The Southern Cross Group

Promoting Mobility in the Global Community

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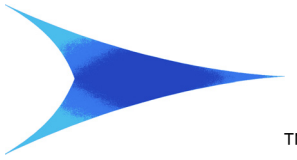

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Third Supplementary Submission to the Australian Senate's
Legal and Constitutional References Committee

Inquiry into Australian Expatriates

Brussels and Canberra
23 July 2004

The Southern Cross Group is an international volunteer-run non-profit advocacy and support organisation for the Australian Diaspora

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Introduction

This supplementary submission solely concerns the subject of Australian citizenship and is being made in response to the announcement by the Minister for Citizenship and Multicultural Affairs, the Hon. Gary Hardgrave MP, on 7 July 2004, that further reforms will be undertaken to the *Australian Citizenship Act 1948*.[1] The Minister's Media Release and Fact Sheet of 7 July 2004 are attached as **Annex 1** to this submission. His speech to the Sydney Institute of the same date is attached as **Annex 2**.

The Southern Cross Group (SCG) welcomes the initiative taken by the Government in the planned reforms. Without a doubt, many in the Diaspora will be able to resume their lost citizenship or alternatively register as Australian citizens by descent as a result. The SCG's media release of 8 July 2004 by which it informed its 5,600 current subscribers of Minister Hardgrave's announcement is attached as **Annex 3**. A number of messages have been received by the SCG from around the world in response from individuals who are extremely pleased that they will be able to be Australian citizens within the foreseeable future. A selection of the comments received in response to the SCG's media release of 8 July 2004 is attached as **Annex 4**. The SCG has also begun to take up individual contact with many of those whose citizenship status will be able to be altered once the reforms have become law, to make sure they are aware of the impending changes.

Nevertheless, the SCG is concerned that the announcement made on 7 July 2004 may lead to the mistaken assumption by members of the Senate's Constitutional and Legal References Committee and others that all the citizenship difficulties currently faced by those in the Diaspora will disappear once the promised reforms have become law. That is not the case. This submission

[1] The Minister's media release of 7 July 2004 is available at http://www.minister.immi.gov.au/cam/media/media04/h04128.htm, and the full text of his speech of the same date to the Sydney Institute at http://www.minister.immi.gov.au/cam/media/speeches/sydinstitute_07_04.htm.

seeks to clarify the particular groups of people whose citizenship predicaments will not be solved by those reforms, based on the material currently to hand outlining the details of those changes.[2] No draft amending legislation currently exists. This submission also refers back to the SCG's primary submission to the Inquiry and takes stock of recent progress on a number of citizenship points made in that submission nearly five months ago.

1 Resumption for Individuals who Lost Citizenship under Section 19

It is noted that at this stage the planned reforms on resumption only concern those who themselves directly lost their citizenship under Sections 17 and 18. Loss of citizenship is also possible under Section 19 of the Act 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.[3]

Were an individual ever to lose their citizenship under Section 19, no resumption route is currently available for them.[4] It is submitted that it may today be appropriate to allow for the resumption of citizenship lost under Section 19 if, since the loss, the person has ceased to serve in the armed services of that other country and Australia is no longer at war with it.

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2 The SCG gratefully acknowledges the suggestions and input provided by Jeremy Jenkins and Kim Rubenstein as well as others in the development of this submission.

3 Kim Rubenstein, *Australian Citizenship Law in Context*, Lawbook Co., 2002, page 147 at footnote 471 writes: "Inquiries to the Department regarding the number of people who have lost their citizenship due to this section have revealed that, to date, no-one has lost his or her citizenship under this section as Australia has not been at war with another country. This reflects upon Australia's independence as a nation and the executive's capacity to enter war. Section 61 of the *Constitution* carries with it the royal war prerogative: see *Farey v Burvett* (1916) 21 CLR 433 at 452. However, the Department's response suggests that this power has not been used. For more about the evolution of Australian independence, see the High Court decision of *Sue v Hill* (1999) 199 CLR 462.

4 Minor children who lost under Section 23 due to a parent's loss under Section 19 can however currently resume their citizenship after they turn 18 under Section 23B, although this resumption provision has limitations of its own that are addressed elsewhere.

2 Resumption for Individuals who Lost Citizenship under Section 20

As noted on page 101 of the SCG's primary submission of 27 February 2004, until 8 October 1958, naturalised Australian citizens who had "resided outside Australia and New Guinea for a continuous period of seven years" would lose their Australian citizenship unless certain conditions had been met.[5] Section 23A is the resumption provision specifically applicable to Section 20 loss cases, although it is couched in terms similar to Section 23B and presents the same difficulties.

It is submitted that resumption should be available to Section 20 victims along the same lines as now proposed by the Minister for Section 17 and Section 18 victims. In other words, it should be sufficient to show good character, and the application for resumption should be able to be made at any time.

3 Resumption for Individuals who Lost Citizenship as Minors under Section 23 due to their Parent's Loss

On pages 97 to 100 of the SCG's primary submission of 27 February 2004, it has been argued that resumption for those who lost their citizenship while minors under Section 23 due to their parent's loss under Sections 17, 18,19 and 20 should be made easier.[6] The current resumption provision applicable to these people, Section 23B, is inadequate for a number of reasons. Specifically, the requirement in Section 23B that the applicant for resumption is required to apply "within one year after attaining the age of 18 years or within such further period as the Minister in special circumstances, allows", prevents many such individuals from rejoining the Australian family. A number of cases in the AAT over the last

[5] The question of what constituted "residing outside Australia" under Section 20 was addressed in *Dvorani and Secretary, Department of Immigration and Multicultural Affairs* [2000] AATA 187, (10 March 2000), subsequently appealed to the Federal Court: *Dvorani v Minister for Immigration & Multicultural Affairs* [2000] FCA 1302 (15 September 2000).

[6] Until 8 October 1958 Section 23(1) included a reference to Section 20.

few years have highlighted that it is virtually impossible to show "special circumstances".[7]

A close reading of the Minister's media release and speech of 7 July 2004 does not provide a clear answer as to whether the Government is now planning to amend Section 23B and specifically provide a simple resumption route for these individuals who lost as minors under Section 23. On balance, the evidence presently available leads to the conclusion that these individuals will still be excluded from the Australian family. There is certainly no clear statement that individuals who lost as minors will now also be allowed to resume their citizenship on simply showing a good character requirement.

On the one hand, in his speech, the Minister does fleetingly refer to minor children who lost with their parents when their parents lost under Section 17, when he says, under the heading "Resumption":

> Of particular concern to former Australian citizens living overseas and seeking to resume their Australian citizenship is the requirement that they must intend to reside in Australia within three years. Over the last 18 months alone I have received some 340 representations from people who lost their Australian citizenship under Section 17. Many of them did not know they had lost their Australian citizenship until they applied to renew their passport or register their children as citizens by descent.
>
> *Some of them were children when they lost their Australian citizenship as a result of the actions of their parents.* (emphasis added)

But this section of the Minister's speech, when considered alongside the technical provisions of the Act itself, is inconsistent. First, minor children who lost under Section 23 and who have reached adulthood currently resume under Section 23B, and not Section 23AA, which contains the "intention to reside in

[7] *Antonio Catanzaro v Department of Immigration, Local Government and Ethnic Affairs*, 11 July 1994; *Franciscus Hubertus Beertsen and John Peter Beertsen v Minister for Immigration and Multicultural Affairs*, 6 March 1997; *Ibrahim and Minister for Immigration and Multicultural and Indigenous Affairs* [2003] AATA 154, 14 February 2003.

Australia with three years limitation" which the Minister has now said he will do away with.[8] Section 23B has no three year intention requirement, but contains other limitations which preclude resumption in many cases, as stated elsewhere. It requires reform in its own right. Second, it is not only minor children of Section 17 victims who lost their citizenship under Section 23, but also minor children of victims of Sections 18, 19 and 20.

The Fact Sheet accompanying the Minister's media release of 7 July 2004 also provides little guidance. On a literal interpretation, the two bullet points under the heading of "Resumption" appear only to refer to those individuals who themselves directly lost under Section 17 and Section 18, but not their minor children who lost under Section 23. This is because under the Act the children themselves did not lose when they acquired another citizenship, or renounced Australian citizenship, but due to their parent's acquisition or renunciation action, which triggered the operation of Section 23 for those minor children.[9]

Further, the bullet point under heading "Children of former Australian citizens" in the Fact Sheet clearly does not cover those who lost as minors with their parents. It solely concerns those born after their parents lost citizenship.

It might be argued that children who were born overseas who lost their citizenship under Section 23 do not need a special resumption provision in the Act because they could simply use the forthcoming amended citizenship by

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[8] Minor children can only resume under Section 23AA if their parent includes them on their application for resumption made under Section 23AA. This only applies to minor children whose parent lost citizenship under Section 17 or under Section 18 (in the limited circumstances where Section 23AA can currently be used for resumption following Section 18 renunciation.) Parents who renounced under Section 18 and who are themselves not yet 25 years old can include their minor children on their resumption applications made under Section 23AB.

[9] Note that prior to 22 November 1984, the responsible parent for the purposes of Section 23 of the Act was usually the father (unless he was dead or the parents were separated). In the case of an Australian-born mother who was naturalised as a US citizen in the 1950s, who had a child born in 1946, for example, in Australia, and a US-citizen father, one would have expected the child to lose citizenship when the mother lost under Section 17 by virtue of Section 23. But in such a case the child would not have lost Australian citizenship since its father was never Australian in the first place.

descent provision, as the only requirements for registering as an Australian citizen by descent will shortly be that at least one of the parents was an Australian citizen at the time of the person's birth, that the person is of good character if 18 years or over, and if a parent of the applicant acquired Australian citizenship by descent that parent must have spent a total of two years in Australia as a lawful resident. Nevertheless, this interpretation would still leave Australian-born children who lost their citizenship under Section 23 out in the cold. It is argued that registration as a citizen by descent should not be used in such cases where a person is born overseas, and that an adequate resumption provision should be separately provided.

The Southern Cross Group calls on the Committee to clarify with DIMIA whether or not individuals who lost their citizenship as minors under Section 23 will also be able to avail themselves of the simplified resumption route which the Minister is planning to introduce for direct Section 17 and Section 18 victims. It is submitted that it would be wholly appropriate to repeal the current Section 23B and replace it with a provision that allows such individuals, <u>regardless of their age now</u>, to resume their lost citizenship simply by showing good character. Resumption should be available for all those who lost their citizenship as minors, regardless of which specific provision their responsible parent lost their citizenship under.

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

Children who are still minors can resume with their parent on their parent's application made under Section 23AA or Section 23AB. There appears to be no provision for minor children to resume in their own right while minors if their parent decides not to make an application for resumption. Further, children of individuals who lost under Sections 19 and 20, and children of Section 18 renouncees who are over the age of 25, cannot be included on their parent's resumption applications as minors under Sections 23AA and 23AB. Such

children must wait until their 18th birthday and use Section 23B to resume in their own right.

It is submitted that there may be cases, where, for whatever reason, a parent who has lost citizenship under Section 17, 18, 19 or 20 may decide not to avail themselves of resumption. Their minor children might be very young at the time of the parent's loss. Without provision for minor children to apply for resumption in their own right before their 18th birthday, such children may have to spend a considerable period without Australian citizenship before being able to apply under Section 23B once they turn 18. This could affect their educational opportunities in Australia, as without Australian citizenship, to attend primary or secondary school they will have to go through the arduous process of applying for a student visa and pay hefty overseas student fees.

Just as applications for grant of citizenship can now be made on behalf of minor children born after their parent lost Australian citizenship under Section 17, all minor children who lost their citizenship by virtue of Section 23 of the Act should be given a right to apply for resumption in their own right before their 18th birthdays.

5 Children Born Overseas <u>after</u> their Parent Lost Australian Citizenship under Section 18

On pages 94 to 97 of its Primary Submission to this Inquiry dated 27 February 2004, the SCG discussed the issue of resumption of citizenship for individuals who had previously renounced Australian citizenship under Section 18 of the *Australian Citizenship Act 1948* in order to retain another citizenship. The Section 23AA resumption provision can at present only be used by people who began with solely Australian citizenship and then renounced their Australian citizenship using Section 18 in order to <u>acquire</u> from scratch a new citizenship. Section 23AB, introduced into the Act in 2002, allows resumption by those who

renounced to retain another citizenship, but only if they are under the age of 25 years. In particular, almost 2,000 Australian-born individuals in Malta are excluded from resumption due to the current legal situation. Approximately 300 of those individuals have made submissions to the present Inquiry.

The planned reforms announced on 7 July 2004 make clear that "former Australian citizens who renounced their Australian citizenship to acquire or retain another citizenship, or renounced to avoid significant hardship or disadvantage will also be given the opportunity to resume their Australian citizenship, if they are of good character".[10] This will allow those in Malta and elsewhere to resume their lost Australian citizenship and is an important and necessary reform.

However, it is unclear whether the children of these former Australian citizens, born after their parents had to renounce their Australian citizenship under Section 18, will be able to become Australian citizens.

The situation is analogous to that of the children of Section 17 victims born after their parent/s lost their Australian citizenship because they acquired another citizenship.

A solution has already been provided for the children of Section 17 victims. In October 2003, the Minister announced a policy change allowing children (i.e. those still under 18 years) of Section 17 victims, born after their parent lost Australian citizenship, to apply for grant of Australian citizenship, i.e. naturalisation under Section 13 of the Act.[11] The SCG is aware of several children who have since used this policy change to become Australian citizens by grant.[12] It should be noted that no amendment to the Act was needed, and that

[10] Second bullet point of Fact Sheet under heading "Resumption", 7 July 2004.

[11] Media Release by Gary Hardgrave MP, "Important Changes to Citizenship for Children", 14 October 2004, available at http://www.minister.immi.gov.au/cam/media/media03/h03139.htm.

[12] Interestingly, this policy change may give rise to situations where siblings in the same family, all born overseas, have citizenship of different quality. Those who obtain citizenship by grant will be able to pass on their citizenship to their own children without limitation, whereas a

all that was needed to implement this reform was an amendment to the Australian Citizenship Instructions to reflect the policy change. Children born after a parent lost Australian citizenship under Section 17 may become Australian by grant regardless of whether or not their parent has since resumed Australian citizenship.[13]

In the reforms announced on 7 July 2004, the Minister has said that this reform will be extended to those who are over the age of 18 years. Specifically, the material available states:

> The Act will be amended to provide for grant of citizenship to a person of good character and over the age of 18 years who was born overseas after their parent lost citizenship under the former Section 17.[14]

Although the heading on the Minister's Fact Sheet is "Children of former Australian citizens", which could logically include children of parents who had lost under any provision of the Act, the fact that the bullet point text quoted above specifically refers to parents who lost under the former Section 17 would seem to specifically exclude children of parents who lost under Section 18 or any other provision. The discussion of this issue by Minister Hardgrave in his 7 July 2004 speech to the Sydney Institute under the heading "Children of former Australian citizens" is similarly couched solely in terms of the children of Section 17 victims.

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sibling who was registered as an Australian citizen by descent can only pass on citizenship to his or her children by descent if he or she lives in Australia for two years themselves. This in turn raises the issue of the quality of resumed citizenship, as families in which this anomaly occurs generally have experienced loss and resumption of both parent and minor child. If the minor child, who was originally a citizen by descent, resumes citizenship of a quality equal to that of grant or birth, then the siblings are in fact on the same footing for the future. See the SCG's primary submission of 27 February 2004, pages 101 to 103, and below.

[13] The SCG would prefer to see the October 2003 child policy amendment enshrined in the Act, along with the equivalent provisions for those who are over 18, rather than remaining only a matter of policy.

[14] First bulletin point under the heading "Children of former Australian citizens", Fact Sheet of 7 July 2004.

DIMIA has indicated to the SCG that the question of citizenship for children of Section 18 victims has not been considered at this stage.[15] DIMIA told the SCG on 9 July 2004 that this issue "has not come up". When specifically asked whether the Minister/DIMIA had to date taken any sort of policy decision following considered reflection, to specifically exclude children of Section 18 victims from Australian citizenship, DIMIA stated that no policy decision had been made. The SCG was told that if people wanted this aspect to be included in the legislation that will bring about the package of reforms, they should "write in".

It is hoped that the exclusion of the children of Section 18 victims (and those who lost under other provisions of the Act apart from Section 17) is merely an oversight by the Minister and his Department. The SCG strongly urges the Minister to ensure that children born to parents who lost their citizenship under Section 18 after their parent's renunciation, should be allowed to apply for Australian citizenship by grant, regardless of their age, and at any time.

6 Children Born Overseas <u>after</u> their Parent Lost Australian Citizenship under Section 19

As noted above, at this stage the planned reforms on resumption for adults only concern those who lost their citizenship under Sections 17 and 18. There is a case for providing a new resumption route for individuals who lost their citizenship under Section 19 when they served in the armed forces of a country at war with Australia (see above). The fact that existing minor children of an adult who loses citizenship under Section 19 also lose their Australian citizenship automatically by virtue of Section 23 (unless their other parent is Australian and retains their Australian citizenship) has also been discussed.

[15] Telephone conversation between Anne MacGregor, SCG and Mary-Anne Ellis, DIMIA, Friday 9 July 2004.

Whether or not a new resumption route is made available to the individuals who themselves lost under Section 19, their children, whether born before or after their loss of citizenship, should not be denied their Australian heritage. The case has been made above for equitable resumption for children who lost as minors under Section 23 when their parents lost under Section 19.

Additionally, as in the case of Section 18 victims, children born overseas to a person who lost their citizenship under Section 19 after that loss will not qualify for Australian citizenship by descent because they will not have an Australian-citizen parent at the time of their birth (unless their other parent is still an Australian citizen). The same arguments as outlined above apply for children of Section 19 victims in this context.

7 Children Born Overseas after their Parent Lost Australian Citizenship under Section 20

Under the now repealed Section 20, a naturalised Australian citizen could also (until 8 October 1958) forfeit their Australian citizenship simply by residing outside Australia and New Guinea for a continuous period of seven years unless certain conditions had been met. While Section 20 was in force, Section 23 included a reference to Section 20 so that minor children of Section 20 victims also lost their citizenship with their responsible parent.

Again, as in the case of the children of Section 18 and Section 19 victims discussed above, children born overseas to a person who lost their citizenship under Section 20 after that loss will not qualify for Australian citizenship by descent because they will not have an Australian-citizen parent at the time of their birth (unless their other parent is still an Australian citizen). The same arguments as outlined above apply for children of Section 20 victims in this context. They should be able to apply for grant of citizenship, regardless of their

age now, and independently of whether their parent has since resumed Australian citizenship.

8 Children Born Overseas after their Parent Lost Australian Citizenship under Section 23

It should be noted that many of the victims of Section 23 (i.e. those who lost as minors when their parents lost under Sections 17, 18, 19 and 20) who have not been able to avail themselves of Section 23B resumption due to its current limitations, have since reached adulthood and parented children. Children born overseas after their parent's loss of Australian citizenship under Section 23, whether or not their parent has been able to resume under Section 23B, should be given the same rights going forward to apply for grant of Australian citizenship as children of Section 17 victims, regardless of their age.

9 Section 23: Case for Repeal

The discussions above concerning minor children who lost their citizenship by virtue of Section 23 following the action of a parent demonstrate that many historical problems concerning such individuals remain to be ironed out.

Going forward, though, it has to be asked whether it is appropriate to retain Section 23 in the *Australian Citizenship Act 1948* at all. Section 23(1) in its current form only applies to minor children of Section 18 and 19 victims. It is submitted that it is unfair to deprive minor children of their citizenship involuntarily due to a parent's loss under either provision. The SCG submits that Section 23 should be repealed, so that no further minor children lose their Australian citizenship in the future.

10 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

A number of individuals have contacted the Southern Cross Group with a specific scenario not otherwise mentioned in this submission so far or in the SCG's primary submission of 27 February 2004. Three of those people have made separate individual submissions to this Inquiry.[16] The Committee has also been provided with copies of all the correspondence between Mr Michael Young and the Minister, as well as the Shadow Minister for Citizenship, Mr Laurie Ferguson, on this matter to date.[17]

The individuals who have contacted the SCG in this special group all migrated to Australia after World War II as children with their parents from the UK or another Commonwealth country, but subsequently moved overseas again at a later date. There are also many individuals who migrated to Australia without their parents who live abroad today and have the same citizenship difficulties as those who arrived with their parents. Not all children who came to Australia under the British Child Migration Scheme automatically acquired Australian citizenship.[18]

People who migrated to Australia from the UK and other Commonwealth countries as children with their parents are sometimes also referred to as "child migrants", but it is submitted that the term "child migrant" should refer only to unaccompanied children generally under the age of 16 years who were brought to Australia from the United Kingdom or Malta under approved schemes during the 20th century.[19]

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16 Michael Young, Submission No 156, Phillip Cheetham, Submission No 326, and Michael Jack, Submission No 455. A further case is that of Bob Pounder, who lives in the UK and contacted the SCG for the first time in April 2004.

17 This correspondence includes a useful Client Memorandum prepared for Laurie Ferguson MP by Jennifer Norberry of the Information and Research Services of the Department of the Parliamentary Library dated 15 October 2003 which summaries the law on this issue.

18 See DIMIA Form 1014i, "Australian citizenship - Former British child migrants (unaccompanied)".

19 This is the definition of "child migrant" adopted by the Senate's Community Affairs Committee in its 2001 Report entitled "Lost Innocents: Righting the Record" as a result of its inquiry into

Whether accompanied by parents or not, most of these people believed that they were Australian citizens on departing Australia to live abroad some years later, usually in early adulthood. However, unless they or their parents had taken active steps to acquire Australian citizenship for them, they were not Australian citizens, but only permanent residents, on departure. Because they were only permanent residents, their permanent residency eventually was lost if they spent a number of years overseas, meaning that today they can usually only return to Australia on some form of temporary visa.[20] A person who realises now that they were entitled to apply for citizenship by registration under provisions of the Act no longer in force while they lived in Australia years ago, but did not, cannot retrospectively apply.[21]

Citizenship was available in two ways for such people in Australia before the mid-1970s:

- By registration: From 1949 until Section 12 of the Act was repealed by the *Australian Citizenship Act 1973*, persons of full age and capacity from the UK and various other Commonwealth countries could apply for and be issued with a certificate of citizenship after not less than one year's residence in Australia or New Guinea. The Minister could grant a certificate of registration to a person who was not of "full age". Alternatively the Minister could include the names of minors in the citizenship certificate granted to a person who was their parent or

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child migrants, available at http://www.aph.gov.au/senate/committee/clac_ctte/child_migrat/report/contents.htm.

[20] The exception is those who qualify under the Special Migration category for a Former Resident Visa. This is available for former Australian permanent residents who have spent at least 9 of their first 18 years in Australia and wish to resettle in Australia. The person must have maintained business, cultural or personal ties with Australia and be under the age of 45 at the time of application, or have served in the Australian Defence Forces for three months.

[21] For an historical overview of the law on citizenship by registration and citizenship by notification see Rubenstein, *Op cit*, page 100 to 103.

guardian. People who were granted citizenship in this way did not have to make an oath of allegiance or attend a citizenship ceremony.

- By notification: From a period of approximately four years in the early 1970s, persons who came from a listed Commonwealth country, who were ordinarily resident in Australia or New Guinea for five years prior to giving notice and who were not a prohibited immigrant or subject to deportation) could give notice stating that the person desired to become an Australian citizen by notification as from the date upon which the notice was received by the authorised officer. Such a notice could not be given by a child under the age of 16 but could be given by their parent or guardian on their behalf. Once notice had been duly given, the Secretary of the relevant department issued a certificate of Australian citizenship.

On the introduction into Parliament of the legislation to repeal these provisions in 1973, the then Immigration Minister Al Grassby acknowledged that many people from Commonwealth countries believed that they acquired Australian citizenship automatically by long residence in Australia but that this was not the case.[22] This myth perpetuated for many years after the 1973 amendments and in some quarters, still persists. The purpose of the 1973 amendments was to make all applicants for Australian citizenship subject to the same basic requirements for naturalisation.

The SCG urges the Committee to give this matter a full consideration, so that individuals who migrated to Australia as children post-war and then subsequently left the country without exercising their right to registration or notification, and later citizenship by grant, eventually losing their permanent residency status, be allowed to rejoin the Australian family. The situation of people from the UK and other relevant Commonwealth countries was very different to that of migrants from other countries, in that due to their British subject status, many did not

[22] House Hansard, 11 April 1973, page 1312.

understand the need to apply for separate Australian citizenship and indeed thought that they were in many cases already Australian. People who migrated to Australia from elsewhere were under no such illusions - they always had to apply for citizenship by grant.

It would be entirely appropriate to require those claiming Australian citizenship in this way to show good character, and that they have maintained close and continuing ties with Australia since their departure. Limiting the "fix" in the Act to those who migrated as children from the Commonwealth countries concerned would necessarily restrict the number of returned adult migrants who could avail themselves of Australian citizenship due to the amendment. A "close and continuing ties" requirement would also rule out many "ten pound Poms" who returned to Britain after only very short periods in Australia and are therefore less likely to have had time to develop close ties which have then been continued over many years.

A full examination should be undertaken as to the other limitations which might appropriately be imposed on any citizenship by grant concession for such cases, at the same time taking care not to arbitrarily exclude groups of individuals due to legislation deadlines for application or other dates. It may be appropriate to impose a minimum number of years during which the person must have lived in Australia before departure again following migration. Such a period might feasibly be two years, the current permanent residency requirement under the Act for citizenship by grant.

In addition, one would need to look at whether the concession should only apply to individuals who departed Australia to live overseas prior to a certain date. Making the date of departure cut-off the date of effective repeal of the notification and registration provisions seems arbitrary, especially since many of those who lived in Australia during the 1970s, 80s and 90s and departed more recently to lose their permanent residency believed their long residence had awarded them

Australian citizenship by default, when they could have made use of the grant provisions even after the notification and registration provisions had been repealed. This issue is a highly complex one, which deserves further study.

A less attractive, but nevertheless welcome alternative for the individuals concerned would be to stop short of enabling them to apply for grant of citizenship, and instead grant them a permanent residency visa, but on more liberal terms than the current Former Resident Visa allows.

11 Permanent Residency for Former Australian Citizens who have a Valid Reason not to Resume

The Southern Cross Group has come across rare instances of individuals who have lost their Australian citizenship under either Section 17, 18, 19 or 20, and who wish to return to live in Australia, but who do not wish to resume their lost citizenship, for a number of practical and financial reasons.

In particular, a person who lost their Australian citizenship to acquire another citizenship, on resumption of Australian citizenship, may in turn forfeit that other citizenship under the laws of the other country. Many countries still do not tolerate dual citizenship.

Keeping the non-Australian citizenship may be crucial in order to access acquired pension rights, in particular in cases where Australia does not have a bilateral social security agreement with that other country. For example, some countries will not pay pensions to individuals living outside the country unless the person is a citizen of the country. Belgium provides an illustration of this point (although a bilateral social security agreement has now been negotiated with Belgium, and is almost in force). Without the new bilateral social security agreement, Australians without Belgian citizenship who retire back to Australia cannot have their Belgian pensions paid to them in Australia, even though they may have spent decades

working in Belgium and contributing to the Belgian state social security system. Without access to their Belgian pension, they will be thrown back onto the resources of the Australian social security system. Access to the Age Pension will only be possible if they fulfil all the requirements for that benefit under Australian law. Not only does this mean that acquired pension rights overseas are lost, but it puts added strain on the Australian social security system, and forces individuals to rely much more heavily on personal savings when they have already contributed considerable sums to a state pension scheme abroad. Several such cases concerning Belgium are known to the Southern Cross Group.

For this reason, the SCG calls on the Government to recognise that resumption is not always the best option for former Australian citizens. Even when the existing resumption provisions are reformed to make resumption possible for many more former Australians, some people will have valid reasons not to take that route.

If such individuals wish to return to live in Australia, they should not be made to compete for a visa under the same conditions as others wishing to come to Australia with no Australian heritage. Permanent residency should be available to them immediately if they can show good character, and a valid reason as to why they do not wish to avail themselves of resumption.

If at some future point the person then seeks Australian citizenship because their circumstances change (perhaps because the citizenship law of the other country changes to allow dual citizenship, or because Australia enters into a bilateral social security agreement with their other country of citizenship), this could then be by way of grant after two years residence in Australia, or even still via the resumption route, particularly if the person is overseas again at that point.

12 Permanent Residency for Individuals Born Overseas to Australian Citizen Parents who have a Valid Reason not to Register as Australian by Descent

There are also cases where an individual born overseas to an Australian-citizen parent has not been registered as an Australian citizen by descent, either while a minor or in adulthood, and who may not wish to avail themselves of Australian citizenship by descent, for reasons similar to those outlined in the section above. Again, it is submitted that those people should be given the option of applying for a special permanent residency visa, to enable them to live in Australia easily without being formal Australian citizens, because they have such close ties to Australia. They should not be denied the right to live in Australia simply because they decide not to avail themselves of registration as an Australian citizen by descent, to which they are fully entitled, because such registration would result in negative practical and financial consequences for them under other laws.

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

With so many Australian citizens living abroad today, it is logical that some will adopt children while they live abroad, under the laws of their country of residence or some other country, rather than the laws of Australia.[23]

Children who are born overseas and then adopted overseas by one or two Australian citizens under the law of a foreign country cannot normally be registered as Australian citizens by descent under Section 10B of the *Australian Citizenship Act 1948*. That provision requires that the person born overseas, for whom registration as a citizen by descent is sought, have an Australian-citizen parent <u>at the time of birth</u>. Adopted parents are not legally parents of the child at the time of their birth, even though adoption can occur within a few days or weeks of the child's birth. Unless one of the overseas-born adopted child's birth

[23] As of 22 November 1984, non-citizens adopted <u>in</u> Australia automatically become Australian citizens under Section 10A if they are in Australia as permanent residents and if they are adopted under a law in force in a State or Territory by an Australian citizen or jointly by two persons, one of whom is an Australian citizen. Prior to that date, people adopted in Australia had to wait to be naturalised according to the provisions of Section 13.

parents fortuitously happens to be an Australian citizen and this is documented, Australian-citizen adoptive parents are currently prevented from registering their overseas-born adopted children as Australian citizens by descent.

Similarly, individuals who are the adopted children of Australian citizens, adopted under the laws of a foreign country, who have reached adulthood, do not qualify at present for registration as citizens by descent under Section 10C. The case of *Heald and Minister for Immigration and Multicultural Affairs* [2001] AATA 455 (28 May 2001) makes this clear. There, the applicant for Section 10C registration was born in 1961 in the UK and adopted a few months later by an Australian-citizen woman and a British-citizen man. Section 10C requires a "natural parent" of the applicant to have been Australian at the time of the birth of the applicant, and there was no evidence of the nationality of Ms Heald's birth parents. She was therefore deemed not to satisfy the eligibility criterion of Section 10C and her application failed.

Children who have been adopted by Australian citizens overseas can obtain Australian citizenship by grant under Section 13(9)(a), by way of Ministerial discretion, unless they are legally adopted again in Australia.[24] Policy requires that the parents have lived overseas for more than one year at the time of the adoption and that they have acquired full and permanent parental rights by the child's adoption.

However, it seems that there is no route to Australian citizenship by grant for overseas-born individuals adopted by Australian citizens overseas under the laws of a foreign country who are now 18 years old or over.

Australia ratified the *Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption* on 1 December 1998. Under the Convention Australia must provide for the recognition of an adoption which takes

[24] Rubenstein, *Op cit*, page 94.

place under the Convention and is obliged to accord the same rights to the child as would be accorded to a child adopted in Australia.[25] Parents of a child adopted overseas under the Convention may apply for citizenship on a child's behalf under streamlined procedures. As Rubenstein notes, theoretically, if this Convention is applied to the *Australian Citizenship Act 1948*, then children adopted overseas should be given the same rights as children adopted in Australia, as set out in Section 10A.[26] The Australian Citizenship Council noted in 2000 that automatic citizenship for such children (as occurs under Section 10A) might not always be appropriate, because the child may lose citizenship of their country of birth and/or residence.

It is submitted that one way to get around this problem is to make available registration for citizenship by descent in such cases. Then, the decision to register for Australian citizenship by descent can be taken by the individual concerned if it does not have detrimental consequences under the citizenship laws of another country. The requirement that a person have an Australian-citizen parent at the time of their birth, or a "natural" parent who was Australian, should be amended.

There are certainly a number of cases going back some years in which the overseas-born and overseas-adopted children of Australians living overseas have not been able to enjoy Australian citizenship. The case of the Salisbury family is illustrative:

> Mrs Salisbury was born in Australia in 1932 and grew up there, before marrying a Canadian citizen and settling in Canada in the late 1950s. She and her husband adopted a child born in Canada in 1960, and another in 1962, in both cases just a few weeks after the child was born. The adoptions were carried out under the laws of Canada. In the 1970s, the family moved to Australia for several years, and Mrs Salisbury tried to obtain Australian citizenship for the two children, who were still minors at that time, but was told

[25] Australian Citizenship Council, *Australian Citizenship for a New Century*, A Report by the Australian Citizenship Council, February 2000, pages 41 and 42.
[26] Rubenstein, *Op cit*, page 94.

> in writing by the Department of Immigration that they could not be Australian citizens because they were adopted under the laws of Canada and not the laws of Australia. Today, Mrs Salisbury is a dual Canadian/Australian citizen and lives with husband in Canada. She lost her Australian citizenship in 1980 under the now repealed Section 17 on acquiring Canadian citizenship but recently resumed it. However, her children, now both in their forties, are just Canadian citizens, despite the fact that the only mother they have ever known was an Australian citizen for the entire period of their childhood. This is a matter of continuing disappointment to the whole family. It has also greatly influenced educational, career and other important life decisions, which could well have been very different if the two Salisbury children had been Australian citizens.

From the Minister's 7 July 2004 announcement it is clear that Mrs Salisbury's two children will not qualify to register as Australian citizens by descent once the reforms on descent come into force, because they will still need to have had an Australian citizen parent at the time of their birth. The SCG strongly urges the Committee to recommend legislative change, either to the citizenship by descent provisions, or elsewhere in the Act, which would allow them and others like them to become Australian citizens.

The general comment must also be made that there is very little information on pertinent Australian citizenship issues available in the public domain to guide overseas Australians who are considering adopting overseas-born children while they live abroad, under the laws of a foreign country, or who have done so at any time in the past. The Australian Citizenship Instructions do contain some policy rules, but as noted in the SCG's primary submission of 27 February 2004, they are not publicly available.

Certainly, the *citizenship.gov.au* website could be greatly improved to include answers to both historical adoption citizenship questions and questions relevant to those planning to adopt while overseas. The website should also fully explain whether and how Australia is complying with its obligations under the Hague Convention. The SCG invites the Committee to request full information from DIMIA as part of this Inquiry on that score.

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

There are still some individuals who were born in Australia prior to 26 January 1949 when the Act entered into force, or who were born overseas before 26 January 1949 to a person born in Australia, who lost their British subject status prior to that date. These people will generally not hold Australian citizenship (unless they have since migrated back to Australia and obtained it by grant).

For example, a person born in Australia who acquired United States or Argentinean citizenship before 26 January 1949 would have forfeited their British subject status on that acquisition. There is currently no scope for resumption of Australian citizenship for such individuals as they never had Australian citizenship.

It is submitted that there is a case for allowing the grant of Australian citizenship and/or the grant of permanent residency if such individuals can demonstrate a close and continuing association with Australia and fulfil good character requirements.

Another situation also arises under this heading which is worthy of note. A person who was born outside Australia before 26 January 1949, say in the UK, to an Australian citizen father (who himself became a citizen by virtue of s 25 of the *Nationality and Citizenship Act 1948*) appears not to qualify for Australian citizenship by descent if he or she did not enter Australia on permanent entry permits before 1 May 1987.

Section 25(3) of the *Nationality and Citizenship Act 1948* only enabled the children of those individuals born outside of Australia before 1949 to claim

citizenship by descent if their father was an Australian citizen[27] but it also required that the child enter Australia on permanent entry permits before 1 May 1987. Section 25(7) precluded these individuals from Australian citizenship if they entered Australia on temporary permits.

It is unclear from the Minister's speech and media release of 7 July 2004 whether all children (of men and women) born before 26 January 1949 will be entitled to become Australian citizens, regardless of whether they entered Australia before 1 May 1987 and regardless of whether they entered on temporary permits.[28]

At present, a person born for example in 1940 in the UK to an Australian-born father, who herself later entered Australia in 1980 on a visitor visa, is denied her Australian heritage due to Section 25(7).

If the changes being advocated for citizenship by descent only require the person to be of good character, then this should apply retrospectively to all children of Australian citizens, regardless of when they were born.

15 Children of Australian Citizens Born in Papua

Apart from the adoption cases mentioned above, there is also another class of individuals who are currently denied Australian citizenship by both birth and by descent, i.e. people who were born in Papua when Papua was a territory of Australia, and who also had an Australian citizen parent.

The case of Susan Walsh is illustrative. Her case was appealed to the AAT and to the Federal Court, before she made an application for special leave to the High

[27] The gender issues have been covered elsewhere in the reforms.

[28] See also *Grossberg v Department of Immigration and Ethnic Affairs*, AAT NO. V94/565, 25 July 1995 where the applicant could not satisfy the equivalent entry provision in Section 11 of the Australian Citizenship Act 1948 for those born to Australian women.

Court.[29] Ms Walsh was born in Papua on 13 July 1970. Her father was an Australian citizen, having been born in NSW, and her mother an Indigenous Papuan. Ms Walsh was born an Australian citizen by virtue of Section 10 of the *Australian Citizenship Act 1948* because she was born after 26 January 1949 and before 20 August 1986. Australia was defined between 8 January 1954 until 31 December 1973 as including "the Territories of the Commonwealth that are not trust territories"[30] and birth in an Australian territory led to Australian citizenship.[31]

If Papua had not been an Australian territory at that time, Ms Walsh could have been registered as an Australian citizen by descent given her father was an Australian citizen at the time of her birth, as long as this occurred within five years of her birth, the time limit in the Act at that time.

At the time of her birth, however, no one considered Australian by descent for her, because she was born in Australian territory and therefore an Australian citizen by birth. When Papua ceased to be Australian territory on 16 September 1975 by virtue of Section 4 of the *Papua New Guinea Independence Act 1975* (Cth), unbeknown to Ms Walsh, the *PNG Independence (Australian Citizenship) Regulations 1975* (Cth) were introduced.[32] Regulation 4 purported to strip Ms Walsh and most Papuans of their Australian citizenship.

When this came to Ms Walsh's attention some years later, she examined whether she might be able to claim citizenship by descent. While Section 10B of

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29 Re Susan Walsh and Minister for Immigration and Multicultural Affairs [2001] AATA 378, Walsh v Minister for Immigration & Multicultural Affairs [2001] FCA 1886 (24 December 2001), Minister for Immigration & Multicultural & Indigenous Affairs v Walsh [2002] FCAFC 205 (26 June 2002). The transcript of her special leave application to the High Court Walsh v MIMIA B41/2002 (2003), appears at www.austlii.edu.au/au/other/hca/transcripts/2002/B41/1.html.

30 Rubenstein, Op cit, page 90, footnote 139.

31 Section 10 provided at that time that birth in an Australian territory was sufficient to become an Australian citizen provided their parent was not a diplomat or an enemy alien when the birth occurred. See further Rubenstein, Op cit, page 90.

32 Under s 6 of the Papua New Guinea Independence Act 1975 (Cth) on 10 September 1975.

the Act provided for citizenship by descent if the birth was registered at an Australian consulate within 18 years of the birth[33] from 15 January 1992, new provisions[34] were inserted to allow for citizenship by descent for people over the age of 18 who were born after 26 January 1949 and who were 18 or over at the time of the new provisions. Thus, they must have been born on or after 26 January 1949 and before 15 January 1974.

The delegate of the Minister refused the application for citizenship by descent on the grounds that Ms Walsh "was not born outside Australia" and therefore "did not meet the requirements of Section 10C(4)(c)(i) of the Act. This provision, like all provisions regarding citizenship by descent, refers to people who are "born outside of Australia". This is logical because normally a person born inside Australia to Australian citizen parents is and remains an Australian citizen by birth and does not need to citizenship by descent options.

Ms Walsh, according to the delegate, was not born outside Australia, because, at the time of her birth she was born in Australia. The consequence of this was Ms Walsh was not entitled to her citizenship by birth, because that Territory had changed and it had been stripped from her. Nor was she entitled to her citizenship by descent, because she was born within Australian territory.

Susan Walsh is not the only individual facing this predicament. This special group of descendants of Australians are being denied citizenship by descent simply because they were unlucky enough to be born in territory (Papua) that was once Australian territory, but is no longer Australian territory.

It would appear that Papua is the only place in the world where this restriction applies. The SCG submits that individuals like Ms Walsh, who can show they were born in Papua to Australian citizen parents, should now be included in the

[33] Rubenstein, Op cit, page 96 ff.
[34] Section 10C.

Minister's inclusive proposals, and changes should be made to the Act to enable them to claim their Australian citizenship by descent.

16 Loss of Citizenship by Australian Citizens Connected to Burma

A little known element in the law caused a small number of Australian citizens connected with Burma to lose their citizenship in 1950. Some may have lodged declarations to resume their citizenship before 1952, but others may not have done so. It would seem reasonable to treat those affected as well as their overseas victims consistently with Section 17 victims. A full description is given in the Australian Citizenship Instructions.

17 Awareness of Limitations on Passing on Citizenship by Descent

A number of comments have been received that those registering overseas as citizens by descent, and indeed their parents, when young children are concerned, should be informed of the limitations on passing on citizenship to a second generation at the time of registration. A number of individuals who have citizenship by descent have said that if they had been aware of the two year residency requirement, they would have deliberately made it their business to spend two years in Australia before starting a family, to ensure that their overseas-born children later would enjoy Australian citizenship.

More obvious warnings on this point need to be made available on the *citizenship.gov.au* website and in DIMIA literature. When Australian passports are replaced and renewed, it should be standard practice to provide an information sheet with such points on it. Leaflets to this effect should be permanently available in the public areas of Australian missions overseas at all times.

18 Staff Training and Publicity to Inform the Diaspora of Citizenship Reforms

In light of the fact that significant reforms to the Act now seem likely to enter into force in 2005, the SCG is concerned that many will not learn of their new rights to become Australian citizens. It calls on DIMIA to go back through all its files of correspondence received over as long a time period as possible, with a view to individually contacting all those who were excluded before but will benefit from the reforms. This should include contacting those who have had cases in the AAT and Federal Court, all those who have used the SCG's online Citizenship Affirmation Facility since September 2002 to e-mail the Minister about resumption issues, all other faxes, letters and e-mails the Minister and the Department have received from those in the Diaspora with citizenship problems.

Staff at all overseas missions dealing with immigration matters will need to be adequately trained to handle increased numbers of resumption applications and to be able to provide adequate information on the effects of the amendments. In Malta, in particular, where many resumption applications will be filed, DIMIA will particularly need to ensure that appropriate staffing is in place. Comments have been received by the SCG that information provided during a programme on Maltese television on 18 July 2004 by a staff member from the Australian High Commission in Malta discussing the 7 July 2004 announcement was "very unclear" and a "mish mash". It is imperative that completely clear and timely information be readily available.

19 Recommendations on Citizenship in the SCG's Primary Submission

As to Recommendation 3 in the SCG's primary submission of 27 February 2004, the SCG notes for the record that a number of improvements have been made to the *citizenship.gov.au* website in the last few months but scope for further improvements remains.

Recommendations 1, 2, 4, 7, 9, 10 and 11 in the SCG's primary submission appear not to have been addressed at this stage.

With regard to Recommendation 5 in the SCG's primary submission, the SCG would be glad if DIMIA could provide unequivocal confirmation that the two year residence in Australia requirement currently part of Section 23AA(1)(b)(iii) will be repealed. The SCG assumes this will be the case in view of the Minister's announcement that the only requirement for resumption will be one of good character. As the two-year restriction is not specifically referred to by the Minister, whereas the "intention to return to Australia to reside within three years" is, the SCG has received several queries following 7 July 2004 on this point.

Finally, brief mention is made again of three points which were included in the SCG's primary submission of 27 February 2004 for which no numbered recommendations were provided and on which there appears to be no evidence to date that changes have been implemented by DIMIA since that submission was made:

20 **Quality of Resumed Citizenship**: On pages 101 to 103 of the SCG's primary submission, the point was made that it is unclear whether a person who obtained citizenship by descent, lost it under one of a number of provisions of the Act, and subsequently resumed it, would get back citizenship by descent, or would have "citizenship by resumption". Citizenship by descent is citizenship of a lesser quality in terms of the citizenship it allows that person to pass on to their own children born overseas. They need to have spent a total of two years in Australia as a lawful resident to be able to register their own overseas-born child as an Australian citizen by descent. Citizenship by resumption is presumably equivalent in quality to citizenship by birth or citizenship by grant. The SCG discussed this issue with DIMIA by telephone on 24 February 2004, and an e-mail from Clare Egan to Anne MacGregor promising to have this point clarified

with the Department's Legal Opinions section was received on 25 February 2004 and is attached as **Annex 5**. No response has been received to date.

21 **Improvement of Australian Citizenship Instructions on issues key to expatriate Australians:** On pages 59 to 62 of the SCG's primary submission, the point was made that the Australian Citizenship Instructions are extremely limited, and at times simply misleading in their brevity on key expatriate citizenship issues. There is great scope for amendment of the Instructions to include more examples based on the many cases DIMIA has faced over the years.

22 **Availability of the Australian Citizenship Instructions:** the Instructions should be published in SCALEplus and made available on the *citizenship.gov.au* website so that they are accessible for all Australians and former Australians.

The Southern Cross Group
Brussels and Canberra
23 July 2004