THE EVOLUTION OF AUSTRALIAN PASSPORT LAW

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[*In this modern world of rapid international travel the passport has assumed a previously unrealized importance. The 'right' to travel freely to and from this country depends so heavily upon this one document that the development of law in relation to passports has become of critical importance to all Australians. Mr Lancy examines the rights and obligations that have attached to passports up until now and opens up some disturbing civil liberties issues that governmental action on passports has raised.*]

1. INTRODUCTION

The age of jet travel has ushered in an unprecedented growth in the number of Australians travelling overseas. Whether for business, study or tourist holidays, vast numbers of Australians leave and return to this country every year.

This growth in overseas travel has raised the question of whether there is a 'right' to travel and if so, what is the exact nature of this right. It has also called into question the precise nature and effect of the principal travel document, the passport. For it is upon this modest and relatively obscure document that the right to travel is predicated. The development of the law relating to passports has been based upon both municipal and international law doctrines. It demonstrates the legal response to the complex social and human problems that have emerged with the large scale movement of persons across international frontiers.

In 1979 the Commonwealth government enacted the Passports Amendment Act. The Act introduced significant changes to the law relating to passports and was the first major attempt in over forty years to systematically describe and explain the law relating to passports in Australia. It was the passage of this Act coupled with the growing concern over the nature of the 'right' to travel that prompted the author to write this article.

The article examines three major themes in the evolution of Australian passport law. Firstly it considers the historical evolution of the passport document. This involves an examination of the juristic nature of the document both in international and municipal law. In addition, the role of the prerogative powers and their relationship to the evolving common law concerning passports will be discussed.

The second major theme involves an examination of the relevant Australian legislation in the field and the development of procedures governing the granting and cancellation of passports.

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The final theme involves an examination of the extent to which judicial procedures are available to a passport applicant or holder who wishes to challenge ministerial or departmental decisions concerning his or her rights with respect to a passport. This involves an appraisal of the nature and scope of the ministerial discretion and the manner in which it has come to be exercised in this field.

2. THE LEGAL NATURE OF A PASSPORT

In Medieval England a 'passport' was a form of license issued by the Crown to a subject authorising him to leave the realm. It appears that in the early development of the common law a subject could not leave the realm without the leave of the Crown, lest the King be deprived of the subject's military or other feudal services.

By Blackstone's time that notion had been largely outmoded. Blackstone was of the view that the subject had a general common law right to leave the realm, subject to the Crown's prerogative right to restrain him by the ancient writ of *ne exeat regno*.[1] The first use of the word 'passport' in an English statute indicates its generic import, describing any document issued to a person to enable him to travel or to facilitate his journey from one place to another.[2]

In the treaty between England and Denmark of 11th July, 1670, providing for mutual trade between the two countries, reference is made to passports. The treaty describes 'letters of passport' to accompany the ships, goods and men of the contracting states when visiting the territories of each state.[3]

The textual form of the passport set out in the treaty referred exclusively to a ship, but the treaty also provided for letters of passport which might be required to be produced on land by men travelling. Here, then, may well be the modern precursor to the 'passport'. In this instance there is an official document issued by a state to its own subjects to enable them to travel abroad.[4]

[1] 'A Natural and regular consequence of this personal liberty, is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The King indeed, by his royal prerogative, may issue out his writ *ne exeat regno*, and prohibit any of his subjects from going into foreign parts without licence. This may be necessary for the public service and safeguard of the Commonwealth.' Blackstone, William, Sir, *Commentaries On The Laws of England* (1978) I, 136-7.

[2] In 1548, an Act (2 and 3 Ed. VI c. 2) was passed for the reformation of captains and soldiers. Section VII provided that 'no captain shall give to any of his soldiers . . . any licence or passport to depart from his service. . . .'

[3] Treaty of Peace and Commerce between Great Britain and Denmark, signed at Copenhagen, 11 July 1670, noted in Parry C., *Consolidated Treaty Series*, Vol. II 1668-71, (1969) 372-3. Section XX of the Treaty provided inter alia the following '. . . for the preventing of fraud, and clearing all suspicion, it is thought fit, that the ships, goods, and men, belonging to the other Confederate, in their passage and voyages, be accompanied with letters of passport and certificate; . . .'

[4] It was arguably introduced on the analogy of the ship's passport, seabrief or certificate of nationality commonly issued by states to their ships during the 17th century. See Lord Stowell's discussion in the prize court case of *The Success* (1812) 1 Dodds 131-2.

During the 18th century and early part of the 19th century, the term 'passport' acquired a technical meaning quite different from the current usage. In the 1758 edition of *Droit des Gens*, Vattel defines 'passport' as:

> a kind of privilege ensuring safety to persons in passing and repassing, or to certain things during their conveyance from one place to another . . . the term passport is used on ordinary occasions when speaking of persons who lie under no particular exemption as to passing and repassing in safety, and to whom it is only granted for greater security and in order to prevent all debate, or to exempt from some general prohibition.[5]

It is noteworthy that the 'passport', as defined, is issued by the sovereign of the territory in which the document has its effect. But by the time of the war with France, new legislation was enacted respecting aliens arriving and leaving the kingdom. In 1793 it was provided that any alien, except the domestic servants of any of His Majesty's subjects, who shall have arrived in the kingdom, being desirous of changing the place of his or her usual residence by virtue of his or her first passport, shall obtain from the mayor, a passport in which shall be expressed the name and description of such alien and the name of the town to which such alien proposes to remove.[6] A special exemption was however granted to alien merchants to whom were extended full liberties to pass and repass within the country.[7]

The Act of 1793 dealt only with aliens entering and travelling within England. But by the Act of 1798,[8] it was further provided that no alien should *leave* the kingdom without a passport obtained from one of His Majesty's Secretaries of State. Hence a passport issued to an alien to travel within the realm was a matter for the local authorities, whilst a passport to leave the kingdom was one for the central government. This pattern of passport control of aliens lapsed with the advent of peace in 1802 and 1814-15, but was reintroduced with the resumption of hostilities in 1803 and 1815.

From an examination of the legislation one inference seems possible. It could be suggested that by the beginning of the 19th century, a passport in English law meant a written permission given by a belligerent to enemy subjects or others allowing them to travel in his territory or in enemy territory captured or occupied by him. This conception of a passport still survives and has its place in modern international law. Clearly however, today's passport is an entirely different document. How and when did the change come about?

[5] Diplock K., 'Passports and Protection in International Law' (1946) 32 The Grotius Society 42, 46.

[6] Act of 1793, 33 Geo III, c. 4, s. 9.

[7] This special exemption to alien merchants from the more burdensome provisions is derived from the Magna Carta c. 41. 'All merchants (if they were not openly prohibited before) shall have their safe and sure conduct to depart out of England, to come into England to tarry in, and go through England, as well by land as by water, to buy and sell, without any manner of evil tolts, by the old and rightful customs, except in time of War.' See Diplock, *supra* n. 5.

[8] Act of 1798, 38 Geo III, c. 50.

By 1836 a new Act required aliens, upon arrival, to show any 'passports' which they might have in their possession, to the customs office on landing; having shown them they were allowed to retain them in their own possession during their stay.[9] This document was obviously quite different from the earlier 'passports', but more akin to the modern passport. It was not, however, an essential accompaniment of travel at that time. In 1858, it is apparent that the passport system in its modern sense was operating for travellers between England, France and Belgium.[10] But it was not without considerable confusion, due in part to the practice of governments concurrently issuing 'passports' to their own subjects and possibly others, to facilitate their travel abroad, and issuing through their consular agents abroad 'passports' to aliens to facilitate their travel in the issuing government's territory. This latter practice was, by 1887, replaced by the modern visa system. The situation, however, was somewhat fluid, as that date, and indeed later, there was no international custom prohibiting governments from issuing passports to aliens present in their own territory, to facilitate their travel either within that territory or outside.[11]

Moreover, at this time various countries did not require alien travellers to have 'passports' of any description. Italy abolished them in 1860, Denmark in 1887 and, by the outbreak of the 1914 war, passport requirements had been abolished on a reciprocal basis between Belgium, France, Holland, all Scandinavian countries and the British Isles.[12] But the war in 1914 necessitated for both belligerents and neutrals alike the general reintroduction of the passport system. This became necessary in order to ascertain the identity of travellers in various territories.

This reintroduction was not, however, evidence of any uniform international usage. In 1922, the British Government stated that it was not its practice to issue passports to persons other than British subjects or those from Protected or Mandated Territories. The Bulgarian government issued 'passports' *eo nomine* to subjects and aliens alike. Germany issued Identity Certificates to non-nationals, resident in its territories, for the purpose of facilitating their travel abroad. Moreover the governments of France, Belgium and the Netherlands had reciprocally abolished the requirement of 'passports' for travellers holding 'cartes d'identite' issued by the govern-

[9] Act of 1836, 6 and 7 WILL. IV, c. 11, s. 3.

[10] *R. v. Bernard* (8 St. Tr. n.s. 887). This case arose out of the attempt by Orsini on the life of Napleon III. Evidence showed that the British Foreign Office issued 'passports', to British subjects over the name of the Foreign Minister to 'all whom it may concern' much like a modern passport. The case also indicates that a visa from the consular officers of France and Belgium was necessary before the bearer of a passport issued by the British Foreign Office could enter those countries.

[11] *Parliamentary Papers 1887 No. 81* in reply to an inquiry it was stated that in Austria-Hungary the state authorities granted 'passports' to travellers of alien nationality if their own passports were not in order and they were not suspicious characters. Noted in Diplock, *op. cit.* p. 51.

[12] See Diplock K., *op. cit.* p. 51.

ments of the respective territories in which the holders were resident, irrespective of whether they were nationals of that territory.

It can be suggested, that a passport, in its current sense, is a document of identity, which a state may require alien travellers within its territories to have in their possession. Thus, it is a requirement of the state of which he is a national. It becomes therefore a matter for the *municipal* law of the state, which the traveller visits, to prescribe the kind of identity document which it requires the traveller to have in his possession.[13]

The question then arises, concerning the nature of a passport in international law, as to whether it affords the traveller any rights to protection on the part of the issuing state. This involves first a question of municipal law.[14] Under the common law, it appears that the right to issue passports is part of the prerogative of the Crown.[15] No one is entitled as of right to demand a passport; no subject has any remedy if he or she is denied a passport. The Crown retains a discretion to refuse a passport although this discretion is seldom exercised. It is also the case that, at common law, the subject has no legally enforceable right to demand the protection of the Crown when outside the realm. The Crown retains a discretion as to whether, and to what extent, and on what conditions it will extend its protection.[16]

International usage seems to suggest that passports issued by various governments are not conclusive evidence that the holder is entitled to the national status entered upon a passport document.[17] However, as a matter of day-to-day practice, a passport is treated by consular officers of the issuing state, and by the officials of the state which is being visited by the holder, as *prima facie* evidence that the holder is entitled to the national status endorsed on the passport. Being only *prima facie* evidence it is subject to displacement by other more compelling evidence.

[13] Such a document may be a 'passport' issued by another state either with or without a '*visa*' issued by the Consular representative of the state to be visited; it may be an ordinary carte d'identite issued by another state for its own domestic purpose, under its own municipal law.

[14] In the United Kingdom there is currently no law which either declares the right to a passport or regulates its issue. There are no published rules and regulations which set out the reasons which may justify the withdrawal or refusal of a passport. However in 1958 the grounds for refusal were set out in a statement in the House of Lords: see 209 H.L. Deb. col. 860. See also *Going Abroad: a Report on Passports* (1974) paras. 29, 46-7, 51-5; 985 H.C. Deb. (Written Answers) cols. 189-90.

[15] Goodwin-Gill, Guy S., *International Law And The Movement of Persons Between States* (1978) 34-5. See also Street H., *Freedom, the Individual and the Law* (1979) 290-4. See also Chitty J., *A Treatise on The Law of The Prerogatives of The Crown* (1820) 48-9. See also *Joyce v. D.P.P.* [1946] A.C. 347.

[16] See *China Navigation Co. v. Attorney-General* (1932) 147 L.T. 22; subject unable to establish a right of armed protection of the Crown against pirates operating in Chinese waters.

[17] The United States Department of State expressly disclaims the view that a U.S. passport is conclusive evidence of the right of the holder to the protection of the United States, and, as a matter of municipal law in the United States, a U.S. passport is not evidence that the person to whom it is granted is a citizen of the U.S.A. See Diplock, *op. cit.* p. 66. To the same effect see *R. v. Ketter* (1939) 160 L.T. 306 and *ex p. Banta Singh* [1938] 1 D.L.R. 789.

What then, at common law, is the precise nature and effect of a passport? First, it appears that a passport does not confer upon its holders any legal right to enter or leave the realm. At common law, a citizen may have a right to do so, whether he has a passport or not, except in so far as his rights may have been taken away by any statutory regulation. If the holder of a passport is an alien, the mere possession of a passport gives him no automatic right to enter or leave the realm.[18] In addition, a passport, in itself, does not necessarily entitle the holder to enter or leave any foreign state. That right is dependent on the municipal law of the foreign country concerned. That state may require whatever documentation of identity it sees fit as a condition of entry. This may be a passport issued by a foreign government to its subjects, or to an alien, either with or without a visa or it may be no documents at all. However, the state to which entrance is sought may, in its discretion, refuse entrance to whomever it chooses, regardless of any documentation he may possess.

Again, at common law, a passport as such is incapable, in international law, of granting to the holder any right to the protection of the government outside the realm. If he is a British subject at common law he possesses that right irrespective of whether he holds a passport. If he is not a British subject, the British government has no right, in international law, to exercise any power of protection on his behalf. Hence, apart from express treaty or generally adopted usage, it is a matter of discretion for a state to decide what document it requires aliens within its jurisdiction to carry. Arguably, therefore, in the ordinary current sense of the term, passports in themselves confer no right recognized in international law. Whilst they may be evidence of national status, the rights to protection recognized in international law flow from actual national status, not the evidence by which that status is conclusively established.

There has, of course, been considerable legislative activity in the area of passports generally. Consequently it is to that legislation that attention must be directed to determine to what extent the hisorical nature and function of a passport has been altered. However, before turning to the legislation it is necessary to examine the relationship between it and the prerogative powers.

3. PASSPORTS AND THE PREROGATIVE POWERS

At the outset, it is important to note the relationship between international and municipal law in the area of passport control. In international law, no person has any legally enforceable right to the grant of a passport by the country of which he is a national. As every sovereign state has the right to determine who are its nationals,[19] it follows that a state has a corresponding power to determine whether, and on what conditions, it will issue a travel

[18] *R. v. Ketter* (1939) 160 L.T. 306.
[19] Hague Convention on the Conflict of Nationality Laws, 1930, article 1.

document to any of its nationals. The International Covenant on Civil and Political Rights of December 1966 guarantees liberty of movement from one country to another[20] and it could be argued that there is a corresponding right to be granted a passport, as the guarantee would be meaningless without such a right. However, if, under paragraph 3, the domestic law of a sovereign state duly prescribes restrictions on freedom of passage from one country to another, paragraph 2 ceases to apply.

The right to travel, to leave and return to the country of which a person is a national is recognized as a basic human right.[21] Hence the withholding of a passport arguably involves the denial of that basic right. But as noted, at common law there exists no 'right' to travel. In Britain, passports are issued by the Foreign Office under the royal prerogative. Thus the Crown may refuse or revoke a passport at its discretion. In practice passports are often refused.[22] A similar pattern is evident in the United States. After World War II, the United States government developed a policy of refusing a passport to a person, if the State Department had information in its files which gave reason to believe that the person was knowingly a member of a Communist organization, or that his conduct abroad was likely to be contrary to the interests of the United States.[23]

However, in *Kent v. Dulles*,[24] the Supreme Court declared that 'the right to travel is part of the liberty of which the citizen cannot be deprived without due process under the Fifth Amendment. . . . Freedom of movement is basic in our scheme of values'. More recently, in *Agee v. Muskie*,[25] the

[20] International Covenant on Civil and Political Rights (1966) article 12 par. 2 provides that 'everyone shall be free to leave any country including his own'.
However under par. 3 this right is subject to those restrictions which 'are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the Covenant'. Australia is a signatory of the Covenant.

[21] See the Universal Declaration of Human Rights, Article 13(2) 1948. The Australian government has signified its recognition of this right by endorsement of the above Declaration. See also the European Convention on Human Rights (Fourth Protocol) Article 2(2). 'Everyone shall be free to leave any country including his own.'

[22] Street H., *Freedom, the Individual and the Law* (4th ed. 1979) 292-3.

[23] See *The Department of State Bulletin* 9 June 1952. Secretary of State Dean Acheson.

[24] *Kent v. Dulles* (1958) 357 U.S. 116. The Supreme Court held that the relevant statutes did not empower the Secretary of State to withhold a passport for the reason that the plaintiffs had refused to file an affidavit concerning their membership of the Communist Party. The majority of the Court held that Congress had not intended to give the Secretary of State an unbridled discretionary power. They also held the view that, while the issue of a passport carried some implication of an intention to extend diplomatic protection to the bearer, this was but one subordinate function. The primary purpose of the passport was control over exit, and the right of exit was a personal right included within the word 'liberty' in the Fifth Amendment. See also *Aptheker v. Secretary of State* (1964) 378 U.S. 500 where the Supreme Court held that section 6 of the Subversive Activities Control Act 1950, which made it unlawful for members of any 'Communist Organization' to apply for or attempt to use a passport, was unconstitutional in that it restricted the right to travel too broadly and indiscriminately.

[25] *Agee v. Muskie* (1980) 629 F. 2nd 80.

United States Court of Appeals for the District of Columbia Circuit has ruled that Congress has not expressly or implicitly authorized the Secretary of State to promulgate a regulation that permits him to revoke a passport because its holder's activities abroad are causing or likely to cause serious damage to the United States' foreign policy or national security. The court held, also, that the right to travel is a fifth amendment liberty of which a citizen cannot be deprived without due process of law, and which is subject to regulation only pursuant to the law making functions of Congress. The decision may impose a further procedural limitation on the Secretary's discretion to restrict passports. Implicitly, the case suggests that the right to international travel is of such importance that its protection requires that all grounds for its limitation be detailed specifically by the Secretary in the notification of the restriction and of the right to a hearing on those charges. This issue of precisely what safeguards are required, if the right to travel is to be abridged, is a vital one, for while the *Agee* case[26] reached no constitutional issue, the Supreme Court in *Zemel v. Rusk*[27] arguably has established that Congress could constitutionally authorize a valid regulation on passport control and cancellation.[28]

Statutory power to issue and cancel a passport in Australia is conferred on the Federal government by the Passports Act 1938 (Cth).[29] An officer authorized by the Minister may issue Australian passports to Australian citizens and to British subjects, who are not Australian citizens; the passports are issued in the name of the Governor-General.[30] It is of particular significance that the power is granted in discretionary language — an officer *may* issue Australian passports. Quite clearly, therefore, the Minister, or his officer may refuse a passport. Moreover, they may cancel a passport and once cancelled the passport is void and must be delivered up to an authorized officer.[31]

[26] *Ibid.*

[27] *Zemel v. Rusk* (1965) 381 U.S. 1. The Supreme Court held that the Secretary of State was statutorily authorised to refuse to validate the passports of United States citizens for travel to Cuba, and that the exercise of that authority was constitutionally permissible. Prior to 1961, no passport was required for travel anywhere in the Western Hemisphere. On January 3rd, 1961, the United States broke diplomatic and consular relations with Cuba. On January 16 the Department of State eliminated Cuba from the area for which passports were not required, and declared all outstanding United States passports (except those held by persons already in Cuba) to be invalid for travel to or in Cuba 'unless specifically endorsed for such travel under the authority of the Secretary of State'. Through an exchange of letter in 1962, Zemel, a citizen of the United States and holder of an otherwise valid passport, applied to the State Department to have his passport validated for travel to Cuba as a tourist. His request was denied. Zemel then instituted a suit against the Secretary of State.

[28] In *Worthy v. Herter* (1959) 270 F. 2d 905 and *Frank v. Herter* (1959) 269 F. 2d 245 the Supreme Court gave express judicial recognition of the power to restrict the travel of American citizens to certain countries or areas. It appears from these cases that the concept of area restriction is more of a political and foreign affairs matter than is the denial of a passport in an individual case. These decisions on area restrictions were upheld by the Supreme Court in *Zemel v. Rusk* (1965) 381 U.S. 1.

[29] For the history of Australian passport legislation see section 4 of this article.

[30] Passports Act 1938 (Cth) s. 7(2).

[31] *Ibid.* s. 8(3).

Legally, therefore, the position is much the same as in England. There remains, however, one question concerning the residual prerogative power of the Crown. It could be argued that, apart from any specific statutory power, the issuance and cancellation of a travel document could be supported by the prerogative powers of the Crown. The prerogative is defined as the residue of discretionary or arbitrary authority which, at any given time, is legally left in the hands of the Crown. However, as Lord Dunedin pointed out in *Attorney-General v. De Keyser's Royal Hotel Ltd*:

> inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.[32]

If, therefore, the Passports Act 1938 (Cth) comprehensively covered by statute all that the Crown might previously have been empowered to do by virtue of its prerogative in the field of passports and travel documents, there exists now no residual prerogative power in this area.

If there is no residual prerogative power in the area of passports, the question then arises as to whether a person possessing Australian citizenship has any legal right to an Australian passport. Such a right would necessarily entail a right that a currently valid passport should not be cancelled by the Commonwealth government, nor be subject to a demand that it be delivered up to a Commonwealth officer.

Although case law on the point is sparse, the authorities establish that under Australian law there is no absolute right to a passport. As noted, there are no express limitations upon the discretion of issuing or cancelling officers, or of the Minister in the Passports Act 1938 (Cth). However an applicant for a passport, or the holder thereof, might be entitled to some relief if he could positively establish that a refusal to issue or a cancellation was made quite arbitrarily or with denial of natural justice.[33] In *R. v. Holt; ex parte Glover*,[34] the High Court held that there exists a power under s. 7 of the Act to refuse an application for a passport as a matter of discretion, such refusal being justified on grounds of the security of the Commonwealth of Australia. Providing therefore that the Minister acts honestly, his discretionary power to refuse to issue or to cancel will not be reviewed by the court.[35]

There is, finally, the writ of *ne exeat regno* and its relationship to the prerogatives of the Crown. The Crown's right to restrain subjects from leaving the realm and to compel them to return from foreign countries was grounded upon the general interest which the monarch had in his or her

[32] *Attorney-General v. De Keyser's Royal Hotel Ltd* [1920] A.C. 508, 526.

[33] See Administrative Decisions (Judicial Review) Act 1977 (Cth) s. 19. This topic is developed later in section 6 of this article.

[34] *R. v. Holt; Ex parte Glover* (Unreported).

[35] *The King v. Paterson; Ex parte Purves* (1937) 43 Argus L.R. 144; (1936-37) 10 A.L.J.R. 469.

subjects. However, the King had in general no legal power to force any of his subjects out of his dominions even to conduct a war. At common law, as noted above, everyone, generally speaking, was at liberty to go out of the kingdom without the leave of the King, though often some particular classes of persons were forbidden to do so, without a licence previously obtained. This common law right of the King expressly recognized in the great charter of King John may be exercised in one of two ways. First, by embargo, which probably could only be done in time of war or by the common law writ of *ne exeat regno*. This writ appears to be a state writ, used originally in cases of attempt, suspected or actual, involving conduct prejudicial to the King or the nation. In these cases, the Lord Chancellor granted it on application from any of the principal secretaries, without showing cause or upon other such information as his Lordship thought of sufficient weight. In the 1820 edition of Chitty, the view is expressed that:

> the writ may still be used on similar occasions, and may be obtained in the same manner; and, when it is not issued out of chancery in aid of the debt or demand of a private individual, and in order to prevent the party from evading justice, the King is not restricted to any particular cases; so that the causes of its issuing, and the grounds and motives on which it is granted, are not traversable: and of course, therefore, the King may issue it at pleasure, without any reasons applicable to the party restrained.[36]

Moreover, it is clear that although the writ was, in its nature, a state writ it was gradually introduced into the Court of Chancery and became a common process therein to prevent individuals leaving the kingdom to avoid payment of debts. As Lord Eldon said, in *Flack v. Holm*:[37]

> This writ was originally issued in attempts against the safety of the state, and may be applied, subject to the responsibility in those who give the advice, to prevent any subject from quitting the country. How it happened that this great prerogative writ, intended by the laws for great political purposes and the safety of the country, came to be applied between subject and subject, I cannot conjecture.

Halsbury regards the writ as having application only in time of war. The suggestion is that in such times, where the public welfare so demands, both subjects and aliens may be restrained from leaving the realm in various ways. One such method was the writ of *ne exeat regno*. Regarded as probably obsolescent, and in peace time confined to absconding debtors, it may still have use as a state writ to prevent persons leaving the realm in war time.[38] Holdsworth regarded the practice of using the writ to command a subject to return as long being disused. He suggested that the writ might possibly be used in a national emergency, but that it had ceased to be used to prevent subjects from going abroad, except as part of the process of the Court of Chancery.[39]

[36] Chitty J., *op. cit.* 21-2.
[37] (1820) 37 E.R. 430, 433.
[38] 7 *Halsbury's Laws of England* 3rd ed. 294 para. 618.
[39] Holdsworth, *A History of English Law* 10, 362. Referred to in *Parsons v. Burk* [1971] N.Z.L.R. 244.

This view of the fate of the writ for state purposes was accepted and acted upon as the modern statement in *Parsons v. Burk*[40] where it was held that the writ, whatever its current import, would not issue upon the application of a private citizen.[41] It may be concluded, that the writ survives in its original political use only as an historical relic rather than as a tool of any utility.[42] Only the Crown may apply for it, and there exist adequate and simpler devices for controlling the exit of individuals from the country through passport control. There is little need, in practice, for the political use of the writ and clearly the Passports Act 1938 (Cth) is a more certain and effective method by which the movement of citizens may be regulated.[43]

The prerogative powers of the Crown to refuse or impound passports to British subjects has been described by two experienced American authors as follows:

> This is perhaps the only really objectionable arbitrary power which the Crown still claims. Its legal justification is highly doubtful. A lesson needs to be learned from the statutes and judicial decisons which have established the right to a passport in the United States and elsewhere.[44]

Can the same criticism be levelled at the Australian legislation and ministerial practice? It is to that question that we now turn.

4. THE AUSTRALIAN PASSPORT LEGISLATION

The first Commonwealth Act relating to passports was the Passports Act 1920 (Cth). It was a continuation of the main regulations issued under the War Precautions Act 1914-1915 (Cth), with regard to the issue of passports. It provided that any person over sixteen years of age, on leaving the Commonwealth, must possess a passport.[45] The Act was introduced in response to the then widening practice in the international community requiring travellers to have adquate documentation and proof of identity. Persons entering Australia at that time were dealt with under the Immigration Act 1901 (Cth). The passports issued under the Act expired after 2 years, unless extended by prior arrangement.

Certain exemptions were granted from the requirements of the Act, where arrangements had been made with foreign countries to facilitate freedom of

[40] [1971] N.Z.L.R. 244.

[41] The court relied on Lord Eldon's view, that the responsibility is on those who give the advice, who in the context of the case, were Her Majesty's Ministers. Thus, the court held that in the absence of clear authority to the contrary, the writ would not issue in a matter of State upon the application of a private citizen, at least where the Crown declined either to be a party to the application or to be represented in the proceedings.

[42] *Cf. Felton v. Callis* [1969] 1 Q.B. 200, 217 *per* Megarry J. The writ may be of greater use in civil cases.

[43] See generally Beames, *Brief View of the Writ of Ne Exeat Regno* (1812) cited by Story, *Equity Jurisprudence* (2nd ed. 1839) v. 2, 635. See *Felton v. Callis* [1969] 1 Q.B. 200.

[44] Schwartz B. and Wade H. W. R., *Legal Control of Government* (1972) 63.

[45] Passports Act 1920 (Cth) s. 3(1). Certain specified persons were exempted under s. 3(2).

intercourse. Section 5 of the Act provided that any person entering Australia who was required to be in possession of a passport, must, if required, give up his passport to an officer before leaving the vessel by which he or she entered the Commonwealth.[46] In the second reading speech Senator Russell described the problem concerning undesirables coming to Australia by signing on as seamen outside the Commonwealth.[47] To help check this traffic, section 7 of the Act made it an offence for the master of a vessel to discharge any alien seamen who signed on outside the Commonwealth, and who had not lodged his passport with an officer as required under section 5.

Finally, the Act conferred a broad discretionary power on the Minister of the Department controlling the issue of passports to cancel a passport, permit or pass, and to demand that it be delivered up to the relevant officer.[48] It is this broad discretionary power, which over the years has been expanded to include the issue of a passport, that has proved to be the most controversial aspect of current passport legislation. The next Commonwealth Act in the field was the Passports Act 1938 (Cth).

The 1938 Passports Act was introduced to achieve separate purposes. On the one level it was an attempt to bring Australian legislation into conformity with the ordinary conception of a passport described by Lord Alverstone C.J. in *R. v. Brailsford*:

> It will be well to consider what a passport really is. It is a document issued in the name of the Sovereign on the responsibility of a Minister of the Crown to a named individual, intended to be presented to the Governments of foreign nations and to be used for the individual's protection as a British subject in foreign countries, and it depends for its validity upon the fact that the Foreign Office in an official document vouches the respectability of the person named.[49]

To achieve conformity with that conception, the passport contained the following words:

> I, the Governor-General of the Commonwealth of Australia, request, in the name of His Britannic Majesty, all those whom it may concern, to allow the bearer to pass freely without let or hindrance, and to afford him every assistance and protection of which he may stand in need.

It may be objected that the word 'validity' is misconceived in Lord Alverstone's definition. As mentioned above, a British passport does not confer upon its holder any legal right to enter or to leave the realm. If he is a British subject he is entitled at common law to do so, whether he has a passport or not, except in so far as his rights may have been taken away by statute. If he is an alien, the mere possession of a British passport gives him no right to enter or leave the realm.[50] Nor does a British passport, as such, entitle the holder to enter or leave any foreign state. That right depends upon the municipal law of the country concerned. Such state may require

[46] Passports Act 1920 (Cth) s. 5(1).
[47] *Parliamentary Debates* (Senate) 28 April 1920, 1517-19.
[48] Passports Act 1920 (Cth) s. 6(1).
[49] *R. v. Brailsford* [1905] 2 K.B. 730, 745. This description was adopted by all their Lordships in *Joyce v. Director of Public Prosecutions* [1946] 347, 369.
[50] See *R. v. Ketter* (1939) 160 L.T. 306.

whatever document of identity (if any) it pleases as a condition of entry. These considerations, it seems, did not commend themselves to the framers of the 1938 Act.

But the Act set out to achieve additional objectives. It repealed the Passports Act 1920 (Cth), which was in substance a re-enactment of the War Precautions (Passports) Regulations 1916, which made it an offence for any person to leave the Commonwealth, without being in possession of a passport or other document authorizing his or her departure. Thus, the new 1938 Act provided that the minister or authorized officer could issue passports,[51] but that it would no longer be an offence for any person to leave Australia without a passport. The Act further stipulated that Australian passports would only be issued to 'British subjects', a term, that included all persons who in Australia were entitled to all political and other rights, powers and privileges to which natural born British subjects were entitled.[52] It also included any aboriginal natives of any territory of the Commonwealth.

One new addition to the 1938 Act was a provision giving power to require a person to hand over his passport in cases where it was known, or there was reason to believe, that it had been obtained by false or misleading statements.[53] It was also provided, that proceedings for an offence against the Act could be instituted, either in the state or territory where the offence was committed, or in the state or territory in which the defendant was found.[54] The final clause of the 1938 Act provided for some additional regulation making powers.[55] Finally, 'stateless' persons and others, who had no consular representatives in the Commonwealth, could be issued with certificates of identity in lieu of passports, if they were unable to obtain national passports in Australia.

It was objected then, and the same objection may be made now, that the import of the 1938 Act was to confer upon the Minister unlimited power to prevent the free passage of Australian citizens abroad. Although the Act did not compel Australian citizens to secure a passport, few would have been unwise enough to leave Australia without one. Possession of a passport assured its holder in various foreign countries a safer passage than travel without such a document. Thus, most citizens who wished to travel abroad would appreciate that it was in their own interests to secure a passport. Yet the Act conferred on the Minister power to refuse to issue a passport and to decline to give reasons for his action. Under the 1938 Act, the person

[51] Passports Act 1938 (Cth) s. 7(1).

[52] The Nationality Act 1920 s. 6, enumerated those persons within the description 'British Subject'. It also provided that a woman who was British at the time of marriage to an alien, could make a declaration which enabled her to retain the rights and privileges of a British subject whilst in Australia. Thus, the Commonwealth government thought it desirable to have the power to issue a passport to a woman in this category who wished to travel on an Australian passport instead of a foreign one.

[53] See Passports Act 1938 (Cth) s. 9(1).

[54] *Ibid.* s. 11.

[55] *Ibid.* ss. 12(a), (b), (c).

denied a passport had no right to appear before the Minister to state his case. The Act thereby conferred great discretionary powers indeed. If the matter of passports was originally in England a prerogative of the Crown, the 1938 Act committed that matter to legislative expression. The point to note is that here is an attempt to gain a respectability for the exercise of a power by clothing it within a legislative framework thus giving it the imprimatur of the parliament.

The debate surrounding the 1938 Act concentrated on two major themes. One was the width and scope of the Minister's discretion coupled with the non-reviewability of his decision. In the Federal Parliament members discussed at some length the question of an appeal against the Minister's refusal to issue. Cases of hardship were cited and certain members of the federal opposition sought to introduce various amendments by which the subject's civil liberties would be more adequately protected.[56]

The then Minister for the Interior, in supporting the width of the powers granted to him under the Act, argued that passports were, in fact, testimonials issued in the name of the sovereign to facilitate travel in foreign lands. Thus when a passport was issued, 'the seal of approval' was placed on the holder by the Minister. Thus, he argued, it was evident that the Minister should not be required to communicate to any person to whom a passport was refused the exact reasons which had influenced him in the refusal. The Minister drawing on the analogy of a testimonial said,

> In our private lives, there are many occasions when, for reasons which are quite adequate, we feel justified in declining to give a testimonial to some person, but we should not like to be called upon to disclose our reasons, or be compelled to justify our action. In regard to the issue or refusal of passports, a Minister of the Crown is in a comparable situation.[57]

It may be objected, that a passport and a testimonial are two totally different documents. It may be argued, that the cancellation or the refusal of a passport involves a serious infringement of a well established common law right, whereas the denial of a testimonial has no such implication.

The Minister, however, was not persuaded, and advised the Parliament that he should, in exceptional circumstances, have the discretionary power to refuse the issue of a passport without advising the applicant of the reasons for so doing. The issue, however, had not been adequately or finally resolved. Many argued at that time that an amendment ought to have been added giving redress to an applicant in the courts by way of *mandamus*, so that if improper reasons did actuate a refusal the matter could be properly ventilated in the courts.[58]

[56] The then member for Batman (Mr Brennan) unsuccessfully moved for the following proviso to be added to the Act. 'Provided that a passport visa or endorsement shall not be refused, cancelled or recalled unless and until reasons subscribed by the Minister have been conveyed to the appicant or holder of the passport visa or endorsement as the case may be.' *House of Representatives Debates* 21 June 1938, 2419 (Mr Brennan).

[57] *House of Representatives Debates* 21 June 1938, 2422 (Mr McEwen).

[58] *House of Representatives Debates* 21 June 1938, 2421 (Mr Spender).

The other theme in the debate was related to the potential use of the Passports Act 1938 (Cth) in the collection of taxation revenue. It was suggested that a clearance from the Taxation Department was a condition precedent necessary in order to secure a passport. The then Minister denied that this was the case. He told the House of Representatives that the protection of the revenue was assured under the Income Tax Assessment Act 1942 (Cth) in which it was stipulated that no person could secure a passage to leave the country by any transport service without first obtaining and furnishing the company concerned with a clearance from the Taxation Department. He stressed, however, that a clearance from the Taxation Department was not a necessary condition precedent to the issue of a passport.

Lastly, the procedure with respect to married couples was regulated in order to allay fears that the Passports Act 1938 (Cth) might be used to prevent a married man from leaving Australia without having first obtained his wife's consent. When a married man applied for a passport the department or the Minister requested that he furnish a letter of consent from his wife. If he failed to do so, the department advised the wife by letter that her husband had made application for a passport to enable him to leave the country. A wife who lived in the same state as her husband was informed that it was proposed to issue a passport within fourteen days, a wife who lived in a different state from her husband was told that the passport would be issued after twenty-one days. The purpose of the procedure was to enable a wife, who felt that she had or might suffer some wrong or injustice if her husband left the country, to institute action in a civil court to protect her position. Regardless of whether or not the wife eventually provided her husband with a letter of consent, the passport was issued at the expiration of the appropriate period.

With respect to such practice, it was held by Mr. Justice Evatt in *The King v. Patterson; ex parte Purves*[59] that the absence of the consent letter did not preclude the Minister from granting a passport, as the consent letter had no statutory basis. Furthermore, it was held that neither spouse had any right to compel the Minister to consider representations that a passport should be denied. Doubtless, the Minister could, if he deemed it proper, listen to such representations, but there was certainly no duty which the statute or any regulation placed upon the Minister. Thus the remedy of *mandamus* was quite inapplicable. If the Minister was considering the grant or cancellation of a passport, it was held that the Court had no authority to compel him to hear the representations of any other person, no matter what their relevancy or force. Mr. Justice Evatt concluded:

[59] *The King v. Paterson, Ex parte Purves* (1937) Argus L.R. 144, 146; (1936-37) 10 A.L.J.R. 469.

> . . . the matter is one which the Statute has referred to his discretion, and, so long as the Minister carries out his duties honestly, no Court may interfere with him.[60]

Although the case was concerned with the Commonwealth Passport Act 1920, section 6(1), the decision was apposite to the 1938 Act. It was suggested in the Parliament that the procedure with respect to married persons was quite futile, and that the Minister ought not participate in the private quarrels of spouses nor determine the rights of the parties concerned.[61]

What emerged from the debates and discussions surrounding the 1938 Act was the open-ended and ill-defined nature of the Minister's powers and the potential for misuse.

It also became evident that the grant or cancellation of a passport had wide ranging implications in various domestic law matters including family disputes and revenue collection. With this background, we can now turn to a consideration of the present amendments and the extent to which the various objections have been accommodated in the current legislation.

5. THE PASSPORTS AMENDMENT ACT 1979

The legislation governing the issue of Australian passports remained substantially unchanged from 1938 until 1979. The new Act attempts to update and modernize the existing legislation and departmental practice. In 1975, the responsibility for the administration of the Passports Act 1938 (Cth) was transferred to the Department of Foreign Affairs. The new Act maintained the general discretionary power to issue or refuse passports. However, it also sought to provide a proper legislative basis for the passport policy as well as a clear legislative framework for the exercise of ministerial discretion. The ministerial discretion remained, however, as the cornerstone of the administration in the field.

Since 1938, there have been several significant changes in policy and practice. In the past, it was often suggested that the need to carry a passport was an infringement of a basic right. Today however, the *withholding* of a passport is more likely to be regarded as a denial of a basic human right. Ironically, a passport or recognised travel document, while not essential for overseas travel under Australian law, is now generally necessary for overseas travel. The Australian government has, therefore, recognized a dual obligation in this area. It accepts its responsibilities to provide travel facilities to its own citizens as well as accepting an international obligation to those countries to which Australian citizens travel. In view of the request contained in the passport from the Governor-General seeking free passage, protection and assistance to the bearer, the government is responsible to ensure, as far as possible, that passports are not issued to persons likely to

[60] *Ibid.* 146.
[61] *House of Representatives Debates* 21 June 1938, 2418 (Mr Brennan).

threaten the national security and public order of another country, or the rights and welfare of its citizens. This is especially important in the case of political extremists, terrorists, drug dealers and persons inclined to acts of violence as a result of mental illness. Therefore the new Act retains the broad ministerial discretion in the issuance or cancellation of passports, but spells out in some measure, the reasons for which a citizen may be refused a passport. Section 7 of the new Act empowers the Minister to issue passports.[62] To retain the necessary flexibility in dealing with the vast range of circumstances surrounding passport applications, it was decided that the Minister for Foreign Affairs should himself retain an unfettered discretion to issue passports.

Section 8 of the Passports Amendment Act 1979 however, inserts a series of new provisions into the Act. These list a number of categories of persons to whom passports shall be refused by authorized officers. Such persons are described as follows; persons who are not married, and who have not reached the age of 18 years, unless the consent of persons having custodial rights has been obtained;[63] persons in respect of whom the authorized officers has reason to believe that there is in force a warrant for arrest issued in Australia;[64] persons whom the authorized officer has reason to believe are required to remain in Australia under a court order, or under a condition of parole or of recognisance, surety or bail bond;[65] persons who owe money to the Commonwealth as a result of circumstances arising from previous overseas travel;[66] persons whom the authorized officer believes already to be in possession or control of an Australian passport in force,[67] and persons in respect of whom the Minister has decided that issue of a passport would threaten security or welfare in another country.[68]

Many of these provisions conform with the existing ministerial and departmental practice and give clearer legislative expression to well established precedents on which successive governments have acted. The limitations apply only to the issue of passports by authorized officers, and do not affect the Minister's general discretionary powers to issue or cancel passports.

The section dealing with unmarried minors is an attempt to improve the problems involving the removal of children from Australia by one parent without the knowledge, or against the wishes, of the other parent. Although this is not a problem which could be solved by new passport legislation alone, the new provisions have to some degree strengthened the position.

[62] The current position is that only officers authorized by the Minister can issue passports.
[63] Passports Act 1938 (Cth) s. 7A(2)(a).
[64] *Ibid.* s. 7B(a).
[65] *Ibid.* s. 7B(b).
[66] *Ibid.* s. 7C(1)
[67] *Ibid.* s. 7D (unless there are special reasons).
[68] *Ibid.* s. 7E(1).

In modern times, the passport has become not only a necessary document, but also an extremely valuable one. There is an ever increasing traffic in lost, stolen and forged passports for use in connection with criminal and terrorist activities. The new Act seeks to combat this traffic, and to preserve the international status of an Australian passport as an acceptable identity document. To these ends section 6 of the Act inserts a new provision to the effect than an Australian passport remains the property of the Commonwealth.[69] Section 9 of the 1979 Act increases certain penalties in the 1938 Act and provides that passports may be cancelled in circumstances which would have prevented the issue of the passport, had those circumstances existed immediately before the passport was issued.[70] Section 10 of the 1979 Act establishes an obligation on a person, to whom a passport is issued, to report any loss or theft to the relevant authorities as soon as possible. Section 11 of the 1979 Act provides that an officer may demand the delivering up of a passport that has been obtained by means of a false or misleading statement, or has been used in connection with the commission of any offence against the Act or Regulations. Section 12 of the 1979 Act establishes a series of new offences relating to the improper use or possession of an Australian passport, forgery and fabrication of passports, and the wrongful issue of passports. Section 13 of the 1979 Act establishes greater penalties than under the original Act for a series of offences relating to the making of false or misleading statements in relation to passports, renewals or endorsements. This section also applies to non-Australian passports where the purpose of the statement is to defeat the provisions of a law of the Commonwealth or of a Territory.

Several passport related matters raised earlier have not been dealt with by specific provisions in the 1979 Act. The practice of requiring the consent of a spouse or former spouse to the issue of a passport continues to attract criticism from passport applicants. Occasionally this policy has caused considerable inconvenience and distress, but the Department of Foreign Affairs has found it both necessary and desirable to retain it. It remains a practical methods of protecting the financial right of a spouse or former spouse. The current procedure provides an opportunity for the other party to take legal action to prevent the applicant from leaving Australia, and thus possibly evading maintenance obligations or settlement of property matters. The need for the current requirement, however, will be significantly reduced when Australia becomes a signatory to the International Convention on

[69] *Ibid.* s. 6A.

[70] Hence if by virtue of the operation of ss. 7A, 7B, 7C or 7D the Minister may have, or would have, prevented the issue of a passport had those circumstances existed immediately before the passport was issued, he is now empowered by s. 8(1A)(a) to cancel those passports so issued. Thus, if through a change of circumstances a person would no longer qualify for the issue of a passport, his existing passport may be cancelled. He may also cancel a passport when he becomes aware that the passport has been lost or stolen. See Passports Act 1938 (Cth) ss. 8(1A)(a) and (b).

Recovery Abroad of Maintenance, when it is envisaged that the present practice will be discontinued.[71]

During the debate on the Passports Amendment Bill, a number of senators expressed concern that the place of birth on a passport exposed a considerable minority of Australians to dual jeopardy with respect to the country of their origin.[72] One case was cited, where the Yugoslav government refused to allow Australian diplomats access to Australian citizens held in detention for several months. That government even executed Australian citizens, who held Yugoslav nationality, without informing the Australian government. Another case dealt with a naturalised Greek-born Australian who was facing court-martial proceedings for failing to undergo military service with the Greek army, without the knowledge or protection of Australian Government officials in Greece. These cases merely serve to illustrate the serious problems involved with dual nationality affecting Australian citizens, when they return to their former homelands.[73]

With these problems in mind, the Joint Committee on Foreign Affairs and Defence recommended, in its 1976 report, on dual nationality that consideration be given to deleting 'place of birth' from Australian passports. One suggestion was to substitute 'place of residence' in its stead, or to make the entry optional at the request of the applicant.[74]

However, omission of 'place of birth' would remove a significant item of personal information which facilitates ready identification. It is a requirement of most countries, when considering application for entry, that the date and place of birth of the applicant be provided. A passport is internationally accepted as evidence on these matters. Moreover, certain countries would not accept passports which did not show place of birth. Other countries, although they would accept the omission of place of birth, have indicated that such an omission would cause considerable difficulties for those who held such passports. The omission of the place of birth from Australian passports would therefore clearly inconvenience a large minority of Australian travellers, and confer little or no real advantage on those who wished to have this information omitted from their passports, since the

[71] The Department of Foreign Affairs has advised that the government is still considering the ratification of the Treaty which would require certain administrative arrangements with the States especially in matters concerning ex-nuptial children. Ratification is expected sometime around the middle of 1982.

[72] *Senate Debates* 29 March 1979, 1179. (Senators Tate, Lajovic and Mulvihill).

[73] It is a fact for example that, despite taking Australian citizenship, people from Yugoslavia, USSR and Greece do not automatically relinquish their original citizenship and all that that entails, including oftentimes, the obligation to undertake military service. In fact the Yugoslav regime has implemented the law by which every citizen of Yugoslavia is forced to retain his or her citizenship whether or not he or she obtains a citizenship of another country. Furthermore, the clause extends over children of the first generation who are not even born in Yugoslavia. In practical terms, this means that it is impossible for an immigrant from Yugoslavia or his children to renounce their Yugoslav citizenship despite the fact that they had become Australian citizens. See *Senate Debates* 29 March 1979, 1185 (Senator Harradine).

[74] *Senate Debates* 29 March 1979, 1182 (Senator Lajovic).

information would, in any event, need to be shown in visa applications. 'Place of birth', however, need not include the country of birth,[75] and this detail may be omitted from a passport at the applicant's request.

There is, finally, the departmental practice in relation to withholding passports from persons generally known as 'white collar criminals' who are suspected of attempting to escape from justice. In the past, passports have been withheld or withdrawn from persons suspected of having committed a corporate offence. Such action was taken upon receipt of advice by the Department of Foreign Affairs, from State corporate affairs commissions or companies' offices advising that investigation was in progress. This practice involved the use of the Passports Acts 1938 (Cth) as an extension of the judicial system. In addition, it often involved the imposition of a greater restraint on an individual than a court would be prepared to impose. Therefore, the practice has been discontinued. Passports now are only withheld from such persons if a warrant for their arrest exists, or where the applicant is the subject of an Australian court order or condition of parole which restrains that person from obtaining a passport, or from leaving Australia.[76] Under the Act, the authorized officer must have reason to believe that a warrant has been issued, mere belief is insufficient. The narrow purview of the provision tends to favour the principle of the liberty of the individual and the right to a passport at the expense of the prevention of 'white collar' and other criminals fleeing abroad.

During the debate it was argued that this new provision was ill-conceived. A comparison of the occasions on which the Minister has withheld or withdrawn passports of persons suspected of corporate crime in the five years 1974-1979 with the number of extradition proceedings commenced in the same time shows that five passports were withdrawn or withheld as opposed to sixty extradition proceedings. Whilst not all extradition proceedings related specifically to persons associated with corporate crime, such persons would have comprised a substantial proportion of that number. One extradition procedure involved costs in the vicinity of $1 million.[77] On a simple cost/benefit analysis, the minimal costs involved with the Minister's

[75] In some circumstances, especially concerning countries in eastern and central Europe the disclosure of the place of birth, e.g. town or region, will not necessarily identify the country of birth if there have been substantial international boundary changes since the date of birth.

[76] Passports Act 1938 s. 7B provides that an authorised officer shall not, unless otherwise directed by the Minister, issue an Australian passport to a person if (a) the authorised officer has reason to believe that there is in force a warrant issued in Australia for the arrest of the person; or (b) he has reason to believe that the person is required by a court order (made under Commonwealth, State or Territory law) or under a condition of parole or of a recognizance, surety or bail bond, to remain in Australia or to refrain from obtaining an Australian passport.

[77] The information available on the extradition proceedings in the case involving Thomas and Alexander Barton discloses costs in the vicinity of $1 million. *House of Representatives Debates* 29 March 1979, 1357. Mr Jacobi lists several major instances of corporate criminal activities in which very large sums of money were involved where the offenders fled overseas.

withdrawal or withholding a passport of suspected corporate criminals as compared with the vast costs of extradition coupled oftentimes with the loss of investors' money, it would appear that as a result of the new practice contained in the Act, a substantial price will be paid in the cause of human rights and civil liberties. It seems incongruous to afford such amity to white collar criminals, and to apply very rigorous standards to those holding political views antagonistic to the government of the day. One case which highlighted this discrepancy was the one involving war correspondent Wilfred Burchett. Although an Australian citizen, Burchett reported the Korean War from the Communist side. The Australian government on several occasions refused to issue him with an Australian passport. However with the change of government in 1972 he was quickly provided with a passport. Such vagaries illustrate both the width of the Ministerial discretion and the concommitant need and importance of judicial review of such decisions.

6. JUDICIAL REVIEW OF MINISTERIAL DECISIONS

The Passports Act 1938 (Cth) itself makes no provision for the review of determinations made by the Minister or an authorized officer. Nor does it contemplate any appeal from such decisions. In Britain, passports are still issued under royal prerogative, not under any statutory provision. Hence, judicial review is strictly limited.[78] There have been some suggestions that judicial review might be extended to the exercise of a limited number of prerogative powers, although the exact scope of such an extension is still in doubt.[79] In Australia, however, the power to issue and cancel passports is of a statutory nature, which means that a wider scope of judicial review of ministerial action is available. Similar decisions in both India and Malaysia have indicated that the power to issue or cancel a passport under statutory provision is subject to the traditional procedures of judicial review.[80]

As has been noted above, it is extremely difficult to impugn the Minister's decisions directly. However, there are two methods of challenging them indirectly. First, an unsuccessful applicant for a passport can seek a prerogative writ in the High Court.[81] However, this procedure is unlikely to be viewed with favour in view of the alternative and wider grounds for review in the Federal Court.

[78] Pryles M., *Australian Citizenship Law* (1981) 154-5.

[79] See *Laker Airways Ltd v. Department of Trade* [1977] Q.B. 643, 705-6.

[80] See *Government of Malaysia & Ors v. Loh Wai Kong* [1979] 2 Malayan Law Journal 33, 36; *Maneka Gandhi v. Union of India* [1978] A.I.R. (S.C.) 597, 691-2.

[81] Australian Constitution s. 75(v). A detailed discussion of these prerogative writs and procedures is beyond the scope of this article. For further material on this topic see De Smith S. A., *Judicial Review of Administrative Action* (4th Ed. 1980) 381-422; Sykes E. I., Lanham D. J. and Tracey R. R. S., *General Principles of Administrative Land* (1979) 147-97; Whitmore H. and Aronson M., *Review of Administrative Action* (1978) 353-447. In view of the introduction of the Administrative Decisions (Judicial Review) Act 1977 (Cth) it is increasingly unlikely that these writs will be used, in any event.

Section 5 of the Administrative Decisions (Judicial Review) Act 1977 (Cth) enables a person who is aggrieved by a decision to which the Act applies to apply to the Federal Court of Australia for an order of review in respect of the decision.[82]

The Act applies to:

> a decision of an administrative character made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not) under an enactment, other than a decision by the Governor-General or a decision included in any of the classes of decisions set out in schedule 1.[83]

Therefore a decision taken by the Minister or an authorized officer in relation to the issue or cancellation of a passport would be one to which the Act applies. However, paragraph (k) of schedule 1 of the Act specifically excludes 'decisions under regulations 7, 11 or 12 of the Passport Regulations, other than decisions relating to Australian passports'. Therefore, the decision on the renewal or endorsement of British passports (other than Australian passports) and the granting of a visa on any passport requiring a British visa are not subject to review under the Act.

Persons entitled to seek review are those 'aggrieved by a decision' and those 'aggrieved by the conduct'[84] of the Minister or authorized officer in connection with the making of a decision under the Passports Act 1938 (Cth). Hence, an applicant for a passport or a holder of a passport which had been or was about to be cancelled would fall within the definition. Equally, an infant, child or spouse[85] could have standing to seek relief with respect to a decision to cancel or grant a passport. It is also arguable that a citizen seeking to prevent a debtor leaving Australia would be adversely affected by a decision to issue a passport to the debtor.

The 1979 amendments specifically list the circumstances in which passports will not be issued. On one view the new ss. 7A-7E cover the field, by prescribing the only grounds for denial. The more probable approach is however, that in view of the wording of s. 7(1) of the Passport Act 1938

[82] Under s. 6, an order for review can be sought at an earlier stage before the decision is actually made where the decision maker 'has engaged, is engaging, or proposes to engage, in conduct for the purpose of making a decision to which this Act applies'.

[83] S. 3(1).

[84] The terms are defined in s. 3(4) of the Act.

'3(4) In this Act —

(a) a reference to a person aggrieved by a decision includes a reference —
  (i) to a person whose interests are adversely affected by the decision; or
  (ii) in the case of a decision by way of the making of a report or recommendation — to a person whose interests would be adversely affected if a decision were, or were not, made in accordance with the report or recommendation; and

(b) a reference to a person aggrieved by conduct that has been, is being, or is proposed to be, engaged in for the purpose of making a decision or by a failure to make a decision includes a reference to a person whose interests are or would be adversely affected by the conduct or failure.'

[85] *Cf. The King v. Paterson; Ex parte Purves* [1937] Argus L.R. 144, (1936-37) 10 A.L.J.R. 469 where a husband sought to have cancelled a passport issued to his wife and to restrain the Minister from issuing her with a passport.

(Cth) a residual discretion still exists.[86] Such discretion would be subject to control by the criteria set out in the Administrative Decisions (Judicial Review) Act 1977 (Cth),[87] as would the exercise of the discretion to cancel passports under s. 8(1A) of the Passports Act 1938 (Cth).

As discussed above, in *The King v. Patterson* Evatt J. took the view that the Minister had no duty to afford a hearing to interested parties in connection with decisions under the Passports Act 1938 (Cth).[88] The question, therefore, arises as to whether the Minister or an authorized officer is obliged to accord natural justice to passport applicants. Arguably, there is no automatic right under the Administrative Decisions (Judicial Review) Act 1977 (Cth)[89] to a hearing in proceedings under the Passports Act.

As Pryles points out, *The King v. Patterson*[90] is an old case, and the modern trend is to impose a duty to accord natural justice.[91] Knowing the practical significance of a passport to an individual, it is clearly preferable that the issue or cancellation thereof should not be a matter entirely within the arbitrary discretion of the government or its officials. There exists, therefore, a clear case for requiring the Minister or his authorized officers to afford a hearing to those persons concerned with cancellation or issuance of a passport.[92]

There are two additional contexts in which judicial review of the right to hold or apply for a passport is relevant.

Firstly, the Bankruptcy Act 1966 (Cth) provides[93] that a bankrupt shall, unless excused by the trustee or prevented by illness etc. deliver to the trustee his passport. The same Act makes it an offence[94] for a bankrupt, without the written consent of the trustee of his estate, to leave or prepare to leave Australia.[95]

In *Re Tyndall; Ex parte Official Receiver*[96] the bankrupt delivered his passport to the trustee as required. Subsequently, he sought the return of his passport and permission to leave Australia, which was refused. He then applied[97] to the Federal Court of Australia, seeking an order that he be permitted to leave Australia and that his passport be restored to him. The

[86] S. 7(1) is worded in permissive language 'a passport may be issued'.
[87] S. 5(1), (2) and s. 6.
[88] (1937) Argus L.R. 144; (1936-37) 10 A.L.J.R. 469.
[89] S. 5(1)(a), s. 6(1)(a).
[90] (1937) Argus L.R. 144; (1936-37) 10 A.L.J.R. 468.
[91] Pryles, *op. cit.* 159. For a detailed discussion of the concept and requirements of Natural Justice, see Sykes E. I., Lanham D. J. and Tracey R. R. S., *General Principles of Administrative Law* (1979) 104-41; De Smith S. A., *Judicial Review of Administrative Action* (4th Ed. 1980) 156-277; Whitmore H. and Aronson M., *Review of Administrative Action* (1978) 42-90.
[92] See e.g. *Maneka v. Union of India* [1978] A.I.R. (S.C.) 597.
[93] S. 77(a).
[94] S. 272.
[95] This might presumably include making an application for a passport if the bankrupt did not already have one.
[96] (1977) 17 A.L.R. 182.
[97] Under s. 178 of the Bankruptcy Act 1966,

court declined to grant the order sought, not being persuaded that the creditors of the estate would benefit from any such overseas journeys. In considering the policy behind ss. 77a and 272 of the Act and the relevant considerations in determining whether permission to travel should be granted the court said:

> Bankruptcy does not, of itself, involve any criminal offence. A citizen should be free to travel if and when his commercial activities or personal desires prompt him so to do. Restrictions upon such travel under the bankruptcy legislation must be seen as being aimed at insuring the proper administration of the bankruptcy laws and of bankrupt estates under such laws and not as a penalty imposed upon a citizen as a consequence of inability to pay debts leading to the making of a sequestration order. In some cases, the possibility that the bankrupt has committed offences under the Act and is seeking to abscond from possible prosecution will be extremely relevant.[98]

Secondly, in order to protect children, the Family Law Act 1975 (Cth)[99] provides that where a court is of the opinion that there is a possibility or threat that a child will be removed from Australia, it may order the passport of the child and/or of any other person concerned to be delivered up to the court on such terms as it thinks fit.[1]

7. CONCLUSION

What then is the relationship between international law and domestic practice in this field?

It is important to recognise the almost universal acceptance of the requirement of a passport for international travel and its role in municipal law. A refusal by a national state to issue such a document would seriously impede the individual in the exercise of the 'right to travel'. This 'right' has often been expressed in international instruments.[2] Yet state practice in the municipal arena illustrates a claim to absolute discretion, rather than acceptance of any generally recognized rule of international law. In so far as the Australian government has moved to limit or curb any absolute discretion in this area it has done so through the influence of municipal doctrines designed to protect individual civil liberty. The rule and practice still remains that the issue of a passport is a matter within the exclusive domain of domestic jurisdiction and is an aspect of the executive control over foreign affairs. The Australian government feels free, therefore, to impose those conditions and restrictions which it deems fit and regards it as an acceptable practice to use the passport as a means of controlling the

[98] *Re Tyndall; Ex parte Official Receiver* (1977) 17 A.L.R. 182, 190-1.

[99] S. 64(6).

[1] In addition, under s. 70(6)(c) of the Family Law Act 1975 (Cth), a court which is satisfied that a person has knowingly, and without reasonable cause, contravened or failed to comply with a provision of the section may order that the person deliver up to the court that person's passport.

[2] Universal Declaration of Human Rights, Article 13(2); International Covenant on Civil and Political Rights, Article 12(2); International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d); European Convention on Human Rights, Fourth Protocol, Article 2(2).

movement abroad of Australian nationals. Therefore, the question of the right to travel as a fundamental freedom remains exclusively a matter for the Australian legal system to define and control. International law will play only a small part in confining and structuring the discretion currently exercised by the Federal government. We have traced the evolution over time of the policies, practices and procedures involved in the evolution of Australian passport law. It will become an area of increasing importance given the nature of the Australian population and the increasing interdependence among the members of the world community. Pressures within Australian political and social life will continue to influence the role and scope of ministerial power and the exercise of a local administrative discretion. No doubt, at some future stage the Parliament will again respond to both domestic and international influence to define, extend and protect the right to a passport.