



## **Australian Citizenship Bill 2005** **Australian Citizenship (Transitionals and Consequentials) Bill 2005**

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Law and Bills Digest Section

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## **Australian Citizenship Bill 2005 and Australian Citizenship (Transitionals and Consequentials) Bill 2005**

**Date Introduced:** 9 November 2005

**House:** House of Representatives

**Portfolio:** Citizenship and Multicultural Affairs

**Commencement:**

Sections 1 and 2 of the Australian Citizenship Act 2005 commence on the day the Act receives Royal Assent. Sections 3–54 and Schedule 1 commence on a day to be fixed by Proclamation.

Schedules 1–3 of the Australian Citizenship (Transitionals and Consequentials) Act 2005 commence on the same day as sections 3–54 of the Australian Citizenship Act 2005.

### **Purpose**

The Australian Citizen Bill 2005 (the Citizenship Bill) replaces the *Australian Citizenship Act 1948* (the 1948 Act). The Australian Citizenship (Transitionals and Consequentials) Bill 2005 (the Transitionals Bill) puts in place the necessary transitional and consequential amendments necessary for the introduction of the Citizenship Bill.

### **Background**

The 1948 Act, the *Australian Citizenship Act 1948*—originally titled the *Nationality and Citizenship Act 1948*—was proclaimed to commence operation from 26 January 1949. The introduction of the 1948 Act took place in the context of establishing Australian citizenship for the first time, while maintaining the status of ‘British subject’ for Australians:

The bill is not designed to make an Australian any less a British subject, but to help him express his pride in citizenship of this great country. ... To say that one is an Australian is, of course, to indicate beyond all doubt that one is British; but to claim to be of the British race does not make it clear that one is an Australian. The time has come for Australia and the other dominions to recognize officially and legally their maturity as members of the British Commonwealth by the passage of separate citizenship laws. Therefore, it gives me great pleasure to introduce this bill that will enable Australia to

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proclaim its own national citizenship and establish the duties and responsibilities as well as the rights and privileges that are inherent in it.<sup>1</sup>

Before 1948, naturalisation had been regulated successively by the *Naturalization Act 1903–1920* and the *Nationality Act 1920*.

The concepts of Australian nationality and citizenship have greatly evolved over the last 57 years, and the 1948 Act has been amended 36 times. Some of the major changes have been:

1955: procedures were streamlined (for example, no more advertising in newspapers of intention to apply for naturalisation), and the Act was amended to refer to husbands of Australian citizens as well as wives

1969: the residence requirement for aliens who could read and write English was reduced from five to three years, and the Act was retitled the *Citizenship Act 1948*

1973: the residency requirement was set at two years for both aliens and British subjects; British subjects were required to attend citizenship ceremonies; the Act was retitled the *Australian Citizenship Act 1948*; a reference to the Queen of Australia was added to the oath and affirmation

1984: all forms of discrimination on the basis of sex and marital status were removed; the residence requirement was reduced from three to two years; Australians became Australian citizens only, and ceased to be British subjects; the term spouse replaced husband/wife; the registration of Australian citizenship by descent was limited to persons under 18 as from 22 November 1986

1986: the requirement to renounce other allegiance was removed

1993: a preamble was added to the Act, reference to the monarch in the oath and affirmation of allegiance was deleted, and a new oath/affirmation pledging ‘my loyalty to Australia and its people ...’ was added

2002: Australians were permitted to obtain foreign citizenship without losing Australian citizenship; the age limit for persons born overseas to Australian parents to register as Australian citizens was raised from 18 to 25.<sup>2</sup>

### **Basis of policy commitment**

On 7 July 2004, the Hon. Gary Hardgrave, MP, then Minister for Citizenship and Multicultural Affairs, gave a speech to the Sydney Institute in which he outlined in detail changes that the government would be introducing to the 1948 Act.<sup>3</sup>

The Prime Minister, Mr Howard, announcing stronger terrorism laws on 8 September 2005, stated that the waiting period for citizenship would be extended from two to three years.<sup>4</sup>

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The forthcoming new Act was announced in a speech to the National Press Club on 14 September 2005.<sup>5</sup>

### **Reviews of Australian Citizenship**

There is long-running, bi-partisan support for making the 1948 Act more accessible and easily understood by those who are already Australian citizens and those who aspire to be citizens.

In 1993 and 1994, the Joint Standing Committee on Migration, under the chairmanship of Senator Jim McKiernan, conducted an inquiry into the 1948 Act.<sup>6</sup> The Committee looked at many issues addressed by this legislation, including the appropriateness of the discretionary provisions for the granting of Australian citizenship, dual citizenship, the acquisition of citizenship by overseas-born children of Australian citizens, and the appropriateness of the provisions of the 1948 Act in relation to deferral and deprivation of citizenship. The Committee reported that many people making submissions said that, in their view, the 1948 Act was cumbersome and dated.<sup>7</sup> Among the Committee's recommendations was that the 1948 Act be redrafted using simple language and be recast in a modern drafting style.<sup>8</sup>

The Government response to the Committee's report supported the redrafting of the 1948 Act, and stated that the government had committed funds in the 1995–96 Budget for the Department of Immigration and Ethnic Affairs to oversee the review and redrafting of the citizenship legislation over a four-year period, so that fully redrafted legislation could be in place for the 50<sup>th</sup> Anniversary of Australian citizenship in 1999.<sup>9</sup> This timetable was not met, following the change of government on 2 March 1996.

In August 1998, the Coalition government established the Australian Citizenship Council as an independent body to advise the Minister for Immigration and Multicultural Affairs on Australian citizenship matters that were referred to it by the government. The Minister asked the Australian Citizenship Council to prepare a report on contemporary issues in Australian citizenship policy and law, and this was presented to the government in February 2000.<sup>10</sup> Chapter 6 of the report discussed ways of refining the structure of the 1948 Act. The Council considered how the Act could be 'tidied up' to make it more readily understandable, and whether there were ways to make it more accessible.<sup>11</sup> The Council recommended retaining unchanged the current preamble to the Citizenship Act,<sup>12</sup> and this recommendation has been followed in this rewrite of the legislation.

The proposed redrafting of the 1948 Act also retains the principles underlying the original legislation. Since the Bill was introduced into Parliament on 9 November 2005, the main discussion in the media has concerned the role of ASIO in assessing whether or not a person applying for Australian citizenship is a direct or indirect risk to our security. Greens Senator Kerry Nettle is reported as saying that this provision 'effectively gives ASIO the power to decide who can and can't become a citizen'.<sup>13</sup> The president of the

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NSW Council of Civil Liberties, Cameron Murphy, is also reported as saying that ‘ASIO assessments were virtually impossible to challenge because of the lack of information made available to the subject and their legal team’.<sup>14</sup>

### **Resuming Australian citizenship—the example of the ‘Maltese’ migrants and their descendants**

There a number of ways Australian citizens can lose their citizenship under the 1948 Act. The most common ways are renunciation (section 18), and before 2002, the dual citizen provision (former section 17).<sup>15</sup> Provided certain conditions are met, the 1948 Act also currently provides for the resumption of citizenship lost under these provisions. Notably, these conditions include certain residency requirements, and in the case of resumption of citizenship lost via renunciation, the persons must be under 25 years of age. Much of the background to these provisions is covered in Chapter 5 of the Senate Legal and Constitutional Committee’s report [\*They still call Australia home: Inquiry into Australian expatriates\*](#).<sup>16</sup>

The Citizenship Bill makes it considerably easier to resume Australian citizenship, by amending or deleting many of the relatively restrictive conditions in the 1948 Act. The specifics are covered in the main provisions section of this Digest, but the main requirement for most persons seeking to resume citizenship lost under section 18 or former section 17 is that the responsible Minister is satisfied that they are of good character.

Numerous arguments for the easing of the conditions regarding resumption were contained in evidence given to the Senate Committee’s Inquiry into Australian expatriates mentioned above. In particular, a large number of submissions concerned the now adult children born in Australia to parents who emigrated from Malta, mainly during the post-1945 period, but accompanied their parents when the latter returned back to Malta. As they were born in Australia, under the Australian citizenship laws, these children became Australian citizens. As children of Maltese-born parents, they also were automatically deemed to be Maltese citizens. Some of the parents decide to return to Malta, taking their children with them. Before 2000, Maltese law required such persons to renounce any foreign citizenship by the time they were 19 if they were to retain their Maltese citizenship. Maltese citizenship was virtually essential for the educational, social welfare and other economic benefits it offered, and so most of these now young adults did renounce their Australian citizenship. Evidence of the experience of these persons, and the difficulties facing those who attempted to resume their Australian citizenship, was included in the Senate report:

... one example is the submission from Ms Ann Marie Galea, who stated that:

I was born in Wentworthville in Australia on the 24<sup>th</sup> July 1971. My father and mother migrated to Australia from Malta in 1964. When I was only 5 years ... in 1976 my family moved back to Malta. Under Maltese citizenship law I was required to decide between Maltese and Australian citizenship between my 18<sup>th</sup> and 19<sup>th</sup> birthdays ... In the circumstances, opting for the Maltese citizenship

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was essential to continue with my studies free of charge, and allowing me to purchase my property. I was extremely unhappy forfeiting my Australian citizenship as I was born in Australia and I consider myself as an 'Australian'. I still maintain close ties with Australia.

5.50 In 2000, the Maltese Government 'accepted the concept of dual citizenship and no longer requires the renunciation of Australian citizenship before the age of 19 years in order to keep the Maltese citizenship'. However, the Committee heard that many Maltese people who renounced their Australian citizenship have faced considerable barriers to regaining Australian citizenship under the current provisions of the Citizenship Act.

5.51 Submissions observed that these Maltese citizens had been unable to resume citizenship under section 23AA of the Citizenship Act. This was because they were deemed to have *retained* their right to Maltese citizenship rather than having *acquired* a foreign citizenship. Several submissions suggested that this was discriminatory when compared with people who had lost their citizenship under section 17. For example, the Malta Cross Group pointed out that:

91% of Australian-born citizens who 'acquired' foreign citizenship have been successful in resuming their Australian Citizenship under Section 23AA, yet not one Maltese (who renounced), having applied under the same Section, has ever been accepted to resume their Australian birth-right, despite having the same compelling reasons required under this section ...

5.52 The Malta Cross Group continued:

So here you have the anomalous situation whereby the rights of Australian-born citizens are split into two categories, one group whose application to resume is accepted and the other group whose application is rejected. It is indeed even more anomalous when you think that those Australian-born Citizens, undoubtedly of a more mature age, who freely chose to 'acquire' the citizenship of another country can apply to resume their birth-right under Section 23AA but those Maltese who had no choice, cannot!

5.53 Several submissions highlighted that many of these Australian-born Maltese are also unable to resume Australian citizenship under section 23AB of the Citizenship Act, because that section contains an age limit of 25 years. These submissions pointed out that many affected Maltese are now older than 25 years, and have therefore exceeded this limit. As the Malta Cross Group remarked:

From within a single family you now find siblings who are both under and over the imposed age limit. This means that some are eligible to return to Australia while others are not. This discriminatory amendment gives rise to family isolation, discord and splits family unity.

5.54 Submissions also noted that the requirement to state an intention to return to Australia to live within three years is a further barrier to resuming citizenship renounced under section 18.

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5.55 However, the proposed changes to the Citizenship Act, announced during the Committee's inquiry, would amend the resumption provisions for citizenship renounced under section 18.<sup>17</sup>

These changes mean that, in the case of the children of the Maltese immigrants who returned to Malta with their parents and subsequently renounced their Australian citizenship when they turned 19, they will be able to apply to resume their Australian citizenship even if they are 25 years or over and are of good character.

Evidence given to the Senate Inquiry into Australian Expatriates also raised the issue of the children born after their parents renounced their Australian citizenship:

... there were concerns that the proposed changes would not include the children born to individuals after they renounced their Australian citizenship under section 18 of the Citizenship Act. For example, Ms Anne MacGregor from the [Southern Cross Group] argued:

the Minister's proposed changes do not currently include the children born to individuals after they were forced to renounce their Australian citizenship using section 18 of the Australian Citizenship Act ... This group, of course, encompasses the children of all those Australian born individuals, almost 2,000 people, who had to renounce their citizenship in Malta as teenagers ...

5.57 Ms MacGregor continued:

We submit that the situation of those children is no different, practically speaking, from the children born to section 17 victims after their loss of citizenship. We see it as being very important that this inquiry recommend that the announced changes be extended to include the children of section 18 victims born after their parents' loss of citizenship.

5.58 The Committee queried whether there was any plan for such children to be covered by the proposed amendments. Representatives from DIMIA responded that 'it is an issue that will be considered' and that 'there may well be further changes down the track, but that is the minister's prerogative'.<sup>18</sup>

However, the Bill does not contain any special provision for the situation outlined in Ms MacGregor's evidence quoted above. In the second reading speech for the Bill, the Minister for Citizenship and Multicultural Affairs, Hon. John Cobb MP, stated that:

No provision has been made for children born to a former Australian citizen after that parent renounced their citizenship. Unlike those who lost their citizenship under section 17, people who renounced their citizenship were well aware that they had ceased to be Australian citizens. They could have had no reasonable expectation of access to Australian citizenship for any children born after renunciation.<sup>19</sup>

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## Main changes

Apart from restructuring the 1948 Act to make it more accessible, the Citizenship Bill proposes a number of main changes.<sup>20</sup>

The Citizenship Bill introduces a framework for the collection, use and storage of personal identifiers, to increase the government's ability to accurately identify people seeking to become citizens. In addition, the Citizenship Bill explicitly provides that the Minister must be satisfied of an applicant's identity before an application for citizenship can be approved.

There is a new prohibition on the Minister approving applications from those assessed by the Australian Security Intelligence Organisation (ASIO) to be direct or indirect risks to Australia's security. This prohibition will apply to all applications—whether they are for citizenship by descent, by conferral or by resumption.

Spouses of Australian citizens will need to meet the same eligibility criteria as other applicants, that is, the applicant must have a basic knowledge of the English language, an adequate knowledge of the responsibilities and privileges of citizenship, must be likely to reside in or maintain a close relationship with Australia, and must be of good character.

The Citizenship Bill increases the residential qualifying period—not less than two years in Australia in the previous five years—to three years. There will be no change to the requirement to have spent one year in Australia in the two years immediately prior to making the application.

There is a strengthening of existing residence exemptions:

- for the purpose of the residential qualifying period, up to two years spent outside Australia as a permanent resident or in Australia as a temporary resident may be treated as time spent in Australia as a permanent resident, provided the person has been involved in activities beneficial to Australia. These applicants will therefore need to have spent a minimum of 12 months in Australia as a permanent resident.
- there will be only two circumstances in which a person will be exempt from the requirement to spend at least 12 months as a permanent resident.

The 1948 Act provides that where a child's Australian citizen parent or parents renounce their citizenship, their children automatically cease to be citizens, unless they do not have the citizenship of another country. The Citizenship Bill replaces this with a discretionary power, so that the circumstances of each case can be considered and a decision can be made whether or not it is appropriate for the child's citizenship to cease.

The Citizenship Bill removes the age limit for registration of citizenship by descent.

There is provision under the Citizenship Bill for children of people who lost their citizenship under the old section 17 (stripping Australians of citizenship if they became foreign nationals) to apply for citizenship by conferral.

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There is provision under the Citizenship Bill for people born in the former Australian territory of Papua before it became part of the new independent state of Papua New Guinea in 1975, to apply for citizenship by conferral if one or both parents were born in Australia as it is now known.<sup>21</sup>

The Citizenship Bill removes the age limit on resumption of Australian citizenship for those people who renounce it to retain or acquire another nationality. The only requirements for resumption will be that the person be of good character and not a security risk.

The Citizenship Bill introduces provisions to revoke citizenship acquired as a result of third-party fraud, and strengthens the revocation provisions relating to serious criminal offences.

## Main Provisions

### The Citizenship Bill

#### Part 1—Preliminary

**Subclause 4(1)** sets out the definition of **Australian citizen** as being a person who is an Australian citizen as provided under Division 1 (Automatic acquisition of Australian citizenship) and Division 2 (Acquisition of Australian citizenship by application) of Part 2 of the Citizenship Bill.

If a determination is required as to whether a person is an Australian citizen at a point in time *before* the commencement of the Australian Citizenship Act 2005, then that determination is done using the 1948 Act in force at the particular time (**subclause 4(2)**).

**Clause 5** defines **permanent resident** for the purposes of the Citizenship Bill. A permanent resident either (**subclause 5(1)**):

- is present in Australia and holds a permanent visa, or
- is not present in Australia and holds a permanent visa, and has previously been in Australia and held a permanent visa immediately before last leaving Australia.

The Minister has the discretion under **subclause 5(2)** to determine that people:

- who hold, or have held, certain visas, or
- who are present in certain external territories of Australia

may also be permanent residents. The Minister's determination is made by legislative instrument under the *Legislative Instruments Act 2003*.

**Clause 7** deals with children born either on a ship or an aircraft, or born after the death of a parent. Where a child is born on a ship or an aircraft, that child will be taken to have been born at the place where the ship or aircraft is registered (**subclause 7(1)**). Where a

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child is born on a ship or aircraft that is not registered, but is owned by a government of a country, the child will be taken to have been born in the country whose government owns the ship (**subclause 7(2)**).

For the purpose of working out the citizenship status of a child born after the death of a parent, the deceased parent's citizenship status is taken to be the deceased parent's status at the time of death.

**Clause 8** deals with children born as a result of artificial conception procedures. Specifically, clause 8 expressly provides that if a child is conceived through artificial conception to a married woman, where the woman's husband has consented to the procedure, but is not the biological father of the child, the woman's husband is taken to be the father of the child.

**Clause 10** defines **personal identifiers** as any of the following:

- fingerprints and handprints
- height and weight
- a head and shoulders photograph
- an iris scan
- a signature
- any other identifier prescribed by regulations.

The definition in clause 10 includes a digital form of the identifier.

## **Part 2—Australian Citizenship**

### Division 1—Automatic acquisition of Australian citizenship

**Clause 12** provides that a child born in Australia will be an Australian citizen only in the following situations:

- where a parent of the child is either an Australian citizen or permanent resident, or
- the child is ordinarily resident in Australia for ten years from the day they are born.

**Subclause 12(2)** creates an exemption to subclause (1), to the effect that a person is not an Australian citizen where at the time of their birth:

- one of the person's parents is an enemy alien, and
- the place where the person is born is under occupation by the enemy.

However, subclause 12(2) does not apply where the person's other parent is an Australian citizen who is not an enemy alien.

**Clause 13** provides that a child (or children) adopted under state or territory laws by an Australian citizen(s) who permanently resides in Australia at the time of the adoption, will be an Australian citizen.

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**Clause 14** provides for abandoned children found in Australia to be Australian citizens, unless and until evidence of a contrary status is presented.

**Clause 15** deals with the situation of a territory being incorporated into Australia. In those circumstances, the Minister has the discretion to determine that specified classes of people are, from a specified day, Australian citizens by reason of their connection with the territory. The Minister's determination takes the form of a legislative instrument.

Division 2—Acquisition of Australian citizenship by application

***Subdivision A—Citizenship by descent***

**Subclause 16(2)** sets out eligibility for Australian citizenship *for people born outside Australia on or after 26 January 1949* (when the 1948 Act came into force). The primary requirement is that at the time of the applicant's birth, one of their parents was an Australian citizen.

If, at the time of the applicant's birth, the *parent* of the applicant was an Australian citizen by virtue of the provisions in Subdivision A of the Citizenship Bill or the descent provisions in the 1948 Act (specifically sections 10B, 10C or 11 of the 1948 Act), then either of the following requirements applies:

- the *parent* must have been present in Australia for a total period of at least two years at any time before the applicant makes an application for citizenship, or
- the applicant is not a national or citizen of any country at the time of the application for Australian citizenship, and the person has never been a national or citizen of any country.

For applicants over the age of 18, the Minister must also be satisfied that the applicant is a person of good character at the time the Minister makes a decision about the application.

**Subclause 16(3)** sets out the eligibility for Australian citizenship *for people born outside Australia or New Guinea before 26 January 1949*. A person is eligible for Australian citizenship where:

- one of the applicant's parents became an Australian citizen on 26 January 1949, and
- that parent was born in Australia or New Guinea or was naturalised in Australia prior to the applicant's birth, and
- the Minister is satisfied that the applicant is of good character at the time the Minister makes a decision about the application.

**Clause 17** deals with the Minister's decision-making powers in respect of applications made under clause 16. The Minister must, in writing, approve or refuse the person becoming a citizen under clause 16 (**subclause 17(1)**). However, where an applicant satisfies the eligibility requirements, the Minister must approve the applicant becoming an Australian citizen (**subclause 17(2)**).

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The Minister must not approve a person to become an Australian citizen unless the Minister is satisfied of the applicant's identity (**subclause 17(3)**).

Where there is an adverse security assessment or a qualified security assessment in force under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) in relation to an applicant, the Minister must not approve the applicant becoming an Australian citizen (**subclause 17(4)**).

Where a person has ceased to be an Australian citizen, there is a minimum twelve-month period from the cessation of citizenship, when the Minister must not approve that person to become an Australian citizen again (**subclause 17(5)**).

A person's Australian citizenship under Subdivision A commences on the day the Minister approves the person becoming an Australian citizen (**subclause 19(1)**).

**Subclause 19(2)** re-emphasises that a person cannot become an Australian citizen by virtue of Subdivision A, unless:

- for applicants born on or after 26 January 1949: one of their parents was an Australian citizen at the time of the applicant's birth, or
- for applicants born before 26 January 1949: one of their parents became an Australian citizen on 26 January 1949.

### ***Subdivision B—Citizenship by conferral***

A person becomes a citizen under Subdivision B when (**clause 20**):

- the Minister approves the person becoming a citizen (see **clause 24**), and
- if required, the person makes a pledge of commitment to become an Australian citizen (see **clauses 26** and **27**).

**Clause 21** sets out the eligibility requirements for a person to become an Australian citizen under Subdivision B. The general eligibility requirements are set out in **subclause 21(2)**, and require that the Minister be satisfied that the applicant:

- is aged over 18 at the time of the application
- is a permanent resident at the time of the application
- understands the nature of the application
- satisfies the residence requirement (see **clause 22** for more details), **or** has completed relevant defence service (see **clause 23** for more details)
- possesses a basic knowledge of English
- has an adequate knowledge of the responsibilities and privileges of Australian citizenship
- is likely to reside, or to continue residing, in Australia, or otherwise maintain a close and continuing association with Australia, and
- is of good character at the time of the Minister's decision on the application.

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Specific eligibility requirements are set out in relation to:

- persons with permanent physical or mental incapacity (**subclause 21(3)**)
- persons aged 60 or over or with a hearing, speech or sight impairment (**subclause 21(4)**)
- persons aged under 18 (**subclause 21(5)**)
- persons born to a former Australian citizen (**subclause 21(6)**)
- persons born in Papua (**subclause 21(7)**), and
- stateless persons (**subclause 21(8)**).

In order for a person to be eligible for citizenship under subclauses 21(2), (3) and (4), the person must satisfy the residency requirement in **clause 22**. That requirement is that the person has been in Australia as a permanent resident for a total of (**subclause 22(1)**):

- one of the two years prior to making the application for citizenship, and
- three of the five years prior to making the application for citizenship.

Exemptions and limitations to this residency period are set out in **subclauses 22(2)–(9)**, and include:

- that the ‘three years in the past five years’ requirement does not apply where a person was born in Australia or was previously an Australian citizen (**subclause 22(2)**)
- a Ministerial discretion to treat a period as time in Australia as a permanent resident where the person:
  - was present in Australia, and
  - will suffer significant hardship or disadvantage if the period is not treated as a period in Australia as a permanent resident (**subclause 22(6)**)
- a Ministerial discretion to treat a period of not more than 12 months as time in Australia as a permanent resident where the person:
  - was present in Australia, and
  - was engaged in activities during that period which were beneficial to Australia (**subclause 22(7)**).

**Clause 23** sets out the ‘relevant defence service’ requirements, being that the person has:

- completed either three months in the permanent forces of the Commonwealth, or six months as a reserve, or
- has been discharged as medically unfit for the service.

Where a person satisfies the relevant defence requirements in clause 23, there is no need to meet the residency requirements in clause 22, for the purposes of eligibility under subclause 21(2).

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**Clause 24** sets out the framework for the Minister's decision when considering whether a person should become a citizen under the provisions in Subdivision B.

**Subclause 24(2)** gives the Minister discretion to refuse a person becoming an Australian citizen, even when the eligibility requirements in Subdivision B are met. This is in contrast to subclause 17(2), where the Minister must approve the application for citizenship where the person meets the eligibility criteria.

**Subclauses 24(3), (4) and (7)** put the same limitations on the Minister's decision as subclauses 17(3), (4) and (5) respectively.

**Subclause 24(6)** prevents the Minister from approving a person becoming an Australian citizen where the person is:

- the subject of proceedings for an offence under Australian law, or
- serving time in prison, or
- confined to a psychiatric institution under court order in connection with proceedings for an offence.

**Subclause 24(6)** also sets out certain circumstances in which the Minister must not approve a person becoming an Australian citizen when the person has previously served time in prison.

**Subclause 24(8)** exempts persons covered by subclause 21(8) (stateless persons) from having subclauses 24(6) (Offences) and 24(7) (Cessation of citizenship) applied to their application.

**Clause 25** allows for the Minister to cancel approvals made under clause 24 where the person's Australian citizenship is yet to commence under the provisions in **clause 28**, and either:

- for persons covered by subclause 21(2), (3) or (4), the Minister is satisfied the person is not a permanent resident; **or** is not likely to reside or continue residing in Australia or maintain a close relationship with Australia; **or** the person is not of good character (see **subclause 25(2)**); or
- the person has not made a pledge of commitment within 12 months of receiving approval to become a citizen from the Minister, and the failure to make the pledge is not one prescribed by regulations (**subclause 25(3)**).

The Minister can also cancel approval under clause 24 for a child under 16 to become an Australian citizen, where the Minister has cancelled the child's parent's approval under clause 24 (see **subclause 25(4)**). It seems that if **both** of the child's parents were approved by the Minister, in order for the Minister to cancel the child's approval, **both** of the parents would have to have their approval cancelled (see specifically **subclause 25(4)(d)**).

**Clause 26** provides that a pledge of commitment must be made to become an Australian citizen unless the person:

- is aged under 16 at the time of the application, or

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- has a permanent physical or mental incapacity at the time the application was made and cannot understand the nature of the application, or
- applied to become a citizen by virtue of subclause 21(6) (Person born to a former Australian citizen), 21(7) ( Person born in Papua), or 21(8) (Stateless person).

**Clause 27** makes provision for the form of the pledge and the persons who may receive the pledge.

**Clause 28** provides that a person applying under Subdivision B becomes a citizen:

- if the person is required to make a pledge of commitment, on the day they make the pledge (**subclause 28(1)**), or
- if the person is not required to make a pledge of commitment, on the day the Minister gives approval for the person to become a citizen (**subclause 28(2)**).

### ***Subdivision C—Resuming Citizenship***

**Subclause 29(1)** makes provision for a person to apply to the Minister to resume Australian citizenship.

**Subclause 29(2)** deals with the eligibility of a person who ceased being a citizen under **clause 33** (renunciation) or **clause 36** (regarding children) of the Citizenship Bill to resume citizenship.

**Subclause 29(3)** deals with the eligibility of a person to resume citizenship, who had ceased to become a citizen under the following provisions of the 1948 Act:

- section 17 (dual citizenship)
- section 18 (renunciation)
- section 20 (residence outside Australia), or
- section 23 (about children).

**Clause 30** sets out the provisions in relation to a Minister's decision in relation to an application to resume citizenship.

**Subclause 30(2)** gives the Minister the discretion, similar to the provision in **subclause 24(2)**, to refuse to approve a person to become an Australian, even the eligibility requirements in subclause 29(2) or (3) are met.

**Subclauses 30(3)** and **(4)** put the same limitations on the Minister's decision as subclauses 17(3) and (4) respectively.

**Clause 32** provides that a person resumes Australian citizenship on the day on which the Minister approves their becoming a citizen. Clause 32 also deals with the 'kind' of citizenship which the person resumes, that is, citizenship under Subdivision A or B.

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### Division 3—Cessation of Australian citizenship

**Clause 33** provides that a person can apply to the Minister to renounce Australian citizenship.

The Minister must approve an application to renounce citizenship where the Minister is satisfied the person (**subclause 33(3)**):

- is aged 18 or over and, at the time of making the application to renounce citizenship, is a national or citizen of a foreign country, or
- was born, or is ordinarily resident, in a foreign country, and is not entitled to acquire nationality or citizenship in that country because the person is an Australian citizen.

The Minister must not approve a renunciation of Australian citizenship unless the Minister is satisfied of the person's identity (**subclause 33(4)**).

**Subclauses 33(5)–(7)** set out specific instances when the Minister may, or must, not approve a person's renunciation of Australian citizenship.

**Subclause 33(5)** provides the Minister with the discretion to refuse to approve a renunciation of Australian citizenship when, at the time the application was made, the person is a national or citizen of a country, and Australia is engaged in a war. According to the Explanatory Memorandum, this is to ensure that a person does not absolve themselves of their responsibilities as an Australian citizen during a time of war.<sup>22</sup>

The Minister must not approve a renunciation of Australian citizenship when the Minister considers that the renunciation would not be in Australia's interest (**subclause 33(6)**).

**Subclause 33(7)** provides that the Minister must not approve a renunciation of Australian citizenship unless the person is, or immediately on renunciation of Australian citizenship will become, a national or citizen of a foreign country. This provision is intended to avoid the situation of a person becoming stateless on renunciation of Australian citizenship.<sup>23</sup>

A person's Australian citizenship ceases at the time the Minister approves the renunciation (**subclause 33(8)**).

**Clause 34** makes provision for the Minister to revoke a person's Australian citizenship.

**Subclause 34(1)** provides that where a person has obtained citizenship under the provisions of Subdivision A of Division 2 (Citizenship by descent), the Minister may revoke the person's citizenship for any of the following reasons:

- the person is convicted of an offence of making a false statement or representation under **clause 50**, or
- the person is convicted of an offence of making a false or misleading statement or providing false or misleading documents under sections 137.1 or 137.2 of the *Criminal Code*, or

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- the person obtained the Minister's approval to become a citizen as a result of 'third-party fraud' (see **subclause 34(8)**), or
- the Minister is satisfied that it would be contrary to the public interest for the person to remain an Australian citizen.

**Subclause 34(2)** provides that where a person has obtained citizenship under the provisions of Subdivision B of Division 2 (Citizenship by conferral), the Minister may revoke the person's citizenship if the Minister is satisfied that it is contrary to Australia's interest for the person to remain an Australian citizen, *and* any of the following apply:

- the person is convicted of an offence of making a false statement or representation under **clause 50**, or
- the person is convicted of an offence of making a false or misleading statement or providing false or misleading documents under sections 137.1 or 137.2 of the *Criminal Code*, or
- the person has been 'convicted of a serious offence' (see **subclause 34(5)**), or
- the person obtained the Minister's approval to become a citizen as a result of 'migration-related fraud' (see **subclause 34(6)**), or
- the person obtained the Minister's approval to become a citizen as a result of 'third-party fraud' (see **subclause 34(8)**).

**Subclause 34(3)** prohibits the Minister from revoking a person's Australian citizenship because they have been convicted of a serious offence, if that revocation would result in the person becoming stateless.

**Clause 35** provides that a person ceases to be an Australian citizen if he or she is a national or citizen of a foreign country, and the person serves in a country's armed forces in a war against Australia.

**Subclause 36(1)** provides for the revocation of Australian citizenship of a child under 18 where the 'responsible parent' (see **clause 6**) of the child ceased to be an Australian citizen under clauses 33, 34 or 35. However, the child's Australian citizenship cannot be revoked where another responsible parent of the child is an Australian citizen (**subclause 36(2)**).

#### Division 4—Evidence of Australian citizenship

**Clause 37** provides for a person to apply to the Minister to be provided with a notice evidencing the person's Australian citizenship.

**Clause 38** provides for the surrender of the evidentiary notice where a person's Australian citizenship is revoked under clause 34 or the Minister cancels the notice (see **subclause 37(6)**).

**Clause 39** creates an offence of altering a notice of Australian citizenship.

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### Division 5—Personal identifiers

**Clauses 40** and **41** make provision for obtaining personal identifiers from people in order for the Minister to meet her/his obligations under Part 2 of the Citizenship Bill to be satisfied of a person's identity before making certain decisions.

**Subclause 42(1)** creates an offence of accessing identifying information without authorisation. Authorised access to identifying information is provided for in **clauses 42(3)–(5)**.

**Subclause 43(1)** creates an offence of disclosing identifying information without permission. Permitted disclosures are set out at **subclause 43(2)**.

**Subclause 44(1)** creates an offence of unauthorised modification of identifying information. **Subclause 44(2)** creates an offence of unauthorised impairment of identifying information.

**Subclause 45(1)** creates an offence of destroying identifying information.

The maximum penalty for the offences in clauses 42–45 is two years imprisonment or \$13 200, or both.

### Part 3—Other matters

**Clauses 46** and **47** make provision for the administrative details of making applications to the Minister and notification by the Minister of decisions.

**Subclause 48(1)** provides that the Minister may arrange for computerised decision-making for the purposes of making any decision or complying with obligations under the Citizenship Bill or subordinate regulations. The Minister may substitute her/his own decision for a computer-made decision (**subclause 48(3)**).

**Clause 49** provides that a notice by an authorised person that a computer program was or was not functioning correctly at a particular time and in relation to a particular decision is prima facie evidence of the matters set out in the notice.

**Subclause 50(1)** creates an offence of making false or misleading statements. **Subclause 50(2)** creates an offence of concealing a material circumstance. The maximum penalty in relation to the offences in clause 50 is 12 months imprisonment.

**Clause 51** provides that the extended geographical jurisdiction—Category D, in section 15.4 of the *Criminal Code*, applies to all the offences in the Citizenship Bill.

**Clause 52** provides for applications to be made to the Administrative Appeals Tribunal in relation to certain decisions made under the Citizenship Bill.

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**Clause 53** inserts a regulation-making power for the purposes of the Citizenship Bill.

### **Schedule 1—Pledge of commitment as a citizen of the Commonwealth of Australia**

Schedule 1 sets out two alternative pledges which may be used by those making a pledge for the purposes of clauses 26 and 27. These are unchanged from those in the 1948 Act, which was last amended in 1993.

## The Transitionals Bill

### **Schedule 1—Consequential amendments**

**Schedule 1** of the Transitionals Bill makes amendments to a number of Acts as a consequence of the commencement of the provisions in clauses 3–54 of the Citizenship Bill. These amendments mainly change references to the 1948 Act to refer to the Citizenship Bill.

### **Schedule 2—Other amendments**

Schedule 2 makes a single amendment to the provisions of the *Immigration (Education) Act 1971* to repeal a provision regarding when the Commonwealth's obligation to provide English tuition to a person ceases.

### **Schedule 3—Application and transitional provisions**

**Part 1** of Schedule 3 sets out the provisions for transitioning people covered by the 1948 Bill to being covered by the Citizenship Bill.

**Part 2** of Schedule 3 sets out the transitional provisions in relation to the amendments made by Schedule 1 of the Transitionals Bill.

## **Concluding Comments**

The Citizenship Bill makes a sensible re-structuring of the 1948 Act in line with recommendations of both the Joint Standing Committee on Migration in 1994 and the Australian Citizenship Council in 2000.

There are a number of issues in the Bill on which Parliament may wish to request further advice.

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### **ASIO assessments**

As noted above, under **proposed subclause 17(4)**, the Minister must not approve a citizenship application where there is an adverse security assessment or a qualified security assessment in force under the ASIO Act which indicates that the applicant ‘is directly or indirectly a risk to security’. Under section 54 of the ASIO Act, a person can apply to the Administrative Appeals Tribunal for a review of an adverse security assessment. As noted above, however, there are claims that such assessments are ‘virtually impossible to challenge because of the lack of information made available to the subject and their legal team’.<sup>24</sup> Under subsection 38(2) of the ASIO Act, for example, the Attorney-General for security reasons can certify that a person is either not to be notified of an adverse security assessment or not to be informed of the grounds for such an assessment. Parliament may wish to request advice as to whether, as claimed by Senator Nettle, proposed subclause 17(4) ‘effectively gives ASIO the power to decide who can and can’t become a citizen’.<sup>25</sup>

### **Children born after parents renounce Australian citizenship**

Another issue is the situation of children born after their parents renounced Australian citizenship, as in the case of children of Maltese immigrants who were required to give up Australian citizenship to obtain work and other rights when they returned to Malta. As discussed above, in contrast to children of people stripped of citizenship under the old section 17 (prohibition on dual nationality), the Bill does not address the situation of children whose parents renounced Australian citizenship. The policy behind this distinction appears to be that there should be no special treatment for families who make their own decision to renounce Australian citizenship, for whatever reason. Under the Bill, however, parents who renounced their Australian citizenship will be able, under proposed clause 29, to apply to resume their citizenship, but any children born after they renounced citizenship will have no access to Australian nationality. Parliament might consider obtaining further advice on the extent to which this may create an anomalous situation *within* families with a connection to Australia.

### **Who is a ‘real Australian’?**

Finally, the Bill does not address some important nationality issues which have arisen in recent High Court cases and which could affect a significant number of inhabitants of Australia.

One such nationality issue is the situation of people born overseas who have grown up in Australia, but have not formally become Australian citizens. These people are legally regarded as ‘aliens’ under the Australian Constitution. They can have their permanent residency removed and be deported from this country if, for example, they fail the ‘character test’ under the Migration Act.<sup>26</sup> In *Shaw* (2003) the High Court said that this even applied to long-term British settlers who have lived in Australia for decades and have

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been treated as full members of the Australian community with the same voting and other rights in this country as Australian citizens.<sup>27</sup>

A further issue is the constitutional position of dual nationals in Australia. In *Singh* (2004) and *Ame's Case* (2005), the High Court said that an 'alien' under the Australian Constitution is simply a person who owes obligations (allegiance) to 'a sovereign power other than Australia'.<sup>28</sup> If this is the extent of the definition, then any dual national in Australia is an 'alien' and can be subject to the full extent of the Commonwealth's power over 'aliens' under the Constitution. Given not least the statement in the Preamble—both of the 1948 Act and the current Bill—that 'citizenship represents formal membership' of the Australian community, it would seem logical that an Australian citizen, even if also a national of another country, cannot be an 'alien'. However, the High Court has taken a different view in its handling of the definition of 'alien' in recent cases.<sup>29</sup> Parliament might consider whether the Bill could usefully address this issue.

## Endnotes

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- 1 Hon. A. Calwell (Minister for Immigration), 'Second reading speech: Nationality and Citizenship Bill 1948', House of Representatives, *Debates*, 30 September 1948, p. 1060. For more background on the 1948 Act, see the [Explanatory Memorandum](#), Nationality and Citizenship Bill 1948. For general information on citizenship law, see the Parliamentary Library's Internet guide to Administrative Law, <http://www.aph.gov.au/library/intguide/law/adminlaw.htm#immigration>.
- 2 For further details, see Australian Citizenship Council, 'Key legislative amendments 1955–1997', *Australian Citizenship for a New Century*, Canberra, 2000, pp. 34–36; I. Ireland, 'Australian Citizenship Legislation Amendment Bill 2002', *Bills Digest, no. 78*, Department of the Parliamentary Library, 2001–02.
- 3 Hon. G. Hardgrave (Minister for Citizenship and Multicultural Affairs), *Australian citizenship: then and now*, speech to the Sydney Institute, Sydney, 7 July 2004.
- 4 Hon. J. Howard (Prime Minister), *Counter-terrorism laws strengthened*, media release, Canberra, 8 September 2005.
- 5 Hon. J. Cobb (Minister for Citizenship and Multiculturalism), *Australian Citizenship in the Global Age: Reforms to Australian Citizenship Act*, speech to the National Press Club, Canberra, 14 September 2005.
- 6 Joint Standing Committee on Migration, *Australians all: enhancing Australian citizenship*, Australian Government Publishing Service, Canberra, September 1994.
- 7 *ibid.*, p. xxii.
- 8 *ibid.*, p. xxiv.

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- 9 *The ties that bind*, Government response to the report by the Joint Standing Committee on Migration: ‘Australians all: enhancing Australian citizenship’, 18 September 1995, p. 12.
- 10 Australian Citizenship Council, [op. cit.](#)
- 11 *ibid.*, Recommendation 62, p. 91.
- 12 *ibid.*, Recommendation 64, p. 91.
- 13 Joseph Kerr, ‘Convicted terrorists will keep citizenship’, *Sydney Morning Herald*, 10 November 2005, p. 4.
- 14 *ibid.*
- 15 Former section 17 was repealed by the *Australian Citizenship Legislation Amendment Act 2002*. That section provided that, except in relation to ‘an act of marriage’, a person who does ‘any act or thing: (a) the sole or dominant purpose of which; and (b) the effect of which; is to acquire the nationality or citizenship of a foreign country, shall, upon that acquisition, cease to be an Australian citizen’. Thus, if an Australian citizen applies to become a citizen of another country, the act of making that application will, once approved, lead to the loss of Australian citizenship. The background to the repeal of former section 17 is covered in the relevant [Bills Digest](#).
- 16 Senate Legal and Constitutional Committee, [They still call Australia home: Inquiry into Australian expatriates](#), Canberra, March 2005.
- 17 *ibid.*, pp. 49–51.
- 18 *ibid.*, p. 51.
- 19 Hon. J. Cobb, ‘Second reading speech: Australian Citizenship Bill 2005’, House of Representatives, *Debates*, [9 November 2005, p. 13](#).
- 20 *ibid.*
- 21 See also Peter Prince, [‘Mate! Citizens, aliens and ‘real Australians’—the High Court and the case of Amos Ame’](#), *Research Brief*, no. 4, Parliamentary Library, Canberra, 2005–06.
- 22 [Explanatory Memorandum](#), p. 43.
- 23 [ibid.](#), p. 44.
- 24 Kerr, *op. cit.*, p. 4
- 25 *ibid.*
- 26 See, for example, the case of Robert Jovicic, born in France to Yugoslav parents, who had lived in Australia since the age of two but had not formally become a citizen, and who was deported to Serbia after committing drug-related crimes. [‘Out of touch deportation rules need a review’](#), *The Age*, 28 November 2005.
- 27 There are some 355 000 British-born migrants in this country who have not become citizens. See Peter Prince, [‘Deporting British Settlers’](#), *Research Note*, no. 33, Parliamentary Library, Canberra, 2003–04.

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- 28 See Peter Prince, [‘Mate! Citizens, aliens and ‘real Australians’—the High Court and the case of Amos Ame’](#), op. cit., p. 22.
- 29 See [Singh](#) and [Ame’s Case](#).

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