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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 78 2001–02

Australian Citizenship Legislation Amendment Bill 2002

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Law and Bills Digest Group
18 February 2002

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Australian Citizenship Legislation Amendment Bill 2002

Date Introduced: 13 February 2002

House: House of Representatives

Portfolio: Immigration and Multicultural and Indigenous Affairs

Commencement: Schedule 1 commences on Royal Assent, Schedule 2 on Proclamation or six months after Royal Assent.

Purpose

The Bill proposes to:

- repeal section 17 of the *Australian Citizenship Act 1948* with the effect that adult Australian citizens do not lose their Australian citizenship on acquisition of another citizenship
- extend the descent and resumption provisions to give young people more opportunities to acquire Australian citizenship
- provide for children who acquire Australian citizenship with their responsible parent, or at a later date, to be given their own citizenship certificates
- strengthen aspects of the integrity of the Australian citizenship process, and
- insert a specific reference to 'people smuggling' offences in the existing provision in the *Australian Citizenship Act 1948* which provides for the deprivation of Australian citizenship in certain circumstances.

Background

This Bill was originally introduced into the Parliament in September 2001. The Australian Citizenship Legislation Amendment Bill 2001 was not debated or referred to a committee. That Bill lapsed with the dissolution of Parliament for the November 2001 federal election.

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The following background deals with the issue of dual citizenship. A brief background to the other measures in this Bill appears in the Main Provisions section of this Digest.

Dual Citizenship

Australian citizenship may be acquired by birth, adoption, descent or discretionary grant.

A dual citizen is a person who holds citizenship of two countries. Although no official statistics are collected by the Australian Bureau of Statistics, the Australian Citizenship Council has estimated that there are 4.4 million Australians who are already dual citizens.¹

Australian law is anachronistic in that it allows naturalised Australians to hold dual citizenship, yet, in most cases prevents those persons who have been Australian citizens since birth from acquiring the citizenship of another country without losing their Australian citizenship. This situation is inequitable in the sense that it attempts to restrict dual citizenship for one sector of the population, yet for another sector of the population – approximately one quarter – dual citizenship is already a *fait accompli*.

The categories of Australian citizens who already possess another citizenship include:

- Australian citizens by grant who are able, under the law of their country of origin, to keep their previous citizenship on obtaining Australian citizenship
- Australian citizens born in Australia who automatically acquire, through a parent, another citizenship by descent
- Australian citizens born overseas to an Australian citizen parent who by the law of that country acquire that citizenship by birth, and
- Australian citizens who acquire the citizenship of another country automatically by legislation of that country, for example, through marriage.²

Section 17 of the *Australian Citizenship Act 1948* provides 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.

With respect to these consequences, the Australian Citizenship Council stated:

Around 600 cases of loss of Australian Citizenship come to the notice of the Department of Immigration and Multicultural Affairs (the Department) each year, often in the context of the individual applying for an Australian passport. In some cases, the Department may have to advise a person that she or he has ceased to be an Australian Citizen some years previously. Many of these notifications cause significant distress to the individuals concerned. Many cases of persons losing their Australian citizenship do not come to official notice at all.³

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Arguments For and Against

Broadly, the argument in favour of dual citizenship is that the prohibition on dual citizenship effectively discriminates against Australians who are citizens by birth.

Moreover dual citizenship was considered to be consistent with:

- an acceptance of multiculturalism and would enhance Australia's international reputation accordingly;
- an acceptance of the fact that loyalty and commitment to a country is not solely possessed by the holders of single citizenship;
- economic globalisation, instant communications and vastly increased personal mobility by facilitating travel, business and work opportunities for individuals;⁴ and
- an international trend towards dual citizenship, with the United States, the United Kingdom, New Zealand, Canada, France and Italy all allowing their citizens to hold another citizenship without this affecting their existing citizenship status.

Broadly, the argument against dual citizenship is that it raises questions of disloyalty to Australia and that it runs contrary to notions of national identity, and cohesion. It is also argued that citizenship should not be degraded by being treated as a commodity to be sought for economic reasons or convenience of travel arrangements, employment opportunities or tax advantages. As one commentator has suggested, '[i]t is this symbolic significance of citizenship (and/or populist politics) that has prevented successive governments from repealing section 17 of the *Australian Citizenship Act 1948*, despite the recommendation of Parliamentary and government commissioned inquiries over the last decade.'⁵

Inquiries and Reviews

In 1976, the Parliamentary Joint Committee on Foreign Affairs and Defence carried out an inquiry into dual nationality.⁶ Its reference was 'the international legal and diplomatic aspects of the situation of Australians possessing dual or plural nationality'. That inquiry rejected the introduction of dual nationality for Australian born citizens. By 1994, attitudes to dual citizenship had altered significantly. The Joint Standing Committee on Migration inquiry in its report *Australians All: Enhancing Australian Citizenship* recommended the repeal of section 17 of the *Australian Citizenship Act 1948*, on the grounds that it was outmoded and discriminatory. The 'allegiance' argument was rejected on the grounds that there was little evidence to suggest a lack of loyalty amongst those Australians who had not relinquished former nationalities.⁷

In February 2000 the Australian Citizenship Council's released its report, *Australian Citizenship for a New Century*, following the distribution of an issues paper entitled *Contemporary Australian Citizenship*. The Council 'strongly' recommended repeal of

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section 17 of the *Australian Citizenship Act 1948*, 'so that Australian citizens over the age of 18 do not lose their Australian Citizenship on acquisition of another Citizenship'.⁸

In May 2001, the Government responded to the report, with a paper entitled *Australian Citizenship: A Common Bond*.⁹ In that paper the government indicated its disposition to support the Citizenship Council's recommendation.¹⁰

Political Views

Until very recently, political leaders have continued to view the issue as politically sensitive in the broader community. The position of the major political parties on dual citizenship over the past decade has been somewhat opaque – it has often been stated that the question should be reviewed in the context of a more wide-ranging review of citizenship legislation. Nevertheless, the previous Labor Government removed the renunciation of former allegiances in the oath of allegiance in 1986, and relaxed requirements for resumption of citizenship relinquished under section 17 of the *Australian Citizenship Act 1948* in 1995.

The Keating Labor Government however declined, in a pre-election environment, to respond to the Joint Standing Committee's recommendation referring it for a forthcoming review and redrafting of citizenship legislation scheduled to be completed by 1999.¹¹

In August 1998 the Coalition Government established the Australian Citizenship Council to report by the close of 1999 on 'contemporary issues in Australian citizenship policy and law to be addressed as Australia moves into the next millennium'.¹²

In April 2000, the Labor Party indicated its 'strong support' for the recommendation of the Australian Citizenship Council to repeal section 17 of the *Australian Citizenship Act 1948*.¹³

Media comment

Media comment surrounding the current debate, as in the mid-1990s, has been supportive of the repeal of section 17 of the *Australian Citizenship Act 1948*. One commentator suggested in 1994 that 'whatever argument there may be against dual nationality (and it is pretty flimsy), there can be no argument in favour of a punitive law that applies to only one group of Australians (the—quite literally—Australian-born-and-bred)'.¹⁴ Another commentator in 1997 described Australia as being seen by business leaders overseas as 'out of step' with other countries, including the United States, Canada, Britain and New Zealand.¹⁵

The Constitution

The Constitution places limitations on holders of dual citizenship in section 44(i). That section provides for the disqualification of a person from being chosen for sitting as a Senator or Member of the House of Representatives if they are a holder of dual

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citizenship. The Bill does not address this particular issue, as obviously a referendum would be required to make changes to the Constitution.

The matter of section 44 and dual citizenship was addressed in 1997 by the House of Representatives Standing Committee on Legal and Constitutional Affairs.¹⁶ It was also considered by the High Court in 1999 in the *Heather Hill Case*.¹⁷

Main Provisions

Loss of Citizenship by Acquisition of Foreign Nationality

Item 1 of Schedule 1 repeals section 17 of the *Australian Citizenship Act 1948* with the effect that adult Australian citizens will not lose their Australian citizenship on acquisition of another citizenship.

Citizenship by Descent

Section 10B of the *Australian Citizenship Act 1948* deals with citizenship by descent. A person born overseas to Australian parents may become an Australian citizen if they are registered before their 18th birthday (subsection 10B(1)(a)).

Schedule 2, item 3 inserts **new subsection 10B(1A)** in the *Australian Citizenship Act 1948* to extend this window of opportunity. A person may be registered until their 25th birthday. However, an adult may not be registered unless the Minister is satisfied that they are of good character.

Service in Australian Reserve Forces

Subsection 13(1) of the *Australian Citizenship Act 1948* establishes various conditions for the grant of Australian citizenship. Two key conditions are that the person has been a permanent resident in Australia for a period or periods amounting to 1 out of the last 2 years (paragraph 13(1)(d)) or 2 out of the last 5 years (paragraph 13(1)(e)). A person is exempt from these conditions if they have completed at least 3 months' 'relevant defence service' (paragraph 13(3)(a)). This is defined as service in the permanent forces, or national service prior to 26 November 1964 (subsection 5(1)). Similarly, they are exempt if they have been discharged from service within 3 months as a result of a service related injury or incapacity (paragraph 13(3)(b)).

Schedule 2, items 1 and 4 extend the service exemption to:

- persons who have completed a period or periods of service amounting to 6 months' full-time service in the Australian reserve forces (**proposed paragraph 13(3A)(a)**), and

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- persons who have been discharged from full-time service in the Australian reserve forces within 6 months as a result of a service related injury or incapacity (provided they are discharged whilst on full-time service) (**proposed paragraph 13(3A)(b)**).

Paragraph 13(4)(b)(iii) of the *Australian Citizenship Act 1948* provides that the Australian residence requirement for citizenship may take account of residence in Papua New Guinea prior to its independence (16 September 1975) or within a subsequent window period of 3 years (ie prior to 16 September 1978).

Item 5 of Schedule 2 repeals this exemption as it is 'no longer used'.¹⁸

Item 6 provides for ministerial discretion to allow parents to have their children joined in a citizenship application (provided the children are under 16 years). The children acquire citizenship automatically when the parents acquire citizenship.

Prohibitions on Grant of Citizenship

Subsection 13(11) provides that a person cannot be granted citizenship if, among other things, he or she are on trial or have been convicted and imprisoned in Australia. Nor can he or she be granted citizenship while on bail or parole or for a period of 2 years following his or her release from gaol.

Item 17 provides that serious repeat offenders cannot be granted citizenship for 10 years. A 'serious repeat offender' is a person who has been imprisoned under a sentence of 12 months or more and who has, since being released, been subject to a second such sentence.

Under the *Crimes Act 1914*, an offence for which a person has been imprisoned for less than 30 months is 'spent' after 10 years.¹⁹ A 'spent conviction' is one which a person generally cannot be required to disclose under Commonwealth, State or Territory laws.²⁰ However, there are exclusions. Significantly, a person can be required to disclose information relating to a spent conviction for the purposes of citizenship decisions.²¹

Effect of Prohibitions

Broadly, the grant of citizenship has two procedural stages. An applicant must receive a certificate of citizenship but they must also make a pledge of commitment before the Minister, a judge or an authorised person. Either stage may occur first.

Item 20 inserts **new sections 14B** and **14C** which deal with these two procedural stages.

First, the new subsections deal with the effect of the prohibitions in subsection 13(11):

- if a certificate of citizenship has been granted, but a pledge of commitment has not been made, and the application for citizenship, if it had been a fresh application, would have to be rejected under subsection 13(11), the Minister may *revoke* the grant of the citizenship certificate (**new section 14B**), and, conversely, and

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- if a pledge of commitment has been made but a certificate of citizenship has not been granted, and the person has been or may be charged with an offence in Australia, the Minister may *defer* the grant of the citizenship certificate (**new section 14C**).

Second, under **new paragraph 14B(1)(c)(ii)** the Minister may revoke a citizenship certificate if the person has failed to make a pledge of commitment within 12 months without an 'acceptable reason' (a list of which will be prescribed in the regulations).

Third, under **new paragraph 14C(1)(c)(i)** the Minister may defer a citizenship certificate if a visa held by the person 'may be cancelled'.

A deferral under **new section 14C** may not last for a period or periods that exceed 1 year.

Deprivation of Citizenship

A person may lose citizenship by renunciation (section 18 of the *Australian Citizenship Act 1948*) or by doing something the purpose of which is to become a national or a citizen of a foreign country (section 17). S/he may also lose citizenship if, as a person with dual citizenship for example, the person serves in the armed forces of a foreign power at war with Australia (section 19). Under section 21 of the *Australian Citizenship Act 1948*, if the person has obtained citizenship by obtaining a certificate, and either:

- has been convicted of an offence under the *Australian Citizenship Act 1948* of making a false representation,
- has been convicted of an offence, committed before the grant of the certificate, under domestic or foreign law for which s/he has been sentenced to imprisonment for at least 12 months, or
- obtained the certificate as a result of 'migration-related fraud'

the Minister may deprive the person of their citizenship if s/he is satisfied 'that it would be contrary to the public interest for the person to continue to be an Australian citizen'.

Section 21 of the *Australian Citizenship Act 1948* has at least two areas of significance in the migration context.

Clearly, it is relevant in the context of 'migration-related fraud'. A person is deemed to have obtained a certificate as a result of such fraud if s/he is convicted of an offence against certain provisions of the *Migration Act 1958* or *Crimes Act 1914* for conduct before the grant of the certificate that was connected with his or her entry into Australia or the grant of a visa or permission to enter and remain in Australia.²² The conduct must have been directly or indirectly material to the person becoming a permanent resident.²³

However, it is also relevant in the context of people smuggling. It is an offence under the *Migration Act 1958* for a person to carry non-citizens to Australia without documentation.²⁴ It is also an offence for a person to organise or facilitate the bringing or

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coming to Australia of a group of 5 or more persons where s/he knows they would become illegal immigrants.²⁵ Similarly, it is an offence to present false or forged documents, to make false or misleading statements or to pass documents to help a group gain illegal entry into Australia.²⁶ And it is an offence for a person to make a false or misleading statement about his or her ability or power to influence a decision or to make a false or misleading statement about the effect of his or her actions on a particular decision.²⁷ Finally, it is an offence to undertake for a reward that a particular decision will be made.²⁸

Item 24 inserts a note to section 21 of the *Australian Citizenship Act 1948* to the effect that persons convicted of people smuggling offences may be deprived of citizenship.

Resumption of Citizenship

Section 23AA of the *Australian Citizenship Act 1948* deals with the resumption of citizenship. Citizenship can be resumed in various circumstances, one of which is where a person, either inadvertently or acting under duress, did any act or thing the purpose and effect of which was to end their Australian citizenship. The person must furnish an explanation to the Minister which describes these circumstances and statements to the effect that the person has satisfied a 2 year residence requirement, that he or she will return or remain as a resident and that he or she has a close and continuing association with Australia. The Minister must be satisfied that the statements are true and that any duress, if economic, was reasonably significant.

Item 26 inserts an additional requirement that the Minister must be satisfied that the person is of good character.

Item 27 inserts **new section 23AB** which will deal with resumption of citizenship lost by renunciation. A person may resume citizenship by providing an explanation similar to the explanation under section 23AA of the *Australian Citizenship Act 1948*. The key differences are that citizenship may only be resumed by a person under 25 years who, acting under duress, renounced his or her citizenship in order to retain citizenship or nationality of a foreign country.

Section 23 of the *Australian Citizenship Act 1948* provides that children of persons who lose or are deprived of citizenship are also generally deprived of citizenship. A child of a person who is deprived of citizenship under section 21 of the *Australian Citizenship Act 1948* (offences including migration fraud and people smuggling offences) may also be deprived of citizenship subject to ministerial discretion.

Section 23B of the *Australian Citizenship Act 1948* provides that a person who is deprived of citizenship in these circumstances may apply to resume citizenship, subject to a special circumstances ministerial discretion.

Item 28 inserts a requirement that the Minister must be satisfied that the person is of good character (**new subsection 23B(2)**).

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Concluding Comments

A question which has frequently been asked in relation to this Bill is:

“If someone today took out British citizenship, thus losing Australian citizenship under section 17 of the *Australian Citizenship Act 1948*, would the passing of the Australian Citizenship Legislation Amendment Bill 2001 act retrospectively so as to restore the lost citizenship?”

It is the opinion of the author that the passage of the Australian Citizenship Legislation Amendment Bill 2002 will not act retrospectively so as to restore lost citizenship and Australian citizenship will only be able to be resumed in the various circumstances provided for in the *Australian Citizenship Act 1948*.

Currently section 17 of the *Australian Citizenship Act 1948* provides 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'.

In practice this means 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.

As to 'affected Australians' being awarded back their nationality, existing section 23AA already allows citizenship to be resumed in various circumstances.

Generally resumption can only occur under section 23AA if the person did not know that the act through which they lost their citizenship would have that effect (ie they were ignorant or mistaken as to the effect of existing section 17) or were they acted under duress. There appears to be no provision for resumption if they took the act voluntarily and in full knowledge of its consequences.

Resumption of citizenship must be approved by the relevant Commonwealth Minister - the person must provide details surrounding the loss of citizenship and statements to the effect that the person has satisfied a 2 year residence requirement, that he or she will return or remain as a resident and that he or she has a close and continuing association with Australia.

Endnotes

- 1 This estimate was based on surveys undertaken by the Department of Immigration and Multicultural Affairs in late 1999, that there are approximately 4.4 Australians who have dual citizenship: *Australian Citizenship for a New Century*, Commonwealth of Australia, 2000.

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- 2 Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, 2000, p.60.
- 3 Ibid.
- 4 Adrienne Millbank, 'Dual Citizenship in Australia', *Current Issues Brief No. 5, 2000-01*.
- 5 Ibid, p.ii.
- 6 Joint Department of Foreign Affairs and Defence, *Dual Nationality*, Parliamentary Paper No. 255/1976.
- 7 Joint Standing Committee on Migration, *Australians All: Enhancing Australian Citizenship* tabled 12 October 1994.
- 8 Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, 2000, Recommendation No.49.
- 9 Commonwealth of Australia, *Australian Citizenship A Common Bond, Government Response to the Report of the Australian Citizenship Council*, May 2001, 28 pp.
- 10 Ibid at p.24.
- 11 Government response to the report by the Joint Standing Committee on Migration: 'Australians All—Enhancing Australian Citizenship', *The Ties that Bind*, tabled 5 September 1995.
- 12 Minister for Immigration and Multicultural Affairs, Hon. Philip Ruddock, 'Australian Citizenship Council Announced', *Media Release* No. 104/98.
- 13 Hon. Con Sciacca, 'Labor Gives Green Light to Dual Citizenship', *Media Release*, 11 April 2000.
- 14 Robin Fitzsimons, 'New Citizenship Law is Unfair', *Sydney Morning Herald*, 27 January 1994.
- 15 Karen Middleton, 'Minister Shelves Nationality Push', *The Age*, 14 March 1997.
- 16 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution*, tabled July 1997.
- 17 *Sue v Hill & Anor.* (1999) 163 ALR 648. See also *Sykes v Cleary* (1992) 176 CLR 77 in which the High Court found two candidates in the Wills by-election ineligible under s.44(i).
- 18 *Explanatory Memorandum*, p. 8.
- 19 Section 85ZM.
- 20 Section 85ZV.
- 21 Subsection 85ZZH(d).
22. Subsection 21(1A).
23. Subsection 21(1B).
- 24 Section 229.

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- 25 Section 232A.
- 26 Section 233A. Also ss 22, 23 and 234.
- 27 Section 334.
- 28 Section 335.

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