMillan Press, 1998.

¹⁴³³ Mary Crock, *Defining Strangers: Human Rights, Immigrants and the Foundations of a Just Society*, Melbourne Law Review 39, 2007, 1-14.

¹⁴³⁴ Douglas Massey, Joaquin, Arango Graeme, Hugo Ali Kouaouci, Adela Pellegrino and Edward Taylor, *Theories of International Migration: A Review and Appraisal*, Population and Development Review, Vol 19, No. 3, 1993, 431-466.

¹⁴³⁵ Roel Jennissen, *Causality Chains in the International Migration Systems Approach*, Population, Research and Policy Review, Vol 26, 2007, 411-436.

migrate by providing financial or other assistance.¹⁴³⁶ Having close networks in a state helps to inform individuals wanting to migrate to that state¹⁴³⁷ of the opportunities that might be available such as employment, and the ability to take out citizenship, and assists with settling in.

Migration enhances the host state by becoming more socially and culturally diverse.¹⁴³⁸ However, immigration can also result in tension, insecurity and anxiety. This has certainly been the case in Australia over the past two decades, as discussed in **chapter three**. Kymlicka¹⁴³⁹ highlights that migration brings with it different cultures, food, music, clothing, values and practices that when integrated and accepted by a state, form part of the national identity. This has certainly been the case in Australia, which has become a state that consists of an amalgam of ethnic groups. Slovenia has been and currently is open to immigration.

The Organisation for Economic Co-operation and Development (OECD)¹⁴⁴⁰ estimated that approximately 221,000 people entered Australia¹⁴⁴¹ permanently in 2011 and about 27,400 for the same period in Slovenia.¹⁴⁴² Putting these figures into context, Australia had a population estimated at 22.62 million in 2012,¹⁴⁴³ while Slovenia's population for the same period was estimated at 2.052 million.¹⁴⁴⁴ This is an important point. Australia having a much larger land mass and population is able to accommodate more immigrants than Slovenia. The total land area for Slovenia is about 20,151 square kilometers¹⁴⁴⁵ whereas Australia's land mass is approximately 7,692,030 square kilometers, some thirty two times larger than the United Kingdom.¹⁴⁴⁶ Even so, much of Australia is considered to be uninhabitable. In 2012 and 2013, more than 28,000 people immigrated to Slovenia,¹⁴⁴⁷ from outside of the European Union. That is, this figure does not account for emigration from other member states within the Union. However, for 2014 it was estimated there was more than 16,000 people had emigrated to

¹⁴³⁶ Ibid.

¹⁴³⁷ Oded Stary and Edward Taylor, *Relative Deprivation and international migration*, Demography, 1989, in Roel Jennissen, *Causality Chains in the International Migration Systems Approach*, Population, Research and Policy Review, Vol 26, 2007, 411-436.

¹⁴³⁸ Laurie Ferguson, Warren Gardner, *Fostering Australian Citizenship in a Changing World*, in Glenn Patmore, Gary Jungwirth, *The Vocal Citizen*, Fitzroy Vic, 2004, 163.

¹⁴³⁹ Will Kymlicka, *Multiculturalism: Success, Failure, and The Future*, Migration Policy Institute, 2006, 4.

¹⁴⁴⁰ Organisation for Economic Co-operation and Development, *International Migration Outlook*, SOPEMI, 2011, 30.

¹⁴⁴¹ Ibid, 41.

¹⁴⁴² Ibid, 41.

¹⁴⁴³ The World Bank, Data Indicators, Australia, 2012, <http://data.worldbank.org/country/australia>, accessed 2 January 2013.

¹⁴⁴⁴ Ibid.

¹⁴⁴⁵ Slovenia, History, Geography, Government and Culture, www.infoplease.com/ipa/A0107971.html, accessed 3 January 2012.

¹⁴⁴⁶ Australian Facts and Figures, www.australiatravelsearch.com/trc/facts.htm, accessed 3 January 2012.

¹⁴⁴⁷ Eurostat, Immigration, European Commission, Code: tps00176.

Slovenia from other European member states.¹⁴⁴⁸ In comparison, immigration to Australia for 2013 – 2014 was estimated to be 212,000.¹⁴⁴⁹ Interestingly, for the size of the Slovenian state compared to Australia and their population, on a per capita basis, there has been a higher level of immigration than in Australia.

The 2006 census found that close to three million immigrants living in Australia had taken out citizenship. This indicated a take up rate of about 68 per cent of 4.4 million migrants at the time.¹⁴⁵⁰ Immigrants taking out citizenship in Australia from 2001 to 2010 was been estimated at 368,000.¹⁴⁵¹ Slovenia for the same period recorded 3.2 people for every 1000 who immigrated to the country took out citizenship. Since 2006, there has been a steady decline with the most recent figures being available from the 2011 indicating 1.8 for every 1000 person.¹⁴⁵² Migration today has resulted in many citizens leaving their home state to take up permanent residence or citizenship in another state, forming part of the diaspora community. Rainer Bauböck¹⁴⁵³ argues that engaging the diaspora is becoming increasingly important to states.¹⁴⁵⁴ Slovenia has implemented specific laws to assist the state's engagement with their Slovene diaspora (discussed **chapter two**).

In 2011, it was estimated there were more than 228, 000 residents in Slovenia that were born in another nation state, of whom 198,000 hailing from the former Yugoslav Republics (Croatia, Bosnia and Herzegovina, Montenegro, Kosovo, Macedonia and Serbia).¹⁴⁵⁵ The number who migrated to Slovenia from Oceania (including Australia) was 458.¹⁴⁵⁶ In the same year, it was estimated there were more than 800,000 non-citizens residents in Australia.¹⁴⁵⁷ The number of

¹⁴⁴⁸ Slovenian Statistical Office, <http://pxweb.stat.si/pxweb/Dialog/Saveshow.asp>, accessed 2 September 2015.

¹⁴⁴⁹ Australian Bureau of Statistics, Immigration, 3412.

¹⁴⁵⁰ David Smith, Janice Wykes, Sanuki Jayarah and Tanya Fabijanic, *Australian Citizenship*, 2010, 2-10, http://www.immi.gov.au/media/publications/research/_pdf/citizenship-in-australia-2011.pdf, accessed 3 February 2014.

¹⁴⁵¹ David Smith, Janice Wykes, Sanuki Jayarajah and Taya Fabijanic, *Citizenship in Australia*, Department of Immigration and Citizenship, 2010, http://www.immi.gov.au/media/publications/research/_pdf/citizenship-in-australia-2011.pdf, accessed 16 March 2014.

¹⁴⁵² European Commission Eurostat, Acquisition of citizenship statistics, http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Acquisition_of_citizenship_statistics, accessed 16 March 2014. This data represents the number of individuals taking out citizenship of a MS, including Slovenia.

¹⁴⁵³ Rainer Bauböck, *Transnational Citizenship: Membership and Rights in International Migration*, Aldershot: Edward Elgar, 1994.

¹⁴⁵⁴ Rainer Bauböck, *Reinventing urban citizenship*, Citizenship Studies, Taylor Francis Group, 2003, 139-160.

¹⁴⁵⁵ Migration, Slovenia, 1 January 2011-final data, Statistical Office of the Republic of Slovenia, http://www.stat.si/eng/novica_prikazi.aspx?id=4430, accessed 6 January 2013.

¹⁴⁵⁶ Ibid.

¹⁴⁵⁷ Andrew Markus, *Australian Population and Immigration Statistics*, Scanlon Foundation Social Cohesion Research Program, Faculty of Arts, Monash University, <http://www.arts.monash.edu.au/mapping-population/--documents/statistics-tables.pdf>, accessed 20

people from the former Yugoslav Republics resident in Australia was estimated to be 25,000 from Bosnia and Herzegovina, 48, 828 from Croatia, 40,222 from the Former Yugoslav Republic of Macedonia and 20,167 people from Serbia.¹⁴⁵⁸ For the same period, Slovenia recorded the least number of people resident in Australia at 4,955, with more than 17,000 individuals recording Slovenian ancestry.¹⁴⁵⁹

At the time of concluding this research the mass movement of refugees from Syria to the European Union begun unfolding. According to the European Commission, the Syrian conflict has resulted in the world's largest humanitarian crisis since WW II.¹⁴⁶⁰ Of the estimated 4.5 million people who have fled Syria, more than 600,000 had entered the European Union.¹⁴⁶¹ Slovenia has been viewed by the refugees as a transit country to Austria and Germany, however, during October 2015 it was reported that more than 100,000 asylum seekers had arrived in Slovenia.¹⁴⁶² The huge influx of refugees has to date had such an impact on European member states that the issues is beginning to have wider legal ramifications that could see the European project being diluted. The evidence has confirmed that most of the people arriving in the European Union are from Syria. Syria is a very different country to the member states of the European Union. Firstly, the Syrian's speak a very different language. Secondly, they have very different religious beliefs and customs. Thirdly, those beliefs and customs may not align to the values, beliefs and customs of member states and more generally the European Union. The large influx of people not only has an economic burden to member states including Slovenia, but also, has the potential to create tensions and xenophobic behavior amongst citizens. This would impact national identity by the community potentially forcing government to implement strong exclusionary measures so as entry to the territory is difficult. For instance, some member states had begun to close their borders, which could result in the entire Schengen legal framework and common immigration policy and law being reviewed. At its extreme, member states and the European Union could dismantle the Schengen and immigration framework, which would see a return to a closed Europe that was evident during the mid 1900s.

February 2014. However, the figures only show New Zealand citizens, individuals on 457 long stay business visas, and 417 and 462 working holiday maker.

¹⁴⁵⁸ Australian Bureau of Statistics, 2011 Census, http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/3202_0, accessed 21 February 2014.

¹⁴⁵⁹ Australian Government, Department of Immigration and Citizenship, Community Information Summary, Slovenia born, <http://www.immi.gov.au/media/publications/statistics/comm-summ/pdf/slovenia.pdf>, accessed 22 February 2015.

¹⁴⁶⁰ Syria Crisis, European Commission, Humanitarian Aid and Civil Protection, http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf, accessed 22 November 2015.

¹⁴⁶¹ Ibid.

¹⁴⁶² The Guardian, Still the refugees are coming, but in Europe the barriers are rising, <http://www.theguardian.com/world/2015/oct/31/austria-fence-slovenia-wire-europe-refugees>, accessed 22 November 2015.

Reinstating the historical closed border policy across European Union member states would have a significant economic and social impact. This would delay the movement of goods and services. The resultant effect could see member states restrict and tighten their citizenship laws so as refugees cannot apply for or obtain citizenship. Further restrictions may also be applied to short and longer-term residency permits and dual nationals. Australia has agreed to increase its humanitarian intake in 2015 by 12,000 to accept people from Syria. Australia could increase this number and should increase acceptance of refugees from Syria, while it maintains its current closed border policy stance. The large influx of migrants has the potential to not only destabilise nation states, but also significantly dilute a state's identity. Therefore, it is important for a state to ensure they maintain a robust legal framework for immigration and citizenship. This will ensure national identity continues to remain relevant to the state and citizens.

Psychological Migration

As discussed by Linda Bosniak, citizenship provides a sense of belonging and identification to a national community (values, history and culture) through a collective identity.¹⁴⁶³ Apart from the decision to migrate which could be to improve a person's economic conditions or to flee conflict or for love, the psychology to migrate commences long before the person is on a boat or in a car or truck.¹⁴⁶⁴ The psychology of migration along with citizenship and immigration law is also multidimensional. It can involve a person's expectations of what their life will be the people, culture, security, foods, values and individual human rights. Migrating can have a positive or negative impact on people. The person may or may not be able to adjust to the local environment (weather, food, culture), or they may be able to assimilate and embrace their new environment. For Briton's coming to Australia, there is a lot of commonality that is connected through history such as place names, food, sport (such as cricket, rugby, cycling amongst others) and legal system.¹⁴⁶⁵

Following WWII, there were large numbers of people who arrived in Australia from the former Yugoslavia. This also occurred following the conflict and disintegration of Yugoslavia between 1990 and 1995. Unlike their British counterparts who migrated to Australia without being subject to war, conflict or the disintegration of a state, people from Yugoslavia experienced massive change. Firstly, the legal system was and is different from the former socialist state, and the foods, customs and values were also different. Secondly, the climate, depending on where the person settled in Australia is very different to the climate across the former

¹⁴⁶³ Linda Bosniak, *Citizenship Denationalised (The State of Citizenship Symposium)*, Indiana Journal of Global Legal Studies, Vol. 7: Iss 2, 2000.

¹⁴⁶⁴ Aidan Tabor and Taciano Milfont, *Migration change model: Exploring the process of migration on a psychological level*, International; Journal of Intercultural Relations, 2011, 818-820.

¹⁴⁶⁵ Ibid.

Yugoslavia. Slovenia has significantly cooler weather in the winter and cooler more temperate summers compared to Australia. The housing and infrastructure of a state can vary greatly.

Today, there are greater similarities between Slovenia and Australia. Since 1990, similar democratic values appear within the legal and policy discourse of both states. Slovenians migrating to Australia are at an advantage as they have a large diaspora community to call upon. Even though the language is different, many Slovenians speak English. In a period of increasing globalisation, the decision to migrate can be enhanced through the personality of an individual. Aidan Tabor and Taciano Milfont argue that students who are high achievers and value their personal life and employment more than their family are likely to decide to migrate and undertake study in another country that may result in better economic and employment outcomes.¹⁴⁶⁶ Nevertheless, whatever the choice for a person to migrate from Slovenia to Australia or vice versa, the immigration laws and policy of both states play a part in that process. The immigration laws of both states protect national identity and ensure the state continue to be able to choose their future citizens.

National Immigration Policy

Slovenia and Australia's immigration policies account for economic and international (humanitarian) protection. They are closely linked to the economy of the state and ensure national identity is retained.

Slovenia

It was nearly ten years after becoming an independent state that an immigration policy was finally established which saw the recognition of, and progression towards multiculturalism.¹⁴⁶⁷ In the early period following independence Slovenia did not welcome migrants. As discussed in **chapter two and three**, Slovenia had many challenges in the early years of independence, which resulted in former Yugoslav citizens being excluded from the state. With the implementation of the Slovenian Aliens Act and the 2002 Slovenian Resolution on Migration Policy¹⁴⁶⁸ the country's legislation was developed to be consistent with European Union law.

¹⁴⁶⁶ Ibid.

¹⁴⁶⁷ CoMide – Initiative for Migration and Development, Report/Slovenia, Peace Institute, Institute for Contemporary Social and Political Studies, January 2012, 3-7.

¹⁴⁶⁸ Resolution on Migration Policy of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 106/2002.

The current day Slovenian immigration policy is based on the principle of solidarity being responsible to Slovenia and its citizens (and includes the long term macro-economic and equality, freedom and mutual cooperation).¹⁴⁶⁹ In 2010, the ‘Economic Migration Strategy from 2010 to 2020’¹⁴⁷⁰ was released identifying its future migration and population needs. Slovenia like many other countries is facing labour shortages, and the management of migration has become one of the principal political and economic priorities for the state.¹⁴⁷¹ As discussed in **chapter four**, since joining the European Union, Slovenia has been required to transpose European Union immigration law into its national laws.¹⁴⁷² By doing so, Slovenia fulfils its obligation to implement the common immigration policy of the European Union. Comparatively, the Slovenian immigration policy resembles that of Australia, with both considering economic and social immigration. However, Slovenia’s immigration policy is largely determined by the European Union, whereas Australia’s immigration policy is stand-alone. Therefore, to some extent Slovenia’s national identity is influenced by the policies and law of the European Union. Australia on the other hand has greater scope to determine what the future national identity will look like. The next section outlines the European Union law Slovenia has transposed into national law.

European Union law transposed into Slovenia Immigration Law

European Union law provides a consistent approach¹⁴⁷³ to entry, stay and the types of grounds on which a permit or visa will be issued by member states. Slovenia has implemented European law through the Aliens Act and Law on International Protection.

Aliens Act [AA]

Slovenia has transposed¹⁴⁷⁴ a total of eighteen European Union legal instruments (Directives, Decisions and Regulations).¹⁴⁷⁵ One of the most important inclusions in Slovenian law has been implementing the Schengen Agreement,¹⁴⁷⁶ enabling the facilitation of unauthorised entry,

¹⁴⁶⁹ Resolution on Migration Policy of the Republic of Slovenia, Official Gazette of the Republic of Slovenia No. 106/2002, in CoMide – Initiative for Migration and Development, Report/Slovenia, Peace Institute, Institute for Contemporary Social and Political Studies, January 2012, 3-7. The immigration policy ensures the protection and free migration to refugees, while controlling admission of migrants to meet demands of Slovene’s labour and capital markets.

¹⁴⁷⁰ Slovenia, Strategy of Economic Migration 2010-2020, European Website on Integration, Slovenia, http://ec.europa.eu/ewsi/en/info_sheet.cfm?ID_CSHEET=63, accessed 6 January 2015.

¹⁴⁷¹ Ibid.

¹⁴⁷² European Commission, Home Affairs, *Schengen Area*, <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen>, accessed 20 February 2015.

¹⁴⁷³ Article 78 and 79, Lisbon Treaty, Official Journal of the European Union, C 83/171.

¹⁴⁷⁴ Ibid.

¹⁴⁷⁵ Article 1, *Aliens Act 2011*, Official Gazette Republic of Slovenia, No 50/2011.

¹⁴⁷⁶ Article 1, Council Directive 2001/51/EC, supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement, official Journal of the European Union L 187.

transit and residence.¹⁴⁷⁷ With the ability of individuals to take up employment in another member state, they may wish to take their family.¹⁴⁷⁸ The Slovenian Constitutional Court in 2011,¹⁴⁷⁹ stated that member states are obliged to implement the common market principle across the European Union.¹⁴⁸⁰ That is, it is mandatory for member states to implement European Union law.

Many of the regulations and directives established by the European Union while not all directly related to economic activity, do assist the Union in protecting the economy from the influx of unauthorised non-citizens. Additionally, Union law provides a coherent approach to international protection. For instance, illegal entrants and overstays (people that over stay their permits) can take jobs from local citizens, as they can be operating on the black market of the economy. Thus, there can be situations where individuals¹⁴⁸¹ must be removed.¹⁴⁸²

Long-term residents in the European Union enjoy residence in a member state for a continuous period of 5 years.¹⁴⁸³ However, this does not include those individuals that are declared refugees. Furthermore, the European Union has established laws for residence permits issued to non-citizens who are victims¹⁴⁸⁴ of the black economy (such as prostitution). Education forms an important part of member states economic activity and that of the Union. Harmonisation of training and education law boosts economic activity and enables students to travel,¹⁴⁸⁵ work and reside in other member states where their qualifications¹⁴⁸⁶ will be recognised.¹⁴⁸⁷

¹⁴⁷⁷ Council Directive 2002/90/EC, defining the facilitation of unauthorised entry, transit and residence, Official Journal of the European Union L 328/17.

¹⁴⁷⁸ Ibid, Council Directive 2003/86/EC, on the right to family reunification, Official Journal of the European Union L 251/12. Council Directive 2004/38/EC on the right of citizens of the Union and their family members to move freely and reside within the territory of the Member States L 158/77.

¹⁴⁷⁹ Official Gazette of the Republic of Slovenia, 98/2011.

¹⁴⁸⁰ Ibid.

¹⁴⁸¹ Council Directive 2003/109/EC, concerning the status of third-country nationals who are long-term residents L 16.

¹⁴⁸² Council Directive 2003/110/EC, on assistance in cases of transit for the purposes of removal by air L 321/26.

¹⁴⁸³ Council Directive 2003/109/EC concerning the status of third country national who are long term residents, Official Journal of the European Union L 16/44.

¹⁴⁸⁴ Article 1, Aliens Act 2011, Official Gazette Republic of Slovenia, No 50/2011, Council Directive 2004/81/EC OJL 261, 6.8.2004.

¹⁴⁸⁵ Ibid, Council Decision 94/795/JHA, on a joint action adopted by the Council on the basis of Article K.3.2.b of the Treaty on European Union concerning travel facilities for school pupils from third countries resident in a Member State Official Journal of the European Union L 327.

¹⁴⁸⁶ Council Directive 2005/71/EC, on a specific procedure for admitting third-country nationals for the purposes of scientific research Official Journal of the European Union L 289/15. Council Directive 2009/50/EC, on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment Official Journal of the European Union L 155/17.

¹⁴⁸⁷ Council Directive 2004/114/EC, on conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service Official Journal of the European Union L 375/12.

Notwithstanding the above, the Union immigration law protects and facilitates economic activity across member states. For instance, a non-citizen¹⁴⁸⁸ requires travel documents;¹⁴⁸⁹ a visa¹⁴⁹⁰ to enter¹⁴⁹¹ the Union;¹⁴⁹² who decide to stay long-term.¹⁴⁹³ The other Union law that applies includes the Stockholm Program;¹⁴⁹⁴ Eurodac (Dublin Convention),¹⁴⁹⁵ displaced persons,¹⁴⁹⁶ reception of asylum seekers,¹⁴⁹⁷ and granting and withdrawing refugee status.¹⁴⁹⁸

Law on International Protection [LIP]

Slovenia has implemented programs to meet their international and regional obligations to refugees and asylum seekers. The policy programs that commenced outside of the treaty process for refugees and asylum include the European Union Tampere Program, later replaced by the Hague Program that was superseded by the Stockholm Program.¹⁴⁹⁹ In addition, Council Regulation (EC) No 2725/2000 was implemented to enable the establishment of Eurodac that allows for fingerprints of non-citizens to be compared between member states.¹⁵⁰⁰

¹⁴⁸⁸ Regulation 380/2008, amending Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals Official Journal of the European Union L 115/1.

¹⁴⁸⁹ Regulation 2252/2004 on standards for security features and biometrics in passports and travel documents issued by Member States Official Journal of the European Union L 385.

¹⁴⁹⁰ Regulation 810/2009 establishing a Community Code on Visas, Official Journal of the European Union L 243/1.

¹⁴⁹¹ Ibid, Regulation 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement Official Journal of the European Union L 81/1.

¹⁴⁹² Regulation 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) Official Journal L 105/1.

¹⁴⁹³ Regulation 265/2012, implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus Official Journal of the European Union L 85.

¹⁴⁹⁴ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, Official Journal of the European Union C 115/01.

¹⁴⁹⁵ Council Directive (EC) No 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union L 50/1.

¹⁴⁹⁶ Council Directive 2001/55/EC, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Union, L 12/2012.

¹⁴⁹⁷ Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers, Official Journal of the European Union L 31/18.

¹⁴⁹⁸ Council Directive 2005/85/EC, on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union, L326/13.

¹⁴⁹⁹ The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, Official Journal of the European Union C 115/01.

¹⁵⁰⁰ Council Directive (EC) No 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union L 50/1.

In 2001, minimum standards for giving temporary protection to displaced persons were established.¹⁵⁰¹ While this directive is not formally recognised within the LIP, it is nevertheless, European Union law that Slovenia is obliged to implement. In 2003, Council Directive laying down the minimum standards for the reception and housing of asylum seekers,¹⁵⁰² and the granting or withdrawing refugee status,¹⁵⁰³ was established and later reinforced by the Slovenian Constitutional Court.¹⁵⁰⁴ In 2003, the European Union extended the criteria for family,¹⁵⁰⁵ and the mechanisms for determining the member state that would be responsible for examining asylum applications.¹⁵⁰⁶ In 2004, minimum standards were established for the qualification and status of non-citizens or stateless persons as refugees that require international protection by MS including Slovenia.¹⁵⁰⁷ Furthermore, article 16b of the LIP was determined by the Slovenian Constitutional Court to be inconsistent with the Slovenia constitution. The Constitutional Court ruled that the authority may under exceptional circumstances consider a family member to also be a relative who has refugee status.¹⁵⁰⁸ Article 16b did not originally apply to this situation.

The Slovenian Constitutional Court¹⁵⁰⁹ had to determine whether articles 60, 61 and 63 of the LIP were consistent with Directive 2005/85/EC.¹⁵¹⁰ This Directive narrows the guarantee of non-refoulement under the principles set out in the Geneva Convention. The court ruled that the procedural Directive should allow member states to regulate their own way of determining a safe third country. However, the Slovenian government disagreed because the directive is clear that a third country is to have an asylum procedure and the concept of protection is consistent with the international convention. As a result, the court decided that article 61 of the Law on International Protection was not inconsistent with the Slovenian Constitution. Articles 60 and the first paragraph of article 62 were to be repealed, while article 63 was determined to be inconsistent with the Slovenian Constitution.

¹⁵⁰¹ Council Directive 2001/55/EC, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, Official Journal of the European Union, L 12/2012

¹⁵⁰² Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers, Official Journal of the European Union L 31/18.

¹⁵⁰³ Council Directive 2005/85/EC, on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union, L326/13.

¹⁵⁰⁴ U-I-295/12, Official Gazette of the Republic of Slovenia, 47/2013.

¹⁵⁰⁵ Council Directive 2003/86/EC, on the right to family reunification, Official Journal of the European Union, L 251/12.

¹⁵⁰⁶ Council Regulation No 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, Official Journal of the European Union, L 50/1.

¹⁵⁰⁷ Council Directive 2004/83/EC, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted Official Journal European Union, L 304.

¹⁵⁰⁸ U-I-309, Up-381, Official Gazette of the Republic of Slovenia, No. 6/2015.

¹⁵⁰⁹ Official Gazette of the Republic of Slovenia, No. 114/2013.

¹⁵¹⁰ Council Directive 2005/85/EC, on minimum standards on procedures in Member States for granting and withdrawing refugee status, Official Journal of the European Union, L326/13.

Despite the obligation for Slovenia to implement the European Union's immigration legal framework, there are an estimated 23 European Union Directives and Regulations that have been established to regulate the entry and stay of citizens and non-citizens. Therefore, the European Union could undertake a review of this legislation in accordance with the smart regulation program to determine what legislation could be consolidated to simplify and reduce their number. This could reduce the regulatory burden to business and individuals. A starting point could be determining where duplication exists, for example, having a single Regulation or Directive that deals with all international protection matters. In conclusion, Slovenia's immigration policy, legal framework and implementation of the law is constrained by the common policy and law of the European Union. Australia is not constrained by any other state or regional supranational polity in its development or implementation of immigration law. This is an important point because Slovenia, while having full autonomy in the development of its citizenship laws, the immigration laws are predominantly imposed by the European Union. However, it is argued that even though the immigration policy and law of Slovenia must conform to the European Union, it in no way reduces Slovenia's national identity. Rather, the European Union immigration law not only ensures consistency across all member states, but also enables member states to determine who will enter, stay and become a citizen. Therefore, it can be argued that in part Slovenia's national identity is influenced by the European Union. In addition, it could also be argued that national identity is strengthened by the laws of the European Union.

Australia

The current 2015 immigration policy approach taken by the Australian Government has a strong focus on border protection, particularly at sea, by deterring and stopping boats entering Australian territorial waters. It sends a clear message to those involved in getting people to Australia and the illegal arrivals that Australia will intercept them and send them back to their country of origin. Australia's projected population¹⁵¹¹ could be 35 million by 2050,¹⁵¹² and will have impacts for economic growth,¹⁵¹³ urban and environmental amenity as well as social and cultural outcomes.¹⁵¹⁴ Both Slovenia and Australia are grappling with immigration and the potential impact this will have economically and socially on their states. Since federation and immigration being constitutionalised in Australia, it has evolved into a complex area of policy

¹⁵¹¹ Productivity Commission, *Population and Migration: Understanding the Numbers*, Research Paper, Australian Government, 2010, 1-10.

¹⁵¹² Ibid, 1.

¹⁵¹³ Productivity Commission, *A Sustainable Population - Key Policies Issues*, Roundtable Proceedings, Australian Government, 2011.

¹⁵¹⁴ Ibid.

and law for Australia. Consecutive immigration policies of Australia since WWII have been closely intertwined with the state's citizenship policy, and creating¹⁵¹⁵ the nation state.

Furthermore, like citizenship, the evolution of immigration in Australia can be summarised as being closely related to world and regional events. As discussed in **chapter two**, there were many people displaced in the former Yugoslavia who migrated to Australia. Furthermore, post WWII and the Vietnam conflict saw the influx of migrants from Indo-China. Secondly, the fall of Dili in East Timor resulted in large numbers of Timorese people escaping to Australia in 1975. The next major influx was students from China as a result of the Tiananmen Square uprising in 1989. Shortly after, people would begin to arrive from the breakup of Yugoslavia. In the last fifteen years, there have been arrivals because of the conflicts in Afghanistan, Iraq and more recently Syria. As discussed above the Syrian conflict is not only seeing large numbers of refugees arriving in Europe, but Australia is also playing a role in receiving refugees from this country.

The mass influx of ethnic groups into Australia has challenged the notion of the traditional concept of the Australian identity.¹⁵¹⁶ The influence immigration has had on citizenship policy, has seen citizenship evolve into what Stephen Castle¹⁵¹⁷ would describe as multicultural. Multicultural citizenship is where everyone is equal and consideration of everyone's different needs¹⁵¹⁸ is taken into account. However, the mass influx of migrants has not been without its own challenges. As highlighted in **chapter three**, Australia has experienced its share of social unrest, whereby different ethnic groups have opposed each other in violent encounters. These issues of integration challenge the very notion of national identity, as people who arrive in Australia do not want to take on the values and expected behaviours of the state. Australia, the European Union as a whole and to a lesser extent Slovenia are having to balance the high influx of legal and illegal immigrants and the rising xenophobic behaviour of different ethnic groups. As discussed in **chapter three**, xenophobic behaviour has been overtly evident in Australia. Today, across the European Union including Slovenia, xenophobic behaviour is also overtly present with the large-scale influx of refugees from the Middle East and North Africa.

A notable absence from the immigration policies of Australia, Slovenia, and the European Union is the reference and linkages of immigration to citizenship. Both states, including the European Union could improve this area within their respective immigration policy, to

¹⁵¹⁵ Mary Crock, *Contract or Compact: Skilled Migration and the Dictates of Policies and Ideology*, Georgetown Immigration Law Journal, Vol 16, Issue 1, 2001, 133-154.

¹⁵¹⁶ Ghassan Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society*, Pluto Press Australia, 2003.

¹⁵¹⁷ Stephen Castles, *Migration and Community Formation Under Conditions of Globalisation*, International Migration Review, 2005, 1143-1166.

¹⁵¹⁸ Ibid.

encourage new immigrants to take out citizenship when they intend to reside in the state long term. Furthermore, the immigration policy of each jurisdiction could be expanded to identify how and what level of testing should be undertaken of immigrants that will not take out citizenship but reside in the state. The testing could be similar to citizenship testing and be required every five years to ensure immigrants understand and practice the values and identity of the state. This would enable both states to promote their respective national identity. The proposal would also go some way to assist in unifying citizens and residents, because everyone would have to know the values and language of the state. However, this proposal comes with its own dangers. Testing of long term residents could be viewed (by scholars, government, and immigration specialists) as a threat to multiculturalism. This proposal could also be viewed as contradicting (the focus of this research in supporting) postnational citizenship. Nevertheless, this must be viewed in the context of states such as Slovenia and Australia continuing to retain and even strengthen their national identity. However, if a person fails the test, the state would need to decide whether the person has to undertake the test again until they pass, or develop a program where the individual is to attend schooling or undertake community work.

5.2 Migration Legislation

Immigration in Slovenia is regulated by 152 articles of the Aliens Act (AA)¹⁵¹⁹ and the Law on International Protection (LIP). In Australia the equivalent legislation is the *Migration Act 1958*. This is regulated by the LIP.¹⁵²⁰ The AA has no more than one hundred pages consisting of about 142 articles. The LIP is about 70 pages comprising of 142 articles. In contrast, Australia's *Migration Act 1958* (MA) and *Regulations* are more than 800 pages in length, and consist of 507 provisions dealing with both economic and humanitarian (international protection) migration. This thesis argues that the current migration laws of Australia and Slovenia assist both states to reinforce their respective national identity, by enabling a state to choose who will enter, stay and apply for citizenship. The extent of Australia's legislative framework for migration is long overdue for a review. Consideration needs to be given by Australia to simplify the migration legislative framework and adopt a similar framework to Slovenia.

¹⁵¹⁹ Article 3(4), *Aliens Act*, Official Gazette Republic of Slovenia, No 50/2011.

¹⁵²⁰ Article 3, *Law on International Protection*, Official Gazette Republic of Slovenia 2011/11.

5.3 Entry to Slovenia and Australia

The AA and MA regulate the entry and exit, of lawful and unlawful non-citizens in either state.¹⁵²¹ Article 6 of the AA stipulates that entry can only be undertaken through the designated external borders that have been established under the European Union legal framework in accordance with the Schengen rules. Chapter II of the AA regulates the entry of non-citizens into and their departure from the Republic of Slovenia. Articles 10 and 11 assist in implementing elements of the Schengen Borders Code pertaining to the movement of persons, their vehicles, and items in their possession (when entering and exiting the state). Information may be verified in accordance with the Schengen SIS database, which provides all member states with the ability to track and record information on individuals of concern (those that may be involved in criminal activity).

Australia being an island continent, can only be entered by air or sea.¹⁵²² Slovenia can be entered by land, sea or air. Generally, a non-citizen cannot enter Australia without a valid visa and passport.¹⁵²³ There are specific provisions for people who are crews on shipping vessels that allow entry under a temporary visa arrangement.¹⁵²⁴ Australia's migration zone includes the States, Territories and Australian resources and sea installations such as piers, and ports along with land to the mean low water mark.¹⁵²⁵ Furthermore, there are areas the Australian Government can declare to be parts of the Australian territory and form part of the overall migration zone such as Ashmore Reef, Keeling Islands or Christmas Island.¹⁵²⁶ This addition has been included so that the government can manage illegal entrants offshore. In contrast, the territory of Slovenia has been incorporated into the wider immigration and border area defined by the Schengen arrangements of the European Union.

The states that make up the Schengen area include Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, The Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland. Secondly, Slovenia unlike Australia has borders with other nation states that include Austria, Italy, Hungary and Croatia. As of 30 June 2015, only the Slovenian borders of Italy, Austria and Hungary were open and free without any border controls. Croatia, which only became a full member of the European Union in 2013, has not yet implemented the Schengen Borders Code and security program. Thus, at 30 June 2015, the southern border of Slovenia with Croatia remained one of the external Schengen borders. An

¹⁵²¹ *Migration Act 1958*, sections 13 and 14.

¹⁵²² *Ibid*, s42.

¹⁵²³ *Ibid*, Division 3, section 29.

¹⁵²⁴ *Ibid*, s38B,

¹⁵²⁵ *Ibid*, s5.

¹⁵²⁶ *Migration Amendment (Excision from Migration Zone) Act 2001*.

Australian or Slovenian ‘citizen’ who enters and exits their state of origin, is also subject to immigration clearances. Nevertheless, instead of having a visa or residence permit, they are only required to hold a passport.¹⁵²⁷ To enter Slovenia a non-citizen will need to be in possession of a valid permit¹⁵²⁸ to enter the Schengen area.¹⁵²⁹ Immigration clearance requires the person to provide a valid passport, visa or permit at the border control.¹⁵³⁰ However, a dual citizen of Slovenia and Australia (discussed **chapter two**) who has entered the European Union through Munich, Germany may not be required to produce their Slovenian passport upon entering the Ljubljana airport (as they are deemed to have entered the Schengen area by entering through Germany).

5.4 Visas

A non-citizen entering either Australia¹⁵³¹ or Slovenia¹⁵³² is required to be in possession of a valid travel document (visa or permit) and passport.¹⁵³³ A visa or permit provides the non-citizen with the authorisation to enter and stay within Australia or Slovenia. Australia refers to the term – visa, whereas Slovenia and the European Union use the term-permit. However, both the visa and permit authorise the same activity. The Australian visa framework consists of visa classes and their subclasses.¹⁵³⁴

¹⁵²⁷ *Australian Passports Act 2005*, section 7 an Australian citizen is entitled to be issued an Australian passport. *Law on passports of citizens of the Republic of Slovenia*, Official Gazette 65/00, article 3 states a citizen has the right to leave and return to the country with a valid travel document.

¹⁵²⁸ Article 8, *Aliens Act 2011*, Official Gazette Republic of Slovenia, No 50/2011.

¹⁵²⁹ *Ibid*, article 8(1), party to the Schengen Agreement 1985.

¹⁵³⁰ Mary Crock and Laurie Berg, *Immigration Refugees and Forced Immigration, Law, Policy and Practices in Australia*, The Federation Press, 2011, 149.

¹⁵³¹ *Migration Act 1958*, s30 (1) & (2)

¹⁵³² Article 8, *Aliens Act*, Official Gazette of the Republic of Slovenia 50/2011.

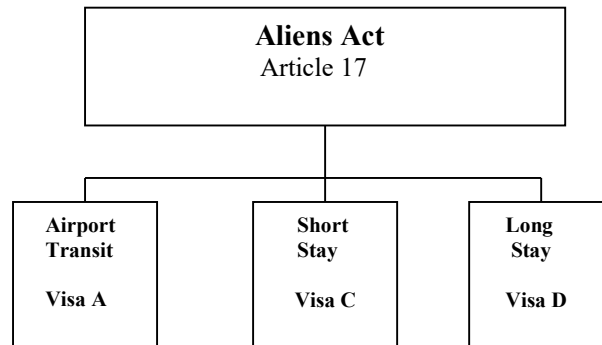
¹⁵³³ *Ibid*, article 7(1) & (2).

¹⁵³⁴ *Migration Act 1958* s31,

The Slovenian Aliens Act along with the Community Code¹⁵³⁵ (Schengen Borders Code¹⁵³⁶) sets out the conditions for non-citizen¹⁵³⁷ to enter Slovenia or the European Union, and includes:¹⁵³⁸

- being in possession of a valid travel document or documents, authorising them to cross the border (the acceptance of travel documents for this purpose remains within the domain of the member states).¹⁵³⁹
- those non-citizen possessing a valid visa (if required) or a valid residence permit.¹⁵⁴⁰
- third-country nationals who are the holders of a residence title of a Schengen state may freely enter into and stay in any other Schengen state for a period of up to three months.¹⁵⁴¹

Slovenian – Visa Framework



- **Visa A [Schengen visa]**¹⁵⁴² - only for airport transit (not entering the country) for a short list of countries such as Afghanistan, and Iraq, or humanitarian reasons; or
- **Visa C [Schengen visa]**¹⁵⁴³ - (used also for transit, but transit only for a very specific reasons. For example, a diplomatic passport holder of Pakistan does not need a visa for Germany and Austria, but needs a visa for Slovenia). Generally issued for short term stays, valid for all Schengen states. This visa can be issued for so called LTV (limited territorial validity) for Slovenia only or for a number of Schengen states only; or

¹⁵³⁵ Council Regulation 810/2009, OJL No. 243. Articles 61 and 251, Consolidated version of the Treaty Establishing the European Community, security, public health or international relations threat, http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html, accessed 26 January 2015.

¹⁵³⁶ *Schengen Borders Code*, Official Journal of the European Union L 105. Regulation 562/2006 requires that non-citizen must have a valid travel document being a visa and passport in order to enter Slovenia, official Journal of the European Union L 81/1. Council Regulation 539/2001, listing the third countries whose nationals must be in possession of a visa when crossing the external borders and those whose nationals are exempt from that, Official Journal of the European Union, L 81/1.

¹⁵³⁷ Article 19 of the *Schengen II* Agreement for third-country nationals requiring a visa; Article 20 of the *Schengen II* Agreement for third-country nationals who do not require such visa.

¹⁵³⁸ Article 5 of the Schengen Borders Code - Regulation (EC) No 562/2006, also Article 4, Council Regulation No 539/2001.

¹⁵³⁹ Article 6 of Consolidated version of the Council Regulation (EC) No 539/2001, listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

¹⁵⁴⁰ Regulation No 562/2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

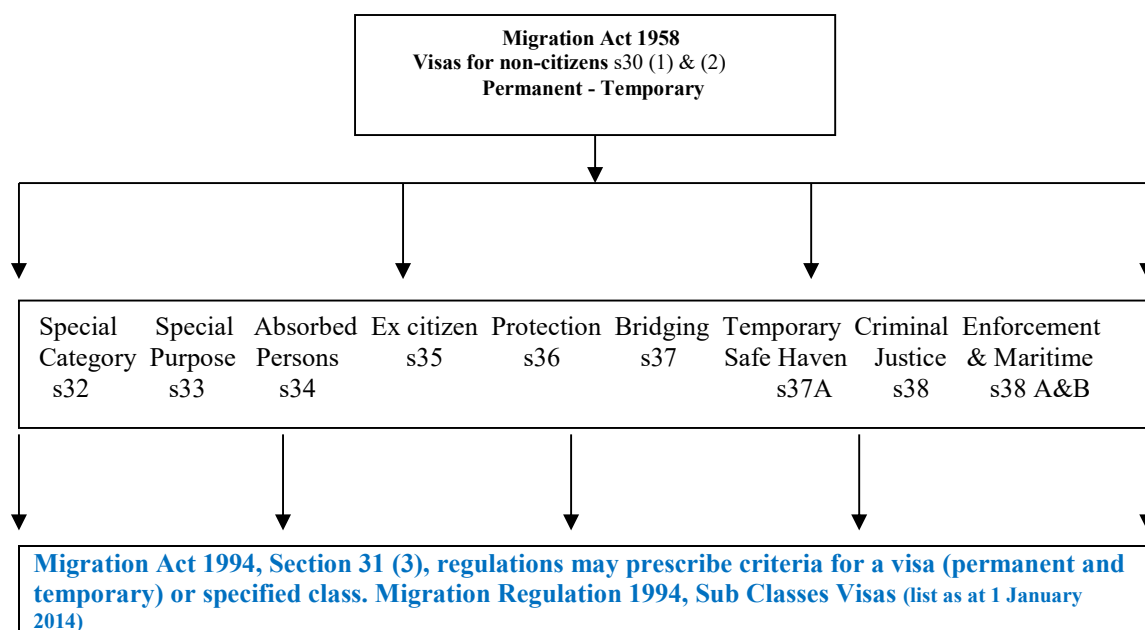
¹⁵⁴¹ Article 21, of the Schengen Agreement.

¹⁵⁴² Article 17, *Aliens Act*, Official Gazette of the Republic of Slovenia, 50/2011.

¹⁵⁴³ Visa C, Short stay, Article 17, *Aliens Act*, Official Gazette of the Republic of Slovenia, 50/2011, ADS tourism (specific for China only), Events in partner cities, Family member of EU citizen, Humanitarian reasons, Seminar/symposium/congress, Short term education, Culture, Journalism, Funeral, Professional driver, Business, Research, Rehabilitation ITF (specific rehabilitation treatments in Slovenia for land mine victims), Sport, Transit, Tourism, Official delegation, Private visit, Health treatment

- **Long stay (visa D)** ¹⁵⁴⁴ - issued for long term stays, there is no restriction of 90 days in 6 months and they are usually issued for up to one year but not shorter than 3 months. Residence permits are issued for work or employment (residence permit that is either temporary or long stay); ¹⁵⁴⁵ work or research in higher education; ¹⁵⁴⁶ study; ¹⁵⁴⁷ seasonal work, trans-border employment and posted workers; ¹⁵⁴⁸ daily work migrants; ¹⁵⁴⁹ family reunion; ¹⁵⁵⁰ residents in other EU countries, family members or foreigners of Slovenian origin; ¹⁵⁵¹ children of aliens born in Slovenia; ¹⁵⁵² victims of human trafficking and illegal employment; ¹⁵⁵³ and other justified reasons. ¹⁵⁵⁴

Australian - Visa Framework



Comparatively, Australia has ten (10) classes of visa and more than one hundred subclass visas (see Appendix Two).¹⁵⁵⁵ Slovenia on the other hand has a total of three permits. Australia should borrow from Slovenia and Europe and consider reforming its visa framework by reducing their number. A starting point would be to commence with business visa classes and

¹⁵⁴⁴ Article 17, Aliens Act, Official Gazette of the Republic of Slovenia, 50/2011, D – visa and include; BCASMM (specific for Canada only), BNZPDP (specific for New Zealand only), Accreditation of foreign diplomats who will serve in Slovenia, Economic interest (specific reason that the person is important for Slovenia), Humanitarian activity, Education, Journalism – accreditation, Sport – employment in Slovenia, Religious activity, Family reunion, Science interest (specific reason that the person is important for Slovenia) Other reasons.

¹⁵⁴⁵ Article 37, *Aliens Act 2011*, Official Gazette Republic of Slovenia, No 50/2011.

¹⁵⁴⁶ *Ibid*, article 38.

¹⁵⁴⁷ *Ibid*, article 44.

¹⁵⁴⁸ *Ibid*, article 45.

¹⁵⁴⁹ *Ibid*, article 46.

¹⁵⁵⁰ *Ibid*, article 47.

¹⁵⁵¹ *Ibid*, article 48.

¹⁵⁵² *Ibid*, article 49.

¹⁵⁵³ *Ibid*, article 50.

¹⁵⁵⁴ *Ibid*, article 50.

¹⁵⁵⁵ *Migration Regulations 1994*.

subclasses, reducing the administrative burden¹⁵⁵⁶ to business and government. Reducing the number of visas types could also reduce the cost to business. The visa frameworks of Slovenia and Australia reinforce that states concurrently include and exclude non-citizens from the state. Both states through their respective visa and permit programs extend the postnational, civic and universal citizenship to include economic and humanitarian entrants. The visa and permit programs along with various other provisions of migration law enable a states citizenry to be mobile and participate globally (by entering and exiting the state). The visa framework assists the state to implement its immigration and citizenship policy. The Australian framework has enabled the state to establish a cottage industry (creating business and jobs such as migration agents). Slovenia's model is not as advanced. Thus, while this thesis is promoting legal harmonisation, and reducing the number of visas available in Australia, it may not be accepted by industry or government. It is argued that the respective visa and permit systems, are at the front line of a state's national identity. That is, an individual requires a visa or permit to enter and stay.

The economic benefits of establishing a regional model require further research. Australia and Slovenia could develop a pilot project to take to other countries and test whether they would be interested in harmonising their visa or permit framework. The benefits would not only extend economically to the individual and state, but also to the state's diaspora, making it easier for them to exit and return to their original state, in the same way as dual citizenship. The visa and permit framework established by both states, along with the visas and permits discussed in this chapter all make a contribution to the national identity. However, governments continue to look at areas of services that should be provided at full cost recovery. Thus, Australia may not want to reduce the cost or number of visas, as this provides a revenue stream for the government agency responsible for administering immigration. Due to the large number of visas under Australian law, the next section only compares the Highly Qualified Employment (Skilled), Family Reunification, Student (Education), Permanent Residence and Refugee visa-permit types.

¹⁵⁵⁶ Australian Government, Productivity Commission, *Rethinking Regulations*, Report of the Taskforce on Reducing Regulatory Burdens on Business, 2006, 5-7. Regulatory burden is the cost or costs in time researching, completing the necessary paperwork or technological application processes. This also extends to engaging experts in the profession when applying for and obtaining a visa or permit.

Highly Qualified Employment (Skilled)

In 2009, the European Union (EU) implemented the Blue Card (BC)¹⁵⁵⁷ to boost competitiveness and address labour shortages across European member states.¹⁵⁵⁸ To qualify for a BC a valid contract must have been established such as a binding job offer.¹⁵⁵⁹ A member state can refuse an application when there is a severe recession.¹⁵⁶⁰ The Blue Card can be withdrawn where fraud has been identified or where the card holder does not meet the conditions of residence.¹⁵⁶¹ The individual who obtains a BC is subject to the same working conditions including pay, dismissal, health and safety as the citizens of that member state.¹⁵⁶² However, the BC does not guarantee family reunion once the person is physically in a member state.¹⁵⁶³ Article 16 is an important provision providing that residence periods may accumulate where there has been residence in different member state across the Union (for a period up to five years).¹⁵⁶⁴ For example, where a person has obtained the BC to work in Slovenia then through that employment has moved to the Netherlands, the time of residence in the Netherlands, will be included along with the time of residence in Slovenia. Even so, periods of absence from the European Union can be undertaken provided they are shorter than twelve months and do not exceed eighteen months. Provided the person meets these restrictions, their cumulative calculation of residence will not be affected.¹⁵⁶⁵ However, for the person which has been issued the BC to move from one member state and reside in another, they can only do so provided they have resided in the member state who issued the card for a period of at least eighteen months.¹⁵⁶⁶ Provided the conditions of residence have been met¹⁵⁶⁷ a long term residence permit can be issued by Slovenia, and the individual could if they choose to do so, apply for, and obtain, citizenship. The Blue Card Directive has simplified the conditions of entry and residence for highly skilled employees across the European Union. While Australians have access to the Asia Pacific Economic Cooperation card (discussed below), a similar approach could be developed and established between Australia and Association of South East Asian Nation (ASEAN) member states.

¹⁵⁵⁷ Council Directive 2009/50/EC, conditions of entry and residence of third country nationals for the purposes of highly qualified employment, Official Journal of the European Union L155/17.

¹⁵⁵⁸ Ibid, Preamble (7).

¹⁵⁵⁹ Ibid, article 5.

¹⁵⁶⁰ Ibid, article 8.

¹⁵⁶¹ Ibid, article 9.

¹⁵⁶² Ibid, article 14.

¹⁵⁶³ Ibid, article 15.

¹⁵⁶⁴ Ibid, article 16.

¹⁵⁶⁵ Ibid, article 16 (3).

¹⁵⁶⁶ Ibid, article 18.

¹⁵⁶⁷ Ibid, article 17.

Comparatively, the employer nominated visa¹⁵⁶⁸ assists Australian employers to recruit and obtain highly skilled individuals. However, an individual is subject to the points test.¹⁵⁶⁹ The points test is based on age, level of English in accordance with the international English Language Testing System and length of skilled employment. That is, the longer the stay in Australia, the more points will be earned. A person who has a doctoral degree would gain twenty points. Furthermore, a person can also earn points for studying in Australia and points will be afforded where the individual undertakes that study in a regional centre. In addition, more points can be earned where the individual has a recognised community language or their partner has specific skills that make a contribution to the local community. Neither the European Union nor Slovenia has a points system; therefore, they could benefit significantly from implementing a system similar to that of Australia. The United Kingdom, also a member of the European Union (at the time of writing), has a points system similar to Australia. The benefit for member states and the broader Union is that the points system enables the state to better understand and direct where migrants (and their skills) are required in the economy. The European Union and Slovenia could consider adopting a directive that is based on Australia's points system. This would enable the European Union and Slovenia to attract skilled labour from third-world countries and not from within the Union.

A person can also be nominated by an Australian State Government in accordance with the relevant state migration plan to enter and stay under the skilled migration program.¹⁵⁷⁰ A number of business visas are available that include business skills¹⁵⁷¹ (provisional, owner, investor, senior executive, state and territory sponsored business owner, executive, talent).¹⁵⁷² A regional (state) program has been established by Australia whereby an individual can gain entry and residence in Australia, but only in the state of Victoria or the nominated state. The

¹⁵⁶⁸ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, Employer Nomination AN, subclass 119 regional sponsored migration scheme, subclass 121 employer nominated scheme, Employer Nomination Residence BW, subclass 856 employer nomination scheme, subclass 857 regional sponsored migration scheme.

¹⁵⁶⁹ *Migration Act 1958*, sections 92 to 95, Visas, Immigration and Refugees, Professional and other Skilled Migrants, The Points Test, Department of Immigration and Citizenship, <http://www.immi.gov.au/skilled/general-skilled-migration/points-test.htm>, accessed 1 February 2015. The following General Skilled Migration (GSM) visas are subject to a points test assessment Skilled (Migrant) (Class VE) Independent subclass 175 visas, Skilled (Migrant) (Class VE) Sponsored subclass 176 visas, Skilled (Provisional) (Class VC) Regional – Sponsored subclass 487 visas, Skilled (Provisional) (Class VF) Regional – Sponsored subclass 475 visas, Skilled (Residence) (Class VB) Independent subclass 885 visas, Skilled (Residence) (Class VB) Sponsored subclass 886 visas.

¹⁵⁷⁰ Points Test for Certain Skilled Migration Visas, Department of Immigration and Citizenship, <http://www.immi.gov.au/skilled/general-skilled-migration/pdf/points-test.pdf>, accessed 1 February 2015.

¹⁵⁷¹ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, Subclass visas 160, 161, 162, 163, 164.

¹⁵⁷² *Ibid*, Business talent 132, established business in Australia 845, state/territory sponsored regional establishment business in Australia 846, Business owner 890, investor 891, state/territory sponsored business owner 892, state-territory sponsored investor 893.

requirements are linked to the Victorian Government's State Nomination Occupation list.¹⁵⁷³ This list also reflects the skills that have been outlined in the national skills list. Slovenia has established Administrative Units (AU) throughout the state. These Units have delegated responsibility from the Ministry of Interior to assist in the administration of visas (excluding analysis of local business and skills required). The AU's role could be extended to have a greater focus on local business and skilled shortages, in a similar way to Australia and its states.

It is worth noting that there has been controversy in Australia in relation to the use of 457 visas that allow a non-citizen to enter Australia and take up employment. To do so, a business has to agree to sponsor the individual. The business must be located in Australia and have the appropriate processes and practices established to ensure that the individual is safe. Similar measures and protections apply to the member states of the European Union. Thus, individuals working under this visa are subject to the same safety standards as local citizens. Additionally, the 417 visa enables a person to come to Australia and undertake temporary work, similar to the guest worker program in Slovenia and the European Union.

The Asia Pacific Economic Cooperation (APEC)¹⁵⁷⁴ card is the equivalent in Australia¹⁵⁷⁵ and allows a person to enter any of the APEC member states for 60 to 90 days. In addition to the above, there are also short stay sponsored,¹⁵⁷⁶ medical practitioner,¹⁵⁷⁷ work and holiday,¹⁵⁷⁸ domestic worker,¹⁵⁷⁹ cultural and social,¹⁵⁸⁰ education,¹⁵⁸¹ student,¹⁵⁸² retirement,¹⁵⁸³ and medical treatment (visitor),¹⁵⁸⁴ visas,¹⁵⁸⁵ made available by Australia. The other remaining skilled visa

¹⁵⁷³ Victorian Government, State Nomination Occupation List for Graduates in Victoria 2012 & 2013, www.LiveInVictoria.vic.gov.au/graduates, accessed 12 February 2015. The list outlined groups of occupations that Biotechnology and Science, Health, PhD Graduates, Engineering and Building, Financial Services and Human Resource Management, Information and Communications Technology, Tourism and Hospitality, Education and Trades.

¹⁵⁷⁴ Asia Pacific Economic Cooperation (APEC), Members Australia, Brunei Darussalam, Canada, Chile, The Hong Kong Special Administrative Region of the People's Republic of China, Republic of Indonesia, Japan, Korea, Malaysia, Mexico, Papua New Guinea, China, Peru, Philippines, Russia, Singapore, Taiwan, Thailand, United States of America, Vietnam. <http://www.immi.gov.au/skilled/business/apec/>, accessed 12 February 2015.

¹⁵⁷⁵ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, Temporary Business Entry UC, subclass 456 business short stay and 457 business long stay.

¹⁵⁷⁶ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, class UL.

¹⁵⁷⁷ Ibid, class UE.

¹⁵⁷⁸ Ibid, class US.

¹⁵⁷⁹ Ibid, class TG.

¹⁵⁸⁰ Ibid, class TE.

¹⁵⁸¹ Ibid, class TH.

¹⁵⁸² Ibid, subclass 571 independent sector, 571 schools sector, 572 vocational education and training sector, 573 higher education sector, 574 post graduate research, 575 non-award sector, 576 AusAid or defence sector, 580 student guardian.

¹⁵⁸³ Ibid, TQ.

¹⁵⁸⁴ Ibid, UB.

¹⁵⁸⁵ Roel Jennissen, *Causality Chains in the International Migration Systems Approach*, Population, Research and Policy Review, Vol 26, 2007, 411-436.

categories have been established under labour agreements¹⁵⁸⁶ or been defined as distinguished talent visas.¹⁵⁸⁷ Labour agreements, are those agreements where the Minister for Immigration or the Minister responsible for employment has developed an agreement with other nation states. These consist of the Regional Headquarter Agreement (Invest in Australia Supported Skills Agreement) that have been developed to enhance Australia's research and investment by companies that want to establish their head office within the state. As discussed above, Australia could explore adopting a similar 'Blue Card' model between Australia and ASEAN member states.

Investment Visas and Permits

Australia has recently extended its visa system to include investment visas. The current investment visa in Australia is valued at \$1.5 million for a four-year period.¹⁵⁸⁸ The national Government wants to expand the current residency permits to fast track the entry and stay of investors from the United States of America who have \$15 million or more.¹⁵⁸⁹ The Significant Investor Visa allows a person who has more than \$5 million to invest into Australia¹⁵⁹⁰ to fast track their permanent residency and citizenship. In June 2015, the Victorian State Government of Australia assisted in fast tracking residency visas for individuals from China who agreed to invest \$2.1 million, directly into the Victorian state.¹⁵⁹¹ Furthermore, a recent study undertaken by the Australian Productivity Commission on Migrant Intake into Australia, proposed that a fee be imposed to cover the full administrative cost of processing a visa. The proposal is to charge the migrant a fee, which could be made up front, or the Australian Government provide a loan.¹⁵⁹² The then Australian Prime Minister Tony Abbott stated in 2015 that the proposal by the Productivity Commission was not the policy of the Australian Government.¹⁵⁹³ In addition, the Australian government is considering the idea of also charging a fee for refugee visas¹⁵⁹⁴ (as discussed later in this chapter).

¹⁵⁸⁶ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, Labour Migrant AU, subclass 120 labour agreement, Labour Agreement BV, subclass 855 labour agreement.

¹⁵⁸⁷ Ibid, Distinguished Talent Migrant AL, subclass 124 distinguished talent, Distinguished Talent Residence BX, subclass 858 distinguished talent.

¹⁵⁸⁸ Migration Law, The Australian Significant Investor Visa and Premium Investor Visa, <http://aussiemigrationlaw.com.au/the-significant-investor-visa/>, accessed 2 June 2015.

¹⁵⁸⁹ Mark Dunn, *Chinese migrants pay billions to settle here, Wealthy buying visas*, HeraldSun, 1 July 2015.

¹⁵⁹⁰ Australian Government, Significant Investor Visa, <https://www.immi.gov.au/faqs/Pages/What-is-the-significant-investor-visa.aspx>, accessed 1 June 2015.

¹⁵⁹¹ Ibid.

¹⁵⁹² Productivity Commission, *Migrant Intake into Australia* Australian Government, Issues Paper, 2015, 31.

¹⁵⁹³ Citizenship for cash is not our policy: Tony Abbott – The Sydney Morning Herald, 4 May 2015.

¹⁵⁹⁴ Government Plan to fast-track refugees in exchange for potential \$19,000 fee, <http://www.msn.com/en-au/news/australia/government-plan-to-fast-track-refugees-in-exchange-for-potential-dollar19000-fee/ar-BBlh0sR?ocid=SKY2DHP>, accessed 1 August 2015.

However, the above is not limited to Australia. Greece and the United Kingdom provide resident permits to individuals from third countries that make investments to member states.¹⁵⁹⁵ For example, in Greece¹⁵⁹⁶ the individuals must have €250,000, and the United Kingdom requires £1,000,000. States such as Hungary, France, Spain, Latvia, Portugal and Ireland also have investor programs.¹⁵⁹⁷ The issue has been debated in the United Kingdom to the extent that a radical approach has been proposed to charge \$50, 000 [US] for a permit to enter and stay in the state. Gary Becker argues that by charging such an extensive fee it would ensure that only those individuals who have a commitment to the state would apply.¹⁵⁹⁸ Cyprus has developed a similar investment scheme where a person can invest €5,000.000 however the individual must have a permanent privately-owned residence in Cyprus. The thesis does not advocate that citizenship or permanent residence should be limited to those individuals who have the financial resources available to pay. Even so, the earlier postnational concept did not have such a hefty fee attached to a guest worker permit, but rather enabled Europe to fill labour requirements (usually unskilled). The issue has been identified as an area for future research to better understand the positives and negatives to a state and prospective resident (citizen).

Student (Education)

To obtain a student visa the applicant needs to be able to fulfil the financial, language proficiency¹⁵⁹⁹ health and national security requirements.¹⁶⁰⁰ Moreover, there needs to be evidence of accommodation and welfare arrangements with whom the person will reside. This includes evidence of family or other arrangements provided through the educational institution.¹⁶⁰¹ A student from a third country in Europe will not need a visa to enter and stay in another member state provided:

- the student travels as a member of a group studying at a general education institution; or
- the group is accompanied by a teacher from the institution who is able to present a list of the children they are accompanying; or
- the pupil presents a valid passport or other entry document specified in an international agreement or decision issued by the Slovenian government.

¹⁵⁹⁵ European Parliamentary Research Service, <http://epthinktank.eu/2014/01/15/eu-citizenship-and-residence-permits-for-sale/>, accessed 10 June 2015.

¹⁵⁹⁶ European Parliamentary Research Service, <http://epthinktank.eu/2014/01/15/eu-citizenship-and-residence-permits-for-sale/>, accessed 10 June 2015.

¹⁵⁹⁷ Madeleine Sumption and Kate Hooper, *Selling Visas and Citizenship: Policy Question for the Global Boom in Investor Immigration*, Migration Policy Institute, 2014.

¹⁵⁹⁸ Gary Becker, *The Challenge of Immigration – a Radical Solution*, The Institute of Economic Affairs, 2011, 1-5.

¹⁵⁹⁹ Schedule 5A, *Migration Regulation 1994*.

¹⁶⁰⁰ PAM3, Generic Guidelines, Student visas – application & related procedures, Australian Immigration Law

¹⁶⁰¹ *Ibid*, 12.

This process was established in 1994 by Council Decision 94/795/JHA. The European Council decided on the basis of article K.3.2.b of the TEU that travel arrangements for students from third countries could be liberalised for those students resident in a MS.¹⁶⁰² A non-citizen that has entered Australia under a student visa¹⁶⁰³ can travel and reside anywhere. There are a significant number of subclass visas prescribed by the 1994 MR¹⁶⁰⁴ that will not be discussed. Nevertheless, both states provide for short and long-term visas or permits¹⁶⁰⁵ to enable a person to enter and stay for the purposes of education that could then lead to the individual obtaining permanent residency, and, applying for and obtaining citizenship. Education is important to Australia and in 2011 the education economy contributed \$16 billion to the state.¹⁶⁰⁶ Slovenia is encouraged to look at Australia's education system, which has attracted a steady inflow of international students and made a significant economic contribution to the economy. Adopting a similar approach would allow Slovenia to not only benefit economically, but also make citizens of other states more aware of what and who Slovenia and Slovenia are. Adopting a similar approach would also assist Slovenians in identifying future talented citizens that could make a significant contribution to the state. It is argued that this would also translate to Slovenia spreading its identity regionally and to the rest of the world.

Family Reunification

Family migration allows the family to reunify through sponsorship (temporary and permanent). The ability for citizens to create and maintain basic family relationships is a defining aspect of a free society.¹⁶⁰⁷ The discussion here is narrow and only focuses on marriage and international adoption. Marriage and international adoption are those personal activities undertaken by citizens within a nation state or transcend international borders under the legal framework of private international law. Furthermore, family migration has served Australia well by providing a competitive advantage for countries seeking to attract highly skilled immigrants.¹⁶⁰⁸

¹⁶⁰² European Council, Official Journal of the European L 327, 19/12/1991 P. 0001-0003.

¹⁶⁰³ Australian Government student visa types, The Student (Temporary) (Class TU) visa comprises 8 subclasses. Subclasses 570–576 are based on the education sector of your main course.

¹⁶⁰⁴ Schedule 1, *Migration Regulations 1994*, permanent business visas are also able to be obtained under class Business skills – Business Talent EA and subclass; Business talent – 132; Business skills – Established business residence - BH; Established business in Australia – 845' State territory sponsored regional established business in Australia – 846; Business Skills residence DF; Business owner – 890; Investor – 891; State territory Sponsored Business Owner – 892; State Territory Sponsored Investor – 893.

¹⁶⁰⁵ Temporary visas can be issued for such things as work, education, study, seasonal work, daily work, family reunion, residents in other MS, family members or foreigner of Slovenian origin, children of aliens born in Slovenia, victims of human trafficking and illegal employment amongst other reasons article 37 to 51 Aliens Act 2011.

¹⁶⁰⁶ Australian Bureau of Statistics, Australian Social Trends 2011, [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication14.12.113/\\$File/41020_International_Dec2011.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication14.12.113/$File/41020_International_Dec2011.pdf), accessed 26 November 2013.

¹⁶⁰⁷ Mary Crock and Laurie Berg, *Immigration Refugee and Forced Migration, Law, Policy and Practices in Australian*, The Federation Press, 2011, 176.

¹⁶⁰⁸ Ibid.

A sponsor for a family visa must be an Australia citizen or permanent resident. People do migrate to a state where they have family networks. Networks extend to relatives and friends of the migrant by providing financial or some other assistance such as accommodation, job opportunities and transport.¹⁶⁰⁹ Stark and Taylor point out that having an awareness of family members who have migrated to improve their living standard, is the most important factor for others in the family when deciding to migrate.¹⁶¹⁰ It is the knowledge and experience from this network that are used by an individual when migrating to another state. The family class visa includes partner, child, adoption, parent, aged dependent relative, remaining relative, orphaned relative, designated parent and contributory parent.¹⁶¹¹ Family reunification is considered a right across the EU¹⁶¹² in accordance with article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Charter of Fundamental Rights. Family reunification can be achieved under both Slovenian and Australian law, although under slightly different banners. In Australia, this is undertaken similar to the EU directive and Slovenian legislation under the principle of a 'sponsor',¹⁶¹³ including a spouse and children, and can include (family) relatives under certain conditions.

The child migrant class AH adoption subclass 102 visa allows children from overseas who have either been, or about to be adopted to be provided a permanent visa. However, the child must be under the age of 18 years. This visa allows the child to reside in Australia permanently with their adoptive parents.¹⁶¹⁴ Inter-country adoption has become more common over the past two decades and Australia is a signatory to the Convention on the Protection of Children and Cooperation in Respect of Inter-country Adoption 1993. Slovenia is also a signatory to the convention. There are two ways an inter-country adopted child can become an Australian citizen. Firstly, citizenship will be granted automatically provided at least one of the parents is an Australian citizen. Secondly, where the child has been adopted overseas they may apply for citizenship by conferral.¹⁶¹⁵ Citizenship by conferral in Australia is subject to a number of conditions under section 19G of the ACA.¹⁶¹⁶ These requirements have been outlined in **chapter three**.

¹⁶⁰⁹ Roel Jennissen, *Causality Chains in the International Migration Systems Approach*, Population, Research and Policy Review, Vol 26, 2007, 411-436.

¹⁶¹⁰ Oded Stary and Edward Taylor, *Relative Deprivation and international migration*, Demography, 1989, in Roel Jennissen, *Causality Chains in the International Migration Systems Approach*, Population, Research and Policy Review, Vol 26, 2007, 411-436.

¹⁶¹¹ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268.

¹⁶¹² Council Directive 2003/86/EC on the right to family reunification, Official Journal of the European Union L 251/12.

¹⁶¹³ *Migration Act 1958*, Division 3A.

¹⁶¹⁴ *Migration Regulations 1994*, Schedule 1, Child Migrant, Adoption subclass visa 102.

¹⁶¹⁵ Hague Conference on Private International Law, *Country Profile for Inter-country Adoption, Australia*, 2005, 1-25.

¹⁶¹⁶ *Citizenship Act 2007*, Section 19G.

Notwithstanding the general requirement of family reunification, other ways a non-citizen can enter either state is as a partner¹⁶¹⁷ or, prospective marriage.¹⁶¹⁸ Both states provide for family reunification, yet the European Union considers this to be a fundamental right, whereas Australia does not. Nevertheless, this could include getting married to a foreigner and bringing them back to Australia. In the case of an Australian marrying a Slovene in Slovenia and deciding to relocate to Australia, a spousal visa can be obtained. However, the couple will be subject to the requirements to prove they are actually in a relationship. This test includes demonstrating they have joint ownership of real estate or other assets, joint liabilities, financial resources, care of children, living arrangements and sharing day-to-day living expenses.¹⁶¹⁹

Similar arrangements are in place in Slovenia, with one of the deciding factors in either state that the spouse will not be a financial or other burden on the state. The Australian court in *Asif*¹⁶²⁰ refused a spousal visa because it was not being convinced the marriage was genuine as the applicant lied to the department about the history of the marriage. Migrants who have taken citizenship of the destination state can, under the family reunification policies of Slovenia and Australia, get their family to accompany them, thus allowing these new family members to enter and stay, and upon meeting the residency requirements, being eligible to apply for and obtain citizenship.

Permanent (Long Term) Residence Visa

The alternative to citizenship, particularly in Australia, is the opportunity for a person to obtain a permanent residence visa (permit).¹⁶²¹ Long-term or permanent residency, along with other visas and permits, is a pathway to citizenship. However, individuals may not wish to apply for citizenship even though they elect to remain in the state. Permanent residency status allows a person to reside in the state indefinitely, whether or not that person takes out citizenship.

In Australia, permanent residency is limited compared to Slovenia. Permanent residence can be granted for family-based (partners, fiancé, children or dependent relatives) and work-based (employer sponsor, general skilled, and select skilled) reasons.¹⁶²² Additionally, skilled workers can also obtain sponsorship for permanent residence. A permanent resident who has been residing in another state can apply for a Resident Return Visa; this also applies to a former permanent resident whose last permanent resident visa was cancelled, or a former Australian

¹⁶¹⁷ Subclass 100 and 309, Partner (Provisional) and Partner, Schedule 2, *Migration Regulations 1994*.

¹⁶¹⁸ Subclass 300 Prospective Marriage, Schedule 2, *Migration Regulations 1994*. In Slovenia, this would be issued under the Long stay visa.

¹⁶¹⁹ *Migration Regulations 1994*, 1.09A, 1.15A.

¹⁶²⁰ *Asif v MIMA* (2000) 60 ALD 145.

¹⁶²¹ *Migration Regulation 1994*.

¹⁶²² *Migration Regulation 1994*, Subclass 820, 801, 101, 130, 189, 190, 489, 186.

citizen who has lost or renounced his or her Australian citizenship. In Slovenia, a person obtains a Long Term Stay permit,¹⁶²³ then is issued a Residence permit depending on the situation which could include: work or employment; work or research in higher education; study; seasonal work, trans-border employment and posted workers; daily work migrants; family reunion of residents in other EU countries, family members or foreigners of Slovenian origin, children of aliens born in Slovenia.

Deportation or Expulsion

Comparatively, both states can remove or deport non-citizens who are resident in the state. Slovenia, however, is subject to the deportation and removal requirements set out by the European Union. In Australia, sections 201 and 501 of the *Migration Act 1958*, allow for long-term residents to be either removed or deported. However, there are separate processes that apply, whereby, section 501 allows for the cancellation of a visa on grounds of character. Upon cancellation, the person is automatically removed from the territory. Section 201, allows for a non-citizen to be deported who has been in Australia less than ten years, and have committed a serious criminal offence, which resulted in imprisonment for one year or more. Even so, in accordance with section 201, the person is immune from deportation after the ten-year period has expired. That is, a person who has been in the country for 11 years is immune from deportation. This has given government a foot in each camp. If they cannot use one provision to force a person out of the state, they can use the other. Thus, the opportunity is there for the government to deport residents even after the period of immunity comes into effect (after ten years)

There have been numerous decisions by the judiciary in Australia regarding the deportation and removal of residents. In *Shaw*, the deportation of a British national who had been resident in Australia since 1949 could occur, even though the person clearly exceeded the ten-year requirement for residency.¹⁶²⁴ However, the ruling in *Shaw* was an example of how the court ruled that such non-citizens could not be removed.¹⁶²⁵ This had significant ramifications for all non-citizens who had migrated to Australia and only took out permanent residency. Nevertheless, in *Nystrom*¹⁶²⁶ the court ruled that the administration of section 501 had lost its way. The court went on to rule that the bona fide use of this section to cancel the permanent absorbed person's visa who is 30 years old and has spent all his life in Australia, has family in Australia, and is deported for a criminal offence, should not be used to circumvent section 201.

¹⁶²³ Article 17, Aliens Act, Official Gazette of the Republic of Slovenia, 50/2011.

¹⁶²⁴ *Shaw v Minister for Immigration and Multicultural Affairs* [2003] HCA 72.

¹⁶²⁵ *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

¹⁶²⁶ *Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 121.

Consider the case of Robert Jovicic (originally from Serbia) who was deported to Serbia by the Australian government in 2004. The case raised the question of who is “morally” a citizen of a state. This relates to the notion that a person has membership of a state due to the length of stay. Jovicic’s case resembles those where states in transition from one ruler to the next would grant citizenship automatically based on *jus domicili*. Jovicic, Yugoslav born, was a non-citizen of Australia who had been living in Australia for thirty-six years before being deported due to criminal convictions for drug use. To further complicate matters, he was granted only a 7-day visa in Serbia which did not allow him to work. Furthermore, he had not met the citizenship application requirements, and thus was declared stateless. He later returned to Australia after much publicity,¹⁶²⁷ and was granted a permanent residency visa in 2008 by the Minister for Immigration and Citizenship.¹⁶²⁸ Today Mr. Jovicic is still not a citizen of either Serbia or Australia.

The issue of deportation and removal of long-term residents¹⁶²⁹ is also a concern in European member states. Similar to Australia, European Union member states including Slovenia have requirements that relate to a non-citizen’s criminal record and financial situation as an assessment of good character. The European Union has largely applied general rules for member states to manage the removal of non-citizens. However, the law and procedures have two levels: one for third country nationals (migrants) resident in a member state, and the other for European citizens residing in another member state. There is a test for migrants (non-European citizens) that may see them expelled on grounds of public policy related to public security or a conviction for a serious criminal offence.¹⁶³⁰ There is a subtle difference, as the European citizen would need to pose a serious, genuine and present threat affecting the interests of society, and must be exclusively the person’s own conduct. Whereas, the migrant (third country national) has no explicit requirement based exclusively on their conduct; as such, it could be similar to Australia where a person has an association with a criminal – where they are deported. Both European citizens and migrants are afforded a similar ten-year period where the individual has resided in the host state. However, the European Union has introduced a greater level of oversight by aligning deportation (expulsion) with equal rights. That is, in general, European citizens will be assessed in the same way as migrants. Thus, the principles set out for the assessment include length of stay, family and employment arrangements. Deportation is

¹⁶²⁷ Julian Burnside QC, *Citizens rights and the rule of law in civil society: not just yet*, 2008, 1-12, www.valuesineducation.org.au/pdf/burnside080310.pdf, accessed 31 March 2012.

¹⁶²⁸ Chris Bowen, Minister for Immigration and Citizenship, Permanent Visa granted to Robert Jovicic, [tp://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm](http://www.minister.immi.gov.au/media/media-releases/2008/ce08018.htm), accessed 31 March 2012.

¹⁶²⁹ Council Directive 2003/109/EC concerning the status of third country national who are long term residents, Official Journal of the European Union L 16/44.

¹⁶³⁰ *Ibid*, article 12.

viewed as interference with the right to have a 'private life and family'.¹⁶³¹ The rules established by the European Union appear to be more certain than those of Australia. The notable difference is that European law automatically allows a person the right of access to judicial and, where appropriate, administrative redress procedures by the host member state.¹⁶³² This has been reaffirmed by the European Court of Justice that ruled a member state could not execute a deportation order without giving the migrant the chance to avail themselves of the right to remedy.¹⁶³³

The fragility of permanent residence in Australia continues to be evident. Even though the judiciary and government have identified that a problem exists with sections 201 and 501 of the migration laws there appears to be little appetite for a change in the law. Moreover, Australia by continuing to adopt such an approach could be breaching international human rights law.¹⁶³⁴ The European Union does not have the same concerns as Australia, because no matter whether an individual is a citizen of the Union or a migrant they are afforded the same rights to protect themselves against deportation. Australia should change its migration laws. Additionally, Australia could promote citizenship better as the option to long-term residency, so that people will not be subject to inappropriate applications of the law.

Residence versus Citizenship - Benefits

Citizenship today is symbolic in terms of those individuals who are permanent or long-term residents.¹⁶³⁵ However, citizenship is much more important because it provides a greater sense of belonging. Citizenship allows a person to participate in the political process by voting and standing for elections. Citizenship is important not only to an individual, but also, to the nation state. It allows a state to determine who its citizens will be. One of the benefits of Australian citizenship is that it enables a person to apply for certain jobs in the national civil service. Citizens are entitled to a passport that allows them to travel (exit and enter the state), and receive assistance from a state's consular office while abroad. Furthermore, in the case of deportation or removal from Australia, citizenship provides greater certainty.

¹⁶³¹ Sonia Morano-Foadi and Stelios Andreadakis, *The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and the ECtHR Jurisprudence*, The European Journal of International Law, Vol. 22 no. 4, 2001, 1071-1088.

¹⁶³² Council Directive 2004/38/EC, the right of citizens of the Union and their family members to move freely and reside freely within the territory of the MS, Official Journal of the European Union L 158/77.

¹⁶³³ Case 48/75, *Royer* <http://eur-lex.europa.eu>.

¹⁶³⁴ Australia could be breaching the provisions of the International Covenant on Civil and Political Rights 1966.

¹⁶³⁵ Katherine Betts and Bob Birrell, *Making Australian Citizenship Mean More, People and Place*, Vol 15, No 1, 2007, 44-55.

Testing Permanent Residents

Permanent residency appears to be a firmly entrenched feature of both Australia and Slovenia's legal frameworks. In the same way as prospective citizens are obliged to undergo testing to obtain citizenship in Australia, the same process should be considered for long-term residents. This thesis argues that states should consider imposing testing (language, history and culture) requirements for permanent residents every five years. The testing of permanent residents is new, and could be similar to or an advanced model of citizenship testing. The benefits could translate to better assimilation and an understanding of the state and its identity. It is acknowledged that encouraging people to take out citizenship may force them to lose their citizenship of the other state. However, Australia and Slovenia should take a leadership role and work with those states that they deem to be friends and allies to encourage law reform and provide for dual citizenship.

Special Category Visa

Citizens from New Zealand can reside and work permanently within Australia under a Special category visa¹⁶³⁶ that applies to New Zealand visitors. To become an Australian citizen, they need to apply in accordance with the naturalisation process. It is asserted that this could be the start of a wider regional based citizenship, similar to the European Union. Even though this visa category is restricted to New Zealand citizens. Further research is required to explore this concept. Australia has acknowledged closer ties with one neighbouring state, and could explore a similar framework with ASEAN member states.

Bridging visas

The bridging visa has no direct effect on whether citizenship is granted by a state. A bridging visa¹⁶³⁷ is issued to non-citizens who have entered into Australia on another visa (for example, a student visa) and have applied for permanent residency.¹⁶³⁸ This visa can also apply where a person has been detained after arriving within the territory illegally.¹⁶³⁹ The visa allows a person to remain in the Australian territory for a specified period until a decision has been made by the authorities as to whether permanent residency is granted, or a visa is re-issued. Slovenia does not have a bridging visa. However, if an individual is within the territory of Slovenia, and has submitted an application for extension, a visa is issued.

¹⁶³⁶ *Migration Act 1958*, s32

¹⁶³⁷ Bridging visa types from A, B, C, D, E, F, R, are granted for different situations, but, generally allow individual to be in Australia whether in detention or in the community, travel overseas, and those waiting for another visa type to be processed or their current visa extended, such as for permanent residence, or, full citizenship.

¹⁶³⁸ *Migration Act 1958*, s73.

¹⁶³⁹ *Ibid*, s75.

A similar process applies in Australia, where the person's visa is about to expire and they have made an application for residency. This allows the person to stay within the territory while the application is processed. An example, of when an extension would be provided is where the individual is injured and unable to leave hospital. Not only are bridging visas used in Australia and Slovenia where a person's original visa has expired, but also, used to avoid the arrest and detention of a person of unlawful status. This visa type has been established to help facilitate the individual's current immigration status, which could include business, skilled, education, family reunification or refugee. Australia has seven bridging visa types whereas; Slovenia and the European Union only have one. The above visas and permits vary across both states. It is argued that the framework are an important part of Slovenia and Australia's ability to control who stays within the territory and obtains citizenship. The visa and permits system provide one of the elements within the immigration laws that form the pathway to citizenship. They allow the state to regulate who can enter and stay on the territory, thus providing inclusionary and exclusionary measures that contribute to national identity. They have been used successfully by both states to ensure they continue to choose who their future citizens will be, and enhance the citizenship legal framework. Therefore, they have a small role in contributing to the overall identity of both Australia and Slovenia.

5.5 General Requirements

The general requirements for obtaining a visa includes the public interest test, health check;¹⁶⁴⁰ and character test.¹⁶⁴¹ The discussion in this section will only focus on the general requirements of health. Failure to meet the health requirement will result in the person not being able to enter the state. A non-citizen will require health insurance.¹⁶⁴² Similarly, in Australia¹⁶⁴³ a non-citizen will need to obtain a medical certificate confirming whether they have HIV or hepatitis B.¹⁶⁴⁴ Generally, the health examination will be determined by the departmental medical officer and is

¹⁶⁴⁰ *Migration Act 1958*, ss60, 496,, 505, and *Migration Regulations 1994*, regulation 13 interpretation of community services; 225A referral to a Medical Officer of the Commonwealth; 5.41 fees, and Schedule 4, 405,4006A and 4007.

¹⁶⁴¹ *Migration Act 1958*, ss501-503, *Migration Regulations 1994*, regulation 1.03, 2.25 and 2.53.

¹⁶⁴² Article 6 Council Directive 2004/114/EC, Official Journal of the European Union L 375/18.

¹⁶⁴³ *Migration Act 1958*, section 5 (1) relates to the application for the visa, or the members of the family unit of that applicant for a prescribed disease, physical or mental condition, prescribed examination and treatment.

¹⁶⁴⁴ John Vrahnas, Mirko Bagarič, Penny Dimopoulos and Athula Pathinayake, *Migration and Refugee Law*, Principles and Practices in Australia, third edition, Cambridge University Press, 2012, 152-158.

an important aspect of public policy¹⁶⁴⁵ in keeping the Australian¹⁶⁴⁶ community and its citizens safe.¹⁶⁴⁷

5.6 International Protection

Individuals flee their country of origin due to war,¹⁶⁴⁸ poverty,¹⁶⁴⁹ persecution or a natural disaster.¹⁶⁵⁰ Only some people are considered refugees. A refugee has been defined as; ‘Any person who owing to a well-founded fear of being persecuted for reasons of race, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country’.¹⁶⁵¹ Australia, Slovenia and the European Union (EU)¹⁶⁵² all define ‘refugee’ in accordance with the Geneva Convention. Australia ratified the 1951 Convention and 1967 Protocol in 1973 Slovenia¹⁶⁵³ automatically assumed responsibility for its implementation, upon independence¹⁶⁵⁴

The European Union has taken a broader role in regulating elements of refugee law, ensuring a consistent approach by member states.¹⁶⁵⁵ The harmonisation of laws across the Union has extended to managing the reception of asylum seekers,¹⁶⁵⁶ refugees,¹⁶⁵⁷ fingerprints¹⁶⁵⁸

¹⁶⁴⁵ *Robinson v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1626, in John Vrahnas, Mirko Bagarič, Penny Dimopoulos and Athula Pathinayake, *Migration and Refugee Law, Principles and Practices in Australia*, third edition, Cambridge University Press, 2012, 152-158.

¹⁶⁴⁶ Mary Crock and Laurie Berg, *Immigration Refugees and Forced Migration, Law, Policy and Practice*, The Federation Press, 2011, 156.

¹⁶⁴⁷ *Migration Act 1958, Migration Regulations 1994*, PAM3. Aliens Act 2011, Official Gazette Republic of Slovenia, No 50/2011.

¹⁶⁴⁸ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equity*, Oxford: Martin Robinson, 1983, 25-40.

¹⁶⁴⁹ Joseph Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, in Brian Barry and Robert Goodin (eds), *Free Movement: Ethical Issues in the Transnational Migration of People and Money*, New York, Harvester Wheatsheaf, 1992, 25 - 47.

¹⁶⁵⁰ Alan Wolfe, *Whose Keeper: Social science and moral obligation*, Berkley and Los Angeles: University of California Press, 1991, 1-23.

¹⁶⁵¹ Article 2, Convention relating to the Status of Refugees 1951, adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Person, Geneva, 2 to 25 July 1951, entry into force 22 April 1954, Treaty Series, vol. 189, p. 137. Protocol Relating to the status of Refugees 1967, noted by the UN General Assembly, in resolution 2198 (XXI), 2 to 16 December 1966, Treaty Series, vol. 606, p. 267.

¹⁶⁵² Joint Position 96/196/JHA of March 1996 defined by the Council on the basis of article K.3 of the Treaty on European Union on the harmonised application of the definition of the term ‘refugee’ in article 1 of the Geneva Convention of 28 July 1951, Official Journal of the European Union L 63.

¹⁶⁵³ Up-1136/11-24, Official Gazette of the Republic of Slovenia 26/2012.

¹⁶⁵⁴ Notification of succession in respect of United Nations Conventions and conventions adopted by IAEA.

¹⁶⁵⁵ Article 62, Lisbon Treaty 2007, Official Journal of the European Union C 306/1.

¹⁶⁵⁶ Council Directive 2003/9/EC, laying down minimum standards for the reception of asylum seekers, Official Journal of the European Union, L 31/18.

¹⁶⁵⁷ Council Directive 2005/85/EC, on minimum standards on procedures in Member States for granting and withdrawing refugee status Official Journal of the European Union, L 326/13.

¹⁶⁵⁸ Council Regulation No 2725/2000, Official Journal of the European Union, L 316/1.

applications,¹⁶⁵⁹ and establishing a minimum standard for temporary protection.¹⁶⁶⁰ Mary Crock argues that the continued influx of illegal immigrants seeking international protection has created a fear of xenophobia in Australia.¹⁶⁶¹ The same can be seen in Europe with immigrants from North Africa and Syria arriving in Spain, Southern Italy, Greece and transiting through Slovenia.¹⁶⁶² More recently, in 2015, there has been huge numbers of migrants from Syria and other countries entering, Slovenia, the European Union and (Schengen area) and Australia. Refugees who enter a state's territory illegally in some cases are subject to racism, prejudice and xenophobia¹⁶⁶³ as opposed to those individuals arriving legally and over staying their visas. This thesis argues that people arriving illegally are a lot more visible than those that have already arrived legally and have begun integrating into the community. As discussed in **chapter three**, xenophobic behaviour (violence) exists in Australia, Slovenia and across the Union. The increase in illegal arrivals at the border of the European Union (Schengen area) and Australia from the conflict in the Middle East is likely to result in an increase in this type of behaviour by states and their citizens. Any further discussion on this matter is outside the scope of this research, but it is suffice to say that the current crisis unfolding in Syria and the rise of Islamic State is posing a significant challenge to Australia's multicultural identity.

5.6.1 Humanitarian Visas

Those declared refugees¹⁶⁶⁴ or asylum seekers are issued a visa,¹⁶⁶⁵ (or temporary safe haven visas).¹⁶⁶⁶ Slovenia provides temporary stay that is valid for a period of 6 months, although this may be extended. Australia on the other hand, has established seven offshore and three onshore visas. Onshore visas allow the person to stay in the territory upon arriving in Australia without a visa or without a valid visa. These individuals are usually placed in detention until it has been

¹⁶⁵⁹ Council Regulation No 343/2003, establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national Official Journal of the European Union, L 50/1.

¹⁶⁶⁰ European Union: Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, Official Journal of the European Union L 212-223 7.8.2001, <http://www.unhcr.org/refworld/docid/3ddcee2e4.html>, accessed 22 April 2011.

¹⁶⁶¹ Mary Crock, *A sanctuary under review: where to from here for Australia's Refugee and Humanitarian Program?* University New South Wales, Law Journal, 2000, 246-250.

¹⁶⁶² Flood of desperate refugees test Spaniards tolerance, April 2015, <http://www.npr.org/sections/parallels/2015/04/25/402035778/flood-of-desperate-refugees-tests-spaniards-tolerance>, accessed 2 June 2015.

¹⁶⁶³ International Migration, *Racism, Discrimination and Xenophobia*, International Labour Office, Office of the United Nations High Commissioner for Human Rights, International Organisation for Migration, 2011.

¹⁶⁶⁴ Articles 30, 31, 32, 33, 34, 35, 39a, 41, 46, 47, 48, 49, 55, 56, 57, 58, 119, *Law on International Protection*, Official Gazette Republic of Slovenia 2011/11. The *Migration Act 1958* allows a person who provides incorrect or false information in their application to be refused. Similarly, for Australia a visa will be granted or refused in accordance with the *Migration Act 1958*, whether outside or inside the migration zone provided they meet the refugee status.

¹⁶⁶⁵ *Migration Act 1958*, s36.

¹⁶⁶⁶ *Ibid*, s37A.

determined if they warrant refugee protection. Australian offshore visas consist of seven types 1) refugee and humanitarian class XB; 2) refugee; 3) inter-country special humanitarian; 4) global special humanitarian; 5) emergency rescue; 6) women at risk; and 7) secondary movement relocation.¹⁶⁶⁷ These are used where the individual has been detected, for example, on a boat outside of the Australian territory, intercepted by authorities and sent to an offshore detention centre. The policy response can vary depending on the government of the day. Successive governments over the past decade have continued with both the onshore and offshore detention of individuals. Additionally, there is the territorial asylum visa that enables an individual to be declared as an asylum seeker.¹⁶⁶⁸

There are a number of other visas provided in Australia however they will not be discussed here (for example, special visas for permanent or temporary stay). Nevertheless, eligibility for a refugee visa¹⁶⁶⁹ requires the individual to be assessed and approved by the United Nations High Commissioner for Refugees. In Slovenia, a refugee passport can be issued for a period of ten years,¹⁶⁷⁰ however such a passport will not be issued to an individual who has been granted subsidiary protection¹⁶⁷¹ Australia does not have a similar passport.

It has been documented that climate change will potentially be a future threat causing displacement of people.¹⁶⁷² States may need to take a closer look at their current legislative framework to ensure they are able to adapt to people being displaced as a result of climate change. The former Australian Senator Kerry Nettle from the Australian Greens Party in 2007 proposed to amend the Migration Act in 2007 in an attempt to create a new visa category to accept individuals displaced by environmental disasters.¹⁶⁷³ However, by the conclusion of Parliament in 2008, the Bill had lapsed and there was no amendment to the Migration Act. No such proposal has been put to the Slovenian Parliament on the same issue.

Australia and Slovenia, as well as the EU could consider expanding their current legislation to include and allow for environmental refugees. This thesis asserts that the international protection visas and permits discussed in this chapter ensure both states continue to implement

¹⁶⁶⁷ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, Class XA, subclass 866, subclass 851, class XB, subclass 200, subclass 2012, subclass 202, subclass 203, subclass 204, subclass 451.

¹⁶⁶⁸ Schedule 2, *Migration Regulations 1994*, Statutory Rules No. 268, subclass 800.

¹⁶⁶⁹ *Migration Regulations 1994*, schedule 2. Department of Parliamentary Services, Parliamentary Library, United Nations High Commissioner for Refugees, Frequently asked Questions about resettlement, 2011, 1-29, www.aph.gov.au/library/pubs/bn/law/RefugeeResettlement.pdf, accessed 6 January 2012.

¹⁶⁷⁰ Article 115, *Law on International Protection*, Official Gazette Republic of Slovenia 2011/11.

¹⁶⁷¹ *Ibid*, article 116.

¹⁶⁷² Stephanie Perkiss, Graham Bowrey and Nick Gill, *Environmental Refugees: An accountability Perspective*, University of Wollongong,

<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1990&context=commpapers>, accessed 11 January 2013.

¹⁶⁷³ The Parliament of the Commonwealth of Australia, The Senate, Migrations (Climate Refugees) Amendment Bill 2007, Explanatory Memorandum, 1 – 3.

their immigration policies. Additionally, they allow the state to determine the number of people to whom they provide a visa or permit. In the case of Australia this is about 15,000 to 20,000 people annually, depending on government policy. Nonetheless, this process reinforces the right of states to implement laws that control this activity while meeting their international obligations, and thus, retaining and strengthening their national identities. Apart from regulating the numbers of people allowed to enter under international protection, the state through national identity demonstrates to other states, it is an open country that supports individuals that have been displaced through war and conflict. The visa framework is an integral part of the laws that regulate immigration and citizenship. This form of immigration is also considered a pathway to citizenship.

Purchasing a Refugee visa

The Australian Government recently considered the idea of charging \$19,000 to fast-track refugee applications.¹⁶⁷⁴ The proposal has not progressed. Such a proposal could raise serious questions in relation to a nation state's meeting its international obligations to provide a safe place for all people who are classified as refugees. By charging a fee, an argument could be formulated that there is little difference between people smugglers (charging a fee) and the government charging a fee, in order for a person to escape their country of origin due to war or persecution. The only difference is that the government would be guaranteeing that the person obtains a refugee visa and is able to enter Australia whereas a charge (or sum of money) paid to people smugglers does not guarantee the person will enter Australia, or obtain refugee status. The proposal to charge a fee for a refugee visa, further reinforces Australia's right to choose who enters and stays. It has the potential to exclude many people who are experiencing serious harm and persecution. Such a proposal should not be supported in Australia or Slovenia. It is argued that a proposal such as this may have a negative impact to the national identity, by sending a message to the world community that Australia will take the highest bidder. No such proposal has been discussed in Slovenia.

Refugee Status terminated, excluded or withdraw

At any time, the refugee status can be terminated, excluded or withdrawn. Upon termination¹⁶⁷⁵ or withdrawal by the state, the individual would no longer be eligible to apply for and obtain citizenship. This can be achieved in Slovenia¹⁶⁷⁶ even though it is left up to member states¹⁶⁷⁷ to

¹⁶⁷⁴ Government plan to fast-track refugees in exchange for potential \$19,000 fee, <http://www.msn.com/en-au/news/australia/government-plan-to-fast-track-refugees-in-exchange-for-potential-dollar19000-fee/ar-BB1h0sR?ocid=SKY2DHP>, accessed 1 August 2015.

¹⁶⁷⁵ Ibid, article 4.

¹⁶⁷⁶ Council Directive 2005/85/EC, minimum standards for granting and withdrawing refugee status, Official Journal of the European Union, L 326/13.

examine the application.¹⁶⁷⁸ However, the state is obliged to ensure the individual is not subject to persecution or harm upon return to their state of origin. The termination of refugee status can be undertaken where a refugee voluntarily takes protection or has re-acquired citizenship from their country of origin.¹⁶⁷⁹ Australia has the same process. Termination will also take place where, for example, a stateless person returns to the state of former residence.¹⁶⁸⁰ Furthermore, protection ceases when refugee status is terminated or expires.¹⁶⁸¹

Withdrawal of international protection¹⁶⁸² and refugee status will occur in Slovenia where the individual has misrepresented or omitted relevant facts or made false documents.¹⁶⁸³ This also extends to where the person has been determined to be a threat to Slovenia or has been convicted of a crime against humanity.¹⁶⁸⁴ The states use different language when referring to cancellation (termination) and withdraw of refugee status. In Australia, rather than terminate the refugee status of a person, it is a single step to terminating the individual's visa. A visa can be cancelled at any time where it is determined the person has provided incorrect information, or completed the relevant forms incorrectly.¹⁶⁸⁵ Additionally, where the individual has been cleared by immigration and later found to have provided incorrect information, a notice may be issued cancelling the visa, thus, withdrawing international protection.¹⁶⁸⁶ For example, a person who has claimed refugee status by providing information they have been subject to persecution which did not actually exist, but was using refugee status to gain entry, stay and citizenship in either state, could have that status withdrawn or cancelled.

5.7 Undocumented (Irregular – Human Trafficking) Migration

Irregular Migration

The issues underlying irregular migration are complex.¹⁶⁸⁷ While asylum policies have been discussed, irregular migration is otherwise outside the scope of this research. Furthermore, the over-stay of visas by foreigners is outside the scope of this research because the topic is large and complex. The problem varies widely depending on the region of the world being discussed. Over the past decade, both the European Union and Australia have experienced criminal activity

¹⁶⁷⁷ Council Directive 2004/83/EC, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, Official Journal of the European L 304.

¹⁶⁷⁸ Ibid, article 19.

¹⁶⁷⁹ Article 4, *Law on International Protection*, Official Gazette Republic of Slovenia 2011/11.

¹⁶⁸⁰ Ibid, article 4.

¹⁶⁸¹ Ibid, article 4 (2).

¹⁶⁸² Ibid, article 108.

¹⁶⁸³ Ibid, article 6.

¹⁶⁸⁴ Ibid, article 6.

¹⁶⁸⁵ *Migration Act 1958*, sections 97 to 107.

¹⁶⁸⁶ Ibid, s107.

¹⁶⁸⁷ Mary Crock and Daniel Ghezlbash, *Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals*, Griffith Law Review, 2010, Vol. 19. No 2, 239.

involving people smuggling.¹⁶⁸⁸ A prime example is where people are trafficked into the sex industry. The International Labour Organisation estimated in 2014 that the private economy generates \$150 billion in illegal profit annually, with an estimated \$99 billion estimated to come from sexual exploitation.¹⁶⁸⁹ The remaining \$51 billion includes domestic workers, agriculture and other economic activity.¹⁶⁹⁰ Slovenia has been considered to be both a transit and destination country, and to a lesser extent a source country for women who are subjected to sex trafficking. Illegal prostitution in Germany and Italy alone is estimated at more than €50-60 million.¹⁶⁹¹

Labour exploitation in Slovenia has been documented with people coming from the Ukraine, Romania, Serbia and Bosnia and Herzegovina.¹⁶⁹² For Australia, it was estimated in 2013 – 2014 that there was between 50,000 and 100,000 people working illegally¹⁶⁹³ across the state. However, this figure does not provide an accurate assessment of the total number of people who are subject to forced labour, in the sex industry. It has been reported that people from Thailand, Malaysia, South Korea and the Philippines have been forced into migrating to Australia and into the illegal sex industry.¹⁶⁹⁴ Between 2009 and 2011 it was reported at least 110 people entered Australia and were subjected to sexual exploitation.¹⁶⁹⁵ Unlike Slovenia, Australia is seen as a destination state, rather than a transit state. Both Slovenia and Australia have criminalised trafficking of human beings.¹⁶⁹⁶ Permits are issued to people subject to human trafficking.¹⁶⁹⁷ Australia takes a slightly different approach and has the ability to issue four visa types for

¹⁶⁸⁸ *Migration Act 1958*, Division 12, Offences in relation to entry into, and remaining in Australia, subdivision A – People Smuggling and related offences.

¹⁶⁸⁹ International Labour Organisation, Strengthening action to end forced labour, SAP-FL Newsletter, 2014, 1-6.

¹⁶⁹⁰ *Ibid.*

¹⁶⁹¹ *Ibid.*

¹⁶⁹² International Labour Organisation, Strengthening action to end forced labour, SAP-FL Newsletter, 2014, 1-6.

¹⁶⁹³ Border Crossing Observatory, Trafficking in Persons, Newsletter, Monash University, 2014, <http://artsonline.monash.edu.au/thebordercrossingobservatory/files/2014/02/BOB-News-Issue-7-February-2014-Trafficking-in-Persons.pdf>, accessed 14 June 2014.

¹⁶⁹⁴ Australian Institute of Criminology, *People Trafficking in Australia*, Trends & Issues in Crime and Criminal Justice no. 441, <http://www.aic.gov.au/publications/current%20series/tandi/441-460/tandi441.html>, accessed 14 June 2014.

¹⁶⁹⁵ Jacqueline Joudo Larsen and Lauren Renshaw, Australian Institute of Criminology, *People trafficking in Australia*, Trends & issues in crime and criminal justice no. 441, <http://www.aic.gov.au/publications/current%20series/tandi/441-460/tandi441.html>, accessed 14 June 2014.

¹⁶⁹⁶ *Criminal Code Act 1995, Criminal Code*, Official Gazette of the Republic of Slovenia 55/2008.

Slovenia has transposed the EU Directive 2011/36/EU into the Criminal Code along with Council Directive 2004/81/EC that allows the state to issue a residence permit to those individuals that are subject to and victims of trafficking.

¹⁶⁹⁷ Article 50, *Aliens Act*, Official Gazette Republic of Slovenia, No 50/2011.

human trafficking.¹⁶⁹⁸ Individuals who have been subjected to human trafficking can apply for citizenship.

Detention

Immigration law extends to the detention of non-citizens who enter a state illegally. Moreover, people who have over stayed their visa or permit may be detained before being deported. Detaining non-citizens entering Australia has been the approach taken by government since the 1990s. Detention in Australia can be onshore or offshore. The government has had a general approach to detaining illegal boat arrivals offshore in third countries. Onshore there is a combination of detention centres and community based detention. A similar approach is taken in the European Union and Slovenia with detentions centres and community (housing detention). Slovenia and the European Union largely deal with detention within the border of the Union.

As discussed in **chapter four**, in article 18 of the European Charter of Fundamental Rights 2000 provides the right to asylum is guaranteed, across the Union including Slovenia in accordance with rule of the Geneva Convention 1951 and 1967 Protocol. This right is not guaranteed in Australia, although Australia has ratified the Geneva Convention 1951 and 1967 Protocol and assumed responsibility for managing asylum seekers, including detention. The detention of children and women for extended periods can pose significant challenges to government and the individuals involved. The mental and physical impact that long-term detention has on refugees can be detrimental to their overall well-being. This is an area for further research, comparing Australia, Slovenia and the European Union.

Detention in Australia works against the interest of asylum seekers.¹⁶⁹⁹ It does not allow the person to assimilate and begin to understand, practice and embrace the values of the state. The negative impacts on the wellbeing of the individual from detention can be physical or psychological or both. The detention of non-citizens allows a state to verify whether the individual should be classified as a refugee. Upon release from detention, they are provided with a humanitarian visa or permit to stay in the state. Individuals seeking asylum who have entered the Australian or Slovenian¹⁷⁰⁰ territory illegally can be detained and placed in immigration

¹⁶⁹⁸ Bridging visa F (provided for forty five days for those will to assist police in investigations), Criminal Justice visa (issued to assist police ion their investigations), however, the principal visas issued for trafficking victims are the Witness Protection visa (permanent or temporary).

¹⁶⁹⁹ Mary Crock, *A sanctuary under review: where to from here for Australia's Refugee and Humanitarian Program?* University New South Wales, Law Journal, Vol 23(3), 2000, 246-250.

¹⁷⁰⁰ Council Directive 2003/343/EC establishes the criteria for determining the MS responsible for assessing an asylum application, Official Journal of the European Union, L 50. Council Directive 2008/767/EC regarding the exchange of data between member states, Official Journal of the European

detention¹⁷⁰¹ (either a detention centre onshore or off shore, or home placed accommodation).¹⁷⁰²

The grounds for detention are similar in both states and enable relevant authorities to ascertain the identity of the person and ensure they pose no health or security threat to the state.¹⁷⁰³

Detention extends to adults and children, but, the respective legislation does not provide for a minimum age. Both states have established different periods of time for the detention of asylum seekers. Article 51 of the Slovenian Law on International Protection provides that detention may be effective for no longer than three months and can be extended for a further one month.

An applicant who is being removed from Australia or being granted a visa will cease being detained.¹⁷⁰⁴ However, in practice, the detention of illegal entrants in both states and across the European Union can be for extended periods. The European Court of Justice in *Kadzoev*¹⁷⁰⁵ confirmed that the 18 months is the maximum time for a person to be in detention, and must not be exceeded. The case also reaffirmed that the European Union's policy on detention considers the rights of individual being detained, whereby, a person's liberty cannot be denied. Upon release from detention a person may be granted a visa or permit to remain in the state. The visa or permit will allow the person, once eligible, to apply for citizenship. To be eligible, the individual will need to fulfill the residency requirements set out in accordance with the respective state's citizenship law. The detention and granting of a visa or permit enables Slovenia and Australia to determine who enters and stays in their respective territories. The legal framework that enables either state to regulate this area, contributes to national identity. As the thesis has argued immigration law provides a pathway to citizenship and they play a small but important role in national identity. Without a robust framework to regulate who enters and stays within a state, not only is the state's national identity weakened, the state would not know who its future citizens might be. Therefore, immigration and citizenship law today go hand in hand and support the broader national identity of both states.

Union, L 218. Council Directive 2000/2725/Establishing Eurodac for comparing fingerprints, Official Journal of the European Union, L 316.

¹⁷⁰¹ *Migration Act 1958*, Division 6.

¹⁷⁰² *Ibid*, Subdivision B.

¹⁷⁰³ *Migration Act 1958*, s18. Article 51, Law on International Protection, Official Gazette of the Republic of Slovenia, 2011/11.

¹⁷⁰⁴ *Migration Act 1958*, ss178, 181, 182 and 189.

¹⁷⁰⁵ Case 357/09 *Kadzoev* [2009] ECR I-11189.

5.8 Administration

In Slovenia, migration policy and legislation matters are the responsibility of the Ministry of Interior.¹⁷⁰⁶ At the time of undertaking this research, in Australia the equivalent is the Department of Immigration and Border Protection. The administration of the law is an important part of a state's sovereignty. These central agencies are responsible for the legislation and policy for immigration (on shore), and their respective Ministries for Foreign Affairs and Department of Foreign Affairs and Trade are delegated administrative functions and power to issue visas and permits from and in third countries.

Once an individual is granted a visa or permit and is present within the respective states, both ministries have sub offices. In Australia, the department has sub offices in each of the states such as Victoria. This allows the individual holding the visa to apply for citizenship. The Commonwealth ministry still determines the process for eligibility for either another visa, extending the visa or application for citizenship. In Slovenia, a similar role is delegated to the local Administrative Units. There are 58 Administrative Units spread across Slovenia. These Administrative Units are separate to the central Ministry of government. While Australia is a larger nation in size and population having a single focused department has ensured effective and efficient administration of immigration, naturalisation and citizenship law and policy.

The major difference is that the Australian model has a single ministry responsible for immigration, citizenship and naturalisation policy and legislation. That is, the Department of Immigration and Border Protection's sole focus is on these policy areas. However, the Slovenian Ministry of Interior has a larger portfolio that is also responsible for immigration and naturalisation, public sector administration and policing.¹⁷⁰⁷ Slovenia is a smaller state but a single focus could benefit Slovenia rather than having the administration coupled with other government responsibilities, and, the administration delegated to Administrative Units. Therefore, it is suggested that the future administration of citizenship, immigration and naturalisation of law and policy in Slovenia could come under a single Immigration or Citizenship Authority, Commission or Ministry. This recommendation has been confirmed in an interview with staff from the Slovenian Ministry of Foreign Affairs in July 2013. It is argued this, while being a very small part of national identity, is still important. Having a single Ministry responsible for citizenship and immigrations ensure effective administration and oversight of future policy and legislative development in these area. It could enable the state to better inform and enhance national identity. The effective administration of a state's legal

¹⁷⁰⁶ Ministry of Interior Organisational Structure September 2013, http://www.mnz.gov.si/fileadmin/mnz.gov.si/pageuploads/SOJ/Organigrami/ORG_MNZ_1.9.2013_ang.pdf, accessed 8 November 2013.

¹⁷⁰⁷ Ibid.

framework ensures the state maintains national identity by demonstrating to other states a consistent approach to implementing national laws.

5.9 Residency

Migration enables a non-citizen to enter and stay in Slovenia and Australia but does not guarantee that the person will obtain citizenship. This section will not discuss the application process for citizenship, but rather focus on the residency requirements to obtain citizenship. An individual who has been granted a residency permit in Slovenia or in the case of Australia, permanent residence can apply for citizenship. However, the person must be eighteen years (18) of age and have been in Australia for a period of four (4) years and not absent for more than twelve (12) months. Where an individual has been resident for twelve (12) months and has not been absent from the state for more than ninety (90) days, they can also apply for citizenship.¹⁷⁰⁸ The notable difference between Australia and Slovenia is apart from having the same age requirement the individuals must have resided for a longer period in Slovenia. That period constitutes ten (10) years and five (5) years prior to making application must have been uninterrupted.¹⁷⁰⁹ In both states, there is a requirement to have a level of proficiency in language. Apart from the requirements of having to prove good character (criminal record), financial status, health and public interest test (not a threat to the state), in Australia an individual must demonstrate their knowledge of the responsibilities and privileges that come with having citizenship.¹⁷¹⁰ This is done through an examination, as discussed in **chapter three**.

Nevertheless, there are different requirements for skilled migration. If an applicant has a scientific, economic (skilled) or cultural benefit to Slovenia, the residency requirement is significantly reduced to one (1) year.¹⁷¹¹ Australia has a longer period of two (2) years during a period of four (4) years for the same benefits to the state. However, the individual must have been a permanent resident for twelve months before making an application.¹⁷¹²

Education is also an integral part of a nation's economic and social development, and therefore individuals who wish to obtain citizenship in Slovenia can do so by naturalisation, and having resided in the territory for seven (7) years.¹⁷¹³ The residency requirement associated with education is three (3) years less than the general ten (10) year requirement stated above.

¹⁷⁰⁸ *Australian Citizenship Act 2007*, sections 21 and 22.

¹⁷⁰⁹ Article 10, *Law on Citizenship*, Official Gazette of the Republic of Slovenia 24/2007.

¹⁷¹⁰ *Australian Citizenship Act 2007*, section 21.

¹⁷¹¹ Article 13, *Law on Citizenship*, Official Gazette of the Republic of Slovenia 24/2007.

¹⁷¹² *Australian Citizenship Act 2007*, section 22B, the further requirements attached to section 22B include being present for a total of 480 days during the 4 year period, being present for 120 days in the period of 12 months, being resident in Australia throughout the 4 year before applying and was not present in Australia unlawfully.

¹⁷¹³ Article 12, *Law on Citizenship*, Official Gazette of the Republic of Slovenia 24/2007.

Furthermore, for those individuals that would suffer significant hardship, disadvantage, or are a spouse, defacto partner of an Australian citizen there is the ability for the Minister to treat the time period no matter the length as being permanently resident.¹⁷¹⁴ The residency requirement can also be altered where there is a person undertaking activities in Australia that are beneficial to the state. This includes sport, employment within an agency of the Commonwealth, medical research a PhD in a specialty field of research, or a person who is a writer engaged in the Arts.¹⁷¹⁵

Once the application for citizenship has been lodged in Slovenia, Maša Kovič Dine argues that a ‘decision to grant citizenship is made at two levels in Slovenia, with the initial decision made by the administrative unit of the applicants place of residence’.¹⁷¹⁶ Secondly, the decision will then go to the Interior Ministry for finalisation.¹⁷¹⁷ The Australian Department of Immigration and Border Protection has responsibility for making the decision to grant or refuse citizenship. Upon approval the individual would be notified and would take the oath in Slovenia, and in the case of Australia the pledge and attend a citizenship ceremony. This separation in administrative function reinforces, as argued above, the need for a single agency in Slovenia to not only administer both immigration and citizenship. The residency requirements imposed by both states are exclusionary policy measures that go some way to strengthening a state’s national identity. The residency measures imposed by a state go some way to ensuring the individual integrates and has a knowledge of the state’s values, institutions and laws. They also allow the state to confirm whether the person is suitable to be a citizen of the state.

5.10 Bilateral Arrangements

To assist citizens moving between Slovenia and Australia, the states have established bilateral agreements in the areas of health care and social security. This thesis argues the introduction of bilateral agreements strengthens the role of postnational citizenship, as citizens from both states are able to take certain benefits with them to another state. The establishment of bilateral agreements has confirmed the ongoing relationship Slovenia and Australia have had for many years. It also supports the purpose of this research to compare their respective citizenship, immigration, rights and private international laws. It is argued by states establishing these types of agreements enhances national identity, through the engagement and exchange of ideas

¹⁷¹⁴ *Australian Citizenship Act 2007*, section 22 (6) (9).

¹⁷¹⁵ Explanatory Statement, *Australian Citizenship Act 2007*, Special Residence Requirement – Legislative Instrument.

¹⁷¹⁶ Maša Kovič Dine, *Naturalisation Procedures for Immigrants Slovenia*, EUDO Citizenship Observatory European University Institute, <http://eudo-citizenship.eu/admin/?p=file&appl=countryProfiles&f=33-Slovenia.pdf>, accessed 8 November 2013.

¹⁷¹⁷ The decision process allows an applicant to be heard and require information in accordance with the *Administrative Act*, Official Gazette of the Republic of Slovenia, No. 8/2010.

between citizens. These agreements enhance cross border private activities such as migration and marriage.

Health Care

Slovenia and Australia have established an agreement for medical protection of their citizens should they be injured in either state.¹⁷¹⁸ However, the agreement is limited to certain visa types. For instance, a Slovenian citizen (Y) travelling to Australia under a 405 or 410 retirement visa is covered for health insurance,¹⁷¹⁹ however they cannot reside in Australia for more than six (6) months in a twelve (12) month period.¹⁷²⁰ This extends to free treatment in a public hospital, subsidised medication, and out of hospital care. This will also be extended to the child who will study in Australia on a student visa from Slovenia, provided they have taken out Overseas Student Health Cover. X, (an Australian citizen) travelling to Slovenia under these arrangements, will also have access to Slovenia's health care system that includes hospital, medical, pharmaceutical, dental and ambulance services. Australia and Slovenia should investigate the opportunity to expand this agreement to also include other visa and permit types. It could be limited to only dual Slovenia and Australian citizens or those individuals who have a connection to the state (similar to the naturalisation process discussed in **chapter three**). Additionally, the agreement could be extended but limited to business and others who are making a valuable contribution to the state.

Social Security

Australia and Slovenia¹⁷²¹ have established a social security agreement¹⁷²² that allows the states to manage portable social security between their citizens.¹⁷²³ For these arrangements to be effective, individuals must be citizens of either state and they must have been resident in either state.¹⁷²⁴ For instance a person having dual citizenship¹⁷²⁵ and having worked in Australia for

¹⁷¹⁸ Australian Government, Department of Immigration and Citizenship, <http://www.immi.gov.au/visitors/retirement/410/>, accessed 6 April 2013.

¹⁷¹⁹ *Health Care and Health Insurance Act 1992*, Official Gazette of the Republic of Slovenia 99.

¹⁷²⁰ Australian-Slovenia Reciprocal Health Care Agreement, Australian Government, Department of Human Services, <http://www.humanservices.gov.au/customer/enablers/medicare/reciprocal-health-care-agreements/slovenia>, accessed 26 November 2013. For proof the individual needs a current Slovenian Passport, evidence of eligibility of health insurance in Slovenia and European Health Insurance Card.

¹⁷²¹ Agreement on Social Security between the Government of the Republic of Slovenia and the Government of Australia, Official Gazette of the Republic of Slovenia, No 36/2003.

¹⁷²² *Social Security (International Agreements) Act 1999*, Schedule 17.

¹⁷²³ Agreement on Social Security between the Government of Australia and the Government of the Republic of Slovenia, 2002, www.aph.gov.au/.../House_of_Representatives_Committees?.../slope, accessed 6 April 2013.

¹⁷²⁴ Article 5, *Social Security Act*, Official Gazette of the Republic of Slovenia, No. 105/06.

¹⁷²⁵ *Social Security (International Agreements) Act 1999*, s19.

thirty years,¹⁷²⁶ is able to claim an age or disability pension.¹⁷²⁷ These reciprocal arrangements enable a Slovenian¹⁷²⁸ citizen to receive those payments in Australia.¹⁷²⁹

Tax

With the constant movement of people across international borders for work (skilled migration), states have developed tax arrangements to ensure their citizens do not pay income tax twice.¹⁷³⁰ Slovenia and Australia do not have a double tax treaty. The European Australian Business Council¹⁷³¹ has recognised the twenty-seven (28) MS making up the European Union as part of the strategic alliance for business between the European Union, its member states and Australia. Slovenia forms part of that alliance. As part of enhancing the economic activity between Slovenia and Australia, while small, and part of the broader objective of business relationships with the European Union and Australia, consideration should be provided to establishing a tax treaty.

5.11 Conclusion

Immigration is a pathway to citizenship, immigration along with citizenship is multidimensional. Both concepts have an important role to play in national identity. The national identity is further strengthened as a result of a state requiring a non-citizen to meet their respective residency requirements before they can apply for citizenship. This chapter has confirmed that immigration is on the one hand public (national law) and on the other private (the act of migrating). This chapter confirmed that immigration does not provide a person with a legal status of citizenship to or within a state. Immigration allows a state to strengthen and retain its national identity by restricting who enters and stays. The new arrivals must understand, respect and implement the values, customs and rule of law, of that state. The findings in this chapter have confirmed that there is work to be undertaken by Slovenia, Australia and the European Union not only to harmonise their immigration laws (visas and permits), but also to strengthen their immigration policies by better linking them to citizenship and national identity. The chapter demonstrated Slovenia and Australia's long-standing relationship, as Australia has been a destination country from Slovenes since the mid 1800s. It is

¹⁷²⁶ Ibid, s23, Residence Factor is calculated at 300 months.

¹⁷²⁷ *Social Security (International Agreements) Act 1999*, Schedule 2.

¹⁷²⁸ Social Security Act, Official Gazette of the Republic of Slovenia, No. 105/06.

¹⁷²⁹ Social Security (International Agreements) Act 1999, section 5, schedule 2.

¹⁷³⁰ Slovenia: Double Tax Treaties, LowTax, Global Tax and Business Portal, http://www.lowtax.net/lowtax/html/slovenia/slovenia_double_tax_treaties.asp, accessed 30 September 2013.

¹⁷³¹ European Australian Business Council, <http://www.eabc.com.au/>, accessed 20 December 2013.

argued the comparative study in this chapter reinforces why Slovenia was chosen to compare its laws discussed throughout this research.

This chapter has demonstrated the sensitivities associated with permanent residency, particularly in Australia. The fragility of permanent residence in Australia cannot be underestimated, and the ability for government to use section 501 of the migration laws inappropriately so as to circumvent section 201, and cancel a residency visa. Australia could learn from the European Union and look more broadly to the rights of individuals when administering these provisions. Furthermore, with this tension in the Australian law, Australia should address the problem or encourage people to take out citizenship, which would provide greater protection. Finally, the chapter confirmed there are differences in the law, and both states could consider adopting the following measures, where appropriate. **Appendix One** has identified these measures as recommendations for both states to consider. These measures include:

- The review and change of Australia's migration legislation is long overdue. Australia can adopt a similar framework to Slovenia by separating economic and humanitarian migration into two separate acts. This would simplify the legislation and allow the laws to be easily interpreted and understood.
- Australia could learn from Slovenia and streamline the visa classes and subclass (types) by reducing the current number. Australia has more than 100 classes and subclasses of visas that allow non-citizens to enter the state. Slovenia has three.
- The immigration policies of Australia, Slovenia, and the European Union should be expanded to reference and link immigration to citizenship. Both states, could do a lot more to encourage new immigrants to take out citizenship, where they intend to reside in the state long term.
- The Blue Card Directive has simplified the conditions of entry and residence for highly skilled employees across the European Union. While Australians have access to the APEC card, a similar approach could be developed and established between Australia and ASEAN member states.
- Economic migration has been a significant contribution to Australia's nation building process. Visas have been established that allow for business skills, established business and business talent to assist Australia and its States and Territories in further advancing business opportunities. Slovenia could adopt a similar local framework to that of the

State of Victoria, Australia. The program established in Victoria assists the state to strengthen its local economy. The requirements are linked to the Victorian Government's State Nomination Occupation list. Slovenia should apply a similar approach to be implemented across the Administrative Units however central decision-making would still be required by the Ministry of Interior.

- Australia's economic immigration program has been enhanced through the requirement for an individual to meet the points test in accordance with sections 92 to 95 of the *Migration Act 1958*. The points test is based on age, level of English, length of skilled employment, holding a degree (depending on the industry). The European Union and Slovenia could establish a similar test. The European Union could standardise a framework by developing a Directive to include points system and list of skills needed for future skilled migration across the region. The skills list will need to identify those specialists and general (agricultural production) skill sets that are needed by each member state. However, language could be a barrier to the implementing this proposal, unless the European Union and Slovenia were willing to provide language lessons.
- Environmental refugees will not only be a problem for Australia, but also the European Union and Slovenia, whether directly impacted or becoming destination countries for refugees. Former Australian Senator Kerry Nettle from the Australian Greens Party in 2007 put forward the Migration (Climate Refugees) Amendment Bill 2007, to create a new visa category so the government can recognise and accept those individuals displaced by environmental disasters due to climate change. Australia, Slovenia, and the European Union should expand their current legislation to allow for environmental refugees. Australia and Slovenia could include this proposal as a category under the current humanitarian visa.
- Testing (language, history and culture) should be imposed on permanent residents every five years. The testing could be similar or an advanced model to that of Australian citizenship testing. The benefits would improve assimilation and understanding of the state and its identity. However, it is noted that such a proposal may undermine multiculturalism in Australia.
- There are up to twenty-three European legal instruments transposed into Slovenian national immigration law. Slovenia could take a lead role and propose to the European Union to explore consolidating and simplifying the large number of Regulations, Directives and Decisions pertaining to migration (entry and stay) in member states. This would include all legislative instruments pertaining to economic and humanitarian entry and stay.

- Slovenia and Australia have not established a double tax treaty, and it could be time for either state to examine the viability for this to occur. Slovenia and Australia has established an agreement for medical protection should citizens be injured in either state. However, this benefit is restricted to 405 or 410 retirement visas. Australia and Slovenia should investigate the opportunity to expand this agreement to also include other visa and permit types such as tourists, workers and individuals conducting business and trade for a period of up to three years.
- The future administration of citizenship, immigration and naturalisation law and policy in Slovenia could come under a single Immigration or Citizenship (Citizenship and Immigration, or Immigration and Citizenship) Authority, Commission, or separate Ministry.

The immigration legal framework for Australia and Slovenia go hand in hand with their respective citizenship laws. Today, a state cannot have immigration laws without having citizenship laws. Adopting the proposed recommendations discussed above would enable both states to strengthen their current day immigration laws, and in turn enhance national identity. The recommended proposal for the European Union to reform its immigration legal framework will make it easier for member states, their citizens and third country nationals to understand and implement. There would be no affect to national identity from this proposal. This chapter has demonstrated that national identity has been maintained and strengthened by a state's immigration legal framework.

Chapter 6 – Private International Law – Slovenia and Australia

6. Overview

The ability of a Slovene citizen to migrate from Slovenia to Australia or vice versa and engage with citizens in private activities is regulated by both states. Private International Law helps facilitate those private activities of a citizen such as marriage and divorce across international borders. Transnational engagements between citizens from Slovenia and Australia constitute private activities. It has become an important part of citizenship as it impacts on the daily lives of citizens. The law discussed in this chapter is the law to 2015. This chapter demonstrates that citizenship is not the deciding factor when determining the choice of law and jurisdiction in private activities such as marriage (across international borders). This chapter will also demonstrate how both jurisdictions have applied the legal principles of citizenship, residence and location (country) in private international law (marriage, divorce, paternity or maternity, maintenance, parental responsibility, international adoption, matrimonial property [immovable and common assets], inheritance and superannuation). Slovenia's *Private International Law and Procedures Act* provides the basis for determining the choice of laws and jurisdiction in private activities. Australia does not have equivalent legislation and that responsibility rests with the judiciary. This chapter does not examine the procedural laws or the dispositive and indicative¹⁷³² rules to ascertain the governing law. The chapter provides an example of how citizenship, residence and location applies in marriage, divorce parental responsibility, child maintenance, the purchase of property, inheritance and personal income tax between an Australian and Slovenian. Even though this chapter has very little to do with the citizenship laws of both states, private international law forms part of the overall legal framework to assist the state in facilitating private activities between citizens across international borders. Therefore, this law also forms part of national identity, and assists citizens to participate in the globalised world. Therefore, private side of citizenship is an important part of modern day citizenship. Finally, the chapter will identify areas within the law that both states could adopt as part of their legal frameworks.

¹⁷³² Dispositive laws describe the rules of law which determine the rules (national or domestic) that are applied in a matter. The indicative rules identify the legal system, and in this case it could be either the civil law or common law of either Slovenia or Australia.

6.1 Introduction

Citizens being transnational¹⁷³³ is not new but today states such as Slovenia and Australia have established laws to facilitate cross border engagements. Laws established by state enable the ‘process by which citizens forge and sustain multi-stranded social relations that link them to societies of origin and settlement’.¹⁷³⁴ Private international law (PIL) can be traced back over many centuries to the Roman Empire, when it was applied in disputes between citizens,¹⁷³⁵ across international jurisdictions.¹⁷³⁶ Karen Knop argues ‘private international law is the private side of citizenship’ and is triggered by travel and cross border engagements between citizens from different states.¹⁷³⁷ Citizenship is multidimensional and has been used to provide a legal status, integrate and unify a state’s population. The state has control over a territory and the people of the state are joined by citizenship. Having citizenship enables a person to move between states and encounter the foreign. Furthermore, the private act of a citizen constitutes an individual’s decision to marry another citizen, divorce, purchase property and have a family. These concepts of citizenship enable citizens to participate in a globalised and regionalised world. However, PIL doesn’t confirm the legal status of a citizen within a state, but rather, in the cosmopolitan¹⁷³⁸ sphere of globalisation enhances a citizen’s individual freedom. That freedom allows the individual to engage with other citizens across international borders in private activities.

The international legal instrument (s) established by the Hague Conference on PIL cover those private activities across international borders and include civil procedure, residence, divorce, and maintenance of children¹⁷³⁹ and assist and guide states in PIL matters. Australia and Slovenia have a private legal framework that allows citizens from both states to take up residence and citizenship. Citizenship and residence form part of the connecting factors when determining which law will apply in private international law. However, as discussed later in this chapter citizenship only plays a minor role in determining the connecting factors in PIL matters. The connecting factors include residence, intention, family and employment. Nevertheless, in a globalised world, these laws help facilitate private activities of citizens across

¹⁷³³ Steven Vetovec, *Transnationalism and Identity*, *Journal of Ethnic and Migration Studies*, Vol. 27, No. 4: 2001.

¹⁷³⁴ Rudd Koopmans and Paul Statham, *How national citizenship shapes transnationalism*. A comparative analysis of migrants Claims-making in Germany, Great Britain and the Netherlands, *Revue Euroheranna des Migrations Internationales*, REMI, 2001, 63-100.

¹⁷³⁵ Reid Mortensen, Richard Garnett, Mary Keyes, *Private International Law in Australia*, 2nd Edition, LexisNexis Butterworths, 2011, 8.

¹⁷³⁶ Peter Stone, *EU Private International Law*, Second Edition, Elgar European Law, 2010, 3.

¹⁷³⁷ Karen Knop, *Citizenship Public and Private*, *Law and Contemporary Problems*, Vol. 71:309, 2008, 309-340.

¹⁷³⁸ Immanuel Kant, *To Perpetual Peace: A Philosophical sketch*, in Ted Humphrey, Hackett Publishing, 2003, para 358.

¹⁷³⁹ Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=text.display&tid=26, accessed 4 March 2013.

international borders and reflect national identity of a state. That is, a citizen is provided citizenship by the state, and the private laws of that state enable the citizens to participate in private activities that transcend international borders.

6.2 Private International Law

Private international law is an important part of modern day citizenship. Private international law affects the daily lives of citizens who engage across international borders in private activities such as marriage. Slovenia and Australia have taken a very different approach to the administration and regulation of private international law. A key feature of Australia's common law system is the responsibility of the judiciary to determine the choice of law. Australia, when compared to Slovenia has limited legislation specific to PIL, which an example is provided later in this chapter. Slovenia on the other hand relies on legislation that codifies the legal principles. The next section discusses the approaches taken by Slovenia and Australia. Although PIL by definition affects multiple jurisdictions, individual states have their own PIL.

(i) Slovenia

Slovenia has implemented the *Private International Law and Procedures Act* (PIL Act) of 1999. The PIL Act provides the basis for determining the law to be used in personal, family, property and other civil relations with an international element.¹⁷⁴⁰ Kreso Puharič¹⁷⁴¹ states that Slovenia upon independence tried to maintain legislative continuity from the former Yugoslavia. However, this did not extend to all aspects of PIL, and did not account for European PIL.¹⁷⁴² Furthermore, Puharič highlights that the initial draft of the PIL Act considered private international law from Austria, Germany, and Switzerland, and retained some elements from the former Yugoslavia PIL. Today, the PIL Act reflects the modern day independent state of Slovenia within the European Union.¹⁷⁴³

The PIL Act operates between Slovenia and third countries such as Australia. The PIL Act determines where citizenship or residence applies in cross border personal activities such as marriage,¹⁷⁴⁴ divorce,¹⁷⁴⁵ matrimonial property,¹⁷⁴⁶ relations between children and parents,¹⁷⁴⁷

¹⁷⁴⁰ Article 1, *The Private International Law and Procedure Act*, Official Gazette of the Republic of Slovenia No. 56/99.

¹⁷⁴¹ Kreso Puharič, *Private International Law in Slovenia*, in *Yearbook of Private International Law*, Kluwer Law International & Swiss Institute of Comparative Law, Vol 5, 2003, 155-157.

¹⁷⁴² Ibid.

¹⁷⁴³ Ibid.

¹⁷⁴⁴ Article 34, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia, 56/99.

¹⁷⁴⁵ Article 37,

¹⁷⁴⁶ Ibid, article 38.

paternity or maternity,¹⁷⁴⁸ maintenance,¹⁷⁴⁹ international adoption,¹⁷⁵⁰ wills¹⁷⁵¹ probate affairs,¹⁷⁵² personal names,¹⁷⁵³ and guardianship.¹⁷⁵⁴ The PIL Act also describes where residence will apply such as dual citizenship,¹⁷⁵⁵ stateless persons,¹⁷⁵⁶ or a person having temporary residence.¹⁷⁵⁷ The PIL Act describes where the place or location (state law) will apply to such issues such as contracts with employees,¹⁷⁵⁸ contracts for matrimonial property,¹⁷⁵⁹ and personal injury while employed. Not only does the PIL Act provide certainty for Slovenian citizens, the legislation also assist the citizens and state by providing clarity of when citizenship, residence and location will be applied. Therefore, the private side of citizenship is an important part of modern day citizenship. Moreover, the nation state has the sovereign right to develop laws, to facilitate the transnational engagement of citizens in private activities. The PIL laws of Slovenia achieve this.

(ii) Australia

Australia has adopted a minimalist approach to developing legislation that specifically deals with PIL matters. Australia relies on the judiciary to determine whether residence or citizenship applies in private international law matters. Alex Mills argues that PIL has assisted states in retaining and strengthening their sovereignty, nationalism and identity.¹⁷⁶⁰ The Australian Government has recognised the incoherence in private international law in Australia and has proposed that a private international law code be developed.¹⁷⁶¹ State, Territory courts and the Federal Court, have "long-arm" rules permitting service of process upon defendants in a broader range of circumstances than at common law.¹⁷⁶² The result of having nine different regimes governing courts' personal jurisdiction over overseas defendants¹⁷⁶³ provides an incoherent and inconsistent approach for how basic legal principles are to operate. The need for coherence in private international law has been summarized as 'there is a growing need for legal certainty in a world where people and corporations have seemingly unfettered mobility. Ensuring legal

¹⁷⁴⁷ Ibid, article 42.

¹⁷⁴⁸ Ibid, article 43.

¹⁷⁴⁹ Article 44.

¹⁷⁵⁰ Article 46.

¹⁷⁵¹ Article 33.

¹⁷⁵² Article 32.

¹⁷⁵³ Article 14.

¹⁷⁵⁴ Article 15.

¹⁷⁵⁵ Article 10.

¹⁷⁵⁶ Ibid, article 11.

¹⁷⁵⁷ Ibid, article 11.

¹⁷⁵⁸ Ibid, article 21.

¹⁷⁵⁹ Ibid, article 39.

¹⁷⁶⁰ Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International ordering of Private Law*, Cambridge, 2009, 66.

¹⁷⁶¹ Federal Court of Australia, <http://www.fedcourt.gov.au/digital-law-library/judges-speeches/chief-justice-allsop/allsop-cj-20130410>, accessed 4 March 2017.

¹⁷⁶² Ibid.

¹⁷⁶³ Ibid.

certainty places responsibility on those in charge of managing justice'.¹⁷⁶⁴ That is, the Australian Government has a responsibility to develop laws that are easy to understand, accessible by all and consistent across internal jurisdictions (states and territories) where issues involve transnational (cross border) conflict. The benefit of legislative rules as Federick Hayek argues is that legislation is supposed to provide a greater level of legal certainty¹⁷⁶⁵ and minimises the gaps in the law. Providing clarity in the law and its text allows the law to be easily understood by all its recipients. It is this legal certainty that could be improved in Australia and would close the gaps in the law. Australia could look to Slovenia's private international legal framework to assist.

Australia has adopted the common law principle of domicile via the *Domicile Act 1982*¹⁷⁶⁶ (*The DA*) (*Cth*) moved away from domicile of legitimacy, to domicile of residence.¹⁷⁶⁷ In *Henderson*,¹⁷⁶⁸ the court determined that domicile is the legal relationship between the citizen and the country where that person is able to invoke the country's laws as their own. Section 8 provides a person has independent domicile at the age of eighteen. Children have domicile of their parents.¹⁷⁶⁹ An individual's domicile is the country with which the individual has their closest connection.¹⁷⁷⁰ The intention of a person to choose their domicile becomes important when determining the subtle differences between the common law principle of domicile and the civil law concept of habitual residence (residence). However, the domicile in Australia does not extend to those cross border activities that have been provided for by the Slovenian PIL Act. The *Domicile Act* applies to domicile in or outside the area that constitutes Australia only¹⁷⁷¹ and clarifies the intention of a person to acquire domicile of choice.¹⁷⁷² The next section discusses the differences between the common law principle of domicile and the civil law principle of habitual residence.

¹⁷⁶⁴ American Law Institute and UNIDROIT, *Principles of Transnational Civil Procedure* (Cambridge University Press, 2006) xxxiv-xxxv.

¹⁷⁶⁵ Federick Hayek, *Law, Legislation and Liberty: A New Statement of Liberal Principles of Justice and Political Economy*, Routledge & Kegan Paul, Vol 1, 1973, 116-118.

¹⁷⁶⁶ *Domicile Act 1982*, Commonwealth, <http://www.comlaw.gov.au/Details/C2008C00386>, accessed 2 March 2013.

¹⁷⁶⁷ Michael Dirkis, *Nowhere man sitting in his nowhere land: The continuing saga of cross border arbitration*, *Revenue Law Journal*, Vol 21, Issue 1, 2013, 5, 179.

¹⁷⁶⁸ *Henderson v Henderson* [1965] 1 All E.R.

¹⁷⁶⁹ *Domicile Act 1982*, s 9.

¹⁷⁷⁰ *Ibid*, s10.

¹⁷⁷¹ *Ibid*, s3.

¹⁷⁷² *Ibid*, s10.

Domicile and Habitual Residence

Domicile and residence form part of the legal process to allow a person to acquire citizenship in time of state succession.¹⁷⁷³ The Paris Treaty 1947 between the former Yugoslavia and Italy determined that those people who had permanent residency on 10 June 1940 when it became Yugoslavia, lost their Italian citizenship. The people in the Italian territory had the option to claim either Yugoslav or Italian citizenship.¹⁷⁷⁴ This is highly significant in the context of this chapter and the private side of citizenship. The common law of Australia has traditionally relied on the principle of domicile, whereas Slovenia relies on the principle residence or habitual residence.

The Hague Convention relating to the settlement of the conflicts between the law of nationality and the law of domicile was established in 1955, to overcome the conflict between the law of nationality and residence. The convention reinforces the principle that domicile rather than citizenship or nationality is applicable in PIL matters. However, the convention does not define or discuss the differences between domicile and habitual residence.¹⁷⁷⁵ Despite this international convention being established in 1955,¹⁷⁷⁶ it has only been signed by five countries with two countries fully ratifying the instrument. The legal instrument today may not be relevant, but neither Australia nor Slovenia has ratified the convention.¹⁷⁷⁷ This thesis does not assert that either state should ratify the convention, but rather explores whether it is relevant.

The American courts have ‘had to decide whether ‘residence was intended as a synonym for domicile’.¹⁷⁷⁸ Cavers argues that “habitual residence is not a half-way house between domicile and residence, but rather a connection between a citizen and a territory”. This is distinct from the notion of a legal headquarters and can be freed from the constraining rules of the function of domicile.¹⁷⁷⁹ Habitual residence concludes when the resident no longer continues to use the residence habitually.¹⁷⁸⁰ Cavers further highlights that a person may not have residence anywhere, particularly if they are constantly mobile, and therefore, it will come down to the

¹⁷⁷³ The Saint-Germain – en-Laye Peace Treaty 1920. Treaty of Trianon 1921.

¹⁷⁷⁴ Felicita Medved, *Unified Slovenian Nation: Slovenian Citizenship Policy towards Slovenians Abroad*, in Gyözö Cholnoky, Zoltán Kántor, András Ludányi and Eszter Herner-Kovács, *Minority Studies Special issue Trends and Directions of Kin-State Policies in Europe and Across the Globe*, Lucidus Kiadó, 2014, 153- 184.

¹⁷⁷⁵ Articles 4 & 5, Convention relating to the settlement of the conflicts between the law of nationality and the law of domicile was established in 1955, Hague Conference on Private International Law, http://www.hcch.net/index_en.php?act=conventions.text&cid=35, accessed 12 October 2013.

¹⁷⁷⁶ Ibid.

¹⁷⁷⁷ Hague Conference on Private International Law, Status Table, http://www.hcch.net/index_en.php?act=conventions.status&cid=35, accessed 12 October 2013, Belgium, France, Luxembourg, Netherlands and Spain.

¹⁷⁷⁸ David Cavers, *Habitual Residence: A Useful Concept*, *The American University Law Review*, Vol 21, 1972, 480-483.

¹⁷⁷⁹ Ibid.

¹⁷⁸⁰ Ibid.

state of mind (the individual's intention) of where their residence is located. Additionally, it will be the connecting factors that are determined by a jurisdiction that will ultimately decide where a citizen resides.¹⁷⁸¹

There are arguments for and against both principles, but in a global transient world the connecting factors provide greater certainty of where a citizen is located. That is, a person could have a base in Melbourne, Australia (property, family and investments), but spends four out of five years working and living in Indonesia. The concept of domicile is not uniform throughout the world and to a civil lawyer it means habitual residence.¹⁷⁸² Conversely, at common law it is regarded as an individual's permanent home. Increasingly, common law states such as Britain are applying habitual residence to matrimonial jurisdiction, recognition of foreign divorces and succession matters.¹⁷⁸³ Habitual residence appears to be the most appropriate concept to use in meeting the demands of a modern day society.¹⁷⁸⁴ Habitual residence provides greater flexibility and is more relevant today. This also demonstrates that Britain, like Australia and Slovenia has borrowed from civil law to modernise, where appropriate, its application of the law in private international legal matters.

Habitual residence has been defined to include 'the state in which the person or persons is concerned to be habitually residing and where the habitual center of their interests is located.'¹⁷⁸⁵ The courts may consider a number of things such as employment and family situation,¹⁷⁸⁶ and the length and continuity of residence.¹⁷⁸⁷ Both domicile and habitual residence as legal principles are also used in accordance within European law - Brussels I Regulation.¹⁷⁸⁸ Brussels I and European PIL operates where the defendant is domiciled in one of the member states of the European Union, other than their state of origin.¹⁷⁸⁹ Brussels I repeatedly refers to both domicile and habitual residence in civil and commercial matters where a court is required to determine the applicable laws in private matters, except revenue, customs or administration.¹⁷⁹⁰

¹⁷⁸¹ Ibid.

¹⁷⁸² James Fawcett, Janeen Carruthers, Peter North, *Cheshire, North and Fawcett, Private International Law*, fourth edition, Oxford University Press, 2008, 154-195.

¹⁷⁸³ The Law Reform Commission Ireland, Report on Domicile and Habitual Residence As Connecting Factors in the Conflict of Laws, <http://www.lawreform.ie/fileupload/consultation%20papers/wpHabitualResidence.htm>, accessed 28 November 2013.

¹⁷⁸⁴ Ibid.

¹⁷⁸⁵ Ibid.

¹⁷⁸⁶ Case 90/97, *Swaddling v Adjudication Officer* [1999] ECR I-1075, 29. The case also referred to Case 76/76 *Di Paolo v Officer of National de l'Emploi* [1997] ECR 315 paragraphs 17 to 20.

¹⁷⁸⁷ Case 90/97, *Swaddling v Adjudication Officer* [1999] ECR I-1075, 29. The case also referred to Case 76/76 *Di Paolo v Officer of National de l'Emploi* [1997] ECR 315 paragraphs 17 to 20.

¹⁷⁸⁸ Article 2, Council Regulation (EC) No 44/2001, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union L 12/1.

¹⁷⁸⁹ Ibid, article 2.

¹⁷⁹⁰ Ibid.

Brussels I,¹⁷⁹¹ as Peter Stone puts it, is the most important legal instrument in the sphere of PIL within the European Union.¹⁷⁹² It extends to natural persons, marriage, bankruptcy, wills and succession as well as social security. The European Court of Justice¹⁷⁹³ has interpreted 'residence' as 'habitual' or 'normal residence', pointing to a connection with a state.

For matrimonial proceedings and parental responsibility for children located in the European Union Brussels II was introduced.¹⁷⁹⁴ It applies to civil matters on divorce, legal separation or marriage annulment, but does not extend to grounds for divorce or property consequences of the marriage.¹⁷⁹⁵ In *Marinos v Marinos*¹⁷⁹⁶ the court had to decide on what constituted habitual residence. The case related to a Greek man and an English woman who married had children and, for a period worked and resided in England. The court calculated the time spent in Greece and the United Kingdom, in addition to other connecting factors such as employment and family. This demonstrates that there are many considerations a court will take into account when determining habitual residence. The court ruled that habitual residence in a member state will be where the matrimonial home (the family home) is located.¹⁷⁹⁷ The court also determined the connecting factors were based on the central 'interests' such as employment, education, children, land (state) of birth, time spent in the state, and the state and emotional attachment and commitment that was retained by individuals to these connecting factors.¹⁷⁹⁸

Similar to domicile (of origin and choice), habitual residence can be categorised as the ordinary residence and the voluntariness of residence.¹⁷⁹⁹ A person may lose their residence: for example, a Slovenian who has permanent residency in Australia could lose that residency where they have committed a crime against the state. There is an overlap between the meaning of ordinary residence and habitual residence, whereby ordinary residence means that the person must be habitually and normally resident, in a particular place.¹⁸⁰⁰ That includes the partial or temporary absences from that residence such as a citizen being on holidays, or employed to work in another state for a short period.

¹⁷⁹¹ Council Regulation (EC) 44/2001, on jurisdiction and the recognition and enforcement of judgments in Civil and Commercial matters, Official Journal of the European Union L 12.

¹⁷⁹² Peter Stone, *EU Private International Law*, 2nd Edit, 2010, Elgar European Law, 6.

¹⁷⁹³ Jan Wouters, *Residence of Individuals in EU law*, Institute for International Law, Katholieke Universiteit Leuven, Working Paper No. 148 – April 2010.

¹⁷⁹⁴ Council Regulation 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, Official Journal of the European Union L 338.

¹⁷⁹⁵ *Ibid.*

¹⁷⁹⁶ *Marinos v Marinos* [2007] EWHC 2047 (Fam).

¹⁷⁹⁷ *Ibid.*

¹⁷⁹⁸ *Ibid.*

¹⁷⁹⁹ *Nessa v The Chief Adjudication Officer and Another* [1999] UKHL 41; [1999] 4 All ER 677; [1999] 1 WLR 1937.

¹⁸⁰⁰ *Ibid.*

In *Bank of Dubai v Abbas*¹⁸⁰¹ the court, rather than refer to habitual residence, stated that ‘residence’ requires a settled place of abode with a substantial degree of performance or continuity. Additionally, the presumption of a substantial connection from three months’ residence provides no guidance as to whether the person was, or has become, a resident. While this case related to international trade, it nevertheless, demonstrates the different permutations the courts have defined to be residence, habitual residence or domicile. Nonetheless, there is a key theme running through residence, habitual residence and domicile. That is, the connecting factors will in most circumstances include the period of time, intention of the person, nature and circumstances of the individual’s or parties’ residence. However, being a concept of common law, domicile is defined by a person always having a domicile but a person can only have one domicile at any one time.¹⁸⁰² Furthermore, it can be defined as ‘a person’s domicile that connects him with a system of law for the purposes of determining a range of matters principally related to status of property (immovable).’¹⁸⁰³ David Cavers argues there has been a shift away from domicile to habitual residence as the connecting factors in private international law. This has come about because of the increasingly mobile population and the introduction of dual citizenship.¹⁸⁰⁴ However, and even though there has been a shift from domicile to habitual residence, it is argued that domicile is a rigid concept when compared to habitual residence.

In *Korkein hallinto-oikeus*¹⁸⁰⁵ it was stated that habitual residence must be distinguished from mere presence, and normally be for a certain period of duration. It was also determined that in family law disputes, determining habitual residence of a child, further contributing factors needed to be understood such as the age of the child, leisure activities, schooling, friends, command of the local language, and contact with other family members including relatives.¹⁸⁰⁶ What the court is saying is that one test will not fit all circumstances and must be evaluated on its merits.¹⁸⁰⁷ However, under common law, habitual residence has been more problematic. The High Court of Australia in *LK v Director General, Department of Community Services*¹⁸⁰⁸ stated there was a lack of uniformity in determining habitual residence, and that the settled intention was necessary to understand what constituted the principle. However, in Australia, in matters concerning tax, the expression ‘permanent place of abode’ is also used to determine whether a person has permanent residence or the residency requirement of 183 days is met in order for tax

¹⁸⁰¹ *Bank of Dubai v Abbas* [1997] ILPr 308.

¹⁸⁰² *V v V* [2011] EWHC 1190 (Fam)

¹⁸⁰³ Hong Kong Law Reform Commission and the Consultation Paper on Rules for Determining Domicile, HKLRCCP, 1 2004, PARA 1.2.

¹⁸⁰⁴ David Cavers, *Habitual Residence: A Useful Concept?*, *The American University Law Review*, 1971-1972, 476.

¹⁸⁰⁵ Case – 523/07 *Korkein hallinto-oikeus* [2009], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0523:EN:HTML>, accessed 2 April 2013.

¹⁸⁰⁶ *Ibid.*

¹⁸⁰⁷ *Ibid.*

¹⁸⁰⁸ *LK v Director-General, Department of Community Services* [2008] FamCAFC 81 INCADAT HC/E/AU 995.

to be paid. In *Applegate*¹⁸⁰⁹ the expression 'place of abode' was qualified as being the physical surroundings in which the person lives. Therefore, similarities between the use of the word and domicile exist, as they both refer to where the person lives. That is, where the person permanently resides. European law in accordance with Council Regulation 2201/2003 has accommodated both habitual residences for most member states of the European Union, and for the United Kingdom and Ireland, domicile can be used.¹⁸¹⁰ Thus, there is clear recognition by the European Union that domicile, being a common law principle still, operates within those MS that use common law.

It is difficult to distinguish between domicile and habitual residence. Even so, and while, the differences are subtle, domicile is more rigid. Domicile is the legal registration of a citizen to a state where that citizen has their permanent home. On the other hand, habitual residence is where a citizen is resident, no matter in what state they reside. That is, a citizen may not be habitually resident in the state in which they were domiciled or where they have citizenship. It is further argued that the connecting factors including employment, family, birth, property, investments and the intention of the person will provide guidance to the courts in determining what law will apply. Slovenia, unlike Australia, provides greater clarity under article 10 of the PIL Act that states where a persons' residence cannot be determined, no matter where that person holds citizenship, the 'closest ties' will be the determining factor of what laws will apply. Domicile continues to be a common law principle applicable to PIL and habitual residence originated by the civil law. Even though it is difficult to separate the two principles, it will be the connecting factors, which ultimately determines the jurisdictional laws that apply. These principles have no impact on the acquisition or loss of citizenship. The private side of citizenship is important to this thesis and national identity because Australia and Slovenia allow their citizens to participate in private activities beyond the nation states border.

¹⁸⁰⁹ *Applegate v Federal Commissioner of Taxation* (1979) 9 ATR 899, 910-11, 79ATC 4307, 4317.

¹⁸¹⁰ Council Regulation (EC) 2201/2003, concerning the jurisdiction and the recognition and enforcement of judgements in international matters and the matters of parental responsibility, Official Journal of the European Union L 338.

6.3 Private Activities across International Borders

The table below outlines how citizenship, residence and location applies in private international law matters between Slovenia and Australia.

Table - One

Private Activities (across international borders)	Residence		Citizenship/ Nationality		Location
	Australia	Slovenia	Australia	Slovenia	Slovenia/ Australia
Marriage	X	X	X	X	
Divorce	X	X	X	X	
Paternity or maternity	X	X	X	X	
Child Maintenance	X	X	X	X	
Parental Responsibility	X	X	X		
International Adoption			X	X	
Matrimonial Property (Purchase of Immovable)					X
Matrimonial Property (Common Assets)	X	X	X	X	
Inheritance (Succession)					X
Will					X
Probate			X*		
Superannuation	X	X			

*Citizenship at the time of death.

Comparatively, there are many similarities associated with the application of citizenship, residence and location in private international law between the two jurisdictions. Furthermore, the similarities confirm that the universality of legal principles both states have adopted, resulting in the rules pertaining to private activities, are close to being the same. Part of a state's national identity allows their citizens to participate in the wider world, across international borders. To do so, the state requires a legal framework to allow their citizens to engage with other citizens in other nation states. Firstly, Slovenia has implemented the PIL Act that has provided clear, concise and easy to follow rules in PIL matters. Australia has PIL rules throughout common law (the judiciary). Despite the similarities, marriage is based on

citizenship law of where the marriage was registered.¹⁸¹¹ However, there are many variables between both states legal frameworks in the area of cross border private activities such as marriage and divorce. Below outlines examples of the complex nature of choice laws that apply in private cross border activities between Australia and Slovenia. The law discussed in this chapter contributes to the legal framework that applies to citizenship today. The section also confirms that citizenship has little relevance in marriage, divorce, parental responsibility, child maintenance, purchasing property, inheritance and personal income tax.

Marriage

The registration of the marriage in Australia can occur after the marriage has been finalised in Slovenia. That is, the marriage in Slovenia will be deemed to be valid when the marriage certificate has been issued and the registration concluded in Slovenia.¹⁸¹² Despite this process in Slovenia, a (foreign) marriage in Slovenia (between a Slovenian and an Australian) will be recognised under Part VA of the Australian *Marriage Act 1961*.¹⁸¹³ The marriage of a Slovene and an Australian citizen in Australia will be valid in Slovenia, provided the marriage was valid under Australian law.¹⁸¹⁴ The minimum age for marriage in either state is generally the age of 18. However, section 12 of the Australian *Marriage Act 1961* enables a person between the age of 16 and 18 to be married provided the courts approve. With special permission from a Social Work Centre, individuals under the age of 18 can be married in Slovenia. However, and unlike Australian law, Slovenia does not specify a minimum age.¹⁸¹⁵

Pre-marital contracts exist in both Australia¹⁸¹⁶ and Slovenia.¹⁸¹⁷ These can be established between spouses in relation to matrimonial property and used at the time of divorce to manage the settlement of property and assets.¹⁸¹⁸ The general principle will be dividing the assets equally between the parties.¹⁸¹⁹ During a marriage the parties can establish a contract in order to divide the property between them.¹⁸²⁰ Similar to the process in Australia, in Slovenia a marriage

¹⁸¹¹ Article 35 & 36, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸¹² *Marriage Act 1961*, Part VA – Recognition of foreign marriages,

¹⁸¹³ *Ibid.*

¹⁸¹⁴ Article 36 and 82, *The Private International Law and Procedure Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸¹⁵ Article 23, *Law on Marriage and Family Relations*, Official Gazette of the Republic of Slovenia 69/2004.

¹⁸¹⁶ *Family Law Act 1975*, sections 90B, 90D, 90UB, 90UC, 90UD,

¹⁸¹⁷ Matjaž Tratnik, *Unexpected Circumstances*, Slovenian Report, University Maribor, www.unexpected-circumstances.org/Slovenian%20report.doc, accessed 2 April 2013.

¹⁸¹⁸ Article 39, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸¹⁹ *Ibid.*, article 59.

¹⁸²⁰ *Ibid.*, article 58.

contract can be arranged (in Slovenia) between the parties but the technical arrangements for recognition are slightly different as there is a requirement for notarial recording.¹⁸²¹

Divorce

Divorce in both states is based on citizenship and residence.¹⁸²² The grounds for divorce in Slovenia constitutes that the marriage is unbearable.¹⁸²³ In the case of Australia the marriage must have been broken for not less than 12 months before the application for divorce.¹⁸²⁴ The order should not be made where it is likely the couple will continue to reside together.¹⁸²⁵ A major difference is that the Australian legislation goes further than the marriage laws of Slovenia, by specifying a 12 month period of separation. The divorce between an Australian and Slovenian will be recognised by Slovenia when undertaken in Australia.¹⁸²⁶ However, should the divorce not be able to be achieved in Australia, article 37 (3) of the PIL Act would allow the laws of Slovenia to be used. This is provided that one of the partners to the marriage is permanently residing in Slovenia. There is further flexibility provided for Slovene citizens to divorce, whereby, if the partners to the marriage are not permanently residing in Slovenia, and the law of Australia cannot be used, the couple can opt to use Slovenian law to dissolve the marriage.¹⁸²⁷

A divorce undertaken in Slovenia will be recognised by Australia where the applicant has their ordinary residence in Slovenia. However, residence must have continued for not less than one year, or, the last place of cohabitation.¹⁸²⁸ The Slovenia PIL Act specifies that the divorce will be recognised on the basis of permanent residence. The *Family Law Act 1975* defines 'ordinary residence to mean the couple are 'habitually resident'. Therefore, the divorce of a Slovenian and Australian (couple) can be undertaken in either state. Australia is a signatory to the Hague Convention on the Recognition of Divorces and Legal Separation 1970. However, according to the Hague Conference on International Law August 2013, Slovenia has not ratified this convention, and therefore, it should ratify this international legal instrument. Slovenia has determined that where individuals are from different states it could be the cumulative laws of those states that apply.¹⁸²⁹ For instance, in a divorce that is in dispute under Australian law, the law of Slovenia may be used provided the spouses (citizens) are from either state. Divorce in

¹⁸²¹ Article 129, *Notaries Act*, Official Gazette of the Republic of Slovenia, No. 2/2007.

¹⁸²² *Family Law Act 1975*, Section 39 (3). Article 37 *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸²³ Article 65, *Marriage and Family Relations*, Official Gazette of the Republic of Slovenia, 69/2004.

¹⁸²⁴ *Family Law Act 1975*, s48.

¹⁸²⁵ *Ibid.*

¹⁸²⁶ *Ibid.*, article 37.

¹⁸²⁷ *Ibid.*

¹⁸²⁸ *Family Law Act 1975*, s104 (3).

¹⁸²⁹ Article 37 *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

Slovenia will be recognised under Australian law.¹⁸³⁰ This will apply where the individual is resident in Slovenia for more than one year, and the last cohabitation or their residence was in Slovenia.¹⁸³¹

Parental responsibility

Parental responsibility and child maintenance are closely linked. The laws pertaining to access and custody are based on residence. That is, a person (parent) upon divorce will have responsibility for the custody for a child or children, more than the other parent. The Australian *Family Law Act 1975* (Cth) enables the Australian Family Court to decide on matters relating to a child's custody, guardianship and access. In Slovenia, the Marriage and Family Relations Act is the relevant legislation.¹⁸³² The Slovenian constitution¹⁸³³ (also) provides that parents have a duty to maintain, educate and raise their children. Article 42 provides that where the parents and child are citizens of different nation states, and do not have permanent residence in the same state, the law that will apply, is the state where the child is a citizen.¹⁸³⁴ Nevertheless, both states have ensured parents maintain an obligation to care for their children. Where the marriage between an Australian and Slovene citizen has broken down, and divorce has been settled, with the Australian citizen returning to Australia, there could be disagreement on custody arrangements. As the couple prior to separation resided in Slovenia, (in accordance with article 104 of the Law on Marriage and Family Relations)¹⁸³⁵ a Slovene court could determine that the agreement between the parents was in the best interests of the child. Where there is agreement that the child would visit Australia every two years to ensure the child has access to the other parent, the court is likely to ensure this agreement is fulfilled. However, upon return to Australia the former husband (X) wanted to revise the agreement and have the child permanently migrate to Australia in order for him to raise the child. Thus, when back in Australia, X filed with the Australian courts a new agreement to have permanent custody. The original order issued in Slovenia had been registered in Australia, and as such, has the same effect as being an order made by a court in Australia.¹⁸³⁶ An Australian court that is aware of the order exists cannot exercise jurisdiction over the order unless it is relation to the child and not the parents, to ensure the welfare of the child is not adversely impacted.¹⁸³⁷ Additionally, an

¹⁸³⁰ *Family Law Act 1975*, s104, captures private international law regarding recognition of overseas decrees.

¹⁸³¹ *Ibid.*

¹⁸³² Marriage and Family Relations Act, Official Gazette of the Republic of Slovenia, No. 15/76.

¹⁸³³ Article 54, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹⁸³⁴ Article 42, Marriage and Family Relations Act, Official Gazette of the Republic of Slovenia, No. 15/76.

¹⁸³⁵ Official Gazette of the Republic of Slovenia, No. 15/76.

¹⁸³⁶ *Family Law Act 1975*, ss70G and 70H.

¹⁸³⁷ *Ibid.*, s70J.

Australian court has no jurisdiction in cancelling the Slovenian order.¹⁸³⁸ This process has been reaffirmed by article 73 of the Slovenian PIL Act, where, there is a dispute between the parents and because X has returned to Australia and no longer permanently resident in Slovenia, the order remains in force.¹⁸³⁹ Furthermore, where the mother and child have maintained their residence in Slovenia, and, both being Slovene citizens, jurisdiction will continue to be Slovenia.

Child Maintenance

Maintenance is based on common nationality and residence. A Slovenian court can have jurisdiction to establish or contest paternity or maternity, when the defendant is not permanently resident in Slovenia.¹⁸⁴⁰ The court of Slovenia may also have jurisdiction when the parties are Australian citizens and one of the individuals has permanent residence in Slovenia.¹⁸⁴¹ X (an Australian citizen) has remained in Australia, and is obliged to continue to pay their maintenance obligations for child and spouse.¹⁸⁴² A maintenance assessment is undertaken to ensure there is agent reimbursement or arrears of payments made under a court order from Slovenia requiring the Australian citizen to pay maintenance.¹⁸⁴³ Slovenia is listed in schedule 2¹⁸⁴⁴ that has been identified in Australian legislation as a reciprocating jurisdiction. An assessment is undertaken of both parents to determine the level of support¹⁸⁴⁵ necessary for the child.¹⁸⁴⁶ The child must be an Australian citizen or resident in Australia when the application was made to the Registrar.¹⁸⁴⁷

Maintenance liability will remain valid while both individuals remain resident in Australia and the other in Slovenia.¹⁸⁴⁸ However, this liability will cease on the day both individuals are no longer resident in Australia, or, one of the individuals is no longer resident in Slovenia, or, a reciprocating nation state.¹⁸⁴⁹ Similar arrangements apply where a child¹⁸⁵⁰ and spouse¹⁸⁵¹ can

¹⁸³⁸ Ibid, 70k.

¹⁸³⁹ Article 73, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁴⁰ Article 71, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁴¹ Ibid, article 72.

¹⁸⁴² Schedule 2 *Child Support (Registration and Collection) Regulations* 1988.

¹⁸⁴³ Sections 4 and 18A *Registration and Collection Act 1989*, Regulation 4A *Registration and Collection Regulations* 1988.

¹⁸⁴⁴ *Child Support (Assessment) Act 1989*, section 25A.

¹⁸⁴⁵ *Child Support (Assessment) Act 1989*, section 25A.

¹⁸⁴⁶ Ibid, Part 5.

¹⁸⁴⁷ Ibid, s24.

¹⁸⁴⁸ *Registration and Collection Act 1989*, section 4.

¹⁸⁴⁹ Schedule 2 *Child Support (Registration and Collection) Regulations* 1988.

¹⁸⁵⁰ Article 103 and 123 *Marriage and Family Relations Act*, Official Gazette of the Republic of Slovenia 69/2004.

¹⁸⁵¹ Article 50 and 81 *Marriage and Family Relations Act*, Official Gazette of the Republic of Slovenia 69/2004.

obtain maintenance under Slovenian law.¹⁸⁵² The Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007 has been established to assist cross-jurisdictional issues surrounding divorce and child maintenance. The European Union has signed this convention. Australia has neither signed nor ratified the convention. Therefore, it is recommended that Australia sign and ratify this legal instrument (Slovenia does not have to sign or ratify this legal instrument).¹⁸⁵³ The international legal instrument aims to improve co-operation between nation states for the international recovery of child and family maintenance. The United Nations Convention on the Recovery Abroad of Maintenance 1956 of which Australia¹⁸⁵⁴ and Slovenia are signatories can be found in respective legislation from either jurisdiction.¹⁸⁵⁵ The Convention on the Recovery Abroad of Maintenance has been in place since 1956,¹⁸⁵⁶ and is given effect by section 111 of the Australian *Family Law Act 1975* and Regulations 40-56 of the *Family Law Regulations 1984* (Cth). Slovenia under succession of the former Yugoslavia signed and ratified the convention on 31 December 1956.¹⁸⁵⁷ The principles of the 1956 convention were used and updated in the modern day text of the 2007 Convention on the Recovery of Child Support and Other Forms of Family Maintenance. Child maintenance that has been established by a Slovenian court will cease when the Australian Child Support Agency registers a subsequent overseas maintenance liability in accordance with regulation 30AA(1)¹⁸⁵⁸ or, accepts and application for a child support assessment, or, both parties cease to be residents in Australia or Slovenia.¹⁸⁵⁹ However, where there is a dispute over maintenance, a Slovenian court could have jurisdiction where the individual (defendant) does not have permanent residence in Slovenia and the child permanently resides in Slovenia. A Slovenia court will have jurisdiction where both parents are Slovene citizens residing in Slovenia, or where individual is a minor and a Slovenia citizen.¹⁸⁶⁰

An Australian citizen who is not resident in Slovenia, but, the mother being a Slovene citizen resides in Ljubljana a Slovene court can have jurisdictions. This will also apply where the parent's last joint permanent residence was in Slovenia and the mother continues to reside in

¹⁸⁵² Marriage and Family Relations Act, Official Gazette of the Republic of Slovenia 69/2004.

¹⁸⁵³ The Hague Conference on Private International Law,

http://www.hcch.net/index_en.php?act=conventions.status&cid=131, accessed 20 April 2013.

¹⁸⁵⁴ Child Support (Assessment) Act 1989, Child Support (Assessment) Regulations 1989, Child Support (Registration and Collection) Regulations 1988.

¹⁸⁵⁵ Section 111, Family Law Act 1975 and Regulations 40 to 56 Family Law Regulations 1984. Marriage and Family Relations Act, Official Gazette of the Republic of Slovenia 69/2004.

¹⁸⁵⁶ Convention on the Recovery Abroad of Maintenance, United Nations, Treaty Series, vol. 268, p. 3, and vol. 649, p. 330.

¹⁸⁵⁷ The Hague Conference on Private International Law,

http://hcch.cloudapp.net/smartlets/sfjsp?interviewID=hcchcp2012&t_lang=en, accessed 20 August 2016.

¹⁸⁵⁸ Child Support (Registration & Collection) Act 1988.

¹⁸⁵⁹ Child Support (Registration & Collection) Act 1988, ss152(2) and 4(1),

¹⁸⁶⁰ Article 74, *The Private Internal Law and Procedure Act*, Official Gazette of the Republic of Slovenia 56/99.

Slovenia during the court proceedings.¹⁸⁶¹ Maintenance payments will usually conclude when the child reaches the age of 18.¹⁸⁶² However, both states have extended the law to allow for further maintenance support beyond the age of 18, although somewhat under different arrangements. In Australia a person over 18 years of age may obtain continued support for ongoing schooling, illness, or the individual has a physical or mental disability.¹⁸⁶³ Article 118 of the Marriage and Family Relations Act of Slovenia provides that a child over the age of 18 who has a physical or mental handicap can still be supported through maintenance payments. Article 118 does not extend to those children who are undertaking schooling. Even so, it could be argued a court in Slovenia may decide that ongoing support for the child beyond 18 years is required where they are continuing schooling. This would only be attainable where an extension of parental rights has not been lodged in time. Thus, the courts can step in and make a decision.

Property Purchase

Citizenship and residence are not the deciding factors in relation to property purchase. The status of ownership will be the place where the immovable is located (*lex rei sitae*).¹⁸⁶⁴ A married couple from Slovenia and Australia can take ownership of property in either state. Foreigners are able to own property in Slovenia,¹⁸⁶⁵ and Australia¹⁸⁶⁶ without being a citizen of either state. However, unlike Slovenia foreign ownership of property in Australia is not a constitutional right. Article 68 of the Slovenian constitution, states that aliens may acquire ownership rights to real estate that allows a foreigner to own property in Slovenia. Whereas, the Australian constitution in accordance with s51 xxxi provides that acquisition of property on just terms by the Commonwealth or any State, or, a person for any purpose in respect of which the Parliament has power to make laws. Australia focuses on property rights and the acquisition of that property by the State. Nevertheless, depending on where the property is acquired in Australia, for example, property acquired by the State in Victoria (just terms through compensation¹⁸⁶⁷), will be subject to that state's legislation,¹⁸⁶⁸ unlike the national laws of Slovenia. The process for the purchase of property by citizens is similar in both Slovenia and

¹⁸⁶¹ Ibid.

¹⁸⁶² Child Support (Registration and Collection) Act 1988, Child Support (Assessment) Act 1989, Law on Marriage and Family Relations, Official Gazette of the Republic of Slovenia, 69/2004.

¹⁸⁶³ Child Support (Assessment) Act 1989, s151B.

¹⁸⁶⁴ Article 18, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁶⁵ Article 68, The Constitution of the Republic of Slovenia, Official Gazette Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

¹⁸⁶⁶ Foreign Investment Board, http://www.firb.gov.au/content/real_estate/real_estate.asp, accessed 31 May 2014.

¹⁸⁶⁷ Legislation allows the government to acquire property such as for building roads and infrastructure.

¹⁸⁶⁸ Victorian Legislation for the purchase and sale of property includes the *Property Law Act 1958*, *Sale of Land Act 1962*, *Sale of Land Regulations 1962*, *Transfer of Land Act 1958*, *Transfer of Land (General) Regulations 2004*, *Trustees Act 1958*.

Australia. This research will not discuss the variables in contract, land and real estate legislation including the registering of property. The purchase and ownership of property is undertaken under two different systems of law in Australia and Slovenia. Australia, adopting the Torrens title system can also be found in the United Kingdom, Ireland, Malaysia, Singapore, Iran, Canada and Madagascar, operates by land titles register detailing the information of the land (size and location and other interests) in a title. That title deed ensures the citizen or foreigner has a registered interest in that land, which is protected by government (in the state of Victoria Australia this is undertaken through the *Transfer of Land Act 1958*).¹⁸⁶⁹ Under the common law, a landowner must be able to prove they have ownership of that land, and protects the citizen if challenged. The court in *Breskar*¹⁸⁷⁰ stated that the Torrens system is not a system of registration, but rather, a system of title 'by' registration.

Purchasing of property in Slovenia is undertaken under a different legal framework to Australia. Real estate and land are considered rights *in rem*, however the obligatory right need not be registered. Unlike Australia's systems where the land is registered and recorded accurately. In Slovenia, registration of land is undertaken in 'good faith' and is based on the land registry being accurate, with no guarantee of a title deed.¹⁸⁷¹ Citizens of other European Union member states can purchase property unrestricted in Slovenia. The purchase of property whether a dual citizen of Australia and Slovenia, or only an Australian citizen, in both cases the individual can purchase property with no restrictions, the same as a Slovenian citizen. That is, unless the law of the state has restricted the purchase of property to Slovenes. A Slovenian citizen purchasing property in Australia is subject to the restrictions set out by the Foreign Investment Review Board (FIRB).¹⁸⁷² The Australian Government, Foreign Investment Board has established rules and policy principles that regulate the foreign acquisition of property (residential, commercial, shares and other business) such as dwellings throughout Australia. The restrictions on a Slovenian citizen will be dependent of their residency status, whether a non-resident, or, permanent resident.¹⁸⁷³ For example, where a Slovenian who does not reside in Australia, while being able to invest in real estate in Australia, they can only do so, where this will add to the housing stock. That is, provide additional housing to the country.

¹⁸⁶⁹ Transfer of Land Act 1958 (Victoria, Australia), s42.

¹⁸⁷⁰ *Breskar v Wall* (1971) 126 CLR 376, 381.

¹⁸⁷¹ Law on Land Registry, Official Gazette of the Republic of Slovenia, 33/95. Law on Land Cadastre, Official Gazette of the Social Republic of Slovenia 16/74 and 42/86.

¹⁸⁷² *Foreign Acquisitions and Takeovers Act 1975, Foreign Acquisitions and Takeovers regulations 1989, Foreign Takeovers Notices Regulations 1975.*

¹⁸⁷³ Australian Government, Foreign Review Board, Guidance Note 3, Australia's Foreign Investment Policy Residential Real Estates, http://www.firb.gov.au/content/guidance/downloads/gn3_jan2012.pdf, accessed 20 June 2014.

Inheritance

The laws related to inheritance are based on where the property is located and not citizenship or residence. In determining the jurisdiction and laws to apply, movable (*lex domicile*) and immovable property (*lex situs*) is to be dealt with separately. This distinction was discussed in *Lewis v Balshaw*¹⁸⁷⁴ whereby, the forum of choice will be the jurisdiction where the deceased was domiciled at the time of death unless the representative is disqualified under the law of the forum.¹⁸⁷⁵ This was reaffirmed in *Pipon v Pipon*¹⁸⁷⁶ where the court stated movable property should be governed by the law of the place where the deceased was resident at the time of death. The Australian law will apply where a will with an appointed executor¹⁸⁷⁷ has been determined.¹⁸⁷⁸ However, where there is no will, contract or other agreement, the assets located in Slovenia, will be subject to the Slovenian law. The law of the place of where the testator was resident at the time the will was made¹⁸⁷⁹ applies. The probate affairs and will, is based on the country of citizenship at the time of death.¹⁸⁸⁰ The court has exclusive jurisdiction to announce the death of a Slovene citizen in Slovenia.¹⁸⁸¹ In situations where the citizenship of the person cannot be determined, Article 81 of the PIL Act provides the Slovenian courts have exclusive jurisdiction.¹⁸⁸² The jurisdiction of the court is also based on the principle of domicile where the deceased had their permanent or temporary residence.¹⁸⁸³ The testamentary capacity and the form of a will is covered under sections 32 and 33 PIL. In 1989, the Hague Conference on Private International Law established the Convention on the Law Applicable to Succession to Estates of Deceased Persons; however, neither the European Union, nor any member state of the European Union including Slovenia, nor Australia are contracting parties.¹⁸⁸⁴ This convention assists states and their citizens in determining the applicable law to succession of estates of deceased persons. However, it does not apply to property upon death, disposing of property upon death, matrimonial property, pension or insurance plans.¹⁸⁸⁵ Therefore, it is recommended

¹⁸⁷⁴ *Lewis v Balshaw* (1935) 54 CLR 188 in Reid Mortensen, Richard Garnett, Mary Keyes, *Private International Law in Australia*, 2nd Edition, LexisNexis Butterworths, 2011, 520.

¹⁸⁷⁵ *Ibid.*

¹⁸⁷⁶ *Pipon v Pipon* (1744) Amb 25; 27 ER 14, in Reid Mortensen, Richard Garnett, Mary Keyes, *Private International Law in Australia*, 2nd Edition, LexisNexis Butterworths, 2011, 270-275.

¹⁸⁷⁷ Section 18 *Administration and Probate Act 1958*. It is encouraged two executors are appointed in the event one dies. *Wills Act 1997*.

¹⁸⁷⁸ *Bremer v Freeman* (1857) 10 Moo PC 306; 14 ER 508.

¹⁸⁷⁹ Article 33, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁸⁰ Article 32 & 33, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁸¹ Article 78, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁸² Article 81, *The Private International Law and Procedures Act*, Official Gazette of the Republic of Slovenia 56/99.

¹⁸⁸³ Article 177, *Inheritance Act*, Official Gazette of the Republic of the Socialist Republic of Slovenia, No. 15/76,

¹⁸⁸⁴ The Hague Conference on Private International Law,

http://www.hcch.net/index_en.php?act=conventions.status&cid=62, accessed 20 April 2013.

¹⁸⁸⁵ Article 1, *Convention on the Law Applicable to Succession to Estates of Deceased Persons 1989*,

that Slovenia and Australia sign the convention. Even so, the UNIDROIT Convention providing a Uniform Law on the Form of an International Will 1973,¹⁸⁸⁶ came into force in Slovenia as a successor to the former Yugoslavia. In Victoria, Australia the UNIDROIT Convention providing a Uniform Law on the Form of an International Will 1973, was only recently included into domestic legislation. The convention deals with personal capacity of the testator or witness relating to the revocation, destruction or modification of wills. This legal instrument ensures a consistent approach between states. Slovenia ratified the convention in 1992. Slovenia and Australia are both signatories to the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions 1961.¹⁸⁸⁷ The convention provides the basis for confirming the place where a testator was made, nationality possessed by the testator, place where the testator was domiciled or had habitual residence at the time of death.¹⁸⁸⁸ Therefore, reaffirming an earlier point that both domiciled and habitual residence are used to determine jurisdiction of private international legal matters.

Personal income tax

Personal income tax law in Australia and Slovenia¹⁸⁸⁹ is based on residence and length of stay and not citizenship. The length of time resident in Australia¹⁸⁹⁰ and Slovenia¹⁸⁹¹ for personal income tax purposes is continuous presence of 183 days without interruption. Annually, citizens of Slovenia¹⁸⁹² and Australia¹⁸⁹³ are required to submit personal income tax returns.

¹⁸⁸⁶ *Wills Amendment (International Wills) Bill 2011*, Explanatory Memorandum. The convention also came into force in Slovenia as a successor to the former Yugoslavia. Slovenia and Australia are both signatories to the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions 1961. Convention Providing a Uniform Law on the Form of International Will 1978. Note: dates of notification of succession to the Convention by former states of Yugoslavia including Slovenia, deposited and instrument of accession to the Convention on 9 August 1977.

¹⁸⁸⁷ Australia and Slovenia have both ratified the Hague Convention on the Conflict of Laws relating to the Form of Testamentary Dispositions 1961.

¹⁸⁸⁸ *Ibid*, article 1.

¹⁸⁸⁹ Article 35, Law on Personal Income, Official Gazette of the Republic of Slovenia 151/2006, income from employment is considered income received on the basis of past or current employment.

¹⁸⁹⁰ Income Tax Assessment Act 1936, section 6, resident of Australia means a person who resides in Australia, a person whose domicile is in Australia unless determined by the Commissioner not to be, who as been in Australia continuously or intermittently, during more than one-half of the year of income. The Australian Tax Office (ATO) and courts have further expanded on this definition recognising specific principles that will apply to determining what constitutes residence being physical presence, family, employment or business ties, maintenance of a place of abode and assets, frequency, regulatory and duration of visit, habits and mode of life. However, the position is not clear in relation to where a person has been present in Australia for more than 6 months and a resident for the 183 day tests S19 85 ATC 225, in Paul Kenny, *Australian Tax 2013*, LexisNexis Butterworths, 2013, 88-99. Note: the scenario does not account for part stay and leaving the Australian territory, as certain other rules will apply.

¹⁸⁹¹ Article 6, Law on Personal Income, Official Gazette of the Republic of Slovenia No 151/2006, residency means officially registered permanent residence in Slovenia, resides outside of Slovenia for employment in diplomatic mission, consulate, international mission, permanent representation to the European Union, was resident in Slovenia during any period in the previous year and resides outside Slovenia for employment, has habitual residence or the centre of their personal and economic interests is in Slovenia, or time spent during the tax year is present in Slovenia for a total of more than 183 days.

¹⁸⁹² Ministry of Finance, Republic of Slovenia, Submission of tax returns,

http://www.durs.gov.si/si/angleske_strani/faq/individuals/, accessed 12 October 2013. Personal income

For example, an Australian citizen working in Slovenia on contract for an Australian company for 300 days, and maintains banking, family and other private activities in Australia, the residence rule of 183 days will not apply and the person will pay tax in Australia.¹⁸⁹⁴ The notable differences are the current personal income tax rates. For an Australia citizen, or, individual on a skilled migration visa and is employed, the personal income tax rate includes; from \$18,201.00 to \$37,000.00; 32.5% from \$37,001.00 to \$80,001.00; 37% from \$80,001.00 to \$180,000.00; 45% from \$180,000.00.¹⁸⁹⁵ For a Slovenia citizen, or, an Australian citizen resident in Slovenia employed beyond the 183 day requirement will be subject to the following tax rates; 16% up to €7,814.04, 27% €18,534, 41% €69,312.96, 50% exceeding €69,312.96.¹⁸⁹⁶

The examples outlined above highlight how an Australian and Slovenian citizen can be engaged in private activities that transcend both states. This section reinforces the purpose of this research to understand the extent of the private activities of citizens, and that these private activities in the contemporary world are just as important to citizenship as the state regulating citizenship. Furthermore, part of a state's national identity allows their citizens to participate in the wider world, across international borders. To do so, the state requires a legal framework to allow their citizens to engage with other citizens in other states.

6.4 Conclusion

The rise of the nation state has resulted in the development of laws to control the movement of citizens and non-citizens across international borders. This chapter has confirmed that PIL facilitates the regulation of the cross-border private activities of citizens. To assist Slovenes and Slovenia, the state has implemented the Private International Law and Procedures Act (PIL). Australia does not have similar legislation and deals with those issues in common law. The legislative framework established by Slovenia provides a greater level of legal certainty and minimises the gaps in the law. It is this legal certainty that could be improved in Australia and would close the legislative gaps.

tax returns are automatically generated and would be sent out by 15 June in any one year, this individuals has 15 days upon receipt to lodge a complain if they disagree with the data on their individual calculation.¹⁸⁹³ Australian Government, Australian Taxation Office, tax returns are lodged between 30 June and 31 October of each year, <http://www.ato.gov.au/Individuals/International-tax-for-individuals/Coming-to-Australia/Paying-tax-and-lodging-a-tax-return>, accessed 12 October 2013.

¹⁸⁹⁴ *Pillay v Commissioner of Taxation* [2013] AATA 447.

¹⁸⁹⁵ Australia Rates of Income Tax as from 1 July 2012, personal income tax rates include 19% income from \$18,201.00 to \$37,000.00; 32.5% from \$37,001.00 to \$80,001.00; 37% from \$80,001.00 to \$180,000.00; 45% from \$180,000.00 and over. However, there is a 30% taxable rate for dividends unless they have been franked, http://www.lowtax.net/lowtax/html/australia/australia_personal_taxation.asp, accessed 30 September 2013.

¹⁸⁹⁶ Deloitte International Tax, Slovenia 2013 personal income tax rates, 16% up to €7,814.04, 27% €18,534, 41% €69,312.96, 50% exceeding €69,312.96, http://www.deloitte.com/assets/Dcom-Global/Local%20Assets/Documents/Tax/Taxation%20and%20Investment%20Guides/2013/dttl_tax_high_light_2013_Slovenia.pdf, accessed 4 October 2013. The rule change where other income has been sourced within or outside the state.

This chapter confirmed the overall research that citizenship constitutes the public and private. This chapter has confirmed that there are limited PIL matters that directly relate to citizenship, however both residence and citizenship can be the connecting factors used to determine the appropriate jurisdiction and laws that will apply. This chapter confirmed that PIL matters have little effect on citizenship. PIL adds to a state's ability to direct its citizens to behave according to the defined rules that have been established. The public being the state develops laws that provides a pathway to citizenship. The private has been discussed in the context that a citizen undertakes private activities such as migration and engages other citizens across international borders. Finally, this chapter has also identified that Australia could consider looking to Slovenia and developing more specific legislation for the administration of PIL matters. The following proposals have been identified in **Appendix One** as a possible recommendation, and include;

- Slovenia unlike Australia has a single Private International Law Act (PIL). The PIL Act provides the basis for determining the law to be used in international personal, family, social labour, property and other civil matters. Australia should take advantage of the work undertaken by Slovenia and establish a single Act outlining the high level legal principles associated with private international law matters.
- According to the Hague Conference on International Law, Slovenia has not ratified the Hague Convention on the Recognition of Divorces and Legal Separation 1970. Slovenia should ratify this convention.
- The Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007 has been established to address cross-jurisdictional issues regarding divorce and child maintenance. The European Union has signed this convention. Slovenia being a member state of the European Union does not have to sign this convention. Australia has not ratified this convention. Australia should consider ratifying this convention.

Chapter 7 – Conclusion

7. Overview

The final chapter brings together the research by concluding that citizenship, immigration, human rights and private international law of both states have contributed to their respective national identity. The comparative study of Slovenia and Australia, while being unusual and not often used as an example to highlight aspects of citizenship, both states have a long history of cooperation. The research is original and new because it has identified how citizenship is more than just a relationship between a state and individual. Rather, citizenship today includes the activities in which the private citizen engages both within the state and beyond international borders. The comparative analysis can enrich the discussion and research into citizenship and would assist those dual citizens from Australia and Slovenia to navigate the respective states legal frameworks. There is no single approach as to how citizenship will evolve; rather, states including Slovenia and Australia have the foundation and a good legal framework in place to ensure that citizenship continues to evolve in a changing world. This final chapter will also bring together the findings identified throughout the research that have been used to formulate recommendations (**Appendix One**) for Australia, Slovenia and the European Union to consider. The adoption of the recommendations will require both Australia and Slovenia to reform their citizenship, immigration, rights and private international law.

7.1 Findings and Future Citizenship

The historical paths of both Slovenia and Australia have been very different but share some similar features. No other research has compared Australia and Slovenia's citizenship, immigration, human rights and private international laws and their contribution to national identity. National identity is the collective imagination of the nation and also includes historic territory, common myths, historical memories, a shared culture and language. National identity is multidimensional, contestable and fluid in nature. Citizenship makes an important contribution to national identity, as this thesis has highlighted.

Modern day Slovenia had been under the rule of the Roman Empire, the Habsburg Monarchy, the Austrian Empire, the Austro-Hungarian Empire, the Kingdom of Serbs, Croats and Slovenes (later renamed the Kingdom of Yugoslavia), Democratic Federal Yugoslavia, to the Federal People's Republic of Yugoslavia. The Federal People's Republic of Yugoslavia would later become the Socialist Federal Republic of Yugoslavia and in 1990 the Republic of Slovenia was born. Throughout this long history, citizenship had evolved by adopting exclusionary and inclusionary measures. Australia's relationship with Slovenia began in 1855, with the first Slovenia arriving on the Australian territory. Australia had been occupied by the indigenous

aboriginal people, and settled by the British who imposed their governance and legal framework over the people and the territory. Australian citizenship has evolved from the British Empire and allegiance to the King, and later to a legal status. Slovenia has only been an independent state for 25 years but has developed its national identity over centuries. For half its independent life, Slovenia has been a member state of the European Union, a supranational body with its own citizenship. In recent times, Australia and Slovenia have established bilateral agreements to support their respective citizens when present in either state.

Citizenship has contributed to national identity. Citizenship evolved from allegiance to a master, excluding women to provide a legal status for all. The current day statistics of Slovenia and Australia demonstrate that citizenship is in a healthy state. As highlighted in **chapter one**, more than 18 million people hold citizenship in Australia and more than 1.9 million people hold Slovenian citizenship. The population of Australia is about 23 million whereas Slovenia's population is about 2 million.

Citizenship has been used to unify inhabitants of empires, kingdoms and nation states. It has also been used to assist empires to colonise territory, and provide continuity to inhabitants of territory when rulers have changed. Both Slovenia and Australia have used citizenship to exclude residents on the territory, and impose restrictive rules and law that make it difficult for a non-citizen to enter the state and become a citizen. Women have been accepted both under citizenship law and their rights to political participation has improved considerably over the past sixty years. The early exclusionary and discriminatory approach Australia took to the indigenous Australians slowly dissipated and they were integrated into society, however there is still a long way to go. These measures have allowed both states to continue to shape their respective identities. The evolution of citizenship combined with long-term residence has exposed potential ongoing issues for Australia's permanent residents, and the ability for them to be deported from the state with relative ease.

Immigration is a pathway to citizenship. Today, citizenship in the private sphere is just as important as states regulating citizenship and citizens in the public sphere. Citizenship is the right to have rights. A state's constitution is an important part of the legal framework that provides rights to their citizens. As part of a citizen's private activities today, they are mobile and do from time to time engage with other citizens across international borders. The research has confirmed citizenship plays a minor role in private international law. However, private international law is important today as citizens continue to participate in the global society.

Future Citizenship

The future of citizenship in the context of this thesis has been determined by the comparative analysis of both states. The future of citizenship will continue to be based on Linda Bosniak and Kim Rubenstein's work discussed throughout this thesis. Slovenia and Australia have a lot to offer each other in this area of law.

It is argued that to propose how and what citizenship in the future might look like could not be justified or even concluded. Australia and Slovenia have a good legal framework for citizenship. This could be improved by adopting the recommendations discussed throughout the research and in appendix one. Citizenship and immigration law will continue to evolve as states respond to national and international events and to their own sovereign needs. The future of citizenship is a balance between a state maintaining its national identity while allowing its citizens to participate in the regional and global community. A global citizenship is unlikely any time in the near future because the institutional framework has not been established to enable this concept to be realised. A regional based citizenship that has been created by the European Union, and could be extended to other regions and states of the world. Australian citizens could be considered European citizens. However, it is for the European Union to explore such an idea. Australia could be a leader in its own region and commence working with other countries by developing a similar framework to the European Union.

The future of citizenship lies in the way states engage and maintain an ongoing connection with their citizens no matter what state they reside. Diasporas are not only formed by those people who originate from a state, but who may also have an historical connection such as descendants or holding dual citizenship of that state. Continued engagement of a state's diaspora will enhance and strengthen a state's identity with the transfer of knowledge and skills.

Future citizenship requires states to promote the benefits of holding citizenship of a state, particularly for those immigrants who are long-term residents. In 1989, Australia successfully established the 'Year of Citizenship'. A similar policy approach could be undertaken by both Slovenia and Australia every decade. The European Union have also done some work in this area and should continue to promote the benefits of European citizenship.

Future citizenship [law] requires a state to have a constitution that adequately reflects national identity, citizenship and the rights and freedoms afforded to its citizens. Constitutional reform must be considered by states as part of their legislative reform program. States need to look at ways of simplifying the process for constitutional change, particularly Australia. Australia should reform its constitution. Chapter four highlighted how Australia has looked to the

European Court of Human Rights, European Union and European Commission for guidance regarding the interpretation and application of human rights law. This should continue. Australia could also learn a lot from Slovenia in the area of constitutional human rights. States should find ways of attracting long-term residents to take out citizenship. States such as Australia should look to newly formed states such as Slovenia when comparing their citizenship laws.

The future of citizenship should consider how states deal with permanent residents. Permanent residents need to be encouraged to take out citizenship. States need to determine what level, if at all testing of permanent residents, so as they better assimilate and understand the values of the state. States such as Australia and Slovenia need to take a leadership role and work with other states to encourage dual citizenship. The future of citizenship will require states to have a legal framework in place to assure citizens they retain a legal status of a state. Secondly, citizenship retains a comprehensive set of rights, protections and freedoms. Citizenship must continue to be used to form a (collective) identity and membership of a polity. This will ensure citizenship continues to contribute to national identity.

This thesis has documented how Australia and Slovenia since 1990 to 2015 undertook a comprehensive program of reforming citizenship law. Firstly, the state has strengthened citizenship and secondly the state has used citizenship to enhance and express national identity. Therefore, future citizenship will require states to continue to review and reform their respective citizenship laws. Finally, the future of citizenship in Australia and Slovenia, could include further research collaboration in this area and consider transplanting and borrowing law from each other to implement the recommendations discussed below.

7.2 Conclusion

This research has confirmed that both states have a citizenship legal framework has evolved over time. The law compared in this research all pertains to citizenship and makes a vital contribution to national identity.

Appendix One - Recommendations

The comparative study throughout chapter three, four, five and six of this research has identified possible improvements both Australia and Slovenia could consider adopting as part of their legal frameworks. The European Union may also want to consider improving areas of its legal framework, particularly in the area of immigration. Australia and Slovenia could consider amending their citizenship, immigration, human rights and private international laws, by borrowing from each other.

Citizenship

1. To obtain citizenship by descent¹⁸⁹⁷ in Slovenia, the individual must be able to prove a connection to the state. The person must be able to demonstrate they have a connection that extends to a fourth generation. The Australian Citizenship Act 2007 does not describe a generational principle. Australia should amend the Act and borrow from Slovenia to include a similar provision. Such an inclusion would assist those individuals born to former Australian citizens, now residing in other states to obtain Australian citizenship. This could be an opportunity for Australia to expand its diaspora.
2. Scholars have written about the need for nation states to continue to develop and enhance their connection with their diaspora. The Slovenes have established the Act Regulating the Relations Between the Republic of Slovenia and Slovenes Abroad.¹⁸⁹⁸ The legislation predominantly targets Slovenes, citizens or not, located in those national communities within the border locations of Austria, Italy, Hungary and Croatia. Australia could investigate the opportunity of establishing similar legislation, particularly to engage those diasporas located in the European Union, New Zealand, ASEAN member states and other states of its choosing.
3. In establishing the Act Regulating the Relations Between the Republic of Slovenia and Slovenes Abroad,¹⁸⁹⁹ Slovenia allow Slovenes to participate in organisations outside of Slovenia and promote the development and retention of the Slovenian language and culture abroad. It is important for Slovenia to retain and develop its identity. The legislation is predominantly focused on those Slovenes, citizens or not, located in those communities within the border locations of Austria, Italy, Hungary and Croatia. This

¹⁸⁹⁷ Refer chapter 3, Birth and Descent.

¹⁸⁹⁸ Refer chapter 3, Citizens Abroad.

¹⁸⁹⁹ Refer chapter 3, Citizens Abroad.

Act should be extended to include those Slovenes that are located in third countries such as Australia.

4. Today children can be conceived by artificial conception.¹⁹⁰⁰ Section 8 of the *Australian Citizenship Act 2007*, allows a child that has been born as a result of artificial conception to obtain citizenship. The Slovenian citizenship laws do not provide the same clearly described provision. Slovenia could include a similar provision to Australia to ensure it is clear when artificial conception is concerned.
5. There continues to be a low rate of acceptance of the European Convention on Nationality by member states including Slovenia. The European Union has further work to undertake to have this legal instrument fully implemented. This must be a priority for the European Union and will go some way to further integrating member states thus ensuring that a consistent approach is taken in the evolving area of citizenship law. Slovenia as a matter of priority should sign and ratify the European Convention on Nationality 1997.¹⁹⁰¹
6. The notion of dual citizenship¹⁹⁰² has gained wide acceptance from nation states across the world. Both Slovenia and Australia have recognised dual citizenship as part of their respective citizenship laws, however Slovenia should further liberalise dual citizenship with no restrictions. Currently, dual citizenship is restricted to those people that can prove a connection to Slovenia. Slovenia should look to Australia's dual citizenship laws.
7. In 2010, the European Union Flash Eurobarometer¹⁹⁰³ surveyed European citizens on how familiar they are with their understanding of European citizenship and the rights they possess. Only 49% of citizens in Slovenia were familiar and understood what being a European citizen meant. 36% were familiar but not sure of its meaning and 15% had never heard of the term. Further work is needed by Slovenia and the European Union to promote European Union citizenship and the benefits this has afforded Slovenians.
8. Australia has recognised that people can be born on an aircraft or ship.¹⁹⁰⁴ In these circumstances the individual can apply for citizenship no matter where the ship or aircraft is located in the world. It is deemed the individual has been born on Australian

¹⁹⁰⁰ Refer chapter 3, Birth and Descent.

¹⁹⁰¹ Refer chapter 3.

¹⁹⁰² Refer chapter 3, Dual Citizenship.

¹⁹⁰³ Refer chapter 4, Slovenia and the European Union.

¹⁹⁰⁴ Refer chapter 3 Birth and Descent.

territory. In accordance with article 4 (3), provided one of the parents is a Slovene citizen at the time of the birth and the individual was born in a foreign country, they are entitled to citizenship by origin. Slovenia could tighten this article to include reference to ships and aircraft.

9. The resumption¹⁹⁰⁵ of citizenship has many benefits for the individual and the state. Firstly, the individual resumes their political, social and economic ties with the state. The Slovenian law on citizenship does not provide for resumption of citizenship, although an individual could do so through the naturalisation process in accordance with article 10. Slovenia should amend the law on citizenship and make it clear that an individual can resume their citizenship.
10. More can be done by both states to promote citizenship, Australia successfully established the Year of Citizenship in 1989.¹⁹⁰⁶ A letter was sent to every household encouraging those eligible to apply for citizenship, which resulted in more than 130,000 people taking out citizenship between 1989 and 1990. A similar approach could be undertaken by both Slovenia and Australia every decade or five years to ensure individuals that are long term residents (permanent residents) take out citizenship. Implementing this recommendation also provides both states with the opportunity to expand the understanding of the national identity.
11. The Lisbon Treaty of the European Union¹⁹⁰⁷ provides the citizen's initiative ensuring greater participation in European Union affairs by all citizens, which is based on the size of a member states population. For Slovenia to meet the requirement could be somewhat problematic due to the population only being approximately 2 million. To build a more inclusive European Union, particularly for the smaller member states such as Slovenia, there should be a threshold included to allow those states with less than 10 million in population to be able to submit a policy proposal, provided there are between 250,000 and 300,000 citizens who form part of that submission.
12. The *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* introduces three ways that a citizen of Australia can have their citizenship removed. These include where the person acts inconsistently with their allegiance to Australia by engaging in specified terrorist-related conduct, or where the individual fights for or is in the service of a declared terrorist organisation, and where the individual is convicted of a terrorist offence. The proposed amendments only capture those individuals who hold dual

¹⁹⁰⁵ Refer chapter 3, Resuming citizenship.

¹⁹⁰⁶ Refer chapter 2, Historical Development of Citizenship.

¹⁹⁰⁷ Refer chapter 4.

citizenship. At the time of concluding this research, the Bill had not been passed through the Australian Parliament. Slovenia has not put a similar proposal to the Slovene Parliament.¹⁹⁰⁸ Slovenia should consider similar laws to protect the state and its citizens from people wanting to undertake terrorist activities.

13. Australia must ensure Aboriginal people are able to fully participate as citizens.¹⁹⁰⁹ In 2012 the United Nations criticised Australia for its handling of aboriginal people at birth, denying many the opportunity to obtain a birth certificate. The registration of a birth provides the individual with a certificate. A birth certificate is fundamental to the daily lives of all citizens. It enables a citizen to be fully active in the community, and for example, obtain a passport to travel abroad. Australian and Slovenian governments should undertake a review of this practice every five years to ensure aboriginal people are registered and provided a certificate at birth.
14. Both states have implemented the requirement for an individual applying for citizenship to undertake the 'oath' (Slovenia) and 'pledge' (Australia). Slovenia and Australia could expand the oath and pledge to include further reference of their respective national identity. This could include recognising those that have dual citizenship with another state, and the need for them to continue to maintain their loyalty to their state of origin, no matter where they are located. Additionally, there could be more emphasis placed on an individual's obligations to the state.¹⁹¹⁰

Constitutional

15. The Slovenian constitution states that 'citizenship is regulated by the law'. Australia's constitution could be amended to resemble Slovenia's constitution.¹⁹¹¹ The absence of the recognition of citizenship in the constitution has been highlighted by scholars in Australia. It could be argued that the failure to have citizenship recognised is diluting the national identity.
16. Australia's official language is English, however this has not been codified in the same way as Slovenia. Australia could do the same. Australia could investigate whether the English language should be recognised in the constitution in the same way as article 11 of the Slovenian constitution has recognised the Slovenian language. This would further

¹⁹⁰⁸ Refer chapter 3.

¹⁹⁰⁹ Refer chapter 3.

¹⁹¹⁰ Refer chapter 3.

¹⁹¹¹ Refer chapter 4.

enhance the national identity of Australia.¹⁹¹² However, there is likely to be strong opposition to such a proposal by many in the community.

17. Australia has considerable work to do in the area of constitutional reform. While the rights of citizens and non-citizens in Australia have been reflected in a number of Acts, it is time for those rights to be better and more clearly reflected in either 1) the Constitution, 2) a Charter or 3) the Citizenship Act. However, this third option may not be considered viable. Thus, constitutional reform is needed in Australia to resemble Slovenia's modern day constitution.¹⁹¹³
18. There is much work Australia can do to recognise minorities in the state. Australia can look to Slovenia and resemble their constitution in this area of law, as they have done for national communities and the Rom community. Additionally, Australia can also look to the European Union to assist in better accommodating national minorities and their rights into the national legal framework.¹⁹¹⁴
19. Of all the constitutional amendments recommend, none is more important than the recognition of the Australian indigenous peoples. The same has been undertaken by Slovenia in recognising the Austrian, Italian and Hungarian communities who have been in the Slovene territory for many centuries. It is time that Australia did the same and reformed its constitution to recognise the indigenous aboriginal peoples.¹⁹¹⁵
20. Article 32 of the Slovenian constitution¹⁹¹⁶ provides that citizens have the right to exit and return to the state at any time. While the Australian constitution does not provide a similar right, citizens have the right of exit and return. Australia could apply a similar provision within its constitution.

Child Rights

21. Child slavery is an issue globally and is not confined to an individual state. To ensure children are not exploited the Convention on the Minimum Age for Admission to Employment. Australia has not ratified the convention. Slovenia has. Australia should ratify this convention.¹⁹¹⁷

¹⁹¹² Refer chapter 4.

¹⁹¹³ Refer chapter 4.

¹⁹¹⁴ Ibid.

¹⁹¹⁵ Ibid.

¹⁹¹⁶ Refer chapter 4.

¹⁹¹⁷ Refer chapter 4.

Immigration

22. The review and change of Australia's migration legislation is long overdue. Australia can adopt a similar framework to Slovenia by separating economic and humanitarian migration into two separate acts.¹⁹¹⁸ This would simplify the legislation and allow the laws to be easily interpreted and understood.
23. Australia could learn from Slovenia (European Union) and streamline the visa classes and subclass (types) by reducing the current number.¹⁹¹⁹ Australia has more than 100 classes and subclasses of visas that allow non-citizens to enter the state. Slovenia has three.
24. The immigration policies of Australia, Slovenia, and the European Union should be expanded to reference and link immigration to citizenship. Both states, could do a lot more to encourage new immigrants to take out citizenship, where they intend to reside in the state long term. Furthermore, the immigration policy of each jurisdiction should be expanded to identify how and what level of testing should be undertaken of immigrants that will not take out citizenship but reside in the state. The testing could be based on similar citizenship testing and be required every five years to ensure immigrants understand and practice the values and identity of the state.¹⁹²⁰ However, this proposal challenges postnational citizenship and multiculturalism.
25. The Blue Card Directive¹⁹²¹ has simplified the conditions of entry and residence for highly skilled employees across the European Union. While Australians have access to the APEC card, a similar approach could be developed and established between Australia and ASEAN member states. Not only would this improve and enhance trade and economic activity with these countries, but also further simplify and harmonise the immigration laws of Australia with those in Europe and Slovenia.
26. Economic migration has been a significant contribution to Australia's nation building process. Therefore, there are a number of business visas available that include business skills (provisional, owner, investor, senior executive, state and territory sponsored business owner and executive). In addition, visas have been established that allow for business skills, established business and business talent to assist Australia and its States and Territories in further advancing business opportunities. Slovenia could adopt a similar local framework to that of the State of Victoria, Australia. The program

¹⁹¹⁸ Refer chapter 5.

¹⁹¹⁹ Ibid.

¹⁹²⁰ Ibid.

¹⁹²¹ Ibid.

established in Victoria assists the state to strengthen its local economy. The requirements are linked to the Victorian Government's State Nomination Occupation list.¹⁹²² Slovenia should apply a similar approach to be implemented across the Administrative Units, however central decision-making would still be required by the Ministry of Interior.

27. Australia's economic immigration program has been enhanced through the requirement for an individual to meet the points test in accordance with sections 92 to 95 of the *Migration Act 1958*. The points test is based on age, level of English, length of skilled employment, holding a degree (depending on the industry). The European Union and Slovenia could establish a similar test. The European Union could standardise a framework by developing a Directive to include a points system and list of skills needed for future skilled migration across the region. The skills list will need to identify those specialist and general (agricultural production) skill sets that are needed by each member state.¹⁹²³ However, language could be a barrier to the implementing of this proposal, unless the European Union and Slovenia were willing to provide language lessons.
28. Environmental refugees will not only be a problem for Australia, but also the European Union and Slovenia, whether directly impacted or becoming destination countries for refugees. Former Australian Senator Kerry Nettle from the Australian Greens Party in 2007 put forward the Migration (Climate Refugees) Amendment Bill 2007, to create a new visa category so the government can recognise and accept those individuals displaced by environmental disasters due to climate change. Australia and Slovenia, and the European Union should expand their current legislation to allow for environmental refugees. Australia and Slovenia could include this proposal as a category under the current humanitarian visa.¹⁹²⁴
29. Testing (language, history and culture)¹⁹²⁵ should be imposed on permanent residents every five years. The testing could be similar or an advanced model to that of Australian citizenship testing. The benefits would improve assimilation and understanding of the state and its identity.
30. There are up to twenty-three European legal instruments transposed into Slovenian national immigration law. Slovenia could take a lead role and propose to the European

¹⁹²² Ibid.

¹⁹²³ Ibid.

¹⁹²⁴ Ibid.

¹⁹²⁵ Refer chapter 5.

Union to explore consolidating and simplifying the large number of Regulations, Directives and Decisions pertaining to migration (entry and stay) in member states. This would include all legislative instruments pertaining to economic and humanitarian entry and stay.¹⁹²⁶

31. Slovenia and Australia have not established a double tax treaty, and it could be time for either state to examine the viability for this to occur.¹⁹²⁷ Slovenia and Australia has established an agreement for medical protection should citizens be injured in either state. However, this benefit is restricted to 405 or 410 retirement visas. Australia and Slovenia should investigate the opportunity to expand this agreement to also include other visa and permit types such as tourists, workers and individuals conducting business and trade for a period of up to three years. Furthermore, Slovenia and Australia should work together to identify other areas where bilateral agreements could be established.

Private International Law

32. Slovenia unlike Australia has a single Private International Law Act (PIL). The PIL Act provides the basis for determining the law to be used in international personal, family, social labour, property and other civil matters. Australia should take advantage of the work that has been undertaken by Slovenia and establish a single Act outlining the high level principles associated with private international legal matters.¹⁹²⁸ This would provide some level of legal certainty for Australian citizens who are engaged in private international activities such as marriage.
33. According to the Hague Conference on International Law, Slovenia has not ratified the Hague Convention on the Recognition of Divorces and Legal Separation 1970. Slovenia should ratify this international legal instrument.¹⁹²⁹
34. The Convention on the International Recovery of Child Support and other Forms of Family Maintenance 2007 has been established to assist cross jurisdictional issues surrounding divorce and child maintenance. The European Union has signed this convention. Slovenia being a member state of the European Union does not have to sign

¹⁹²⁶ Ibid.

¹⁹²⁷ Ibid.

¹⁹²⁸ Refer chapter 6.

¹⁹²⁹ Ibid, chapter 6.

this convention. Australia has neither signed, nor ratified the convention. Australia should ratify this convention.¹⁹³⁰

Institutional

35. The future administration of citizenship, immigration and naturalisation law and policy in Slovenia could come under a single Immigration or Citizenship (Citizenship and Immigration, or Immigration and Citizenship) Authority, Commission, or separate Ministry¹⁹³¹.
36. The EUDO should consider including Australia's citizenship laws into their ongoing research. Over time, this could be used to further harmonise law between Australia and European member states, and move Australia closer to Europe or vice versa.¹⁹³²

Future Research

The following recommendations have not been discussed in this research and have been identified as future research that could be undertaken to enhance citizenship law between Slovenia and Australia.

37. Victoria University could establish a partnership with a university in Slovenia to establish research in the area of private international law, rights, immigration, citizenship and other areas that will benefit both states and their respective economies, social well-being and the environment.
38. An institutional partnership should be established with Slovenia in relation to constitutional, citizenship and immigration law that would see this research extend to other regions such as Central and South East Asia. This research would assist governments in being prepared for economic, social, security and environmental threats and enable governments to maintain laws that will enable a state to maintain its identity, but continue to allow its citizens to effectively participate as part of a global and regional community.

¹⁹³⁰ Refer chapter 6.

¹⁹³¹ Refer chapter 5.

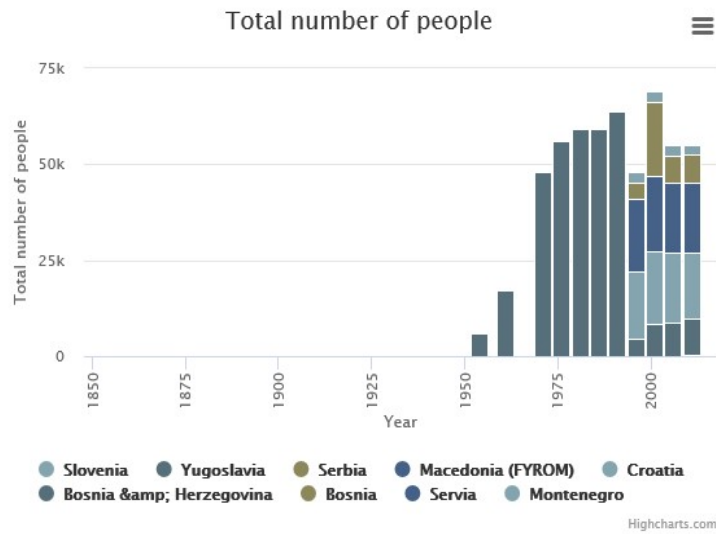
¹⁹³² Refer chapter 5.

Appendix - Two

The table below details the number of subclass visas available to non-citizens wanting to enter Australia in accordance with the Migration Regulations 1994, at January 2015.

<p>Business Skills--Business Talent (Permanent) (Class EA) 132 (Business Talent) Business Skills (Permanent) (Class EC) 888 (Business Innovation and Investment (Permanent)) Business Skills (Residence) (Class DF) 890 (Business Owner) 891 (Investor) 892 (State/Territory Sponsored Business Owner) 893 (State/Territory Sponsored Investor) 1108. Child (Migrant) (Class AH) 101 (Child) 102 (Adoption) 117 (Orphan Relative) Child (Residence) (Class BT) 802 (Child) 837 (Orphan Relative) Confirmatory (Residence) (Class AK) 808 (Confirmatory) Designated Parent (Migrant) (Class BY) 118 (Designated Parent) Designated Parent (Residence) (Class BZ) 859 (Designated Parent) Distinguished Talent (Migrant) (Class AL) 124 (Distinguished Talent) Distinguished Talent (Residence) (Class BX) 858 (Distinguished Talent) Employer Nomination (Permanent) (Class EN) 186 (Employer Nomination Scheme) Regional Employer Nomination (Permanent) (Class RN) 187 (Regional Sponsored Migration Scheme) Special Eligibility (Class CB) 151 (Former Resident) Norfolk Island Permanent Resident (Residence) (Class AW) 834 (Permanent Resident of Norfolk Island) Other Family (Migrant) (Class BO) 114 (Aged Dependant Relative) 115 (Remaining Relative) 116 (Carer) Other Family (Residence) (Class BU) 835 (Remaining Relative) 836 (Carer) 838 (Aged Dependent Relative) Parent (Migrant) (Class AX) Aged Parent (Residence) (Class BP) 804 (Aged Parent) Protection (Class XA) 866 (Protection) Refugee and Humanitarian (Class XB) 200 (Refugee) 201 (In-country Special Humanitarian) 202 (Global Special Humanitarian) 203 (Emergency Rescue) 204 (Woman at Risk)</p>	<p>Partner (Residence) (Class BS) Subclasses 100 (Spouse) visa; 100 (Partner) visa; 110 (Interdependency) visa; 309 (Spouse (Provisional)) visa; 309 (Partner (Provisional)) visa; 310 (Interdependency (Provisional)) visa; 801 (Spouse) visa; 801 (Partner) visa; 814 (Interdependency) visa; 820 (Spouse) visa; 820 (Partner) visa; 826 (Interdependency) visa. Resolution of Status (Class CD) Return (Residence) (Class BB) 155 (Five Year Resident Return) 157 (Three Month Resident Return) Partner (Migrant) (Class BC) 100 (Partner) Contributory Parent (Migrant) (Class CA) 143 (Contributory Parent) Contributory Aged Parent (Residence) (Class DG) 884 (Contributory Aged Parent (Temporary)) visa: 47PT 864 (Contributory Aged Parent) Territorial Asylum (Residence) (Class BE) 800 (Territorial Asylum) Witness Protection (Trafficking) (Permanent) (Class DH) Skilled (Residence) (Class VB) Skilled--Independent (Permanent) (Class SJ) Skilled--Nominated (Permanent) (Class SN) Border (Temporary) (Class TA) 773 (Border) Business Skills (Provisional) (Class UR) 160 (Business Owner (Provisional)) 161 (Senior Executive (Provisional)) 162 (Investor (Provisional)) 163 (State/Territory Sponsored Business Owner (Provisional)) 164 (State/Territory Sponsored Senior Executive (Provisional)) 165 (State/Territory Sponsored Investor (Provisional)) Business Skills (Provisional) (Class EB) 188 (Business Innovation and Investment (Provisional)) Special Program (Temporary) (Class TE) 416 (Special Program) Diplomatic (Temporary) (Class TF) 995 (Diplomatic (Temporary)) Electronic Travel Authority (Class UD) 601 (Electronic Travel Authority) (Removal Pending)</p>	<p>Emergency (Temporary) (Class TI) 302 (Emergency (Permanent Visa Applicant)) 303 (Emergency (Temporary Visa Applicant)) Bridging F (Class WF) 60 (Bridging F) 070 (Bridging Extended Eligibility (Temporary) (Class TK)) 445 (Dependent Child) Investor Retirement (Class UY) 405 (Investor Retirement) Medical Treatment (Visitor) (Class UB) 602 (Medical Treatment) New Zealand Citizen Family Relationship (Temporary) (Class UP) 461 (New Zealand Citizen Family Relationship (Temporary)) Partner (Temporary) (Class UK) 820 (Partner) Prospective Marriage (Temporary) (Class TO) 300 (Prospective Marriage) Resident Return (Temporary) (Class TP) 159 (Provisional Resident Return) Resolution of Status (Temporary) (Class UH) 450 (Resolution of Status--Family Member (Temporary)) 850 (Resolution of Status (Temporary)) Retirement (Temporary) (Class TQ) 410 (Retirement) Tourist (Class TR) 676 (Tourist) Visitor (Class TV) 651 (eVisitor) Special Category (Temporary) (Class TY) 444 (Special Category) Partner (Provisional) (Class UF) 309 (Partner (Provisional)) Contributory Parent (Temporary) (Class UT) (Contributory Parent (Temporary)) Contributory Aged Parent (Temporary) (Class UU) 884 (Contributory Aged Parent (Temporary)) Student (Temporary) (Class TU) 570 (Independent ELICOS Sector) 571 (Schools Sector) 572 (Vocational Education and Training) 573 (Higher Education Sector) 574 (Postgraduate Research Sector) 575 (Non-Award Sector) 576 (AusAID or Defence Sector) 580 (Student Guardian) Temporary Business Entry (Class UC) 457 (Temporary Work (Skilled)) Temporary Safe Haven (Class UJ) 448 (Kosovar Safe Haven (Temporary)) 449 (Humanitarian Stay (Temporary))</p>	<p>Temporary (Humanitarian Concern) (Class UO) (Temporary (Humanitarian Concern)) Transit (Temporary) (Class TX) 771 (Transit) Work and Holiday (Temporary) (Class US) 417 (Working Holiday) 462 (Work and Holiday) Working Holiday (Temporary) (Class TZ) 417 (Working Holiday) Maritime Crew (Temporary) (Class ZM) 988 (Maritime Crew) Superyacht Crew (Temporary) (Class UW) 488 (Superyacht Crew) Skilled (Provisional) (Class VF) Graduate) 476 (Skilled--Recognised Graduate) Skilled (Provisional) (Class VC) 485 (Temporary Graduate) 487 (Skilled--Regional Sponsored) 570 (Independent ELICOS Sector) visa; 571 (Schools Sector) visa; 572 (Vocational Education and Training 575 (Non-Award Sector) visa; 485 (Skilled--Graduate) Skilled--Regional Sponsored (Provisional) (Class SP) 489 (Skilled--Regional (Provisional)) 400 (Temporary Work (Short Stay Activity)) Temporary Work (Long Stay Activity) (Class GB) 401 (Temporary Work (Long Stay Activity)) Training and Research (Class GC) 402 (Training and Research) Temporary Work (International Relations) (Class GD) 403 (Temporary Work (International Relations)) Temporary Work (Entertainment) (Class GE) 420 (Temporary Work (Entertainment)) Visitor (Class FA) 600 (Visitor) Bridging A (Class WA) 010 (Bridging A) Bridging B (Class WB) 020 (Bridging B) Bridging C (Class WC) 030 (Bridging C) Bridging D (Class WD) 040 (Bridging (Prospective Applicant)) 041 (Bridging (Non-applicant)) Bridging E (Class WE) 050 (Bridging (General)) 051 (Bridging (Protection Visa Applicant))</p>
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Appendix Three – Slovenes arriving to Australia.



Year	Slovenia	Yugoslavia	Serbia	Macedonia (FYROM)	Croatia	Bosnia & Herzegovina	Bosnia	Montenegro
1891								1
1901							1	1
1921		73						
1933		279						
1947		454						
1954		6071						
1961		17014						
1971		47892						
1976		56059						
1981		59286						
1986		59092						
1991		63770						
1996	2800		4084	18912	17432	4657		
2001	2735		19536	19487	18870	8494		
2006	2513		7030	18289	18175	8886		
2011	2437		7367	18293	17239	9157		518

- Croatia, Slovenia and Macedonia (Former Yugoslav Republic of Macedonia) seceded from the Socialist Federal Republic of Yugoslavia in 1991.
- Bosnia-Herzegovina seceded in 1992.
- Serbia and Montenegro remained part of the Yugoslav Federation and established the Federal Republic of Yugoslavia in 1992.
- The Federal Republic of Yugoslavia changed its name to Serbia and Montenegro in 2003.

Note: information provided by the Museum Victoria.¹⁹³³

¹⁹³³ <https://museumvictoria.com.au/origins/getpopulation.aspx?pid=54>, accessed 12 October 2016.

Appendix Four - Abbreviations

AG - Advocate General

ASEAN – Association of South East Asian Nations

AU - Administrative Unit Slovenia

ECJ – European Court of Justice

ECoHR – European Court of Human Rights

ECFR – European Charter of Fundamental Rights 2000

EEC – Treaty establishing the European Economic Community 1957

EU – European Union

FIRB - Foreign Investment Board Australia

IOM – International Organisation for Migration

MS – Member States

NA – Slovenia National Assembly

OECD – Organisation for Economic Co-operation and Development

PIL – Private International Law

SC – Slovenian Constitution

SCC – Slovenian Constitutional Court

TEU - Treaty of the European Union

TFEU – Treaty on the Functioning of the European Union

TCN – Third Country Nation (non-citizen)

UNHCR – The United Nations High Commissioner for Refugees

YU – Yugoslavia

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