The Southern Cross Group

Promoting Mobility in the Global Community

Senator Annette Hurley
Shadow Minister for Citizenship and Multicultural Affairs
Parliament House
Canberra ACT 2600
AUSTRALIA

by e-mail

1 December 2005

Dear Senator Hurley

Australian Citizenship Bill 2005

Checklist of Issues Against SCG Submission of 23 July 2004

Further to our previous e-mails over the last couple of weeks, in which the Southern Cross Group (SCG) has raised with you various points which appear not to be covered by the *Australian Citizenship Bill 2005* as tabled on 9 November 2005 (the Bill), we thought it might be useful to provide you with a summary of issues raised by the SCG in its third supplementary submission to the Senate Inquiry into Australian Expatriates (dated 23 July 2004), with a commentary as to whether each of those issues has been addressed in the Bill. You will recall that the SCG's 23 July 2004 submission was in response to the Government's 7 July 2004 announcement that it intended to reform Australian citizenship law. In that submission (attached again hereto) we attempted to set out what we thought had been left out of the reform proposal.

We would like to make several points at the outset:

a) It may not be worth raising any questions concerning section 19 of the *Citizenship Act 1948* (the current Act). As we understand it, this section has never operated because Australia has never formally been at war with any country since the date the current Act came into force, 26 January 1949, despite involvement in various military conflicts since then. The issues on section 19 (point 1, and parts of point 3 and 6) are shown for completeness (as they were mentioned in our 23 July 2004 submission) but in the current political climate, we are not suggesting that time be invested to achieve change here.

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b) The issue regarding former permanent residents from the UK and other Commonwealth countries who resided in Australia as children before 1987 (when the concept of "British subject" still existed in the law and the distinction between British and Australian nationality was less clearly made compared to now) is a complex one. We understand you have already heard from Mr Michael Young on this subject. While we at the SCG feel that this is an important issue to pursue, we are conscious that it may not be politically feasible to include this issue as part of the Bill. We did note in our submission that an immigration visa solution may be an alternative that could be introduced at a later date. We would be interested to know your views on this specific issue. Several individuals in the same situation as Mr Young have been in touch with the SCG, so we believe that this particular problem may affect a significant number of people. Some of them made submissions to the Australian Expatriates Inquiry in 2004.

c) Our 23 July 2004 submission also mentioned the issue of permanent residence rights for former Australian citizens and children of Australian citizens who have a valid reason not to seek Australian citizenship (for example, if this would cause loss of pension rights in another country). This is an immigration rather than a citizenship issue and one we do not seek to pursue for now. However it is something that may be required to be addressed in future under the immigration laws.

We are continuing to examine the technicalities of the new Bill. While we are confident there are no significant policy issues outstanding other than the ones mentioned below, we may still bring some technical issues (such as potentially unintentional loopholes or anomalies) to your attention, and the Department's, as we find them.

The issues raised in our submission of 23 July 2004 are set out below. At the end of this letter we include a handful of additional points on which we have been working over the last few weeks.

Resumption for Individuals who Lost Citizenship under Section 19

Under Section 19 of the current Act, loss of citizenship is possible if an Australian citizen who is also a citizen of another country serves in the armed forces of that country and that country is at war with Australia. The SCG queried whether a resumption provision should be introduced for those who have lost their citizenship under this section. No such provision has been made in the new Bill.

We understand that as Australia has never formally declared war on any country since 26 January 1949, no one has ever lost their Australian citizenship under Section 19. Hence we believe that the lack of a resumption provision for such individuals in the new Bill is moot at this point in time.

However, looking to the future, it cannot be ruled out that were Australia to formally declare war against another nation, such a resumption provision may in time become desirable. Section 19 of the current Act will be replaced by clause 35 in the Bill.

Resumption for Naturalised Individuals who lost Citizenship under Section 20

Until 8 October 1958, under the now-repealed Section 20 of the current Act, it was possible for naturalised Australians forfeit Australian citizenship as a result of residing outside Australia for seven years. This issue has been addressed by the Bill, in clause 29(3)(iii).

Resumption for Individuals who Lost Citizenship as Minors under Section 23 due to their Parent's Loss under Sections 17, 18, 19 or 20

This issue has been addressed by the Bill, in clause 29(3)(iv).

Resumption for Minor Children while still under 18 in their Own Right

We argued that these children should be allowed to resume citizenship independently of their parents. This issue has been addressed by the Bill, in clause 29(3)(iv).

Access to Citizenship for Children Born Overseas <u>after</u> their Parent Renounced Australian Citizenship under Section 18

This is the "Maltese children" issue which, as you are aware, has not been addressed by the Bill. Although we have been focussing on affected children in Malta, and undoubtedly by far the largest group of Section 18 people are from Malta, it is worth pointing out that Section 18 has been used by individuals in several countries other than Malta to renounce citizenship over the years, i.e. countries which demand proof of formal renunciation under Australian law in order for a person to keep their citizenship in adulthood, or in order to naturalise a person. Section 18 is also occasionally used by individuals with dual citizenship where in order to obtain a security clearances for a specific job, for example, they may only hold one citizenship. In 2000, the Australian Citizenship Council reported that, on average, around 112 people were renouncing Australian citizenship every year. Countries demanding renunciation as a condition of naturalisation or retention include *inter alia* Denmark, Germany, and Japan. Malta stopped requiring renunciations on 10 February 2000. Individuals in those countries who have renounced citizenship in the past will also have children born to them outside Australia after their renunciation who have not been provided with access to Australian citizenship

under the Bill. Any amendment to the Bill to include Section 18 children would of course apply to those of any nationality whose parent had lost under Section 18, not just Maltese children.

Access to Citizenship for Children Born Overseas after their Parent Lost Citizenship under Sections 19, 20 or 23

No provision has been made in clause 21(6)(c) the Bill for such children to be given access to Australian citizenship. You will recall that we sent you an e-mail on this point on 21 November 2005, and the same questions were submitted to DIMIA on 22 November 2005.

Minor Children Should Not Lose Citizenship with their Parents

In our submission of 23 July 2004, on page 15, we queried whether Section 23 of the current Act (under which minor children lose or have lost citizenship as a result of their parent losing citizenship under Sections 17, 18, 19 or 20) should be repealed in its entirety. We noted that, due to subsequent amendments to the current Act, Section 23 now only applies to children whose parents lose citizenship under s 18 or s 19. This issue has on its face been partially addressed by the Bill, in that clause 36 provides that the Minister "may" revoke the child's citizenship, by notice in writing. This is to be contrasted with the current Section 23, under which there is no ministerial discretion, where the child "shall" lose its citizenship.

Nevertheless, it is not clear under clause 36 of the Bill how this Ministerial discretion will be exercised. Certainly, where a second responsible parent remains Australian, the Minister cannot revoke the child's Australian citizenship. Further, the Minister cannot revoke the child's citizenship if that step would leave the child stateless. But there is scope for the Minister to exercise his discretion under clause 36 in every other circumstance in which a responsible parent either renounces their Australian citizenship, has it revoked, or loses it due to service in the armed forces of another country. Clarification should be sought as to how this discretion will be exercised in practice.

The SCG submits that clause 36 should be deleted from the Bill in its entirety. Minor children have no influence in their parent's decisions leading to loss of Australian citizenship. They should not involuntarily lose their citizenship when a responsible parent renounces, has their citizenship revoked, or loses due to military service. This issue was raised with you in our e-mail dated 21 November 2005, and passed on to DIMIA by e-mail on 22 November 2005. Although such children will have a right of resumption under clause 29(3)(iv) of the Bill, we question whether clause 36 is appropriate at all if Australia is seeking to fully modernise its citizenship legislation at this time. In Canada, the UK, Ireland and New Zealand, there is no provision allowing for a minor child's citizenship to be revoked due their

parent's renunciation of citizenship. Irish law specifically states that "loss of Irish citizenship by a person shall not of itself affect the citizenship of his or her spouse or children".

Grant of Australian Citizenship for Individuals Born in the UK and Certain Other Commonwealth Countries who Migrated as Children and Lived in Australia for a Certain Period but who did not apply for Citizenship by Registration, Notification or Grant while this was Possible

This issue relates to individuals who migrated to Australia as children and spent a substantial period of time in Australia but, as they were British subjects, were not aware of, or did not feel, the need to take out Australian citizenship (for which they were eligible). They then left Australia again, many of them believing that they were Australian citizens, although they were not. These people now have no entitlement to Australian citizenship. This issue has not been addressed by the Bill at all. The SCG suggested that an alternative method of dealing with this group of individuals would be to give them preferential access to permanent residency, a matter which would obviously be dealt with under the *Migration Act* rather than the *Citizenship Act*. To our knowledge, however, the government has not to date given any indications that it is looking at finding equitable solutions for these people.

Citizenship by Descent for Children Born Overseas and Adopted Overseas under the Law of a Foreign Country by Australian Citizens

This issue was discussed at length in the SCG's 23 July 2004 submission at pages 22 to 25. It relates to children born and adopted overseas by one or more Australian citizens. Such children are not eligible for citizenship by descent as children are only eligible for citizenship by descent if one of their parents was an Australian citizen "at the time of their birth", whereas adoption only occurs after birth. The SCG argued that this discriminated against adopted children vis-à-vis other children. This issue has not been addressed in the Bill.

Those Connected with Australia Prior to 26 January 1949 who do not Hold Australian Citizenship

This relates to issues regarding loss of entitlement to citizenship under previous legislation, the *Nationality Act 1920*. The Bill addresses certain anomalies regarding citizenship by descent in relation to the 1920 Act. However, it does not provide access to Australian citizenship for individuals who were "Australian" at some point prior to 26 January 1949 but who lost their British subject status, as it was then known, under the 1920 Act before 26 January 1949. In our view, the Bill should allow a route to Australian citizenship for these individuals. You will recall the document we sent you by e-mail on this subject on 16 November 2005. Similar questions were put to DIMIA on 18 November 2005, in which

we have asked for clarification as to exactly how individuals could have lost their British subject status under Australian law prior to 26 January 1949 and which groups of such individuals would nevertheless have become Australian citizens on 26 January 1949 under the current Act. No response has been received from the Department at this stage.

Children of Australian Citizens born in Papua

There is an anomaly in the current Act, such that children born in Papua during a certain time period, to an Australian citizen parent, are not eligible for citizenship by descent. This issue has been addressed in the Bill, in clause 21(7). We note that this issue was highlighted in the Susan Walsh case, argued before the High Court in 2003 by Kim Rubenstein, who is presently on contract to DIMIA to advise it on the *Citizenship Bill 2005*.

Loss of Citizenship by Australian Citizens Connected to Burma

Under the *Nationality and Citizenship (Burmese) Act 1950*, certain individuals born in Burma were effectively stripped of Australian citizenship unless, within two years (ie by 1952), they made a declaration that they wished to retain Australian citizenship. The SCG argued that resumption provisions should be available to such individuals who lost their Australian citizenship by failing to make a declaration within the required time. This issue is not addressed in the Bill. You will recall that we outlined this issue for you in an e-mail dated 25 November 2005. We also drew this point to DIMIA's attention in an e-mail of the same date.

Allowing Minor Children to Renounce their Citizenship

Although not covered in our 23 July 2004 submission, we raised with you in an e-mail of 21 November 2005, and with the Department on 22 November 2005, the fact that we believe it may not be appropriate for Australia to allow minors to renounce their Australian citizenship in any circumstances. Section 18 of the current Act already allows children under 18 to renounce Australian citizenship in some circumstances, i.e. if they were born, or are ordinarily resident, in a foreign country and are not entitled, under the law of that country, to acquire the nationality or citizenship of that country by reason that they are an Australian citizen. Clause 33 of the Bill would substantially re-enact Section 18. We note that under citizenship laws in Canada, the UK, Ireland and New Zealand, it is simply not possible for a minor to renounce their citizenship. These countries have a policy that a person should be of full age and capacity in order to make such a significant decision.

The Australian Citizenship Council, in its February 2000 Report, on page 72, acknowledged that even at the age of 18, when a person is legally of full age and capacity, such young people may take the decision to renounce "before they are able to make an adult and informed decision", because they may still be living with their parents, and may still be at school. The Council noted that the consequences of such decisions can have a significant impact on the futures of such people. It is submitted that it should simply be impossible, under Australian citizenship law, for a person under the age of 18 to renounce their Australian citizenship in any circumstances.

Indeed, the SCG has previously suggested that Section 18 of the current Act should be entirely repealed to make renunciation for all Australian citizens, regardless of age, simply impossible. This suggestion was made because if Australia had no provision in its citizenship law for renunciation, another country could not then demand that a renunciation be made before it naturalises a person or allows them to keep a second citizenship in adulthood. We note that even following the repeal of Section 17 in April 2002, significant numbers of Australians resident in countries such as Germany and Denmark, for example, cannot acquire the citizenships of their countries of residence because the authorities in those countries still demand documentary evidence of a formal renunciation under Australian law. They are thus prevented from the enjoying the benefits of dual citizenship.

At the very least, clause 33 of the Bill should be amended so that minors are prevented from renunciations which they may regret in later life. Further, the SCG urges that due consideration be given to whether clause 33 is necessary in the Bill at all.

Australian Citizenship for Spouses

Finally, although not referred to in our 23 July 2004 submission, as you know, we are concerned to understand more on subject of Australian citizenship for spouses of Australian citizens, i.e. issues raised by clauses 22(7), 22(9) and 22 (10) of the Bill. You will recall our e-mail on this subject dated 25 November 2005. The same issues have been raised with the Department in parallel. These clauses in the Bill are very welcome reforms to Australia's citizenship law for thousands in the Australian diaspora. However, it is unclear exactly how they will be implemented and interpreted. The SCG is receiving a significant number of queries on this subject.

Conclusion

The *Australian Citizenship Bill 2005* is a significant piece of legislation which is welcomed by the SCG. The citizenship dilemmas of thousands in the Australian diaspora will be solved by these reforms. We have been presented with a unique opportunity to equip Australia with a modern citizenship law. That

law must be able to adequately serve its people as they become increasingly globally mobile in the 21st century. It is of the utmost importance that we take every opportunity now to make sure that the legislation which is finally enacted does that job in every respect and contains no unintentional anomalies.

The Government's repeal of Section 17 in 2002 was a watershed in that it was a public statement that Australia as a nation was finally ready to embrace dual citizenship for all its citizens as a matter of policy. This new Bill, in a broad sense, is about putting old wrongs right. In it about inclusion into the Australian family, rather than exclusion. Whether a particular past wrong is now put right in this Bill or left unaddressed should under no circumstances be conditional upon whose fault the original wrong was. Such an approach would not be in line with the overall spirit of these reforms. It would be wholly inappropriate to exclude from this legislation any specific groups which have in the past been innocent victims of historically outdated citizenship laws in Australia or any other country.

Should you have any further queries, please do not hesitate to contact us.

Kind regards,

Anne MacGregor
Co-founder

Attachment: SCG Submission of 23 July 2004 with Attachments

cc Tony Burke, MP, Shadow Minister for Immigration
Senator Andrew Bartlett, Democrats
Karen Lee, Immigration Advisor to the Democrats
Senator Bob Brown, Australian Greens
Mary-Anne Ellis, Assistant Secretary
Citizenship and Language Services Branch, DIMIA