PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Australian Citizenship Amendment (Citizenship Cessation) Bill 2019

Question No. 1

Senator Abetz asked the following question at the hearing on 18 October 2019:

Mr Edgerton: Yes, we have said that it should be subject to merits review under recommendation 9. Then, in recommendation 11, we have said the decision of the AAT should be subject to judicial review under ordinary principles, which would be the Administrative Decisions (Judicial Review) Act.

Senator ABETZ: The issue, then, could be litigated for quite some time over a number of years, as we've experienced with other issues in general terms. So the question I have as a follow-up is: what should the status of the individual be during this period, should their citizenship be deemed to have been revoked or to be still in place, whilst it's subject to the review and then possible appeal to the Federal Court and High Court?

The answer to the Senator's question is as follows:

If the Minister has made a decision that a person's citizenship ceases, then the usual position would be that the person is not an Australian citizen unless that decision was revoked by the Minister, or overturned on merits review or judicial review.

When the Minister makes a decision that the person's citizenship ceases, if the person is in the migration zone they will be taken to have been granted an ex-citizen visa under s 35(3) of the *Migration Act 1958* (Cth).

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Question No. 2

Mr Julian Leeser MP asked the following question at the hearing on 18 October 2019:

Mr LEESER: In relation to the interplay of recommendations 9 and 11, are there instances where there are appeals to the AAT on a merits review that are not subject to the ADJR Act?

The answer to the Member's question is as follows:

The Administrative Appeals Tribunal (**AAT**) can review decisions made under more than 400 Commonwealth Acts, regulation or legislative instruments. A full list of those decisions is available on the AAT's website.[1]

The jurisdiction of the AAT includes many decisions made by Ministers. In the context of the *Australian Citizenship Act 2007* (Cth) (**Citizenship Act**), for example, it includes the following decisions of the Minister:[2]

- a decision under ss 17, 19D, or 24 to refuse to approve a person becoming an Australian citizen
- a decision under s 25 to cancel an approval given to a person under s 24
- a decision under s 30 to refuse to approve a person becoming an Australian citizen again
- a decision under s 33 to refuse to approve a person renouncing his or her Australian citizenship, except a refusal because of the operation of s 33(5) (about war)
- a decision under ss 34 or 36(1) to revoke a person's Australian citizenship.

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1 Administrative Appeals Tribunal, *AAT Reviewable Decisions List* (as at 31 May 2019), at https://www.aat.gov.au/AAT/media/AAT/Files/Lists/List-of-Reviewable-Decisions.pdf.

2 *Australian Citizenship Act 2007* (Cth), s 52.

The AAT describes the most common types of decisions it can review as relating to:[3]

- child support
- farm household support
- Commonwealth workers' compensation
- family assistance, paid parental leave, social security and student assistance
- migration and refugee visas and visa-related decisions
- taxation
- veterans' entitlements.

It also reviews decisions relating to:

- Australian citizenship
- bankruptcy
- civil aviation
- corporations and financial services regulation
- customs
- freedom of information
- the National Disability Insurance Scheme
- passports and security assessments by the Australian Security Intelligence Organisation
- a refusal to approve transfer to Australia for medical treatment or assessment.

The *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**) applies to decisions of an administrative character made, proposed to be made, or required to be made under a Commonwealth Act, regulation or legislative instrument, except those set out in Schedule 1 of that Act. This means that if a decision is reviewable in the AAT, it is also subject to review under the ADJR Act unless it is on the list of decisions in Schedule 1 of the ADJR Act.

All of the decisions of the Minister made under the Citizenship Act that are subject to review in the AAT are also subject to ADJR Act review.

[3] Administrative Appeals Tribunal, Legislation and jurisdiction, at https://www.aat.gov.au/resources/legislation-and-jurisdiction.

Some other decisions that are reviewable in the AAT are not subject to ADJR Act review. In the time available, the Commission has not been able to conduct a comprehensive comparison of the scope of jurisdiction of the AAT with the scope of decisions removed from the jurisdiction of the ADJR Act by Schedule 1 of that Act.

Case study: Passports Act

The Commission notes that the *Australian Passports Act 2005* (Cth) (**Passports Act**) establishes a nuanced regime pursuant to which particular decisions of a more significant nature that are made personally by the relevant Minister are treated differently on review by the AAT.

Under the Passports Act, the AAT has the jurisdiction to review certain decisions made either by the Minister for Foreign Affairs personally, or by a delegate of the Minister, to refuse to issue an Australian travel document or to cancel an Australian travel document.[4] In limited circumstances, the Minister may certify that a refusal or cancellation decision involves matters of international relations or criminal intelligence.[5] These circumstances include, for example, that a person is the subject of an arrest warrant in another country in respect of serious foreign offence;[6] or that a relevant authority reasonably suspects that if a person were issued a travel document the person would be likely to engage in certain kinds of serious criminal conduct or conduct that might prejudice the security of Australia.[7] If the Minister issues such a certificate, the decision is still reviewable by the AAT, but the AAT is limited to making a decision that either affirms the Minister's decision or remits the decision to the Minister for reconsideration in accordance with any directions or recommendations of the AAT.[8]

This is an example of a targeted limitation on the powers of the AAT to provide certain remedies following a review of certain highly significant Ministerial decisions. The types of decisions are those involving a high degree of specialised expertise (i.e., decisions that affect Australia's international relations) or where an independent assessment has been

4 *Australian Passports Act 2005* (Cth), s 50(1).
5 *Australian Passports Act 2005* (Cth), s 50(2).
6 *Australian Passports Act 2005* (Cth), s 13(1)(a).
7 *Australian Passports Act 2005* (Cth), s 14(1).
8 *Australian Passports Act 2005* (Cth), s 50(3).

made about relevant risks. The decisions are still subject to merits review but with more limited remedies for review applicants.

All decisions under the Passports Act are subject to ADJR Act review, including decisions about revocation or cancellation, other than decisions under ss 22A or 24A. Under s 22A, the Director-General of Security may ask the Minister to suspend all Australian travel documents issued to a person for up to 14 days if the Director-General suspects on reasonable grounds that:

- the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country; and

- all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.

Under s 24A, an officer may demand that a person surrender an Australian travel document suspended under s 22A.

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Additional questions Nos. 1–22

The Committee asked the following 22 written questions by email on 23 October 2019 following the hearing:

1. Is it the case that, in order for the Minister to make a determination to cancel the Australian citizenship of a person who is aged 14 or older under clause 36B(1):

it would not be necessary:	**it would only be necessary:**
for that person to in fact be a national or citizen of another country	for the Minister to be satisfied that the person would not "become a person who is not a national or citizen of any country" if the Minister were to make the determination
for that person to • have in fact engaged in any of the conduct specified in clause 36B(5) while outside Australia; or • to have in fact engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)	for the Minister to be • satisfied that the person engaged in any of the conduct specified in clause 36B(5) while outside Australia; or • satisfied that the person engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)
for the conduct referred to above to have, in fact, demonstrated that the person has repudiated their allegiance to Australia	for the Minister to be satisfied that the conduct referred above demonstrated that the person has repudiated their allegiance to Australia
for it to be contrary to the public interest for the person to remain an Australian citizen (in the view of any person other than the Minister)	for the Minister to be satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (having regard to the considerations listed in clause 36E of the Bill)?

The answer to the Committee's question is as follows:

Yes.

2. Under clause 36B of the bill, would it be necessary for a person to have ever been convicted – or even charged – with a criminal offence in order for the Minister to cancel that person's citizenship under clause 36B(1)?

The answer to the Committee's question is as follows:

No.

3. Without being exhaustive, is it correct that two common law principles of "natural justice" are that:

    a. where a decision-maker is proposing to make a decision that would affect a person's fundamental rights, the decision-maker should inform the person of the case against them and provide them with an opportunity to be heard *prior* to that decision being made (the so-called "hearing rule"); and
    b. a decision-maker should disqualify himself or herself from making a decision if the decision-maker is affected by actual bias or where a fair-minded lay observer might reasonably apprehend that the decision-maker is bias (the so-called "bias rule")?

The answer to the Committee's question is as follows:

Broadly, yes.

The common law principle of natural justice (also referred to as 'procedural fairness') incorporates both the 'hearing rule' and the 'rule against bias'.

The requirements of the hearing rule are flexible and will be determined by what is fair in all of the circumstances of the case. In many cases this will require a person to be informed of the case against them and to be given an opportunity to make submissions in response before a decision is made that affects their rights or interests.

The rule against bias requires a decision-maker to disqualify themselves from making a decision if the decision-maker is affected by actual bias or where a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the resolution of the relevant question (*Ebner v Official Trustee in Bankruptcy* (2001) 205 CLR 337 at [6]).

4. Do the rules of natural justice apply in relation to the Minister's decision to cancel a person's citizenship under clause 36B(1) of the bill?

The answer to the Committee's question is as follows:

No. The common law principles of natural justice may be displaced by statute. Here, clause 36B(11) provides that the rules of natural justice do not apply in relation to making a decision under clause 36B.

5. Under clause 36B(1), is the Minister required to inform a person of the case against them or provide them with an opportunity to be heard prior to making a decision to cancel their Australian citizenship?

The answer to the Committee's question is as follows:

No.

6. Provided he was satisfied of the various matters set out in clause 36B(1), does the bill prohibit the Minister from cancelling the citizenship of a person in circumstances where the Minister is affected by actual bias (or where a fair-minded observer might reasonably apprehend that the Minister is affected by bias)?

The answer to the Committee's question is as follows:

On its face, clause 36B(1) appears not to prohibit the Minister from cancelling a person's citizenship in these circumstances. However, notwithstanding the statutory exclusion of 'natural justice', and assuming that it was intended to exclude both the 'hearing rule' and the 'rule against bias', it may be that a person could still seek judicial review under s 75(v) of the Constitution if a decision under clause36B(1) was affected by actual or apprehended bias.

7. If the Minister cancels a person's Australian citizen under clause 36B(1), does the person cease to be an Australian citizen with immediate effect?

The answer to the Committee's question is as follows:

Yes, pursuant to clause 36B(3).

If the person is overseas when his or her citizenship is cancelled:

8. The Department told the Committee that such a person would automatically receive an "ex-citizen visa" under the *Migration Act*. However, is it correct that a person whose citizenship is cancelled under clause 36B would only receive an "ex-citizen visa" under section 35 of the *Migration Act* if the person was in the "the migration zone" at the time his or her citizenship was cancelled?

The answer to the Committee's question is as follows:

Yes.

9. Is it correct that the "migration zone" is the area consisting of the States and Territories of Australia (as well as Australian resource and sea installations)?

The answer to the Committee's question is as follows:

Yes, pursuant to the definition in s 5 of the *Migration Act 1958* (Cth).

10. So, if:

    a. the Minister cancelled a person's Australian citizenship under clause 36B; and
    b. the person was on an overseas holiday at the relevant time,

would that person automatically receive an ex-citizen visa under the *Migration Act*?

The answer to the Committee's question is as follows:

No.

If the person is in Australia when his or her citizenship is cancelled:

11. Does the Minister have a personal power to cancel a person's ex-citizen visa if the Minister (i) reasonably suspects that the person does not pass the "character test" (as defined in the *Migration Act*) and (ii) is satisfied that the cancellation is in the national interest?

The answer to the Committee's question is as follows:

Yes, pursuant to s 501(3) of the *Migration Act 1958* (Cth).

12. If Australian officials know or reasonably suspect that a person does not (i) have a valid visa and (ii) the person is in "the migration zone", officials must detain the person. Is that correct?

The answer to the Committee's question is as follows:

Yes, pursuant to s 189 of the *Migration Act 1958* (Cth) and the definition of 'officer' in s 5, with very limited exceptions (there is a discretion to detain if the person is also a citizen of Papua New Guinea and the person is in or in the vicinity of the 'protected zone' established under Article 10 of the Torres Strait Treaty).

13. If:

    a. the Minister cancelled a person's Australian citizenship under clause 36B of the bill while that person was in the migration zone; and
    b. the Minister cancelled the person's "ex-citizen visa",

would officials from the Minister's Department be required by law to detain that person?

The answer to the Committee's question is as follows:

See answer to question 12 above.

14. If the Minister cancels a person's citizenship under clause 36B, does the bill allow that person to seek merits review of the Minister's decision from an independent third party?

The answer to the Committee's question is as follows:

No.

15. Is it correct that a person whose citizenship is cancelled under clause 36B has only two options for having the Minister's decision reviewed:

    a. he or she could apply to the original decision-maker, the Minister, to have the decision revoked under clause 36H ("ministerial review"); or
    b. he or she could seek review of the Minister's decision in the federal court or in the high court ("judicial review")?

The answer to the Committee's question is as follows:

Under clause 36H, a person may apply to the Minister for revocation of a citizenship cessation determination.

Under clause 36J, the Minister may revoke a determination on their own initiative.

A person may seek review of a determination made under clause 36B(1) in the High Court of Australia under s 75 of the Constitution, or in the Federal Court of Australia under s 39B of the *Judiciary Act 1903* (Cth). These judicial review options do not provide the same rights as ADJR Act review. They are the narrowest set of judicial review grounds that cannot be excluded by statute.

16. Is it the case that, in order for the Minister to re-affirm his decision to cancel the Australian citizenship of a person who is aged 14 or older under clause 36B:

it would <u>not</u> be necessary:	**it would only be necessary:**
for that person to <u>in fact</u> be a national or citizen of another country	for <u>the Minister</u> to be <u>satisfied</u> that the person would not "become a person who is not a national or citizen of any country" if the Minister were to re-affirm his determination
for that person to • have <u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while outside Australia; or • to have <u>in fact</u> engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)	for <u>the Minister</u> to be • <u>satisfied</u> that the person engaged in any of the conduct specified in clause 36B(5) while outside Australia; or • <u>satisfied</u> that the person engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)
for the conduct referred to above to have, <u>in fact</u>, demonstrated that the person has repudiated their allegiance to Australia	for <u>the Minister</u> to be <u>satisfied</u> that the conduct referred above demonstrated that the person has repudiated their allegiance to Australia
for it to be contrary to the public interest for the person to remain an Australian citizen (in the view of any person other than the Minister)	for <u>the Minister</u> to be <u>satisfied</u> that it would be contrary to the public interest for the person to remain an Australian citizen (having regard to the considerations listed in clause 36E of the Bill)?

The answer to the Committee's question is as follows:

Under clause 36H(3), the Minister must consider an application for revocation of a citizenship cessation determination and either revoke the determination or refuse the application. The Minister must revoke the determination if satisfied that (i) at the time the determination was made, the person was not a national or citizen of any other country; or (ii) if the Minister is satisfied that the person did not engage in the conduct to which the determination relates. The Minister may revoke the determination if satisfied that revoking the determination would be in the public interest by reference to clause 36E.

Each element of a revocation determination turns on the satisfaction of the Minister.

17. The Minister would always be reviewing his own decision under clause 36H. Is it arguable that, as a matter of law, the Minister would have a bias – or that a fair-minded observer might reasonably apprehend that the Minister has a bias – in relation to every review the Minister conducts under clause 36H?

The answer to the Committee's question is as follows:

The Commission does not suggest that the mere fact that an administrative process involves a decision-maker reconsidering their decision gives rise to a reasonable apprehension of bias. However, it is not good administrative practice to rely on reconsideration by the original decision-maker as the only substantive factual review of a decision. All decision-makers can make mistakes and a more appropriate decision-making process would include provision for independent review of the merits of the decision. An independent merits review process would have a greater likelihood of detecting and remedying any factual errors in the original decision. The conventional form of internal merits review (that is, review of a decision by the same statutory agency that made the original decision) involves review by a decision-maker other than the person who made the original decision.

18. Is it the case that, where a person seeks judicial review of the Minister's decision to revoke his or her citizenship:

the court would <u>not</u> be required:	**the court would be required to:**

to consider whether the person is in fact a national or citizen of another country	consider whether the Minister was satisfied that the person would not "become a person who is not a national or citizen of any country" if the person's Australian citizenship was cancelled
to consider whether the person: • in fact engaged in any of the conduct specified in clause 36B(5) while outside Australia; or • in fact engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)	consider whether the Minister was: • satisfied that the person engaged in any of the conduct specified in clause 36B(5) while outside Australia; or • satisfied that the person engaged in any of the conduct specified in clause 36B(5) while in Australia (prior to that person leaving Australia without having been tried for any offence in relation to the conduct)
to consider whether the conduct referred above had, in fact, demonstrated that the person had repudiated their allegiance to Australia	consider whether the Minister was satisfied that the conduct referred above had demonstrated that the person had repudiated their allegiance to Australia
to consider whether it would be contrary to the public interest for the person to remain an Australian citizen	consider whether the Minister was satisfied that it would be contrary to the public interest for the person to remain an Australian citizen (having regard to the considerations listed in clause 36B of the Bill)?

The answer to the Committee's question is as follows:

If a person seeks judicial review under s 75 of the Constitution or s 39B of the *Judiciary Act 1903* (Cth) of a citizenship cessation determination made under clause 36B(1), the Court would be limited to considering whether there was a 'jurisdictional error' in the Minister's decision. As noted above, this is the narrowest possible judicial review and is the only judicial review that cannot be excluded by statute.

One kind of jurisdictional error occurs if a necessary criterion for the operation of the section was not present. Where, as here, almost all of the relevant decision-making criteria require the Minister to be 'satisfied' of a particular thing, the court would only be able to review the reasonableness of the Minister's satisfaction (for example, see *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135). The Court would not ordinarily be able to review whether the fact in question actually existed.

The one exception in the case of clause 36B is the age of the person. The section applies to persons aged 14 or older, making this age threshold a question of jurisdictional fact. If the Minister made a determination in relation to a person under 14 years old, it would be possible to review the decision on the basis that this amounted to a jurisdictional error (regardless of the Minister's view about the person's age).

The problem of relying on the satisfaction of the Minister is mitigated to some extent on judicial review by clause 36K(1)(a) and (c) of the Bill which provide that if a court finds that a person:

- did not engage in the conduct to which the determination relates; or
- was not a national or citizen of a country other than Australia at the time the determination was made,

then the determination is taken to be revoked and the person's citizenship is taken never to have ceased.

19. If this bill were to become law, could the following scenario play out in Australia:

Peter

- Peter works in IT and lives in Melbourne. He has never been convicted of a crime – or even charged with one. In fact, he has never even received a parking ticket.
- The Minister is satisfied that Peter sought to recruit people for a terrorist organisation in 2004.
- It's not true – the Minister has made a terrible mistake. But the Minister is very confident and does not bother to make basic inquiries that would alert him to his mistake.
- The Minister is also satisfied – for reasons that are secret to him – that:
    - if Peter lost his Australian citizenship, he would not become a person who is not a national or citizen of any country;
    - by engaging in the conduct that the Minister thought Peter had engaged in (albeit mistakenly), Peter had repudiated his allegiance to Australia; and
    - it would be contrary to the public interest for Peter to remain an Australian citizen (having regard to the considerations listed in clause 36B of the Bill).
- The Minister cancels Peter's Australian citizenship and notifies Peter by letter.
- Because Peter is in Australia, he is automatically given an ex-citizen visa. But the Minister revokes that visa immediately in accordance with the *Migration Act*.

- Peter, who is now an unlawful non-citizen, is detained by Border Force and placed in immigration detention. He is confused – and has to tell his family, friends or his employer that he has had his Australian citizenship cancelled because, according to the Minister for Home Affairs, he is a terrorist. He loses his job and friends distance themselves from Peter.
- Peter asks the Minister to change his decision and provides the Minister with evidence that the Minister is making a terrible mistake. After one month, the Minister rejects Peter's application.
- Peter applies to the federal court for judicial review. After reviewing the application, the court is appalled – the Minister has clearly made a terrible mistake. Worse, the Minister failed to make basic inquiries and ignored key evidence that would have alerted him to his mistake.
- The court orders that the Minister's decision to revoke Peter's citizenship be quashed.
- Peter gets his citizenship back but, by this time, he has lost his job and his mental and physical health has seriously deteriorated.

The answer to the Committee's question is as follows:

The Commission refers to its answers to the above questions, which respond to the legal aspects of this hypothetical scenario.

20. Under the bill, the Minister must not make a determination to cancel a person's Australian citizenship under either clause 36B or clause 36D if "the Minister is satisfied that the person would, if the Minister were to make the determination, become a person who is not a national or citizen of any country". Is that formulation contrary to Australia's obligations under the *Convention on the Reduction of Statelessness*?

The answer to the Committee's question is as follows:

Article 8(1) of the Statelessness Convention provides that a state 'shall not deprive a person of its nationality if such deprivation would render him stateless'. There is a narrow exception in article 8(2) where the nationality has been obtained by misrepresentation or fraud.

Australia has voluntarily adopted the obligations in this Convention without reservation. The Commission's written submission sets out how the Bill increases the risk of statelessness, raising a serious risk of conflict with this obligation. This could arise, for example, where the Minister is satisfied but mistaken about the fact that a person has another nationality or citizenship, and:

- the person has not been notified of the determination, or
- the Minister has decided not to revoke the determination, and/or

- it is not practicable for the person to bring court proceedings to correct this error.

21. If this bill were to become law, would it be possible for the Minister to lawfully render a person stateless?

The answer to the Committee's question is as follows:

See answer to question 20 above.

22. Do you agree with the following propositions:

- all Ministers in the Australian Government are human beings;
- all human beings are fallible;
- Peter Dutton is a human being;
- Peter Dutton is a Minister in the Australian Government; and
- Peter Dutton is fallible?

The answer to the Committee's question is as follows:

All administrative decision-making can be subject to error. The Commission's written submission sets out why independent merits review of decisions about citizenship cessation should be required, given the grave human rights impacts of making a decision that is not the correct and preferable decision.