

The Southern Cross Group

Promoting Mobility in the Global Community
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Submission to the Australian Department of
Immigration and Multicultural Affairs

Section 17 of the *Australian Citizenship Act 1948*: Grounds for Repeal and Associated Issues

Brussels and Washington DC

6 July 2001

The Southern Cross Group is an international non-profit advocacy organisation seeking to speak for and work with the million-odd members of the Australian Diaspora world-wide.

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SUMMARY OF RECOMMENDATIONS

Recommendation 1: The Southern Cross Group recommends that the Government take action to repeal Section 17 of the *Australian Citizenship Act 1948* during the term of the current Parliament.

Recommendation 2: The Southern Cross Group urges the amendment of Section 23AA of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so that it provides an unqualified right for those former Australians who have been victims of Section 17 since 1948 to immediately resume their Australian citizenship. For former Australians resident overseas this right of resumption should not be conditional upon a statement that the person has an intention to commence residing in Australia within any period.

Recommendation 3: The Southern Cross Group recommends that those former Australian citizens who have acquired the citizenship of a country which currently does not allow dual citizenship be allowed to return to Australia as permanent residents automatically without having to fulfil the normal requirements for permanent residency under the law.

Recommendation 4: The Southern Cross Group recommends that former Australian citizens who have had to renounce their Australian citizenship under Section 18 of the *Australian Citizenship Act 1948* in order to be able to take up the citizenship of another country now be given an unconditional right to resume Australian citizenship under the same conditions as the SCG believes should be available to those who have lost their citizenship under Section 17. For those individuals who currently hold the citizenship of a country which does not allow dual citizenship, automatic permanent residence in Australia should be possible.

Recommendation 5: The Southern Cross Group recommends a consequential amendment to Section 23AA of the *Australian Citizenship Act 1948* in addition to the amendment to that Section called for in Recommendation 2 above, so that the minor children of former Australian citizens who lost their Australian citizenship automatically when their responsible parent lost their citizenship under Sections 17 and 18 can automatically resume their Australian citizenship when their parent exercises their unqualified right to resumption.

Recommendation 6: The Southern Cross Group recommends the amendment of Section 23B of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so that persons aged 18 years or over who lost their Australian citizenship automatically when they were minors because their responsible parent lost their citizenship under Sections 17 or 18, now have the unqualified right to resume their Australian citizenship in adulthood up to the age of 25. Aged

25 or over, resumption should still be possible in special circumstances as is currently the case from age 19.

Recommendation 7: The Southern Cross Group recommends the amendment of Section 10B of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so any child under 18 born overseas who presently cannot be an Australian citizen by descent because their parent or parents lost their Australian citizenship under Sections 17 or 18 before the child's birth and the child had no Australian parent at the time of his or her birth, can now be registered as an Australian citizen by descent once at least one parent has exercised their right of resumption under Section 23AA.

Recommendation 8: The Southern Cross Group recommends the amendment of Section 10C of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so any person 18 years or over born overseas who presently cannot be an Australian citizen by descent because their parent or parents lost their Australian citizenship under Sections 17 or 18 before the person's birth and the person had no Australian parent at the time of his or birth, can now be an Australian citizen by descent. This right should not be contingent on whether the person's former Australian parent or parents have resumed their citizenship. The person should be able to apply for registration as an Australian by descent until they turn 25.

Recommendation 9: The Southern Cross Group recommends that Sections 94 and 94A of the *Commonwealth Electoral Act 1918* be amended so that all Australian citizens overseas have an unqualified right to vote and thereby participate in the Australian political process which results in laws to which they are subject.

Recommendation 10: The Southern Cross Group recommends that the Government establish an Australia-based agency or group within the Department of Immigration and Multicultural Affairs (DIMA), to act as a focal point for the dissemination of Government information to Australians living overseas and to ensure that Government services are more accessible to Australians overseas

Recommendation 11: The Southern Cross Group recommends that a dialogue be commenced in which ways for achieving better representation of expatriate Australians in Australia, as well as initiatives for allowing Australians overseas to contribute more effectively back into Australia can be developed.

1. INTRODUCTION

This submission by the Southern Cross Group (SCG) is in response to the Discussion Paper on Section 17 of the *Australian Citizenship Act 1948* (the Act) issued by the Minister for Immigration and Multicultural Affairs on 8 June 2001.¹ The SCG welcomes this new opportunity to provide comments to the Government on the very important issue of the loss of Australian citizenship on the acquisition of another citizenship. In addition, the Group notes the Minister's invitation to comment on other issues and has accordingly widened its submission to cover several other citizenship-related matters of concern.

Our primary purposes in this submission are to:

- argue in support of the repeal of Section 17 of the *Australian Citizenship Act 1948*;
- urge the amendment of Section 23AA of the Act to accompany the repeal of Section 17 so that victims of Section 17 have an unqualified right to resume their Australian citizenship;
- urge amendments to other provisions of the Act to accompany the repeal of Section 17 so that children of past victims of Section 17 can either resume their lost Australian citizenship or acquire Australian citizenship by descent for the first time;
- argue in support of an unqualified right to vote for all Australian citizens overseas so that their right to participate in the Australian political process which results in laws to which they are subject is ensured;
- promote an understanding within Australia and elsewhere that Australian citizens who are not physically present within Australia's territorial boundaries are nevertheless part of the Australian community in the twenty-first century. Australians overseas can be viewed as another group in Australia's multicultural community distinguished by location rather than ethnic background;
- suggest initiatives which would enable the enhancement of the Australian Diaspora for the benefit of all Australians.

¹ Available at www.immi.gov.au/citizenship/0601paper/index.htm.

2. **FOUNDATIONS FOR REPEAL OF SECTION 17 OF THE *AUSTRALIAN CITIZENSHIP ACT 1948***

2.1 **Repeal of Section 17**

Recommendation 1: The Southern Cross Group recommends that the Government take action to repeal Section 17 of the *Australian Citizenship Act 1948* during the term of the current Parliament.

It is the view of the SCG that the arguments for change set forth in the 8 June Discussion Paper, together with other issues raised in this submission, far outweigh the arguments against change canvassed in the Discussion Paper or elsewhere.

2.1.1 The Concept of Citizenship

The preamble to the *Australian Citizenship Act 1948* provides a useful, if not legally binding, definition of the concept of Australian citizenship:

Australian citizenship represents 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; and

Persons granted Australian citizenship enjoy these rights and undertake to accept these obligations by pledging loyalty to Australia and its people, and by sharing their democratic beliefs, and by respecting their rights and liberties, and by upholding and obeying the laws of Australia.²

Australians overseas consider that they are part of the community of the Commonwealth and that they share the common bond of Australian citizenship, despite the fact that they are not physically present within Australia's territorial boundaries. The infamous "tyranny of distance", a phrase coined several decades ago by leading historian Donald Horne,³ no longer separates Australians overseas from their homeland so that their absence of physical

² This Preamble has been in the Act since 1993 and the Australian Citizenship Council recommended that it remain unchanged in its February 2000 Report, a recommendation which was accepted by the Government in May 2001.

³ Donald Horne, *The Lucky Country: Australia in the Sixties*, Penguin, 1966. Donald Horne was a member of the Citizenship Council which recommended the repeal of Section 17 in February 2000.

presence necessarily cuts off their membership in the Australian community.⁴ Today, an Australian living in any location around the globe can read the Australian newspapers and listen to Australian radio on the internet as well as speak to family and friends in Australia at no great expense or inconvenience. In many cases an Australian living abroad will be just as informed of events in Australia, if not more informed, than the average Australian living in Australia. This modern "death of distance" means that members of the Australian Diaspora are now more connected to Australia and to each other than they have ever been in Australia's history. Globalisation has changed what it means to be an Australian citizen. Notions that residence on Australian soil should be a relevant criteria for enduring legal membership of the Australian community are becoming increasingly inapposite.⁵

A contemporary Australian view of citizenship can be taken from the editorial of the *The Age* of 21 June 2001:

Citizenship, as this newspaper argued last month when the Federal Government announced its intention to amend the Citizenship Act, is about more than being the bearer of entitlements such as the right to vote. It is also about having an identity, a sense of belonging. And, in a world in which national borders are more porous than they have ever been and an increasing number of people live outside their countries of origin for extended periods, many people can reasonably claim to have a sense of belonging to more than one part of the globe. That is why people who have migrated to Australia from elsewhere often continue to hold dual citizenship, and it is why the government is right to end the Citizenship Act's requirement that people born in this country must relinquish their Australian citizenship if they take out the citizenship of another country. For some, dual citizenship is merely a matter of convenience, of claiming pension entitlements or of working abroad legally, but for others it is also a matter of political participation: they vote in elections in their country of origin as well as in Australia. People who hold dual citizenship can scarcely be denied the right to exercise all the prerogatives of citizenship in each of their homelands, including the vote, ...

As an organisation which seeks to speak for and work with Australian expatriates, the Southern Cross Group has no doubt that the thousands of individuals who are no longer legally Australian due to the operation, over 50 years, of Section 17, nevertheless still carry a sense of belonging to the

4 Frances Cairncross, *The Death of Distance: How the Communications Revolution Will Change Our Lives*, Cambridge, Harvard Business School Press, 1997.

5 Indeed the *Australian Citizenship Act 1948*, Section 13(1)(j), already recognises this. The rules on who may be granted Australian citizenship require that the applicant must be likely to reside or continue to reside in Australia, or *maintain a close or continuing association with Australia* (emphasis added).

community of the Commonwealth. Their historical, emotional and family ties to Australia remain and can never be displaced by a provision in an Act of Parliament, even though that provision may have taken away their Australian citizenship in the formal sense. As Davidson has stated, the formal rules on "belonging" may have primacy, but it is not simply in the formal rules but in the human relations of practical life that the implications of these formal rules are seen.⁶

As the internet and modern communications continue to shrink the world, and globalisation leads to unprecedented movements of individuals between countries, it is submitted that Section 17 is no longer appropriate because it does not adequately reflect the realities of the lives of almost a million Australians who currently make their homes outside Australia's territorial boundaries. Australia's Prime Minister has said that "Government policies and programs should be subject to periodic evaluation and renewal to keep them relevant and responsive to changing circumstances."⁷ As a formal rule which determines that certain Australians can no longer legally belong to the Australian community, Section 17 ignores the modern truth that a person, and indeed a family, can legitimately "belong" to more than one country or society, at different levels, for varying or concurrent periods in their lives.

How can it be that Section 17 remains valid law in Australia? It is submitted that the overwhelming majority of the Australian community has long ago accepted this reality of simultaneous "belonging" to different societies at various levels. About 23 percent of Australia's population was born overseas. There are more than 100 ethnic groups in Australia. Australia provides perhaps the most striking example of a multi-ethnic society in the world. As a nation we have accepted that our migrants do not have to break their legal bond of belonging to their country of birth when they are formally accepted into the Australian family. The requirement to renounce other allegiances as part of the citizenship acquisition process was lifted in 1986.

Incongruously, fifteen years later, Australia nevertheless continues to punish Australians who choose to make part of their lives, for whatever reasons, in another country, essentially denying them the right to maintain their formal link of "belonging" with their country of origin. The perpetuation of this overt double standard is untenable in a society which claims, as a matter of government policy, that

⁶ Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century*, Cambridge University Press, 1997, p. 5.

⁷ Foreword by the Prime Minister to *A New Agenda for Multicultural Australia*, Commonwealth of Australia, December 1999, p.3.

All Australians are entitled to equality of treatment and opportunity enabling them to contribute to the social, political and economic life of Australia, free from discrimination on the grounds of race, culture, religion, language, location, gender or place of birth.⁸

One cannot logically endorse multiculturalism and oppose dual nationality.⁹ Section 17 has no place in a contemporary community which defines itself as inclusive. Australia's multicultural present means that today there is no single universally-valid notion of Australian identity. It is now a matter of Government policy that "we do not seek to impose a sameness on all our people".¹⁰ An Australian who moves to Silicon Valley and works for a US high-tech multinational,¹¹ acquires a US-national spouse and then parents three dual citizen children before retiring back to Australia represents just as valid an expression of the Australian identity as that of an Australian who lives his entire life in a small town in country New South Wales, has never been overseas, has a grandfather who fought at Gallipoli and two sixth-generation Australian children, or indeed a naturalised Vietnamese-Australian who lives in one of Australia's big cities and has four first-generation Australian children. The contributions of all of these Australians to the Australian community are different, but equally valuable.

2.1.2 Australian Citizenship at the Core of Individual Identity

Over a number of months the Southern Cross Group has had contacts with many hundreds of Australians and former Australians who live in various countries around the world. A significant number of individuals have expressed the personal view that they consider their Australian citizenship to be an "inalienable right" or their "birthright". These statements arise from the widely held popular perception that citizenship is at the intrinsic core of an individual's identity. One ex-Australian who unwittingly lost his Australian citizenship by virtue of the operation of Section 17 wrote to the SCG in the following terms:

⁸ Statement of the foundations and principles of Australian multiculturalism as enunciated by the National Multicultural Advisory Council in its report *Australian multiculturalism for a new century: Towards inclusiveness*, Commonwealth of Australia, April 1999, and subsequently announced as Government policy in *A New Agenda for Multicultural Australia*, Commonwealth of Australia, December 1999, p. 8. Note also that in the Foreword to the *New Agenda*, the Prime Minister stated, "Our democratic values and commitment to a fair go for all underpin Australia's success as a multicultural and cosmopolitan society".

⁹ Michael Pendleton, "Our Allegiance - Australians Or Global Citizens?" *E-Law - Murdoch University Electronic Journal of Law*, Vol 6, No 3, September 1999, para. 132, available online at www.murdoch.edu.au/elaw/issues/v6n3/pendleton63nf.html.

¹⁰ *A New Agenda for Multicultural Australia*, Commonwealth of Australia, December 1999, p. 6.

¹¹ Under Article 6(1) of the International Covenant on Economic, Social and Cultural Rights, which recognises the right to work, Australia has an obligation to ensure that everyone has the opportunity to gain his living by work which he freely chooses or accepts.

"Ever since I found out that I had lost my Australian citizenship, I have felt an underlying current of depression. I cannot adequately explain in words exactly why I have this enduring unhappiness about my lost citizenship. Someone told me I should have been more careful to find out about Australian citizenship law before I applied to become a US citizen. As if my citizenship was like an umbrella which I had inadvertently left behind somewhere and lost by accident. But in losing my Australian citizenship my sense is rather that someone has stolen something which is part of me which wasn't theirs to take in the first place. I can only liken my emotion in crudest terms to something similar but stronger than the feeling you have when your house is burgled and you have to come to terms with the fact that someone has gone through all your personal possessions and violated your own private space."

In its Discussion Paper of 8 June 2001, the Government has acknowledged that in many cases, when it has to advise a person that they have lost their citizenship under Section 17, the notification causes significant distress to the individual concerned. The SCG's discussions with those who have fallen victim to Section 17 over the years confirms the heartache which these people experience at an emotional level.

The distress which Section 17 brings about at the individual level is because citizenship, as part of an individual's identity, is closely linked with the concept of human dignity. To quote a Justice of the United States Supreme Court, "citizenship is no light trifle".¹² Put another way, "citizenship is really a central concern for human beings bent on being happy and seeking justice...it is only part of life and usually understood not as a goal in itself, or intrinsically virtuous, but as an activity and status directed towards other more private human realms where human conviviality and friendship are the goal."¹³

2.1.3 An Emerging Right to Dual Citizenship

Not only have many Australians told us that they consider their Australian citizenship to be their "birthright", significant numbers have in addition expressed the view that they believe it is their "right" to hold dual citizenship. A right, whether or not it is a legal right, is essentially a claim which has a large degree of acceptance. In this respect, the concept of dual citizenship, in today's world, can be viewed as an emerging "right".

¹² Black, J. in *Afroyim v. Rusk*, 387 U.S. 253, 267.

¹³ Alastair Davidson, *From Subject to Citizen: Australian Citizenship in the Twentieth Century*, Cambridge University Press, 1997, p. 1.

There are many indications that this "right" is already accepted in Australia and internationally. Most tellingly, Australia already accepts that one quarter of its citizens can be dual citizens. The Government has recently engaged in a campaign to encourage as many permanent residents as possible to become Australian citizens, and on naturalisation many of these people will become dual citizens.¹⁴ Furthermore, dual citizenship is no bar to membership of the Australian Defence Forces.¹⁵ Despite the fact that Section 17 remains valid law for the time being, the Government has accepted the Citizenship Council's recommendation that existing reciprocal arrangements between Australia and other countries for the exchange of Citizenship acquisition information remain lapsed, or, where necessary, be formally terminated.¹⁶ Furthermore, the resumption provisions in the *Australian Citizenship Act 1948* mean that many, although not all, victims of Section 17 can resume their Australian citizenship and in doing so become dual citizens, an illogical and inconsistent twist in the law.¹⁷ The High Court of Australia has stated that the common law recognises the concept of dual nationality.¹⁸ And, internationally, the law and practice of many countries now allows citizens of those countries to acquire another citizenship without losing their original citizenship.¹⁹

As a concept which is rapidly gaining in acceptance as a "right", dual citizenship can also be considered to have at least some of the characteristics of a

¹⁴ Media Release of the Hon Philip Ruddock MP, "Government Invites More People to Become Citizens", 1 July 2001.

¹⁵ Not only does Australian law permit the retention of one's preexisting citizenship upon taking up Australian citizenship, thus tacitly endorsing dual citizenship, but it is the policy of the Australian Defence Forces to actively recruit for military service non-Australian nationals and non-residents who pledge in writing to apply for Australian Citizenship as soon as they are eligible (which, in the case of the Permanent Air Force for example, is normally after three months). This policy fully recognises the value of dual citizenship in the modern world and serves to highlight the disparate opportunities available to naturalised Australian citizens and native-born Australians. Because this recruitment opportunity is exclusively available to non-Australians with prior military experience, these recruits have most probably all, in the fulfilment of their previous military activities, taken oaths of allegiance to other nations. The Australian Defence Forces put full faith in the allegiance of dual nationals to Australia, why does Australia not put the same faith in its nationals who start from a base of having only Australian citizenship?

¹⁶ *Australian Citizenship...A Common Bond*, Government Response to the Report of the Australian Citizenship Council, Commonwealth of Australia, May 2001, p. 24.

¹⁷ The Southern Cross Group concurs with the predominant view that resumption is not an appropriate avenue by which to address the issue of loss of citizenship through acquisition of another citizenship: Australian Citizenship Council, *Citizenship for a New Century*, Commonwealth of Australia, February 2000, p. 71.

¹⁸ *Sykes v Cleary and Others* (1992) 176 CLR 77 at para. 49; see with respect to the common law of England, *Oppenheimer v Cattermole* [1976] AC 249 at 263-264 per Lord Hailsham of St Marylebone, 278-279 per Lord Cross of Chelsea; *Kramer v Attorney-General* [1923] AC 528 at 537 per Viscount Cave LC (with whom Lord Shaw of Dunfermline agreed).

¹⁹ For a list of countries which allow or prohibit dual citizenship, see Adrienne Millbank, *Dual Citizenship in Australia*, Current Issues Brief 5, Parliamentary Library, 28 November 2000, p. 5, on-line at www.aph.gov.au/library/pubs/cib/2000-01/01cib05.htm. Another list can be found in Stanley A. Renshon, *Dual Citizens in America: An Issue of Vast Proportions and Broad Significance*, Background, Center for Immigration Studies, Washington DC, July 2000, p. 4. Renshon states that he established that there are currently 89 countries world-wide that allow some form of multiple citizenship.

fundamental right or a "natural right" because of the inalienable and special quality of a person's original citizenship and the link between that citizenship and a person's own dignity and identity. Human dignity is considered to be an inviolable right which all members of the human family are entitled to enjoy.²⁰ Part of a person's dignity and identity can be described in turn as the right to carry one's culture with one to a new society. Dual citizenship is a mode of citizenship which enables us to reconcile the pressures of globalization and population mobility with the reality that states will continue, for the foreseeable future, to exist as the most important political unit in the modern world.²¹

In recognition of the special nature of citizenship, some countries take the approach that citizenship, once obtained, can never be lost unless the citizen personally chooses to formally renounce it, precisely because they recognise that citizenship has an "inalienable" quality. Under the law of Switzerland, for example, a Swiss citizen will only be released from his or her citizenship upon his or her demand if he or she has no residence in Switzerland and has acquired another nationality. Other countries go further, and make it almost impossible to lose one's citizenship. For example, a Greek national will only have his or her Greek nationality discharged if (a) he or she has acquired the nationality of another country with the permission of the appropriate Greek Minister; or (b) he or she has acquired the nationality of another country and later obtain the approval of the appropriate Greek Minister for the discharge of his or her Greek nationality.

Repeatedly the SCG has heard expressions of frustration and unhappiness as well as simple disbelief that it is possible for the Australian government to enact legislation which takes away a person's citizenship without that person voluntarily renouncing or giving up his or her citizenship. Many SCG members are of the opinion that Australian citizenship should be constitutionally protected. The fact that the Australian Parliament has the power at all to enact legislation as it may see fit from time to time to remove citizenship and provide laws on all aspects of citizenship as well as naturalisation is seen by some as inappropriate because of the special nature of citizenship. An examination of the way in which the United States deals with citizenship provides an informative contrast.

²⁰ First Preamble to the Universal Declaration of Human Rights of 1948; Article 1(1) of the Basic Law of the Federal Republic of Germany.

²¹ Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the politics of belonging*, Routledge, New York, 2000, p. viii.

2.2 Australian Treatment of Citizenship as a Concept Under the Law Compared to the United States Position

2.2.1 Conferral of Citizenship

In Australia, whether a person may be an Australian citizen by birth or any other means is determined by the *Australian Citizenship Act 1948* and not by the words of the Australian Constitution.²² As such, Australians are dependent upon the Australian legislature to ensure that their citizenship is adequately protected at all times.

For example, although it was once possible for a child born on Australian soil to be Australian by birth even if neither parent was Australian, the Australian Parliament chose to limit the right to enjoy Australian citizenship by birth so that since 20 August 1986 at least one parent must be Australian or an Australian permanent resident for a child to be Australian by birth.

By comparison, in the United States, Section 1 of the Fourteenth Amendment to the Constitution provides that:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Thus, it will therefore always be the case that a child born in the United States will automatically be a US citizen, regardless of the nationality of his or her parents, and this right to citizenship by birth cannot be abridged or interfered with by Congress.

2.2.2 Removal of Citizenship

The United States Supreme Court has declared that Congress cannot enact a law stripping an American of the citizenship which he or she has never voluntarily renounced or given up. To do so would be incompatible with the Fourteenth Amendment. The Supreme Court, in 1967, expressly rejected the idea that the US legislature had a general power, sustainable as an implied attribute of sovereignty possessed by all nations, to take away an American citizen's citizenship without his assent. In *Afroyim v. Rusk*, the majority ruled:

²² In *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 54, Gaudron J. stated that citizenship is purely a statutory and non-constitutional concept in Australia. The Australian Constitution confers power on the Commonwealth to legislate with respect to naturalization and aliens (s. 51(xix)); immigration and emigration (s. 51 (xxvii)); and external affairs (s. 51 (xxix)).

In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship.²³

The Court found that the Fourteenth Amendment gave no indication of "fleeting citizenship", and that "once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit". In looking at the legislative history of the Amendment from 1866, the Supreme Court concluded that although the framers of the Amendment were not particularly concerned with the problem of expatriation, it seemed "undeniable from the language they used that they wanted to put citizenship beyond the power of any governmental unit to destroy".²⁴

In concluding the majority judgment, Mr Justice Black stated that

"Citizenship in this Nation is a part of a co-operative affair. Its citizenry is the country and the country is its citizenry. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship."

In contrast, citizenship in Australia can be taken away under the terms of several provisions of the *Australian Citizenship Act 1948*. As well as the automatic loss of citizenship upon acquisition of another citizenship under Section 17, Section 19 provides for the loss of Australian citizenship when a person serves in the armed forces of a country at war with Australia, and Section 21 allows the government to deprive a naturalised person of their Australian citizenship in certain circumstances. The Australian Parliament has the power to decide in what circumstances citizenship should be taken away because citizenship in Australia is not protected in the Constitution.

In the absence of a constitutional provision similar to the first sentence of Section 1 of the Fourteenth Amendment to the United States Constitution which guarantees that citizenship cannot be taken away by the legislature, Australian

²³ 387 U.S. 253, 257.

²⁴ The United States Constitution, Section 8(4) confers power on Congress to "establish an uniform Rule of Naturalization". This has been interpreted by the Supreme Court to mean that Congress under the power of naturalization has "a power to confer citizenship, not a power to take it away"; *United States v. Wong Kim Ark*, 169 U.S. 649, 703.

Acts of Parliament can validly provide for the removal of citizenship. While the Southern Cross Group does not dispute the constitutional basis for Section 17, it nevertheless wishes to highlight the very different, and it believes, more appropriate, constitutional approach to citizenship and its removal taken in the United States. That citizenship "is not a concept which is constitutionally necessary", as stated by one of Australia's High Court judges, is not a view shared by the SCG.²⁵

2.3 Unequal Treatment Between Groups of Citizens

2.3.1 Constitutional Equal Treatment: Australia and the United States Compared

The Southern Cross Group has been asked many times by various members whether it would be possible to challenge the constitutionality of Section 17 of the *Australian Citizenship Act 1948* in the High Court using the argument that Section 17 divides Australian citizens into two unequal classes. Many cannot understand how it is that up to 5 million Australians are legally entitled to hold dual citizenship by virtue of descent or naturalisation, whereas the remainder of Australians, starting from a base of only Australian citizenship, are treated differently and cannot enjoy dual citizenship if their personal circumstances allow them to acquire a second citizenship at some point in their lives. One SCG member wrote:

It is ironic that having grown up in Australia with the notion of equality, I have now discovered how it feels to be discriminated against. I never, ever imagined that I could be discriminated against by Australia because I'm Australian.

Although it is claimed that "as Australians we have equal rights and equal obligations",²⁶ those who have felt the effects of Section 17 or have a clear understanding of the Section 17 problem would not share this view. Robert Manne, a member of the Australian Citizenship Council, told participants at the 50th Anniversary of Australian Citizenship Conference in Melbourne in 1999:

On the question of "dual citizenship" I have come to the opinion that Australian citizenship law is at present in an unsatisfactory state because it discriminates in favour of new settlers and against the native born.²⁷

²⁵ Gaudron J. in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at 54, para. 5.

²⁶ *A New Agenda for Multicultural Australia*, Commonwealth of Australia, December 1999, p. 19.

²⁷ Robert Manne, *Concluding Remarks - The Past and the Future of Citizenship in Australia*, Conference Paper, 23 July 1999, p. 6, available online at www.law.unimelb.edu.au/events/citizen.

It is interesting to note that the views on fairness and equal treatment which many expatriate Australians have expressed to the SCG, albeit in abstract terms, on the issue of dual citizenship, actually reflect those concepts as they are protected under the US Constitution as interpreted by the United States Supreme Court rather than the reality of protection currently available under the Australian Constitution as interpreted by the Australian High Court.

The same provision of the United States Constitution which provides that citizenship can never be taken away by the legislature also contains, in its second sentence, the following protection:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The so-called "Equal Protection Clause" applies to the US Federal Government by virtue of the Fifth Amendment. While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process."²⁸

Under United States law, it is quite clear that a provision such as Section 17 of the *Australian Citizenship Act 1948* in the context of the rest of the Act, if contained in an Act of the US Congress, would have been struck down as unconstitutional long ago, for the simple reason that it divides citizens into two classes and treats those with only Australian citizenship unequally.

In 1964 the US Supreme Court looked at an Act of Congress which treated naturalised US citizens differently than native-born US citizens with regard to citizenship. In *Schneider v. Rusk*, Mrs Schneider had been born in Germany and later become a naturalised US citizen. After college she lived abroad and eventually married a German national and settled in Germany. The State Department denied her a US passport, since a provision in the Immigration and Nationality Act 1952 provided that a naturalized US citizen would lose their citizenship by continuous residence for three years in their country of origin.

The US Supreme Court held that the rights of citizenship of the native born and of the naturalised person are of the same dignity and are coextensive. It found that the statute in question proceeded "on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption which is impossible for us to make...A native-born citizen is free to reside abroad indefinitely without

²⁸ *Bolling v. Sharpe*, 347 U.S. 497, 499.

suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons".

In Australia, due to the fact that the Constitution contains no due process or equal protection clauses of a similar nature to those in the United States Constitution, it would seem unlikely that Section 17 could be successfully challenged in the High Court at this time on equal protection grounds. Despite an implied freedom of equality under the law discovered by Deane and Toohey JJ in *Leeth v. Commonwealth*,²⁹ the majority of the High Court rejected their approach in *Kruger v Commonwealth* in 1997³⁰ where it was held that no general guarantee of equality under the law could be derived from the Constitution or the common law.³¹

Nevertheless, the Southern Cross Group strongly submits that Australia, like the United States, should be a nation where the rights of citizenship of the native born and of the naturalised person are of the same dignity and are coextensive.³² The *Australian Citizenship Act 1948* presently divides Australian citizens into two classes: those that are allowed to be dual citizens, and those that are not.

Over the years there have been many calls for an Australian Bill of Rights which, if successful, would arguably have provided those negatively affected by Section 17 with an avenue for constitutional challenge.³³ A comparison with the United States law in this area exposes Australia as a nation which is unable to afford all Australian citizens equal protection at a constitutional level, at least on this issue. The Fourteenth Amendment of the United States Constitution is an effective guarantee of equality because it acts as a constitutional limitation on the adoption of discriminatory laws by the States and the Federal Government.

²⁹ (1992) 174 CLR 455.

³⁰ (1997) 190 CLR 1.

³¹ See generally George Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999, pp. 220-225.

³² Note that until 1958, the *Australian Nationality and Citizenship Act 1948*, Sections 20 to 22, provided that a naturalised Australian who had lived outside Australia for seven years, and did not notify an Australian consulate annually of his or her desire to retain their Australian citizenship, would lose it.

³³ See Peter H Bailey, *Human Rights: Australia in an International Context*, Chapter 3, "The Bill of Rights Controversy", Butterworths, 1990, pp 45-78.

2.3.2 Equal Treatment as Part of Australia's International Human Rights Obligations

Australia ratified the International Covenant on Civil and Political Rights (ICCPR) in 1980. Since 1991, when Australia ratified the First Optional Protocol to that treaty, it has been possible for individuals who believe that they have had rights enumerated in the Covenant violated by Australia to bring their grievances to the Human Rights Committee set up under the Covenant for consideration.³⁴

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Equal protection of law or equality in law requires that legislative classifications must be just. The fact that an Australian citizen by birth cannot hold dual citizenship due to Section 17 whereas an Australian citizen by naturalisation can is a clear case of discrimination.

A strong case for the breach of Article 26 of the ICCPR can also be made in the case of naturalised Australian citizens who acquire a non-Australian citizenship after Australian naturalisation and fall victim to Section 17.³⁵ In that case, the law is still discriminating between groups of citizens. The naturalised Australian will lose his Australian citizenship when he takes another citizenship because he has gone overseas and acquired the right to apply for another citizenship under the laws of that other country. The naturalised citizen who stays at home can keep his Australian nationality. This could well amount to discrimination under Article 26 on the basis of "other status".

In addition, one could argue that a naturalised citizen who becomes a victim of Section 17 is being discriminated against on the grounds of birth vis-a-vis an Australian-born citizen, since many thousands of Australian-born Australians are already allowed to hold dual citizenship by descent.

The non-binding proceeding which is available to aggrieved victims of Section 17 before the Human Rights Committee is not an adequate substitute for proper

³⁴ Optional Protocol to the International Covenant on Civil and Political Rights, Article 2.

³⁵ In its 8 June 2001 Discussion Paper DIMA notes that the majority of people affected by Section 17 are born in Australia, but not all. In 1999/00 Australian-born people represented 68 percent of those who came to official notice as having lost their citizenship through the operation of Section 17.

constitutional protection for equality.³⁶ However, if an individual chose to bring a complaint to the Committee, it could well give rise to a finding at the international level that Australia is in breach of its treaty obligations on human rights.

2.3.3 Unequal Treatment on Dual Citizenship Incompatible with Existing Government Policies and Statements

While there is no "equal treatment" clause in the Australian Constitution, the concept of equal protection is not foreign in modern Australia. As well as the fact that it is contained in international human rights instruments to which Australia is a party, we would argue that it is already an entrenched principle which finds expression many times over in various Australian Government policies and statements. This leads to the inescapable conclusion that while it may be constitutionally permissible not to repeal Section 17, it is nevertheless socially unacceptable to maintain this provision on the statute books, because it is incompatible with basic notions of fairness accepted in Australian society. There is clear evidence from a number of government policies and statements that equal treatment is an established concept in Australia in citizenship and migration matters.

As pointed out above, in 1999, the present Government accepted as policy the National Multicultural Advisory Council's statement that "all Australians are entitled to equality of treatment". In addition, in its May 2001 response to the Citizenship Council's February 2000 report, the Government acknowledged that the values in the text of the Australian Compact proposed by the Australian Citizenship Council are "embedded in Australian society, institutions and value statements in one form or another."³⁷ The commitments in that Compact read as follows:

- To respect and care for the land we share;
- To maintain the rule of law and the ideal of equality under the law of all Australians;
- To strengthen Australia as a representative liberal democracy based on universal adult suffrage and on freedom of opinion;
- To uphold the ideal of Australia as a tolerant and fair society;

³⁶ In *Dietrich v The Queen* (1992) 177 CLR 292 the High Court stated that ratification of the ICCPR as an executive act by Australia has no direct legal effect upon domestic law. The rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing its provisions. At this time no such legislation has been passed.

³⁷ *Australian Citizenship...A Common Bond*: Government Response to the Report of the Australian Citizenship Council, Commonwealth of Australia, May 2001, p. 9.

- To recognise and celebrate Australia as an inclusive multicultural society which values its diversity;
- To continue to develop Australia as a society devoted to the wellbeing of its people;
- To value the unique status of the Aboriginal and Torres Strait Islander peoples.

The fact that the Government decided earlier this year "that there is no strong community demand for an additional value statement sponsored by Government" along these lines, despite its acknowledgement of the principles the Compact contains, must surely be further evidence of the solid and unquestioned acceptance and existence of all of these principles in Australia today.

2.4 Limitations in the Australian Constitution Highlighted by the Section 17 Problem

Clearly, the United States Supreme Court ruling in *Afroyim v. Rusk*, which found that citizenship can only be renounced by citizens themselves, must be viewed in context. In its statement that "the people are sovereign" the Court was interpreting the constitution of a nation which is a republic. Australia has not yet embraced republicanism. In addition, the US Supreme Court was interpreting a constitutional provision which clearly bestows citizenship. The Australian Constitution omits citizenship from its terms. As one Australian commentator has recently noted, "citizenship concerned the drafters acutely and they made a conscious effort to exclude the term from Australia's foundational legal document".³⁸ The prejudices which ultimately led to the White Australia policy and its maintenance until the second half of the twentieth century were at the root of this failure to define citizenship.³⁹

The added omission of an equal treatment or due process provision in the Australian Constitution is also lamentable for those affected by Section 17. Indeed, in 1898, at the time when Australia's Constitution was being drafted, a clause mirroring the entire Section 1 of the Fourteenth Amendment of the US Constitution was proposed for inclusion by the Tasmanian Attorney-General and

³⁸ Kim Rubenstein, "Citizenship and the Centenary - Inclusion and Exclusion in 20th Century Australia", *Melbourne University Law Review*, 2000, online at www.austlii.edu.au/au/journals/MULR/2000/24.html.

³⁹ John M. Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"", 42 *Australian Journal of Politics and History* 1996, 10 at p. 13 ff.

delegate Andrew Inglis Clark, but was rejected in large part because other delegates did not share Clark's republican outlook.⁴⁰

In the year of Australia's centenary of federation, it is perhaps timely to reflect on the limited vision of Australia's founding fathers, who based their Constitution on a concept of responsible government in which there was little or no role for provisions that explicitly protected human rights.⁴¹ It has been argued by those against an Australian Bill of Rights that Australia's system of responsible government and the democratic traditions of common law it inherited from Britain would be sufficient to protect individual liberties.⁴² It is submitted that Section 17 of the *Australian Citizenship Act 1948* provides a concrete example of a situation where Australia could well use explicit and unequivocal equal treatment and due process guarantees at a constitutional level.

As Australia moves towards a new evaluation of its readiness to embrace a system of republic, it may be opportune to reconsider whether citizenship should be clearly defined in our Constitution, and at the same time whether equal treatment and due process clauses should be included which would protect all Australians from discrimination in the widest sense. The thousands of testimonies of the hardships suffered by Australians as a result of Section 17 which the Government has received over several years, as well as the latest expressions of these difficulties by many individuals put forward in letters in response to the 8 June Discussion Paper, separately to this submission, serve as uncanny proof that Clark's own prophecy on learning that his proposed "14th Amendment" clause was doomed in 1898 has been realised:

The more I consider it, the more I am persuaded that if the whole amendment is not adopted, the time will come when the omission will be deeply regretted.⁴³

Certainly Section 17 and its discriminatory effects are a matter of deep regret for many thousands of Australians and former Australians. As Rubenstein has commented just over one hundred years later:

It is a pity that the Australian Citizenship Council was not specifically asked to address the concepts of citizenship in the *Constitution* as, in my

⁴⁰ John. M. Williams, "Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"", 42 *Australian Journal of Politics and History*, 1996, p. 10; Convention Debates, vol. 4, Melbourne 1898, p. 667.

⁴¹ George Williams, *Human Rights under the Australian Constitution*, Oxford University Press, Melbourne, 1999, p. 39.

⁴² R. Menzies, *Central Power in the Australian Commonwealth*, Chapters 2 and 3, Cassell, Melbourne, 1967.

⁴³ Clark to Wise, 20 February 1898, MS 1708, Wise Papers, Australian National Library, Canberra, cited in John M. Williams, *op cit*, at 16.

view, they are fundamental to all other issues raised in its report. The report wishes to speak of citizenship as a concept of inclusion, but how can a government honestly do this if its source document of law, the *Constitution*, together with other legal expressions of citizenship in legislation and through the common law, are returning mixed messages on membership of the community?⁴⁴

Based on its wide canvassing of the Australian expatriate community in particular, the SCG makes the observation that many Australians and ex-Australians would feel more secure if citizenship in Australia was afforded a constitutional basis.

The Southern Cross Group recognises that Constitutional amendments would be necessary to achieve this protection in Australia, and understands the difficulties in achieving amendments to the Australian Constitution under Section 128 thereof. Despite the fact that these ideas are beyond the scope of the change contemplated in the Government's 8 June 2001 Discussion Paper, the Group considers it necessary to place these considerations firmly on the public record at this time. Even if Section 17 of the *Australian Citizenship Act 1948* is repealed, the special inalienable quality of citizenship and the fact that it is an inherent part of a person's identity dictate that the law on when citizenship can be taken away should be beyond the reach of the Australian legislature. Without this protection, there is no guarantee that future governments will not reintroduce a provision similar to Section 17.

The present lack of constitutional protection is no excuse for a legislature to turn a blind eye to an existing injustice. A government which fails to take action to repeal Section 17 is perpetuating discrimination. The lack of redress available to the Australian people on this issue in the High Court makes it all the more incumbent upon their elected representatives to "do the right thing" at this time.

2.5 Other Reasons to Repeal Section 17

2.5.1 The Impact of Globalisation on Citizenship

The impact of globalisation as a force pointing to the need to reassess our attitudes on citizenship should not be treated lightly. The SCG is aware of the many divides that currently exist in the Australian community over the concept of globalisation, but nevertheless points out that many of its positive aspects have considerable community support.

⁴⁴ Kim Rubenstein, "Citizenship and the Centenary - Inclusion and Exclusion in 20th Century Australia", *Melbourne University Law Review*, 2000, online at www.austlii.edu.au/au/journals/MULR/2000/24.html.

Much has been written in the last few years on the way in which globalisation is leading us to redefine citizenship.⁴⁵ Many would argue that citizenship must be re-evaluated in an era of supra-national governance and should no longer be based on the concept of belonging to a nation state. Since 1993, citizens of the Member States of the European Union have enjoyed both national citizenship and regional citizenship of the EU.⁴⁶

It is beyond the scope of this submission to enter into a detailed analysis of the impact of globalisation on citizenship or canvas new models of citizenship for the future. The Southern Cross Group believes that the world has changed due to globalisation, and that globalisation has led to unprecedented movements of individuals between countries. The number of Australians now overseas evidences this fact. Allowing an Australian to hold dual citizenship means that the reality that many individuals live parts of their lives in different countries is adequately reflected in Australia's formal rules on belonging. For the moment, dual or multiple citizenship is the most feasible mode of citizenship to use as nation states remain the most important political unit in the modern world.

2.5.2 Brain Drain/Regain

Much attention is currently being paid in Australia to the flow of skilled Australians to overseas locations and to the means by which those people may be attracted back to Australia. The root causes for this "brain drain" have been well canvassed by political parties and the media. Central to the issue are the opportunities for a greater breadth of experience available in the international environment outside Australia, and, not least, the level of remuneration that such skilled Australians enjoy in overseas employment.

The SCG notes that several Australian professional associations actively promote the need for their members to gain overseas training and professional experience as a means of improving the performance of the professions within Australia. Recently CPA Australia reported that it had negotiated mutual recognition arrangements to allow its members to practice in the United States.

The SCG believes that it is timely to remind the Government and others who are considering the "brain drain" issue that it is not just confined to scientific

⁴⁵ An overview of some of the interdisciplinary literature available is given in Geoffrey Stokes, "Global Citizenship", in Wayne Hudson and John Kane (eds), *Rethinking Australian Citizenship*, Cambridge University Press, 2000, p. 231 at 233. A succinct formulation of the two positions at the opposing poles in the debate is given in Stephen Castles and Alastair Davidson, *Citizenship and Migration: Globalization and the politics of belonging*, Routledge, New York, 2000, pp. 15-24.

⁴⁶ The Treaty on European Union ("Maastricht Treaty") introduced a new Part Two into the Treaty Establishing the European Community (EC Treaty) entitled "Citizenship of the Union". Article 8(1) of the EC Treaty establishes a citizenship of the European Union. Every citizen of the EU residing in a Member State of which he or she is not a national has the right to vote and stand as a candidate at municipal elections in the Member State in which he resides.

researchers but includes Australians who have skills across a broad spectrum of professions and trades. The Group's recent contacts with many hundreds of Australians overseas indicate that the vast majority of skilled people who leave Australia each year do not come from a science background.

If viewed from a short-term perspective, the "brain drain" represents a serious loss to the Australian economy in terms of education costs and productivity losses. But taking a medium or longer-term view there are many pluses for Australia. Those that return bring with them a broad and valuable range of experience that they may not have been able to duplicate if they had remained in Australia. Most will use that experience to broaden the training and skills of other Australians and to promote and enhance Australia's position in the world economy. They may also bring back with them to Australia financial assets for new investment and the establishment of new businesses.

Some Australian citizens who are part of the "brain drain" are not dual citizens and will never become dual citizens, even if Section 17 is repealed. In order to acquire the nationality of their host country, they would have to satisfy the relevant residency requirements under that country's naturalisation laws.⁴⁷ These differ according to the country concerned and whether the Australian is married to a national of the host country, but in most cases citizenship of the host country will not be possible until the Australian has lived overseas for between five and ten years. For example, many Australian professionals who have left as part of the "brain drain" to work in the United States spend a period of between three and six years on a non-immigrant H1B visa. Only after this visa expires would they acquire permanent residency status in the US, the so-called "green card". Naturalisation is not possible until one has been a permanent resident in the US for five years, or three years if married to a US citizen.

While working overseas it is the SCG's observation that most Australians hold proudly to their Australian citizenship and some will return to Australia before reaching a stage in their life or career where the need and/or opportunity to seek citizenship of the host country arises. This is Australia's gain.

Others, though, will move inevitably towards a point in time where the lack of citizenship in the country in which they live poses serious problems from the point of view of family, work, financial and social security matters, or merely the right to continue to live in that country. Under Section 17 those Australians cannot take out citizenship in their host countries and retain their Australian citizenship. Once they have reached the point where they feel they have to take out the citizenship of their host country, their legal link with Australia will be

⁴⁷ See Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, February 2000, Appendix 5, p. 113 for a list of the permanent residency requirements for acquiring citizenship in a number of countries.

severed. Although they may still have family and friends in Australia, the chances that they will ultimately move back to Australia and bring with them their financial and intellectual resources are greatly diminished.

Australia is a small country in terms of the world economy and cannot afford to turn its back formally on these individuals. A highly-qualified woman in her thirties, currently in a managerial position with a multinational cosmetics company in Paris, expressed the following view:

For some illogical reason, because we brain-drainers were brave enough to leave the safe cage and make a go of it in the big wide world, Australia is prepared to give us up as its citizens. This has to be the ultimate expression of that uniquely Australian phenomenon known as the "Tall Poppy Syndrome" in our globalised world. Let it be known: those who dare to leave shall be deemed traitors and not worthy of Australia's recognition or pride. We no longer recognise them as Australian and their achievements are immaterial - unless of course they are sportsmen.

2.5.3 Global Communications

As mentioned elsewhere in this submission, overseas Australians are increasingly enjoying the benefits of the communication revolution.

In past eras all Australians travelling overseas would have complained about the dearth of Australian news coverage provided by the overseas printed and electronic media, the cost of telephone connections to Australia, and the time required for the delivery of postal items as well as the cost of a ticket home. These are all difficulties which tended to weaken and sometimes breach the connections between overseas Australians and their Australian contacts and interests.

Today, reflecting the fact that Australia leads the world in the penetration of internet and e-mail usage in everyday life, Australians everywhere can enjoy relatively cheap instant contact with one another. Few overseas Australians would not have internet access through computers in their homes, their place of work, or public access locations such as libraries and the increasingly common internet café. This particular aspect of the global economy enables overseas Australians to reinforce and maintain their Australianness in a way never before envisaged. They enjoy stronger links to their family, friends and business and professional colleagues at home. Most of the Australian media organisations maintain websites with up-to-the-minute local, national and international news coverage from the Australian perspective.

These are all reasons why the Southern Cross Group believes that Australians overseas must now be viewed as part of the Australian community. They are

simply another group of Australians that should be understood as an additional facet of a multicultural Australia. Rather than being a minority "different" due to race or ethnic background, they are distinguished by location, but this does not make them any less Australian. An Australian in France on the verge of marrying a Frenchman wrote to the Southern Cross Group:

If this Government can just repeal Section 17, to my mind it would be a great leap forward because it would send a clear message to us expats that we are cherished and valued for our diversity. Basically, at long last, the Government would be welcoming us in under the Great Australian Beach Umbrella.

2.5.4 Cultural Understanding as a Strong Motivation for a Peaceful World

A significant outcome of the movement of people between countries is the positive effect it has on their understanding of the political, cultural, economic and social relationships within and between countries. Australia's own multicultural community and international standing as an immigration country amply illustrate this point. These are forces recognised by many as being strong motivators for world peace.⁴⁸ The movement of Australians to other countries is a modern facet of multiculturalism which originally had its genesis in the large influx of migrants from other countries into Australia.

Over the years the number of Australians moving overseas has grown substantially. With an estimated 820,000 Australians currently living overseas the SCG believes that the point has now been reached at which we should recognise that body of people as Australia's Diaspora and a natural extension of Australia's national identity. The Government should promote and support the Diaspora as an Australian national asset which provides a multi-faceted set of links to other cultures in much the same way as many other emigrant countries support their diasporas.⁴⁹ Part of that support must surely be the removal of Australian barriers to dual nationality.

2.5.5 Advantages for Australia and Australians

A number of submissions to the Department from individuals in response to the June 2001 Discussion Paper no doubt canvas the range of advantages which would accrue to Australia and Australians should Section 17 be repealed. They include:

⁴⁸ "Links between Europeans living abroad and their countries of origin". - Recommendation 4, Doc. 8339, A report of the Committee on Migration, Refugees and Demographics of the Council of Europe, 6 March 1999 available at <http://stars.coe.fr/doc/doc99/edoc8339.htm>.

⁴⁹ For a detailed discussion on this see the Council of Europe report cited above.

- Increased trade penetration for Australian services and products through the ability to place Australian citizens long term and on site as dual citizens in those overseas locations which are crucial to the expansion of Australian businesses and international trade. As citizens of their country of residence they will enjoy greater mobility and access within their industry groupings;
- An informal recognition of the importance of the Australian Diaspora as promoters of the Australian way of life and of Australia as a tourist and migrant destination. Expatriate Australians are also well placed to convey to the outside world Australia's position on issues of international importance;
- Increased flows of investment and retirement capital into Australia which will reflect a growing confidence of overseas Australians in Australia as the country of choice for the later years of their working life or retirement;
- International recognition of Australia as a country which stands at the forefront of the world scene for its citizenship and migrant policies.

2.5.6 Barriers Faced by Australians as Foreign Nationals

The hurdles faced by overseas Australians who live as foreign nationals in their various host countries are pervasive. Details as they affect individuals will no doubt be well demonstrated in the personal submissions received in response to the Government's Discussion Paper of 8 June 2001.

Briefly, the SCG is aware of the following hindrances which Australians encounter, although this is by no means an exhaustive list:

- The requirement for special visas and permits for entry and/or employment in many countries and in many instances the limited or temporary nature of those visas and permits;
- Limitations on the right to work, in many cases extending to the rights of spouses and family. Note also that while foreign nationals may be granted approval to work in the private sector, those seeking places in the public sector are usually required to become citizens of the particular country;
- The difficulties, once admitted to a country, of entering into what would be seen in Australia as every-day non-regulated contracts such as leasing or buying property; establishing credit, finance and banking facilities; employment contracts; obtaining insurance, vehicle registration and driving licences;

- Taxation issues, including financially crippling inheritance provisions in the United States for non-US citizens;
- An inability to vote in national and local elections or to seek public office;
- Barriers to the freedom of movement within the European Union (EU) and North American Free Trade (NAFTA) area when contrasted to EU nationals and US and Canadian nationals respectively. Although the Schengen Agreement does allow Australians legally resident in one EU Member State to travel to another, travel to a neighbouring non-EU country such as Hungary, for example, requires a visa whereas EU nationals require no visa. This requirement hinders business travel at short notice. Similarly, in North America, Australians in Canada, the US or Mexico cannot benefit from the NAFTA provisions on the temporary entry of business persons between those countries. This makes Australians less attractive candidates for many positions for which they may be equally as qualified as their North American counterparts;
- Restrictions on the amount of out-of-country time that a non-citizen is allowed before there is an automatic loss of permanent residence status and, again, the impact this has on an Australian's career and business prospects;
- Loss of social security entitlements and pension benefits often after years of compulsory contributions to national social security schemes in the host country where Australia has no bilateral social security in place with the host country. In France, a widowed alien will be denied access to the spouse's contributory pension. In addition, a number of Australians who have lived in Belgium for several decades and are approaching retirement will not be able to draw their Belgian pensions if they retire back to Australia as Australian citizens because there is no bilateral social security agreement between Australia and Belgium.⁵⁰ Further, it should be noted that the EU-level social security legislation which allows for the portability of social security entitlements within the EU does not apply to non-EU nationals legally living and working in the EU.

⁵⁰

Note that Article 9 of the International Covenant on Economic, Social and Cultural Rights guarantees the right of everyone to social security.

2.5.7 A Choice that Should Never Have to be Made

For Australians who have never lived abroad, and never acquired the right to apply for a second citizenship, it is probably difficult to conceive the very real predicament engendered by Section 17 for thousands of their compatriots.

The Southern Cross Group's contacts with many former Australians have not revealed a single individual who was indifferent to losing their Australian citizenship when faced with that choice in the full knowledge of the existence of Section 17. Without exception, those that finally decided to take out citizenship of their host countries when they knew Section 17 existed did so because they felt they had no option from a practical point of view. Parents commonly relinquish Australian citizenship in order to be able to sponsor their children back in Australia to join them in their new country. Australian spouses of US citizens forfeit their Australian citizenship so that they will not be prohibitively taxed as non-US citizens under current US estate tax law. These are just a few examples of the reasons why the choice to give up Australian citizenship is never easy.

A person who has been confronted with this dilemma and subsequently lost their Australian citizenship, in the experience of the Southern Cross Group, typically harbours feelings of rejection by the Australian community and anger and frustration that they have had to make that choice at all. Return to Australia as part of their longer term plans may then recede into the distance. To even enter Australia to visit friends and family, they require a visa. A former Australian now in Belgium told the Southern Cross Group:

I took out UK citizenship after living in the UK for many years so that I would be able to apply for a permanent position in one of the EU institutions in Brussels. Having to sacrifice my Australian citizenship made me extremely angry but I felt I had to become British to have a shot at being the best I could be in my career. There are already some Australians who work in the EU institutions because they have an EU passport of some sort by descent, or they migrated as children from Europe to Australia and became naturalised Australians, so they're legal dual citizens. In fact, there was even a Member of the European Parliament who held dual Australian/British citizenship until the last European elections.

What happened when my father died, though, just added insult to injury. His death came out of the blue and I had to return to Australia at a moment's notice. I got the call that he had died on a Friday afternoon, and the Embassy was shut by the time I managed to get there. I couldn't get a visa until the Monday morning. For my mother's sake, I really should have been on a plane home on the same day but it just wasn't possible because

I didn't have a visa. I just can't believe I needed a visa to go home and bury my Dad. Australia is the country where I was born and grew up.

No Australian citizen should ever be placed in a situation of having to choose between Australian citizenship and that of another country. Regardless of which choice is ultimately made, the consequences will be enduring and often painful. Repealing Section 17 to allow all Australians the right to dual citizenship would end this dilemma.

2.6 Subsection 44(i) of the Australian Constitution

The Southern Cross Group is aware of the debate in the community over the last decade in particular on the difficulties surrounding Subsection 44(i) of the Australian Constitution. That provision provides:

Any person who -

(i) is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen entitled to the rights or privileges of a subject or a citizen of a foreign power:

...

shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

The most recent example of this provision coming into play would appear to be the events surrounding the preselection vote for the Liberal candidate in the by-election for the Queensland federal electorate of Ryan in February 2001. Hong Kong-born Michael Johnson, one of the candidates for preselection, held dual British/Australian citizenship.⁵¹ He eventually withdrew from the preselection vote due to the limitations imposed by Subsection 44(i) of the Constitution.

The Southern Cross Group notes that Subsection 44(i) as currently interpreted by the High Court does not prevent dual citizens for standing for federal Parliament as such, as long as they "take all reasonable steps" to divest themselves of their other citizenship or citizenships.⁵² The renunciation must be done under the citizenship laws of the other country or countries concerned,

⁵¹ "Thanks to all the Australians here" by Scott Emerson, *The Australian*, 6 February 2001, p. 2; also the article by Scott Emerson, *The Australian*, 5 February 2001, p. 5 as well as an article in the *Courier Mail*, 6 February 2001, p. 10.

⁵² *Sykes v Cleary* (1992) 176 CLR 77.

since according to the majority of the High Court, Australian naturalisation is insufficient to renounce an allegiance to a foreign power.⁵³

Further, the Group acknowledges that Subsection 44(i) was included in the Constitution due to concerns that the parliamentary system might be jeopardised if candidates' performances could be influenced by a potential conflict of loyalties. In this respect, Section 17 of the *Australian Citizenship Act 1948* has to be very clearly distinguished from Subsection 44(i) of the Constitution.

While both provisions result in an individual not being able to hold dual citizenship, the SCG believes that allowing all Australians the right to hold dual citizenship under Australian citizenship law, by repealing Section 17, would not give rise to conflict of loyalty concerns. Indeed, the Australian community does not appear to have suffered any ill-effects from any "divided loyalties" in its some five million legal dual citizens to date.

With regard to candidates for federal Parliament, the SCG believes that Subsection 44(i) of the Constitution as it stands does restrict the full participation in the political process of Australian citizens who hold another citizenship. Those who renounce a foreign citizenship in order to nominate pay a high price - regardless of whether or not they are subsequently elected to office. Essentially they have to sacrifice their non-Australian citizenship. The SCG would imagine that this loss can engender the same type of distress in some cases as many overseas Australians have felt on forfeiting their Australian citizenship under Section 17.

The SCG agrees with the conclusions of the House of Representatives Standing Committee on Legal and Constitutional Affairs in its report tabled in July 1997 on the Subsection 44(i) problem.⁵⁴ A referendum needs to be held to delete Subsection 44(i) from the Constitution. At the same time, a new provision should be inserted requiring simply that candidates and members of Parliament must be Australian citizens, and Parliament should be empowered to enact legislation determining the grounds for disqualification of members of Parliament in relation to foreign allegiance. Thereafter, whether such legislation were to include protections against the perceived possibility of divided loyalties in members of

⁵³ *Sykes v Cleary* (1992) 176 CLR 77, Mason J, Toohey and McHugh JJ at 106-107, Brennan J at 113, Dawson J at 131-132. Note that a minority, consisting of Deane J at 130 and Gaudron J at 137, placed a greater weight on the effect of acquisition of Australian citizenship as indicating renunciation of foreign allegiance, since the candidates concerned had been naturalised when the citizenship oath in Australia required a person to swear/affirm renunciation of all other allegiance (a requirement which was removed from the *Australian Citizenship Act 1948* in 1986). In the view of the minority, this was enough to cancel foreign allegiance unless some physical or mental act by the person reasserted foreign citizenship.

⁵⁴ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Aspects of Section 44 of the Australian Constitution*, July 1997, p. 42, Recommendation 2.

Parliament would be a matter for the Australian community to decide through their elected representatives at the appropriate time.

The SCG notes that the Australian Citizenship Council has questioned whether the holding of another citizenship does of itself mean that a person would necessarily act in a disloyal manner.⁵⁵ The Council points out that any Australian citizen, whether or not they hold another citizenship, potentially could have split loyalties or conflicts of interests for various reasons. For example, an Australian citizen who does not possess another citizenship might have commercial interests in another country.

Finally, the Southern Cross Group urges that the difficulties in achieving an amendment to Subsection 44(i) under Section 128 of the Constitution not be put forward as a spurious reason to delay the repeal of Section 17 of the *Australian Citizenship Act 1948*. The two issues should be remedied separately.

Subsection 44(i) directly affects only a few hundred candidates for federal office each election. The repeal of Section 17 of the *Australian Citizenship Act 1948* is necessary as a matter of urgency for hundreds of thousands of overseas Australians. It would remove discrimination between groups of Australian citizens and would result in the right to hold dual citizenship for the three-quarters of Australians who have only Australian citizenship. It requires only the enactment of an Act of Parliament and is achievable within the term of the current Government.

⁵⁵ Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, February 2000, p. 77.

3. A CASE FOR ALLOWING VICTIMS OF SECTION 17 AN UNQUALIFIED RIGHT TO RESUME THEIR AUSTRALIAN CITIZENSHIP

Recommendation 2: The Southern Cross Group urges the amendment of Section 23AA of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so that it provides an unqualified right for those former Australians who have been victims of Section 17 since 1948 to immediately resume their Australian citizenship. For former Australians resident overseas this right of resumption should not be conditional upon a statement that the person has an intention to commence residing in Australia within any period.

3.1 Repeal of Section 17 Along with Measures to Correct Past Harm

The SCG notes from the June 2001 Discussion Paper that the Government does not propose that the repeal of Section 17 act retrospectively. In the Group's view, this position by the Government ignores the fact that if Section 17 is repealed, there will still be a significant number of former Australians who will not be able to resume their lost citizenship and as such they will be "left out in the cold".

The repeal of Section 17 in itself will of course only prevent further Australians from losing their citizenship. It will not mean that all those who lost their citizenship under Section 17 in the past suddenly automatically become Australian citizens again overnight.⁵⁶

The Government states in its June 2001 Discussion Paper that "the avenue of resumption of Australian citizenship would, of course, remain available to those who had lost their Australian citizenship through the operation of Section 17 prior to the repeal."⁵⁷ However, the Southern Cross Group is of the opinion that while Section 23AA of the Act does allow many former Australian citizens to resume their lost citizenship, as it is currently worded a large number of former Australians do not fall within its ambit. Specifically, those former Australians who are resident overseas and have no intention to commence residing in Australia again within three years are unable to avail themselves of resumption.

⁵⁶ Note that it has been widely and incorrectly reported in the Australian media in recent months that if Section 17 were to be repealed, Rupert Murdoch would instantly become an Australian citizen again. The Southern Cross Group has had to explain to many disappointed former Australians that the repeal of Section 17 by itself will not help them get their citizenship back.

⁵⁷ *Australian Citizenship Act 1948*, Section 23AA.

The Australian Citizenship Council put forward the view that the existing resumption provisions are adequate for those who have already lost Australian citizenship under Section 17, and that the only change that should be made is to insert a good character requirement.⁵⁸ The Government accepted this recommendation in May 2001.⁵⁹ It is strongly submitted that the adequacy of existing resumption provisions within the context of a repeal of Section 17 has not to date been properly considered.

The Southern Cross Group points out that the 1994 Joint Standing Committee on Migration (JSCM) recommended that former Australian citizens who had lost Australian citizenship under Section 17 have the unqualified right to apply for the resumption of their Australian citizenship.

Many former Australians currently resident overseas have advised the SCG that because of family and career commitments over the medium to long term they are unable in all honesty and good faith to furnish the Minister with a statement in writing to the effect that they intend to commence residing in Australia within three years of resuming their citizenship. For this reason they cannot resume their citizenship.⁶⁰ Nevertheless all these individuals have said that they have an earnest desire to once again be officially recognised as Australian citizens even though they are not presently living in Australia. They have always considered themselves as Australians and have never lost their Australianness.

3.2 Reasons Why Section 23AA of the Act Should be Amended When Section 17 is Repealed

The SCG considers that there are a number of reasons why the Government should review Section 23AA of the Act at this time:

- Many former Australians affected by Section 17 were unaware of Section 17 when they took up another citizenship. While ignorance of the law is generally said to be no excuse, the SCG notes that it is only in very recent times that Government agencies have thought it appropriate to include a warning about the impact of Section 17 in their information packages on the Internet and in documentation provided to Australians applying to renew their passports overseas. It is submitted that for many, this information is too little and too late;

⁵⁸ Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, February 2000, Recommendation 57, p. 65.

⁵⁹ *Australian Citizenship...A Common Bond*, Government Response to the Report of the Australian Citizenship Council, Commonwealth of Australia, May 2001, p. 26.

⁶⁰ *Australian Citizenship Act 1948*, Section 23AA(1)(b)(iv)(B).

- It would also be fair to say that Australians living in Australia largely take their citizenship for granted and would be totally unaware of the provisions of the *Australian Citizenship Act 1948* and of Section 17 in particular;
- The SCG has had reports of several instances in which incorrect advice on dual citizenship has been provided by Australia's overseas consular staff to SCG members. At least one other example of confusing and misleading advice has been documented in a resulting administrative appeal.⁶¹
- Several recent examples reported to the SCG indicate that some agencies of foreign countries do not understand Australia's position in relation to dual citizenship. They commonly believe that Australia allows dual citizenship for all its citizens or that it does not allow dual citizenship for anyone. This confusion is perfectly understandable in view of the inconsistent treatment which Australians receive under the Act at the present time. Often Australians considering taking up another citizenship are told the wrong thing by the consular authorities of the other country about the effect their new citizenship will have on their Australian citizenship;
- Often, incorrect advice is given to those Australians seeking to exercise a right of citizenship of another country on the basis of descent that they will lose their Australian citizenship because of the operation of Section 17. Noting that the reciprocal notification arrangements with other countries on citizenship acquisition have substantially lapsed, the SCG is nevertheless concerned that in past eras some persons who could legitimately now be Australian dual citizens were inadvertently included on such lists sent to Australia. If such is the case it would be reasonable to assume that the individuals concerned would have been unaware of their inclusion on the list or of their rightful position under the law;

⁶¹ *Guergli v Department of Immigration, Local Government and Ethnic Affairs*, (1991) 13 AAA 40, in which an Australian citizen checked with the Australian consular authorities in Switzerland on two occasions, four years apart, as to whether she would lose her Australian citizenship if she exercised her right to Swiss citizenship by descent. She was told on both occasions that she would not, but then in fact did. The Australian Administrative Appeals Tribunal (AAT) held she did not lose her Australian citizenship as she was not acquiring a foreign nationality, but that she had inherited her Swiss nationality and only carried out a minor administrative procedure to verify her rights.

It should be noted that prior to the 1984 amendment to Section 17, which applies from 22 November 1984, there was no test of dominant intention in the provision. Before that date, as illustrated by *Allan v Department of Foreign Affairs*, (1986) 5 AAA 432, applying for a passport of a country with which one had been registered as a citizen by descent since birth was held to be a formal act which triggered the loss of Australian citizenship under Section 17.

- The Australian Citizenship Council's February 2000 report indicates that of the 199 submissions received by it in early 1999, only 52 were from Australian citizens living overseas.⁶² Only three of the 199 submissions addressed the issue of resumption of Australian citizenship;⁶³
- Although an unspecified number of the 6000 copies of the Australian Citizenship Council's February 1999 Issues Paper⁶⁴ were distributed overseas,⁶⁵ it seems unlikely that many of the approximately 820,000 Australians living overseas would have even been aware of the inquiry. Although advertisements were placed in mainstream newspapers and thirteen key ethnic newspapers in Australia, these notices do not appear in the on-line versions of the Australian newspapers, and to the SCG's knowledge, no other efforts of any note were made to reach Australian citizens abroad. The genesis of the Southern Cross Group itself may be traced back to a chance sighting by an informed parent of an expatriate Australian of the public notice placed in *The Canberra Times* in February 1999. That led to a hurriedly prepared letter written by two Australians in Brussels, to which a further thirty-four Australians in resident in Belgium put their names. Subsequently these individuals formed the Southern Cross Group. Learning from that experience, following the release of the Government's 8 June 2001 Discussion Paper, the SCG placed its own public notices in major expatriate magazines outside Australia to alert members of the Australian Diaspora to the fact that Community consultation was being invited and engaged in a number of other measures to reach expatriate Australians all over the world;
- Comparing the number of submissions received by the Australian Citizenship Council in 1999 with the number of communications which have flowed to Ministers since the release of the Council's February 2000 report, and the number of submissions which are flowing into DIMA as a result of the issue of the 8 June Discussion Paper, it is fair to conclude that the Council was unaware of the depth of feeling of, and the full extent of difficulties faced by, overseas Australians on the issue of the loss of citizenship. Certainly, the Australian Citizenship Council seems to have been oblivious to the difficulties for former Australians still overseas in resuming their citizenship under Section 23AA of the Act as it is presently

⁶² Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, February 2000, p. 92.

⁶³ *Ibid*, p. 100.

⁶⁴ Australian Citizenship Council, *Contemporary Australian Citizenship*, Commonwealth of Australia, February 1999.

⁶⁵ Australian Citizenship Council, *Australian Citizenship for a New Century*, Commonwealth of Australia, February 2000, p. 92.

drafted.

- If the Government does move to delete Section 17 without at the same time enacting adequate provisions to correct the harm caused by Section 17 since 1948, it will in effect create four categories of Australians living overseas:
 - those who currently enjoy dual citizenship;
 - those who, after repeal, take up another citizenship and become dual citizens;
 - those who took up a non-Australian citizenship before repeal and are able to give the time-limited undertaking to return to Australia and thereby resume their Australian citizenship (often becoming dual citizens); and
 - those who took up a non-Australian citizenship before repeal and are unable at this time to give a time-limited undertaking to return to Australia.

It is unlikely that those in any of the groups above would see themselves as different to anyone in any of the other groups in terms of their Australianness or their desire to be formally recognised as Australians. The Southern Cross Group urges the Government not only to repeal Section 17, but at the same time to enact adequate measures to enable all former Australian citizens who lost their citizenship under Section 17 to be able to resume their citizenship.

3.3 Former Australians Who Have Lost Citizenship under Section 17 to Obtain Citizenship in a Country Which Still Does not Allow Dual Citizenship

Recommendation 3: The Southern Cross Group recommends that those former Australian citizens who have acquired the citizenship of a country which currently does not allow dual citizenship be allowed to return to Australia as permanent residents automatically without having to fulfil the normal requirements for permanent residency under the law.

The Southern Cross Group notes that even if the resumption rules in Section 23AA of the Act are amended as suggested above when Section 17 is repealed, some former Australian citizens will not be able to become dual citizens simply by resuming their Australian citizenship.

If the person's current country of citizenship still does not allow dual citizenship, then there will be nothing Australia can do to enable the person to retain their non-Australian citizenship when or if that person decides to avail themselves of the amended Section 23AA of the Act.⁶⁶ Some of these people may decide that they cannot afford to lose their current non-Australian citizenship by resuming their Australian citizenship.

For example, Belgium does not allow dual citizenship. A former Australian citizen who has lived in Belgium for thirty-five years may have decided some years ago to take Belgian nationality for a number of reasons to make his life in his host country and the European Union more equitable. He may now wish to retain his Belgian nationality in order to be able to access his Belgian pension entitlements on retirement. However, he may wish to live in Australia in retirement to be close to family. In those circumstances, it is understandable that the individual cannot avail himself of the resumption option.

The Southern Cross Group hopes that over time countries such as Belgium will change their laws to allow dual citizenship.⁶⁷ In the meantime, however, it would seem that such people should be able to return to Australian and be given permanent resident status with a minimum of fuss.

3.4 Former Australians Who Have Had to Renounce Australian Citizenship under Section 18 of the Act

***Recommendation 4:* The Southern Cross Group recommends that former Australian citizens who have had to renounce their Australian citizenship under Section 18 of the *Australian Citizenship Act 1948* in order to be able to take up the citizenship of another country now be given an unconditional right to resume Australian citizenship under the same conditions as the SCG believes should be available to those who have lost their citizenship under Section 17. For those individuals who currently hold the citizenship of a country which does not allow dual citizenship, automatic permanent residence in Australia should be possible.**

The Southern Cross Group notes that just over one hundred people every year renounce their Australian citizenship under Section 18 of the *Australian Citizenship Act 1948*. This is usually done because a person wants to retain another citizenship. For example, Maltese citizenship law requires that people with Maltese citizenship must renounce any other citizenships within a year after

⁶⁶ In its 8 June 2001 Discussion Paper, DIMA lists in Attachment B some of the countries whose legislation still does not allow the acquisition of another citizenship: www.immi.gov.au/citizenship/0601paper/08.htm.

⁶⁷ It does appear as if there is a trend towards more countries allowing dual citizenship. Sweden amended its law to take effect as from 1 July 2001, and Russia is reputedly in the process of doing so as well. By 2000, 14 out of 17 Latin American countries allowed dual citizenship whereas in 1996, only seven had allowed it.

turning 18 years of age in order to retain their Maltese citizenship. Most other countries which still do not allow dual citizenship do not have a requirement that a person formally renounce their Australian citizenship under Australian law when taking citizenship, and so Section 18 of the Act is rarely used.

For those people who are forced to formally renounce their Australian citizenship under Section 18 due to the laws of another country which does not allow dual citizenship, it is submitted that once Australia grants all Australians the right to hold dual citizenship by repealing Section 17, it would be appropriate to allow these people to resume their citizenship unconditionally in the same way as the SCG believes should then be available to past victims of Section 17. Section 23AA, amended as proposed above, should continue to apply to those who have renounced citizenship under Section 18 as well as those who have lost citizenship under Section 17.

As mentioned above, if the person's current country of citizenship still does not allow dual citizenship, then there will be nothing Australia can do to enable the person to retain their non-Australian citizenship on resumption of their Australian citizenship. However, at least Australia will be making it possible for former Australians who are still overseas who lost their citizenship due to renunciation to resume their Australian citizenship without having to declare an intention to return to Australia to reside within three years.

For the same reasons as discussed under the previous subheading, if the former Australian citizen who renounced their Australian citizenship currently holds citizenship of a country which still does not allow dual citizenship, the person should be allowed automatic permanent residency in Australia if they feel unable to give up their current citizenship.⁶⁸

⁶⁸ Note that Section 13 of the *Australian Citizenship Act 1948* currently allows individuals who were formerly Australian citizens (i.e. lost it under Sections 17 or 18) or who were born in Australia to reacquire their citizenship by grant or naturalisation. This is another alternative to using the resumption provisions under the Act. Such individuals must wait at least twelve months from the time they lost their citizenship before applying to reacquire it, but, unlike other applicants for grant of Australian Citizenship, need only be present in Australia as a permanent resident for twelve months in the two years immediately before lodging their application, rather than two years within the five years immediately preceding the date of application. The grant provisions, however, are not useful for individuals who have lost their citizenship and are still living overseas. Furthermore, for someone who feels they have to keep their non-Australian citizenship of a country which does not allow citizenship, even if they are able to re-enter Australia and meet the one year permanent residency requirement, there will be no point in applying for citizenship by grant.

4. CORRECTING THE EFFECTS OF SECTION 17 ON THE CHILDREN OF FORMER AUSTRALIANS

A number of cases have been reported to the Southern Cross Group which highlight the particularly negative impact which Section 17 has had on the children of individuals who have lost their Australian citizenship on acquiring another citizenship.

Under Section 23 of the *Australian Citizenship Act 1948*, if a child under 18 years of age has a parent who loses Australian citizenship under Sections 17, 18 or 19 of the Act, the child will also lose their Australian citizenship unless their other parent is an Australian citizen or the loss would render them stateless.

4.1 Automatic Resumption for Minor Children

Recommendation 5: The Southern Cross Group recommends a consequential amendment to Section 23AA of the *Australian Citizenship Act 1948* in addition to the amendment to that Section called for in Recommendation 2 above, so that the minor children of former Australian citizens who lost their Australian citizenship automatically when their responsible parent lost their citizenship under Sections 17 and 18 can automatically resume their Australian citizenship when their parent exercises their unqualified right to resumption.

Under Section 23AA in its current form, if the parent subsequently resumes their lost citizenship, and the child is under 18 at the time of the parent's resumption, the child will resume their citizenship at the same time, by virtue of the child's name being included in the relevant declaration. The Southern Cross Group notes that for a minor child, resumption is impossible under this provision if the parent is still overseas and does not feel able to state that they intend to commence residing in Australia within 3 years after the date of resumption.

If the SCG's Recommendation 2 above is accepted, a parent who is still overseas and cannot presently make a statement that they intend to return to commence residing in Australia would have an unqualified right to resumption under Section 23AA as amended. The Southern Cross Group urges a consequential amendment to Section 23AA in those circumstances so that children who have lost their citizenship previously automatically when their parent lost their citizenship under Sections 17 or 18, can resume citizenship automatically on inclusion on the parent's resumption statement.

4.2 Resumption for Individuals 18 Years and Over Who Automatically Lost Citizenship as a Minor

Recommendation 6: The Southern Cross Group recommends the amendment of Section 23B of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so that persons aged 18 years or over who lost their Australian citizenship automatically when they were minors because their responsible parent lost their citizenship under Sections 17 or 18, now have the unqualified right to resume their Australian citizenship in adulthood up to the age of 25. Aged 25 or over, resumption should still be possible in special circumstances as is currently the case from age 19.

At present, if a child has automatically lost their citizenship when their parent lost their citizenship under either Sections 17 or 18, and the child's parent does not resume Australian citizenship while the child is still a minor, Section 23B of the *Australian Citizenship Act 1948* allows that child, once he or she has attained the age of 18, to resume their citizenship by furnishing a declaration to the Department that they wish to resume their Australian citizenship. This provision is very broad, in that the person does not have to state an intention to return to Australia within three years of resumption or satisfy any of the other requirements necessary for resumption under Section 23AA.

However, Section 23B is currently limited in that the young person's application for unqualified resumption must be made before they turn 19. In other words, there is only a window of 12 months in which citizenship can be resumed on unconditional terms. Once the person turns 19, resumption of Australian citizenship is only possible if there are special circumstances. Whether the person can resume their citizenship aged 19 or over is left up to the Minister. Factors considered are why the person did not previously seek resumption, their links to Australia and whether they intend to reside in Australia as well as their current citizenship status.

The Southern Cross Group believes that allowing only a one-year window of opportunity for an application for resumption is too restrictive. Essentially, these people are the indirect and blameless victims of Sections 17 and 18. Many young people, especially if they are outside Australia, may simply be unaware that they must act within this time frame. For the same reasons as the Australian Citizenship Council has recommended that registration for citizenship by descent should be possible up until a person turns 25,⁶⁹ the Group would like to see Section 23B amended to extend this window for young people to resume citizenship automatically lost as a minor until they turn 25.

⁶⁹ Australian Citizenship Council, *Citizenship for a New Century*, Commonwealth of Australia, February 2000, p. 43.

4.3 Citizenship by Descent for Minor Children

Recommendation 7: The Southern Cross Group recommends the amendment of Section 10B of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so any child under 18 born overseas who presently cannot be an Australian citizen by descent because their parent or parents lost their Australian citizenship under Sections 17 or 18 before the child's birth and the child had no Australian parent at the time of his or her birth, can now be registered as an Australian citizen by descent once at least one parent has exercised their right of resumption under Section 23AA.

The SCG has been made aware of the unfortunate plight of several minor children who, under the law as it currently stands, are particularly disadvantaged by the effects of Section 17.

In the case that a child is born overseas, and at the time of their birth, neither parent holds Australian citizenship, that child does not qualify for Australian citizenship by descent. This is the case even when before the child's birth, one or both parents was an Australian citizen. If the parent or parents lost their citizenship by operation of Section 17, even unwittingly, by taking up another citizenship before the child's birth, and at the time of the child's birth had not resumed their Australian citizenship, then that child can never be Australian by descent. For children unlucky enough to be born in the wrong period, this can have enduring consequences. It also leads to situations where a sibling in the same family may hold Australian citizenship or indeed dual citizenship, but the child concerned cannot hold Australian citizenship.

To remove the hardship suffered by this special category of children, the Southern Cross Group would like to see an amendment to the provisions on citizenship by descent in the Act. Once a parent who has lost their citizenship under Section 17 has resumed their citizenship, the child born in the window of time when the parent was not Australian should be able to be registered as an Australian citizen by descent.

4.4 Citizenship by Descent for Individuals 18 Years and Over

Recommendation 8: The Southern Cross Group recommends the amendment of Section 10C of the *Australian Citizenship Act 1948* to accompany the repeal of Section 17 so any person 18 years or over born overseas who presently cannot be an Australian citizen by descent because their parent or parents lost their Australian citizenship under

Sections 17 or 18 before the person's birth and the person had no Australian parent at the time of his or birth, can now be an Australian citizen by descent. This right should not be contingent on whether the person's former Australian parent or parents have resumed their citizenship. The person should be able to apply for registration as an Australian by descent until they turn 25.

The Southern Cross Group fully endorses the Australian Citizenship Council's Recommendation 26 to allow children born overseas to be registered as Australian citizens by descent up until they turn 25.⁷⁰ We note that this Recommendation by the Council was accepted by the Government in May this year.

However, the Group believes that children who fall into the special category of having been born when a parent was not an Australian citizen due to the operation of Section 17 should also be allowed to be Australians by descent, even if a parent does not resume citizenship while they are a minor as outlined in the previous recommendation. In those circumstances, the person should be allowed to register as an Australian by descent until they turn 25.

⁷⁰ Australian Citizenship Council, *Citizenship for a New Century*, Commonwealth of Australia, February 2000, pp. 43, 86.

5. THE RIGHT TO VOTE AND OVERSEAS AUSTRALIANS

Recommendation 9: The Southern Cross Group recommends that Sections 94 and 94A of the *Commonwealth Electoral Act 1918* be amended so that all Australian citizens overseas have an unqualified right to vote and thereby participate in the Australian political process which results in laws to which they are subject.

The right to vote is one of the privileges attached to citizenship. In theory, the Australian people elect the Australian Parliament, and as such the provisions of the *Australian Citizenship Act 1948* should be viewed as a democratic expression of the will of the Australian people. With regard to Section 17 of the Act, however, it is strongly submitted that those Australian citizens who have been or are in fact directly impacted by the provision do not currently enjoy adequate democratic representation at the Australian ballot box.

Only 65,086 votes were issued in the 1998 Federal Election to the some 820,000 Australians currently estimated by the Department of Foreign Affairs and Trade to be living and working overseas.⁷¹ Even fewer overseas Australians participated in the 1999 Referendum on the Australian Republic.⁷²

While it is not compulsory for an Australian citizen to vote while overseas, and bearing in mind the fact that not all Australians overseas are 18 years or over and therefore not all would qualify to vote even if they were in Australia, the Southern Cross Group nevertheless believes that serious numbers of Australian citizens living overseas are unjustly disenfranchised as a result of Sections 94 and 94A of the *Commonwealth Electoral Act 1918*.

The SCG notes that amendments to the *Commonwealth Electoral Act 1918* were introduced just prior to the 1998 Federal Election, which made enrolment to vote from outside Australia possible for the first time. This probably explains why significantly greater numbers of overseas Australians voted in 1998 than in 1996, when only 47,698 votes were issued to Australians abroad.⁷³ The increase in

⁷¹ Figure from the Australian Electoral Commission's 1998 Federal Election Report at www.aec.gov.au/results/1998/report/appendix.htm.

⁷² Note that conflicting figures are provided on the Australian Electoral Commission's website in its 1999 Referendum Report: in the text of the Report itself it is stated that a total of 53,874 votes were issued overseas, whereas in the Appendix it is stated that 57,955 votes were issued overseas. See www.aec.gov.au/referend/report_stats99/.

⁷³ Figure from the Australian Electoral Commission's 1998 Federal Election Report at www.aec.gov.au/results/1998/report/. Note however that the AEC has also reported that the number of Australian electors who actually voted overseas in 1996 was 46,307: Australian Electoral Commission,

overseas voting in 1998 is probably also at least partly attributable to the fact that unprecedented numbers of Australians have left Australia to live and work overseas in the last few years.

While the 1998 amendments to the *Commonwealth Electoral Act 1918* brought about a long-overdue partial extension of the franchise for overseas Australians, further amendments are needed to achieve an unqualified right to vote for all overseas Australians. Australian citizens overseas who are currently ineligible to vote under the law have had this basic political right removed in the same way as people who are incapable of understanding the nature and significance of enrolment and voting, prisoners serving a sentence of five years or more, and people who have been convicted of treason and not pardoned, other groups which the Australian legislature currently sees fit to disenfranchise.⁷⁴

5.1 Australia's International Obligation to Ensure Australians the Right to Vote

The Southern Cross Group points out that Article 25 of the International Covenant on Civil and Political Rights obligates Australia to ensure that:

Every citizen shall have the right to vote and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

It is submitted that the current restrictions on registration as an overseas voter and on enrolment from outside Australia are not "reasonable" and therefore are in violation of Australia's international obligations under this treaty. Those restrictions are examined in detail below.

As outlined under heading 2.3.2 above, Australia's ratification of the First Optional Protocol to the ICCPR means that it would be possible for an individual to bring a complaint to the Human Rights Committee if they believed that their

Supplementary Submission to the Joint Standing Committee on Electoral Matters, AEC Responses to JSCEM Inquiries of 2 May 1997, Canberra, 7 May 1997, at para. 2.12.2.

⁷⁴ *Commonwealth Electoral Act 1918*, Section 93(8).

right to vote under Article 25 was being infringed by the current restrictions in the *Commonwealth Electoral Act 1918*.

It is also noted that Article 41 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by the United Nations General Assembly in 1990, provides in Article 41:

1. Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.
2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Australia has not yet ratified this Convention, and it is not yet in force. However the international community has accepted this important principle.

5.2 Unreasonable Restrictions on Registration as an Overseas Voter

5.2.1 Intention to Resume Residing in Australia within Six Years

An Australian citizen who is already on the Electoral Roll and moves overseas cannot apply to be treated as an eligible overseas voter unless they intend to resume residing in Australia not later than 6 years after ceasing to reside in Australia.⁷⁵ This temporal restriction is arbitrary and unfair in that Australian citizens who remain overseas for a period longer than six years do not suddenly cease, after six years, to be any less connected with Australia or engaged in Australian affairs than during their first six years away. As stated in this submission elsewhere, the internet and reduced communications costs mean that Australians overseas today can always remain aware and informed, no matter how long they have been away.

The fact that the 1998 amendment extended this period from three to six years is of little comfort to the hundreds of thousands of Australians who have been away for longer than six years. In addition, the extension from three to six years is simply further evidence of the arbitrary nature of this fixed time period for return. An examination of the information on the public record documenting events which led to the 1998 amendment evidences no discussion or debate as to why the period of six years was chosen as appropriate, or why six years should be a more desirable time limit than any other period.

⁷⁵ *Commonwealth Electoral Act 1918*, Section 94(1)(c).

Although it is possible to have one's status as an overseas elector extended by one year at a time beyond the initial six years, the mechanism for doing this is clumsy and unlikely to be properly understood or known about by overseas Australians, and therefore the opportunity for extension will in many cases be overlooked.⁷⁶

5.2.2 Time Limit of One Year After Departure for Application

An Australian citizen who is already on the Electoral Roll when they move overseas has their right to vote unnecessarily restricted in that he or she has a window of only twelve months after leaving the country to make an application to be treated as an eligible overseas elector.⁷⁷ It is submitted that there should be no limitation on the period in which an application can be made. Many Australians who go overseas are simply unaware of this provision and miss the existing window of opportunity for registration because there is at present no concerted effort by the Australian Electoral Commission (AEC) to make departing citizens aware of the rules. Although information is available on the AEC's website, many overseas Australians will not turn to this until an election is imminent, even if they know that the website exists. An Australian departing just after a Federal Election is unlikely to think about the need to register until two or almost three years after his departure, if the Parliament runs its full term. At that stage the one year time limit has long expired.

The SCG notes that the booklet *Hints for Australian Travellers* contains the brief advice that Australians who are considering a lengthy absence outside the country should consider informing their electoral office. Although this booklet is issued free with Australian passports and sometimes through travel agents and is available for sale in AusInfo bookstores for a nominal price, the information contained therein is too brief to be useful. Furthermore, Australian passports are generally valid for ten years, and a person may have long since mislaid the booklet they were issued some years before when making a new overseas trip.

5.3 **Unreasonable Restrictions on Enrolment from Outside Australia**

5.3.1 Reasons for Moving Overseas

An Australian citizen who moves overseas and is not already on the Electoral Roll can now apply for enrolment from outside Australia.⁷⁸ However, the application form requires the person to declare that they are "living outside Australia for reasons related to my career or employment, or that of my spouse".

⁷⁶ Commonwealth Electoral Act 1918, Section 94(8).

⁷⁷ Commonwealth Electoral Act 1918, Section 94(1B).

⁷⁸ Commonwealth Electoral Act 1918, Section 94A(1).

The reasons for a particular Australian's absence overseas are irrelevant, and this restriction on enrolment fetters the right to vote and in addition conflicts with the basic human right of an individual to leave their country at any time, for any reason.⁷⁹ An Australian citizen should not be prevented from voting just because they have gone overseas for an extended holiday, for example.

The SCG also notes that this restriction is only applied to those who leave the country without being on the Electoral Roll. An Australian who leaves Australia already on the Electoral Roll is entitled to register as an overseas elector regardless of their reasons for moving overseas. This discrepancy results in unequal treatment between groups of overseas Australians.

5.3.2 Time Limit of Two Years After Departure for Enrolment

For those seeking to enrol from overseas, the application for enrolment must be made within two years of leaving Australia.⁸⁰ For the same reasons that the one year window for making an application as an overseas elector is not acceptable, this two year time limit is also unacceptable.

5.3.3 Intention to Resume Residing in Australia within 6 Years

This restriction is the same as that which applies to those already on the Electoral Roll when they leave Australia, and its inappropriateness is discussed above in that context.

5.4 **Exclusion of Overseas Australians from the Franchise on the Basis of Irrational and Irrelevant Criteria**

Australia's international obligations to guarantee equal treatment under the law to different groups have been discussed above. In the context of voting rights for expatriates, it is apposite to note that not only does Article 25 of the ICCPR come into play, but Article 26 could also be used to mount the argument that the time limitations for applications, a person's length of time abroad, and their reasons for being overseas are all irrelevant reasons for denying large numbers of Australian citizens overseas the vote.

A formal equality approach means that no account should be taken of morally irrelevant or invidious grounds of past discrimination. Artificial barriers which impede some individuals or groups, such as the previous exclusion of Aborigines from the vote until 1962 in Western Australia and 1965 in Queensland, or the

⁷⁹ International Covenant on Civil and Political Rights, Article 12(2).

⁸⁰ *Commonwealth Electoral Act 1918*, Section 94A(2)(b).

past exclusion of women from university medical schools and from the practice of law until the early twentieth century, have to be removed.⁸¹ The restrictions on the right to vote for Australians overseas outlined above are irrational and irrelevant criteria which discriminate between Australian citizens and amount to artificial barriers which impede the exercise of a fundamental right.

5.5 Comparison with United States Arrangements for Overseas Voting

Australia fares poorly when the provisions discussed above and the lack of measures currently undertaken by the AEC to help Australians overseas exercise their right to vote are compared with the arrangements in place in the United States which ensure that expatriate Americans can exercise their fundamental right to vote.⁸²

The law on overseas voting for US citizens is found in the *Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA)* of 1986. This is administered by a special federal agency, the Federal Voting Assistance Program (FVAP). Its goals are to:

- inform and educate US citizens worldwide of their right to vote;
- foster voting participation;
- protect the integrity of, and simultaneously enhance, the electoral process at the Federal, State and local levels.

The FVAP provides US citizens worldwide a broad range of non-partisan information and assistance to facilitate their participation in the democratic process - regardless of where they work or live, and regardless of how long they have been away from the United States. The FVAP provides toll free telephone numbers for US citizens in more than 55 countries.

The United States *National Voter Registration Act* of 1993 was specifically enacted to establish procedures to increase the number of eligible citizens who register to vote in elections for Federal office. In passing this legislation, Congress found that:

- 1) the right of citizens of the United States to vote is a fundamental right;

⁸¹ Elizabeth J Gaze, "Equality and the Rule of Law" in *Human Rights in Australia* loose leaf, The Law Book Company, 1994, para. 21.10, p. 11.

⁸² Note that the United Kingdom does not allow its overseas citizens to vote forever, but in 1989 it enacted legislation to allow the right to vote for up to 20 years after the person moves overseas: Representation of the People Act 1989.

- 2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and
- 3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.

A US national resident overseas may vote as long as they are over the age of 18. Unlike Australia, the United States does not restrict the right to vote of its expatriates based on registration limitations or the length of time a person has lived away, or the reasons for which they are outside the United States. The only way in which a United States citizen can lose their right to vote is to be convicted of a felony or found mentally incompetent by a court.

The FVAP looks after more than six million potential overseas voters. It estimates that there are approximately 190 million US citizens of voting age in total. Eligible overseas voters comprise only around 3 percent of all voters but the measures which the US government has in place to make sure these people can exercise their fundamental right to vote are extensive.

The Australian Electoral Commission's mission is supposedly "to provide the Australian people with an independent electoral service which meets their needs, and which encourages them to understand and participate in the electoral process". Even leaving aside the legal restrictions which the Australian Parliament has imposed on the right to vote for overseas Australians, the Southern Cross Group submits that the AEC's mission is simply not being adequately fulfilled with regard to overseas voters at present. Concrete and active measures should be implemented to encourage overseas Australians to exercise their right to vote and help them better understand the formalities they must adhere to in order to be able to exercise that right.

5.6 The Extent to Which Overseas Australians are Disenfranchised

As at 31 May 2001, 12,529,579 persons were on the Electoral Roll in Australia. The Southern Cross Group has no information as to how many of these individuals are registered as overseas electors.⁸³ Logically, that number would be in excess of the number of votes issued overseas in the 1999 Referendum, as some registered overseas electors would have chosen not to vote at that time since voting is not compulsory for overseas Australians.

⁸³ The Southern Cross Group made several verbal and written requests to the AEC asking if this figure could be supplied. As at the date of this submission, no information had been forthcoming.

DFAT figures indicate that there are approximately 820,000 Australians overseas. Of these, approximately 615,000 would be 18 years of age or over, and therefore eligible to vote if they were resident in Australia.⁸⁴ The fact that only 65,086 of these 615,000 had votes issued to them in the 1998 Federal Election is a crude indication of the extent to which overseas Australians are presently disenfranchised by the *Commonwealth Electoral Act 1918*.⁸⁵ The Southern Cross Group estimates that in the order of a half a million Australian citizens may be disenfranchised by the unreasonable legal restrictions on registering as an overseas voter and applying from overseas to enrol, coupled with the insufficient administrative measures in place to publicise the current rules on overseas voting and facilitate overseas voter participation.

The SCG is of the opinion that this extraordinary level of disenfranchisement lies at the heart of why, despite successive reviews over a number of years which have concluded that Section 17 of the *Australian Citizenship Act 1948* was no longer appropriate, the provision remains to this day on the statute books.⁸⁶ If any government had to reckon with an additional 500,000 voters in the next election from overseas, would Section 17 still be on the statute books next election day?

Just as citizenship is not constitutionally protected in Australia, the inadequate protection afforded to the fundamental right to vote under the Australian Constitution as interpreted by the High Court means that the Australian Parliament is able to exclude from the franchise a significant percentage of its citizenry.⁸⁷ The right to vote is the most fundamental of democratic rights, and a right which is indeed one of the privileges of Australian citizenship. Australia's international obligations dictate that this privilege of citizenship should only be curtailed in reasonable circumstances. It is ironic that around half a million overseas Australian citizens have already lost this privilege of citizenship as they struggle to have a provision repealed which may strip them of their Australian citizenship. Even if Section 17 is repealed, the value of Australian citizenship is severely diminished for overseas Australians, while ever the right to vote for most of them is absent.

⁸⁴ Approximately 25 percent of the Australian population is aged under 18. Without more detailed information, we are assuming that approximately the same percentage of overseas Australians would be minors.

⁸⁵ We have no way of knowing how many overseas Australians would currently be entitled to enrol from overseas or register as overseas electors from overseas but simply do not chose to exercise that right. It is impossible to estimate how long the average overseas Australian has been resident outside Australia.

⁸⁶ For a discussion of the various reviews of Section 17, see Kim Rubenstein, "Let's face it, today we're citizens of the world", *The Australian*, 22 May 2001.

⁸⁷ Anne Twomey, "The Federal Constitutional Right to Vote in Australia", *Federal Law Review*, v 28 no 1, page 125; Davidson, Op cit, Chapter 7. Also Alastair Davidson "Democracy and Citizenship" in Wayne Hudson and John Kane (eds), *Rethinking Australian Citizenship*, Cambridge University Press, 2000, pp. 45-55.

The question must be asked whether it is appropriate or acceptable to exclude from the Australian franchise a group of Australian citizens which is probably more extensive in numerical terms than Australia's indigenous population. The fact that hundreds of thousands of expatriate Australian citizens do not have the right to vote for those that continue to govern them and enact the laws which they are subject to despite their physical presence outside Australia's territorial boundaries must be a matter of deep concern to all Australians.

Section 17 of the *Australian Citizenship Act 1948* is a prime example of a law which applies to Australians outside Australia's territorial boundaries, and yet the severely diminished political voice of those Australians most immediately affected by the provision has to date been ignored. Overseas Australians are the object of governance, just as Australians in Australia are the object of governance. Expatriate Australians should be able to legitimately assert claims against those that govern them. From Aristotle to the most up-to-date of theorists of democratic citizenship, there has always been a wide acceptance that it is the vote, in the long run, that guarantees all other rights.

6. SUGGESTED NEW INITIATIVES

6.1 Improved Government Communication with Australians Overseas

Recommendation 10: The Southern Cross Group recommends that the Government establish an Australia-based agency or group within the Department of Immigration and Multicultural Affairs (DIMA), to act as a focal point for the dissemination of Government information to Australians living overseas and to ensure that Government services are more accessible to Australians overseas.

It has become abundantly clear to the Southern Cross Group during its Section 17 campaign that Australians living overseas face considerable difficulties in finding authoritative information about the laws and administrative processes of their country of citizenship and changes and developments which are taking place in relation to them. The SCG is fortunate in that it has developed, as part of its research resources, a network of part-time monitors. In respect of Australia, they try to monitor the Australian media and Commonwealth Parliamentary proceedings for matters which affect, or could affect, Australians living overseas. In light of the Group's limited resources as a volunteer organisation, it is a far from complete coverage.

Compared with some other countries, the Commonwealth Government websites contain a wealth of well-presented and informative material for the benefit of all Australians. However, of necessity and, largely as a reflection of the Administrative Arrangements Orders, it is difficult for the uninitiated to navigate to all of the material appropriate to an individual's particular set of circumstances. This is particularly the case for overseas Australians who do not have the convenience of dropping into a shopfront or placing several simple phone calls to locate the appropriate source of information.

Since its formation, the SCG has received many e-mails and telephone enquiries from Australians overseas who ask us to clarify their particular citizenship status, or ask us for information which is in fact available on-line, but which they have themselves not been able to locate.

The Group is aware of a number of cases in which Australian Embassies and Consular services have, in the past, provided incomplete and/or incorrect information on citizenship issues. Some of these cases have been documented in current submissions before the Department. We also have had put to us a number of instances in which agencies of foreign governments have provided incorrect advice on the Australian law on dual citizenship.

With regard to Australian taxation law for overseas Australians, it is the SCG's experience that there is considerable confusion as to what an individual's obligations may be when a non-resident of Australia. Although some individuals are able to invest in professional advice in order to ensure that they fulfil their obligations, not all overseas Australians have this luxury.

The problem lies not in any desire to make information difficult to access, or in carelessness in providing the information, but in the sheer volume and variety of information that is available and needed, and the fact that the information stays static for such a short time. The Internet, of course, has allowed the Government to be a leader in the dissemination of timely information and there are many excellent official websites as a result of this.

For all these reasons, the Southern Cross Group considers that it would now be opportune, in light of the almost one million Australians overseas, for the Government to put in place administrative arrangements within the Department of Immigration and Multicultural Affairs for a central information coordination point. This agency should have as its mandate the responsibility of making sure that all Government information, from whatever area of Government, which is relevant to Australians overseas, can be easily accessed. In doing this, overseas Australians would have better access to the Government services they require.

For ease of reference, we will term this group the Overseas Australians Agency (OAA). The responsibilities of the OAA could include:

- The establishment of an Overseas Australians Website (OAW) on which are posted well-described links to sources of Government information relevant to Australians overseas. While not an exhaustive list, the links could cover:
 - Both Commonwealth and State Government matters;
 - Citizenship;
 - Passports;⁸⁸
 - Immigration and short-term entry arrangements (as an aid to Australians who are frequently asked for information by non-Australians contemplating migration or visits to Australia);

⁸⁸ The Southern Cross Group notes that at present, Passport Application forms are not available on-line.

- Information on how to renew Australian driving licences while outside of Australia and information on countries with which Australia has reciprocal arrangement on the recognition of driving licences, if any;⁸⁹
- Official sites on Australian tourism;
- Electoral matters;
- Social security matters including bilateral agreements;
- Health coverage under Australia's reciprocal Medicare arrangements in various countries;
- Taxation including taxation agreements with other countries and the e-mail lodgement facility for personal income tax returns;
- Advice for Australians travelling overseas as currently available on the DFAT site;
- Customs and quarantine information;
- Inheritance, family and other law;
- Adoption of non-Australian children;
- Trade agreements and other international instruments to which Australia is a party;
- Parliamentary proceedings, particularly notice of Committee hearings, Government inquiries, and new bills which may impact upon overseas Australians, or to which overseas Australians may want to provide input relevant to their overseas experience;
- Links to Australian media sites, for example via the National Library website;
- General sources of information about Australia, such as the National Library.

⁸⁹

Australians who holiday overseas can drive on their Australian licence with an International Driving Licence. However, for Australians who become resident in an overseas country, most countries require the Australian to obtain a local driving licence. Sometimes this can involve sitting both a practical and theory test and considerable expense. The Southern Cross Group notes that the United States has a number of reciprocal agreements with other countries which allow licences to be simply exchanged without the need to pass a test.

- Establishment of an Overseas Australians Database (OAD) in which those accessing the OAW would be invited to record their contact details, interests and other appropriate matters on a voluntary and private basis;⁹⁰
- Publication of a regular free e-bulletin notifying important issues, new links added to the website, or substantive changes that have occurred on the existing linked sites. People would subscribe to the e-bulletin via an invitation on the OAW;
- Provided the links on the OAW lead to appropriate contact details for each Government agency responsible for each of the linked sites, SCG would not see that the OAA would have any responsibility for responding to, or otherwise processing, requests for advice from Australians using the site;
- Ensuring that all Ambassadors, Consuls-General, and Consuls, together with all Australia-based staff are aware of the OAA and the OAW prior to departure for their overseas posting. The awareness campaign should also cover Honorary Consuls and all locally engaged staff at overseas missions;
- Ensuring that the existence of the OAW is well publicised within Australia and overseas, and that all Australians leaving Australia on either a short or long-term basis are advised of its existence as part of their travel documentation;
- Consideration might also be given to making Ambassadors and Consul-Generals to Australia of other countries and appropriate government agencies in those countries, aware of the existence of the website.

The SCG believes that, given the relative efficiency and low cost of the Internet for this type of dissemination process, the cost of maintaining the OAA, the OAW and the OAD would require a minimum of annual budget outlays.

⁹⁰ The SCG is aware that some Australian Embassies and Consulates no longer register Australians resident in their country of operation, while others continue the practice. The Australian Embassy in Brussels has recently actively been encouraging Australians in Belgium to fill in registration forms, but the Australian Embassy in Washington DC refused to register someone who presented with the desire to do so.

6.2 Improved Policy Input and Representation at Home of Australians Overseas and Increased Contributions by Members of the Australian Diaspora into Australia

Recommendation 11: The Southern Cross Group recommends that a dialogue be commenced in which ways for achieving better representation of expatriate Australians in Australia, as well as initiatives for allowing Australians overseas to contribute more effectively back into Australia can be developed.

The SCG notes the recent establishment by the Italian Government of a Ministry of Italians Abroad as reported in *The Age* newspaper on 18 June 2001 and its subsequent editorial on 21 June 2001. It also notes that in Switzerland, there is a Council which exists to unite many associations which act to help Swiss citizens abroad.

For French citizens abroad, the *Conseil Supérieur des Français de l'Etranger* (CSFE) has been given the task of representing and defending the interests of expatriate French citizens with the French Government.⁹¹ This is a body of 150 members, elected by enrolled French nationals living abroad. This Council elects 12 Senators as representatives of expatriate French citizens to the Senate, where they can propose laws and amendments for the benefit of expatriates. The President of the Council is the Minister for Foreign Affairs, and three Vice-Presidents are elected by the Council. The full Council meets once a year, but there is a permanent bureau and various committees whose meetings and actions continue all year round. The Council also reports to the Government on its research into the problems that affect French expatriates in the areas of education, law, social security, foreign trade, taxation and other matters. It also has the role of giving its opinion and expressing its wishes on the actions of the administration on behalf of French citizens living outside France. Members of the Council also provide liaison between diplomatic personnel abroad and local French communities.

The SCG will continue to research and monitor these developments and similar arrangements in other countries as part of its brief on expatriate issues generally. The Group would welcome the opportunity to work more closely with Australian governments to help develop mechanisms whereby Australians overseas can more effectively have their voices heard in Australia. It is submitted that representatives of the expatriate community would be able to provide helpful and broad-ranging perspectives if given the opportunity to participate on various Australian consultative bodies. The Council for Multicultural Australia, for

⁹¹ www.csfe.org.

example, has no expatriate members, although as the SCG submitted elsewhere in this paper, Australians overseas should be considered part of today's multicultural Australia, and the Government stated when the Council was set up that its members would be drawn from a cross-section of the Australian community.

The Southern Cross Group welcomes the "Virtual Electorate" proposal put forward as part of the "Information Economy 2002 Statement" by the Southern Australian Government in August 2000. This proposes the adoption of legislation to amend the *South Australian Electoral Act* to create a special "global" extraterritorial electorate for expatriate South Australians. The SCG wholeheartedly endorses the statement made by the SA Government in the IE2000 Statement that "global people networks are one of the key sources of competitive advantage in the Information Economy". This represents a recognition by that Government that the State's extended population is a significant asset and demonstrates a desire to forge links between expatriates and their home state.

There are many ways in which members of the Australian Diaspora can contribute back into the Australian community, and many would welcome the opportunity to do so. At the same time, the Southern Cross Group believes that much work needs to be done in Australia to develop a recognition and acceptance that Australians who are not physically present in Australia should not simply be dismissed because they are "out of sight, out of mind".

7. CONCLUSION

In this year of the Centenary of Federation, the Southern Cross Group urges the Government to proceed without delay to repeal Section 17 of the *Australian Citizenship Act 1948*. There is no place for this outdated and discriminatory provision on the statute books of a country which defines its society as inclusive and wants to play a full role in the global community.

The Southern Cross Group also urges the Government to recognise, when repealing Section 17, that repeal of Section 17 alone will not correct the injustices which many victims of the provision and their families have suffered and will continue to suffer. Additional amendments to the Act are necessary in order to take account of the people who have already lost their citizenship under Section 17 and cannot presently avail themselves of the resumption provisions. Further, arrangements for certain children must be put in place so that their special situations are remedied.

The Group hopes that in the coming months, and in particular after the next Federal Election, within the context of the post-election review by the Joint Standing Committee on Electoral Matters, the very serious issue of the disenfranchisement of up to half a million overseas Australians can be addressed. It is the SCG's view that the current provisions in the *Commonwealth Electoral Act 1918* relating to overseas voter registration and enrolment are in breach of the internationally protected right to vote, and that Australians overseas must be able to fully exercise their democratic rights when legislation can be enacted in Australia which impacts them despite their location.

Finally, the Southern Cross Group asks that the Government move administratively to establish an Overseas Australians Agency to act as a focal point for the dissemination of government information appropriate to the needs of overseas Australians. It also wishes to open the door for discussions as to how Australians overseas can in the future be better represented in Australia and the ways in which their often unique skills and experience can benefit Australia even while they are not living in the Lucky Country.

Put simply, it is our vision that in future, Australian citizens at home might work with Australian citizens abroad in the spirit of the common bond which unites us all. In the words of one Australian, writing 36 years ago:

A good citizen tries to understand his neighbour across the street, as well as his neighbour across the sea...Jingoism is no substitute for thoughtful citizenship.⁹²

⁹² Paul Morawetz, *The Australian*, 22 June 1965.