CLOTHIER ANDERSON & ASSOCIATES

BARRISTERS & SOLICITORS

Partners

Michael J. Clothier LL.B.
Accredited Specialist in Immigration Law
(Registered Migration Agent No 74433)

Karyn Anderson BA., LL.B., LL.M. (Hons)
Accredited Specialist in Immigration Law
(Registered Migration Agent No. 859900)

Senior Associate

Don Lucas B.A., LL.B.
Accredited Specialist in Immigration Law
(Registered Migration Agent No. 9501008)

29 Argyle Place South, Carlton 3053
PO Box 227, South Carlton 3053
Telephone: (03) 9347 4022
Facsimile: (03) 9347 5066

E-mail: info@clothieranderson.com.au
ABN No: 76 463 833 253

Our Ref:
Your Ref:

31 July 2009

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Sir / Madam

Re: Inquiry into the *Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009*

This submission comments only on clause 5 of Schedule 1 of the *Australian Citizenship Amendment (Citizenship Test Review and Other Measures) Bill 2009* ("the Bill") which proposes to amend section 21(5) of the *Australian Citizenship Act 2007* ("the Act").

The proposed amendment appears to be a response to recent decisions of the Administrative Appeals Tribunal (the Tribunal) that, nder the terms of s.21(5) of the Act, applicants under 18 years in Australia but who are not permanent residents, are not eligible for the conferral of Australian citizenship. In the most recent of these decisions, *SNMX v Minister for Immigration and Citizenship* [2009] AATA 539 (21 July 2009), the Tribunal held that Departmental policy requiring applicants under s.21(5) to be permanent residents was *ultra vires*. The proposed amendment gives legislative authority to that policy. It is concerning that the policy and purposes underlying the current s.25(1) do not appear to have been considered when proposing the new amendment to the Act.

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

The Government's concern that people will try to manipulate s.25(1) to circumvent the *Migration Act 1948* is not a new concept. On 20 August 1986, following the decision of the High Court of Australia in *Kioa v West (1985)* HCA 159 CLR 550, the *Citizenship Act 1948* was amended to state that children born in Australia to parents who were not Australian Citizens or permanent residents would only be able to acquire Australian Citizenship by grant if they were usually resident in Australia until their tenth birthday. Prior to that amendment *jus soli*, the nationality by birthplace rule, was in force. As will be suggested at the conclusion of these submissions, perhaps it is time to re-evaluate this amendment as well.

Policy and Historical Overview

The current s.21(5) was introduced through the *Australian Citizenship Bill 2005*. The Explanatory Memorandum to that Bill noted that amendments to citizenship law in the new Act reflected changes in governmental policy. Specifically with regard to s.21(5), it stated:

> *This new subsection is the equivalent of Section 13(9) of the old Act*

Subsection 13(9) was inserted into the *Australian Citizenship Act 1948* in 1984 and took effect from 22 November 1984. In the second reading speech of the enabling Act in the Senate, the Honourable Senator Gietzelt stated:

> *Existing ministerial discretion to grant citizenship notwithstanding the requirements of sub-section 13(1) is retained in sub-section 13(9). The most important of these are powers to grant citizenship to a spouse, widow or widower of an Australian citizen, and to persons under the age of 18 years*

This second reading speech emphasized the Government's intention that the requirements of s.13(1), the predecessor to s.21(2) of the current Act, would not be applied to applications made under s.13(9). One such requirement is that of permanent residency.

It is understood that one of the purposes of s.13(9) was to enable the children of former Australian citizens, who were born at a time when their parents had lost their Australian citizenship (but then regained it) to be recognized as Australian citizens. This anomaly has been resolved by the insertion of s.21(6) into the current legislation. From all information provided to the Parliament and the Australian public, it is apparent that the retention of the content of the old s.13(9) in s.21(5) of the current legislation is to provide a discretion for children who are Australian citizens in all but formality to be formally recognized as Australian citizens. The proposed amendments completely prohibit this original purpose from being effected.

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

The United States of America established a government and a citizenship *of the people, by the people and for the people*. In ancient Greece, citizenship was connected deeply to people's every day lives. Aristotle stated that *to take no part in the running of the community's affairs is to be either a beast or a god!* It is not possible to remove the concept of being part of the community from the notion of citizenship; however it is feared that this is exactly what the proposed legislation intends to do.

The Purpose of the Proposed Legislation

The Bill states that the purpose of the proposed amendments is to:

> *... ensure the integrity of the citizenship and migration programs by preventing an applicant for citizenship by conferral who is under 18 from being eligible for citizenship if they are not eligible for a permanent visa under the Migration Act 1958 and the Migration Regulations 1994.*

This Bill is therefore preventative, rather than enabling, legislation. It is noted that this characterisation is inconsistent with the Preamble of the Act, which states:

> *The Parliament recognizes that Australian citizenship represents full and formal membership of the community of the Commonwealth of Australia, and Australian citizenship is a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity.*

The words 'permanent resident' are not mentioned nor are they implied in the above definition of Australian citizenship. It is contended that being a member of the Australian community is not mutually exclusive with being a temporary resident or even an unlawful non-citizen, as many of this firm's clients have demonstrated.

One such client is Thomas (not his real name), a 15½ year old young man from Mildura in rural Victoria. He arrived in Australia with his parents from their native Tonga when he was only 3 years old. Thomas' mother made an unsuccessful application for a carer visa and ultimately sought the Minister's discretion under s.351 of the *Migration Act 1958*, which was denied in 2001. Thomas, who was then aged 7 years old, remained in Australia with his parents as unlawful non-citizens until his application for citizenship was lodged in 2008, during which time he attended local schools, participated in sporting and cultural events and became, through assimilation and acceptance, a member of the Australian community.

Thomas even received an *Aussie of the Month* award from his school! Thomas provided glowing references from his school, Church leaders, music teachers and leaders of the Mildura community with his application for conferral of Australian citizenship, which was lodged in 2008. His application was originally refused by the

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

Department of Immigration and Citizenship simply because he was not a permanent resident. This was clearly a case of the "Sins of the Fathers" being visited upon the children, as no investigation was undertaken by the Department as to Thomas' psychological identification with Australia as his home, but merely a determination that, as he wasn't a permanent resident, no further investigation was necessary. Thomas appealed to the Administrative Appeals Tribunal and a short time before his hearing, the Minister withdrew his opposition, recognizing that Thomas was already a substantive Australian citizen, despite his immigration status and that the correct or preferable decision (and one in accordance with Thomas' paramount welfare) was for his membership of the Australian community to be formally recognized by a grant of Australian Citizenship.

Accordingly, if the purpose of the Act is to formally recognize membership of the Australian community, does it not make sense to consider that membership as a whole, rather than simply an immigration status? It is noted that in considering the applications under s.21(5) and s.13(9) of the previous Act, Tribunal members had regard to all the circumstances of the applicant's case. Their education, English language-proficiency (and their ability to speak the language of their parents' homelands), the length of time they have spent in Australia regardless of their place of birth or immigration status, as well as their prospects should they be forced to leave Australia, were all considered. Not every case was successful and I refer you to the AAT cases of *Paul* and *Baddage*, where the circumstances of the applicants' cases were insufficient to persuade the AAT that they were members of the Australian community.

Surely an underlying element of the Australian community is our belief in justice for everyone – a 'fair go' for all. The vast majority of children with applications submitted under s.21(5) had no say in their parents' choice to take them to Australia, nor were they able to make informed choices about being included as secondary applicants on their parents' visa applications. It hardly seems fair to punish children who have spent the majority if not all of their lives in Australia and who have contributed significantly to their communities, because of the actions of their parents. Indeed, it is contended that to take a 17 year old from her school and her friends and to send her to a place she has not seen since she was 5 years old, a place which may well hold terrible memories, is a particularly heinous punishment of an innocent human being.

It is submitted that the current *functionalist* legislative approach, similar to that considered by the United States Supreme Court in *Mistretta v United States* 488 US 361 (1989) and employed under the current section 21(5) of the Act (at least by some Members of the AAT), enables the particular circumstances of individual applicants to be taken into account – including their psychological identification as members of the Australian community. The proposed amendments under the current Bill would

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

signal a shift to a *formalist* approach, with strict reliance upon specific rules and foregoing consideration of the individual's particular circumstances: negating the need for meaningful and contributing membership of the Australian community. The result would actually be the de-valuing of Australian citizenship.

Fear that the Floodgates will Open

It is understood that the Government is concerned about the Administrative Appeal Tribunal's recent decisions in this area and particularly the possibility that the "floodgates" will open and the Department will be inundated with applications under s.21(5) by applicants simply seeking to extend their time in Australia. However, s.21(5) is not a loophole available for every child to exploit. It remains that in order to obtain Australian Citizenship, child applicants must establish that they psychologically identify as members of the Australian community. This was demonstrated by the Administrative Appeals Tribunal decisions in *Paul* and *Baddage*, as mentioned above. Obviously the length or residence and the integration into the community is relevant when determining this membership, but the formal immigration status of the applicant or their parents is not always indicative of their membership into, or association within, the community of the Commonwealth of Australia.

Tribunals and the Judiciary are in place to ensure that Citizenship is not going to be exploited or flaunted by people who are clearly not entitled to be formally recognized as members of our community. These checks and balances on Government action encompass the separation of powers which is fundamental to our Constitution. If the Government is not going to trust this process to distinguish the worthy from the unworthy applications, but simply have Parliament make another "prescriptive" law, is this not indicative of a much more significant problem? Should we not be focusing all our energies on addressing the real problem rather than a knee jerk reaction making Citizenship an unattainable goal for many young Australians who, through their length of residence and activities in identify as members of the Australian community?

It is concerning (and also disappointing) that the Government does not want to recognise contributing members of society as Australian citizens. This appears to be at odds with the current media campaigns encouraging people to apply for Australian citizenship and become a formal member of the Australian community. Perhaps those campaigns should be amended to include the caveat: "but not if you're under 18 years old or if your parents have ever been temporary or unlawful non-citizens".

Furthermore, it is contended that formal citizenship should be a recognition of something which is already in place. This is implied in the Act's preamble as well as the broader understanding of what it means to be a citizen. The test of what exactly

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

constitutes Australian citizenship (as opposed to being an immigrant) has been debated since Federation. In 1908, Isaacs J in *Potter v Minahan* (1908) 7 CLR 308 held:

> *The ultimate fact to be reached as a test whether a person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.*

In *Ex Parte Walsh; In re Yates* (1925) 37 CLR 64 Knox CJ upheld this understanding of notional citizenship, stating:

> *... a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community.*

The proposed amendments to s.21(5) are unnecessary. Furthermore, by preventing contributing members of society from obtaining Australian citizenship, it is contended that the amendments will diminish the value of Australian citizenship, as it will simply become a residency test, with no consideration of what it actually means to be a *constituent part of the community known as the Australian people* and a *member of the Australian community.*

The Consequences of the Bill

The practical consequence of the proposed legislation will result in the undesirable and unnecessary prohibition upon certain children who identify with, and also form part of, the Australian community from achieving formal citizenship status. This is not in the best interests of Australia's future. Our firm has had the honour to represent young clients whose contribution to Australia's community is already rich, despite their infancy.

Furthermore, should the proposed amendments be passed, hundreds of children who could have made a significant contribution to Australian society (and many who are already making such contribution) will be forced to return to places they cannot remember and, in some instances, places they have never even known.

If this amendment is passed, children who grow up in Australia, who spend their formative years here, and even children who are born in Australia will not have an avenue to obtain Australian citizenship unless their parents are permanent residents. Thehistory of citizenship is entrenched in individual rights, responsibilities and allegiances and it does not seem logical to restrict its application based upon the decisions and actions of another person, no matter what their relation to the applicant.

Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
PO Box 6100
Parliament House
CANBERRA ACT 2600

In the past decade, the Australian Government has slowly but surely removed any rights these innocent children may have. No longer can they make application for a *Close Ties* visa, which was based upon having spent their "formative years" in Australia. As they are joined to their parents' applications, they are barred by s.48 of the *Migration Act 1958* from making application for a student visa or other such visa onshore. If they depart Australia, they are unable to return without overcoming the hurdles placed by Schedule 3 of the *Migration Regulations 1994* as many of them have resided unlawfully in Australia through no choice or even knowledge of their own.

Conclusion

The proposed amendment to section 21(5) will result in these children and young adults, who consider themselves as much Australian as you or I, having no choice about their future. They will have no right to live in the country they call home. Some of them will have no right to live in the country of their birth. This is not right and it is not just. The amendments made to the *Australian Citizenship Act 1948* and the *Australian Citizenship Act 2007* must be very carefully considered with respect to the purposes of the legislation and with respect to what it actually means to be an Australian citizen. A mere *visa holding* criterion is not enough in relation to the circumstances of many children and the facts in case of *SNMX* and several other cases we have litigated establish this. The proposed amendments to s.21(5) are unnecessary and they in fact hinder Australian citizenship law by decreasing the worth of Australian citizenship amongst the community – the people. Rather than closing down these small but worthy discretions to grant Australian Citizenship to some innocent children, we should be widening them, as such grants give real meaning to the idea of a compassionate inclusive Australian community.

Should you have any queries or require further information please do not hesitate to contact us.

Yours faithfully,

Lauri Stewart on behalf of all at
Clothier Anderson and Associates